IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hardy v. Whistler Film Festival Society,* 2024 BCSC 990

Date: 20240514
Docket: S242853
Registry: Vancouver

Between:

Shauna Hardy

Petitioner

And:

Whistler Film Festival Society, Susan Brouse, Ann Chiasson, Rob Larson, Liane Bedard, Daniel Cruz, Karla Laird, John Ritchie, and Dipo Ziwa

Respondents

Before: The Honourable Justice Kirchner

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	D.A. Frenette A. Alimadad
Counsel for the Respondents:	J. Zeljkovich
No one appearing for the Respondent, Dipo Ziwa:	
Place and Date of Hearing:	Vancouver, B.C. May 10, 2024
Place and Date of Judgment:	Vancouver, B.C. May 14, 2024

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Introduction

[1] **The Court:** The petitioner, Shauna Hardy, applies for an interlocutory injunction to enjoin the respondent, Whistler Film Festival Society, from proceeding with a Special General Meeting of the Society scheduled for later today. Through that Special General Meeting, the Society's board of directors seeks its members' approval for bylaw amendments that, among other things, would eliminate the position of "Founding Member Appointed Director" from the board. That position is established by s. 4.2 of the existing bylaws, which provides that Ms. Hardy specifically is given authority to name one director to the board, which may be herself. She currently holds that position on the board, having appointed herself to it at the last annual general meeting. The proposed bylaws would also empower the board to deal with what it calls "problem members" of the Society and "problem members" of the board, including by expelling them.

[2] Ms. Hardy is not identified by name in any of the proposed bylaw amendments or in any of the board's communications with its members about the proposed amendments. However, it is obvious, and not disputed by the Society, that the purpose of the amendments is to put in place a mechanism by which Ms. Hardy will no longer have a seat on the board and potentially be removed as a member of the Society. At a minimum, it is clear that the board wishes to dissociate its governance and management of the Society from Ms. Hardy for reasons that I will discuss in a moment.

[3] Ms. Hardy claims that the board's conduct in pursuing the bylaw amendments through a Special General Meeting is oppressive or unfairly prejudicial conduct under s. 102(1) of the *Societies Act*, S.B.C. 2015, c. 18. She argues the board is attempting to marginalize her from the Society to avoid repaying a debt she claims the Society owes to her. She argues the bylaw amendments are directly aimed at her and implicate her rights as a member of the Society. She argues that her interests will be irreparably harmed if the Special General Meeting proceeds in that her standing as a creditor to the Society will be weakened and leave her at risk of not receiving some $500,000 she claims is owed to her by the Society. She submits

the balance of convenience favours suspending the Special General Meeting and deferring the proposed bylaw amendments to the Annual General Meeting expected to be held in August. She submits this will give the parties time to work out the issues under dispute.

Background

Ms. Hardy as a Founder of the Society

[4] By way of background, Ms. Hardy is one of two founding directors of the Whistler Film Festival Society. She established it with another founding director in 2002 and secured its charitable status in 2007. She served as its Executive Director from 2001 to 2020, has served on the board of directors since 2002, and has held the status of Founding Member since 2022, a position that is established under the existing bylaws in a provision that is not affected by the proposed amendments.

[5] Ms. Hardy deposes that during her time with the Society, she created, developed, and produced its core programs, including the film festival itself and its competitions and awards. She established a slate of foundational talent programs and developed partnerships with several film industry organizations. She claims to have raised over $23 million for the Society during her tenure.

[6] Also during her tenure, she loaned the Society significant amounts of money. She says that as of December 31, 2017, the Society owed her $861,505, consisting of $659,616 in operating expenses that she paid from a line of credit secured by a mortgage on her home; $183,424 in unpaid salary for the period of January 1, 2017 to March 1, 2019; and $18,465 in other expenses.

The Trademark Licence Agreement

[7] In 2015, Ms. Hardy began a discussion with the Society's board to reach an agreement to restructure this debt. She said this was eventually achieved by way of a Trademark Licensing Agreement. She says the parties agreed that Ms. Hardy would formally register the trade name “Whistler Film Festival” and register the trademark for the Society's logo both in her name. She would then licence those

trademarks back to the Society for an annual licence fee. Once the Society has paid an amount in annual licence fees equal to what it owed Ms. Hardy, the Society without be entitled to buy the trademarks from her for $1.

