Court of King's Bench of Alberta

Citation: Ehli v Lamanator Coatings Ltd, 2024 ABKB 339

Date: 20240610
Docket: 1703 08818
Registry: Edmonton

Between:

Julia Patricia Ehli, Christopher Brian Ehli, and Stephen Taylor Sicoli

Plaintiffs

- and -

Lamanator Coatings Ltd, Teresita Thompson, Anthony Thompson, John Doe, and ABC Corporation

Defendants

Reasons for Decision
of the
Honourable Justice W.N. Renke

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[1] In 2007, the Plaintiffs Julia and Christopher Ehli became shareholders of the Defendant Lamanator Coatings Ltd (Lamanator) and in 2009, the Plaintiff Stephen Sicoli became a shareholder of Lamanator. When they became shareholders, the Plaintiffs were minors, not reaching age 18 until about February 2012. The Plaintiffs are three of twenty-two Lamanator shareholders.

[2] In May 2017, the Plaintiffs filed a Statement of Claim against the Defendants alleging misrepresentation, conspiracy by unlawful means, violation of the Alberta *Securities Act*, unjust enrichment, and oppression, this last with particular reference to the Defendants' failure to distribute audited financial statements as required by the Alberta *Business Corporations Act* (the

ABCA). The Plaintiffs sought, among other things, damages of $179,000 or an order directing repurchase of their shares for $179,000. $179,000 was the sum of the purchase prices for their shares.

[3] In September 2018, the Defendants, not including John Doe or ABC Corporation, applied for summary dismissal of the Plaintiffs' claims and costs.

[4] In September 2021, the Plaintiffs applied for provision of annual audited financial statements for Lamanator commencing for 2009 and subsequent years.

[5] On February 22, 2022, Applications Judge Schlosser delivered a decision dismissing the Plaintiffs' action summarily and dismissing the Plaintiffs' application for audited financial statements. No costs of the application or the action were awarded. The decision is reported at 2022 ABQB 152.

[6] The Plaintiffs appealed the summary dismissal and audited financial statements decisions. The Defendants cross-appealed the costs decision.

[7] A central element of this appeal was the tension between a corporation's obligation under ss 155 and 163 of the ABCA to distribute audited financial statements annually and a non-moving party's task in a summary dismissal application to persuade the court that there is a genuine issue requiring trial not grounded on speculation about what might turn up in the future.

[8] For the reasons that follow, I have dismissed the Plaintiffs' appeal and awarded costs to the Defendants.

[9] I will review the background to the appeal including Applications Judge Schlosser's decision, the standard of review, the principles governing summary dismissal, and the disposition of the Plaintiffs' claims other than oppression. I will then then turn to whether the distribution of audited financial statements must be ordered, the principles governing oppression, and whether the record discloses a genuine issue requiring trial respecting oppression.

[10] The record has the following components:

Proceedings before Applications Judge Schlosser

Transcript of the January 5, 2022 Proceedings before Applications Judge Schlosser (22T)

Reasons for Decision of Applications Judge Schlosser (Decision)

Anthony Thompson

Anthony Thompson Affidavit filed November 23, 2017 (AT-A1)

Anthony Thompson Affidavit filed October 25, 2021 (AT-A2)

Questioning of Anthony Thompson of November 23, 2017 (QDAT)

Questioning on Affidavit of Anthony Thompson of November 23, 2017 (QAAT)

Questioning on Undertakings of Anthony Thompson of November 9, 2018 (QOU-A)

Undertaking Responses of Anthony Thompson re November 9, 2018 Questioning

Teresita Thompson

Questioning of Teresita Thompson of November 23, 2017 (TTQ)

Barry McQuay

Questioning of Barry McQuay of November 14, 2019 (BMQ)

Anna Ehli

Anna Ehli Questioning of June 30, 2021 under rule 6.8, exhibit B to Affidavit of Janie Hart, filed November 12, 2021 (JH Affidavit) and Exhibit C to AT-A2 (AEQ)

Christopher Ehli

Questioning of Christopher Ehli of November 24, 2017, exhibit A to Erin Ball's Affidavit filed October 2, 2018 (EB Affidavit) and exhibit D to JH Affidavit (QDCE)

Affidavit of Christopher Ehli filed October 3, 2018 (CEA)

Questioning on Affidavit of Christopher Ehli of June 30, 2021 filed October 21, 2021 (QACE)

Undertaking Responses of Christopher Ehli re June 30, 2021 Questioning, exhibit A to the Affidavit of Ashley Blais filed March 10, 2022 (URCE)

Julia Ehli

Questioning of Julia Ehli of November 24, 2017, exhibit C to EB Affidavit and exhibit E to JH Affidavit (QDJE)

Stephen Sicoli

Questioning of Stephen Sicoli of November 24, 2017, exhibit B to EB Affidavit and exhibit C to JH Affidavit (QDSS)

Costs

Affidavit of Terri Lien filed April 8, 2022 (LCA)

Briefs

Plaintiffs' Brief (PPB)

Defendants' Brief (DDB)

Defendants' Costs Brief (DDCB)

[11] I have referred to parties by their first names, in an effort at clarity and without intending disrespect.

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I. Background

A. Lamanator and the Plaintiffs

1. Lamanator and the Thompsons

[12] The Defendant Anthony Thompson is the principal of Morinville Flooring Centre (MFC), a well-established business in Morinville, Alberta (AEQ 6.4-25).

[13] Based on his experience with MFC, Anthony invented products designed to clean, restore, and protect laminate and other types of flooring surfaces.

[14] In or about 2005, Anthony started Lamanator to manufacture and distribute floor maintenance systems and products.

[15] Anthony is the President of Laminator. Anthony and the Defendant Teresita Thompson are shareholders in Lamanator and were directors of Lamanator. Teresita is now the sole director of Lamanator.

[16] Lamanator continues to carry on business. In addition to the three Plaintiffs, Lamanator has 19 shareholders (AT-A2 para 4).

2. Anna, Julia, Christopher, and Lamanator

(a) Anna and Lamanator

[17] Anna Ehli is a realtor in Morinville. She and Anthony attended the same Church. They'd done some business together.

[18] Anna's mother's house was sold. Anna's mother had wanted $100,000 from the sale proceeds to go to Anna's children, Julia and Christopher (AEQ 41.22-23).

[19] At this time, Julia and Christopher were minors. They did not turn 18 until some time before February 2012 (AEQ 40.5-6).

[20] Anna learned about Lamanator. She had some communications with Anthony about investing the $100,000 in Lamanator for her children.

[21] Anthony recalled that Anna asked about whether shares in Lamanator were available. He said "the company is just growing. I don't know exactly where it's going, but there [are] shares available" (QDAT 9.7-14).

[22] Anna recalled that Anthony said the following about Lamanator (AEQ 18.6-21): "it was a ground-floor opportunity and the shares were, I think at the time, $2 going maybe to 5 or 6, you know. I thought that was an amazing opportunity." She said that Anthony "was confident it was a good business opportunity. That's how it was portrayed" (AEQ 18.22-24).

[23] Anna said that "I guess I was buying shares in a company that hopefully will make an excellent return for them" (AEQ 30.14-16).

[24] Anna confirmed that neither Anthony nor Teresita said that an investment in Lamanator was a guaranteed investment. She said that "... it just sounded like an amazing opportunity ... but [he] made it look like it was a feasible amazing ground-floor opportunity." But not a sure thing (AEQ 29.10-24). She knew there were no guarantees (AEQ 32.7-8).

[25] When asked whether she understood that the return might be zero, she said "In all honesty, no. I really had faith and trust that being a ground floor opportunity .... I was so very

excited about it." She did understand that businesses sometimes fail. "I was a realtor for 17 years. I saw a lot of it, yes. I do .... Of course I understand that businesses fail. Of course I understand that there is a possibility" (AEQ 33.2-23).

[26] Anna did not request 2006 financial information before purchasing the shares on behalf of her children (QDAT 15.2-4). On the evidence, as of 2007, financial statements for Lamanator did not exist.

(b) Meeting at Lazia

[27] Anna took Christopher and Julia to a meeting with Anthony and Teresita at the Lazia restaurant in Edmonton in 2007.

[28] Christopher's evidence was that he heard about Lamanator for the first time at this meeting, not before (QDCE 7.14-20). He said that Anna did not explain why they were going out to dinner, except that they would meet with someone (QDCE 8.4-19).

[29] Christopher did not recall the details of the dinner besides being told "it was a company and I would be getting a portion of it" (QDCE 9.2-23). He remembered "very little" (QDCE 10.23-26). At that meeting he decided to "purchase a portion of Lamanator" (QDCE 11.1-2). He didn't recall the decision-making process respecting the acquisition of the Lamanator shares (QDCE 14.8-11).

[30] Julia had a more detailed recollection of the 2007 dinner meeting. When asked what was discussed at the dinner, she said "It was presented to us as a company that was up and coming and just so much great potential within the company. And, yeah, it was just, I guess, where they're going and the potential within that" (QDJE 6.10-20). When asked whether she thought it was a good opportunity, she said "Because of the potential that he said at the meeting, just of all the different places that it was going to be in and all the different companies that he was talking about picking it up" (QDJE 6.10-20).

[31] She did not remember "specific details," "like, down to dollar numbers" (QDJE 11.21-27).

[32] She decided at the dinner to buy shares in Lamanator (QDJE 9.21-23).

[33] Anna confirmed "the children came to the decision to invest during that dinner" (AEQ 29.6-9; 31.12; 32.1-6; 35.20-24 ("the decision came down to Julia and Christopher")).

[34] The birthdays of the Plaintiffs were not in evidence. They turned 18 by about February 2012 (22T 16.25-17.6). Given that they were at least 18 in 2012, in 2007 they would have been about 13 or 14 years old.

(c) Share Purchase

[35] On September 20, 2007, in consideration of a payment of $100,000, 60,000 Class D non-voting shares were issued to Julia and Christopher jointly. Anna wrote the cheque for the shares. No subscription agreement was signed by Anna, Christopher, or Julia (QAAT 6.22-25).

(d) Share Holding by Minors

[36] I note that the ABCA does not forbid share purchases by minors: ABCA ss 50(2), (5). Directors, in contrast, must be over age 18: ABCA s 105(1)(a).

3. Stephen and Lamanator

[37] In December 2009, Anna's nephew, the Defendant Stephen Sicoli, purchased 39,750 Class D non-voting shares in Lamanator. He too was a minor at this time. The purchase price was $79,000.

[38] Anthony did not meet Stephen in person before the share sale. Before the sale, Anthony spoke with someone connected with Stephen by telephone about Lamanator and purchasing shares in Lamanator. Anthony thought he was speaking with Stephen. However, on the evidence, I infer that Anthony was likely to have been speaking with an unidentified close relative of Stephen. See AT-A1 para 5.

[39] Before the sale to Stephen, Anthony did not say anything to the person he talked to about the financial situation of Lamanator (QDAT 21.15-25). He did explain that he was doing trade shows, had meetings in the US with some major companies, and the company had good possibilities. He didn't say what Lamanator's net income was in 2009 or say anything about Lamanator's "financials" (QDAT 22.7-17).

[40] In Questioning, Stephen said that he first heard about Lamanator in 2016 when (I infer) counsel became involved on his, Christopher, and Julia's behalf (QDSS 5.16-21, 7.20-22). He said that this "was the first point I had actually heard of Lamanator. The point at which I was concerned is when I had been told that litigation was kind of undergoing" (QDSS 13.13-20).

[41] Stephen said that the first time he'd met Anthony was the day before questioning and he didn't think he'd ever spoken with Anthony before that date (QDSS 9.6-10, 10.23-11.1).

[42] Stephen believed it was likely that he was assisted by "a parental unit" (his term) throughout the share acquisition and that the funds came from one of his "parental units" (QDSS 22.3-13).

[43] Stephen didn't remember signing the share purchase agreement but did not contest that it bears his signature (QDSS 6.1-4). He did not know who gave him the document to sign (QDSS 6.15-26).

[44] He did not know where the funds came from to purchase the shares ("I have no idea. I wish I did") (QDSS 6.5-7).

[45] When asked whether he expected anything from Lamanator during the period of time that he didn't know that he owned Lamanator shares, Stephen said "I didn't expect anything because I didn't know it existed" (QDSS 20.10-26).

[46] I infer that at the time of his share purchase, Stephen was a minor (QDSS 21.19-22.2). He turned 18 in or before 2012 (22T 16.25-17.5).

4. Anna, the Plaintiffs, and Lamanator

[47] Although the Plaintiffs turned 18 by 2012, until 2016, all communications by Lamanator to the Plaintiffs were made through Anna. The Plaintiffs' personal contact information was not provided to Lamanator. In particular, Anna did not recall providing the children's contact information during the meeting at Lazia (AEQ 36.1-4).

[48] When Julia was asked whether she had provided her contact information to Anthony or Teresita at the dinner at Lazia, she said "I believe so," but "I'm not certain" (AEQ 17.16-25).

B. Distribution of Lamanator Financial Information

1. No Distribution of Audited Financial Statements

[49] Anthony stated that "I advised every Lamanator shareholder at the time of their investment that Lamanator would not be preparing or circulating annual audited financial statements. Every Lamanator shareholder, including the Applicants, decided to invest anyway" (AT-A2 para 4).

[50] Lamanator has not distributed any annual audited financial statements.

[51] According to Anthony, "[i]nvestors in Lamanator are always welcome to obtain updates as they feel necessary" (AT-A1 para 12).

2. Dispensing with an Auditor

[52] Until a 2021 amendment to the ABCA, unanimous shareholder approval was required to dispense with the appointment of an auditor. Prior to the amendment (2021 c 18 s 41), s 163 of the ABCA provided as follows:

> 163(1) The shareholders of a corporation other than a distributing corporation may resolve not to appoint an auditor.
>
> (2) A resolution under subsection (1) is valid only until the next succeeding annual meeting of shareholders.
>
> (3) A resolution under subsection (1) is not valid unless it is consented to by all the shareholders, including shareholders not otherwise entitled to vote. [emphasis added]

The 2021 amendment did not have retroactive effect.

[53] In 2006, the Lamanator shareholders resolved not to appoint an auditor. That resolution was made before the Plaintiffs became shareholders.

[54] None of the Plaintiffs ever endorsed a resolution dispensing with the requirement for an auditor under s 163 of the ABCA.

[55] No unanimous resolution was passed in any year subsequent to 2006 dispensing with the requirement for an auditor. Some post-2006 resolutions purporting to dispense with the auditor were signed by some shareholders but not by all shareholders. These resolutions were ineffective (AT-A2 para 16 and ex F; URCE tab 1).

3. Anna, the Plaintiffs, and Financial Information

(a) Anna

(i) Provision of Financial Information to Anna

[56] In 2012, Anna received unaudited financial statements for 2009, 2010, and 2011 (AEQ 43.11-20; 44.7). She believed the children had copies. She believed she forwarded the financial statements. The financial statements "were in their possession." She didn't know how soon after receiving the statements she forwarded the statements – "whether it's a week later, I don't know" (AEQ 43.11-44.4).

[57] Investor meetings were held, including meetings at the Lamanator facility, in 2007, 2008, and 2009. Anna attended. Anna also attended at the facility to seek advice respecting tax issues relating to the investment (AT-A1 para 9). According to Anthony, he provided financial updates

to the shareholders every year, especially to Anna, who came to his office once or twice a year, every year (QDAT 25,14-21).

[58] On at least one occasion, Anna was in contact with Barry McQuay, the accountant for Lamanator and also a shareholder, to obtain financial statements. Barry did not recall providing financial statements to Anna (BMQ 16.14-17.3), but Anna did recall contacting him once for financial information. Neither Barry nor Anna confirmed Anthony's recollection that Anna regularly got financial statements from Barry.

[59] Anna received updates and materials from Lamanator from 2007 to 2016 (AT-A2 para 7).

[60] When asked about financial statements and whether there were "things missing," Anna said "I think I had what I needed. I felt I was willing to do that" (AEQ 45.22-46.2).

[61] When asked whether she felt like she had less information than other investors, Anna said "No. I just don't think there was sufficient information for all investors, by way of meetings .... But I don't think I had any less information than anybody else, no" (AEQ 50.15-51.1).

(ii) The 2010 Buy-Out Offer

[62] Lamanator was not an overnight success. In February 2010, Anthony sent out a memo to shareholders offering to buy them out for the amount of their original investments, without interest (exhibit D to AT-A1). The memo read as follows:

> .... it is my understanding that certain parties no longer feel confident or comfortable with their investment in Lamanator .... In response, I offer to buy out the controlling interests of all those who share such feelings and who would prefer to sever financial ties with this company.
>
> I propose a buy out option that is governed by the following terms:
>
> > 1) Investors can opt to be bought out; in so doing they will regain in full their initial financial investment at no interest.
> >
> > 2) Repayment of the amount of the initial financial investment will be made at the discretion of Lamanator .... That is to say that Lamanator ... will repay that amount at such a time as it is able to do so.
> >
> > 3) This buy out offer expires at 5:00 PM MST on April 30th, 2015. If you are opting for the buy out, this letter will need to be signed and returned to me on or before the date and time indicated above ....

[*The exhibit does refer to a deadline of April 30, 2015. Some references by counsel were to 2010. I consider those references erroneous. Nothing turned on the year of the deadline.*]

[63] Anna received the offer. She "got advice from some people." She "opted not to vote for it" (AEQ 62.10-22). She didn't believe that getting the $100,000 back "would come to fruition" (AEQ 65.15-19).

[64] Anna believed she had sent the buy out offer to Christopher and Julia and believed that they discussed it. Her recollection of the discussion was that "We didn't feel that it was worth the paper it was written on at the time. We were just ... we did want out, but we didn't think this was a proper buy out." The decision then was "Not to move forward with it." This was a unanimous decision.

[65] When asked whether the decision was to keep the shares, Anna said "Well, take our lumps if that happens but to keep the shares or whatever to not go ahead with this." The next question was "And then to take the lumps if that happens?" Anna's response was "Like you said, there is no guarantee, right?" (AEQ 66.11-67.19).

[66] Christopher denied having received the buy out offer from Anna in 2010 (QDCE 22.18-26).

[67] Julia said that she only found out about the buy out offer in 2015 or 2016 when she was gathering information from Anna. Anna did not forward it to her (QDJE 24.16-27).

[68] No Plaintiff sought to be bought out pursuant to the buy out offer.

(iii) 2012 – Anna Remains Lamanator's Contact

[69] In May 2012, Anthony requested updated contact information from shareholders. Anna provided her e-mail address, cell phone number, and work phone number and did not provide contact information for Julia or Christopher (AT-A2 para 8, exhibit B; AEQ 38.17-39.6).

[70] Anna didn't know why she didn't provide her children's contact information (AEQ 40.18-22).

[71] Anna did not recall whether the children came to her asking for updates regarding Lamanator (AEQ 43.6-10)

[72] Anna said "I wasn't their [the children's] representative really" (AEQ 40.2, 41.3-4, 42.1-2). She said that "I never really babysat the account or whatever" (AEQ 40.12-13).

(b) Christopher

[73] When asked in Questioning about whether between 2007 and 2016 he was concerned that he was not receiving direct updates regarding Lamanator, Christopher said that he didn't recall (QDCE 22.9-12). When asked whether he would have talked to anyone about the Lamanator shares between 2007 and 2016, his answer was "Maybe" (QDCE 23.7-14).

(c) Julia

[74] After the Lazia meeting in 2007, Julia did not receive communications from Anthony, Teresita, or Lamanator. She didn't follow up until 2016 (QDJE 18.26-19.7).

4. Retaining Counsel in 2016

[75] In 2016, the Plaintiffs retained counsel (not present counsel). The Plaintiffs requested the income statement and balance sheet for Lamanator for 2014 and 2015. The Plaintiffs received unaudited financial statements for 2014 and 2015 (AT-A1 para 10, AT-A2 para 10).

[76] On September 3, 2016, Julia acknowledged receipt of financial statements for 2011, 2012, 2013, 2014, and 2015 (AT-A1 para 11).

C. Financial Statements

[77] Anthony's recollection was that Lamanator did not have financial statements prepared between 2004 and 2007 (QDAT 5.20-24). However, he did provide the 2007 financial statements.

[78] The Lamanator financial statements from 2007 to 2015 disclosed the following (AT-A1 exhibit I):

- 2007
    - balance sheet – total assets: 141,872 total liabilities: 174,974.19
    - profit & loss – sales: 81,648.49 net income: (90,060.00)
- 2008
    - balance sheet – total assets: 333,942 total liabilities: 355,109.86
    - profit & loss – sales: 321,076.07 net income: 1,532.03
- 2009
    - balance sheet – total assets: 287,737 total liabilities: 395,841.19
    - profit & loss – sales:50,746.80 net income: (87,938.59)
- 2010*
    - balance sheet – total assets: 88,871 total liabilities: 408,035
    - profit & loss – sales: 58,194 net income: (210,059)
- 2011
    - balance sheet – total assets: 87,914 total liabilities: 435,507
    - profit & loss – sales: 161,931 net income: (28,429)
- 2012
    - balance sheet – total assets: 212,876 total liabilities: 616,582
    - profit & loss – sales: 329,115 net income: (56,113)
- 2013
    - balance sheet – total assets: 150,413 total liabilities: 576,286
    - profit & loss – sales: 159,959 net income: (22,167)
- 2014
    - balance sheet – total assets: 130,895 total liabilities: 547,869
    - profit & loss – sales: 193,281 net income: 8,899
- 2015
    - balance sheet – total assets: 158,083 total liabilities: 503,874
    - profit & loss – sales: 212,599 net income: 71,183
- 2016
    - balance sheet – total assets: 125,170 total liabilities: 532,806
    - profit & loss – sales: 135,561 net income: (61,845)

**The 2010 financial statements were not produced in my materials. However, the financial statements were comparative with the prior year and the 2011 statements referred to 2010 results.*

D. Information Production by the Defendants

[79] Anthony filed two affidavits in the litigation.

