# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yen v. Ghahramani,*
2023 BCCA 403

Date: 20231107
Docket: CA49074

Between:

**Vincent Yen and 0756383 BC Ltd.**

Appellants
(Plaintiffs)

And

**Frederick Ghahramani, 0751846 BC Ltd., and airG Inc.**

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Butler
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated May 3, 2023 (*Yen v. Ghahramani*, 2023 BCSC 737, Vancouver Docket S220213).

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|---|---|
| Counsel for the Appellants: | S.T.C. Warnett<br>B.J. Cabott |
| Counsel for the Respondents, Frederick Ghahramani and 0751846 BC Ltd.: | J.D. Shields |
| Counsel for the Respondent, airG Inc.: | G.R. Cameron<br>K.F. Milinazzo |
| Place and Date of Hearing: | Vancouver, British Columbia<br>September 25, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>November 7, 2023 |

**Written Reasons by:**
The Honourable Madam Justice Newbury

**Concurred in by:**
The Honourable Mr. Justice Butler
The Honourable Justice Marchand

***Summary:***

*Plaintiffs and defendants together owned vast majority of shares in a successful corporation ("airG"), but fell apart some years ago. The principal of the corporate defendant and an employee of airG are now its directors. Pleadings were filed by plaintiffs and defendants respectively, alleging various oppressive actions, and airG filed a response and counterclaim against plaintiffs. Its pleadings were not "neutral" as between the litigants. Plaintiffs then sought to amend their NOCC by adding claims that airG's 'taking sides' in the litigation was oppressive and that defendants had misappropriated various assets of airG for their own purposes, contrary to the fiduciary duty owed to airG by the defendant director. Lower court dismissed application to amend on the bases that since plaintiffs were seeking airG's dissolution, its conduct of the litigation "could not" be oppressive, and that the material facts necessary for such a claim had not been pleaded. Court also ruled that allegations of misappropriations from airG represented wrongs to airG and could only be brought on the corporation's behalf in a derivative action.*

*Held: Appeal allowed. The principle of neutrality had some support in U.K. and Canadian authorities, as did the "legal costs principle" under which funds of the subject corporation in an oppression action should not be used to pay legal fees of one side or the other. The authorities also suggested, however, that it was for the subject corporation to decide what position it should take to protect its own interests. Where the very existence of the corporation was at stake, it was possible a "vigorous" position would be justifiable. A more fundamental concern in this case, however, arose from the fact that counsel for airG was apparently being instructed by the personal defendant. In an oppression action like this one involving a true shareholders' dispute, counsel should be instructed by an independent person or persons. The fact the personal defendant and an employee of airG were instructing placed them in a position of conflict. On a review of recent authorities, it could not be said plaintiffs were "bound to fail" in claiming that the defendants' use of airG resources, the appropriation of assets belonging to airG, or the litigation conduct of airG itself were oppressive. The particular harm of the litigation conduct to the plaintiffs consisted of the fact they faced two adversaries instead of one. The CA allowed the proposed amendments to the plaintiffs' pleadings in their entirety.*

**Reasons for Judgment of the Honourable Madam Justice Newbury:**

[1] This appeal raises procedural and substantive law issues in the context of a corporate oppression proceeding. The proceeding was brought not by petition but by notice of civil claim. Since the plaintiffs seek, among other things, the winding-up or liquidation of the subject corporation, airG Inc. ("airG"), that corporation is a defendant. It is separately represented by counsel who presumably take instructions from the board and management of airG. Unusually, the corporation filed not only a

response to the plaintiffs' (amended) notice of civil claim ("NOCC"), but also a counterclaim against the plaintiff Mr. Yen and several of his associated entities. In response, the plaintiffs applied below for leave to file a new amended NOCC that contains various allegations — and they are only allegations at this point — concerning airG's conduct *in this proceeding* ("litigation conduct"), as well as the use or appropriation of various resources belonging to airG by the defendants for their own purposes over several years. The chambers judge below dismissed Yen's application to amend as failing to raise an actionable oppression claim as against airG and as unsupported by the necessary material facts.



[2] The plaintiffs' appeal of the judge's order therefore requires us to consider the role of corporations that are caught in the middle of shareholder disputes and wish to defend against the granting of particular relief (here, an order of liquidation and dissolution) sought against the corporation. There are few cases in Canada considering this role (and they have usually done so at the end of the proceedings); but in the U.K., there are authorities that suggest that from the beginning, a corporation in this position should adopt a 'neutral' stance between the shareholder-litigants and that its funds should generally not be used to fund the litigation. The second major issue on appeal is a much more familiar one — to what extent, if any, may a shareholder advance a claim in *oppression* for alleged misappropriations of resources belonging to the corporation?

[3] At the core of the action is a dispute between two major shareholders — the plaintiff Mr. Yen and his holding company 0756383 BC Ltd., whom I will refer to collectively as "Yen"; and the defendants Mr. Ghahramani and his company, 0751846 BC Ltd., whom I will refer to collectively as "Ghahramani". According to the pleadings, Mr. Yen and Mr. Ghahramani, together with a third person, founded airG in 2000. It was continued under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), in 2002. Its shares are not publicly traded.

[4] With the help of some "Angel Investors", airG has evidently achieved some financial success. It has some 150 employees. According to a pleading filed by

Ghahramani, Mr. Ghahramani's holding company now holds 48.58% of the outstanding shares of airG, while Mr. Yen's holding company holds 44.37%. The remaining shares are held by a corporate employee group, Employee Share Ownership Plan Ltd. ("ESOP") and a few other individuals. Between August 2004 and March 2021, Mr. Yen and Mr. Ghahramani were the only directors of airG; at present the directors are Mr. Ghahramani and Mr. Bhangu, airG's Vice-President of Business Development.



### *The Initial Pleadings*

[5] It is clear that the action will require a trial, and a lengthy one at that. The only thing that Messrs. Yen and Ghahramani agree on is that in August 2015, they entered into a so-called "2015 Partnership Agreement". Various terms of that agreement are set forth at paras. 34–35 of Yen's NOCC and para. 4.10 of Ghahramani's response. According to Yen's pleading, beginning on or about March 1, 2021:

> …Ghahramani commenced efforts to, and did: remove Yen as a director of airG; complete a series of Share Buy-Back transactions solely for his own benefit cause airG to pay Ghahramani amounts well in excess of the amounts Yen and Ghahramani agreed could be paid as part of the Annual Year End Bonus and without any corresponding square-up payment to Yen, and terminate Yen's employment with airG (both directly and through a series of consulting agreements between their respective Sidecar Companies, airG, and airG's subsidiaries) …

[6] On the other hand, Ghahramani pleads that Mr. Yen emailed him on February 20, 2021 requesting that "we gracefully wind this down…". Ghahramani's response continues:

> 16. On February 23rd, 2021, Yen emailed Ghahramani, in part, that he wanted to:
>
> "4. Resolve our dysfunctional board/decision making process"
>
> 17. The dysfunctional board/decision making process was the sole fault of Yen, who failed to properly and actively participate as a Director, instead being focused on his own remuneration, greed and jealousy, seeking to act solely in his best interest.
>
> 18. In March, 2021, given:
>
> a) Yen having refused to meet his obligations as a Director of airG;

> b) Yen had been basically incommunicado;
>
> c) Yen being in breach of the 2015 Partnership Agreement;
>
> d) And Yen seeking to renege on his agreement to compensate Ghahramani as set out in the 2015 Partnership Agreement;
>
> Ghahramani advised Yen that Ghahramani wanted Yen to step down as a Director of airG in favour of a Director who would promote and be actively engaged in the business and meet all of the obligations of a Director.
>
> 19. In regard to paragraph 40 and elsewhere of the Notice of Civil Claim:
>
> a) Financial disclosures were made to the angel investors;
>
> b) And Yen advised he would only sign off on the Financial Statements if his bonus was increased or Ghahramani's bonus rescinded.
>
> …
>
> 21. Yen, jealous of Ghahramani's success and remuneration, has herein sought to deprive Ghahramani of his proper and agreed upon compensation and, in the process, endanger airG, its employees, its Shareholders, and their future, based on his greed.
>
> 22. Accordingly, Ghahramani sought to replace Yen as a Director, in favour of someone who would properly fulfill all duties and obligations of that office.
>
> 23. The new Director is Raj Bhangu, who is airG's Vice-President of Business Development, has worked at airG for 2 decades, is a Shareholder, and who is fully committed to his roles, obligations, airG and its Shareholders.

Ghahramani pleaded that "Yen has not taken any real interest, let alone participated, in airG for a decade or so, save in respect of his own remuneration", but that:

> In addition, Yen improperly and unlawfully billed personal, Canfleet, Fairfax Melville Resource Inc., and StudyPug expenses to airG, including flights, hotels, restaurant charges, 3rd party consulting services, software and hardware.

[7] Each side accuses the other of various improprieties involving the operation of airG and its financial resources. Yen, for example, asserts at para. 42(j) of the NOCC that in or around March 2021, Ghahramani caused airG to pay Mr. Ghahramani amounts "well in excess of the amount Yen and Ghahramani agreed could be paid as the Annual Year End Bonus and without any corresponding

square-up payment to Yen". Further, Yen says he had various reasonable expectations as follows:

> (a) At all material times, Yen had a reasonable expectation that he would participate in the management of the business, including as a director of airG;
>
> (b) At all material times, Yen had a reasonable expectation that he would be employed by airG (either directly or through a series of consulting agreements between his respective Sidecar Company, airG, and airG's subsidiaries) unless and until Yen:
>
> (i) submitted a formal written resignation letter to airG;
>
> (ii) terminated all of the financial benefits he was entitled to receive under the 2015 Partnership Agreement; and
>
> (iii) resigned as a director of airG and all of its subsidiaries;
>
> (c) At all material times, Yen had a reasonable expectation that Ghahramani would honour his fiduciary duties as a director and officer of airG, putting the interests of the company above his own;
>
> (d) At all material times, Yen had a reasonable expectation that each of Yen's and Ghahramani's respective percentage of shares owned in airG would remain equal, subject to some other agreement by the parties in the future; and
>
> (e) At all material times, Yen had a reasonable expectation that, he would share in any financial benefit from airG's business activities as agreed by Yen and Ghahramani pursuant to the 2015 Partnership Agreement; and
>
> (f) At all material times, Yen had a reasonable expectation that he would be entitled to raise questions and demand answers from management at an annual shareholders' meeting related to the financial statements, business, management, and affairs of airG in order to make informed investment and corporate governance decisions.
>
> 58. None of those expectations have been met.
>
> 59. The affairs of airG have been and are being conducted and the powers of its directors are and have been exercised in a manner that is oppressive, unfairly prejudicial to and unfairly disregards the interests of Yen and Yen Co. [Emphasis added.]

