IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1043325 Ontario Ltd. v. Jeck,*
2014 BCSC 1197

Date: 20140630
Docket: S118825
Registry: Vancouver

Between:

1043325 Ontario Ltd.

Petitioner

And

CSA Building Sciences Western Ltd.,
Ralph Jeck and Maria Jeck

Respondents

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Petitioner:	Robert S. Fleming
Counsel for the Respondents:	Michael B. Morgan Lauren E. Cook
Place and Date of Hearing:	Vancouver, B.C. October 29-31, 2012 November 1, 2012 December 2-5, 9-10, 12-13, 16-19, 2013
Place and Date of Judgment:	Vancouver, B.C. June 30, 2014

Introduction

[1] This is a claim brought by the petitioner under s. 227(2)(a) and (b) of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"), alleging that the respondents, Ralph Jeck and CSA Building Sciences Western Ltd. ("CSA Western"), have conducted the affairs of that company in a manner that is oppressive and unfairly prejudicial to the petitioner.

[2] The petitioner, 1043325 Ontario Ltd., is a numbered Ontario company (the "Ontario numbered company") whose sole asset is its 44% minority shareholding in the respondent CSA Western, a building envelope business. Christian Skene is the principal of the petitioner. He is a retired professional engineer living in North Carolina.

[3] Mr. Jeck is the sole director of CSA Western and the majority 56% shareholder. He operates the company.

[4] The petition also included claims that corporate profits were inappropriately received by Mr. Jeck and his wife Maria Jeck, and that they acquired various properties with those funds (the claim against Maria Jeck has been adjourned pending the findings in this case). In the alternative, the petitioner seeks leave to commence a derivative action on behalf of the company for the recovery of "divested company profits" and other alleged wrongs by the Jecks to the company.

[5] In these reasons, when I refer to the respondents, unless otherwise indicated, it is a reference to CSA Western and Mr. Jeck, but not Mrs. Jeck.

[6] The petition was amended in November 2012 during the hearing to claim oppressive conduct by the alleged forgery of engineering documents and shareholders' resolutions by the respondents.

Parties' Positions

[7] Mr. Skene says that Mr. Jeck has treated the petitioner oppressively by operating CSA Western as his sole proprietorship and ignoring the interests of the minority shareholder. The petitioner alleges that Mr. Jeck has taken excessive management fees, failed to provide audited financial statements or disclose any financial information for many years, failed to hold shareholders' or officers' meetings, and improperly had CSA Western guarantee the debts of Mr. Jeck's wife. The petitioner also alleges that Mr. Jeck improperly took a corporate opportunity to acquire the property where the company carried on business, failed to disclose a conflict of interest arising from the ownership of the business premises, and diverted a further corporate opportunity of CSA Western to CSA Analytics and Testing Ltd. ("CS Analytics"), a company owned by the Jecks. Moreover, the petitioner alleges that the majority shareholder forged Mr. Skene's signature on shareholders' resolutions purportedly waiving the requirement for audited financial statements and shareholders' meetings, forged his signature on engineering documents, and took steps in this litigation that made it onerous for the petitioner to assert its legal rights.

[8] The respondents deny that Mr. Jeck has acted oppressively and say that the company's affairs were conducted legally and in accordance with the reasonable expectations of the parties. The respondents say that management fees paid to Mr. Jeck were neither excessive nor beyond

the reasonable expectations of the shareholders. They say that financial information was in fact provided to the petitioner, no audit was expected by the parties, and the respondents conducted the financial affairs of the company both within their legal rights and within the reasonable expectations of the parties. Mr. Jeck contends that any non-production by the company of audited statements was waived by the petitioner or historically was not required by the petitioner, and that management fees were authorized by a board of directors which, as expected by the shareholders, was made up of only the majority shareholder. Mr. Jeck denies that when Mr. Skene's signature was affixed to resolutions or engineering documents, that it was done without the consent of the principal of the minority shareholder. The respondents say that the petitioner never availed itself of the provisions of the *BCA* to call a meeting of shareholders.

[9] Moreover, the respondents say that the petitioner is over-reaching and inappropriately seeking to bring claims in an oppression proceeding that include personal claims of the shareholder, not claims *qua* shareholder, and derivative claims available only to the company, neither of which are oppression-related claims that could properly be brought by the petitioner. In that respect, the respondents say that the claim for excessive management fees, the guarantee provided for Maria Jeck's loan, the purchase of the company's business premises, the collection of rent from the company and the diversion of business to CS Analytics are derivative claims only. The respondents further allege that the claim for the forgery of the engineering documents is a personal one only, not a claim of the petitioner. The respondents say that oppression proceedings are not to be used simply as a vehicle for a disgruntled shareholder to get paid out.

[10] The respondents say that the alleged grounds of oppression must be analyzed individually, not cumulatively as the petitioner alleges. When this is done, the respondents submit that none of the proven allegations amount to oppressive conduct, which is something that requires a wrong of the most serious sort. With respect to remedy, the respondents say that the buyout sought by the petitioner is not appropriate as it goes far beyond what is necessary to remedy any matters complained of in the petition, should any of them be established.

[11] The respondents say that many issues of which the petitioner complains arose from the petitioner's failure to maintain its corporate status – a fact that affects its reasonable expectation in the circumstances.

[12] Overall, the respondents say that to the extent there is any merit to the petitioner's claims, they are statute-barred as outside the six year limitation period, they were not brought in a timely manner as required by the *BCA*, or the defence of laches applies. In addition, the respondents' position with respect to the claims they allege are properly derivative only is that they are without merit.

<u>Brief Procedural History</u>

[13] The petition was launched on December 22, 2011. Following the filing of numerous affidavits and the cross-examinations of Mr. Skene and the Jecks on their affidavits, the matter came on for hearing in October 2012. The petition was partly heard and an expert witness was cross-examined, but the hearing was adjourned following certain amendments by the petitioner to plead grounds of forgery of engineering reports and resolutions as oppressive conduct. Following the production of documents relevant to the forgery issue, the hearing of the petition reconvened in December 2013.

Basic Facts

[14] I will outline the basic facts and describe the areas of dispute before I discuss the various issues in this case.

[15] The key figures in this litigation are Mr. Skene and Mr. Jeck.

[16] Mr. Skene is a professional engineer. He is now 83 years old and presently resides in North Carolina.

[17] Mr. Jeck is a younger man, now in his early 60s, who before working with Mr. Skene, had a background in high-end construction and in landscaping work.

[18] Since the mid-1970s Mr. Skene had been carrying on business as “CS Associates” and had incorporated CSA Building Sciences Ltd. in the 1980s which had offices in Vancouver, Toronto, Ottawa, and Montreal and engaged in a similar business to CSA Western. He also incorporated CSA Building Sciences International Ltd. Mr. Jeck met Mr. Skene and worked with him since 1988 in Mr. Skene’s business in Vancouver prior to the incorporation of CSA Western. The Vancouver office closed by November 1992, along with the other CSA offices.