[8] The agreement was reduced to writing in the form of a “Trademark Licence Agreement” dated June 17, 2021. Though framed as a licence agreement, Ms. Hardy asserts that the agreement’s true purpose was to provide a mechanism by which the Society could repay its debt to her. She says the board agreed to this at the time the Trademark Licence Agreement was made. To the extent that is the case, Ms. Hardy agreed to fix the amount owing to her at $700,000, as that is the total amount that had to be paid in annual licence fees to trigger the Society's right to buy the trademarks for $1. Since 2021, the Society has paid Ms. Hardy $119,289.59 in licence fees under the agreement. Thus, she says, another $580,710.41 remains owing to satisfy the Society's debt. The Society views matters quite differently and submits that Ms. Hardy's interpretation of the Trademark Licence Agreement as a tool to repay pre-existing debt is not supported by the terms of the agreement. I will return to that point in a moment.

[9] Ms. Hardy believes that the proposed amendments to the bylaws are intended to facilitate the Society ending its relationship with her under the terms of the Trademark Licence Agreement. However, the Society says its efforts to remove Ms. Hardy from her governance role relates to a functionally incompatible relationship between her and the rest of the board and her conduct in relation to Tourism Whistler, with which the Society has a crucial business arrangement that is essential to holding the annual film festival.

Ms. Hardy’s Dispute with Tourism Whistler

[10] Tourism Whistler is the Society's most important business partner and sponsor. Susan Brouse, the chair of the Society, deposes that each year, Tourism Whistler provides approximately $50,000 in overall value to the Society in the form of marketing, use of Tourism Whistler's hotel booking engine, and renting out the Whistler Conference Centre and Rainbow Theatre to the Society at a discount for

crucial festival events. Since the Conference Centre and the Theatre are essential to holding the film festival, the importance of the relationship with Tourism Whistler extends beyond the monetary value of the services provided.

[11] On December 3, 2022, the Society held a gala at the Whistler Conference Centre at the conclusion of the film festival for that year. Ms. Hardy was in attendance. The following month, senior management of Tourism Whistler apparently complained to the Society's executive director, Angela Heck, that Ms. Hardy had treated Tourism Whistler's staff at the gala in a demeaning and unwelcome manner. Apparently Ms. Heck was asked to ensure that Ms. Hardy would no longer be involved in organizing Society events at the conference. (I say “apparently” because Ms. Heck has not sworn an affidavit, and the evidence on this point is based on information and belief.)

[12] These concerns, however, were later set out in a letter from Tourism Whistler to the Society dated April 11, 2023. There is no explanation for the three or four-month delay in sending the letter. However, it states in part:

> As discussed in her meeting, the conference services team and the catering team communicated their concerns regarding interactions with Shauna Hardy Mishaw during the gala event on the evening of Saturday, December 3rd. This individual demonstrated a lack of respect towards senior management through abrasive verbal communications, which the team found to be unacceptable. This unfortunately is not the first time conference centre staff have experienced this type of negative behaviour from Shauna. While Tourism Whistler completely understands Shauna's role in making the Whistler Film Festival the success that it is. However, moving forward, Tourism Whistler respectfully requests that Shauna not be responsible for events held at the Whistler Conference Centre.

[13] On May 5, 2023, Ms. Heck gave Ms. Hardy a copy of this letter, along with a draft reply from the Society. That reply, which was eventually sent on May 18, 2023, commits that Ms. Hardy would not be involved in the execution of Society events at the conference centre in the future.

[14] Ms. Hardy was upset about Tourism Whistler's April 11, 2023 letter. She retained legal counsel, (who is not her counsel on the present application) and alleged that Tourism Whistler had defamed her in the April 11th letter. In a letter

dated June 2, 2023, to Tourism Whistler, Ms. Hardy's legal counsel on that matter, whom I will refer to as the “defamation counsel” to distinguish them from her counsel in this proceeding, demanded a retraction of the statements in the April 11th letter and an apology. That letter states in part:

> The purpose of this letter is twofold. First, we seek a retraction and apology for Tourism Whistler's defamatory statements identified below. Second, this letter puts Tourism Whistler on notice that further defamatory statements will not be tolerated and that any further publication of defamatory statements may result in legal action.

[15] The letter denied that Ms. Hardy had acted disrespectfully or abrasively towards Conference Centre staff and asserted her communications were professional, though curt. It claims that she was frustrated by Conference Centre staff repeatedly asking her questions about operational matters for the event that she made clear ought to have been directed to others, as she was not the event organizer. The letter goes on to suggest that litigation may be necessary if the matter could not be resolved in the manner proposed by defamation counsel.