[8] Ghahramani on the other hand alleges that when he was a director, Mr. Yen did not:

> a) act honestly and in good faith with a view to the best interests of the corporation; and did not

> b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

At paras. 26–7 of their response, the defendants continue:

> In regard to paragraphs 48-50 and elsewhere of the Notice of Civil Claim:
>
> a) Yen has not taken any real interest, let alone participated, in airG for a decade or so, save in respect of his own remuneration.
>
> b) Yen has not shown any real interest in participation in the management of airG for a decade or so.
>
> c) Yen is still employed by airG.
>
> d) Yen has breached the 2015 Partnership Agreement and is not entitled to any remuneration and economic benefits accordingly.
>
> e) Ghahramani has met his fiduciary duties to airG.
>
> f) And the Plaintiffs have no right to equal shareholdings in airG.
>
> The Plaintiffs' claims are all designed by them to:
>
> a) End or frustrate the remuneration Ghahramani is entitled to pursuant to the 2015 Partnership Agreement;
>
> b) Avoid liability and penalties for Yen's breaches of the 2015 Partnership Agreement;
>
> c) To extort from the Defendants a further bonus without which Yen would not approve the Financial Statements;
>
> d) And to harm Ghahramani, airG, its shareholders and its employees.

In summary, the Yen and Ghahramani camps are in stark disagreement over almost every aspect of the operation and financing of airG, including the remuneration, if any, they are entitled to "expect" from the corporation.

[9] In their NOCC, the plaintiffs seek a declaration under s. 214(1)(b)(ii) of the *CBCA* that it is "just and equitable" to liquidate and dissolve airG; a declaration under ss. 214(1)(a) and 241(2) of the *CBCA* that Ghahramani has conducted and is conducting airG's affairs in a manner that is oppressive or unfairly prejudicial to, or unfairly disregards, Yen's interests; and an order that Ghahramani purchase Yen's shares in airG for their fair value or transfer to Yen a portion of Ghahramani's shares in order to "equalize the shareholdings" of the two groups. Yen also seeks general, special and punitive damages. I have attached as Schedule A to these reasons the relevant portions of s. 214 of the *CBCA*, dealing with the "just and equitable" ground

for winding up a corporation; s. 239, dealing with derivative actions; and s. 241, dealing with oppression actions.

[10] The defendants resist the granting of the relief sought by Yen, adding in their response that:

> … airG is successful, is growing, and reflects the hard work and investments of Ghahramani since 2002, the last decade of such without any real involvement by Yen, and others, including some 18 long term employees in British Columbia, who are also indirectly shareholders of the Company, and they deserve to continue building upon their success, and are fully committed to doing so. [At para. 75.]

As well, Ghahramani pleads that Yen's claims are barred by the terms of the 2015 Partnership Agreement; the *Limitation Act*, S.B.C. 2012, c. 13; and equity, "including by way of approbation and reprobation, estoppel and acquiescence."

[11] In February 2022, Mr. Ghahramani filed a counterclaim against Mr. Yen that made additional allegations of improper appropriations by Mr. Yen of airG's resources between 2009 and the present. Mr. Ghahramani sought, *inter alia*, a declaration that Mr. Yen had "materially breached" the 2015 Partnership Agreement, a declaration that Yen be "terminated from all relationships, direct and indirect, with [Mr.] Ghahramani and airG"; a declaration "terminating" Mr. Yen's entitlement to remuneration and other benefits under the 2015 Partnership Agreement; an order that Mr. Yen repay such benefits to airG and Mr. Ghahramani; and damages and an accounting. Under the heading "Legal Basis", Mr. Ghahramani invoked the terms of the 2015 Partnership Agreement, as well as the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

*AirG's Pleading*

[12] In March 2022, airG itself and ESOP filed their amended response to Yen's NOCC. (Around this time, Yen discontinued the action as against ESOP.) AirG pleads that its affairs have at all times been conducted "in a manner that is in the best interests of airG, by a duly appointed board of directors elected by its several minority shareholders" and that audited financial statements have been and will

continue to be provided to shareholders. It confirms that an annual general meeting was held, presumably following the fiscal year end in 2021. It says “No shareholders’ agreement, unanimous or otherwise, governs the affairs of airG.”

[13] But airG’s response is certainly not neutral. Under the heading “Yen’s Misconduct”, airG makes various allegations, many of which essentially repeat those made in Ghahramani’s pleadings to the effect that Yen has used or appropriated airG’s resources and employees to perform work for other enterprises of Mr. Yen, including “Canfleet” and “Studypug”. AirG says further that Mr. Yen has breached his fiduciary duties to airG, refused to comply with regulatory obligations unless he is paid to do so, and misconducted himself so as to give rise to claims by airG for damages, loss and disgorgement.

[14] Under the heading “No Oppression”, airG pleads that Yen’s claim for oppression must fail because:

> ... (i) Yen cannot have held the reasonable expectations alleged and, in the alternative, no reasonable expectations have been breached; (ii) in the alternative, the Plaintiffs’ own conduct bars them from relief; and (iii) in the further alternative, the remedies sought would be unjust or inappropriate in the circumstances.

All the reasonable expectations claimed by the plaintiffs in their pleading are specifically denied. In the alternative, airG says:

> ... if the Plaintiffs' expectations are found to have been reasonable, which is denied, those expectations were not breached as alleged, or at all. In particular:
>
> > (a) airG has at all times been managed and its affairs conducted in a manner that is in the best interests of airG;
> >
> > (b) airG's directors have always been properly elected and appointed by vote of the shareholders, consistent with past practices, airG's Bylaws, and the provisions of the *CBCA*;
> >
> > (c) Yen remains an employee of airG; and
> >
> > (d) Yen has shared in airG's financial success over and above his entitlements as an employee of airG and 0756373 B.C. Ltd. has shared in airG's financial success in accordance with its entitlement as a shareholder of airG.
>
> 16. In the further alternative, if any reasonable expectation(s) of the Plaintiffs were violated, which is not admitted but expressly denied, they were not

> violated by conduct that was oppressive or unfairly prejudicial. Rather, at all times airG and ESOP acted *bona fides* and in the best interests of airG.
>
> 17. In the further alternative, if any reasonable expectation(s) of the Plaintiffs as alleged were violated, which is not admitted but expressly denied, the conduct complained of is not ongoing and has been cured.

[15] Finally, under the heading "Remedies Sought are Unjust or Inappropriate", airG pleads that even if oppression were found, a liquidation order would be inequitable and inappropriate. It says the plaintiffs' claims are "contractual claims clothed as oppression claims" and that oppression remedies are "not intended to be a substitute for an action in contract." Further, it says the claims should not be entertained as against airG and that the plaintiffs have no standing to seek relief that may be sought only by airG. (Citing *Foss v. Harbottle* (1843) 2 Hare 461, 67 E.R. 189 (Ch.).)

[16] In August 2022, airG also filed an amended counterclaim alleging that Mr. Yen had breached various fiduciary and statutory duties said to have been owed by him to airG under certain agreements. AirG sought damages, an accounting and disgorgement, and a declaration that certain of Mr. Yen's other companies have been unjustly enriched by their receipt of various benefits belonging to, and resources misappropriated from, airG.

[17] An amended response to airG's counterclaim was filed by Mr. Yen and various of his companies on August 17, 2022, and in December 2022, Mr. Yen filed a response to Mr. Ghahramani's counterclaim.

[18] Yen did not seek to have any of airG's pleadings struck out, but in October 2022, the plaintiffs applied for leave to amend their own NOCC. It is this application that is the subject of this appeal.

### *The Application to Amend*

[19] In their application, the plaintiffs stated that the response to civil claim and counterclaim filed by airG further demonstrated that the corporation's affairs were

being conducted, and the powers of its directors being exercised, in a manner that was "oppressive and unfairly prejudicial" to the plaintiffs. In particular, Yen asserted:

> (a) Ghahramani has breached his fiduciary obligation to airG and Yen's reasonable expectations by causing airG to improperly take sides in this dispute and spend company money opposing all relief sought by the plaintiffs;
>
> (b) the claims pursued by airG in the counterclaim relate to events within Ghahramani's and airG's knowledge, in some cases from over a decade ago, but are only being pursued now for strategic or tactical reasons in response to the litigation commenced by the plaintiffs; and
>
> (c) at all material times, Ghahramani and airG knew or reasonably ought to have known that executives and directors other than Yen, including Ghahramani and Bhangu, used airG's resources to fund and pursue other business interests and improperly charged and received reimbursement from airG for personal expenses; however, airG has not brought claims for this type of conduct against any executive or director of airG other than Yen. [Emphasis added.]

Yen's proposed second Notice of Civil Claim was attached to the application. The desired amendments are found at paras. 50.1–50.7 of the Schedule, a copy of which is attached as Schedule B to these reasons.

[20] The allegations set forth at paras. 50.1, 50.3–50.7, and subparas. 52(g) and (h) and 57(g) and (h) may be conveniently divided into two general categories:

a) objections to airG's participation as a party in this proceeding, including in particular the complaint that airG has "*taken sides*" because Ghahramani has "breached his fiduciary obligation to airG and Yen's reasonable expectations by *causing airG to ... spend company money opposing all of the relief sought by the plaintiffs*" (my emphasis; see paras. 50.1, 50.3, 52(g) and (h) and 57(g)); and

b) numerous complaints that Mr. Ghahramani has expropriated resources of airG, including services of its employees and consultants, for personal gain and for the pursuit of other business interests — generally in breach of Mr. Ghahramani's fiduciary duty as a director of airG. (See paras. 50.4, 50.5, 50.6(a), 50.7 and 57.) Similar allegations are made against Mr. Bhangu. (See paras. 50.6(b), 50.7 and 57(h).)