[80] He was questioned for discovery, questioned on affidavit, and questioned on undertakings. Teresita was questioned for discovery.

[81] Anna and Barry McQuay were questioned under rule 6.8.

[82] Anthony's questioning on undertakings and the questioning of Anna and Barry occurred after the application for Summary Dismissal was filed in September 2018.

[83] The Defendants produced the following Lamanator records for years 2007- 2017 (AT-A2 para 10, QACE 13.12-14.10):

- general ledger
- unaudited financial statements
- tax returns and notices of assessment
- Canadian bank statements for Lamanator
- credit card statements.

[84] Anthony has sworn that he has provided all the financial records that he or Lamanator's accountant had up until 2017, the end of the period for which records were requested (AT-A2 para 11, AT-A2 para 14). Anthony's evidence was not contradicted.

II. Decision Appealed

[85] Applications Judge Schlosser's Decision was admirably succinct. The references that follow are to the Decision.

[86] After noting that all causes of action had been abandoned except oppression (para 2), Applications Judge Schlosser confirmed

- the mandatory nature of audited financial statements, absent statutory exceptions, under ss 162 and 163 of the ABCA (para 4)
- the failure to produce audited financial statements can constitute oppression (para 5)
- audited financial statements may be ordered as an interim or a final measure (para 5).

[87] Applications Judge Schlosser found, however, that the lawsuit concerned "disappointed expectations" about corporate performance. Essentially, the Plaintiffs wanted their money back (paras 6 and 7).

[88] The Plaintiffs have had "full production of financial records and underlying documentation" (para 7).

[89] The Plaintiffs have not identified "what would sustain their claim, beyond suspicion." The Plaintiffs have not, on the record, identified what an audit might reveal and how what an audit might reveal would support their oppression claim (para 7). "There is no evidence of why audited statements might advance the Plaintiffs' case" (para 8).

[90] "Disappointed expectations," without more, do not constitute oppression (para 9).

[91] The claim of oppression and the remainder of the lawsuit are without merit (para 9).

[92] The Decision did not invite submissions or provide reasons respecting costs.

[93] An order followed allowing the application for summary dismissal, dismissing the cross-application for audited financial statements, and directing that there would be no costs for the application for summary dismissal, the cross-application for audited financial statements, or the action.

III. Standard of Review

[94] On an appeal of an Application Judge's decision, the standard of review on all issues is correctness: ***Bahcheli v Yorkton Securities***, 2012 ABCA 166, Côté JA at para 30; ***Kaup v Landrex Hunter Ridge Inc***, 2023 ABKB 542, Harris J at para 30. See also ***Remington Development Corporation v Enmax Power Corporation***, 2021 ABQB 261, Hollins J at paras 27, 28. The appeal is a hearing *de novo*: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11; ***Bank of Montreal v Luciano***, 2024 ABKB 314, Marion J at para 62; ***Issa v BMB Inc***, 2024 ABKB 159, Marion J at para 36.

IV. Summary Judgment and Summary Dismissal

[95] The Defendants' application was for summary dismissal, the Plaintiffs' for audited financial statements. Applications Judge Schlosser considered summary dismissal doctrine to frame the issues to be decided, as do Iz.

A. The Law

[96] Under rule 7.3(1),

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds: ...
>
> > (b) there is no merit to a claim or part of it ....
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:
>
> > (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount; ...
> >
> > (c) if judgment is given for part of a claim, refer the balance of the claim to trial ....

and as of Alta Reg 126/2023 (November 30, 2023),

> (4) If the application is unsuccessful, the Court may
>
> > (a) direct that all or part of the claim proceeds by a streamlined trial, and
> >
> > (b) make a procedural order respecting the streamlined trial.

[97] In ***Stefanyk v Sobeys Capital Incorporated***, 2018 ABCA 125 at para 15, the Court of Appeal provided a good reminder of the proper overall perspective on summary judgment: "Summary judgment is one procedure for deciding whether the moving party has proven its case

on a balance of probabilities" [emphasis in original]. It is a procedural alternative to streamlined trials (formerly summary trials) or full trials, available if summary judgment procedure supports a disposition that is fair and just to both parties on the existing record: ***Hryniak v Mauldin***, 2014 SCC 8 at paras 49, 28; ***776826 Alberta Ltd v Ostrowercha***, 2015 ABCA 49 at para 9; ***Rotzang v CIBC World Markets Inc***, 2017 ABQB 354, Hunt-McDonald J, affd 2018 ABCA 153 at para 66(QB).

[98] A "fair and just" disposition may be reached if the summary judgment process

(1) allows the judge to make the necessary findings of fact,

(2) allows the judge to apply the law to the facts, and

(3) is a proportionate, more expeditious and less expensive means to achieve a just result [than a more procedurally complex form of hearing]: ***Hryniak v Mauldin*** at para 49; ***Maxwell v Wal-Mart***, 2014 ABCA 383 at para 12; ***Rotzang v CIBC World Markets*** at para 65.

[99] The leading Alberta decision on summary judgment is ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49, reasons reserved of a five-member panel. Some important features of the majority reasons are as follows, at paras 32-33, 35, and 46-47:

- The moving party must prove that a fair and just adjudication is possible on a summary basis (para 35). At para 46:

> [46] Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result" .... [W]hether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

- The question is this: "Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?" (paras 47(a), (d))
- The moving party must prove the factual elements of its case on a balance of probabilities (paras 32, 33, 47(b)). Proof of the factual elements is a necessary but not sufficient condition for success.
- The moving party must prove "no merit" or "no genuine issue requiring trial" on a balance of probabilities (paras 32, 35, 47(b)).

- The non-moving or resisting party need only demonstrate that the record (the facts or the law) preclude a fair disposition or that the moving party has failed to establish that there is no genuine issue requiring trial (para 32). The resisting party has an evidentiary burden to "persuade the court" that there is a genuine issue requiring trial – i.e., the moving party has not met the burden of proving that there is not a genuine issue requiring trial (para 35). "The resisting party can meet its evidentiary burden by challenging the moving party's entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.), or by raising a positive defence (such as a limitations defence). A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial" (paras 35, 47(c)).
- Nonetheless, if possible, findings of fact can and should be made on a summary disposition application. The mere presence of some conflicting evidence on the record does not preclude summary disposition. As pointed out by Justice Karakatsanis in ***Hryniak v Mauldin*** at para 36, "[o]n a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute" (emphasis added). The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations (para 36).
- Successful resistance to summary disposition must be "grounded in the record" and not in "mere speculation" (para 35).

B. Best Foot Forward

[100] The parties to a summary disposition application must "put their best foot forward": ***Canada (AG) v Lameman***, 2008 SCC 14 at para 11. A non-moving party cannot resist summary disposition or create a "genuine issue requiring a trial" by speculation about what might turn up in the future. ***Lameman*** stated the principle at para 19:

> 19 We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others. [emphasis added]

[101] Some further observations respecting the "best foot forward" consideration are found at at paras 42 and 43 of ***Axcess Mortgage Fund Ltd v 1177620 Alberta Ltd***, 2018 ABQB 626:

> [42] A summary judgment application is assessed "on the record." This is the record actually before the judge not the record that might or could have been before the judge. Each party is obligated to put its "best foot forward" in the application: ***Angus Partnership Inc v Salvation Army (Governing Council)***, 2018 ABCA 206 at para 44; ***Arndt v Banerji***, 2018 ABCA 176 at para 38; ***Stefanyk v Sobeys*** at para 12. That is, a party cannot complain that summary judgment is not appropriate because of some issue

that does not arise on the evidence but could arise if the evidence had been put before the decision-maker or because some evidence is available on an issue but was not put before the decision maker: "Speculating that better evidence might be available at trial is not sufficient to establish that there is a genuine issue of merit for trial:" ***Amik Oilfield Equipment & Rentals Ltd v Beaumont Energy Inc***, 2018 ABCA 88 at para 8; ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12 at paras 23, 26.

[43] If, however, the evidence on the record supports the inference that further and better evidence will be available at trial respecting an issue of merit, an issue "genuinely requiring trial," then dismissing the application is warranted. In such a case, the link between the evidence-to-come and the evidence on the record is not merely a matter of speculation. See ***330626 Alberta Ltd v Ho & Laviolette Engineering Ltd***, 2018 ABQB 478, Feehan J, as he then was, at para 37; ***Angus Partnership Inc v Salvation Army*** at para 44; ***Stefanyk v Sobeys*** at para 16.

[102] In ***Papaschase Indian Band (Descendants of) v Canada (Attorney General)***, 2004 ABQB 655, the Plaintiffs argued that it was "manifestly unfair" to "force the Plaintiffs to prove their claim" before examinations for discovery and full document discovery." Justice Slatter, as he then was, wrote as follows at para 57:

[57] …. Such a result might well be unfair, but that is not the effect of a summary judgment application. A respondent to a summary judgment application need not "prove its case". It need only raise a "genuine issue for trial", which is a significantly lower standard. If a respondent cannot even produce enough evidence to show a genuine issue, there is no unfairness in granting summary judgment. The respondent is not without weapons, as it is allowed to cross-examine on the applicant's affidavit, and file a conflicting affidavit. That is often enough to raise a genuine issue for trial ….

[103] Justice Slatter went on at para 57 to identify circumstances when expecting a non-moving party to have sufficient evidence to make out a genuine issue for trial would be unfair, as when the moving party had exclusive possession of litigation information:

[57] …. <u>There may be cases where the applicant is in such complete control of the records that it would be unfair not to have it discover documents before the application is heard</u>, but that is not the case here, particularly on the limitations issue. There is no basis for postponing a summary judgment application until after discoveries are complete: *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.*, *supra*, at para. 26; *Re Indian Residential Schools* (2002), 9 Alta. L.R. (4th) 84 at para. 45. [emphasis added]

See also ***P Burns Resources Limited v Honourable Patrick Burns Memorial Trust***, 2015 ABCA 390, Paperny JA at para 8:

[8] The chambers judge [Justice Macleod] also considered the nature of the action before him, an oppression action, in deciding that it would be appropriate to permit the questioning to go ahead. He said, at paras [13] and [14] of his reasons [2015 ABQB 378]:

> It is true that a party cannot oppose an application for summary dismissal using the argument that some evidence in support of its claim may arise during questioning or document production and <u>one is obligated to put one's best foot forward in a summary application</u>. <u>But when, as in this case, the Defendants have all of the knowledge and all of the documents related to the Plaintiff's claim the</u>

> situation cries out for an analysis of what disclosure is necessary or reasonable before the summary judgment application goes ahead ….
>
> This is a case where the factual underpinnings of the Plaintiff's case and the evidence as to those facts are within the knowledge and possession of the Defendants. In my view, the request to question two of the Defendants and to review the content of the affidavit of records was not unreasonable ...
>
> Where the nature of the action is such that much of the evidence supporting the cause of action is likely to be in the sole possession of the defendants, the plaintiff is more likely to require access to disclosure of documents and questioning to be able to make full answer to any subsequent application for summary judgment. [emphasis added]

See also ***Anglin v Resler***, 2024 ABCA 113 at para 38.

V. Claims other than Oppression

[104] The Plaintiffs' commitment to claims other than oppression was not clear.

[105] Applications Judge Schlosser and Defendants' counsel considered the Plaintiffs to have abandoned claims other than oppression.

[106] But Plaintiffs' counsel did not precisely abandon the claims. He said that (22T 26.7-11):

> At its heart, this lawsuit really is an oppression action. There are some allegations that were made at the time of the pleadings about *Securities Act* things. A lot of that … [is] old stuff. But really, at the heart of this is a situation of ongoing oppression as a result of failing to provide the financial reporting required of a corporation under the *Business Corporations Act*.

Later he said "It's not a case of misrepresented things." But then he said "And frankly, from our perspective it's premature to know that" (22T 27.14-15).

[107] In this appeal, the Plaintiffs' written and oral submissions focused on the legal and practical necessity of provision of audited financial statements and on the link between those statements and the Plaintiffs' oppression claim. The Plaintiffs did not specifically address the other causes of action raised in the Statement of Claim, save for the misrepresentation claim. But again, there was no explicit abandonment of any causes of action. The Defendants' written and oral submissions, both before Applications Judge Schlosser and before me did address the Plaintiffs' claims other than oppression.

[108] I recognize that the Plaintiffs' position may be that a summary dismissal decision respecting any causes of action would be premature because audited financial statements must be provided.

[109] To ensure that I do not impute abandonment when none was intended, I shall not ignore the causes of action other than oppression. These causes of action are founded on unjust enrichment, the *Securities Act*, conspiracy by unlawful means, and misrepresentation.

A. Unjust Enrichment

[110] At para 27 of the Statement of Claim, the Plaintiffs alleged that "[t]he Defendants have been unjustly enriched by their receipt of and use of the Plaintiffs' funds." There was no particularization of this assertion.

[111] In my opinion, the record contains no evidence that supports the engagement of unjust enrichment as the doctrine is properly understood. As a matter of law, there is no evidential support for a cause of action in unjust enrichment. The pleaded cause of action is not sustainable on the record.

[112] The Plaintiffs appear to have in mind the notion of unjust enrichment by wrongdoing, as opposed to the cause of action for unjust enrichment. What was "unjust" was the Defendants' allegedly illegal acquisition of the Plaintiffs' money. The illegality, though, was set by the law of torts or contracts or by statute. In a true unjust enrichment claim, the injustice "never [consists] of independently actionable wrongs." Further, the defendant is liable regardless of a breach of common law obligation (e.g. a tort or breach of contract): Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (LexisNexis, 2014) 202; see also 7, 145, 201. I note as well the decision of Justice Feth, as he then was, in ***956126 Alberta Ltd v JMS Alberta Co Ltd***, 2020 ABQB 718 at para 197:

> [197] Unjust enrichment is not available where a valid and enforceable contract governs the relationship between the parties. Different considerations apply and the law will respect the parties' allocation of risk made by contract: *Sandhu v MEG Place LP Investment Corp*, 2015 ABQB 297 at para 128. Unjust enrichment must not subvert the agreement negotiated by the parties: *Luscar Ltd v Pembina Resources Limited*, 1994 ABCA 356 at paras 117-119.

[113] Summary dismissal of the unjust enrichment claim is justified on this ground alone.

[114] Defendants' counsel argued that the third element of the tri-partite unjust enrichment test (enrichment, corresponding deprivation, absence of juristic reason for enrichment) was not satisfied, since the Plaintiffs got the shares they paid for. That is, there was a juristic reason for Lamanator receiving the Plaintiffs' money because the Plaintiffs agreed to buy shares and those shares were issued to them. That is a fair observation. The Plaintiffs have a claim only insofar as the circumstances surrounding their purchase give rise to a cause of action that would negate the "juristic reason," but that claim, again, would be a tort, contract, or statutory claim not a restitutionary claim.

[115] There was no argument that audited financial statements would provide any evidence that would support an unjust enrichment cause of action and I can perceive no basis for audited financial statements adding any evidence supporting an unjust enrichment cause of action.

[116] I therefore summarily dismiss the Plaintiffs' claim for unjust enrichment.

B. *Securities Act* Claims

[117] At para 10 of the Statement of Claim, the Plaintiffs particularized a claim leading to the conclusion that the share purchases by the Plaintiffs "were prohibited by the *Securities Act* and unlawful." At para 14 they claimed that "the Defendants failed to disclose material information that should have been disclosed to any prospective investor in Lamanator."

[118] Part 17 of the *Securities Act* establishes civil remedies for violations of the Act. Section 211(b)(ii) of the *Securities Act* provides as follows:

> 211 Unless otherwise provided in this Act, no action may be commenced to enforce a right created by this Part,

> (a) in the case of an action for rescission, more than 180 days from the day on which the transaction that gave rise to the cause of action was completed, or
>
> (b) in the case of any other action, later than the earlier of
>
> > (i) 180 days from the day that the plaintiff first had knowledge of the facts giving rise to the cause of action, and
> >
> > (ii) 3 years from the day on which the transaction, contravention or alleged contravention, as the case may be, that gave rise to the cause of action was completed or committed, as the case may be.

[119] None of the Plaintiffs sought rescission within 180 days from the day they were issued his or her shares (AT-A1 para 6).

[120] Section 211(b)(ii) sets a purely temporal (not discovery-based) limitation period, three years from the alleged contravention. All the evidence that could have been relevant to any alleged contraventions of the *Securities Act* concerned events occurring in 2007 (respecting Christopher and Julia) and 2009 (respecting Stephen). The Plaintiffs became adults in 2012. The Statement of Claim was not filed until 2017.

[121] Any civil remedies under the *Securities Act* were statute-barred. I agree with the Defendants' arguments on this point (DDB paras 59-64).

[122] I therefore summarily dismiss the Plaintiffs' claims based on alleged violations of the *Securities Act*.

C. Conspiracy by Unlawful Means

[123] Paragraph 16 of the Statement of Claim asserted that "[t]he Defendants were parties to a conspiracy by unlawful means." The claim was not particularized.

[124] Neither counsel addressed this cause of action either before me or Applications Judge Schlosser.

[125] The Court of Appeal discussed the elements of civil conspiracy in ***D'Agnone v D'Agnone***, 2017 ABCA 35 at paras 19-24:

> [19] The tort of conspiracy requires the defendants to have an agreement to engage in a course of conduct with the predominant purpose of injuring the plaintiff, or if the conduct of the defendants is unlawful, to have acted knowingly or having ought to have known that injury to the plaintiff is likely to result: *Cement LaFarge v BC Lightweight Aggregate*, [1983] 1 SCR 452.
>
> [20] In *Cement LaFarge*, the court acknowledged that "the scope of the tort of conspiracy is far from clear", but it may be found where parties combine and effect loss in the following manner:
>
> > 1. Whether the means used by the defendants are lawful or unlawful the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
> >
> > 2. Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

> [21] In *Mraiche Investment Corporation v McLennan Ross LLP*, 2012 ABCA 95, 524 AR 151 at para 40, this Court adopted the somewhat restated test as follows …:
>
> > ... the following elements must be proved:
> >
> > 1. an agreement between two or more persons;
> >
> > 2. concerted action taken pursuant to the agreement;
> >
> > 3.(i) if the action is lawful there must be evidence that the conspirators intended to cause damage to the plaintiff;
> >
> > (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (constructive intent);
> >
> > 4. actual damage suffered by the plaintiff;
>
> [22] The tort of conspiracy requires an agreement that is acted on and causes injury to the plaintiff. The agreement may be inferred and need not be in any specific form, or even constitute a binding contract: Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 731 …. The facts of the alleged agreement must be known and intention to be part of the alleged agreement must be found: *Maguire v Calgary (City)*, 1983 ABCA 121, 146 DLR (3d) 350. There must be intentional participation with a view to furthering the common design and purpose ….
>
> [24] The second form, unlawful means conspiracy, requires that the alleged co-conspirators do something contrary to law to further their agreement. Unlawful means have been held to include fraud, perjury and breach of court orders: see *Le Soleil Hospitality Inc. v Louie*, 2011 BCCA 305, 308 BCAC 122; *Pro-Sys*; *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2011 BCCA 187, 331 DLR (4th) 631.

See also ***Bennett v Treit***, 2023 ABKB 348, Kubik J at para 105; ***NEP Canada ULC v MEC OP LLC***, 2021 ABQB 180, DB Nixon J, as he then was, at paras 926-930; ***PR Construction Ltd v Colony Management Inc***, 2023 ABKB 25, Friesen J, as she then was, at paras 127-137; ***RK v GSG***, 2024 ABKB 121, Mah J at para 45; ***North v Davison***, 2024 ABKB 242, Burns J at para 16.

[126] As ACJ Nixon reminded us, corporations may be parties to conspiracies: ***NEP Canada*** at para 928. A corporation may become a party to a conspiracy through the knowledge imputed from its human directing mind: ***Metalworks Canada Ltd v Warrack***, 2018 ABQB 443, McCarthy J at para 127.

[127] Anthony was incontestably the directing mind of Lamanator. There is at least a genuine issue as to whether Anthony and Lamanator, from a legal perspective, mutually engaged in a course of conduct.

[128] The “unlawful means” to further their agreement could include express misrepresentations or any misrepresentations through silence or omission. These latter could include alleged failures to provide corporate financial information. The former would not fall directly within the corporation’s statutory obligations but would be imputed to the corporation through Anthony’s acts within the scope of his authority as the sole directing mind of Lamanator.

[129] Teresita’s position is complicated. She made no express misrepresentations. She was not the directing mind of Lamanator. However, she has been the sole director of Lamanator and

failures to provide corporate information to shareholders could be attributed to her. Moreover, insofar as she permitted Anthony to act as, in effect, Lamanator itself, without supervision or limitation, she could be regarded as having agreed to a course of conduct set between Anthony and Lamanator.

[130] In my opinion, whether there is a genuine issue for trial respecting the tort of civil conspiracy as involving Anthony and Lamanator or Anthony, Teresita, and Lamanator, depends on whether there is a genuine issue respecting the Plaintiffs' misrepresentation claim. (Functionally, the conspiracy allegation, if established, would fix joint and several liability on each Defendant and not just (e.g.) Anthony.)

[131] If the misrepresentation claim fails, the unlawful means conspiracy claim fails as well. I will defer further consideration of the conspiracy claim until I have addressed the misrepresentation claim.

D. Fraudulent Misrepresentation

[132] In para 15 of the Statement of Claim, the Plaintiffs alleged that "[t]he Defendants' statements concerning Lamanator as [a] 'great investment' and 'ground floor opportunity,' combined with the Defendants' failure to disclose and suppression of material information and their silence constitutes fraudulent misrepresentation."