[16] On June 12, 2023, Barrett Fisher, the president and CEO of Tourism Whistler, responded to this letter by email to Ms. Hardy with copies to Ms. Brouse and Ms. Hardy's defamation counsel. Mr. Fisher declined to retract the comments in the April 11, 2023 letter, citing a duty to provide a "safe and healthy workplace for our employees and contractors." He stood by the characterization of Ms. Hardy's conduct at the gala based on reports from his staff. He assured Ms. Hardy that he had kept the communications with the Society highly confidential, and he had no intention of publishing them.

[17] He states that as far as Tourism Whistler was concerned, the matter was resolved by the exchange of correspondence with the Society. However, he goes on to say:

> As previously mentioned by Tori Kargl, the issue was resolved directly between Tourism Whistler and the Whistler Film Festival Society to our mutual satisfaction. This latest legal letter, however, undermines this resolution triggering the 90-day clause within the WFS-TW contract that

> requires resolution of any outstanding issues to the mutual satisfaction of both parties within 90 days or the agreement will be terminated.

[18] The WFS-TW agreement is an agreement between the Society and Tourism Whistler that permits the Society to use the Conference Centre and other facilities for the festival. The agreement provides, among other things, that the parties will work together in the spirit of mutual respect and partnership, and if the terms of the agreement are not met, they will have 90 days to resolve matters, failing which the agreement will be terminated. Mr. Fisher's letter is clear notice that Tourism Whistler was triggering the 90-day provision. Obviously a termination of this agreement would be catastrophic for the Society, as it would leave it without the necessary venues to hold the film festival.

[19] On June 22, 2023, Ms. Brouse wrote to Ms. Hardy advising her that the Society's board considered that Tourism Whistler was operating within its rights to request that Ms. Hardy not be involved in organizing future events and the board would keep the communications in strict confidence. Ms. Brouse suggested that quietly accepted this outcome was the best path and that Ms. Hardy pursuing litigation against Tourism Whistler would be detrimental to the Society. She goes on to state:

> As we do not find it in the best interests of the WFF to be involved with this dispute, we will not assist with providing the documents you have been seeking from us showing you are not a paid organizer or manager of the event. We find this irrelevant, counterproductive, and we suggest you drop it. The letter from your legal counsel to Tourism Whistler references possible legal action against them. As you know, Tourism Whistler is an important community partner and integral to the survival of the festival. WFF has a contract with Tourism Whistler, which contains language that allows Tourism Whistler to unilaterally terminate if an issue with the working relationship is not resolved within 90 days. On June 12th, we were copied on correspondence from Tourism Whistler triggering the 90-day termination clause as a direct response to your lawyer's letter. You know as well as anyone that losing Tourism Whistler contract would kill the festival.
>
> Accordingly, on behalf of the WFF, we implore you to withdraw your complaint so that we may repair our relationship with Tourism Whistler. In addition to withdrawing your complaint, we trust that you will not take any further steps that would jeopardize the festival. We respectfully remind you of your duty of loyalty to the society which you founded and of which you are a current sitting board member. It is your fiduciary duty to act in the best

> interests of the society, and not out of self-interest. It would be tragic if the festival failed as a result of this episode. Of course, speaking on behalf of the rest of the board, should this not be resolved in a timely manner, we will explore all other options to ensure survival of the WFF.

[20] Ms. Hardy was undeterred by both Mr. Fisher's and Ms. Brouse's emails. By letter dated June 30, 2023, her defamation counsel wrote again to Tourism Whistler reiterating its demand for a retraction and apology, albeit in a modified form that would focus on Ms. Hardy not being given an opportunity to respond to the allegations about her conduct before Tourism Whistler took those concerns to the Society. Her defamation counsel suggested the triggering of the 90-day resolution clause and the threat to terminate the agreement with the Society was irrelevant to the matter at hand, which defamation counsel said Ms. Hardy had raised in her personal capacity and not on behalf of the Society. The letter states that Ms. Hardy is working "in the spirit of cooperation, professionalism, and respect to address her concerns" and suggests Tourism Whistler ought to do the same.

[21] On August 10, 2023, Mr. Fisher of Tourism Whistler responded again directly to Ms. Hardy stating that her participation in the 2022 gala was in the role of a Society board member and volunteer co-chair of the Gala Committee, and as such he considered it appropriate to invoke the 90-day resolution provision in the agreement. He said Tourism Whistler would like to put the matter behind them, and they would welcome Ms. Hardy as an attendee at festival events but not in an organizing or directing capacity.