Although the first category is in a sense a subset of the second, I propose to treat the two separately. The judge focused almost entirely on the first category, which engages factors (neutrality and the "legal costs rule") that are in addition to those engaged by the second (the boundaries of oppression and derivative actions).

[21] Paragraph 50.2 of the proposed amended pleading is a combination of allegations regarding the "airG Counterclaim" — that it is "misguided"; that it advances claims that are barred by the *Limitation Act*; and again that Mr. Ghahramani has improperly used or appropriated airG's funds and other resources. The latter allegation may be included in the second category described above. As for the objection based on the *Limitation Act*, that is a matter to be addressed at a later stage.

***The Chambers Judge's Reasons***

[22] Yen's application to amend came before the chambers judge below on February 16, 2023. His reasons are indexed as 2023 BCSC 737. He characterized the question before the Court as "whether and to what extent litigation conduct of a corporation which is [a] co-defendant to an oppression action brought by a shareholder… *can itself be actionable as further acts of alleged oppression* against that same plaintiff shareholder." (At para. 1; my emphasis.) He stated his conclusion on this issue immediately — that the "litigation conduct and choices" of airG and associated expenditures of corporate resources were "not actionable as alleged oppressive acts" and that the application should therefore be dismissed. (At para. 2.)

[23] Beginning at para. 11 of his reasons, the chambers judge briefly reviewed the components of the proposed amendments and the positions of the parties. He acknowledged the relevant principles of pleadings law — that courts take a generous approach to the amendment of pleadings (citing *Navarro v. Doig River First Nation* 2016 BCSC 2006 at para. 62); that amendments are usually granted if the proposed pleading discloses a reasonable cause of action or defence (citing *Argo Ventures Inc. v. Choi* 2019 BCSC 68 at para. 8); that it is only in the "clearest of cases" that a pleading will be struck out or an amendment disallowed as

disclosing no reasonable claim (citing *Hu v. Li* 2015 BCSC 1347); and that courts should "err on the side of permitting a novel but arguable claim to proceed to trial" (citing *Aubichon v. Grafton* 2022 BCCA 77 at para. 26.) He noted that material facts are essential to the formulation of a claim or defence. Where such facts are omitted, a cause of action is not effectively pleaded (citing *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.* 2021 BCCA 362 at paras. 45–8.) A plaintiff cannot rely for this purpose on "speculations, bald assertions, or conclusions of law." (Citing *Vassilaki v. Vassilakakis* 2022 BCSC 763 at paras. 48–9.)



*Litigation Conduct*

[24] Turning to the case before him, the judge characterized the proposed amendments as pursuing a legal theory that airG had committed "actionable oppression by the manner in which it has defended the action, including by filing a counterclaim against the plaintiff Mr. Yen, and its choice to not commence similar claims against other parties who the plaintiffs say are similarly situated to them." (At para. 27.) However, he noted, oppression claims are limited to situations in which a shareholder has been harmed *qua* shareholder. As stated by Mr. Justice Groberman for the majority in *Dubois v. Milne* 2020 BCCA 216:

> It is well-established that a plaintiff may pursue an action for oppression only in respect of wrongs suffered *qua* shareholder, and not for wrongs suffered in other capacities: see *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.* at para. 54, and the cases cited therein. Normally, a person who is both an employee and a shareholder of a company cannot bring an oppression action in respect of claims that arise *qua* employee.

[25] In the judge's analysis, the amendments proposed by the plaintiffs 'collided' with this principle, in that the amended claim alleges harm to the plaintiffs *qua* litigants, not *qua* shareholders. In his words:

> The proposed claims arise because the plaintiffs have brought an action against various parties, including airG, which it has defended and in which it has counterclaimed. The proposed claims arise from the plaintiffs' status as litigant, not as shareholder. [At para. 32; emphasis added.]

As I read the judgment, this was the first of two reasons given by the chambers judge for ruling that airG's litigation conduct in this case did not constitute an appropriate claim for an oppression proceeding

[26] As for the proposition that airG should take a "neutral" stance in the action, the plaintiffs relied on English authority. The chambers judge noted in particular *Koza Ltd. & Anor v. Koza Altin Isletmeleri AS* [2021] EWHC 786 (Ch.) It was not a corporate oppression case, but concerned the efforts of the applicant "Koza Altin", the Turkish parent company of a U.K. corporation ("Koza"), to remove Koza's sole director, Mr. Ipek. A series of injunctions and cross-injunctions had been ordered pending trial. One of the terms of the orders rested on a "shared assumption" that Koza would be spending its own funds on the dispute and that the Trustees of the parent company would not be entitled to notice of how much was being spent. (At paras. 7–19.) This put into issue whether Koza would be essentially neutral in the dispute or was and would continue to be an "active protagonist". (At para. 63.)

[27] In the course of his reasons, Trower J. confirmed the "legal costs principle" — i.e., that:

> …a company's money should not be spent on disputes between shareholders and that its controlling shareholders should be restrained by injunction from permitting it to incur expenditure on legal or other professional services, both for the purposes of the petition and for any other aspect of that dispute. [At para. 64.]

(Citing *Gott v. Hauge* [2020] EWHC 1473 (Ch.) at para. 53 and *Ross River Ltd. v. Waverley Commercial Ltd.* [2014] 1 B.C.L.C. 454.) Trower J. continued in *Koza*:

> It is clear from these judgments that, whatever the procedural context in which the issue arises, the court is concerned to identify the true substance of the proceedings and that which constitutes the real contest. If the real contest is between parties other than the company itself, it will be a misfeasance for the company's directors to cause its funds to be expended on the legal costs of that contest. That does not of course mean to say that there may not be some legal expenditure which it is proper for the company itself to incur in the context of a shareholders' dispute. The incurring of legal costs in relation to the company's obligation as a party to give disclosure is one such example. There will be others, but they are limited to those aspects of the dispute in respect of which the company has its own independent interest to protect.

> The procedural context in which the issue arises can vary. Thus in *Re a Company (No 1126 of 1992)* [1994] 2 BCLC 146 the context was an application by the company itself for an order that it be at liberty to participate actively in an unfair prejudice petition and that the directors be at liberty to pay the costs of such participation out of the company's funds. The court refused the relief sought on the grounds that the company had not proved by cogent evidence that its proposals were necessary or expedient in the interests of the company as a whole. In the course of his judgment Lindsay J referred (at page 156 a-b) to the fact as he described it that "the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency". He went on to say:
>
> > "The chorus of disapproval in the cases puts a heavy onus on the company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expediency in the particular case."
>
> However Lindsay J also rejected (at page 157 h-i) the submission that there can never be approval in advance. It was not a case in which an injunction was sought, but he made clear that, in declining to authorise the expenditure, he was not to be taken as having ruled that participation was not necessary or expedient in the interests of the company as a whole. The directors were left to proceed at their own risk. [At paras. 66–8; emphasis added.]

The High Court ultimately enjoined Mr. Ipek from using Koza's funds to pay his legal costs without "proper regard to the legal principles governing the circumstances in which that expenditure may be appropriate". (At para. 135; see also *King v. Kings Solutions Group Ltd.* [2022] EWHC 1099 (Ch.) at para. 56, cited by the chambers judge at para. 35 of his reasons.)

[28] I also note on this point the following summary of the legal costs principle and the neutrality principle more broadly, from *Halsbury's Laws of England* (4th ed., 2016 Reissue), vol. 7(2):

> It is a general principle of company law that the company's money should not be expended on disputes which are in substance between shareholders. There is, however, no rule that in all cases active participation by a company in proceedings commenced by petition on the ground of unfair prejudice is improper. The test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole; and only in cases of the most compelling circumstances proven by cogent evidence will advance approval of such participation and expenditure be given. [At para. 1413; footnotes omitted; emphasis added.]

[29] The chambers judge in the case at bar next referred to a series of Canadian cases in which courts had considered the 'neutrality' principle (particularly in its financial aspect) in shareholder disputes, including oppression cases. He found all of them to be distinguishable from the case at bar. He noted that *RBL Management Inc. v. Royal Island Development Ltd.* 2007 BCSC 674 was an application to remove counsel for the respondent in an oppression proceeding for conflict of interest; the same was true of *Maedou Consulting Inc. v. 0887455 B.C. Ltd.* 2015 BCSC 2009 and *Mottershead v. Burdwood Bay Settlement Company Ltd.* 1991 CanLII 2284 (B.C.S.C.); and that in *Dewan v. Burdet* 2016 ONSC 4917, *aff'd* 2018 ONCA 195, *lve to app dism'd* 38088 (2 May 2019), the trial court held that since relief was sought solely against the personal respondent, the involvement of the defendant company "should have been limited to monitoring the proceeding and assisting the court as required." (At para. 297.)

[30] The Court in *Dewan*, however, did go into some depth concerning the use of corporate assets by a shareholder litigant to pay his or her legal expenses. The corporation was a condominium corporation, which is not exactly the same as an ordinary corporation in terms of what is represented by units, but the Court's remarks are of interest:

> As a named party, CCC 396 would need to be legally represented in the Eberts Application. Given the relief sought was against Mr. Burdet and the basement unit votes he owned, the involvement of CCC 396 in this proceeding should have been limited to monitoring the proceeding and assisting the court as required. The role of CCC 396 and its counsel should have been neutral as between the opposing unit owners and their positions with respect to Mr. Burdet's voting rights.
>
> The costs of CCC 396 as to this proceeding should have been minor as compared to those it incurred at the direction of and for the benefit of Mr. Burdet.
>
> ...
>
> The evidence is overwhelming that these Directors engaged and instructed counsel of CCC 396 to "vigorously" defend this proceeding at substantial cost to CCC 396 and did so to advance Mr. Burdet's direct interests as owner of the basement units. [At paras. 297–8, 300; emphasis added.]

Mr. Burdet's use of condominium resources to pay his expenses in litigating against other unitholders was found to constitute oppression of or unfair prejudice to the interests of those unitholders, given that "No unit owner would reasonably expect another owner to use their appointed position in the condominium to oppress." (At para. 754.)