[133] The fraudulent misrepresentation claim was not much developed in the Plaintiffs' Brief or in oral submissions. A central point from the Plaintiffs' perspective was set out at para 45 of the brief:

> 45. Given the shoddy state of the Defendants' records, the presence of intercompany and interpersonal transfers of funds, it would be premature to rule on the balance of the Plaintiffs' allegations.

That would include the misrepresentation claim. The Plaintiffs also referred to the gaps in the financial records, with audited financial statements being required to assess the Defendants' conduct (PPB para 30). Further, the Plaintiffs only learned about the poor financial condition of Lamanator in 2016 (PPB paras 19, 48).

[134] Numerous aspects of the misrepresentation claim must be unpacked and addressed:

- does the claim sound in tort, for deceit or civil fraud, or in contract, for inducing a contract through misrepresentation?
- what did the Plaintiffs know and when did they know it, as a matter of law?
- is there merit to the Plaintiffs' misrepresentation claim respecting pre-share purchase communications?
- is there merit to the Plaintiffs' misrepresentation claim respecting post-share purchase communications?

1. Deceit and Misrepresentation Inducing Breach of Contract

[135] Justice Feth observed in ***956126 Alberta Ltd v JMS Alberta Co Ltd*** at para 119 that "[t]he tort of deceit and the contract action of fraudulent misrepresentation inducing a contract are discrete causes of action, although sharing many common features."

(a) Deceit

[136] In ***Toronto Dominion Bank v Wilde***, 2022 ABCA 128 at para 38, the Court of Appeal described the elements of the tort of deceit or civil fraud:

> [38] In *Bruno Appliance* at para 21, the Supreme Court of Canada summarized the four elements of the tort of civil fraud. A plaintiff must prove the following, on a balance of probabilities:
>
> 1. a false representation made by the defendant;
>
> 2. some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
>
> 3. the false representation caused the plaintiff to act; and
>
> 4. the plaintiff's actions resulted in a loss.

[137] In this case there was no claim for negligent misrepresentation.

(b) Misrepresentation Inducing a Contract

[138] Misrepresentation inducing a contract involves proof that

- the defendant made a material statement of fact that was false
- this statement induced the plaintiff to enter the contract.

[139] Equity might award the remedy of rescission even if the misrepresentation were innocent. The common law might award the remedy of rescission if the misrepresentation were fraudulent. Moreover a claim in tort concerning a fraudulent misrepresentation could recover damages. See John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) 359-360, 365.

(c) Contrasts and Comparisons between the two Causes of Action

[140] Deceit requires proof of loss as an element of the cause of action. Misrepresentation inducing contract does not.

[141] Misrepresentation inducing contract requires that the misrepresentation be "material." Deceit does not.

[142] Deceit requires proof of fraudulent intent. Misrepresentation inducing contract may but not must involve proof of fraudulent intent.

[143] Recission is available as a remedy for the contract claim. Damages are the sole remedy for the tort claim.

[144] Both causes of action require proof that the defendant made a "misrepresentation" to the plaintiff and that the plaintiff was "induced" to act because of the misrepresentation.

[145] If no misrepresentation were made or if the Plaintiffs were not induced to act based on any misrepresentation, if they did not rely on any misrepresentation, the Plaintiffs' misrepresentation claim must fail. I will address the misrepresentation and reliance issues, having regard to both pre- and post-share purchase communications.

2. Pre-Purchase Communications - Stephen

[146] Stephen's circumstances differ from Christopher and Julia's as regards the alleged pre-purchase misrepresentations.

[147] Stephen, on his evidence, was not involved in the purchase of his shares. He didn't know or forgot that he had any Lamanator shares until 2016. The evidence permits no inference about the identity of the person who spoke to Anthony about purchasing shares for Stephen.

[148] On the evidence, Stephen knew nothing about any pre-share purchase representations. No representations were made or provided to him.

[149] The evidence did not address the reasons for the purchase of Lamanator shares in his name. The evidence did not support any reliance by the unknown purchaser of the shares on any communications by any Defendant.

[150] The evidence supports no claim for Stephen respecting misrepresentation relating to pre-share purchase representations.

3. Pre-Purchase Communications - Christopher and Julia

[151] There were communications between Anthony and Anna and Anthony and Christopher and Julia at Lazia.

(a) Pre-Lazia Communications with Anna

[152] Before the Lazia meeting, there were no communications between Anthony and Christopher and Julia, only between Anthony and Anna.

[153] The evidence did not support a finding that Anna told Christopher or Julia anything about her conversations with Anthony before the Lazia meeting.

[154] Anna was not a Plaintiff.

[155] No pre-Lazia communications by Anthony were relied on by Christopher or Julia. The evidence did not support that they knew what he said.

[156] Christopher had no recollection of communications at Lazia. Julia recalled some communications. At least as regards Julia, there might be the possibility of reliance on what Anthony said.

(b) Non-Actionability of Communications

[157] However, none of Anthony's communications respecting Lamanator were actionable, whether pre-Lazia meeting or during the Lazia meeting.

[158] Anna's pre-Lazia recollection was that Anthony said that "it was a ground-floor opportunity and the shares were, I think at the time, $2 going maybe to 5 or 6, you know. I thought that was an amazing opportunity." She said that Anthony "was confident it was a good business opportunity. That's how it was portrayed" ((AEQ 18.6-21, 18.22-24). Anna did understand that it was not a "sure thing" and there were "no guarantees."

[159] Julia recalled statements by Anthony about Lamanator at the Lazia meeting. "It was presented to us as a company that was up and coming and just so much great potential within the company. And, yeah, it was just, I guess, where they're going and the potential within that."

Anthony had referred to "all the different places that it was going to be in and all the different companies that he was talking about picking it up" (QDJE 6.10-20).

[160] In my opinion, neither the intent nor the "misrepresentation" elements of deceit nor the misrepresentation element of inducing contract were supported by the evidence.

(i) No Fraudulent Intent

[161] The record does not support any reasonable inference that Anthony knew or was reckless as to whether anything he said was false. In fact, the evidence strongly supports the inference that Anthony believed and believes that Lamanator has promise, that it has an excellent product, and the company will be a success. On the record, it is indisputable that Anthony has invested considerable time and effort in Lamanator and Lamanator is still in business. A great product and considerable effort, unfortunately, may be necessary but are not sufficient conditions of success.

[162] This finding precludes any cause of action by Christopher and Julia respecting the pre-share sale communications.

(ii) "Misrepresentations"?

[163] Moreover, the statements Anthony has been reported to have made do not support the cause of action. His statements were opinions, expressions of hope about the future, sales talk, or "puffery." His statements were not "representations" regulated by the contractual misrepresentation or deceit doctrine. See ***Andronyk v Williams***, 1985 CanLII 3681, [1986] 1 WWR 225 (MB CA), O'Sullivan JA at 238(WWR):

> It has been held that opinion or forecasting are not matters of fact and do not come within the *Hedley Byrne* principles [*Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 3 W.L.R. 101, [1963] 2 All E.R. 575 (H.L.)], or those of *Derry v. Peek* [(1889), 14 App. Cas. 337 (H.L.)]. This was set out in this court by Freedman J.A. (as he then was) in *Campbell v. B. Leslie Real Estate & Dey. Co.* (1971), 1 N.R. at 90 (Man. C.A.), a case in which the dissenting opinion of Freedman J.A. was upheld by the Supreme Court of Canada [[1973] S.C.R. vi, 1 N.R. 89]. Indeed, many statements of opinion as to quality will be treated by the courts as what some call mere puffery. 31 Hals. (4th) 623, at para. 1017, puts it this way: "Mere praise by a man of his own goods, inventions, projects, undertakings or other marketable commodities or rights, if confined to indiscriminate puffing and pushing, and not related to particulars, is not representation."

See also ***Fraser-Reid v Droumtsekas***, [1980] 1 SCR 720, Dickson J, as he then was, at 726 ("That statement was mere trade puffery"); ***Karner v Kuhnke***, 2021 BCSC 1942, Thompson J at para 32; ***Marcinkiewicz v General Motors of Canada Co***, 2022 ONSC 2180, Perell J at para 137; ***Zerbin v Vrbanek***, 2020 ABQB 797, Mah J at para 146; ***Kowal v Sun Star Energy Inc***, 2020 ABQB 244, Woolley J, as she then was, at para 378; ***Motkoski Holdings Ltd v Yellowhead (County)***, 2010 ABCA 72 at para 45; McCamus, *The Law of Contract* at 360-363; Halsbury's Laws of Canada - Contracts (2021 Reissue) (Angela Swan and Jakub Adamski) HCO 120, HCO 123 fn 1).

[164] On this ground as well, any cause of action by Christopher and Julia respecting the pre-share sale communications fails.

[165] The record does not support a cause of action respecting pre-share purchase communications. To that extent, the Plaintiffs' fraudulent representation claim has no merit.

4. Post-Purchase Communications

[166] The Plaintiffs, though, looked as well to post-purchase communications or silence as supporting their fraudulent misrepresentation claim.

[167] How are post-purchase communications or silence relevant to the Plaintiffs' misrepresentation claims? These communications or silence occurred after the shares were purchased so the communications or silence could not have induced the purchase of the shares.

[168] The Plaintiffs' response was that they did not discover Lamanator's poor financial condition until 2016. They relied on "assurances provided by the Defendants" (PPB para 48). From 2007 to 2016, the Defendants hid the true financial condition of Lamanator. This sort of fraud occurs. A relationship begins. It is based on a lie, but the mark is not aware of it. The mark spends money, gladly, because the mark values the relationship. Only later, when the money is gone, does the mark finally learn that it was all a lie, from the very beginning.

[169] The Plaintiffs' further response was that not only did they not discover Lamanator's poor financial condition until 2016 but they still have not plumbed the depths of its financial mismanagement. They cannot know just how badly Lamanator's financial circumstances have been misrepresented until they get audited financial statements, the subject of their cross-application.

[170] In my opinion, the Plaintiffs' arguments founder for five reasons. First, the post-purchase communications are not relevant to the pre-purchase communications. Second, the evidence does not support the elements of deceit respecting the post-purchase communications. Third, any loss suffered by any deceit is a corporate loss or a corporate-related loss. Fourth, Lamanator's financial condition was not hidden. It was disclosed to the Plaintiffs prior to 2016. Fifth, since the Plaintiffs have no sustainable cause of action on the record, no remedy – and particularly no remedy for production of audited financial statements – should be granted for this cause of action.

(a) Irrelevance of the Post-Purchase Communications

[171] The post-purchase communications cannot form part of a chain of misrepresentations stretching back before the shares were purchased because I found that the pre-purchase communications were not "misrepresentations" within the meaning of the tort of deceit or misrepresentation inducing breach of contract. Moreover, from the tortious perspective, the evidence supported no fraudulent intent respecting those communications. There are no prior fraudulent misrepresentations for the post-purchase (alleged) misrepresentations to connect to.

[172] Just because it is suspected after a relationship begins that lies have been told does not mean that lies have been told from the beginning. A business may begin legitimately, with a promising product and the best of intentions. Later the business may fail to make money. And later it may be – although not established to this point – that the failure to make money is disguised. That later disguise does not retroactively change the nature of what was said before the business relationship began and when it began. Again, my finding was that the relationship between the Plaintiffs and Defendants did not begin with lies.

[173] On the record, the post-purchase communications are independent of the pre-purchase communications from an assessment of liability perspective.

[174] This determination entails that the inducing breach of contract cause of action falls away. It is not revivified by any post-purchase communications or silence. Post-share purchase, the misrepresentation inducing contract claim (to the extent that this is an implicit claim) has no merit.

[175] This determination means that the deceit assessment must be made without taking into account the pre-purchase communication circumstances.

(b) Failure to Establish Elements of the Cause of Action

[176] The Plaintiffs are left with the cause of action in tort.

[177] An element of civil fraud or deceit is loss. That element of the cause of action is not established on the record in connection with the post-purchase alleged misrepresentations. The money for the shares was spent and the shares were received before these alleged misrepresentations occurred. After the shares were purchased, the Plaintiffs invested no more money. Nothing more was spent, and it also follows that there was no reliance on any alleged misrepresentation. The Plaintiffs did nothing in reliance on any alleged misrepresentation. Stephen wasn't aware or forgot he had shares until 2016, so he definitely could not have relied on any misrepresentation preceding 2016.

[178] Neither was there evidence that the Plaintiffs lost any financial opportunity connected with the shares because of reliance on any alleged misrepresentations.

[179] As close as might come to this possibility was the buy-out proposed by Anthony.

[180] Anna received the offer. She "got advice from some people." She "opted not to vote for it" (AEQ 62.10-22). She didn't believe that getting the $100,000 back "would come to fruition" (AEQ 65.15-19).

[181] Anna believed she had sent the buy out offer to Christopher and Julia and believed that they discussed it. Her recollection of the discussion was that "We didn't feel that it was worth the paper it was written on at the time. We were just ... we did want out, but we didn't think this was a proper buy out." The decision then was "Not to move forward with it." This was a unanimous decision.

[182] Neither Christopher nor Julia recalled Anna putting the buy-out offer to them.

[183] Either they decided not to take the buy-out or they were not advised of it. Regardless, they did not act on it. And if there was a decision not to take it up, it was because, as Anna said, they didn't think they'd get their money. There was no evidence that in 2010 or later Anna or the Plaintiffs believed that Lamanator was still a marvelous business opportunity and they wanted to stay involved because of they believed their investment would grow.

[184] Absent loss, absent any actual financial expenditure, and absent any reliance on any alleged misrepresentations, including silence, the tort of deceit cannot be established.

[185] The Plaintiffs' deceit or civil fraud cannot be established on the record. The Plaintiffs' deceit or civil fraud claim has no merit, on this ground alone.

[186] My sense is that Christopher, at least, believed that a fraud claim could be founded on non-disclosure alone. When asked in Questioning why he alleged that the Defendants acted fraudulently, the following exchange occurred (QDCE 32.13-27):

> A Because of their silence.
>
> Q Is it your allegation, then, that the defendants purposefully withheld information from you?
>
> A Yes. Failure to disclose and suppression of material information and their silence.

He said that he was "[n]ot getting as much information as I believe I have the right to."

[187] Non-disclosure alone does not establish the tort of deceit.

(c) Corporate Loss

[188] Suppose that there was financial mismanagement of Lamanator or even self-dealing or the provision of benefits to non-arms length parties. Would there not then be loss?

[189] There could be loss, but it would not be the Plaintiffs' loss. It would be a loss to the corporation. What would be lost would not be the Plaintiffs' money but Lamanator's money.

[190] This loss would not be the proper subject of a personal tort claim by the Plaintiffs but a derivative action on behalf of Lamanator or, potentially, an oppression action. I will return to the oppression action below.

(d) No Hidden Information

[191] The Plaintiffs asserted that they did not receive financial information revealing Lamanator's financial condition until 2016. It had been hidden from them. This failure to disclose Lamanator's financial condition would amount to misrepresentation by silence.

(i) Anna's Information

[192] However, Anna received financial information between 2007 and 2016, according to Anthony (AT-A2 para 7).

[193] Anna's evidence supported the determination that she had received ongoing financial information. In 2012, Anna received unaudited financial statements for 2009, 2010, and 2011 (AEQ 43.11-20; 44.7). She believed the children had copies. She believed she forwarded the financial statements. The financial statements "were in their possession." She didn't know how soon after receiving the statements she forwarded the statements – "whether it's a week later, I don't know" (AEQ 43.11-44.4).

[194] Investor meetings were held, including meetings at the Lamanator facility, in 2007, 2008, and 2009. Anna attended. Anna also attended at the facility to seek advice respecting tax issues relating to the investment (AT-A1 para 9).

[195] On at least one occasion, Anna was in contact with Barry McQuay, the accountant for Lamanator and also a shareholder, to obtain financial statements.

[196] When asked about financial statements and whether there were "things missing," Anna said "I think I had what I needed. I felt I was willing to do that" (AEQ 45.22-46.2).

[197] When asked whether she felt like she had less information than other investors, Anna said "No. I just don't think there was sufficient information for all investors, by way of meetings .... But I don't think I had any less information than anybody else, no" (AEQ 50.15-51.1).

[198] Anna could not recall if she asked for information or updates in 2014. She said "I know I went a few times for information but the years I don't know" (AEQ 52.10-16).

(ii) Transmission to Christopher and Julia

[199] But if Anna had financial information, did that mean that the Plaintiffs had financial information, prior to 2016?

[200] Anna could not recall the years when she attended meetings. She didn't believe the children ever went to a meeting. She said she "probably" invited the children to shareholder meetings, but she didn't recall whether they went to any – maybe Julia went to one (AEQ 55.22-56.10, 58.8-14).

[201] Anna said that "at the time this was not something that we – I was obsessed with .... But I probably could have been a little more open to whatever they were discussing it with the children. But I didn't ... it's probably an excuse, but I was one of the top realtors in Morinville. And this was not on the top of my list" (AEQ 57.20-26).

[202] There is Anna's evidence that she forwarded information to the Plaintiffs. That is set against Christopher's lack of confirmation and Julia's denial.

[203] But if the Plaintiffs did not have the information in fact, did they have the information in law? Was Anna's knowledge their knowledge?

(e) Anna as Agent

[204] Anna was an intermediary between the Plaintiffs and the Defendants for a substantial period. While there was evidence concerning the information provided by the Defendants to Anna, the parties did not attempt an analysis of the legal position of Anna during her periods of intermediation.

[205] Christopher and Julia were present at the Lazia meeting. Otherwise, the record supports the conclusion that until 2016, all communications by the Defendants to the Plaintiffs were made to or through Anna. Anna did not provide the Plaintiffs' personal contact information to the Defendants.

[206] Anna's involvement occurred over two time periods, the first from the time preceding the share purchases until 2012 when the Plaintiffs turned 18, and the second from 2012 until 2016 when the Plaintiffs retained counsel and began attending to their interests respecting their Lamanator shares.

(i) Christopher and Julia and Guardianship

[207] The shares were purchased in the then-children's names. Anna was not their trustee.

[208] Until Christopher and Julia turned 18 in 2012, Anna, their mother, was their guardian. See the *Family Law Act*, ss 19(1), 20(2). Since she was their mother, it would have been natural for the Defendants to consider Anna to be the representative of her children. More technically, Anna did have the duty to act in their best interests: *Family Law Act*, s 21(1). While the *Family Law Act* does not address share purchases for children, Anna had the authority to make "day-to-

day" decisions about the children, to receive information from third parties that might significantly affect the children, and to exercise other powers reasonably necessary to carry out the responsibilities of guardianship: *Family Law Act*, ss 21(a), (l), (m).

[209] I was directed to no authority, though, establishing that a guardian is by guardianship alone the agent of a child (outside of agency by necessity).

(ii) Christopher and Julia and Agency

[210] A child may appoint an agent and a child may hold out a person to a third party as the child's agent.

[211] In this case, Christopher and Julia made no express representations to the Defendants that Anna was their agent. However,

- Christopher, Julia, and Anna met with Anthony and Teresita at Lazia respecting investment in Lamanator
- Christopher and Julia discussed the share purchase with Anna and knew that Lamanator shares would be purchased for them.
- Christopher and Julia were aware that they held Lamanator shares
- the Lamanator shares were purchased in Christopher and Julia's names in 2007
- Anna was their mother (and guardian)
- Anna maintained all contact with the Defendants, including providing her own contact information when Lamanator asked for updated contact information in 2012
- Christopher and Julia did not request to have Lamanator deal with them directly until 2016. This included the period from 2012 to 2016 when Christopher and Julia were adults
- the Defendants provided information about Lamanator to Anna
- Anna received unaudited financial statements, attended various meetings respecting Lamanator, and made inquiries about Lamanator matters, from 2007 to 2016.

[212] Christopher alleged that Anthony "knew I was a shareholder, but I wasn't included in any of those things [i.e., distributions of information about Lamanator]." He was asked the following (QDCE 33.16-20):

> Q When did you provide your contact information to Lamanator?
>
> A I don't recall.

On the record, I find that Christopher didn't recall because he did not provide his contact information to Lamanator until this matter was in or approaching litigation in 2016.

[213] The Defendants relied on Anna as being the proper conduit of information to Christopher and Julia.

[214] I find that by their conduct and implicit representations based on their lack of direct contact and lack of pursuit of direct contact with Lamanator, Christopher and Julia held out Anna as their agent for the purposes of receiving information from Lamanator and requesting information from Lamanator. Lamanator relied on their representations and Anna's

representations and provided information to Anna. The Plaintiffs are estopped from denying that Anna was their agent for these purposes. This agency terminated in 2016. See David R Percy, "The Present Law of Infants' Contracts" 1975 *Can Bar Rev* 1 at 46-47; ***Johannson v Gudmundson***, 1909 CanLII 333, 19 Man R 83 (CA), Howell CJA at 88-89; and see ***Doiron v Manufacturers Life Insurance Company***, 2003 ABCA 336 at paras 14 and 15:

> [14] The test for ostensible authority has also been stated by Slade, J., in *Rama Corp. Ltd. v. Proved Tin & General Investments Ltd.*, [1952] 2 Q.B. 147 at pp. 149-50:
>
> > "Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."
>
> [15] The law of ostensible authority does not require an explicit representation of authority. It is found where the principal has created a situation such that it is reasonable to infer and rely upon the apparent authority of the person.