[22] On September 6, 2023, Mr. Fisher emailed Ms. Brouse advising that he had not heard anything further from Ms. Hardy or her defamation counsel. He asked for confirmation from Ms. Brouse that the matter was closed and that Tourism Whistler would face no further legal threat. He also agreed to extend the 90-day dispute resolution period a further 90 days so that the festival could proceed later that year. However, on December 11, 2023, after the 2023 festival had concluded, Ms. Hardy's defamation counsel wrote again to Tourism Whistler reiterating the modified demand from the June 30, 2023 letter and adding a new demand that Tourism Whistler pay

Ms. Hardy's legal fees over the matter. In exchange, the letter states "Ms. Hardy will not commence any legal proceedings" in respect of the matter.

[23] On January 23, 2024, the executive committee of the Society's board met with Ms. Hardy to discuss the dispute. The meeting was called for by a board resolution at an *in camera* meeting held in September of 2023 that excluded Ms. Hardy. The *in camera* resolution authorized the board's executive committee to meet with Ms. Hardy to ask her to withdraw her legal threat against Tourism Whistler and step down from the board, and if she did not agree to this, the board would call a Special General Meeting of the Society to remove her. However, when the executive committee held the meeting with Ms. Hardy on January 23, 2024, there was no resolution of the matter.

[24] Ms. Hardy provides a very different account of the January 23, 2024 meeting. She claims that the attending board members threatened to resign their positions and set up a new Society to operate a separate film festival in competition with the Whistler Film Festival. She also states they threatened to remove her as a director, terminate the Trademark Licence Agreement, re-brand the Society with a new name and logo such that it would not be necessary to pay Ms. Hardy under the Trademark Licence Agreement, and potentially allow the Society to become insolvent. Ms. Brouse denies these threats were made at the meeting but acknowledges the executive committee asked Ms. Hardy to consider resigning from the board.

[25] On February 8, 2014, Ms. Hardy's counsel on the present matter wrote to the Society summarizing the threats that Ms. Hardy reported from the January 23 meeting. He said the purpose of the letter was to warn the board against taking actions that would breach their fiduciary duties as board members. He also stated that removing Ms. Hardy as a Director would constitute oppressive conduct under s. 102(1) of the *Societies Act*. He suggested that Ms. Hardy's position as a Founding Member Appointed Director, was created for the purpose of protecting her interest as a creditor to the Society such that removing her would be unfairly prejudicial or oppressive. He also suggested that terminating the Trademark Licence Agreement

would be oppressive or unfairly prejudicial conduct that would be met with an oppression claim and would give rise to an immediate obligation to repay Ms. Hardy the full amount the Society owed to her.

[26] On March 4, 2024, the Society's legal counsel gave a short response to this letter, stating that the Society has no current plans to re-brand or re-name itself. Nor did any directors plan to resign and establish a new entity to compete with the Society. He also stated that the Society fully intends to abide by the Trademark Licence Agreement but disagreed that the Agreement establishes any indebtedness to Ms. Hardy. He stated in the letter that any debts which the Society may have owed to Ms. Hardy before the Trademark Licence Agreement have been long forgiven by Ms. Hardy.

[27] On February 29, 2024, the board held an *in camera* meeting excluding Ms. Hardy, purportedly to discuss changes to the Society's bylaws to improve electronic meeting options and ensure the bylaws were more democratic. The Board also received legal advice on the issues between Ms. Hardy and the Board. In my view, it is highly improbable that the general governance discussion about the bylaws and electronic meeting attendance was anything other than a discussion about how to potentially remove or marginalize Ms. Hardy's role in the Society's governance and management. Such mundane topics would not ordinarily attract an *in camera* meeting. Obviously, though, receiving legal advice respecting Ms. Hardy would.

[28] Regardless, at or following this meeting, the board decided to pursue the amendments to its bylaws that are now the subject of the Special General Meeting scheduled for today. On April 1 or 2, 2024, the board gave Ms. Hardy notice of the bylaw amendments it intended to seek approval for at the Special General Meeting, and on April 14th it gave notice of the Special General Meeting to its members, along with a general explanation of the bylaw amendments. The amendments include the following:

- The removal of the position of “Founding Member Appointed Director” from the bylaws. This is the position currently held by Ms. Hardy and to which she has the sole right of appointment at each AGM.

- The adoption of a provision that would allow the board by a two-thirds majority vote to “suspend, discipline, or expel” a member whose conduct is detrimental to the Society. In its communication with the membership, the board describes these as “problem” members but does not specifically identify Ms. Hardy.

- A provision allowing the board to remove a director by a vote of three-quarters of the directors. Again, in its communication with the membership, the board describes these as “problem” board members but does not specifically identify Ms. Hardy.

- New provisions to facilitate electronic attendance at general meetings.