[31] The chambers judge also referred to *Lizotte v. Arseneault, Bird, LeBlanc* 2012 NBCA 89, the facts of which were also quite different from those of this case. In *Lizotte*, the corporation had *not* been a party to the litigation, which took the form of an application by the plaintiff minority shareholder for the interpretation of a unanimous shareholders' agreement. The question had been decided largely in her favour. In later "default" proceedings, the New Brunswick Court of Appeal seemed to accept that she had held a "reasonable expectation" that the majority would not exercise its dominant position by having the corporation pay the *majority's* legal expenses in the litigation. (See para. 4). On the other hand, the Court of Appeal noted *Discovery Enterprises Inc. v. Ebco Industries Ltd.* 2002 BCSC 1236, in which the two shareholders of Ebco Industries (brothers who shared equal voting control of the company) had become deadlocked. The dispute was submitted to arbitration, following which the issue of Ebco's paying its own arbitration costs was the subject of a derivative action. The Court concluded that it had *not* been improper for Ebco to pay the arbitration costs since that was the "reasonable means chosen to avoid the wind-up of Ebco in the face of a deadlock between the brothers". (At para. 157; emphasis added.)

[32] The Court in *Lizotte* also cited a Manitoba case, *Gibbons v. Medical Carriers Ltd.* 2001 MBQB 310, in which the corporation had paid the legal fees for the majority's defence of the oppression action. The Court ordered the majority to reimburse the corporation on the basis that the payment to the majority had been "inequitable". Similarly, in *Naneff v. Con-Crete Holdings Ltd.* [1993] 11 B.L.R. (2d) 218 (Ont. Gen. Div.), a well-known oppression case, one of the orders made by Mr. Justice Blair (as he then was) was that the unsuccessful parties should bear the costs of the proceedings and that any amounts paid by the corporation in respect of

the legal fees and disbursements of the unsuccessful shareholders should be reimbursed to the corporation. (See *Lizotte* at para. 29.) Other aspects of Blair J.'s decision were later varied on appeal, but his reimbursement order was not affected: see (1995) 23 O.R. (3d) 481 (C.A.). See also *Waxman v. Waxman (Trustee of)* 2003 CanLII 32907 (Ont. S.C.J.), [2003] O.J. No. 87, at para. 90; *Renpenning v. Renpenning* 2023 BCSC 789 at paras. 126–8.

[33] Ultimately, the Court in *Lizotte* ruled that the successful plaintiff could have reasonably expected that the company would *not* bear the legal fees and disbursements incurred by her opponents in their unsuccessful defence of her application. (See para. 42.) She was held to be entitled to relief under the oppression provision, s. 166(2) of the *Business Corporations Act*, S.N.B. 1981, c. B-9.1, in the form of an order that the defendants repay such fees — presumably to the company.

[34] As noted, the chambers judge in the case at bar distinguished *Lizotte* on the basis that the original action had not been an oppression proceeding. The corporation itself had not even been a party to the litigation. As for the English cases, the judge simply did not find them "persuasive": in his analysis, since one of the remedies sought by the plaintiffs in the case at bar was the liquidation and dissolution of airG, *"There [could] be no cause of action* in oppression against the corporation airG for the act of defending against a claim which seeks its liquidation and dissolution." (At para. 33; emphasis added.) As I read it, this was the chambers judge's second reason for rejecting Yen's submission that airG's litigation conduct could ground an oppression action against the corporation.

*Sufficiency of Pleading*

[35] Finally, although Yen had asserted in their proposed amendment that they had been "uniquely harmed" by airG's litigation conduct, the judge characterized this as a bare assertion unsupported by material facts. In his words:

> In this case, the bare allegation of suffering of unique harm is not supported by any concrete factual basis which has been pleaded or is sought to be pleaded. Instead, the allegation of unique harm is contrary to the wording of

> the proposed amendments which concern expenditures of corporate money through the action, which would be a wrong to the company and a loss shared by all shareholders (the amended notice of civil claim pleads there are currently seven shareholders, including the plaintiff Mr. Yen). The conduct complained of is alleged inappropriate use of corporate resources, which, if a claim at all, is a claim of the company not of the plaintiffs.
>
> Nor did the plaintiffs provide any authority for the proposition that it can be oppressive for a company, when it counterclaims against a plaintiff, to fail to third party or claim against other persons or parties for similar claims. In my view, the plaintiffs' complaint in this regard is a complaint that the corporation airG has failed to pursue its legal rights and remedies in an appropriate manner; this is a claim of the company and as the rule in *Foss v. Harbottle* holds, only the company can sue for a wrong done to it.
>
> The plaintiffs further argued there was unique harm to the plaintiffs because the corporation airG has taken sides. For reasons already expressed, I find that there is no validity to the claim that airG has taken sides in defending a claim in an oppression action which has been brought against it, among others, and seeks relief of corporate liquidation. [At paras. 47–9; emphasis added.]

*Breaches of Duties Owed to airG*

[36] The chambers judge did not refer expressly to the second category of allegations that make up the proposed amendments, but his reasoning at paras. 37–41 may be read as applicable to the first as well as the second group. At para. 41, he ruled that the plaintiffs' proposed claim contravened *Foss v. Harbottle* — the principle that where a claim is advanced for wrongs done to the corporation, it must be brought either by the corporation itself or by way of a derivative action on its behalf. (At para. 37, citing *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.* 2017 BCCA 405 at para. 27, quoting *Hercules Management Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165 at para. 59.)

[37] In his analysis, the proposed amendments to Yen's NOCC alleged breaches of duties owed *to airG* by Ghahramani. They therefore gave rise to a claim *of the corporation*, rather than a claim for harm suffered by the plaintiff *qua* shareholder. Yen had not alleged a "separate and distinct harm beyond a potential loss in shareholder value" and this was not a case in which *Foss v. Harbottle* could, in the judge's word, be 'finessed'. (Citing *Jaguar Financial Corporation v. Alternative Earth Resources Inc.* 2016 BCCA 193 at para. 182; *Khela v. Phoenix Homes Limited* 2015

BCCA 202 at para. 45; see also *Icahn Partners LP v. Lions Gate Entertainment Corp.* 2011 BCCA 228 at paras. 86–9; *Everest Canadian Properties Ltd. v. CIBC World Markets Inc.* 2008 BCCA 276 at paras. 16, 28, 50; and *Rea v. Wildeboer* 2015 ONCA 373.)



[38] In the result, although acknowledging that amendments to pleadings should be granted liberally and that novel but arguable claims should generally be permitted to proceed to trial, the chambers judge concluded that *Foss v. Harbottle* and the current law in British Columbia, including *Dubois* and *Jaguar*, did not support the granting of the plaintiffs' application to amend. He dismissed the application in its entirety.

***On Appeal***

[39] In this court, Yen submits that although the chambers judge stated the "correct test" on an application to amend pleadings, he failed to apply it correctly. In the plaintiffs' submission, the judge committed an error of law in ruling that, assuming the facts pleaded by Yen were true, it was plain and obvious the proposed amendments did not disclose a reasonable cause of action in oppression. Yen asserts the following grounds of appeal:

> ... Specifically, the chambers judge erred in determining it is plain and obvious that:
>
> a. if a company is named as a party, a shareholder could never have a reasonable expectation that:
>
> i. the company's resources would not be unfairly and prejudicially used against him in connection with a dispute between shareholders; and
>
> ii. the company's affairs would be conducted honestly and in good faith in connection with a dispute between shareholders;
>
> Reasons at paras. 33-34, AR at p. 222.
>
> b. the proposed amendments fail to allege harm to the plaintiffs *qua* shareholder;
>
> Reasons at para. 31, AR at p. 221.
>
> c. the rule in *Foss v. Harbottle* is a complete answer to the proposed amendments; and
>
> Reasons at paras. 37-41, AR at pp. 223-224.

> d. the proposed amendments fail to adequately plead, with supporting material facts, that the alleged conduct has caused the plaintiffs to suffer direct and special, peculiar, or separate and distinct harm.
>
> Reasons at paras. 46-47, AR at p. 225.



[40] In this context, the phrase "reasonable expectation" is obviously being used as a shorthand expression to mean a ground for an oppression proceeding, given the primary focus on the reasonable expectations of shareholders in oppression proceedings. (See *BCE Inc*. *v. 1976 Debentureholders* 2008 SCC 69, the seminal oppression case in Canada, at para. 61.) However, not every reasonable expectation a shareholder might have gives rise to such a claim: see *BCE* at para. 67.

*Standard of Review*

[41] With respect to the applicable standard of review, Yen submits that the overall issue on appeal — whether a pleading discloses a reasonable cause of action — is a pure question of law that does not attract appellate deference. On this point, the plaintiffs note *Skalbania v. 0055498 B.C. Ltd.* 2018 BCCA 247 at paras. 17–8 and *Canada (Attorney General) v. Frazier* 2022 BCCA 379. Dealing in *Frazier* with a motion to strike pleadings, this court stated:

> The rigorous nature of the test for a motion to strike was affirmed in *Nevsun Resources Ltd v. Araya*, 2020 SCC 5 at paras. 63–64, 66–67 and 69; .... Deciding whether the pleadings disclose a reasonable cause of action is a pure question of law that does not attract appellate deference on appeal: .... Since it is a question of law, it is reviewed on the correctness standard: .... Justice Groberman for the Court recently affirmed that despite older cases suggesting that decisions under Rule 9-5(1)(a) are discretionary, this is no longer the case and the standard of correctness should be used: .... [At para. 21; emphasis added; citations omitted.]

[42] In *Kamoto Holdings Ltd. v. Central Kootenay (Regional District)* 2022 BCCA 282, Mr. Justice Groberman for the Court said this about applications under R. 9-5(1)(a) of the *Supreme Court Civil Rules*:

> Although some older cases did suggest that all decisions under subrule 9-5(1)(a) are discretionary, more recent cases recognize that the issue of whether a claim discloses a reasonable cause of action is a pure issue of law

> and is to be reviewed on a standard of correctness: See, for example, *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at paras. 39–44; *Watchel v. British Columbia*, 2020 BCCA 100 at para. 28; *Kindylides v. Does*, 2020 BCCA 330 at para. 19.
>
> That is not to say that decisions under Rule 9-5(1) are never discretionary. The judge does have a degree of remedial discretion. For example, where a judge finds that part of a claim fails to disclose a reasonable cause of action, the judge has discretion as to how to go about striking the offending portion of the claim. Similarly, where a claim is deficient in some way, a judge has discretion to allow the plaintiff to amend it.
>
> In the case before us, the issue of whether the claim discloses a cause of action is a pure issue of law, not a discretionary call. ... [At paras. 37–9; emphasis added.]