[215] Agency may be inferred from the facts. See also ***Syncrude Canada Ltd v Western Sterling Trucks Ltd***, 2019 ABCA 465 at para 29; ***Stikeman Elliott LLP v 2083878 Alberta Ltd***, 2019 ABCA 274 at para 45; ***698828 Alberta Ltd v Elite Homes (1998) Ltd***, 2020 ABCA 154 at paras 97, 98; ***Grosvenor Canada Limited v South Coast British Columbia Transportation Authority***, 2015 BCSC 177, Fleming J at para 59. (And the circumstances are distinguishable from ***Crampsey v Deveney***, [1969] SCR 267, Judson J, respecting a mother as purported agent (at 270: "She had no authority from the children to do so. Indeed, she did not even notify them of what she intended to do and only two actually knew of the listing.")).

[216] I observe that Christopher and Julia did not repudiate the share purchase upon attaining their majority. Repudiation should have been occurred a reasonable time after attaining their majority in 2012. That reasonable time has long since elapsed. See ***Re Sovereign Bank of Canada; Clark's Case***, 1916 CanLII 996, 27 DLR 253 (ON CA), Middleton J at 257 ("an infant is called upon to repudiate within a reasonable time after attaining majority: *Edwards v. Carter*, [1893] A.C. 360"); Percy, "Infants' Contracts" at 17.

(iii) Anna's Knowledge as Christopher and Julia's Knowledge

[217] Because Anna was Christopher and Julia's agent for the purpose of receiving information from Lamanator, Lamanator's communications to Anna about Lamanator's affairs were, in effect, communications to Christopher and Julia. What Anna knew about Lamanator was the constructive knowledge of Christopher and Julia. See ***McDonnell v Csaki***, 2014 ABQB 452, Poelman J at para 44:

> [44] … notification given to an agent is presumptively effective as notice to a principal if it is received by an agent within the scope of its authority – regardless of whether it is subsequently transmitted to the principal, and the law imputes the knowledge to the principal.[citing in fn 16 to *Bowstead and Reynolds on Agency*, 19th ed. (London: 2010), paras 8-204 to 8-212].

In ***Royal Bank of Canada v Concrete Column Clamps (1961) Ltd***, [1977] 2 SCR 456, Chief Justice Laskin (dissenting) wrote as follows at 480-481:

> The Reporter's notes to s. 280 point out, inter alia, that "imputing knowledge to the principal is a fictitious way of stating that the principal is liable for the conduct of the agent, and the fiction should be used only where it would be equitable to do so" (at p. 482 of *Restatement of Agency Second*, Appendix).
>
> The distinction taken in the *Restatement of Agency Second* appears to be based on a line of cases different from the line that led to the development of the present law on vicarious liability in tort. That line is concerned with the question of how far notice to or knowledge of an agent of facts relating to a transaction which he is carrying out for the principal will be imputed to the latter. The general rule of imputation in such a case (and I state the matter broadly without the distinctions thrown up by the cases: see Powell, *Agency* (2nd ed. 1961) at pp. 236 ff.) has been held to be subject to an exception where the agent for his own purposes engages in a fraud against the principal ….

And in ***535951 BC Ltd v Penlea Investments Ltd***, 2001 BCSC 49, Justice Maczko wrote as follows at paras 11-15:

> [11] There is at common law a principle that knowledge in the agent is deemed knowledge in the principal.
>
> [12] In *Ottawa Agricultural Insurance Co. v. Sheridan* (1880), 5 S.C.R. 157, at page 174 the Supreme Court of Canada said,
>
> > In all cases, except those to which I have referred as a condition of the policy, a general agent has implied authority to act for and bind his principal, so far as is necessary to the performance of his duties, and the principal is no less bound by his acts than those with whom on behalf of his principal he enters in to agreements. <u>His acts and knowledge are necessarily in such cases deemed to be the acts and knowledge of his principal</u>.
>
> [13] The principle was followed by the Supreme Court of Newfoundland in *M & R Holdings Ltd. v. Chester Dawe Ltd.*, [1989] N.J. No. 218 (Q.L.) (Nfld. Sup. Ct. T.D.) Action 1986 No. 921. The court said,
>
> > ... The type of store to be opened by M & R is information the agent has a duty to pass to the principal. <u>If the agent fails to inform the principal, in the absence of knowledge of the failure by the plaintiff, the principal is deemed to have the information</u> (see *Bowstead on Agency* 15ed, pp. 412 to 420 and cases cited therein).
>
> [14] In *Heath v. Darcus*, [1990] B.C.J. No. 1005 (Q.L.)(S.C.), reversed on other grounds (1991), 60 B.C.L.R. (2d) 145 (C.A.), Spencer J. of this court said,
>
> > ... Ample authority for the proposition that <u>knowledge of the agent gained in the scope of his agency is imputed to the principal</u> is to be found in *Bowstead on Agency*, 15th Edition, at page 412 et seq. It does not matter that Kenneth may never in fact have told Wilfred the result, or that neither Bernice nor Jack knew he had not done so. The knowledge is imputed as a matter of agency law and that had the effect of starting time to run against Wilfred. That is not so harsh a result as it may at first seem, because Wilfred knew the enquiry was on foot but did nothing to ask about its progress. He had ample opportunity to contact Kenneth and ask him the result in 1978.

> [15] In each of the cases the knowledge of the agent is deemed or imputed to the principal. The fact that the principal did not actually have knowledge was irrelevant. [emphasis added]

See also ***Evans v Mullen***, 2012 BCSC 474 Masuhara J at para 133; ***Sandhu v Paterson and 89 Auto Sales v Sandhu***, 2016 ONSC 1748 Tzimas, J at para 42.

(iv) Stephen

[218] Anna was Stephen's aunt but not his guardian.

[219] On the evidence, while he did sign the share purchase agreement, Stephen did not know or forgot that shares had been purchased for him until 2016. The evidence did not establish the identity of the person who paid for his shares.

[220] Anna held herself out as the information conduit for Stephen.

[221] From the Defendants' perspective, Anna was continuing to do what she had done for Christopher and Julia. I can understand why the Defendants would have assumed that Anna was entitled to do what she had been doing for her children. But on the evidence, there was nothing done or not done by Stephen that identified Anna as his agent. The inference of authority cannot be based on the representations of the purported agent alone: ***Toronto-Dominion Bank (TD Canada Trust) v Currie***, 2017 ABCA 45 at para 7 ("Representations about the authority of the agent must come from the principal; an agent cannot clothe himself or herself with authority"); ***Jensen v El Rancho Trailer (South Trail Mobile Ltd)***, 1972 ALTASCAD 29 at para 21.

[222] In his case, the conduct supporting Anna's role as intermediary was Anna's alone, aside from the fact that Stephen's shares were in his name.

[223] Anna was not Stephen's agent. Anna was, perhaps, in breach of warranty of authority, but she was not added as a party and this issue was not addressed by the parties.

[224] However, in 2016, Stephen was an adult. He did not repudiate the share purchase.

[225] He was entitled to accept the benefit of the purchase made in his name. See ***Johannson v Gudmundson*** at 88 ("In case of an adult where a person without authority assumes to act as an agent, and enters into a contract for an alleged principal, the latter can adopt the contract and enforce it ...."); ***John Ziner Lumber Ltd v Kotov***, 2000 CarswellOnt 3752, 2000 CanLII 16894 (ON CA), Weiler JA at para 6 ("a contract made with a person acting as an agent on behalf of a disclosed principal may be ratified by the principal"). The conditions for ratification were met. The purchaser of the shares acted for Stephen by purchasing the shares in his name. The shares were, on the face of the transaction, being purchased for Stephen. When the shares were purchased, Stephen was legally capable of purchasing the shares himself. See ***John Ziner*** at para 29. "Ratification will be inferred from the principal's act of standing by:" ***John Ziner*** at para 32.

(f) Misrepresentations?

[226] The Plaintiffs identified a group of statements by Anthony to the shareholders that the Plaintiffs stated gave the "impression" that Lamanator "was a growing company" (CEA para 9 and exhibit A (pages numbers are to this exhibit); PPB para 18). The suggestion is that the impression conveyed by Anthony to the shareholders was incorrect and misleading. The messages included the following:

(a) April 14, 2010 – p 1 – "[the meeting yesterday...] went extremely well… the word is that they want Lamanator Plus and we are moving forward …."

(b) January 3, 2012 – p 34 – "The new account we have in the USA has been very successful for us just in the last months we have sold $84,000 plus to these guys…"

[Preceding this statement is the following: "We are looking forward to a good year 2012 Lamanator has been coming along very well the last nine months we are not out of the woods yet but well on our way."]

(c) March 8, 2013 – p 2 – "the 2013 los Vegas (sic) trade show surfaces was a great success. The Lamanator booth was extremely busy…."

[On p 3 we read the following: "special thanks to Gerald and Barry for putting up over $100,000 between the two of them to keep this company moving forward ... it is allot (*sic*) more work than I originally forecasted .... I believe very strongly that this company will continue and it will prosper however it will take more time to achieve this then we first believed ...."]

(d) July 26, 2014 – p 6 – "…I have put an extraordinary amount of time and money into the internet and building of a platform to reach new levels within our company. [p 7] … Lamanator has held its own and is growing everyday as we keep pushing forward I can see a viral effect in the future and all this effort will have its rewards."

[Prior to the p 7 quotation we read the following: "Lamanator Coatings has taken a while to penetrate the markets and it has been a hard road we have the best product but we are limited to our marketing because of the cost of doing so."]

(e) December 11, 2015 – p 7 - "…we just secured a rather large opportunity for all of Canada… [p 8] … we are also continually growing in the USA the Amazon accounts are also getting larger as the more that try Lamanator the larger the company is becoming."

[227] For further context, I refer to the following messages:

April 26, 2013 – pp 17-18 - [refers to a "recent major problem" concerning leakage from product packaging and to the "need to do our own bottling, capping, and labelling." This required purchasing equipment.] "There will be an email to follow this alarming event I have taken steps to clean this mess up caused by our packing Company."

April 29, 2013 - p 16 – "Lamanator Coatings is in need of further investment .... We have an extreme amount of cost relating to starting our own packaging it is putting a large amount of stress on the company! .... it is very tough right now trying to get all this done ...."

(i) Actionability

[228] There are some statements of fact embedded in the messages:

April 14, 2010 – the meeting went well

January 3, 2012 –in the last months we have sold $84,000 plus to the US account

March 8, 2013 – the Lamanator booth was extremely busy at the Las Vegas surfaces trade show

July 26, 2014 –Lamanator has held its own and is growing everyday

> December 11, 2015 – we just secured a rather large opportunity for all of Canada; we are growing in the US; the Amazon accounts are getting larger.

[229] The Plaintiffs pointed to no evidence that these claims were false. I observe as well that just because a company's sales are growing does not mean that its profits are growing.

[230] There are some statements about the future, which are not actionable statements of fact:

> April 14, 2010 – "the word is that they want Lamanator Plus" [that is a statement about a report concerning a third party's intention]
>
> July 26, 2014 – "I can see a viral effect in the future and all this effort will have its rewards."

[231] The growth of Lamanator is contextualized by observations accompanying the impugned passages:

> January 3, 2012 – "We are looking forward to a good year 2012 Lamanator has been coming along very well the last nine months we are not out of the woods yet but well on our way."
>
> March 8, 2013 – "special thanks to Gerald and Barry for putting up over $100,000 between the two of them to keep this company moving forward ... it is allot (*sic*) more work than I originally forecasted .... I believe very strongly that this company will continue and it will prosper however it will take more time to achieve this then we first believed ...."
>
> July 26, 2014 – "Lamanator Coatings has taken a while to penetrate the markets and it has been a hard road we have the best product but we are limited to our marketing because of the cost of doing so."

In addition, we have the April 26, 2013 reference to the "recent major problem." And we have the April 29, 2013 message: "Lamanator Coatings is in need of further investment .... We have an extreme amount of cost relating to starting our own packaging it is putting a large amount of stress on the company! .... it is very tough right now trying to get all this done ...."

[232] The absence of evidence of falsity of the statements of facts means that there was no misrepresentation. The statements about the future are not actionable. Even the claims about the growing company are contextualized by references to the hard road to corporate success.

[233] I find that the claims referred to do not amount to misrepresentation, let alone fraudulent misrepresentation.

[234] In the absence on the record of fraudulent misrepresentation, the cause of action for deceit is not supported by the record. On this ground too, the claim for deceit concerning post-share purchase communications has no merit.

(ii) Receipt and Transmission by Anna

[235] Anna may not have transmitted the foregoing messages to Christopher and Julia.

[236] She did receive the April 14, 2010 message. There is a reply from her account.

[237] She remembered receiving the March 8, 2013 message. When asked whether she forwarded it to her children, she said "I would have hoped that I did but I'm not a hundred percent sure .... I'm not sure" (AEQ 51.11-52.9).

[238] As for the July 26, 2013 message, she did not remember receiving but said "I see that I received it." When asked whether she forwarded it to her children she said "I don't know ... I don't recall one way or the other" (AEQ 55.4-16).

[239] And as for the December 11, 2015 message, she said "I don't remember receiving but I did receive it." She did not recall if she forwarded it to her children (AEQ 56.23-57.12).

[240] This evidence does not support the likelihood that Anna forwarded the messages.

[241] If I am right that Anna was the agent for Christopher and Julia, the lack of forwarding is not material. Anna's knowledge was their knowledge, at least for Lamanator's purposes.

[242] If Anna was not their agent and they did not receive the messages, then no representation was made to them. This would be further evidence that no cause of action arose respecting the messages. Certainly they could not rely on what was not communicated to them.

(iii) Conclusion

[243] I have found that, on the record, the Plaintiffs had no action for deceit. They suffered no loss and did not rely on post-purchase communications by the Defendants. I found that the identified messages from Anthony were not misrepresentations or misleading. The post-share purchase deceit claim and the pre-share purchase deceit claim have no merit.

(g) No Remedy

[244] Insofar as the application for audited financial statements relates to the deceit claim, that application must be dismissed. The application is for a remedy for a cause of action that has no merit. With that part of the Plaintiffs' action summarily dismissed, the application for a procedural remedy attached to the dismissed part of its action must be dismissed as well.

[245] Further financial information relating to the Defendants could not cure the lacunae in the Plaintiffs' case concerning loss and reliance.

[246] In addition, the conspiracy by unlawful means cause of action must be dismissed, no relevant unlawful means being viable on the record.

[247] This leaves the issue of whether the Plaintiffs have a meritorious oppression claim and whether audited financial statements should be ordered in connection with that claim.

VI. Oppression

[248] The issue of whether the Plaintiffs have a meritorious oppression claim requires answers to four questions opening four levels of analysis.

[249] First, do the Plaintiffs have an "absolute" right to audited financial statements?

[250] Second, even if there is no "absolute" right to audited financial statements, was the failure by the Defendants to provide audited financial statements itself a type of oppression and should the remedy for this oppression be the ordering of audited financial statements?

[251] Third, even if the failure to provide audited financial statements was not itself oppression, are audited financial statements needed to expose oppression intimated by evidence of financial irregularities?

[252] Fourth, does the evidence of financial irregularities itself demonstrate that the Plaintiffs' oppression claim has merit?

A. "Absolute" Right to Audited Financial Statements?

[253] The Plaintiffs referred in argument to the provision of audited corporate financial statements being "absolute" or "mandatory," given the absence of an appropriate shareholder resolution exempting Lamanator from this duty.

[254] If the provision of audited financial statements were mandatory, the summary dismissal application must be suspended. The application could not proceed until the audited financial statements were provided. The situation would be much like a summary dismissal or summary judgment application being adjourned to permit (e.g.) cross-examination on a moving party's affidavit, except that the adjournment would be, in effect, statutorily mandated or required and not simply the result of discretion exercised under the rules of court.

[255] The question is whether corporate legislation trumps the rules, whether the corporate law requirement can forestall summary dismissal even if the non-moving party could not resist summary dismissal absent the corporate documents.

[256] I'll review the governing statutory and regulatory provisions and some background facts then address the implications of the legislative provisions.

1. Statutory and Regulatory Provisions

(a) Part 13 of the Act

[257] Part 13 of the ABCA contains some relevant provisions, ss 155, 162, 163, 169, and 170:

> 155(1) Subject to section 156, the directors of a corporation shall place before the shareholders at every annual meeting
>
> (a) the following financial statements as prescribed: ....
>
> (iii) if the corporation has completed 2 or more financial periods, comparative financial statements for the last 2 completed financial periods ....
>
> (b) the report of the auditor, if any, and
>
> (c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the bylaws or any unanimous shareholder agreement ....
>
> 162(1) Subject to section 163, shareholders of a corporation shall, by ordinary resolution, at the first annual meeting of shareholders and at each succeeding annual meeting, appoint an auditor to hold office until the close of the next annual meeting ....
>
> 163(1) The shareholders of a corporation other than a distributing corporation may resolve not to appoint an auditor.
>
> (2) A resolution under subsection (1) is valid only until the next succeeding annual meeting of shareholders.

(3) A resolution under subsection (1) is not valid unless it is consented to by all the shareholders, including shareholders not otherwise entitled to vote. [*note: this was the language of s. 163 prior to amendments in 2021 c18 s41*]

169(1) An auditor of a corporation shall make the examination that is in the auditor's opinion necessary to enable the auditor to report in the prescribed manner on the financial statements required by this Act to be placed before the shareholders ....

170(1) On the demand of the auditor of a corporation, the present or former directors, officers, employees or agents of the corporation and the former auditors of the corporation shall furnish any

(a) information and explanations, and

(b) access to records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries

that are, in the opinion of the auditor, necessary to enable the auditor to make the examination and report required under section 169 and that the directors, officers, employees, agents or former auditors are reasonably able to furnish ....

(b) *Business Corporations Regulation*

[258] The *Business Corporations Regulation*, Alta Reg 118/2000, addresses the auditor's report referred to in s 169:

22 The auditor's report referred to in section 169 of the Act must contain

(a) a statement as to the scope, extent and nature of the auditor's examination,

(b) a statement as to whether or not, in the auditor's opinion, the financial statements, including any accompanying notes, present fairly the financial position of the corporation, and

(c) a statement of any concerns or qualifications the auditor has as to whether the financial statements were prepared according to generally accepted accounting principles and generally accepted auditing standards.

2. Facts

[259] Save in 2006, before the Plaintiffs were shareholders, no unanimous resolution dispensing with an auditor and therefore with audited financial statements was made in any relevant year.

[260] There was and could have been no argument that Lamanator met any statutory exemption from the requirement to distribute annual financial statements with an auditor's report while the Plaintiffs have been shareholders.

3. Observations Respecting the Statutory Provisions

[261] Neither Part 13 nor individual sections in Part 13 contain specific remedial provisions. That is, while Part 13 tell us what a corporation must do, it does not address the consequences for

a failure to follow statutory direction, how that failure is addressed, and who has standing to address that failure.

[262] Thus, for example, s 155 obligates a corporation to place financial statements and the auditor's report before shareholders annually, and ss 162 and 163 require the appointment of an auditor unless (prior to the 2021 amendments) there was unanimous shareholder approval to the contrary. But the obligations imposed on the corporation or the duties of the corporation are not immediately correlated with rights of individual shareholders. There is a decoupling of obligation and remedy, a space between the two.

[263] The ABCA does extend remedial jurisdiction to shareholders, however. A shareholder may invoke remedial jurisdiction under s 242 or s 248. Justice Slatter, as he then was, offered the following observations concerning remedial pathways for missing audited financial statements in ***Trautwien v Telsco Security Systems Inc***, 2011 ABCA 282 at para 9:

> a. The minority shareholder may have a substantive right to audited financial statements under s 155 of the *Business Corporations Act*.
>
> b. The minority shareholder might be entitled to the production of audited financial statements as a remedy for oppression under s 242(3)(k) of the *Business Corporations Act*.
>
> c. The minority shareholder as a litigant might be entitled to production of audited financial statements under the *Rules of Court* if they are relevant and material to the litigation.

[264] The Plaintiffs did not seek production of audited financial statements under the rules or under s 248 of the ABCA.

[265] Conceivably, given Equity's supervision of corporate matters, an application might be founded – although I received no argument on this point – on s 155 and the inherent jurisdiction of the Court, as supported by ss. 4, 5, and 8 of the *Judicature Act*. I will not pursue this prospect as it was raised by neither party.

[266] The Plaintiffs did seek production of audited financial statements under s 242 of the ABCA. The Statement of Claim referred to oppression, including failure to appoint an auditor and failure to distribute financial statements (para 23), and referred to oppression remedies. The Statement of Claim relied, as regards oppression, on s 242 of the ABCA only. The Plaintiffs' September 2021 cross-application for provision of audited financial statements referred to ss 155, 162, and 163 of the ABCA and referred to the failure to provide audited financial statements as oppression.

4. Was an Order for Audited Financial Statements Mandatory?

[267] Subsection 242(2) provides that "the Court may make an order to rectify the matters complained of" and s 242(3) provides that "[i]n connection with an application under this section, the Court may make any interim or final order it thinks fit." [emphasis added]

[268] Under s 28(2)(c) of the *Interpretation Act*, "'may' shall be construed as permissive and empowering." [emphasis added]

[269] Hence, the statutory language establishes that an order for production of audited financial statements is a discretionary determination, not an "absolute" or automatic or "mandated"

entitlement. Statute indicates that the production determination under s 242 will depend on the oppression assessment.

[270] Nonetheless, there are decisions that appear to elevate a shareholder's entitlement to annual financial statements to or near to an absolute right.

(a) Mandatory Order

[271] There are judicial comments that tend to support the position that an order for missing audited financial must be granted on the application of a shareholder. For example, Justice Brown wrote as follows in ***Packall Packaging Inc v Ciszewski***, 2016 ONCA 6 at para 28:

> [28] It is a core obligation of a corporation to its shareholders to provide them with an annual report card of the corporation's financial position in the form of audited financial statements: *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.* (2007), 27 B.L.R. (4th) 299 (Ont. S.C.), at para. 12. A shareholder's right to information or material, including audited financial statements, as granted to her under the OBCA is a clear, mandatory right, and it is not necessary for a shareholder to give any reason in exercising her directly held rights under the OBCA: *Labatt Brewing Co. v. Trilon Holdings Inc.* (1998), 41 O.R. (3d) 384 (Gen. Div.), at p. 387.