- Amendments that might best be described as housekeeping.

[29] The notice of Special General Meeting states the date (May 14, 2024), the time (5:00 pm), and the place (a specified address in Vancouver) for the meeting. There is no suggestion that the notice fails to comply with the specific requirements of the *Societies Act* for notice of a Special General Meeting. However, Ms. Hardy takes issue with the adequacy of the explanation given to the members for the bylaw amendments and the way that the meeting will be held.

[30] On the adequacy of the explanation, Ms. Hardy submits that the notice fails to identify the true purpose of the amendments, being to diminish and eventually terminate her role in the governance of the Society and potentially her membership. She argues that fairness to her and to the membership at large requires the board to provide the members with an explanation as to the effect of the proposed amendments on Ms. Hardy's unique position within the Society.

[31] Ms. Hardy also takes issue with how the elimination of the Founding Member Appointed Director position is explained to members. The notice to members explains the change as follows:

> We are advised that this provision is very unusual, if not unique in the context of societies such as WFFS, and it has been questioned by some funders and partners. It is also not consistent with democratic ideals.

[32] Apart from not mentioning that this is a specific right of appointment reserved for Ms. Hardy as a founding member and a significant creditor of the Society, Ms. Hardy takes issue with the assertion that the position of Founding Member Appointed Director has been questioned by some funders.

[33] With respect to process, Ms. Hardy takes issue with the meeting being held in Vancouver with no provision to attend by video conference. She says AGMs have included a video conference option since COVID, and no reason why members who are unable to attend the Special General Meeting in person should be excluded from attending electronically. She also takes issue with the fact that at least one board member appears to be seeking a proxy from a member whose attendance in doubt but is not seeking a proxy from other members. She suggests this indicates board members are targeting proxies from members whom they believe will be supportive of the amendments.

[34] After being notified by the board of these proposed changes on April 1 or 2, 2024, Ms. Hardy sent a lengthy email to the board members detailing her opposition to the proposed amendments. She also sent a lengthy email to BC Gaming, one of the Society's funders, to question the assertion that funders have inquired about the Founding Member Appointed Director position. In that email, Ms. Hardy described the conflict between her and Ms. Brouse as board chair and asserted that Ms. Brouse is "misrepresenting" what BC Gaming has said. She openly questioned whether Ms. Brouse is acting "honestly or in good faith with a view to the best interests of the society."

[35] Significantly, Ms. Hardy opened this email by stating that she was writing "on behalf of the Whistler Film Festival Society" and introduced herself as "the Founder" of the Society, its former executive director, and a sitting member of the board. To my mind, Ms. Hardy was clearly representing herself to BC Gaming as having authority to speak for the Society, which authority she plainly did not have. Further, under the guise of this purported authority, she expressly impugned the conduct of the Society's chair to a major funder.

[36] Following these emails, the board met *in camera* and determined that Ms. Hardy's conduct put her in a conflict of interest with respect to her duties to the Society. The board voted to exclude her from future board meetings until further notice. The board then proceeded with issuing the notice of the Special General Meeting, which as I have said is scheduled for later today.

[37] Overall, Ms. Hardy submits that the Special General Meeting and the bylaw amendments that will be voted on at the meeting will remove her right under the existing bylaws to appoint a director (including herself) and this, in turn, will compromise her position as a creditor to the Society and put at risk the $580,000 (or so) she claims to be owed by the Society. As I have said, she claims this is oppressive or unfairly prejudicial conduct under s. 102(1) of the *Societies Act*, and she has brought a petition under that section challenging the board's actions. Here she seeks an interlocutory injunction enjoining the Society from holding today's Special General Meeting.

Test for an interlocutory Injunction

[38] The test for an interlocutory injunction is a well-known three-part framework set out *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 334:

1) Is there a serious question to be tried?

2) Will there be irreparable harm to the applicant if the injunction is not granted?

3) Does the balance of convenience favour granting the injunction?

[39] These three considerations, or at least the last two, are not a checklist but a guide for considering the over-arching question of whether the granting of an injunction would be just and fair in all the circumstances. *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29, at para. 19. It is for this reason that, in British Columbia at least the test has sometimes been cast in two stages, where the question of irreparable harm is subsumed within the balance of convenience: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd., [1991] 1 S.C.R. 62. In that case, Justice McLachlin, then of the Court of Appeal, said "the practical effect of the two approaches is the same."