[43] Ghahramani does not address the question of standard of review directly in their factum, but airG contends that although inextricable questions of law, such as whether it is "plain and obvious" a pleading discloses no cause of action, may attract the correctness standard, the judge's order in this case concerned the "overall discretion" of the Court to allow or deny amendments to the pleadings and therefore "involves deference". Ghahramani notes that in *EY Holdings*, Mr. Justice Hunter stated for this court:

> In my view, the question whether a pleading discloses a reasonable cause of action under Rule 9-5(1)(a) will generally be an extricable issue for which no deference need be accorded the chambers judge. If it is asserted that a rule of law is a complete answer to the claim, the question at issue is a question of law for which the standard of review is correctness.
>
> ...
>
> In this case, I would frame the issue that was before the chambers judge in this way: Is it plain and obvious that the rule in *Foss v. Harbottle* is a complete answer to the mismanagement and return of fees claims against the appellant? If the answer is Yes, the law dictates that these claims must be dismissed. If the answer is No, either because the rule does not apply to mortgage investment corporations or *may* not apply to the circumstances pled, the case must proceed to trial. [At paras. 24, 26; emphasis by underlining added.]

[44] In my respectful view, the issues raised by Yen in this case are clearly extricable questions of law and the correctness standard applies.

### *Analysis*

*Litigation Conduct*

[45] Turning to the plaintiffs' first ground of appeal regarding litigation conduct, I have no doubt that where the corporation is facing what Mr. Shields described as the "existential threat" of dissolution, it may well be appropriate for it to retain counsel to represent it according to *its* best interests. In some instances, this representation may need to be "vigorous". Mr. Shields on behalf of Ghahramani argues that this is one such instance.

[46] Even the U.K. cases to which we were referred allow for the corporation to participate in an oppression action where it is "necessary or expedient in the interests of the company as a whole." (See *Re a Company (No. 1126 of 1992)* [1994] 2 B.C.L.C. 146 (Ch.), where the Court held that the company had not shown by cogent evidence that this was the case.) Indeed no authority, English or otherwise, was brought to our attention where a court purported to restrain a corporation in airG's position from participating in litigation in which its existence or substantive interests were put at risk. As the Court in *Koza* observed, "the company has its own independent interest to protect." (At para. 66.) Normally, then, one might agree with the chambers judge that "there can be no cause of action against the corporation … for the act of defending a claim which seeks the relief of liquidation and dissolution."

[47] Of course, the directors of the corporation in this case may well be sincere in believing that it is in ***airG's*** best interests to pursue the claims it has against Yen in the litigation. In my respectful view, however, the difficulty in this case is not the issue of neutrality, but the question of conflict. The corporation's interests do not necessarily equate to those of the majority shareholder, or even the majority of the board of directors. As Madam Justice Allan observed in *Mottershead*:

> ... The best interests of the Company are not necessarily those of the majority shareholders and directors. The Company is a separate legal entity and it is no answer for Mr. Davies to say that his instructions from the individual majority shareholders as [the] personal defendants are one and the same as those instructions which they provide as majority directors of the Company.

> The duty of the solicitor for the Company is to advise *all of the directors* so that they may make an informed decision as a board with respect to the best interests of the Company.
>
> In shareholder litigation, there exists a potential conflict of interest between the personal interests of the individual parties ─ both plaintiffs and defendants ─ as shareholders and their fiduciary duties as directors of the Company. A solicitor acting both for the majority shareholders and for the Company on the sole basis of the instructions of that same majority personifies that conflict. [Emphasis by underlining added.]

[48] Counsel for the corporation should not be in the position of taking instructions from a board of directors or other body that is not independent of both sides in the litigation. In the case at bar, the corporation's board consists of Mr. Ghahramani, a defendant in this proceeding, and Mr. Bhangu, an employee of airG who presumably reports to Mr. Ghahramani. Effectively, then, Mr. Ghahramani is instructing both his own solicitor in this matter and the solicitor for airG. This appears to be reflected in the fact that airG has gone considerably farther than *defending* the claim against it. Its counterclaim strongly resembles Ghahramani's own case against Yen and in particular alleges many of the same breaches of fiduciary duty involving the diversion of airG resources to "Canfleet", "Studypug" and other personal enterprises of Mr. Yen. It is difficult to understand why the counterclaim was thought to be necessary, or in the corporation's interests, given this duplication.

[49] Canadian courts have recognized the conflict inherent in circumstances like these. In a 1992 case, *Alles v. Maurice* [1992] 5 B.L.R. (2d) 154 (Ont. C.J.), Austin J. noted an American case, *Messing et al. v. FDI, Inc.* 439 F. Supp. 776 (D.N.J. 1977). It had dealt with "dual representation" in an oppression proceeding. The Court found it was "improper" in the circumstances. Austin J. continued:

> ... [The Court in *Messing*] went on to state that in choosing a new representative the corporation had to choose independent counsel. There was discussion about independent directors and, in the absence of such, the court being called upon to appoint counsel. In *Messing* the court declined to specify a process, stating that it was the duty of the directors to find a way.
>
> It is apparent from the jurisprudence that there are mixed views as to the propriety of letting directors who are themselves defendants appoint corporate counsel. J.W. Bishop, *The Law of Corporate Officers and Directors*: *Indemnification and Insurance* (1986), §4.05, p. 13; *Cannon et al. v. U.S. Acoustics Corporation et al.*, 398 F. Supp. 209 (1975) at p. 220, para. 13;

> *Rowen v. LeMars Mutual Insurance Co. of Iowa*, 230 N.W. 2d 905 at pp. 914-916.
>
> In my view, there is considerable wisdom in the view that, to the extent corporations such as TASCO and Marlba actually need representation in this proceeding, it should be chosen by persons chosen independently of the litigating individuals. As matters stand, there is at least a suggestion of conduct unfairly prejudicial to or unfairly disregarding the interests of the plaintiff.
>
> An order will therefore go requiring Davies, Ward & Beck to withdraw as solicitors for TASCO and Marlba. If either company wishes to be represented, it will be up to its directors or to its shareholders to determine how. As in the case of *Kirby-Maurice*, in the event that it is determined that either company should be represented and no acceptable means is found to make such appointment, any shareholder may apply to this court. [At 158–9; emphasis added.]

[50] More recently, in *Hames v. Greenberg* 2013 ONSC 4410, a founding shareholder of a closely-held corporation wished to retire and took the position that his fellow shareholders were required to buy him out. They disagreed. After commencing an oppression action against them, he applied for a court order removing the corporation's lawyer, Mr. Klaiman, from acting for the corporate respondents in the litigation. Brown J. ruled that the interests of the corporate respondents were not the same as those of the respondent shareholders and that the lawyer could not act for the former.

[51] Again, these facts were obviously quite different from those in the case at bar, but in the course of his reasons, Brown J. cited *Mottershead* as well as *Edwards-Macleod Properties Ltd. v. 1037661 Ontario Ltd.* [2001] O.J. No. 145 (S.C.J.). There the Court had reasoned:

> ... [C]hoice of corporate counsel is commonly determined by those persons having control of the corporation (by virtue of their offices, majority of shares, etc., as applicable). Where, however, as here, counsel (Hacio) takes instructions from those in control (Tim and Jim) with a view to advancing the personal interests of those in control, at the exclusive cost of the corporation,

> in which a minority shareholder (Peter) has an unresolved interest, that normal principle is assailable. [At para. 31; emphasis added.]

[52] The Court in *Hames* also quoted a passage from *Rice v. Smith* 2013 ONSC 1200, where the Court warned against the "fundamental error" of equating a corporation with its majority directors or shareholders and continued:

> Doing so almost inevitably leads to a corporate lawyer's disregard of obligations owed to the corporate body and structure as a whole, in favour of a particular corporate faction. Most notably, the corporate lawyer effectively may ignore his or her obligation to seek litigation instructions from the corporation's entire board of directors, and/or the lawyer's corresponding obligation to share otherwise confidential and privileged litigation information with all of the corporation's directors.
>
> ...
>
> Where such conflict of interest concerns arise, the proper course is to require legal representation for the corporation, (if such representation is required), that is separate and distinct from the legal representation of the majority directors and shareholders. Ideally, such representation should be chosen independently of the litigating individuals. However, if no agreement in that regard is possible, and no acceptable means is found to make such an appointment, any shareholder should be given leave to make an appropriate application to the court. Similarly, if no means is found whereby corporate counsel may be properly instructed, the lawyer or lawyers in question may apply to the court for instructions. [At paras. 27, 32; emphasis added.]

[53] Fortunately, it is not necessary for us to resolve, at least at this stage, the propriety of airG's taking the position it has in relation to Yen's conduct. The only question before us is whether the chambers judge was correct in ruling that "*there can be no cause of action* against the corporation … for the act of defending a claim which seeks the relief of liquidation and dissolution." (At para. 33; emphasis added.) In my respectful view, the foregoing cases are indicative of at least "mixed views" on whether the controlling shareholder of the corporation may properly engage and instruct counsel for the corporation in a "true" shareholders' dispute such as this one. Accordingly, it is quite possible that where the person instructing counsel is a defendant, a claim for oppression would arise even where the corporation is defending itself from dissolution — i.e., that the minority may well have a reasonable expectation that the corporation would adopt a neutral position or that its resources would not be used in support of the majority's position. Further, although there are

not many cases on this topic, it appears that some Canadian courts have accepted, and to my knowledge none has rejected, the notion that where the corporation's litigation decisions are effectively being made by one of the warring shareholder groups, the opposing shareholder or group may well be oppressed or unfairly prejudiced by the fact that it is obliged to litigate against two adversaries rather than one.