[19] The subject company, CSA Western, is a consulting engineering firm in the building envelope business. CSA Western was incorporated in 1993 by Mr. Jeck. Although the precise circumstances leading to the incorporation, including the initial contributions of the principals to CSA Western, are in dispute, I find that they need not be resolved to decide the issues in this case. What is important is that it was agreed Mr. Jeck was the majority shareholder, having received 56 shares to Mr. Skene’s 44 shares (at some point Mr. Skene put his shares into the petitioner Ontario numbered company).

[20] There has never been a formal shareholders’ agreement between the shareholders of CSA Western.

[21] At its incorporation, CSA Western continued to conduct business with the prior clients of CSA Building Sciences Ltd. and CSA Building Sciences International Ltd. Mr. Jeck also brought in a

book of business of his own and provided working capital with the assistance of his mother. The nature of the building envelope work done by the company required that CSA Western have on staff the services of a professional engineer, and Mr. Jeck was not an engineer. As a matter of course in the company's business, it requires plans and other documents to be signed or stamped by a professional engineer.

[22] Mr. Skene provided some professional engineering work to CSA Western over its first decade but the company also employed in-office professional engineers from time to time, and in 1998 CSA Western hired Eric Lofgren as an engineer-in-training. He later became a registered professional engineer.

[23] In 1998 Mr. Jeck married Maria Jeck and Mr. Skene attended their wedding.

[24] Mr. Jeck, it appears, worked hard and was industrious. Mr. Skene lived outside British Columbia and was not regularly in British Columbia.

[25] It appears, at least initially, that engineering documents for company projects which required Mr. Skene's signature as an engineer were sent to him. That only lasted for a period of time, but the length of that time is in question.

[26] Earlier in 2003, Mr. Skene was involved in a practice review by the Association of Professional Engineers and Geoscientists of BC ("APEGBC"), the engineering regulatory body. Although there is a dispute about the extent of Mr. Skene's involvement in the business of CSA Western, it appears at the latest by about 2004 Mr. Skene was no longer practicing as an engineer in British Columbia and by the end of 2004 his status in British Columbia with the APEGBC had changed to non-practicing.

[27] After 2004 at the latest, it appears to be common ground between the parties that Mr. Skene had little if any involvement in the day-to-day operations of CSA Western. That year, Maria Jeck purchased from Jim Ferrie 50% of the interest in the business premises out of which the company carries on business. Mr. Jeck had previously bought the building with Mr. Ferrie in 1997.

[28] Although the informal communication between the parties through the years is relevant, in this proceeding much focus was on the dealings between Mr. Jeck and Mr. Skene in the period 1998-2004. Because the petition was not launched until December 2011, and some amendments were not made until November 2012, there is an issue about whether some of the complaints that arise in this time period (1998-2004) are not timely as required by the *BCA* or are statute-barred by reason of the *Limitation Act*, R.S.B.C. 1996, c. 266.

[29] At the outset of the proceeding when the affidavits were initially exchanged, an issue arose

about the extent of the contribution of each of the principals to the company. Mr. Jeck suggested Mr. Skene's contribution was minimal. The respondents introduced evidence of the existence of complaints from some former employees and suggested that they indicated Mr. Skene was absent from the company when he ought to have been mentoring engineers-in-training.

[30] The petitioner obtained affidavits from the above employees, the Kennedys. They had filed a complaint to the APEGBC in 2006 to the effect that while they worked at CSA Western, and when Mr. Skene was absent, documents went into Mr. Jeck's office and came out bearing the engineer's signature and professional stamp. The suggestion in the complaint was that Mr. Jeck, a non-engineer, and not Mr. Skene, the professional engineer, was affixing the signature and stamp of Mr. Skene.

[31] During 2006 and 2007, counsel for Mr. Skene and other counsel for CSA Western responded to the investigation by the APEGBC. During the APEGBC inquiry into the Kennedys' complaint, Mr. Skene, through his counsel Mr. Bain, advised the professional society that the complaint was without merit.

[32] During this current litigation, however, Mr. Skene amended his pleadings to now allege that his signatures on engineering reports and documents (referred to by the petitioner as "process documents") were forged by Mr. Jeck. Mr. Skene says that he came to this realization contrary to his earlier belief when he found out that shareholders' resolutions purportedly bearing his signature were forged. Mr. Jeck's position, ultimately, was that he affixed Mr. Skene's signature to engineering documents and resolutions but did so with Mr. Skene's consent. Mr. Skene denies granting that consent and says that his position in response to the Kennedys' complaint was contradictory to his present position because he believed Mr. Jeck at the time of the complaint had not forged his signature.

[33] By reason of the amendment to the pleadings in 2012, Mr. Skene now asserts that the forgery of his signature and application of his professional engineering stamp without his consent are part of the respondents' oppressive conduct. The allegation that shareholders' resolutions were forged was a live issue earlier and formed part of Mr. Skene's complaint and his counsel's cross-examination about the respondents not providing financial information or holding shareholder meetings.

[34] The 2006 complaint by the Kennedys, and Mr. Skene's involvement in it, is also relevant because it touches on whether Mr. Skene had knowledge before 2012 that his signature and stamp were being improperly affixed to engineering documents by Mr. Jeck. If that claim is otherwise out of time, the state of Mr. Skene's knowledge or means of knowledge regarding the improper affixation of his signature and stamp by Mr. Jeck bears on his entitlement to postpone the limitation

period, or to assert that the ground of oppression is brought in a timely manner.

[35] Mr. Skene now says that there were few engineering documents signed by him in the year 2000 or thereafter, something Mr. Jeck says contradicts his position during the investigation of the Kennedy complaint by the APEGBC.

[36] In summary, the circumstances surrounding the APEGBC investigation and the positions taken at the time by the parties to this litigation are relevant on a number of levels: first, they are relevant to some of the allegations of oppressive conduct (i.e. the signing of Mr. Skene's name and affixation of his stamp without his consent); second, they are relevant to the issue of credibility between the main participants to this litigation; and third, they may also relate to the limitation defence or timeliness defence, or whether Mr. Skene is entitled to the postponement of the limitation period in the circumstances.

[37] Mr. Skene initially registered the petitioner, the Ontario numbered company, in 1993.

[38] However, by March 2004 the petitioner, whose only asset is its shares in CSA Western, had failed to file its required reports and tax returns, although it apparently earned no income, and in 2006 it was struck from the Ontario corporate registry and remained struck until 2011 when it was reinstated by Mr. Skene. I expect it was a relatively straightforward matter to have the petitioner reinstated.