Justice Lowry wrote as follows in ***Discovery Enterprises Inc v ISE Research Ltd***, 2002 BCSC 1624 at para 6:

> [6] .... the receipt of audited financial statements when required is a clear and mandatory right vested in a minority shareholder and it is not necessary that the shareholder advance any reason for exercising this right. It follows that the shareholder's motive is not relevant ....

[272] The order follows proof of the failure to provide the statements in the absence of exempting circumstances and does not concern the shareholder's reasons or purposes for the application. The cost of the audited financial statements should not be borne by the applicant shareholder and the cost to the corporation is not a reason for not granting the order. See ***Discovery Enterprises*** at paras 6 and 7:

> [6] …. In my view, it is no answer to say that the shareholder can undertake an audit at its own expense. That is not an expense it ought to expect to have to incur when it made its investment in the company ….
>
> [7] I find some support for the view that financial considerations are of no real consequence in ***Smith v. Eco Grouting Specialists Ltd.***, [2001] O.J. No. 2784 (Sup. Ct.). There, it was argued that the delivery of audited financial statements would cost more than the value of the minority shareholder's investment. In ordering that the statements be delivered, the following was said at para. 33:
>
> > While I am not unsympathetic to this submission, I do not think I can or should accede to it … In my view, it would be anomalous to require a shareholder who is merely exercising a statutory right, to pay for the very thing that the law provides to him. In view of the provisions of the [*Ontario Business Corporations Act*, R.S.O. 1990, c. B.16], the company was always required to prepare audited financial statements. This is its legal obligation ….

(b) Confirmation of Discretionary Status of Order

[273] I appreciate the *prima facie* strength of a shareholder's claim to audited financial statements, as confirmed in cases like ***Discovery Enterprises***. But in my opinion, and with respect, these cases should not be taken as a judicial re-writing of the terms of the legislation. It follows that an order is not mandatory on application under s 242. Rather, the Court must decide whether the order is warranted in all the circumstances. Justice Price, in my view, properly conveyed the approach to an application for audited financial statements in ***2265535 Ontario Inc v Sood***, 2017 ONSC 2270 at para 20: ".... The Audit was ordered because one was required in the interests of justice, not because the *Business Corporations Act* granted the Applicants, or Mr. Singh, an automatic right to an audited financial statement." [emphasis added]

[274] Hence, under s 242, an order for audited financial statements should not be granted just because audited financial statements had not been distributed as required by the ABCA.

[275] This determination, of course, does not mean that the Plaintiffs were not entitled to audited financial statements, only that they did not have an "absolute" right to those statements. To that extent, the conflict between statute and the rules is mitigated, to a degree.

[276] The next question is whether the failure to provide audited financial statements was itself oppression in the circumstances, but without considering other alleged oppressive conduct.

B. Failure to Provide Audited Financial Statements as Oppression

[277] If the failure to distribute audited financial statements were oppressive considered by itself, the Plaintiffs' claim of oppression would have merit and summary dismissal should not have been granted.

[278] Further, if there were merit to the Plaintiffs' claim to oppression based on the non-distribution of the audited financial statements, the Plaintiffs would have a strong claim to the remedy of compelling production of those statements as interim relief. It would also follow that the summary dismissal application should have been suspended pending provision of the audited financial statements.

[279] I will review the statutory provisions and the governing authorities, then assess whether, in the circumstances, failing to provide audited financial statements was itself oppression.

1. Statutory Provisions

[280] Part 19 of the ABCA concerns remedies, among other matters.

[281] Section 239 defines "complainant" for the purposes of Part 19:

> 239 In this Part,
>
> (a) "action" means an action under this Act or any other law;
>
> (b) "complainant" means
>
> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates ....

[282] Section 242 deals with oppression:

> 242(1) A complainant may apply to the 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.
>
> (3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> > (a) an order restraining the conduct complained of; ...
> >
> > (g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder; ...
> >
> > (k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;
> >
> > (l) an order compensating an aggrieved person ....

[283] Section 248 provides as follows:

> 248 If a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation contravenes this Act, the regulations, the articles or bylaws or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, in addition to any other right the complainant or creditor has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the Court may so order and make any further order it thinks fit. [emphasis added]

[284] I have referred to s 248 despite the Plaintiffs not having claimed audited financial statements under this section. This section too is permissive or discretionary. Unlike s 242, there is no requirement to prove oppression. Nonetheless, in my opinion, the facts and factors discussed below respecting the Plaintiffs' claims under s 242 would have been relevant had s 248 been invoked and the conclusions I've arrived at would have remained the same as regards the production of audited financial statements. As to the "non-absolute" or discretionary nature of a non-s 242 application for production of financial statements, see ***Envirodrive Inc v 836442 Alberta Ltd***, 2005 ABQB 446, Slatter J at para 85 ("[i]n many cases the appropriate remedy will be an order for production;" [emphasis added] many but not all).

2. *Per Se* Oppression

(a) Cases Suggesting *Per Se* Oppression

[285] Some cases suggest that the failure to distribute audited financial statements, by itself, amounts to oppression. Justice Lowry wrote as follows in ***Discovery Enterprises*** at para 6:

> [6] .... The refusal of a company to deliver audited financial statements can serve to hide the true financial position from a minority shareholder …. I consider the denial of Discovery's right to audited financial statements to amount to conduct that is less than fair to Discovery. It is conduct that is oppressive.

Keeping in mind that Justice Price took, in my view, the correct approach to the production issue, the following passage from ***Sood*** at para 33 could be taken to support a finding that oppression is established by non-distribution of audited financial statements:

> [33] A shareholder's right to audited financial statements is an important check on financial mismanagement by a corporation and must be protected.

[286] Lowry J commented on the transformation of what would not be oppression into oppression at para 8 of ***Discovery Enterprises***:

> [8] As observed there [in ***Smith v Eco Grouting***] at para. 34, it may well be that when the relationship between the shareholders of a closely held company is harmonious, they may be content to forego the delivery of audited financial statements. However, when, as here, the relationship breaks down, for whatever reason, it is understandable that a disaffected shareholder will want an independent assessment of the company's financial position which it is, by statute, entitled to have. It could be most unfair to a minority shareholder's proprietary rights if such an assessment were to be denied.

(b) Not *Per Se* Oppression

[287] There are examples in the jurisprudence of non-distribution of audited financial statements not amounting to oppression. See, for example,

- ***G&G Education Development Corporation v Langley Flying School, Inc***, 2018 BCSC 1796, Kelleher J (the company was closely held and had not produced audited financial statements since it was founded in 1994; the first time Ms. Gong requested audited financial statements was in the petition; the petitioner's real complaint was that Mr. Zhang and Starlily have not bought her shares; the oppression remedy is not a mechanism for forcing the buyout of disgruntled shareholders (paras 126, 206)).
- ***Alleluia v Wilson***, 2011 BCSC 666, Armstrong J (at para 72: "I conclude that the respondents' failure to ensure compliance with the Act and the petitioners' reasonable expectations do not rise to the level of unfair prejudice or unfair disregard of the interests of the petitioners. The conduct does not constitute the type wrong that the oppression remedy is aimed at. While the Company must comply with its statutory duty, in the context of these facts, it does not warrant the remedy sought by the petitioners. It is understandable in the circumstances of this case that the petitioners do not want to continue as shareholders in the Company; however, the oppression remedy is not intended as a mechanism for facilitating forced buyouts of disgruntled shareholders." [*I note that an order to produce unaudited financial statements was made under s. 228 of the governing legislation. That was substantially similar to s. 248 of the ABCA.*])

- ***Brown v Boyar***, 2009 BCSC 1300, Grauer J (at para 89: "In all of the circumstances, I am unable to conclude that Mr. Boyar breached any duty, statutory or otherwise, in relation to Mr. Brown's demands for an audit. To have proceeded with audits would have been financially insupportable, and could not have benefited the companies. Mr. Brown was in fact given fair and reasonable access to the companies' accounting information.")

See also ***Saunder v 360373 Alberta Ltd (Arlington Apartments)***, 2021 ABCA 222 at para 12, and for an example of the proper approach at work, ***Azam v Andrews Custom Furniture Designs Inc***, 2022 BCSC 1166, Norell J at paras 47-48, 53-54, 65.

[288] In ***Mack v Universal Dental Laboratories Ltd***, 2020 ABQB 738, Justice Richardson wrote as follows at para 184:

> [184] In *Rupcich v Mravcak*, 2013 SKQB 77, the court noted that the jurisprudence supports the idea that "shareholders can reasonably expect that the corporation will maintain and provide access to certain records": para 99. This expectation arises through the provisions of the relevant legislation, and may also arise through past practice and the relationship between the parties. The court went on to note, at para 100:
>
> > Breach of a shareholder's reasonable expectation that the corporation will keep and provide access to certain records can accordingly constitute oppression. However, that will only be so if the conduct complained of is oppressive, or constitutes unfair prejudice to or unfair disregard of a "relevant interest". In that context, factors such as the extent of and motives for the breach; the number of requests for records or information and the nature and justification for any refusal to comply; the impact of the breach on the ability of the stakeholder to obtain information necessary to protect his or her interests in that capacity; or the impact on the ability of the corporation to file tax returns, meet other obligations or carry on business are relevant. The facts that will inform this inquiry will be different in every case. [emphasis added]

[289] I conclude that the failure to provide audited financial statements even if contrary to the ABCA does not by itself amount, as a matter of law, to oppression. Put another way, the failure to distribute audited financial statements contrary to the ABCA is not *per se* oppression.

[290] Neither s 242 nor the foundational authority, ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69 refer to any *per se* or categorical species of oppression.

[291] An oppression analysis is statutorily required even when the fault complained of is failure to disclose financial statements. I turn to the governing authorities.

3. Interpreting Oppression

[292] The test for determining whether conduct "is oppressive or unfairly prejudicial to or … unfairly disregards the interests of any security holder" was established in ***BCE***. See also ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd.*** 2014 ABCA 386 at para 18; ***Frydman v Pelletier***, 2015 ABQB 289, Brooker J at paras 301-303; ***Krulc v Krulc***, 2015 ABQB 213, Jeffrey J at para 18; ***Luebke v Manluk Industries Inc***, 2013 ABQB 264, Hillier J at para 32; ***Builders' Floor Centre Ltd v Thiessen***, 2013 ABQB 23, Nielsen J, as he then was, at para 87; ***Hunter v Ingarfield***, 2010 ABQB 74, Brooker J at para 58.

(a) Fact-Specific Inquiry

[293] Whether conduct is oppressive, be the conduct failure to distribute audited financial statements or otherwise, must be assessed on a case-by-case basis. In ***BCE*** the Supreme Court wrote at para 59 that

> like many equitable remedies, oppression is fact specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

And see ***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 2:

> [2] …. what may be oppressive in one factual context may not be oppressive in a slightly different factual context. Fact findings are the crucial foundation for the legal analysis that must follow, because within such fact findings the hearing court identifies the interests that merit relief, and within such fact findings the court assesses the nature of the impugned conduct and its effect.

[294] The Supreme Court stated in ***BCE*** at para 90 that "as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression."

(b) Elements of Oppression

[295] The test for oppression has two elements, described in ***BCE*** at paras 68 and 56:

> (i) does the evidence support a reasonable expectation asserted by the claimant?
>
> (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice," or "unfair disregard" of a relevant interest?

[296] The claimant bears the burden of establishing the asserted expectation, the reasonableness of the expectation, and the violation of the expectation by conduct that was oppressive or unfairly prejudicial or that unfairly disregarded a relevant interest: ***Prairie Bailiff Services v Devtex*** at para 39; ***BCE*** at paras 119, 137.

(c) Reasonable Expectations

[297] The first element of the test concerns the "interests" of a security holder. Protected "interests" have two aspects. First there must be an "expectation" and second that expectation must be reasonable.

(i) Expectation

[298] The "expectation" need not relate to legally enforceable rights (i.e., enforceable outside s 242): ***BCE*** at para 60. At para 61 the Court stated the following:

> [61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the CBCA. <u>It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy</u>. [emphasis added]

[299] To be protected under s 242, an expectation must be neither merely personal nor general. To be protected, an expectation must be founded on a claimant's personal interests *as a shareholder* – but not on general shareholder interests, interests common to all shareholders.

[300] ***Shefsky*** cautions at para 22 against the view that expectations founded on interests other than shareholder interests are protected under s 242:

> [22] …. not every interest is protected by the statutory oppression remedy. Although other personal interests may be connected to a particular transaction, the oppression remedy cannot be used to protect or advance, directly or indirectly, these other personal interests. "[I]t is only their interests as shareholder, officer or director as such which are protected": [***Naneff v Con-Crete Holdings Ltd***, 1995 CarswellOnt 1207, 1995 CanLII 959, 23 OR (3d) 481 (CA), Galligan JA] at para 27. Furthermore, "the oppression remedy protects only the interests of a shareholder *qua* shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation": ***Stahlke v Stanfield***, 2010 BCSC 142 at para 23, aff'd 2010 BCCA 603 at para 38, 305 BCAC 18. [emphasis added]

The expectation must be one "shared in the compact of shareholders" rather than only "a personal aspiration:" ***Stahlke v Stanfield*** at para 18; ***Mack v Universal Dental Laboratories*** at paras 143, 162; ***Main v Delcan Group Inc***, 1999 CanLII 14946, 47 BLR (2d) 200 (ON SC), Lederman J at para 26. See also ***Wilson v Alharayeri***, 2017 SCC 39, Côté J at para 54:

> [54] …. any order made under s. 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders (***Naneff***, at para. 27; *Smith v. Ritchie*, 2009 ABCA 373, at para. 20) …. [The oppression remedy] protects only those expectations derived from an individual's status as a security holder, creditor, director or officer. Accordingly, remedial orders under s. 241(3) may respond only to those expectations. They may not vindicate expectations arising merely by virtue of a familial or other personal relationship. And they may not serve a purely tactical purpose ….

[301] ***Shefsky*** also cautions against the view that s 242 protects general shareholder expectations, expectations shared by all shareholders, at paras 40-41:

> [40] …. However, the oppression remedy is a personal claim and requires the complainant to identify a personal interest that is alleged to have been violated. It is not sufficient to allege that shareholders generally have an expectation that directors generally will not act oppressively. Such assertions are contrary to the analytical framework set out in BCE.
>
> [41] In *Rea v Wildeboer*, 2015 ONCA 373 at paras 34-35, the distinction between a generalized expectation and a personal claim that potentially attracts the oppression remedy is clearly set out:
>
> > The oppression remedy is not available – as the appellants contend – simply because a complainant asserts a "reasonable expectation" (for example, that directors will conduct themselves with honesty and probity and in the best interests of the corporation) and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard". The impugned conduct must be

> "oppressive" of or "unfairly prejudicial" to, or "unfairly disregard" *the interests of the complainant*: OBCA, s. 248(2). No such conduct is pled here.
>
> That the harm must impact the interest of the complainant personally – giving rise to a personal action – and not simply the complainant's interests as a 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 two separate statutory foundations, not just one: a corporate remedy, and a personal or individual remedy. [emphasis added]

The harm cannot be harm only to the corporation and cannot be harm experienced by all shareholders generally: ***Mack v Universal Dental Laboratories*** at para 151.

(ii) Reasonable

[302] The expectation must be reasonable, not merely the subjective or actual expectation of a claimant. The Supreme Court elaborated in ***BCE*** at para 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

See ***Shefsky*** at para 23: "In ***BCE*** the Supreme Court underlines that the stakeholder's actual expectations are not conclusive; rather, reasonableness implies that the analysis is objective and contextual."

[303] The Supreme Court identified some factors that may assist in determining whether an expectation was reasonable in ***BCE*** at para 72:

> Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[304] The Supreme Court elaborated at paras 73-80:

> [73] …. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy ….
>
> [74] The size, nature and structure of the corporation are relevant factors in assessing reasonable expectations: [***First Edmonton Place Ltd v 315888 Alberta Ltd***, 1988 CanLII 168, 1988 CarswellAlta 103, 60 Alta LR (2d) 122 (QB), DC McDonald J, as he then was]; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 N.Z. Univ. L. Rev. 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

> [75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).
>
> [76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance ….
>
> [77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice ….
>
> [78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered ….
>
> [80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications ….

[305] Reasonableness requires consideration of a shareholder's interests in context, not consideration only of a shareholder's interests. The Supreme Court wrote as follows at para 71 of ***BCE***:

> [71] …. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play …. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation. [emphasis added]

(d) Unfair Limitations of Reasonable Expectations

(i) Unfairness of the Limitation

[306] If a claimant succeeds in establishing a reasonable expectation, the claimant must go on to establish that the interests were limited unfairly. A reasonable expectation and even limitation of that expectation do not alone support a remedy. There must be wrongful conduct, causation, and compensable injury: ***BCE*** at para 90; ***Shefsky*** at para 22.

[307] The oppression remedy is "equitable" in nature: "It seeks to ensure fairness — what is 'just and equitable'. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair:" ***BCE*** at para 58; ***Krulc*** at paras 16 and 21; ***First Edmonton Place*** at para 27(CarswellAlta). The remedy addresses "wrongful" conduct, not merely "illegal" conduct: ***BCE*** at para 71.

[308] The oppression remedy is aimed at correcting unfair treatment. "Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to 'reasonably expect':" ***BCE*** at para 64; see paras 58, 71, and 82; 59 ***Seidel v Kerr***, 2003 ABCA 267 at para 34:

> [34] Similarly, the threshold or foundation for entitlement to the oppression remedy in Canada has been held to have been stated by Lord Cooper in *Elder and others v. Elder and Watson Limited*, [1952] A.C. 49 at 55:
>
> > [T]he essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. [emphasis added]

[309] It follows, as the Supreme Court stated in ***BCE*** at para 71 that

> [71] …. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": *Dickerson Committee* (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163.The remedy is focused on concepts of fairness and equity rather than on legal rights …. [emphasis added]

[310] In ***Munro v Nopper***, 2002 ABQB 810 at para 25, Justice Veit J stated that "'[u]nfair' connotes an obligation to act equitably or impartially in the exercise of power or authority."

[311] The availability of a remedy depends on whether the claimant can establish that its interests were limited through the three types of unfair conduct referred to in s 242.

(ii) Three Types of Unfair Conduct

[312] In ***BCE*** at para 67, the Supreme Court distinguished the types of oppressive conduct referred to in s 242:

> "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations ….

[313] "Oppression" is "a wrong of the most serious sort," an "abuse of power:" ***BCE*** at para 92. "Unfair prejudice" involves unfair conduct less offensive than "oppression" but damaging to a stakeholder's interests, while "unfair disregard" is viewed as the least serious type of misconduct.

[314] Examples of "unfair disregard" include "favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant:" ***BCE*** at para 94; see ***First Edmonton Place*** at para 33(CarswellAlta). Justice McDonald suggested in ***First Edmonton Place*** that proof of "unfair prejudice" and "unfair disregard" do not require proof of either bad faith or economic damage to the claimant: at para 43(CarswellAlta).

[315] The *Proposals for a New Business Corporations Law for Canada, Vol. II*, quoted in Alberta Institute of Law Research and Reform, *Proposals for a New Alberta Business Corporations Act (Report No. 36), Volume I* (August 1980) provide further examples of oppression at 138-139, 142 (ALRI):

- dominant shareholders appointing themselves to paid offices of the corporation, absorbing profits that might otherwise be available for dividends (draining profits)

- issuing shares to dominant shareholders on advantageous terms (diluting shareholdings)
- failing repeatedly to pass dividends on shares held by the minority (refusing dividends)
- "The payment of excessive salaries to dominant shareholders who appoint themselves officers is a borderline case: it may constitute a wrong to the corporation and, at the same time, may have as its specific goal the squeezing out of minority shareholders."

At 144, ALRI identifies as oppression abuses of power by someone who controls the machinery of the corporation:

> the wrongdoers are doing something to the prejudice of the complainant's interest in the corporation, whether it prejudices his rights under the corporate constitution or affects the value of the corporation to which his rights apply. The crux of the matter is that the wrongdoers are abusing their power of control.

(iii) Assessing Unfair Conduct

[316] Courts assessing the fairness of directors' conduct must appreciate that directors are required to take into account a variety of interests, not just shareholder interests, in determining action furthering the best interests of the corporation. The courts, then, "should give appropriate deference to the business judgment of directors who take into account these ancillary interests" so long as the business decision in question "lies within a range of reasonable alternatives:" ***BCE*** at para 40; ***Mack v Universal Dental Laboratories*** at para 149. The Court of Appeal wrote in ***Shefsky*** at para 22 that

> [22] ... courts must not second-guess the business judgment of directors of corporations. Rather, the court must decide whether the directors made decisions which were reasonable in the circumstances and not whether, with the benefit of hindsight, the directors made perfect decisions. Provided the directors acted honestly and reasonably, and made a decision in a range of reasonableness, the court must not substitute its own opinion for that of the Board. If the directors have chosen from one of several reasonable alternatives, deference is accorded to the Board's decisions: *Stahlke* at para 22; *Pente Investment Management Ltd v Schneider Corp* (1998), 42 OR (3d) 177 (CA) at para 36, 44 BLR (2d) 115 (CA) ....

[317] Courts should consider not only isolated actions but patterns of conduct to determine whether conduct was unfair under s. 242. Justice Gill has observed that "[i]n considering whether there has been oppression a Court can consider the cumulative effects of a director's action …:" ***Hunka v Degner***, 2012 ABQB 207 at para 28.