[54] It is also unnecessary for us to address the argument made by Mr. Shields on behalf of Ghahramani that permitting an oppression claim to proceed on the basis of the corporation's litigation conduct would cause it "overwhelming prejudice" because it might be required to waive privilege in order to defend its motives and actions. No authorities to this effect in the oppression context were brought to our attention and I have located none. In any event, we should not be taken as commenting on it in any way.

[55] In the result, I respectfully disagree with the chambers judge's ruling concerning airG's litigation conduct. While that conduct might properly be 'non-neutral' in some circumstances, it cannot be the product of the conflict that seems inevitable where one shareholder (or the principal thereof) in a closely-held corporation is a defendant in the litigation. I would allow the appeal to the extent of permitting the plaintiffs to amend their NOCC by permitting the first category of allegations — i.e., those at paras. 50.1, 50.3, 52(g) and (h), and 57(g) reproduced in Schedule B hereto — to be advanced.

*Misappropriation of Resources of airG*

[56] I move next to Yen's second and third grounds of appeal. These focus on *Foss v. Harbottle* and the question of harm to the plaintiffs *qua* shareholders, as these relate to the second group of allegations proposed to be made by Yen. (See the last two sentences of para. 50.2, and paras. 50.4, 50.5(a), (b), and (d), and 50.6 and 50.7 of the application to amend at Schedule B to these reasons.) Ordinarily, a breach of the duty of directors to use a corporation's resources only for the advancement of its own interests would not result in a direct injury to *one or more*

*shareholders* other than by diminishing the value of the corporation's shares. Since *Foss v. Harbottle* was decided in 1843, courts have held that this type of harm gives rise to a claim on the part of the corporation itself, which must be brought by the corporation or on its behalf.

[57] In *BCE*, the Supreme Court warned against the conflation of fiduciary duties owed *to the corporation* with duties owed *to shareholders*:

> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be advised to consider the impact of their decisions of on corporate stakeholders, such as the debenture losing these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the Corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation. [At para. 66; emphasis added.]

[58] Similarly, in *Brant Investments Ltd. v. KeepRite Inc.* (1991) 3 O.R. (3d) 289 (C.A.), the Ontario Court of Appeal observed:

> It must be recalled that in dealing with s. 234 [the oppression remedy], the impugned acts, the results of the impugned acts, the protected groups, and the powers of the court to grant remedies are all extremely broad. To import the concept of breach of fiduciary duty into that statutory provision would not only complicate its interpretation and application, but could be inimical to the statutory fiduciary duty imposed upon directors in s. 117(1) [now s. 122(1)] of the CBCA. That provision requires that
>
> > 117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
> >
> > > (a) act honestly and in good *faith with a view to the best interests of the corporation* ...
>
> Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under s. 234. To impose upon directors and officers a fiduciary duty to the corporation as well as to individual groups of shareholders of the corporation could place directors in a position of

> irreconcilable conflict, particularly in situations where the corporation is faced with adverse economic conditions. [At 301; emphasis by underlining added.]

See also *Alvi v. Misir* (2004) 73 O.R. (3d) 566 (S.C.J.) at paras. 58–9; *Malcolm v. Transtec Holdings Inc*. 2001 BCCA 161 at paras. 17–8; *Stern v. Imasco Ltd*. (1999) 1 B.L.R. (3d) 198 (Ont. S.C.) at para. 103.

[59] Nevertheless, Canadian courts have differed somewhat in the degree of rigour with which they have applied *Foss v. Harbottle* in recent years, especially since it has been held that oppression and derivative actions may be heard at the same time. (See, e.g., *Drove v. Mansvelt* 1999 BCCA 540.) The 'evolution' of views may be illustrated by a series of cases beginning with *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd*. 2016 BCCA 258, *lve to app. dism'd* 37186 (19 January 2017) ("*CSA*"). In that instance, the subject company had two shareholders. The majority shareholder had effectively kept the minority shareholder (who lived outside the province) 'in the dark' concerning the company's financial position. He had caused the company to pay management fees to himself far beyond what the principal of the minority shareholder had understood was being paid. (See especially paras. 26–9.) The majority shareholder had hoped ultimately to buy the minority shareholder out for a "modest amount" not reflective of the true value of its shares. Various other claims stemming from the appropriation by the majority shareholder of opportunities properly belonging to the company were also advanced as particulars of oppressive conduct, although the plaintiff also sought leave to bring the claims as derivative proceedings if the Court was of the view they were not properly the subject of an oppression action. (See para. 30.)

[60] At para. 68 of *CSA*, this court observed:

> There are several authorities that support the proposition that at least in a closely-held corporation, a majority shareholder's appropriation of management fees in disregard of the interests or expectations of the minority may constitute oppression; and that a majority shareholder who treats the company treasury as if it were his or her own will be found to have oppressed the minority. Indeed, in *BCE*, the Court specifically suggested at para. 93 that "preferring some shareholders with management fees" is generally seen as unfair prejudice. (See also the discussion of "self-dealing" in *Koehnen*, *supra*, at 124–7.) [Emphasis added.]

On this point, we also referred to *Faltakas v. Paskalidis* (1983) 45 B.C.L.R. 388 (S.C.); *Low v. Ascot Jockey Club* (1986) 1 B.C.L.R. (2d) 123 (S.C.) and the cases cited at para. 70 of *CSA*.

[61] At the same time, this court stated:

> ... the payment of excessive management fees to, or other self-dealing by, the majority or corporate directors also constitutes a wrong to the corporation. A complaint of this kind can therefore be brought as a derivative action on the corporation's behalf if leave of the Court is obtained under s. 232 [of the *Business Corporations Act*, S.B.C. 2002, c. 57]. This fact, not considered in many of the cases cited above, brings us back to the 'overlap' between derivative and oppression actions, a subject much discussed by courts and learned authors, especially since J.G. MacIntosh published his seminal article, "The Oppression Remedy: Personal or Derivative?" (1991) *70 Can. Bar Rev.* 29.
>
> In this province, the relationship between the two actions has been resolved by the principle that where a petitioner under s. 227 complains of a wrong (usually breach of fiduciary duty) to the corporation, an oppression action is unlikely to be appropriate unless he or she suffered some loss or damage "separate and distinct from" the indirect effect of the wrong suffered by all shareholders generally: see *Pasnak v. Chura* 2004 BCCA 221 at paras. 32-3, citing *Goldex Mines Ltd. v. Revill* (1974) 54 D.L.R. (3d) 672 at 679-80 (Ont. C.A.) and *Furry Creek* at 254.
>
> This principle was re-confirmed in 2007 in *Robak Industries Ltd. v. Gardner* 2007 BCCA 61 after a thorough review of various English and New Zealand authorities, including *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 (H.L.); *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)* [1982] 1 All E. R. 354 (C.A.); *Christensen v. Scott* [1996] 1 N.Z.L.R. 273 (C.A.); and Canadian authorities including *Hercules Management*, *supra*; and *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002) 220 D.L.R. (4th) 611 (Ont. C.A.). Levine J.A. for the Court held in *Robak* that a claimant under s. 227 must show some loss or particular detriment beyond a diminution in the value of his or her shares. She continued:
>
> > The appellants refer to other portions of the judgment in *Johnson v. Gore Wood* and the other cases in which a claim for diminished value of shares was found to be justified. My reading of these cases, however, leads me to conclude, in agreement with the respondents, that *there is no principle articulated there that would allow a shareholder to claim damages for the loss of value in the shares of a company that is consistent with the legal theories adopted in the Canadian authorities (principally Hercules) and applied consistently in Canada*.
> >
> > . . .
> >
> > … The chambers judge did not decide, contrary to the appellants' arguments, that a shareholder may never bring a claim for the

> diminution in the value of the shareholder's shares, but confirmed, by reference to *Hercules* and [*Haig v. Bamford* [1977] 1 S.C.R. 466], that *a shareholder may have a cause of action for loss in the value of shares where the shareholder has both an "independent relationship" with the wrongdoer and an "independent loss" from that of the company to whom the wrong has been done*. She decided that in this case, the appellants had not shown that they have a cause of action for an "independent loss" in respect of wrongs done to [the company]. [At paras. 28, 38; emphasis added.]
>
> More recently, in *Jaguar Financial*, *supra*, the Court discussed the issue at paras. 177-188 and concluded that certain examples of oppression referred to in *BCE* should not be interpreted as authority for 'collapsing' the distinction between oppression and derivative actions. ...
>
> The Court went on to emphasize the importance of the corporate context in considering whether the claimant in an oppression action has shown "peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly". [At paras. 71–4; emphasis by underlining added.]

[62] In *CSA* itself, this court found that the minority shareholder had shown particular prejudice or damage, personal to himself, and should not be required to sue derivatively. In the Court's words:

> ... As seen earlier, the trial judge found that [the majority shareholder] treated [the corporation] "as if it was his alone" and without regard for the minority shareholder's position … And that [he] had been motivated by the hope of buying [the minority shareholder] out of [the corporation] cheaply. Thus, it may be said that [the majority shareholder's] appropriation of a large proportion of [the corporation's] earnings over several years without the payment of any dividend or other benefit to [the minority shareholder] formed part and parcel of the sustained and deliberate course of conduct that was unfairly prejudicial to [it]. The prejudice was suffered solely by … the minority shareholder; obviously, no other shareholder suffered loss or prejudice. Indeed the fact that all of this occurred against the background of a two-member corporation is a key contextual factor: if [the minority shareholder] were required to bring a derivative action on behalf of [the corporation] against [the majority shareholder] to recover the "excessive" management fees, the court would likely order that they be repaid to [the corporation]. It of course is controlled by the [the majority shareholder]; thus the remedy would be wholly counterproductive. [At para. 80; emphasis added.]

[63] In *Dubois*, this court applied similar reasoning in the context of a private corporation with a few shareholders in connection with actions taken by the majority shareholder to prevent the minority from sharing in the company's profits. For this purpose, the majority shareholder had increased his own salary, diverted money to

himself and failed to declare dividends in a timely manner. The majority of the Court, *per* Mr. Justice Groberman, concluded that given the context of the case, it would not be "productive" to require the plaintiff to pursue a derivative action and that an "individual action based on oppression" was available to him. (At para. 110.)