[39] There is an issue whether, during the years starting in 2002 or 2004, before the Ontario numbered company was struck, and ending in 2011, the respondents provided financial information about CSA Western to the petitioner. Mr. Skene says that he was not provided that information, and that he was only told by Mr. Jeck during their occasional semi-annual discussions that the company was "muddling along" and only "able to keep its head above water". The alleged failure to hold meetings, provide audited or any financial statements, or obtain a proper waiver of those requirements is at the heart of the corporate governance aspect of this oppression proceeding.

[40] The evidence at the hearing showed that contrary to the information Mr. Skene says he was receiving, the company was in fact doing well in the first decade of this century. While the revenue of the company grew from $71,530 in 1993 to $623,475 in 2000, it continued on that course and grew from $525,579 in 2001 to $1,459,263 in 2011. In 2012 the gross income of the company was $1,079,912.

[41] The respondents deny taking steps to deprive the petitioner of financial information. Mr. Jeck says he assumed it had been provided and that at the least the petitioner was aware of retained earnings in the company of $227,541 as of 2004 (a slightly higher figure than 2002). The position of the respondents is that the petitioner essentially abandoned any interest in the company

and took no steps, notwithstanding the efforts of the respondents to have the Ontario numbered company restored to the corporate registry in Ontario.

[42] However, the petitioner says the respondents not only failed to provide financial statements but that Mr. Jeck also forged Mr. Skene's name on shareholders' resolutions between the years 2002 and 2006 that purported to waive the requirement for audited financial statements and shareholders' meetings.

[43] I will discuss the communications between the shareholders during this period, whether audited financial statements were required, and whether there was an explicit or implicit waiver of audited financial statements and shareholders' meetings.

[44] In January 2008, during the time that the Ontario numbered company was struck from the Ontario registry, Mr. Jeck authorized CSA Western to grant an unlimited guarantee of the personal debts of Mr. and Mrs. Jeck to the Toronto Dominion Bank. He caused CSA Western to grant an unlimited guarantee to the Toronto Dominion Bank of Mrs. Jeck's liability on her mortgage for the business premises of the company at Fawcett Road in Coquitlam (as previously stated, in 1997 Mr. Jeck and Mr. Jim Ferrie purchased the business premises which are rented by CSA Western; in 2004 Mrs. Jeck purchased Mr. Ferrie's interest, which transfer was registered in 2008). The guarantee granted by CSA Western was never called on by the bank and has since been discharged.

[45] In February 2010, Mr. Jeck's advisor sent a letter offering to purchase the petitioner's shares for $10,000 less the cost of reinstating the Ontario numbered company to the Ontario corporate registry. Mr. Skene called and asked Mr. Jeck for a copy of all the financial statements "since I last attached a signature to a financial statement". Mr. Jeck sent Mr. Skene the 2003-2008 statements.

[46] In September 2011, the Ontario numbered company was restored to the corporate registry in Ontario. In late December 2011 the petitioner commenced this proceeding alleging oppressive conduct on a number of grounds including, *inter alia*: that audited financial statements had not been prepared since 2000; that there had been a failure to disclose any information at all about the financial position of the company during the period 2002 to August 2010; that the company had failed to hold any officers' or shareholders' meetings since at least 2000; that all management fees over seven years were unauthorized; that Mr. Jeck unlawfully caused CSA Western to grant an unlimited guarantee to the Toronto Dominion Bank of the personal debts of Mr. and Mrs. Jeck; and that Mr. Jeck and Mrs. Jeck had wrongfully appropriated to themselves a corporate opportunity in acquiring the business premises of the company in 1997 and 2008.

[47] No shareholders' meetings had taken place between 2001 and 2012 until June 2012, when the annual general meeting of CSA Western was held and subsequently audited financial

statements were provided in 2013 for 2012.

[48] The hearing of the petition in this proceeding was set down for September 2012. There had been some cross-examination of Mr. Skene and Mr. and Mrs. Jeck on their affidavits.

[49] At the hearing on October 31 and November 1, 2012 there was cross-examination by the respondents' counsel of an expert handwriting witness who was testifying about the validity of the signatures of Mr. Skene that appeared on corporate resolutions purporting to waive meetings and the requirement for audited statements. The case, only partly heard, was then adjourned following amendments to plead, as grounds of oppression, forgeries of Mr. Skene's signature in connection with engineering reports in the period 1999 to 2003 (those dates were later amended) and as well as on shareholders' resolutions in the period 2002 to 2006.

[50] The respondents' amended response asserted as follows (para. 26(i)-(j)):

> Mr. Jeck never signed Mr. Skene's name or forged Mr. Skene's signature on the shareholder resolutions between 2002-2006. Rather, Mr. Jeck believed that the signatures on the shareholder resolutions were valid signatures and the Respondents relied on the shareholder resolutions between 2002-2006 as waiving the appointment of an auditor.
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> …
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> Mr. Jeck never signed Mr. Skene's name, or applied his professional engineering stamp, to CSA Western engineering reports between 1999 and 2003 without the knowledge and consent of Mr. Skene …

[51] In a subsequent amendment to the petition response in November of 2013, the respondents modified the dates of the CSA Western engineering reports, referred to above, to between 1998 and 2004.

[52] After the hearing in 2012 was adjourned following the amendments by the petitioner, the respondents produced, pursuant to a direction of the court, numerous company files that apparently contained documents purportedly with Mr. Skene's signature. The respondents in total produced 26 boxes containing 222 files and over 50,000 pages. Mr. Skene deposed that he spent over eight days reviewing the files and identified documents that he said did not contain his true signature. The petitioner then filed a further affidavit from a handwriting expert in support of its allegation of forgery in connection with the engineering reports.

[53] The further amended petition sought an order that the respondents disgorge all profits from the unauthorized use of Mr. Skene's engineering stamp and seal.

[54] As I will discuss, it eventually became clear in the fall of 2013 that the respondents' position was many of the signatures of Mr. Skene on engineering documents were in fact done by Mr. Jeck but that they were done with Mr. Skene's consent. At the hearing of the petition in December 2013,

it was then made clear by the respondents that the impugned signatures on the shareholders' resolutions were signed by Mr. Jeck. At issue during the hearing was the extent to which this was a recent position of the respondents.

[55] In these reasons for judgment, I will set out the relevant statutory provisions, discuss the allegations of oppressive or unfairly prejudicial conduct, describe the law of oppression, and make findings in that regard.

[56] I will also consider whether any of the allegations are statute barred or not brought in a timely way and then decide based on the findings that I make whether the petitioner has established conduct entitling it to relief under the statute, and if so, the nature of any order I ought to make.