Analysis

Serious Question

[40] This first element of the test sets a low bar. Absent some exceptions that do not apply here, applicants for an interlocutory injunction need only show the underlying issue to be tried (or adjudicated in the case of a petition where there is no trial) is serious in the sense that it is not frivolous or vexatious. *RJR* at para. 337. This assessment is to be based "on an extremely limited review of the case on the merits." *British Columbia Teachers' Federation v. British Columbia*, 2014 BCCA 75, at para. 10.Once the court is satisfied the low bar is met, it should avoid a deeper inquiry into the merits of the claim. *RJR* para. 338.

[41] Here Ms. Hardy argues she has an arguable case that the board's actions constitute oppressive or unfair prejudice under the *Societies Act*. In *Canada Snow Mountain Investments Co. Ltd. v Miller Springs Ltd.*, 2015 BCSC 1117, Justice Fleming summarized the oppression remedy at paras. 65 through 67 as follows:

> **Oppression**
>
> [65] The oppression remedy is an equitable one that focuses on harm to the legal and equitable interests of shareholders and other stakeholders caused by the oppressive or unfairly prejudicial conduct of a company or its directors. It seeks to ensure fairness and is fact specific. Importantly, it protects the interests of shareholders qua shareholders, and is not intended

> to be a substitute for an action in contract, tort or misrepresentation (*Stahlke v. Stanfield*, 2010 BCSC 142 at para. 9).
>
> [66] What is just and equitable is judged by the reasonable expectations of the parties. The concept of reasonable expectations is both objective and contextual. While it is impossible to catalogue all of the situations where a reasonable expectation may arise, what is clear from the jurisprudence is not every unmet expectation gives rise to a claim.
>
> [67] The Supreme Court of Canada's decision in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, mandates a two-step inquiry in assessing oppression claims. The first question to be answered is: Does the evidence support the reasonable expectation asserted by the claimant? If so, the second question is: Does the evidence establish that the claimant's reasonable expectation was violated by conduct that was oppressive or unfairly prejudicial?

[42] Though this was stated in that case in the context of the corporation and a shareholder oppression, in *Dalpadado v. North Bend Land Society*, 2018 BCSC 835, Justice Brundrett held that s. 102 of the *Society Act* is sufficiently similar to the oppression remedy under the *Business Corporations Act*, S.B.C. 2002, c. 57 that applicable legal principles can be drawn from both types of cases. Justice Brundrett's summary of the law, including that finding, was endorsed by the Court of Appeal in *Surrey Knights Junior Hockey v. The Pacific Junior Hockey League*, 2020 BCCA 348, at para. 116.

[43] Ms. Hardy argues the elimination of the Founding Member Appointed Director position is oppressive and unfairly prejudicial in that the board did not accord her a fair process before moving to eliminate that position. She argues this oppression is tied to a unique status she has as a member of the Society who, unlike other members, is a founding member, a significant creditor of the Society, and the holder of its trademarks. She argues this makes her more vulnerable to decisions of the board in that she has a significant pecuniary interest that is affected by board decisions. She asserts this is why she was given special ability to appoint herself or her chosen delegate to the board.

[44] The Society argues that Ms. Hardy has no standing under s. 102(1) of the *Societies Act* because an oppression claim can only be brought by a member. It argues that Ms. Hardy's complaint about the removal of her position from the board

is made as a director, not as a member. Further, the Society argues that the pecuniary interest she claims is purely contractual in nature, and that is properly brought as a personal action against the Society under contract.

[45] I disagree with the Society that Ms. Hardy's complaint is made in her capacity as director rather than as member. The right to appoint herself or her delegate to the board is a right of appointment she holds as a member, and more specifically as a founding member. The relevant provision of the bylaw reads:

> **4.2 Election or appointment of directors.** The directors shall be appointed as follows:
>
> …
>
> (e) one (1) director may be appointed to the Board (the "Founding Member Appointed Director") by Shauna Hardy at each annual general meeting, which appointment may include herself.

[46] This provision is not a right of membership on the board by a director but a right of appointment of a director by a specific member, Ms. Hardy. The fact that the position is titled "Founding Member Appointed Director" (emphasis added) makes it clear that Ms. Hardy's right of appointment under this provision is as a member, not as a director.

[47] I am satisfied that there is an arguable case that Ms. Hardy has a reasonable expectation as member that this right of appointment will not be removed without reasonable notice and an opportunity to be heard on the issue: *The Order of St. Basil the Great in Canada v. St. Mary's Ukrainian Senior Citizens Housing Society*, 2023 BCSC 23, at para. 116.