[64] In Ontario, in *Malata Group (HK) Limited v. Jung* 2008 ONCA 111, the Court of Appeal took a "softer" approach to the "particular loss" requirement. (See paras. 75–6.) *Malata* was not adopted, however, in a later case decided by the same court, *Rea v. Wildeboer, supra*. There Blair J.A. applied the more rigorous approach:

> That the harm must impact the interests of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as part of the collectivity of stakeholders as a whole – is consistent with the reforms put in place to attenuate the rigours of the rule in *Foss v. Harbottle*. The legislative response was to create two remedies, with two different rationales and to separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy. [At para. 35; emphasis added.]

[65] Nevertheless, as noted by David S. Morrett, Sonia L. Bjorkquist, and Ellan D. Coleman in *The Oppression Remedy* (2023, loose-leaf ed.), "Transactions involving shareholder loans, payment of excessive management fees or the transfer of corporate assets or opportunities to other companies are … the subject of many oppression cases." (At §5.13.) The authors cite, *inter alia*, *Hansen v. Eberle* (1997) 144 D.L.R. (4th) 422 (Sask. C.A.); *Pasnak v. Chura*, 2004 BCCA 221; *Chicago Blower Corporation v. 141209 Canada Ltd.* (1988) 40 B.L.R. 201 (Man. Q.B.); and *Capobianco v. Paige* (2007) 36 B.L.R. (4th) 229 (Ont. S.C.J.).

[66] In a more recent decision of this court, *Canex Investment Corporation v. 0799701 B.C. Ltd.* 2020 BCCA 231, the plaintiffs were minority shareholders of a company formed for the purpose of buying and developing residential real estate. The summary trial judge found oppressive conduct where the defendants had set up another company, "Flame", and used it to manipulate the company's financial records to restate the plaintiffs' investment in the company, improperly charge interest to the company, and charge excessive management fees and other costs to it.

[67] On appeal, the defendants argued that the trial judge had erred in treating "alleged wrongs as wrongs committed by the personal defendants to the plaintiffs, in their capacity as shareholders, when at most they could support wrongs to the Company committed by another corporation", i.e. Flame. (At para. 4.) This court began its analysis by suggesting that:

> ... There is arguably an unresolved question about whether it is necessary for a claimant to show direct and special harm in their capacity as shareholder in a manner distinct from all other shareholders before an oppression remedy is available: see *Radford v. MacMillan*, 2018 BCCA 335 at para. 61. This question relates to the relationship between the circumstances in which an oppression remedy may properly be sought, as opposed to the requirement to commence a derivative action in the name of the company: see *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 ..., and *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, 2016 BCCA 258 ..., lve to app ref'd [2016] S.C.C.A. No. 383. This issue surfaces in this appeal because the appellants assert, as I understood the argument, that the judge confused conduct that could arguably support a derivative action, based on alleged wrongs that should be seen as wrongs to the Company by another company, with the claim to oppression. ... [At para. 12; emphasis added.]

[68] The Court reviewed the plaintiffs' reasonable expectations and at para. 69 noted that one of the objects of the oppression remedy is to "permit a court to assess the true character of the substance, rather than the form, of relationships within and between parties involved in a company." (Citing *BCE* at para. 58.) In response to the defendants' argument that the alleged wrongs had been committed by Flame "as a separate legal person" that had not been joined as a party or been given an opportunity to defend itself, the Court said this 'missed the point'. In the words of Mr. Justice Harris:

> ... Much of the wrongdoing was committed by the Company, through the actions of a director that were done at the instructions of a shareholder, and assisted by Flame. The Company took the mortgage, paid over the loan proceeds, and then retired the mortgage out of the sale proceeds. It was the Company's financial statements that were manipulated. For the most part, the wrongs were wrongs committed by the Company to its shareholders, not wrongs to the Company. To the extent that Flame arguably also committed wrongs to the Company, those actions were orchestrated by the personal appellants using Flame as an instrument of their wrongdoing.
>
> Similarly, as I have already described, the judge carefully analysed certain of the alleged wrongdoings to determine if they gave rise to a derivative action rather than an oppression remedy. Her analysis is consistent with the

> governing principles recently restated in *Dubois* by Justice Groberman at para. 106–8. Apart from a general assertion that any overcharging of management fees or interest was a wrong to the Company, the appellants point to no specific error in the judge's conclusion that these wrongs were also harms to the particular distinct interests of the minority shareholders. In my opinion, while there may be some open questions about the nature of the harm to particular shareholders as opposed to shareholders in general, as alluded to earlier, the judge did not fall into error in concluding that, on these particular facts, the oppression had been established. [At paras. 73–4; emphasis added.]

[69] Further, the summary trial judge in *Canex* had found that one of the directors of the company, Ms. Amiri, had *breached a fiduciary duty owed to the minority shareholders*. (Ms. Amiri was a discharged bankrupt and only if she had breached a fiduciary duty did her liability survive her bankruptcy: see para. 97.) The judge relied strongly on an earlier decision of this court, *Valastiak v. Valastiak* 2010 BCCA 71, where the Court in turn cited *Malcolm v. Transtec*. There, the Court had endorsed the proposition that although a director's duty is owed to the company and he or she has no fiduciary obligation *to the shareholders*, "there are some exceptions to this rule". (At para. 47.) In the words of McEachern C.J.B.C.:

> There are some authorities were directors of been found to have a fiduciary duty towards other shareholders. In this respect see *Dusik v. Newton* (1985), 62 B.C.L.R. 1 (C.A.); *Coleman v. Myers* (1977), 2 N.Z.L.R. 297 (C.A.); *Edelweiss Credit Union et al. v. Cobbett* (1992), 68 B.C.L.R. (2d) 273 (C.A.) at 280. In all those cases, however, there was either a family relationship or a special relationship of trust and dependency between the plaintiffs and defendants where the latter were seeking to take unfair advantage of the others for personal gain or profit. [At para. 22; emphasis added.]

[70] The summary trial judge in *Valastiak* concluded that:

> In my view, these cases provide sufficient authority to hold that in the circumstances of this case – in a corporation with only two shareholders who were in a special relationship of trust and dependency and in which Mr. Valastiak was the sole director – Mr. Valastiak, as director, owed Ms. Oakley, as shareholder, fiduciary obligations. As a result, when Mr. Valastiak was acting as the director of the corporation he was "acting in a fiduciary capacity" in relation to Ms. Oakley in relation to the corporation and its assets. [At para. 51, emphasis added.]

In *Canex*, this court found that the summary trial judge's analysis in *Valastiak* had "recognized that imposing a fiduciary duty on a director to a shareholder is

exceptional” but concluded that no error had been identified in the legal test the lower court had applied. (At para. 102.)

[71] I return at long last to the question posed by the second and third grounds of appeal in Yen’s factum — was the chambers judge correct to conclude that it was plain and obvious no oppression action could be brought in respect of the proposed allegations of misappropriation of assets belonging to airG? In my view, there are sufficient Canadian authorities that essentially blur the line between oppression and derivative actions in cases involving the misappropriation of assets of closely-held corporations, that it is no longer correct to say these assertions would be ‘bound to fail’, at least in a case like this. (See also *Chen v. Dang* 2023 BCSC 564 at paras. 73–81; *Macreanu v. Godino* 2020 ONSC 535 at para. 60; *J.S.M. Corporation (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.* (2006) 16 B.L.R. (4th) 227 (Ont. S.C.) at para. 76, ***aff’d*** 2008 ONCA 138.) In my respectful view, the chambers judge erred on this issue and, subject to the final ground of appeal, the plaintiffs should have been permitted to make the assertions in the last sentence of para. 50.2, and in paras. 50.4, 50.5, 50.6 and 50.7 of the Appendix attached hereto as Schedule B. I would allow the appeal to this extent as well.

*Material Facts Pleaded?*

[72] The final reason given by the chambers judge for rejecting Yen’s purported amendments was that the plaintiffs’ assertion that airG’s conduct had “uniquely harmed” them was a “bare pleading not supported by material facts.” (At para. 46.) The judge continued:

> In this case, the bare allegation of suffering of unique harm is not supported by any concrete factual basis which has been pleaded or is sought to be pleaded. Instead, the allegation of unique harm is contrary to the wording of the proposed amendments which concern expenditures of corporate money through the action, which would be a wrong to the company and a loss shared by all shareholders (the amended notice of civil claim pleads there are currently seven shareholders, including the plaintiff Mr. Yen). The conduct complained of is alleged inappropriate use of corporate resources, which, if a claim at all, is a claim of the company not of the plaintiffs. [At para. 47.]

[73] The requirement for material facts in pleadings is found in R. 3-1(2)(a) of the *Supreme Court Civil Rules*. There is extensive case law to the effect that a material fact is "the ultimate fact, sometimes called 'the issue', to the proof of which the evidence is directed. … it is the fact put 'in issue' by the pleadings. Facts tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or 'relevant' facts." (*Sahyoun v. Ho* 2013 BCSC 1143 at para. 26.) Mr. Justice Voith recently summarized the definition of "material facts" compendiously: "Material facts are facts that must be pleaded and proven to sustain a cause of action or defence." (*0848052 B.C. Ltd. v. 0782484 B.C. Ltd.* 2023 BCCA 95 at para. 46.)

[74] At para. 50.1 of the proposed amendments, Yen alleges:

> ... [A]irG ought to be a neutral and nominal party to this action. However, the Ghahramani has breached his fiduciary obligation to airG and Yen's reasonable expectations by causing airG to improperly take sides in this dispute and spend company money opposing all of the relief sought by the plaintiffs. This conduct has uniquely harmed the plaintiffs and benefitted Ghahramani as he has two sets of lawyers defending the claims against him – his lawyers acting for him personally and counsel for airG. The expenditure of airG's money on the contest between Yen and Ghahramani is improper, oppressive, unduly prejudicial and unfairly disregards the interests of the plaintiffs. [Emphasis added.]

In my opinion, this allegation describes the "unique harm" complained of by Yen and does so in a way that is more particular than the way in which many courts have dealt with the problem of "unique harm". What Yen finds objectionable is that not only are the corporation's resources being used to pay the legal fees of counsel for airG (thus diminishing its assets), but the result of the expenditure is to double the legal opposition that Yen must face at trial.

[75] In my view, and with respect, the chambers judge erred in finding that Yen's pleading was insufficient in this regard.