<u>The Law of Oppression</u>

[57] The relevant sections for this oppression claim are s. 227(2), (3), and (4) of the *BCA*:

> 227(2) A shareholder may apply to the court for an order under this section on the ground
>
> > (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
> >
> > (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
>
> (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
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> > (a) directing or prohibiting any act,
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> > (b) regulating the conduct of the company's affairs,
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> > (c) appointing a receiver or receiver manager,
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> > (d) directing an issue or conversion or exchange of shares,
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> > (e) appointing directors in place of or in addition to all or any of the directors then in office,
> >
> > (f) removing any director,
> >
> > (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
> >
> > (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
> >
> > (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
> >
> > (j) varying or setting aside a transaction to which the company is a party and

directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

[58] The leading authority on the law of oppression is *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. Though the oppression provision of the *Canada Business Corporations* Act, R.S.C. 1985, c. C-44 at issue in *BCE* is not identical to that in the BC statute, it is much the same.

[59] In general terms, the foundation of the law of oppression, a term I use to include both oppression and unfair prejudice under the statute, is the reasonable expectations of the shareholders. The affected shareholder must establish a breach of his reasonable expectations and that the impugned conduct is oppressive or unfairly prejudicial to his relevant interests. The remedy the court may grant is an equitable one. It has a broad equitable jurisdiction to do not just what is legal, but what is fair, and should consider business realities, not narrow legalities. The concept of reasonable expectations is an objective one and the authorities indicate the reasonable expectations of the shareholders and circumstances in which relief is granted are very fact specific.

[60] The law was aptly summarized by Mr. Justice Armstrong in *Alleluia v. Wilson*, 2011 BCSC 666, wherein the court refers to the various aspects of the test in *BCE* that both counsel asserted before me were applicable under the BC statute (at paras. 27-29):

> The leading authority on the shareholder oppression issues raised in this case is *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. *BCE* sets out a two stage analysis for establishing a claim of oppression:
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> > [56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained

> of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in s. 241(2) of the *CBCA*.
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> ...
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> [58] First, oppression is an equitable remedy. 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: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, [1959] A.C. 324, at p. 343.
>
> [59] Second, 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.
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> [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*. 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.
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> [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.
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> ...
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> [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.

To succeed in a claim for oppression, the petitioners must establish that the breach of a reasonable expectation is oppressive, unfairly prejudicial, or unfairly disregards the petitioners’ relevant interests. In *BCE*, it was held:

> [89] Thus far we have discussed how a claimant establishes the first element of an action for oppression -- a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of “oppression”, “unfair prejudice” or “unfair disregard” of the claimant’s interest, within the meaning

of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

...

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally -- a wrong of the most serious sort.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

[94] "Unfair disregard" (*which does not appear in the BC statute)* is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples 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: see Koehnen, at pp. 83-84.

The reasonable expectations of the shareholders are the cornerstone of the oppression remedy. The petitioners bear the burden of proof that the respondents' actions have failed to meet the petitioners' reasonable expectations and that that failure involved unfair conduct and prejudicial consequences. This is to be an objective assessment.

[61] As reviewed above, the law sets out a two-part test for establishing a claim of oppression. First the petitioner shareholder must establish a reasonable expectation that he or she would be treated a certain way in the conduct of the company's affairs, and second, that the failure to meet the reasonable expectation is conduct that falls within the concepts of oppression or unfair prejudice of the claimant's interest within the meaning of the *BCA*.

[62] Some of the allegations, the respondents say, are not really allegations of oppression but are personal claims of the shareholder or principal, or are exclusively derivative claims in respect of which only the company can sue.

[63] The respondents assert that the possible derivative claims only are: the excessive management fees, the alleged taking of a corporate opportunity in purchasing the company's premises, the collection of rent from the company after allegedly failing to disclose a conflict of interest, the alleged diversion of a corporate opportunity to CS Analytics, and the guarantee. Unless these claims have affected the complaining shareholder in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally, they cannot form the basis of an oppression proceeding for which leave is not required. In this regard, the respondents rely on this statement of the law by Madam Justice Newbury in *Furry Creek Timer Corp. v. Laad Ventures Ltd.*, [1992] 75 B.C.L.R. (2d) 246 (S.C.):

> Although there appear to be authorities in Canada that suggest the derivative action and oppression action are mutually exclusive, I think the better view is that it can, <u>provided the complaining shareholder has been affected by the breach in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally</u>.
>
> [Emphasis added.]

<u>The Allegations of Oppressive or Unfairly Prejudicial Conduct</u>

[64] What are the allegations of oppressive conduct or unfairly prejudicial conduct as a whole?

[65] Overall, the petitioner argues that the oppressive or unfairly prejudicial conduct was Mr. Jeck, the sole director, operating CSA Western as his personal fiefdom, ignoring the petitioner's rights and interest as a shareholder.

[66] The petitioner points to the large payments, in terms of a percentage of profits, that were made by the company to Mr. Jeck personally between the years 2004-2012, and the guarantee by the company for the benefit of Mrs. Jeck's mortgage debt on Fawcett Road, and the lack of formal authority to support this financial assistance.

[67] Moreover the petitioner points to the failure of the respondents to provide financial information, hold shareholders' or officers' meetings, provide audited financial statements, and points to Mr. Jeck's forgery of Mr. Skene's name on resolutions waiving the requirement to provide audited statements or hold meetings, and on engineering documents used by the company in its projects.

[68] The respondents deny that financial information was withheld or not provided as required.

[69] They deny that Mr. Jeck took excessive remuneration contrary to the reasonable

expectations of the shareholders. They also deny that Mr. Skene's signature on engineering documents or resolutions was affixed without his consent and say that many of the petitioner's claims are personal claims not claims *qua* shareholder, some claims are statute-barred or were not brought in a timely manner, and that the claims in any event lack merit. The respondents say that overall Mr. Skene lacks credibility.

Discussion

[70] I will first discuss the issue of the provision of financial statements and information by the company to the petitioner and whether the petitioner waived the requirement for providing audited statements and holding meetings. At that time I will introduce the issue of credibility of the main participants, Mr. Skene and Mr. Jeck.

[71] Then, I will discuss the issue of excessive management fees. I will consider whether that is only a possible derivative action rather than an aspect of oppressive conduct. Finally I will address the issue of allegedly forged engineering reports and other miscellaneous claims of oppressive conduct. I will consider whether some of these claims are only possible derivative claims or personal claims of Mr. Skene.

[72] I will make findings on what the petitioner has proven, and then consider whether given the passage of time before bringing these claims, they have been brought within the applicable limitation period and in a timely manner as required by the statute.

[73] I will also consider whether any conduct that is proven should be assessed individually or cumulatively in determining whether there is oppression or unfairly prejudicial conduct and whether it amounts to conduct entitling the petitioner to relief. If so, I will consider whether I should make an order.