[318] Further, s 242 does not require proof that the impugned conduct was at the same oppressive, unfairly prejudicial to, *and* unfairly disregarded stakeholder interests – the classifications of conduct in s 242(2) are disjunctive not conjunctive. As Justice Jeffrey stated in ***Krulc*** at para 24, "[a]n applicant need not demonstrate all three of these descriptors, just any one of them."

4. Assessment

[319] Three questions must be answered:

- Did the Plaintiffs have an expectation that they would receive audited financial statements?

- If so, was their expectation reasonable?
- If so, was the failure to provide audited financial statements unfair to the Plaintiffs?

(a) Expectation

[320] Did the Plaintiffs have an expectation that they would receive audited financial statements?

[321] Christopher and Julia's shares were purchased in September 2007. From September 2007 until 2016, when counsel was retained, I find that there was no evidence that they personally had any expectation of receiving audited financial statements.

[322] Stephen's shares were purchased in December 2009. From December 2009 to 2016, when he joined the litigation, I also find that there was no evidence that he personally had any expectation of receiving audited financial statements.

[323] Anna, I have found, was the agent for Christopher and Julia. There is no evidence that Anna requested audited financial statements between 2007 and 2016.

[324] I find that as of 2016 when they retained counsel, the Plaintiffs did form the subjective belief that they were entitled to receive audited financial statements.

[325] The Statement of Claim, filed in May 2017, referred to "the failure to appoint an auditor and failure to distribute financial statements" (para 23) but did not expressly seek a remedy concerning audited financial statements. The application for production of audited financial statements was filed September 22, 2021 (ground 6 of the application stated that "[t]he failure to provide audited financial statements to the Applicants is oppressive and violated their reasonable expectations as shareholders").

[326] I find that the Plaintiffs had an expectation that they would receive audited financial statements as of 2016, that is, some nine years after Christopher and Julia acquired their shares and about 6 years after Stephen acquired his shares.

[327] I also find that this expectation was based on the Plaintiffs' status as shareholders, under ss 155, 162, and 163 of the ABCA. To that extent, the interest supporting the expectation was not a purely personal interest falling outside the protection of s 242 (it was not an interest, e.g., relating to the tort of deceit).

[328] However, Lamanator's duty to provide audited financial statements was owed not to the Plaintiffs specifically but to all shareholders. Lamanator provided no audited financial statements, none to the Plaintiffs, none to any shareholders.

[329] I therefore find that the Plaintiffs' expectation was a general shareholder expectation.

[330] I will not, however, dismiss the Plaintiffs' claim for audited financial statements on the ground that it is a general shareholder expectation alone. If audited financial statements should have been distributed to all shareholders, then audited financial statements should have been distributed to the Plaintiffs.

(b) Reasonableness of the Expectation

[331] Was the Plaintiffs' expectation that they would receive audited financial statements reasonable?

(i) General Commercial Practice

[332] The ABCA establishes the corporate obligation to provide audited financial statements unless an appropriate resolution lifts that obligation. Such a resolution was not made after the Plaintiffs became shareholders.

(ii) The Nature of the Corporation

[333] Lamanator is a small private corporation, with about 22 shareholders. It is not consistently profitable and, on the evidence in this application, only had a profit in 3 years between 2007 and 2016. The highest profit was about $71,000 in 2015. Annual sales from 2007 to 2016 were, on a rough average, about $170,000 per year, although there were substantial swings year-to-year.

[334] On the evidence, the structure of the corporation did not involve a class of inherently privileged or practically privileged shareholders. For example, in ***Discovery Enterprises***, the corporation the applicant had invested in was a subsidiary of the majority shareholder. The corporation owed millions to its parent. It had sales of about $1.7 million but ran a loss of about $380,000. In the current case, there was no evidence that any other corporation owned shares in Lamanator or was a dominant shareholder.

(iii) Shareholder Relationships

[335] The Lamanator shareholders are neither strangers (it isn't a publicly traded company) nor family members. Rather, on the evidence, the shareholders are not friends but acquaintances. Anna, the contact that led to the Plaintiffs' shareholdings, knew Anthony from Church. Barry McQuay was the company accountant. The connections between other shareholders and Anthony was not in evidence. I have inferred from Anna's evidence that investment interest in Lamanator was by word-of-mouth.

(iv) Past Practice

[336] I find, as Anthony deposed, that he told all investors before they invested in Lamanator – including Anna and whomsoever it was that he spoke to respecting Stephen's shares – that Lamanator did not have audited financial statements and would not be providing audited financial statements.

[337] Lamanator has never provided audited financial statements to shareholders.

(v) Protective Steps

[338] The Plaintiffs did not request audited financial statements until 2016.

[339] Prior to that time, the Plaintiffs (or at least Christopher and Julia) relied on Anna.

[340] Anna received unaudited financial statements, attended investor meetings, had meetings with at least Anthony respecting Lamanator, and received messages and other updates from Anthony concerning Lamanator from 2007 to 2016.

(vi) Communications

[341] Again, Anthony told prospective shareholders that audited financial statements would not be provided.

[342] As indicated above, Anthony did update shareholders on Lamanator's commercial progress.

[343] As Anna's evidence confirmed, Anthony did have an "open door" policy for investors. He provided information to investors if they requested information.

(vii) Conclusion

[344] As against the legal requirement to provide audited financial statements, I take into account

- the nature of the corporation – it is a small corporation whose shareholders are likely within two degrees of separation from one another (with Anthony as the fixed point)
- the absence of evidence that another shareholder or group of shareholders held some sort of advantageous position as regards the income or assets of Lamanator
- the commercial profile of the corporation – the corporation did not earn a profit in most years from 2007 to 2016; in my opinion, it did not and does not have the money for annual audited financial statements
- the shareholders were put on notice from before they invested that they would not received annual audited financial statements
- no shareholders ever received audited financial statements
- Anna was the "go-between" for the Plaintiffs and Lamanator, as agent for Christopher and Julia and *de facto* if not *de jure* agent for Stephen and Anna never requested financial statements and was of the view that she received adequate financial information
- Anthony had an "open door" policy respecting investors – he provided financial information that they requested, as confirmed by Anna
- the Plaintiffs' expectation that they would receive audited financial statements did not emerge until 2016. Their shares were purchased in 2007 (Christopher and Julia) and 2009 (Stephen) and they became adults in 2012.

[345] I find on the record that the Plaintiffs' expectation to receive audited financial statements was not reasonable.

(c) Unfairness

[346] If I am wrong and the Plaintiffs had a reasonable expectation that they would receive audited financial statements, was the failure to provide audited financial statements unfair to the Plaintiffs?

[347] I accept that the Plaintiffs have a "minority" shareholder position in Lamanator, in the sense that cumulatively they do not own a majority of Lamanator voting shares.

(i) As Between Shareholders

[348] As between the Plaintiffs and other shareholders, I find that the Plaintiffs were not treated unfairly. There was no difference in their treatment respecting corporate financial information in comparison to other shareholders.

[349] No shareholders received audited financial statements. There was no evidence that a group of shareholders received (e.g.) financial statements but those financial statements were not shared with all shareholders.

[350] All shareholders had been told before their shares were purchased that annual audited financial statements would not be provided.

[351] All shareholders, as confirmed by Anna, could receive financial information respecting Lamanator from Anthony. He had an open-door policy. There were no barriers to the Plaintiffs receiving financial information (see, in contrast, ***Mack v Universal Dental Laboratories*** at (e.g.) para 187).

[352] Anthony provided updates respecting Lamanator to shareholders.

[353] Lamanator did not have the funds to pay for audited financial statements. In particular, Lamanator would not have the funds to pay for audited financial statements going back some number of years, even to 2016.

[354] If Lamanator were forced to pay for audited financial statements, it would impair Lamanator's cash flow and financial position. Lamanator would become insolvent (AT-A2 para 20). The result would be injury to the interests of the approximately 19 other shareholders in Lamanator.

[355] The Plaintiffs' shares were purchased in 2007 and 2009. Thereafter they made no investments in Lamanator. They made no other contribution, financial or otherwise, to Lamanator. Others did invest. For example, see the communication by Anthony of March 8, 2013 – "special thanks to Gerald and Barry for putting up over $100,000 between the two of them to keep this company moving forward ...." There will be some further discussion of others' efforts below.

(ii) As Between the Plaintiffs and Management

[356] On the evidence, Lamanator has provided all the financial information that it had to the Plaintiffs.

[357] Anthony and Teresita did not draw salaries from Lamanator until recently (QOA-A 59.26; AT-A1 para 14).

[358] Anthony, as indicated, maintained an open-door policy with investors.

[359] Unaudited financial statements were provided to shareholders, including the Plaintiffs.

[360] The Plaintiffs have raised concerns respecting the financial information they have received. I will return to those concerns below. To anticipate a finding I will make below, I do not consider the absence of *audited* financial statements to have worked any unfairness to the Plaintiffs as between themselves and Anthony and Teresita as Lamanator management.

(iii) Conclusion

[361] I do not find that the failure to provide audited financial statements to the Plaintiffs has created any unfairness as between themselves and other shareholders. I do not find that the failure to provide audited financial statements to the Plaintiffs has created any unfairness as between themselves and Anthony and Teresita as Lamanator management, although this conclusion must be supported by some further determinations set out below.

(d) Overall Conclusion

[362] I have found that the Plaintiffs did not have a reasonable expectation that they would receive audited financial statements. That finding alone precludes a finding of oppression

relating to the provision of audited financial statements. I have also found that the failure to provide audited financial statements to the Plaintiffs did not result in any unfair treatment of them, in comparison to other shareholders or, as with further discussion to follow, as regards Anthony and Teresita as management of Lamanator.

C. The Need for Audited Financial Statements

[363] The Plaintiffs applied for production of audited financial statements. To this point, I have found that the production of audited financial statements should not be ordered under s 242.

[364] The Plaintiffs, though, despite occasional protests to the contrary, did not seek audited financial statements only for the sake of having financial statements or only to acquire financial statements in themselves and by themselves. Rather, audited financial statements had an instrumental value. They would be means for obtaining further information concerning the Lamanator financial records provided to the Plaintiffs and would permit a better understanding of these records. That is, an order for audited financial statements would be interim relief that would vindicate interests protected by s 242.

[365] Two issues arise.

[366] First, what additional information would be gained through audited financial statements?

[367] Second, what interests would audited financial statements serve?

1. Information Gained Through Audited Financial Statements

[368] The Defendants provided all documentation relating to Lamanator's finances to the Plaintiffs, "every shred of paper, every source document" as Defence counsel said. The Defendants have provided

- the accountant's copy of Lamanator's General Ledger for the years 2007-2017 (accountant's copy of QuickBooks (QOA-A 5.14-16))
- unaudited financial statements for Lamanator from 2007-2017
- Tax Returns and Notices of Assessment for Lamanator from 2007-2017
- Lamanator's Canadian bank statements from 2007-2017
- various credit card statements.

In addition to the production of records, Anthony has provided affidavits, been questioned, provided undertakings, and been questioned on undertakings. Teresita was questioned, as was Barry McQuay. Anna was questioned as well.

[369] Plaintiffs' counsel was asked, by both Applications Judge Schlosser and me, what further information would be gained from an *audited* version of the financial statements the Plaintiffs already had. Applications Judge Schlosser was of the view that "[t]here is no evidence of why audited statements might advance the Plaintiffs' case" (Decision para 8). "There is no tangible evidence about what an audit might reveal" (para 7). In the course of submissions, Applications Judge Schlosser had asked what is it that an auditor could do or could have done that has not already been done (22T 28.40-41). I'd asked a similar question.

[370] The question did not concern what could not be known then – precisely what new and hitherto hidden information would be elicited through an audit. Rather, the question concerned

the type or the nature of the inquiries an auditor could complete that would provide some new information. What could an auditor tell us that we didn't already know? (By analogy, one might ask what a particular forensic expert or a set of experts might tell us about a seized physical object. The response would not detail findings of investigations that had not yet occurred but would describe the types of findings that might be made.)

[371] The answer to Applications Judge Schlosser's query was that the auditor could do the audit (22T 29.1). The auditor would tell us more, but counsel did not describe what that "more" might be. I got no farther than Applications Judge Schlosser.

[372] An auditor might confirm that some numbers "don't add up" or lack supporting records, but an auditor was not required for these conclusions to be reached, particularly given the scope of information production in this case.

[373] On the record before Applications Judge Schlosser and on the record before me, there was no evidence and were no counsel representations properly supporting the proposition that an audit would add any information to the information already provided by the Defendants to the Plaintiffs.

[374] No one suggested that a forensic audit be completed or an Investigator be appointed under Part 18 of the ABCA.

[375] I agree with Applications Judge Schlosser that on the record and given the production and informational disclosure that occurred, ordering audited financial statements would serve no purpose.

[376] This is an independent reason for not ordering the production of audited financial statements.

2. The Use of Audited Financial Statements

[377] If audited financial statements were ordered to be produced, would the audited financial statements actually be used to vindicate interests protected by s 242?

[378] Applications Judge Schlosser found that the Plaintiffs' lawsuit concerned "disappointed expectations" about corporate performance. Essentially, the Plaintiffs wanted their money back. "Disappointed expectations," without more, do not constitute oppression. Applications Judge Schlosser summarily dismissed the Plaintiffs' claim. He did not order the production of audited financial statements.

[379] In my opinion, Applications Judge Schlosser was right.

[380] I realize that Justice Lowry stated in ***Discovery Enterprises*** that the motive or reasons for a shareholder's application for audited financial statements are not relevant. However, insofar as an applicant shareholder is relying on the oppression remedy, there is substantial authority to the effect that this remedy should not be used to support interests not protected by the oppression doctrine.

[381] I'll consider the governing authorities then the nature of the Plaintiffs' lawsuit.

(a) No Protection for Interests Falling Outside s 242

[382] The basic principle is set out in ***Shefsky*** at para 22: "Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation: ***Stahlke v Stanfield*** ... at para 23 ...." (see also para 6 of ***Stahlke***). And further in ***Shefsky*** at para 75:

> [75] The legal and jurisdictional boundaries which circumscribe, and delineate, resort to an oppression remedy must be firmly set. A party aggrieved, whether by having made an imprudent, or incomplete, or improvident personal bargain, cannot be permitted to seize an oppression remedy and, thus, gain an equitable remedy that was never in the contemplation of the contracting parties.

In ***Wilson v Alharayeri***, we read the following at para 55:

> [55] ... a court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). As Farley J. put it, statutory oppression "can be a help; it can't be the total law with everything else ignored or completely secondary" (*Ballard*, at para. 124). This means that director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances ....

See ***Naneff v Con-Crete Holdings*** at para 26; ***Icahn Partners LP v Lions Gate Entertainment Corp***, 2010 BCSC 1547, Savage J at paras 179-83, aff'd 2011 BCCA 228.

[383] In addition, the pre-share purchase communications impugned by the Plaintiffs occurred before the Plaintiffs were shareholders. The alleged misrepresentations did not concern the Plaintiffs' interests as shareholders. There was no "time related factual nexus" between the Plaintiffs and the oppression complained of. ***Shefsky*** is again valuable on this point, at para 70:

> [70] The respondents further argue that prospective shareholders do not have standing under the oppression remedy. The requirement that a complainant actually be a shareholder at the time of the oppression complained of is logical, since the question whether a complainant shareholder has sustainable grounds of oppression that brings the shareholder within the ambit of the oppression remedy "requires a time-related factual nexus between the complainant and the oppression complained of": *Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board* (2004), 41 BLR (3d) 74 at para 246, [2004] OTC 53 (SCJ), rev'd (but not on this point) (2006), 263 DLR (4th) 450 (ON CA), leave to appeal to SCC refused (2006), 267 DLR (4th) ix.

[384] The failure to disclose "poor performance" might be argued to be contrary to a shareholder interest in having information needed to make investment decisions (e.g. whether to sell shares). The interest in having information to make personal investment decisions, however, is not an interest held as a shareholder and does not relate to the rights and privileges of shareholders as such. See ***Hercules Managements Ltd v Ernst & Young***, [1997] 2 SCR 165, LaForest J at paras 48 and 56.

(b) What was the Lawsuit About?

[385] The phrase "disappointed expectations" has been used to describe affected interests that do not support a finding of oppression. To say that a plaintiff or applicant has suffered only disappointed expectations is to say that the injury allegedly suffered was not an injury to an

interest protected by oppression doctrine and the injury therefore could not support an oppression remedy.

[386] The Plaintiffs' lawsuit was "about" disappointed expectations based on the claims made and remedy sought by the Plaintiffs. This conclusion is based on both the Plaintiffs' pleadings and their evidence on the record, as has been reviewed to this point.

[387] The Statement of Claim referred to the Defendants "promoting the sale of shares in Lamanator through representations to parishioners at a church" to which the Plaintiffs were connected (para 8). The shares were represented as a "ground floor opportunity" and a "great investment" (para 9). The representations were made with the intention of persuading the investment of the Plaintiffs' money in Lamanator (para 10(a)). After the Plaintiffs purchased their shares, the Defendants made numerous presentations to the shareholders to create the impression that Lamanator was successful and had "significant prospects" (para 11). The Defendants "failed to disclose material information that should have been disclosed to any prospective investor in Lamanator" (para 14).

[388] The Plaintiffs claimed "fraudulent misrepresentation" based on the Defendants' claims made before the shares were purchased and the failure to disclose "material information that should have been disclosed to any prospective investor in Lamanator" (para 14), "their failure to disclose and suppression of material information" after the shares were purchased (para 15). The sale of shares was unlawful as violating the *Securities Act* (the Defendants were not registered under the Act and failed to file a prospectus when required by law to do so) (paras 10(b)-(g)). The Defendants were "parties to a conspiracy by unlawful means" (para 16). The Defendants were "unjustly enriched," "by their receipt of and use of the Plaintiffs' funds" (para 17).

[389] The Plaintiffs did refer to Lamanator's failure "to distribute financial statements to the Plaintiffs" (para 12):

> Lamanator failed to distribute financial statements to the Plaintiffs, and did not do so until October of 2016, at which time the Plaintiffs learned that Lamanator was in poor financial condition.

At para 14, the Plaintiffs stated that

> … the Defendants failed to disclose material information that should have been disclosed to any prospective investor in Lamanator. As a result of the inadequate financial disclosure by Lamanator, the particulars of these omissions are not known to the Plaintiffs at this time and will not be known until production of records and questioning for discovery.

However, the failure to disclose claims were in aid of the claim of fraudulent misrepresentation. The "suppression of material information and [the Defendants'] silence" "constitutes fraudulent misrepresentation" (para 15).

[390] The Plaintiffs also relied on s. 242 of the ABCA and sought an order declaring that the Plaintiffs had suffered oppression (paras 23, 24, 26).

[391] The Plaintiffs identified as particulars of oppression that the Plaintiffs failed to appoint an auditor and failed to distribute financial statements (para 23).

[392] The Plaintiffs referred to the amounts paid for the shares, totaling $179,000 (para 6).

[393] In para 18, the Plaintiffs stated that they had "lost their investment in Lamanator shares together with a loss of a reasonable rate of return" (para 18).

[394] The Plaintiffs sought damages in the amount of $179,000, plus interest (paras 25, 29). Damages were evidently set by reference to the purchase price. The Plaintiffs also sought an order directing the Defendants to purchase the Plaintiffs' shares for $179,000 (para 27), a remedy available under s. 242(3)(g).

[395] While the Plaintiffs claimed relief for oppression (para 26) and an accounting (para 30), the Plaintiffs did not specifically seek an order under s. 242(3) respecting financial statements.

[396] The entire focus of the Statement of Claim and the evidence provided by the Plaintiffs was on the circumstances surrounding and relating to the sale of the shares to the Plaintiffs. The Plaintiffs claimed misrepresentation before sale and an ongoing failure to correct the effects of the misrepresentation post-sale in a timely manner. The Plaintiffs claimed that the sale itself was illegal as violating the *Securities Act*. The conspiracy and "unjust enrichment" claims were only re-characterizations of the complaints about the pre-sale representations and lack of timely post-sale correction.

[397] The alleged oppression related to the failure to produce information that contributed to the ongoing misrepresentation of Lamanator's financial position.

[398] In essence, the claim was "You told us this company would make money, it did not make money, and you lied to us."

[399] I agree with Applications Judge Schlosser that the what the lawsuit clearly demonstrated was that the Plaintiffs wanted their money back (Decision para 7). The Plaintiffs' claim was about disappointed expectations relating to the performance of Lamanator.

[400] The oppression remedy should not be used to support the purely personal interests of the Plaintiffs.

[401] I had found that the Plaintiffs' tort and contract claims had no merit. These claims cannot be reanimated by injecting an oppression remedy.

[402] But if I am found to have incorrectly characterized the Plaintiffs' remaining claims, I will turn to the final issues, whether the financial irregularities that have been identified by the Plaintiffs show that their oppression claim has merit, without the need for supplementation by audited financial statements.

D. Opaque Financial Disclosure and Oppression

[403] The Plaintiffs pointed to what was described as the Defendant's "opaque financial disclosure." The following summative material was set out at paras 25-29 of PPB [footnotes omitted]:

> 24. Anthony Thompson has admitted under oath that he withdrew funds from a Lamanator's US based bank account which doesn't have corresponding expenses or accounting information.
>
> 25. The financial records produced by the Defendants show $983,675.38 in credit card payments to 22 different credit cards.