### *Disposition*

[76] In the result, I would allow the appeal and grant the plaintiffs' application to amend in its entirety.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Butler"

I agree:

"The Honourable Justice Marchand"

## Schedule A

Relevant Statutory Provisions of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44.

214 (1) A court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,

(a) if the court is satisfied that in respect of a 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) if the court is satisfied that

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

(ii) it is just and equitable that the corporation should be liquidated and dissolved.

. . .

239 (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

. . .

241 (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

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

. . .

(7) An applicant under this section may apply in the alternative for an order under section 214.

## Schedule B

## Plaintiffs' Proposed Amendments to Amended Notice of Civil Claim

**M.1 airG's Resources Are Being Used Improperly to Defend the Plaintiff's Claims and Fund Meritless Claims Against Only Yen**

50.1 In its response to civil claim in this action, airG pleaded that "the dispute here is among Yen and Ghahramani". The plaintiffs agree. airG ought to be a neutral and nominal party to this action. However, Ghahramani has breached his fiduciary obligation to airG and Yen's reasonable expectations by causing airG to improperly take sides in this dispute and spend company money opposing all of the relief sought by the plaintiffs. This conduct has uniquely harmed the plaintiffs and benefitted Ghahramani as he has two sets of lawyers defending the claims against him - his lawyers acting for him personally and counsel for airG. The expenditure of airG's money on the contest between Yen and Ghahramani is improper, oppressive, unfairly prejudicial and unfairly disregards the interests of the plaintiffs.

50.2 In addition, on March 7, 2022, airG filed a counterclaim in this action against Yen, Yen's Sidecar Company and a number of other entities that are unrelated to the plaintiff's claim against the defendants in this action (the "**airG Counterclaim**"). The airG Counterclaim is misguided and demonstrates that the affairs of airG are being conducted and the powers of its directors are being exercised in a manner that is oppressive, unfairly prejudicial and unfairly disregards the interests of the plaintiffs. The airG Counterclaim pursues claims in relation to events that occurred with Ghahramani's and airG's knowledge, in some cases, over 13 years ago, most if not all of which are barred from forming the basis of any court action by operation of the *Limitation Act*. The airG Counterclaim alleges, generally, that Yen used airG's resources to fund and pursue other business interests. The airG Counterclaim also alleges that Yen improperly charged and received reimbursement from airG for personal expenses. Yen denies the allegations.

50.3 Ghahramani has breached his fiduciary obligation to airG and Yen's reasonable expectations by causing airG's resources to be weaponized against Yen in an effort to increase the cost and complexity of this action to gain a strategic or tactical advantage. This is evident because Ghahramani has not cause airG to commence a proceeding against Ghahramani and Bhangu with respect to the same type of conduct as alleged against Yen.

50.4 At all material times, Ghahramani and airG knew or reasonably ought to have known that executives and directors of airG other than Yen, including Ghahramani and Bhangu, used airG's resources to fund and pursue other business interests and improperly charged and received reimbursement from airG for personal expenses.

50.5 With respect to the use of airG's resources to fund and pursue other business interests, complete particulars of the conduct of executives and directors of airG other than Yen are known to airG and are unknown to the plaintiffs. At this time, the plaintiffs say and the facts are that:

(a) Beginning in 2009 at the latest, Ghahramani used airG's resources, staff and contractors to set up, manage, and benefit various companies and trusts in which he and/or his family members had control, ownership, and/or beneficial interests, including but not limited to: B.T. Marketing Solutions S.A.R.L., airG Distribution Services Ltd., Fidcucie Limited, Eton Funds (Health Sciences) Holdings Ltd., Eton Funds Holdco Limited, Googie Games Limited, Lista Monstruo Ltd., Brain Test Inc. SEZC, airG Ecuador Limited SA, IRAP Technology Ltd., Raven Strategic Capital Partners LLP, Ghahramani Family Trust no 1, and other offshore companies and trusts;

(b) From 2010 to 2021 Lum Chan, in his personal capacity until 2013, and through Lum Chan Ltd. ("**LCL**") from 2013 to 2021, provided financial, accounting, compliance, and consulting services to Ghahramani and Ghahramani's Sidecar Company, airG Client Services Inc., for the sole benefit of Ghahramani and/or Ghahramani's family members. Those services included but are not limited to: managing a holding company wholly owned by Ghahramani's family trust; facilitating and managing personal loans from Ghahramani's family trust's holding company to other individuals, including Melissa Tovey; facilitating and managing personal loans to Ghahramani from airG Client Services Inc. for the purposes of purchasing real estate; preparing tax returns for Ghahramani; consulting and assisting with various other personal tax issues including TFSA over-contributions and filing notices of objections; managing Ghahramani's family trust; managing Ghahramani's personal investment portfolio, including facilitating transfer of investment accounts between different institutions; managing and accounting for Googie Games Limited; accounting for airG Ecuador Limited SA; and accounting for BT Marketing Solutions SARL. From 2013 to 2021, LCL was paid for these services by airG Client Services Inc., which was in turn marked up and fully reimbursed by airG. Mr. Chan was tasked with performing these services by Ghahramani both during and outside of normal working hours while Mr. Chan was employed by airG (until 2012) and airG Services Inc. (2012 to 2021);

(c) During the time Mr. Chan was employed by airG Services Inc., other executives and employees of airG, including but not limited to Bhangu and Nadine Taing, tasked Mr. Chan with providing tax and accounting consulting services during normal working hours; and

(d) In or about 2013 airG spun out with development and commercialization of a product called Brain Test into a company called BrainTest Inc. SEZC ("**BTIS**"). At all material times 49.8 percent of shares for BTIS have been owned by a company controlled and beneficially owned by Ghahramani, or alternatively Ghahramani's father-in-law, Eton Funds (Health Sciences) Holdings Ltd. The Brain Test product was spun out of airG as described above for the purpose of ensuring Ghahramani would obtain personal and imbalanced benefits from the eventual commercialization of the product. Since the Brain Test product was spun out of airG, Ghahramani cause airG to continue funding all or substantially all costs related to the development of the Brain Test product. By 2020, Ghahramani had caused

airG to spend over $8 million related to the development of the Brain Test product. Further, Ghahramani caused airG to use and pay employees and/or contractors for services related to the development of the Brain Test product. In particular, Terence Lee, an employee of airG, spent six years developing the Brain Test product. This was not disclosed to or approved by Yen as a director of airG. In fact, between 2013 and 2020, Yen repeatedly demanded that airG cease funding costs associated with the development and commercialization of the Brain Test product. Ghahramani refused.

50.6 With respect to improperly charging and receiving reimbursement from airG for personal expenses, complete particulars of the conduct of other executives and directors of airG are known to airG and are unknown to the plaintiffs. At this time, the plaintiffs say and the facts are that:

(a) Beginning in 2009, Ghahramani did, and continues to, improperly charge and receive reimbursement from airG for personal expenses, including but not limited to:

(i) a significant volume of illegitimate “business expenses”;

(ii) an apartment at 685 Pacific Blvd, Vancouver, rented in Ghahramani’s name, which is kept by Ghahramani for his exclusive or substantially exclusive use;

(iii) travel expense for trips to Winnipeg, the Dominican Republic, and other personal vacations and trips;

(iv) personal mobile phone accounts for Ghahramani and Ghahramani’s wife;

(v) fees for hosting, maintaining, and managing websites unconnected to the business of airG, including but not limited to ravensp.com and listamonstruo.com;

(vi) all expenses related to a personal pledge by Ghahramani in 2015 to pay $1 million to oppose anti-terrorism legislation introduced by the Government of Canada;

(vii) hotel stays in Vancouver and other expenses for family members of Ghahramani visiting from out of town;

(viii) in or about December 2009, Ghahramani abruptly and unexpectedly abandoned airG and spent approximately the next 18 months travelling the world without regard to the business of airG and leaving Yen to run the company on his own. Most if not all of Ghahramani’s personal expenses in connection with his travel during this time were improperly charged to and reimbursed by airG;

(ix) Ghahramani collected Aeroplan points by purchasing flights or charging expenses to his personal credit card for which he was reimbursed by airG. He then used those Aeroplan points to purchase other flights and sold those flights to airG in exchange for, or was improperly reimbursed by airG in, cash; and

(x) nanny and other childcare expenses; and

(b) Beginning in 2009, Bhangu did, and continues to, improperly charge and receive reimbursement from airG for personal expenses, including but not limited to

(i) a significant volume of illegitimate "business expenses";

(ii) personal food, drink, and entertainment at restaurants and bars;

(iii) use of cash received from the company for personal use at restaurants, bars, and nightclubs; and

(iii) hotel room rentals in Vancouver.

50.7 Despite airG's knowledge that executives and directors of airG other then Yen, including Ghahramani and Bhangu, used airG's resources to fund and pursue other business interests and improperly charged and received reimbursement from airG for personal expenses, airG has made no effort to make any claim in relation to those matters. This disparate and discriminatory treatment has uniquely harmed the plaintiffs and benefitted Ghahramani in a manner that is improper, oppressive, unfairly prejudicial and unfairly disregards the interests of the plaintiffs.

**N. Yen's Reasonable Expectations Not Met**

…

52. Yen's reasonable expectations – arising in the context of a private company that Yen and Ghahramani, through their agreements, words and conduct, have effectively operated as a partnership for 21 years – include:

…

(g) At all material times, Yen had a reasonable expectation that airG and airG's corporate resources would not be unfairly and prejudicially weaponized against Yen in connection with litigation involving airG or Ghahramani; and

(h) At all material times, Yen had a reasonable expectation that airG's affairs would be conducted honestly and in good faith in connection with litigation involving airG or Ghahramani.

…

**PART 3: LEGAL BASIS**

…

57. Yen's reasonable expectations – arising in the context of a private company that Yen and Ghahramani, through their agreements, words and conduct, have effectively operated as a partnership for 21 years – include:

…

(g) At all material times, Yen had a reasonable expectation that airG and airG's corporate resources would not be unfairly and prejudicially

weaponized against Yen in connection with litigation involving airG or Ghahramani; and

(h) At all material times, Yen had a reasonable expectation that airG's affairs would be conducted honestly and in good faith in connection with litigation involving airG or Ghahramani.

…