Provision of Financial Information and Waiver of Audited Statements and Meetings

[74] Apart from the allegation of excessive management fees, which I will discuss in a moment, the main thrust of the oppression petition is the failure of the respondents to provide financial information (including audited statements) or hold meetings, as well as allegedly making misleading comments about the company's financial affairs and taking a secretive approach to keep the financial affairs of the company from the petitioner.

[75] I will deal firstly with the alleged failure to provide financial information, which is an issue in dispute.

[76] In reference to the allegation relating to the failure to provide financial information or hold shareholders' meetings, Mr. Skene deposed as follows:

> 26. I recall that I stopped receiving financial statements after about 2002. I was not terribly concerned about this—the company had never generated any significant profit and my attention was focused elsewhere.
>
> 27. From time to time, probably twice a year, I would speak to Jeck about how the company was doing financially. He always said something vague like "we're keeping our head above water" or words to that effect. Since this was consistent with everything that had gone on with company since 1993 I did not press him, and my impression that there was no real profit to speak of was reinforced by Jeck's response, above, when I asked him for very small amounts of money. In fact I was reluctant to ask for anything at all because, since Jeck was the sole manager and was supporting himself and his family solely from the company as far as I was aware, asking him to write me a company cheque felt to me like taking money directly from Ralph.

[77] The petitioners' basic position is this. It says that in 2004 (and perhaps earlier) Mr. Skene ceased its active involvement in CSA Western but thereafter had discussions on a bi-annual basis and was told by Mr. Jeck that the company was only "muddling along" or "keeping its head above water". The petitioner complains not only about the failure to hold shareholders' meetings and provide financial information but that the purported consent resolutions of the shareholders between 2002 and 2006 waiving meetings and the audit requirements were forged.

[78] The respondents take a different position. They say that financial information was provided, that no forgeries of resolutions occurred, and in terms of the petitioner's alleged expectations, any lack of full information was more a matter of the petitioner abandoning any interest in the business or in its status as a continuing registered company in Ontario than being deprived of financial information. Such lack of interest on the part of Mr. Skene, the respondents say, cannot ground oppressive conduct or unfairly prejudicial treatment of the petitioner.

[79] The position of the respondents is that they disclosed financial information to the petitioner at all material times and if the petitioner did not receive it, Mr. Jeck did not know that it had not been received, and, at least, he did not intend that financial statements not be disclosed to Mr. Skene. The respondents say that communications with Mr. Skene to restore the Ontario numbered company to the Ontario registry so that the corporate structure of CSA Western could be regularized were ignored for many years. According to the respondents, when there was a request, statements for CSA Western were delivered to the petitioner in 2010 for the years 2003-2010.

[80] The respondents also contend that there was no requirement under the statute to provide audited statements but that if there was, it was waived – at least implicitly – by the petitioner, or that it would have been. The position of the respondents appears to be that no signatures of Mr. Skene were attached by Mr. Jeck to resolutions waiving audited statements or to engineering documents without Mr. Skene's express, or implied, consent.

[81] Mr. Skene denies providing any consent to the affixation of his signature by Mr. Jeck to

resolutions (or to engineering documents), or that he received the financial information for many years. Thus, the extent to which financial information was provided, and the question of who applied Mr. Skene's signatures on resolutions and on engineering documents, and whether it was with consent, which I will discuss later, gives rise to issues of credibility between Mr. Skene and Mr. Jeck.

[82] In September 2012 there was cross-examination of Mr. and Mrs. Jeck and Mr. Skene on their affidavits relevant to the pleaded issues, and in December 2013 there was cross-examination before the court in connection with the alleged forgeries.

[83] I find in the circumstances, and on all of the evidence before me, that I am able to make findings of credibility to determine the facts to resolve the issues in this proceeding. I will discuss the issue of credibility in part here and later when I discuss the allegation of forgery of the engineering reports and related documents.

[84] Mr. Jeck responded to the question of the provision of financial information in his first affidavit. He deposed that the requirement for audited statements was waived each year that the petitioner "existed" up to 2006. Mr. Jeck made inquiries of Mr. Skene and his counsel to have the Ontario numbered company reinstated because he said he needed to have a registered shareholder for corporate governance purposes. He indicated that after 2004, when Mr. Skene resigned as an engineer with the regulatory body, Mr. Skene had even less involvement with CSA Western but Mr. Jeck stated that his involvement before 2004 had been minimal.

[85] Mr. Skene said that he did not press Mr. Jeck for more information than Mr. Jeck offered, and allowed the Ontario numbered company registration to lapse. He did not actually formally request financial statements. He did not find out that CSA Western had in fact been "on a tear" since 2004, until after February 2010, when Mr. Jeck offered to buy the petitioner's shares for $10,000 less the cost of reinstating the Ontario numbered company.

[86] Although it appears that Mr. Skene was reluctant to incur the cost of reinstating the Ontario numbered company, the context in which that occurred is important in considering the reasonable expectations of the shareholders. Was the petitioner really a shareholder that was disinterested in the affairs of CSA Western, or was it simply being economical because it believed that the company was just "muddling along"?

[87] The respondents say the position of the petitioner that it believed the company was just muddling along is misleading, because at least by the 2002 and 2004 financial statements there were clearly retained earnings in the company of some significance. That is a relevant factor to consider. However, I think what is more telling is the respondents' position about the resolutions purportedly waiving audited financial statements and an annual general meeting.

[88] Mr. Jeck, I find, did not really dispute the "muddling along" communication. In his affidavit, Mr. Jeck took the position that the petitioner waived the requirement to appoint an auditor (until the Ontario numbered company no longer existed after 2006) and that CSA Western never had an audit.

[89] Of course, the petitioner could hardly complain about not getting audited statements if it waived any requirement for audited financial statements. The respondents say that there had been a waiver of that requirement since incorporation, that the petitioner never thought that it was necessary nor was it interested in having the financial statements audited or otherwise, and that even if the petitioner did not formally waive the requirement, there is no evidence that the petitioner would have requested an audit. The position of the respondents is that before the Ontario numbered company was struck from the registry in Ontario, it waived the requirement of an audited statement.

[90] However, I find the position taken by the respondents in this litigation – that there was in fact, or in effect, a waiver of the audit and annual general meeting requirement – very odd. The initial position of the respondents was that there was a waiver because Mr. Skene had signed resolutions for several years to that effect. This was denied by Mr. Skene and appeared to give rise to a question of credibility.

[91] First, there is the statement by Mr. Skene in his first affidavit that the "unanimous" shareholders' resolutions between 2002 and 2006 contain a signature that is not his. That is a clear statement early on in the proceedings that Mr. Skene did not sign the resolutions waiving the requirement of an audit. The response of Mr. Jeck in his affidavit is that the petitioner did waive the requirement to appoint an auditor. That appeared to me to mean it was Mr. Jeck's belief that the signatures on the resolutions between 2002 and 2006 were Mr. Skene's.