> 26. Some of these payments are in large amounts for purposes that are not apparent from the records produced. There also appear to be numerous payments made to Morinville Flooring Centre, a company also controlled by the Thompsons.
>
> 27. It is not clear from the records what the purpose of these payments was, and what portion of the payments related to Lamanator's expenses. There are numerous journal entries in Lamanator's ledger … that the Plaintiffs do not understand. There are hundreds of journal entries with most having no explanation or reason as to why they were done.
>
> 28. The financials provided by the Defendants include unlinked references, for example general ledger entries for expenses but missing months of bank statements in their production.
>
> 29. There are many payments to 1382771 Alta Ltd, a company owned by Anthony Thompson and Barry McQuay, the company accountant, with no explicable corresponding entries.

[404] At PPB para 31, the Plaintiffs list 35 specific examples of "irregularities." I will not reproduce these. Plaintiffs' counsel referred to the "litany of irregularities" that "cry out for explanation."

[405] Do these irregularities by themselves (without audited financial statements) show that there is a genuine issue of oppression requiring trial?

[406] There are three reasons why the identified irregularities do not show that there is a genuine issue of oppression requiring trial.

1. Assessment of the Irregularities

[407] First, while the Plaintiffs pointed out irregularities, the Plaintiffs did not allege that these irregularities supported any specific finding of oppression. The Plaintiffs' view was that it would be premature to dismiss its claims without the evidential benefit of audited financial statements. On the issue of showing wrongdoing, the Plaintiffs' position was, in effect, "maybe but not yet." On the Plaintiffs' own evidence on the record at this point there is no merit to the claim of oppression.

[408] I observe that the Plaintiffs had the Defendants' records for a substantial period of time, two years according to Defendants' counsel. But the Plaintiffs had not advanced beyond identifying the irregularities, the gaps.

[409] I observe as well that this is not a case of a non-moving party not having access to information in the moving party's custody. This is not a ***P Burns Resources*** case, with the Defendants having all the knowledge and all the documents related to the Plaintiffs' claim. Again, on the record, the Defendants have provided "every scrap of paper" to the Plaintiffs, all records that could be found.

[410] However, one could reasonably regard the Plaintiffs' evidence to this point, the list in para 31, as being at least suspicious (Applications Judge Schlosser acknowledged this at 22T 31.27-30 and in the Decision). One might reasonably conclude that, considering the Plaintiffs' evidence alone, an inference could be drawn to oppressive conduct in the nature of misusing corporate funds, to treating Lamanator like a "one-way valve" with resources flowing into and out of Lamanator without benefit to Lamanator: see ***R Floden Services Ltd v Solomon***, 2015 ABQB 450 at para 51. At least in the absence of any response by the Defendants, one could

conclude that the Plaintiffs showed on the evidence that there was a genuine issue respecting oppression requiring trial.

[411] But there was response evidence.

2. Defence Explanations

[412] Second, the Defendants provided explanations for the Plaintiffs' concerns. The Defence not only provided documentation to the Plaintiffs but Anthony in particular was questioned multiple times.

[413] I won't match up all the Plaintiffs' questions with the corresponding Defence explanations but I will provide a sample. Generally, the tenor of Anthony's evidence was that Lamanator was struggling. Lamanator was trying to sell its product, but production, distribution, and sales cost money, more money than Lamanator had at hand or could generate through typical business borrowing from financial institutions.

[414] The Plaintiffs were concerned with credit card payments (PPB (e.g.) para 25). Because it lacked bank financing, Lamanator had to finance its business by relying on the credit cards of two shareholders. Credit cards would be used to pay expenses. This generated informal shareholder loans to Lamanator that had to be paid back (QOU-A 49.18, 50.1-13, 51.16-52.14, 53.17-54.17). Anthony said that "Lamanator never had enough money to run. So we were always funding it, so it always had to pay us back in order to keep the company alive" (QOU-A 51.16-52.14). Barry McQuay's questioning confirmed the credit-card financing (QBM 20.6-21.17).

[415] There were numerous oddities in data entries in QuickBooks. Anthony and Teresita were doing the work themselves. They didn't hire a bookkeeper. They didn't have enough experience with QuickBooks (QOU-A 50.14-51.5).

[416] Payments were indeed made to MFC. MFC was an established business. It supported Lamanator. It paid Lamanator's bills. It would have to be repaid (QOU-A 55.16-26).

[417] Lamanator did not have employees. MFC employees would work for Lamanator and MFC would invoice Lamanator for their services (QBM 22.9-27, QOU-A 61.4-19). Some ledger entries that might appear to be payments to Anthony or Teresita were not in fact for them. Lamanator hired people to work in the warehouse. "We paid ourselves to pay them cash" (QOU-A 60.1-13).

[418] The Plaintiffs were concerned with Lamanator putting a deposit on a building (CEA para 15(b)). Four shareholders purchased a building, held by 1382771 Alberta Ltd. The building was leased back to MFC and Lamanator (QBM 7.17-27, QDAT 34.17-35.7). Both Lamanator and MFC paid rent for the building. There were no formal leases until the building got remortgaged (QBM 8.11-20). No Lamanator funds were used to purchase the building (it didn't have any funds). The downpayment came from the four shareholders personally. The purchase price flowed through a Lamanator account (QOU-A 54.18-55.9, 64.16-26, 71.3-27). Mr. McQuay did not know why this was done (QBM 21.18-22.8). There was no evidence of any advantage of any sort to Lamanator for serving as conduit.

[419] The Plaintiffs were concerned about a US bank account and US sales (PPB para 24). Lamanator had a US bank account in its early days for travel (tradeshow) purposes but that account was closed (QOU-A 75.3-16). Lamanator does sell to an online distributor in the US. Lamanator is the supplier only. It does not run the US business. That is run by the distributor.

There is no US bank account through which US or online sales are deposited. There is one bank account in Canada for Lamanator (QOU-A 56.8-18, 57.12-13, 59.8-15).

[420] Neither Anthony nor Teresita took any "wages or salary" from Lamanator until recently (AT-A1 para 14; QOU-A 59.26, 62.2-17 (after 12 years)).

[421] The Plaintiffs were not satisfied with Lamanator's accounting. I find, however, that the Defence responses to the Plaintiffs' concerns were plausible, internally coherent, and not contradicted. The conflict in the evidence is between inferences that might be drawn from the irregularities pointed out by the Plaintiffs and the Defence evidence directly addressing the Plaintiffs' questions about these irregularities. I find that on the record the Defendants have rebutted the "suspicious" inferences that might be considered to arise from the accounting irregularities.

[422] I further find that there was no suggestion (aside from the plea for the audited financial statements) that there would be any better evidence at trial than what we have on the record in this application. I add that an auditor could not provide any information relating to the explanations for the irregularities given by the Defendants.

[423] There have been affidavits and questioning, responses to undertakings and questioning. The evidential ground has been thoroughly tilled. We can expect no more evidential yield than what was on the record in these proceedings.

[424] The Defendants have rebutted the potential inferences of suspicion from the irregularities identified by the Plaintiffs.

[425] I find that there is no merit to the contention that the irregularities identified by the Plaintiffs show that there is a genuine issue for trial. There is no genuine issue for trial concerning oppression.

3. The Plaintiffs' Interest

[426] Third, while the Plaintiffs have raised concerns as shareholders respecting the opaque record keeping, the Plaintiffs have not identified any interest personal to them as "minority" shareholders that is being adversely affected. That is, the record keeping is relevant to the interests of all shareholders, not just the Plaintiffs' interests. The oppression remedy does not protect the general interests of shareholders. See the discussion above, particularly ***Shefsky*** at paras 40-41.

[427] The Plaintiffs' concerns might have been properly addressed through a derivative action.

[428] That is, even if the Plaintiffs' contentions had merit, and I have found that their contentions do not have merit, their contentions do not support their action for oppression.

4. Conclusion

[429] I therefore find that the evidence of what the Plaintiffs described as "opaque financial disclosure" does not show that there is a genuine issue for trial.

E. Limitations

[430] I have found that on the record the Plaintiffs have not shown that there are any genuine issues requiring a trial. None of their contentions have merit. These determinations were made

without reference to the *Limitations Act*. The Plaintiffs' claims do not have merit, even if they were brought within the limitation period.

[431] Limitations issues had some prominence in the parties' submissions, so I will offer a few observations, keeping in mind that resolution of the limitations issues was not necessary for the dismissal of the Plaintiffs' claims.

1. Statute and Interpretation

(a) *Limitations Act*

[432] The relevant provisions of the *Limitations Act* are as follows:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a remedial order had occurred,
> > >
> > > (ii) that the injury was attributable to conduct of the defendant, and
> > >
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding …
>
> the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
>
> (5) Under this section,
>
> > (a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a) ….

[433] Under s. 1(e), "injury" means …

> (iii) economic loss,
>
> (iv) non-performance of an obligation, or
>
> (v) in the absence of any of the above, the breach of a duty ….

(b) Interpretation

[434] The principles for interpreting and applying s. 3(1) of the Act are well-established, and include the following:

(i) Cumulative Test

[435] For the 2-year limitation to begin to run, the claimant must have known or in the circumstances ought to have known all three elements of s. 3(1)(a) – the injury occurred, the injury was attributable to the conduct of the defendant, and the injury (assuming the defendant's liability) warranted bringing a proceeding.

(ii) Knew or Ought to Have Known

[436] The three elements of discoverability in s. 3(1)(a) must be considered in relation to what the claimant "knew, or in the circumstances ought to have known." The subjective test and the objective test are alternatives. Time starts to run as soon as one of them is met: ***Gayton v Lacasse***, 2010 ABCA 123 at para 61; ***Gratton v Shaw***, 2011 ABCA 340 at para 32.

[437] Knowledge of the s. 3(1) elements requires more than mere suspicion but less than perfect knowledge: ***Kydd v Abolarin***, 2011 ABQB 690, Macklin J at paras 36, 29; ***Sztuczka v Knebel***, 2012 ABQB 72, Mason M at para 11(3); ***Rotzang v CIBC World Markets*** at para 84(QB); ***Condominium Plan No 0625385 v Oxford Grande Ltd***, 2017 ABQB 316, Rooke ACJ at para 20. There is no statutory requirement that a claimant have "clear information" respecting an injury: ***Canadian Natural Resources Ltd v Jensen Resources Ltd***, 2013 ABCA 399 at para 41.

[438] The test for "ought to have known" is that of "reasonable diligence" analyzed in the light of the three s. 3(1)(a) factors: ***James H Meek, Jr Trust v San Juan Resources Inc***, 2005 ABCA 448, Hunt JA at para 21; ***De Shazo v Nations Energy Co***, 2005 ABCA 241 at para 28; ***Yugraneft Corp v Rexx Management Corp***, 2010 SCC 19 at para 60; ***Oxford Grande*** at para 20; ***Kydd v Abolarin*** at para 34. That is, as stated by Justice Poelman in ***McDonnell v Csaki*** at para 28,

> [28] What a plaintiff "ought to have known" also incorporates an expectation of reasonable diligence by the plaintiff or his or her counsel[: ***Central Trust Co v Rafuse***, [1986] 2 SCR 147, para 77; ***Peixeiro v Haberman***, [1997] 3 SCR 549, para 42]. It will not suffice to wait idly for information to come to hand. Some research and inquiry may be expected of a reasonable plaintiff as part of determining what ought to have been known[: ***Saxton v Credit Union Deposit Guarantee Corporation***, 2004 ABQB 631, paras 29 and 30; ***Owners: Condominium Plan 9421549 v Main Street Developments Ltd.***, 2004 ABQB 962, revd on other grounds 2006 ABCA 194, para 74(QB)]. The burden is not high to establish at least a triable issue on due diligence, but it is usually expected that the plaintiff to put forward some evidence of steps taken to ascertain the identity of tortfeasors and give a reasonable explanation for why information was not obtainable with due diligence earlier – and doing nothing for two years after an accident except possibly requesting a police report will not usually amount to due diligence [***Wakelin v Gourley*** (2005), 76 OR 272 (Ont M), paras 25 and 26; affirmed, [2006] OJ No 2764]. [footnotes omitted but citations added to text]

What a claimant knew will inform what the claimant ought to have known in the circumstances.

(iii) Facts, Not Law, Not Assurance of Success

[439] Discovery relates to the facts, not the applicable law or any assurance of success: ***Weir-Jones Technical Services*** at para 56; ***Templanza v Wolfman***, 2016 ABCA 1 at para 19, leave to appeal refused [2016] 2 SCR xi; ***De Shazo v Nations Energy*** at para 31; ***Main Street Developments*** at paras 55-56(QB). Thus, "knowledge" refers to knowledge of the facts supporting a claim, not knowledge that, in law, the facts support a claim: ***Laasch v Turenne***, 2012 ABCA 32 at para 24; ***CNRL v Jensen Resources*** at para 43; ***Stobbe v Paramount Investments Inc***, 2013 ABCA 384 at para 15; ***Luscar Ltd v Pembina Resources Ltd***, 1994 ABCA 356 at para 129.

(iv) Injury

[440] With respect to s. 3(1)(a)(i), what is required is knowledge of the injury, not knowledge of whether there is a cause of action: ***Oxford Grande*** at para 20; ***Sun Gro Horticulture Canada Ltd v Alberta Metal Building Sales Inc***, 2006 ABCA 243 at para 11.

[441] Further with respect to s. 3(1)(a)(i), what is required is knowledge of the injury not knowledge of the cause of the injury: ***Oxford Grande*** at para 12.

(v) Warranted

[442] The "warranted" element requires a type of cost-benefit assessment. The assessment is not finely balanced, as if an action were warranted as soon as "the costs of the action are just outweighed by the benefits:" ***Novak v Bond***, [1999] 1 SCR 808, McLachlin J, as she then was, at para 87.

[443] According to Justice McLachlin in ***Novak v Bond***, the test for whether injuries "warrant" bringing a proceeding is whether

> a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could – not necessarily should – bring an action. This approach is neither purely subjective nor purely objective. The question becomes: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. Purely tactical considerations have no place in this analysis.

See ***JN v GJK***, 2004 ABCA 394 at para 14; ***Laasch v Turenne*** at para 19.

[444] On the subjective/objective features of this approach, Justice Hunt-McDonald wrote in ***Currie v Craig***, 2018 ABQB 46 at paras 40-41 that

> [40] The Alberta Law Reform Institute's report on limitations (*Alberta Law Reform Institute, Limitations, Report No. 55* (December 1989) [ALRI Report]) has been relied on by the courts when interpreting the Limitations Act: see e.g. *Keyland Development Corporation v Rocky View (Municipal District No 44)*, 2016 ABQB 735 at paras 107, 109. The ALRI Report states that the discovery period "will not begin until the claimant first knew that his injury was sufficiently serious to have warranted bringing a proceeding" and that the effect of the discovery rule is to "invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time ...": ALRI Report at 24, 33.
>
> [41] Accordingly, there are subjective and objective elements in the analysis of when an action must be commenced. For the subjective part of the test, the Court must examine the situation from the plaintiff's perspective; the Court must then determine objectively when a proceeding is warranted: ***RP Choma Financial and Associates Inc v McDougall***, 2008 ABQB 359 at para 51.

[445] Factors relevant to s. 3(1)(a)(iii) concern not whether the claimant knew or should have known about the injury but whether there were circumstances that did not warrant (or urged or militated against) bringing an action.

[446] The "warranted" factors relate to a claimant's knowledge, economic factors, and any practical impediments faced by the claimant. As for "knowledge," Justice Hunt-McDonald cautioned in ***Currie v Craig*** at para 42 that

> [42] It is clear that s. 3(1)(a)(iii) allows for situations where knowledge of the injury is not sufficient to immediately warrant bringing a proceeding. The courts may decide in such cases to delay the start of the limitation period accordingly: ***Yugraneft Corp v Rexx Management Corp*** … at para 58.

[447] Justice Clackson canvassed economic factors in ***Main Street Developments*** at para 63(QB):

> It is not every nick, bump, bruise, failing or deficiency that warrants action. Thankfully, we Canadians are still reasonably tolerant and non litigious. The question of whether an injury warrants proceedings is not strictly an issue of fault, or even potential economic gain. What warrants proceedings embraces a consideration of the extent of the injury in comparison to the economics of a prospective action. This assessment involves a blended objective/subjective analysis.

And at para 72(QB):

> [72] In my view, it would have been reasonable to consider the following matters: the extent of the damage, the cost of remedying the damage, the likelihood of success, the cost of proceedings, the likely time necessary to achieve success, the time to be personally expended by the Board's members in pursing action, the willingness of the individual owners to finance the litigation, the complexity of the potential litigation, whether the entire costs of the proceedings would have to be paid up front, and whether all or a portion of the litigation could be undertaken by contingency arrangement. No doubt, there are other matters which it might have been reasonable to consider in this case. However, the foregoing is representative of the kind of issues that a cost benefit analysis might reasonably encompass in this Plaintiff's circumstances.

See also ***R P Choma Financial v McDougall***, Hanebury M at paras 48 – 49.

[448] Justice Jones discussed a claimant's "practical ability" to bring an action in ***Champagne v Sidorsky***, 2017 ABQB 557 at paras 33-34:

> [33] The Alberta Court of Appeal first noted in ***N.(J.) v Kozens***, 2004 ABCA 394 at para 14 that the phrase "warrants bringing a proceeding" involves determining the point at which a Plaintiff could reasonably have brought an action. In ***Amack v Yu***, 2015 ABCA 147 at para 44, the court explained that the analysis is not narrowly confined to economic considerations. The phrase "could reasonably have brought an action" raises the question of practical ability. In each individual case, the Court explained, the judge must determine whether particular circumstances or interests have the practical effect of preventing a plaintiff from being able to commence an action.
>
> [34] In ***Gayton***, the court quoted from para 15 of ***Kozens*** to provide some examples of when a Plaintiff may not reasonably be able to bring an action, when viewed objectively with regard to the Plaintiff's own situation. These include when:

> (a) the costs and strains of litigation would be overwhelming to him or her;
>
> (b) the possible damages recoverable would be minimal or speculative at best; or,
>
> (c) other personal circumstances combined to make it unfeasible to initiate an action.

See ***Novak v Bond*** at para 40.

2. The Non-Oppression Claims

[449] I'll consider first the non-oppression claims (not including the *Securities Act* claim that had its own limitation period).

(a) Christopher and Julia

(i) Anna as Agent

[450] I found that Anna was the agent for Christopher and Julia.

[451] Her knowledge was imputed to them. That would include her knowledge of Lamanator's affairs from 2007 to 2012, and from 2012 until 2016.

[452] Under s 3(2)(b)(ii) of the *Limitations Act*,

> 3(2) The limitation period provided by subsection (1)(a) or (1.1)(a) begins
>
> (b) against a principal when either
>
> (i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), or
>
> (ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) or (1.1)(a) to the principal, first actually acquired that knowledge ….

[453] However, under s. 5.1(2),

> 5.1(2) Except as otherwise provided in this section, the operation of limitation periods provided by this Act is suspended during the period of time that the claimant is a minor.

[454] Christopher and Julia were adults in 2012. They retained counsel in 2016 and the Statement of Claim was filed in May 2017.

[455] In February 2012, Christopher and Julia knew they owned Lamanator shares. Through the knowledge imputed to them through Anna and their personal knowledge they would know the circumstances under which they acquired the shares.

[456] In addition, Anna's evidence was that she discussed the 2010 buy-out memo with Christopher and Julia. That memo was at least some evidence of Lamanator's financial difficulties (DBB paras 54-55).

[457] Even with information provided by or through Anna, Christopher and Julia may not have known whether an action against Lamanator was warranted. If they were given a year to acquire the information (as may be inferred from the actual time to retainer to the time to filing), the action should have been commenced by February 2015. Even if the time to determine whether

the action was warranted were extended by a year, the action should have been commenced by February 2016.

[458] As regards the non-oppression claims, then, their claims were statute-barred.

(ii) No Agent

[459] If Anna was not the agent for Christopher and Julia, there would be no imputing of her knowledge to them.

[460] They became adults in 2012. They had known they owned shares in Lamanator since 2007. They had been exposed to the 2010 buy-out memo. As of 2012 they ought to have addressed their ownership of the Lamanator shares. An argument was made that they "ought to have known" about their injury, the cause of their injury, and whether bringing proceedings was warranted within a year or two after becoming adults. They were not reasonably diligent.

[461] In ***Canadian Natural Resources Limited v Husky Oil Operations Limited***, 2020 ABCA 386 the Court of Appeal wrote as follows at paras 31-33:

> [31] The discovery principle requires a plaintiff to exercise reasonable diligence in uncovering the material facts upon which its claims are based: *Central Trust Co v Rafuse*, [1986] 2 SCR 147, 224, 31 DLR (4th) 481; *Hill v Alberta (Registrar, South Alberta Land Registration District)*, 1993 ABCA 75, para 8, 100 DLR (4th) 331, leave to appeal denied, [1994] 1 SCR viii. The discovery principle does not require perfect knowledge: *De Shazo v Nations Energy Company Ltd*, 2005 ABCA 241, para 31, 256 DLR (4th) 502.
>
> [32] The burden on the plaintiff is not high; the plaintiff must "establish at least a triable issue on due diligence, but it is usually expected that the plaintiff put forward some evidence of steps taken … and give a reasonable explanation for why information was not obtainable with due diligence earlier …": *Canadian Natural Resources v Ashland Inc*, 2018 ABQB 1042 (M), paras 13-14, citing *McDonnell v Csaki*, 2014 ABQB 452, para 28.
>
> [33] This Court has said that once the plaintiff "had access to all of the facts required to determine that they had a cause of action" the limitation period would begin to run, and the fact that the plaintiff did not by due diligence actually discover that they had a cause of action "is not a burden which the [defendant] must bear": *Luscar Ltd v Pembina Resources Limited*, 1994 ABCA 356, para 138, [1995] 2 WWR 153.