[48] In my view, there is a triable non-frivolous issue, as to whether the process adopted by the court, namely the Special General Meeting and the contents of the notice to members, affords Ms. Hardy an adequate process to address her legitimate expectations in this respect. Having decided that there is a triable issue on that point, it would not be appropriate to weigh the relative merits of that issue other than to say it is not frivolous, and there are points to be made on both sides.

[49] On the one side, the notice to members is silent about the immediate motivation for the substantive changes to the bylaws that affect Ms. Hardy's position. On the other hand, Ms. Hardy has been provided with almost six weeks' notice of the proposed bylaw changes, and she has been given a membership list. So she is free to communicate with members about the meeting should she wish to do so. Of course, she is also free to attend and speak at the meeting herself.

[50] Ms. Hardy's reasonable expectations with respect to the Trademark Licensing Agreement are less clear. She obviously views that agreement as having substituted the Society's indebtedness to her and she suggests a breach of that agreement would revive her earlier debt claim. The Society argues the terms of the Trademark Licensing Agreement are clear and can provide no legitimate expectation of some other arrangement. The Society points to the entire agreement clause in the agreement and the termination clause, which gives the Society the right to terminate the agreement for “convenience” on 30 days' notice. It argues there is nothing in the agreement that compels the society to pay out the full $700,000 in cumulative licence fees if it elects to terminate the agreement for convenience at an earlier date. In those circumstances, it would be prohibited from using the trademarks which are Ms. Hardy's property, but counsel submits that would ultimately be the board's choice. It is for this reason that counsel argues that any debt that might have existed before the Trademark Licensing Agreement has been forgiven by Ms. Hardy.

[51] I question whether Ms. Hardy has a triable issue that the board conduct that might result in a termination of the Trademark Licence Agreement is fairly characterized as oppressive or unfairly prejudicial. Claims that are purely contractual in nature are generally not entertained as oppression claims. *Bruner v. MGX Minerals Inc.*, 2019 BCSC 11, at para. 72. On the other hand, a contract may ground an oppression claim where the effect complained of is felt as a shareholder and not merely as a party with contractual rights. *Bruner* at para. 74.

[52] Here Ms. Hardy argues her position as debtor and a party to the trademark licence agreement is inextricably grounded in her role and her history as a member

– and particularly a founding member – of the Society. Ultimately I accept that this establishes at least an arguable, that is not frivolous case, that Ms. Hardy may have an oppression claim based on the agreement and the debt she asserts that underlies it.

Irreparable Harm

[53] With that, I move to irreparable harm. At this stage of the *RJR-MacDonald* analysis, the court looks at the nature of the harm the applicant may suffer if the injunction is not granted. The harm will be irreparable if it cannot be remedied, even if the applicant is eventually successful on the merits of the underlying proceeding. It is "harm which either cannot be quantified in monetary terms, or which cannot be cured," *RJR* p. 341. Examples include where a party will be put out of business or suffer a permanent loss of market share or damage to its business reputation.

[54] I accept that Ms. Hardy will suffer some irreparable harm if the meeting proceeds. Assuming the bylaw amendments pass at the meeting, Ms. Hardy's tenure as a director of the Society she founded and to which she has given much of her personal and professional life will come to an end by the next AGM unless she is elected to the board by the members at that meeting. That loss is a personal and sentimental harm to Ms. Hardy that cannot be quantified in monetary terms.

[55] However, I am not persuaded that she will suffer irreparable harm in relation to the Trademark Licence Agreement. Her interest in that is entirely pecuniary, and any loss is compensable in damages should a legal right be infringed.

[56] Further, even if Ms. Hardy remained as a director pending the hearing of the petition, she would have no authority or even power of persuasion over what the board might do on the Trademark Licence Agreement or, for that matter, on the underlying debt claim she asserts. Involving herself in a board discussion about the agreement or the debt claim would almost certainly place her in a conflict of interest. In fact, the Trademark Licence Agreement expressly contemplates that. It states:

> The owner [Ms. Hardy] currently is a director of the society and as such, may as a result of entering into this agreement be in a conflict position with the

> society in certain circumstances. The owner acknowledges that this agreement does not provide the owner any control over the operations of the society other than as a director of the society. Further, the owner acknowledges that if the board of the society determines that the owner is in conflict with respect to certain decisions of the board of is society, either actual or perceived as a result of this agreement, that she will recuse herself from such decision-making process.

[57] I am therefore not persuaded that the removal of Ms. Hardy's power of appointment of a director will affect or protect her interest under the Trademark Licence Agreement or her underlying debt claim. Proceeding with a Special General Meeting cannot irreparably harm Ms. Hardy's position in respect of the agreement and the debt claim because there is nothing she could do as a director to prevent any harm that might flow.