[92] The respondents also pleaded that the resolutions waiving the audit requirement were signed by Mr. Skene, as follows:

> 50. The Petitioner did indeed waive the requirement to appoint an auditor up until it no longer existed after 2006 through to 2011. CSA Western has never had an audit of its financial statements since its inception because the relevant shareholders have always waived that requirement every year up until, as stated, the Petitioner no longer existed.

[93] In his affidavit, Mr. Jeck swore that statement in the pleadings to be true.

[94] The question of waiver and whose signature was on consent resolutions waiving the requirement of audited statements and meetings has always been at the forefront of this litigation, even prior to the amendments in September 2012.

[95] When this matter first came before me in September 2012 the allegation of the petitioner

was that the resolutions dated August 12, 2002, September 6, 2003, September 30, 2004, October 6, 2005, and August 26, 2006 that were purportedly signed by Mr. Skene waiving the requirement for the appointment of an auditor and meetings were forgeries. Although it was asserted that Mr. Skene's signature had been forged, the allegation was not specifically a claim of oppression or unfairly prejudicial treatment in the oppression proceeding until the amendments by the petitioner in 2012.

[96] In September 2012, I allowed an amendment to the pleadings so the petitioner could allege that Mr. Jeck forged Mr. Skene's signature on shareholders' resolutions and also so that the petitioner could assert in these proceedings that the signatures on engineering reports were not Mr. Skene's and that Mr. Jeck forged Mr. Skene's signature.

[97] The resolution of these "forgery" issues took some unusual twists and turns and, as it turned out, were time-consuming matters to resolve.

[98] During a hearing in June 2012 in chambers before another judge, counsel for the respondents suggested that the signatures on the resolutions might have been affixed by Mr. Easto, the petitioner's incorporating solicitor in Ontario. The petitioner then produced an affidavit from that solicitor that he had not signed the resolutions. Subsequently, in response to a question as to whose signature was affixed for the petitioner on the August 12, 2002 resolution, Mr. Jeck said on cross-examination that it "appears to be Mr. Skene" (Cross-Examination on Affidavit of Ralph Jeck, 11 September 2012, p. 106). He maintained this position with respect to the other impugned resolutions.

[99] The petitioner retained a handwriting expert, James Green, who filed two affidavits and there was an affidavit from Dan Purdy, a forensic document examiner retained to prepare a report on the questioned signatures affixed to the engineering documents and related documents. In his first affidavit, Mr. Green provided an expert opinion that the signatures on the impugned resolutions were probably not Mr. Skene's. In the fall of 2013 at the hearing before me, the respondents cross-examined Mr. Green at some length on his affidavit.

[100] As I will discuss shortly in connection with engineering documents for the company, although Mr. Jeck has now recently conceded that he did affix Mr. Skene's signature to certain engineering documents, prior to the hearing before me in December 2013, the respondents maintained through their counsel the position that the signatures of Mr. Skene on the impugned shareholders' resolutions were not signed by Mr. Jeck.

[101] However, during the cross-examination of Mr. Jeck on December 5, 2013, he testified that he had signed Mr. Skene's name on the resolutions and claimed to be unaware of the cross-examination of the handwriting expert, Mr. Green, on that point at the hearing in 2012.

[102] The petitioner asks me to conclude that Mr. Jeck is not credible because of his obfuscation when he said in cross-examination that the signatures “appear to be” Mr. Skene’s, knowing in fact that he had affixed the signatures to the resolutions. Further, the petitioner asks me to conclude that the respondents adopted a tactic of unreasonable delay by putting an elderly man, Mr. Skene, through expensive litigation and requiring him to retain experts and produce those experts for cross-examination, when all along Mr. Jeck knew that the signatures were in fact forged.

[103] I will return to this issue but I find that Mr. Skene did not authorize Mr. Jeck to affix his signature to the resolutions. I also find that Mr. Jeck was not entitled to rely on the fact that audits or meetings had been waived in earlier years by the petitioner as a basis to conclude that they would be waived in the future.

[104] I think it is objectively a reasonable expectation among shareholders, absent other evidence, that statutory corporate requirements, particularly those dealing with the financial affairs of the company, would be complied with.

[105] First of all, the question is whether there is a requirement for an audited financial statement annually or a waiver of that requirement by the shareholders. The *BCA* appears to require it although Mr. Morgan suggests that it is not required. The provisions pertaining to financial statements and audits are contained in Part 6 of the *BCA*. They read as follows:

> Financial statements
>
> 198 …
>
> (2) Subject to section 199 and subsection (3) of this section, unless relieved under section 200 from their obligation to do so, the directors of a company must, on or before each annual reference date, produce and publish, in accordance with subsection (4) of this section,
>
> (a) financial statements in respect of the latest completed financial year of the company, even if that financial year is the company's first financial year, and
>
> (b) if the date on which the financial statements referred to in paragraph (a) are published is more than 6 months after the beginning of the company's current financial year, financial statements for the period that began at the beginning of the company's current financial year and ended on a date that is not more than 6 months before the date on which the financial statements referred to in paragraph (a) are published.
>
> …
>
> Approval for publication
>
> 199
>
> (1) The directors of a company must ensure that, before financial statements referred to in section 198 are published, the financial statements are
>
> (a) approved by the directors, and

(b) signed by one or more directors to confirm that the approval required by paragraph (a) of this subsection was obtained.

(2) The directors must ensure that financial statements published under section 198

(a) have attached any auditor's report made under section 212 (1) (a) on those financial statements, and

(b) do not purport to be audited unless those financial statements have, in fact, been audited and an auditor's report has been made.

Waiver of financial statements

200

(1) Directors are relieved from their obligation under section 198 to produce and publish financial statements

(a) if all of the shareholders of the company, whether or not their shares otherwise carry the right to vote, resolve by a unanimous resolution to waive the production and publication of the financial statements, or

(b) if and to the extent provided by a court order waiving the production and publication of some or all of the financial statements and on any terms the court considers appropriate.

(2) A waiver referred to in subsection (1) of this section may be given before, on or after the date on which financial statements are, under this Division, required to be produced and published and is effective for those financial statements only.

…

Application of this Part

203

(1) Subject to subsections (2) and (3), a company must have an auditor.

(2) If all of the shareholders of a company, whether or not their shares otherwise carry the right to vote, resolve by a unanimous resolution to waive the appointment of an auditor,

(a) the company is not required to appoint an auditor, and

(b) the provisions of this Part, except this section, do not apply to the company unless an auditor is appointed under section 204 (5).