[462] Justice Feasby addressed the due diligence issue in the summary dismissal context, confirming that the moving party has the burden of showing there is no triable issue relating to due diligence (the burden is not on the non-moving party to prove due diligence but for the moving party to prove that there is no merit to the contention that there was due diligence): ***Rick Balbi Architect Ltd v Condominium Corporation No 0824320***, 2023 ABKB 241 at para 14. Justice Feasby commented that "the point holds that the plaintiff is not held to a high standard on the question of reasonable diligence."

[463] On the record, if Anna was not the agent for Christopher and Julia, I would find that they were not reasonably diligent and there was no triable issue as to their reasonable diligence in determining whether they had a claim against Lamanator. With reasonable diligence they could have acquired the information they needed and brought their action by February 2016. Again, I

would find that their non-oppression claims were without merit as having been brought outside the limitation period.

(b) Stephen

[464] In my opinion, Anna was not properly constituted as the agent for Stephen. My "No Agent" comments respecting Christopher and Julia apply to Stephen. I find that his non-oppression claims were without merit as having been brought outside the limitation period.

3. Oppression Claim

[465] My determination that there was no merit to the Plaintiffs' oppression claims, no genuine oppression issue for trial, spares me from determining the limitation issues relating to oppression.

[466] The Plaintiffs relied on ***Seidel v Kerr*** and on the oppression having formed a continuing source of conduct. Reference was made to s 3(3) of the *Limitations Act*. However, my reading of this provision is that it applies to the "ultimate" limitation period, to subsections (1)(b) and (1.1)(b) rather than (1)(a) (the 2-year period). Section 3(3) is irrelevant.

[467] Regardless, argument did not explore whether the ***Seidel v Kerr*** approach to the "continuing conduct" depended on a finding of fraudulent concealment, which I would not have found in the present circumstances. Neither did argument explore whether the oppression should be treated in a unitary manner for limitations purposes or whether elements should be parsed out as being "once and for all" breaches or "periodic" breaches as opposed to a single continuing or rolling breach (the "continuing conduct" equivalent under s 3(1)(a)): see, e.g., ***Meyer v Altex Energy Ltd***, 2021 ABQB 582, Gates J at para 29.

[468] I will not address the oppression limitation issues further.

VII. Conclusion

[469] The Plaintiffs' appeal is dismissed. I confirm that I have found, on a balance of probabilities, that none of the Plaintiffs' claims has merit and that on the record there is no genuine issue for trial. The cross-application before Applications Judge Schlosser for the production of audited financial statements was properly dismissed and is dismissed.

VIII. Costs

[470] The Defendants cross-appealed Application Judge Schlosser's costs decision.

[471] The final two paragraphs of the Decision were as follows:

> [10] The application for summary dismissal is allowed. The cross-application for audited financial statements is dismissed.
>
> [11] There shall be no costs of the application or the action.

[472] I am guided by Justice Malik's observations in ***1490703 Alberta Ltd v Chahal***, 2021 ABQB 853 at para 4:

> [4] I acknowledge that an appeal from a Master's decision is *de novo* and that the standard of review is correctness on all issues …. However, costs awards are discretionary, are entitled to deference, and should not be interfered with absent error

(*864503 Alberta Inc. v Genco Place Properties Ltd.*, 2019 ABCA 248 at para 11; *Coley v Payne*, 2015 ABQB 269 at para 20).

[473] With the greatest of respect, I find that the costs decision was founded on error.

[474] Submissions were not heard on costs. Evidence relevant to costs was not adduced, particularly two formal offers to settle and two *Calderbank* offers.

[475] One might speculate about the reasons for the costs determination (as did Plaintiffs' counsel, in the abstract not unreasonably – "it's a wash"), but the Decision itself provides no foundation for an analytical reconstruction of the reasons for the costs determination: see ***FIC Real Estate Fund Ltd v Phoenix Land Ventures Ltd***, 2016 ABCA 303 at para 3; ***Cook v Calgary Metal Ltd***, 2003 ABQB 115, Sullivan J at paras 8-9.

[476] I shall therefore determine costs afresh. I'll address the governing principles then assess costs.

A. *Rules of Court* and Interpretation

1. *Rules of Court*

[477] The key rules are rr 10.29, 10.31, 10.33, 4.24, and 4.29:

> 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to
>
> > (a) the Court's general discretion under rule 10.31,
> >
> > (b) the assessment officer's discretion under rule 10.41 ….
>
> 10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
>
> > (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
> >
> > (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
> >
> > > (i) an indemnity to a party for that party's lawyer's charges, or
> > >
> > > (ii) a lump sum instead of or in addition to assessed costs ….
>
> (3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:
>
> > (a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C …;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action. [emphasis added]

10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct;

(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

4.24(1) At any time after a statement of claim ... is filed, but 10 days or more before

(a) a streamlined trial is scheduled to be heard,

(b) a trial is scheduled to start, or

(c) an application is scheduled to be heard or considered,

one party may serve on the party to whom the offer is made a formal offer to settle the action or a claim in the action ….

4.29(2) Subject to subrule (4), if a defendant makes a formal offer to settle that is not accepted and a judgment or order in the action is made that is equal to or more favourable to the defendant than the offer, the defendant is entitled to costs for all steps taken in the action in relation to the action or claim after service of the offer.

(3) A defendant is entitled to double the costs provided for in subrule (2), excluding disbursements, if

(a) subrule (2) applies, and

(b) the action or claim that is the subject of the formal offer to settle is dismissed.

2. Interpretation

(a) The Approach to Costs Determinations

[478] The Court of Appeal has provided guidance respecting costs determinations in ***McAllister v Calgary (City)***, 2021 ABCA 25. For a background discussion, see ***GO Community Centre v Clark Builders and Stantec Consulting Ltd***, 2020 ABQB 203 at paras 56-163.

[479] Under r 10.29(1), a successful party is *prima facie* entitled to a costs award: ***McAllister*** at para 21.

[480] The target of an appropriate costs award is an award of "reasonable and proper costs that a party incurred," as referred to in r 10.31(1)(a): ***McAllister*** at paras 26, 62. At para 33, the Court of Appeal stated that "[a] 'reasonable and proper costs' award involves a payment by the unsuccessful party to the successful party to indemnify the successful party for expenses incurred as a result of the conduct of the unsuccessful party."

[481] At para 41, the Court of Appeal confirmed that "[i]n Alberta, the weight of authority is that party and party costs should normally represent partial indemnification of the successful party at a level approximating 40-50% of actual costs …." At para 51, the Court clarified that

> [51] …. we refrain from defining with any precision the level of indemnification required in any given case. All we say is that the level of indemnification must be both meaningful and reasonable. The court's discretion to move up or down from that level having regard to the factors set forth in Rule 10.33 or in Rule 10.2(1) remains intact. Also, the level of indemnification may be higher or lower than the 40-50% depending on how the litigation was conducted and other factors not necessarily having anything to do with the conduct of the litigation.

[482] A reasonable and proper costs award at the appropriate indemnification level may or may not rely on Schedule C to the rules. "[I]n making a costs award under 10.31(1)(a), as in this case,

the court is provided with a menu of orders it may make with respect to costs:" ***McAllister*** at para 25. "Schedule C is merely one of a number of options or tools that may be used to achieve the outcome of reasonable and proper costs under Rule 10.31(1)(a):" ***McAllister*** at paras 29, 53.

[483] Tariff amounts in Schedule C may be appropriate. "[A] multiple, proportion or fraction of an amount set out in … Schedule C" may be appropriate, as indicated r 10.31(3)(b): ***McAllister*** at paras 29, 59. An award of a percentage of assessed costs may be appropriate, as indicated in r 10.31(3)(d): ***McAllister*** at para 29.

[484] As for an award of a percentage of assessed costs, the Court of Appeal wrote as follows at para 46:

> [46] If the option of awarding costs as a percentage of assessed costs is chosen, the assessment of the costs may require a consideration of what is a reasonable amount which ought to have been charged for the services the successful party's lawyer rendered and that may require reference to the considerations set forth in Rule 10.2(1) which go into the determination of what constitutes a reasonable charge …. [T]o determine whether the costs incurred are reasonable and proper, they must be assessed, either by the party opposite, or by the judge or by an assessment officer. If it is the trial judge, then he or she should consider the reasonableness of both the legal services performed and the amounts charged for those services. Reasonable costs reasonably incurred is what the percentage must be based on. The incurring of the cost must be reasonable and the amount of the cost incurred must also be reasonable. As indicated above, the assessment may also be undertaken by the party opposite or, if the parties cannot reach an agreement on costs, the trial judge may direct an assessment of the legal costs by an assessment officer, pursuant to Rule 10.34. Rule 10.31(3)(d) contemplates such an assessment when it speaks of one party being ordered to pay the other "a percentage of <u>assessed</u> costs" (emphasis added).

[485] The Court of Appeal provided further clarification respecting percentage of assessed costs awards in ***Barkwell v McDonald***, 2023 ABCA 87 at para 55:

> [55] ***McAllister*** confirms that the discretion of a trial judge over costs extends to awarding a percentage of the solicitor and client costs incurred by the successful party. That does not, however, mean that the winning party can simply assert the quantum of the fees that was charged by counsel, and paid by the winning party. As ***McAllister*** recognized by sending the costs award in that case back to the trial judge, a detailed analysis is required to determine "reasonable and proper costs".

[486] "The overriding issue is proportionality:" ***Barkwell*** at para 57. The Court continued: "The winning party cannot simply claim a percentage of the fees paid if they are disproportionate to the issues and the amounts involved." In ***VLM v Dominey Estate***, 2023 ABCA 382 the Court of Appeal cautioned at para 9 that

> One of the dangers of a costs award based on a percentage of solicitor and client fees is that there is no clear disincentive to overly zealous, inefficient, or disproportionate litigation. In short, success is not a justification for disproportionate litigation.

[487] The Court further clarified in ***VLM*** at para 13 that

> [13] Even where the Court exercises its discretion to make a costs award based on a percentage of solicitor and client fees actually charged, it is not sufficient for the successful party to simply assert entitlement to the total obtained by multiplying hours

> times hourly rate: ***Barkwell (#1)*** at para. 60. Some justification is required for all the components of the fees claim, such as the hourly rate, the number of hours worked, the number of counsel involved, and the proportionality of the litigation ….

[488] Justice Pentelechuk stated the following in ***Petropoulos v Petropoulos***, 2023 ABCA 193 at para 18:

> [18] There is also a practical difficulty with Chris' claim of solicitor-client costs. A party seeking costs on this basis cannot simply assert a quantum of the fees charged by their counsel. The overriding issue is proportionality between the quantum of costs claimed and the issues and amounts involved in the litigation. Further, the party seeking solicitor-client costs should also provide the court with an assessment of the fees that would be ordered under Schedule C, which provides a rough measure of how much should have been incurred: ***Barkwell v McDonald***, 2023 ABCA 87 at paras 53-61; ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 at para 57. Here, none of the underlying information was provided. Absent was a proposed Bill of Costs on either a solicitor-client basis or under Schedule C.

[489] As Applications Judge Birkett noted in ***AG Clark Holdings Ltd v 1352986 Alberta Ltd***, 2024 ABKB 180 at para 86,

> [86] The Court of Appeal applied the principle of proportionality in its subsequent decision setting the cost award in ***Barkwell v McDonald***, 2023 ABCA 183 [***Barkwell #2***] at paragraph 74:
>
> > … As indicated in the appeal reasons, an award of party and party costs based on solicitor and client costs must be justified: 2023 ABCA 87 at paras. 52-61. The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay. The amount actually charged to the client is not definitive. The rates and amount of time invested must be justified. The costs awarded must be proportionate to the amounts in issue.

[490] And by way of a summary, see ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 at para 57:

> [57] As this Court recently stated in ***Barkwell v McDonald***, 2023 ABCA 87 at paras 53-61:
>
> - The discretion to award a percentage of solicitor-and-client costs does not mean the winning party can simply assert the quantum of the fees charged by counsel and paid by the winning party;
> - The overriding issue is proportionality, the winning party only being able to claim a percentage of the fees paid that are proportionate to the issues and the amounts involved;
> - Awarding 40-50% of solicitor-and-client costs does not necessarily refer to partial indemnity of the costs incurred and paid by the client, but rather to the costs that should reasonably have been incurred;
> - A party seeking a lump sum costs award should provide the court an assessment of the fees that would be ordered under Schedule C, which provides a rough measure of how much should have been incurred;

- In addition to the costs being reasonable as between solicitor and client, the court must consider whether the quantum represents an amount that the losing party in the litigation should reasonably be expected to pay to the winning party;

- Awarding costs based on a percentage of solicitor and client fees involves a number of factors, including those set out in Rules 10.2 and 10.33, as well as things like: whether the hourly rates charged were appropriate; whether the work was being done by lawyers of appropriate seniority; the number of counsel involved; the proportionality and necessity of pre-trial steps; and whether the ultimate fee was proportionate to the issues.

(b) Formal Offers to Settle

[491] The party receiving the offer bears the burden of establishing that an offer to settle should not reasonably have been accepted, that the party should not be penalized for not accepting the offer, or that the offer was not a "genuine" offer: ***Breen v Foremost Industries Ltd***, 2024 ABKB 9, Yamauchi J at para 35; ***Union Square Apartments Ltd v Academy Contractors Inc***, 2017 ABQB 151, Topolniski J at para 14; ***Kozak Estate (Re)***, 2018 ABQB 272 at para 67.

[492] Factors relevant to determining whether the offers are genuine include the following:

- whether (according to some authorities) the offer included an element of compromise
- whether the offer approximated or matched the outcome or result at trial
- the relationship of the offer to the relief claimed
- the timing of the offer, its proximity to the commencement of litigation or the commencement of the trial
- the reasonableness or "objective merit" of the offer, based on the information available to the parties at the time the offer was made and whether the offer reflected the relative strength of the parties' positions
- the "subjective" honesty or good faith of the offering party or whether, as an inference from the foregoing or other factors, the offer cannot have been made with the expectation that it would be accepted by the other party or the offer was made solely to invoke the double costs provision as a "no-risk" litigation tactic.

See ***Kozak Estate*** at para 79; ***Breen v Foremost Industries*** at para 36.

B. Assessment

1. Successful Party

[493] The Defendants were the successful parties. The Defendants were wholly successful in the appeal.

2. Formal Offers

(a) First Offer

[494] The first formal offer to settle was sent to the Plaintiffs on August 9, 2017. The offer was a payment by the Defendants to the Plaintiffs of $5,985 all-inclusive (LCA tabs A and B).

[495] I do not consider this to be a genuine offer. It was sent not long after the Statement of Claim was filed in May 2017, before questioning and document production. I do not consider the

offer to have reflected an informed view of the respective strengths of the parties' positions. The amount of the offer was very low.

(b) Second Offer

[496] The second formal offer to settle was sent to the Plaintiffs on January 29, 2021. The offer was a payment by the Defendants to the Plaintiffs of $15,000 all-inclusive (LCA tab C).

[497] I consider this to be a genuine offer. This offer was provided after substantial questioning and document production had occurred. The Defendants were in a position to have an informed view of the respective strengths of the parties' positions. The Defendants had already applied for summary dismissal. The amount of the offer was still low, although an improvement on the first offer. The offer reflected the Plaintiffs' low prospects of success in the pending summary dismissal application and anticipated the result of that application.

3. Informal Offers

(a) Law

[498] A rules amendment in 2020 added para (h) to r 10.33, "any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5." This confirmed the previous jurisprudence that informal offers do not have automatic costs consequences but are relevant to the exercise of discretion respecting costs: ***Bruen v University of Calgary***, 2019 ABCA 275 at para 7.

[499] Justice Devlin wrote the following respecting the nature and effect of informal offers in ***ILI's Painting Services Ltd v Homes by Bellia Inc***, 2020 ABQB 372 at paras 26-27:

> [26] What matters in the modern approach is that the spirit of r 1.2 is honoured in clear and functional settlement communications. All *bona fide* offers of settlement are to be taken seriously and rejected at the intransigent party's own risk. No magic words are needed.
>
> [27] Therefore, the Court should undertake the examination summarized by Justice Loparco in *Kent v MacDonald*, 2020 ABQB 29 at para 16, where she held that informal offers should operate to enhance costs where:
>
> a) the offer was a reasonable, genuine compromise;
>
> b) it gave a cost advantage if accepted;
>
> c) adequate time for consideration was provided;
>
> d) the offer was unreasonably rejected; and
>
> e) the party making the offer fared better than if the offer was accepted.

In earlier jurisprudence, additional factors were whether

- the offer was clear, precise, and certain in its terms; and
- the offer was identified as a Calderbank Offer with a clear statement that it would be submitted to the court for costs consideration.

See ***Nielsen-Daigle v Nielsen-Daigle***, 2020 ABQB 84 at para 18.

(b) Offers

[500] The first informal offer was sent on May 25, 2021 (LCA tab D). The offer concerned the Plaintiffs' cross-application for audited financial statements. It proposed the preparation of audited financial statements for Lamanator for 2019 and 2020, with the parties sharing the cost of the audit 50/50. Logistics of the auditor retainer were set out. The offer was expressly provided as a *Calderbank* offer. The offer also referred to the Plaintiffs amending their Statement of Claim to remove the fraud claims and claims that were out of time. The offer stated that it may be referred to in (*inter alia*) costs submissions.

[501] The second informal offer was sent on December 24, 2021 (LCA tab E). The offer was to settle the Plaintiffs' cross-application for audited financial statements. It too proposed that the parties share the cost of audited financial statements for Lamator, 50/50, for 2019 and 2020. The Defendants would adjourn its summary dismissal application until the audited financial statements had been prepared and reviewed by the parties. The offer was expressly provided as a *Calderbank* offer and the Defendants reserved the right to refer to the offer once "costs are in discussion."

[502] This offer was provided 10 days and only 10 days before the January 5, 2022 application before Applications Judge Schlosser. The offer was, barely, within the 10-day r 4.24(1) notice period. I do observe that the bulk of the notice period was over the December and New Year's holidays. The Plaintiffs' ability to respond to this offer was impaired and the strength of the offer was impaired. It was not accepted, though, and its terms were similar to the earlier 2021 informal offer.

(c) Assessment of Informal Offers

[503] I consider both informal offers to settle the cross-application for audited financial statements as operative to enhance costs. Given its timing, the second served mainly to reinforce the first offer. The offers were reasonable and demonstrated a genuine compromise – some audited financial statements would be prepared, more than the Defendants would want prepared, fewer than the Plaintiffs would want prepared. The cost would be shared 50/50. There would be a recent account of Lamanator's financial circumstances in the audited form that the Plaintiffs desired. The information would supplement the financial information already produced to the Plaintiffs. The information would be relevant not only to the merits of the cross-application but to the objective valuation of the Plaintiffs' Lamanator shares, in turn relevant to the settlement of the litigation as a whole.

4. Costs Determination

[504] The Defendants sought a costs award calculated by reference to actual solicitor-client costs rather than Schedule C. Reference was made to "full indemnity" (DDCB para 54) and to 100% of legal costs (DDCB at para 49) or in the alternative 65% of solicitor-client costs (DDCB para 54).

[505] A bill of costs was not provided, although a willingness to provide one was expressed (DDCB para 46). I find no fault for the failure to provide a bill of costs although the jurisprudence now tends to require bills of costs when solicitor-client-based costs are sought (e.g., ***Petropoulos v Petropoulos*** at para 18). The jurisprudence has evolved rapidly.

[506] It was stated that Lamanator's actual costs have exceeded $100,000 (DDCB para 46). That disclosure did raise concerns about the proportionality of a costs award based on actual costs, given that the principal amount claimed by the Plaintiffs was $170,000.

[507] I have taken into account that this litigation could be regarded as protracted, having started in 2017, but many cases take longer to get to resolution. A final determination was reached before Applications Judge Schlosser and now an appeal has followed, but neither appearance was a trial, neither involved *viva voce* evidence, and neither took more than a day. This case involved significant record production and multiple pre-trial questionings. There were factual complexities, not so much concerning what people did but what the numbers meant and what business realities were behind the numbers. Nonetheless, I would not say that the factual complexities were extraordinary. There were, at least in my opinion, an unusual number of legal issues and again, at least in my opinion, the legal issues were challenging.

[508] The Defendants emphasized and I agree that the legal complexities and the work required to address those complexities were increased, and unnecessarily so, by the Plaintiffs' failure to amend their Statement of Claim or to expressly confirm in advance of proceedings that they were not pursuing the non-oppression causes of action. I find that the failure to focus their allegations brought the Plaintiffs within r 10.33(2)(a) and (b):

> (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
>
> (b) a party's denial of or refusal to admit anything that should have been admitted.

[509] In my opinion, having regard to the foregoing considerations, a reasonable, proper, and proportional costs award can and should be crafted under Schedule C.

[510] Costs will fall under Column 2. To take into account in particular the complexity of matters and the failure of the Plaintiffs to reduce the complexity, as in my opinion they should have, costs under Column 2 shall be subject to a multiplier of 1.5.

[511] To take into account the second formal offer, the Defendants shall be entitled to double costs for all steps after January 29, 2021. That is, the costs under Column 2 shall be subject to a multiplier of 3 for steps taken after January 29, 2021.

[512] To take into account the two *Calderbank* offers, the Defendants shall be entitled to an additional 0.25 multiplier for all steps after May 25, 2021. That is, the costs under Column 2 shall be subject to a multiplier of 3.25 for steps taken after May 25, 2021.

[513] Under r 10.34, I direct that a Bill of Costs be prepared and assessed by the assessment officer under column 2 of Schedule C, with the multipliers referred to above.

Heard on the 18th day of November, 2022.
Dated at the City of Edmonton, Alberta this 10th day of June, 2024.

W.N. Renke
J.C.K.B.A.

Appearances:

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