Balance of Convenience

[58] The balance of convenience, (or the balance of inconvenience as it is sometimes called) weighs which party would suffer the greater harm from the granting or the refusing of the injunction pending a decision on the merits.

[59] In my view, the balance of convenience favours the Society. It is clear that there has been a complete breakdown in the relationship between the board and Ms. Hardy such that restoring a functional governing relationship seems highly improbable.

[60] More problematic for the Society, though, is the fact that Ms. Hardy has put in jeopardy the Society's critical partnership with Tourism Whistler through a relentless pursuit of what appears to me to be a dubious defamation claim. I accept that Ms. Hardy genuinely feels her interactions with Tourism Whistler staff and contractors at the 2022 gala was mischaracterized in Tourism Whistler's communications with the Society. However, Tourism Whistler obviously takes a different view and believes its description of her conduct was warranted, as consistent with what was reported to it by its staff and its contractors.

[61] Tourism Whistler thought it was necessary to communicate that discreetly to the Society in order to protect its employees and contractors from exposure to conduct it believes they ought not be subjected to. That does not strike me as an unreasonable approach for Tourism Whistler to take. Yet Ms. Hardy has vigorously pursued this issue as a defamation claim with a determination to elicit a retraction and an apology that Tourism Whistler obviously feels is both unnecessary and inappropriate. Her doing so has put her own personal interest ahead of the Society's. It has resulted in Tourism Whistler initiating a dispute resolution process that could lead to it terminating a contract that is essential to the Society's operations and to the festival itself, which is the Society's *raison d'être*.

[62] Ms. Hardy clearly believes this is an overreaction by Tourism Whistler, as she sees her defamation claim as a personal matter unrelated to the society. However, Tourism Whistler does not share that view, and I cannot say that its position is unreasonable. In these circumstances, it is understandable that the board would want to take decisive action to separate itself and its governance from a board member who is engaged in active conflict, including threats of litigation, with a crucial Society partner.

[63] Moreover, the relationship between Ms. Hardy and the rest of the board has grown hostile. Ms. Hardy has, as recently as last month, misrepresented herself to a major Society funder – BC Gaming – as having authority to speak for the Society as a founder and a member of the board, and she has openly impugned the conduct and even challenged the ethics of the Society's board chair, Ms. Brouse, to that same funder.

[64] The airing of this intra-board dispute through communications with a major funder cannot be good for the Society. Ms. Brouse states that the board has determined it is not in the Society's best interests to give Ms. Hardy an opportunity to appoint herself to the board for another term at the next AGM. On the evidence before me, I cannot find fault in that assessment. However, if the proposed change to the bylaws is left to the next AGM, Ms. Hardy would be free to appoint herself to

the board for another year as her right of appointment would be exercisable at the AGM before amendments to the bylaws could take effect if they were voted on at that meeting. This would defeat the Society's objectives of dissociating its governance operations from Ms. Hardy. Ms. Hardy's recent communication with BC Gaming while wearing her hat as a director illustrates why continuation of the status quo is a problem for the Society.

[65] On the other side of the ledger, I am not able to find that Ms. Hardy is significantly inconvenienced by the potential change to the bylaw. As I have said, the impact on her is personal and largely sentimental based on her status as a founder and major contributor to the Society over many years. However, the real potential harm in terms of the money she claims remains owing to her by the Society is neither irreparable, nor is it manageable by holding on to the director's position due to the conflict of interest that would arise if she involved herself in that matter as a director. That is not to say that Ms. Hardy's claim is insignificant. Her evidence is that she has contributed many hundreds of thousands of dollars to the Society, and she is now at risk of not being able to recover that. That harm is real and substantial should it come to pass. However, it is not harm that can be avoided by holding a seat on the board or exercising a right of appointment for one board member.

[66] Further, Ms. Hardy will be free to pursue her petition and potentially set aside any changes that are made to the bylaw if she is successful. Whether or not she is on the board while a petition is proceeding, she would have no power to influence the board's decisions respecting the Trademark Licence Agreement or the debt claim because of the conflict I have discussed. Thus, I am unable to see how holding today's Special General Meeting could prejudice Ms. Hardy's legal or pecuniary position in relation to the Trademark Licence Agreement or the debt claim while the petition is pending. I therefore find the balance of convenience weighs in favour of the Society.

Conclusion

[67] Weighing all the *RJR* factors together, I am not persuaded that granting the injunction would be just and fair in all the circumstances. I therefore dismiss the application with costs to the Society.

"Kirchner J."