(3) A waiver referred to in subsection (2) of this section may be given before, on or after the date on which an auditor is, under this Part, required to be appointed and is effective for one financial year only.

Appointment of auditors

204

(1) The directors of a company must appoint an authorized person as the first auditor of the company to hold office until the annual reference date following the recognition of the company.

(2) On or before the annual reference date referred to in subsection (1) and on or before each subsequent annual reference date, the shareholders of a company must, by an ordinary resolution, appoint an authorized person as auditor to hold office from that annual reference date until the next annual reference date. …

Auditor's duty to examine and report

(1) An auditor of a company must

(a) report in the prescribed manner on the financial statements of the company referred to in section 185 (1) (a), (b) or (c), other than any financial statements of the company referred to in section 198 (2) (b), and

(b) make the examinations that are, in the auditor's opinion, necessary to enable the auditor to make the report required by paragraph (a) of this subsection. …

[106] *Li v. Global Chinese Press Inc.*, 2014 BCCA 53, describes the *Canada Business Corporations Act* as setting out a comprehensive legislative scheme to provide financial information to shareholders, and that the scheme requires the appointment of an auditor and production of audited financial statements unless the shareholders of the company unanimously determine otherwise (at para. 14). I find that applies under this provincial statutory scheme as well.

[107] This provision is important for the protection of a minority shareholder. As one example, I refer to the judgment of Lowry J. as he then was in *Discovery Enterprises Inc. v I.S.E. Research Ltd.*, 2002 BCSC 1624. There the 12% minority shareholder demanded audited financial statements but the company was only prepared to deliver unaudited statements and open its books to the petitioner.

[108] Lowry J. said (at paras. 6-8):

> What amounts to oppressive conduct has, as observed by this court in *Nystad v. Harcrest* (1986), 3 B.C.L.R. (2d) 39 at 43-45, been said to be conduct that, at a minimum, lacks probity and fair dealing toward the proprietary rights of a minority shareholder. The refusal of a company to deliver audited financial statements can serve to hide the true financial position from a minority shareholder. 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. As was said in *Labatt Brewing Co. v. Trilon Holdings Inc.* (1998), 41 O.R. (3d) 384 (Gen. Div.) at 387—88, decided under comparable legislative provisions, 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. In the circumstances, 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.
>
> 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.
>
> ...
>
> As observed there 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.

[109] The failure to provide financial records or audited statements unless waived by the unanimous resolution of the shareholders may be oppression. Justice Levine, as she then was, in *Burdeny v. K & D Gourmet Baked Foods and Investments Inc.* (1999), 48 B.L.R. (2d) 16 (S.C.) said, at paras. 39-40 and 47:

> There is no question that Donald was entitled, as a shareholder of the company, to have access to the company's financial records (*Company Act*, section 171) and to receive the latest financial statement and auditor's report upon request (*Company Act*, section 172(3)). He was also entitled to attend or consent to the business to be conducted at an annual general meeting (*Company Act*, sections 139-40), and to receive the annual financial statement and auditor's report (*Company Act*, sections 145 and 178), unless the audit has been waived by unanimous resolution of the shareholders (*Company Act*, section 179).
>
> In considering whether the failure of the company to comply with these provisions of the *Company Act* is "oppressive" or "unfairly prejudicial" to Donald, the question is not simply whether his legal rights have been breached, but whether his equitable rights have been detrimentally affected: see *Johnston v. West Fraser Timber Company Ltd.* (1981), 29 B.C.L.R. 379 (S.C.); *Bosman v. Doric Holdings Ltd., Redekop and Wall* (1978), 6 B.C.L.R. 189 (S.C.); *Financial Network Guaranty Ltd. v. Terra Nova Energy Inc.*, [1987] B.C.J. No. 2646 (S.C.)(QL).
>
> …
>
> I conclude from the failure of the company to comply with the provisions of the *Company Act* "that the affairs of the company [were] being conducted...in a manner oppressive to one or more of the members." It is clear that at the time Donald filed the petition he had no means to confirm or dispel his suspicions concerning the company's finances. He was prevented from reviewing the company's financial records, he had not been given any financial statements, the company's finances had never been audited, and the company had not held annual general meetings as required by the *Company Act*. There is no evidence that Donald had consented to waiving the statutory requirements concerning annual general meetings or the appointment of an auditor. In my view a shareholder who is put in such a situation is dealt with unfairly "in the matter of his proprietary rights as a shareholder".

[110] I find the company for a number of years failed to provide an audited financial statement or hold meetings as required and the purported waiver of that requirement is ineffective.

[111] I also find, as I will discuss in relation to all of the evidence, that the respondents were withholding financial information from the petitioner generally. I find Mr. Jeck initially deposed the audit had been waived by the petitioner when he knew he had in fact signed Mr. Skene's name on

the resolutions. I find Mr. Jeck allowed his counsel to suggest the resolutions might have been signed by the petitioner's Ontario solicitor knowing that was not the case, compelling the petitioner to expend time and money to file an affidavit to disprove that suggestion. Further, I find Mr. Jeck allowed his solicitor to cross-examine the handwriting expert Mr. Green when Mr. Jeck knew that in fact he had signed Mr. Skene's signature on the resolutions. After all of that, Mr. Jeck took the position at the hearing in December 2013 that he had never denied signing Mr. Skene's name on the resolutions.

[112] I think that this conduct supports the inference that Mr. Jeck saw the business as essentially his, and one in which Mr. Skene had no particular interest that had to be respected. I find on all of the evidence that the petitioner thought the company was just "muddling along", because he was told that by Mr. Jeck. Although the company was doing quite well through the period up to 2010 there is no evidence that indicates that relevant financial information was in fact provided to the petitioner. I accept that starting around 2002, CSA Western stopped providing financial statements or any financial information to the petitioner and indicated to the petitioner that the company was "muddling along", suggesting a poorer performance than the company actually had. I have reached that conclusion on a consideration of all of the evidence including an assessment of the credibility of the principals. I have taken into consideration the fact that Mr. Skene allowed the Ontario numbered company's registration lapse; I do not think that really shows a lack of interest in the company or its affairs, but an understanding or a belief that the company was only performing at a very modest level, and that the cost of reinstating the Ontario numbered company might not be worth it. Whether that decision was right or not, I find that, had Mr. Skene known of the true financial performance of the company, it is unlikely he would have let the registration of the petitioner lapse.

[113] I find that the respondents have failed to comply with the statutory requirements of providing audited financial statements in the absence of a waiver, that no waiver was made between 2002-2006, and that none was requested subsequently. I find there were no financial statements provided to the petitioner from 2002-2010. I will consider the other allegations in the petition before deciding the significance of this conclusion to the relief that the petitioner is seeking.

Excessive Management Fees

[114] One of the core complaints in this petition is that the majority shareholder, Mr. Jeck, treated the company as his own and in doing so took excessive management fees.

[115] The respondents take the position that this is at best only a possible derivative action.

[116] I find that there is authority that the majority shareholder taking excessive management fees might amount to oppression: see for example *BCE* at para. 93. Excessive remuneration has been

properly alleged as a ground of oppression in a number of cases. Some of these cases involve shareholder agreements, some are cases where the shareholder was not the sole director or where shareholders were clearly acting beyond their legal power in diverting funds, and yet others predate the analysis of reasonable expectations set out in *BCE*.

[117] For example, in *Ludlow v. McMillan* (1995), 6 B.C.L.R. (3d) 163 (S.C.), the respondent, the owner of legal title to all the shares, held the beneficial interest to 50% of the shares and was the sole director and president of the company. He declared an additional management fee and dividend to be paid to himself that represented more than 70% of the company's cash assets, reducing the company's retained earnings by $186,000 and leaving a deficit of $29,500 and a cash reserve of only $529. The court held that the actions of the respondent in declaring and paying the additional management fee were unfairly prejudicial. Although the case predated *BCE*, it can be viewed as one where the concept of reasonable expectations prevailed. As stated in *Rupcich v. Mravcak*, 2013 SKQB 77, shareholders can reasonably expect that directors will not "strip the company of its assets, or provide that the directors receive excessive remuneration" (at para. 147).

[118] However, whether or not the claim of excessive remuneration in this case is properly a derivative claim only, in these circumstances I find it is appropriate to consider it because it is an important contextual factor which impacts on my assessment of the claim for non-provision of financial information, which the respondents have not suggested is a derivative claim only. I find I am unable to properly assess the effect of the claim for non-provision of financial information without considering whether Mr. Jeck was drawing excessive management fees while allegedly attempting to mislead Mr. Skene and the petitioner about the true financial state of the company.

[119] Has this claim of excessive remuneration been made out?

[120] There is a dispute in the evidence about what Mr. Jeck's income from the company was, which I will address in the discussion below.

[121] The petitioner says that in the eight fiscal years between 2004 and 2011 Mr. Jeck took an average of $326,000 per annum during a period when no dividends were paid to the minority shareholder. The petitioner says this remuneration exceeded the historical pattern of Mr. Jeck's remuneration, and the reasonable expectations of the parties, to the extent that it constituted oppressive and unduly prejudicial conduct.

[122] An initial question in addressing this issue is the determination of whether there were objectively reasonable expectations for management fees and if so what they were. Was there an objective expectation that the management fees payable to the majority shareholder operating the business would be at a certain level or within a range such that fees beyond that level or outside that range would be considered excessive?

[123] As I noted earlier in my brief review of the law applicable in oppression proceedings, determining the reasonable expectations of the shareholders is a question of fact that can be proven by direct evidence or by reasonable inference from circumstantial evidence: *BCE* at para. 59. The starting point in any examination of reasonable expectations is the legal rights of the parties as described in the articles of incorporation: *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342 at para. 15 (C.A.) *per* Southin J.A. However, shareholders hold certain equitable rights in addition to their strict legal rights, which the doctrine of reasonable expectations protects.

[124] A shareholder's reasonable expectations that are entitled to protection may go beyond his or her strict legal rights, but as noted by Southin J.A. in *Safarik* and more recently by Mr. Justice N. Smith in *Runnalls v. Regent Holdings Ltd.,* 2010 BCSC 1106 at para. 42, the analysis must still begin with the consideration of the legal rights of the parties as defined in the articles.

[125] I agree with Mr. Morgan that Mr. Skene had no expectation he would be involved in management and had no unfettered right to or agreement to dividends. The question of management fees must be viewed in that context.

[126] At the most basic level, however, the reasonable expectation of shareholders must be taken to include an expectation that directors will act in the best interests of the company, which they have a fiduciary duty to do. The extent to which shareholders can reasonably expect more than that depends on the circumstances of each case, viewed through the lens of the factors described by the Supreme Court of Canada in *BCE* at para. 72. They are:

(i) general commercial practice;
(ii) the nature of the corporation;
(iii) the relationship between the parties;
(iv) past practice;
(v) steps the claimant should have taken to protect itself;
(vi) representations and agreements; and
(vii) the fair resolution of conflicting interests between corporate stakeholders.

[127] The petitioner contends that the management fees taken by the respondent Mr. Jeck from the company amount to oppressive conduct because the payments made by the company to Mr. Jeck, although they may strictly speaking have been within the legal rights of the director to authorize, nevertheless go far beyond the reasonable expectations of the parties.

[128] In the case at bar, the petitioner asserts that his expectation was that the company would sell engineering services relying on the well-established brand of CSA Building and the reputation, expertise and accreditation of Mr. Skene; that the company would pay him a reasonable

management fee at a range of $50,000- $70,000 per annum; and that if the company succeeded in generating profits in excess of a comfortable management wage, Mr. Skene would share in those profits commensurate with his 44% shareholding. That may have been Mr. Skene's subjective belief but there was no specific discussion or agreement between Mr. Skene and Mr. Jeck to that effect. There was no written shareholders' agreement, Mr. Jeck was the president of the company since inception, and the articles permitted the directors – of which Mr. Jeck was the sole director – to set the remuneration of the officers. While it may be, as noted in *BCE* at para. 93, unfairly prejudicial to prefer some shareholders with management fees and to pay directors' fees "higher than the industry norm", that begs the question of what is that norm and whether the fees paid to the operator were excessive to the point of being unfairly prejudicial to the minority shareholder.

[129] In *Runnalls*, the majority shareholder performed a management role in the development of a marina and the minority shareholders did not. In reaching the conclusion that he was unable to find the management and directors' fees were so unreasonable as to be oppressive (other than a single payment of $540,000), the trial judge said (at para. 63):

> … [i]n this case, there is no doubt that Mr. Ewachniuk has performed a management role and the minority shareholders have not. As for the value of those services, I am not persuaded that the fees charged by a commercial property manager, who has no equity in the business and may be working for a number of clients, is a valid comparison or that it constitutes evidence of an "industry norm".

[130] That passage highlights a difficulty on this part of the application that I will address after considering the remuneration that Mr. Jeck received during the years prior to the petition. Mr. Jeck was not simply a manager, he also held an equity position as the majority shareholder of the company. Moreover, an analysis of the expert evidence, which I will describe in a moment, shows the importance of finding a proper comparator for determining whether the remuneration paid to a person running a business is excessive or reasonable.

[131] What were the management fees paid to Mr. Jeck? According to the petitioner, in the years 2004- 2012, the revenue, net income and management fees of the company were as follows:

	Revenue	Net Income	Management Fees	%
2004	$603,449	$136,730	$142,500	104%
2005	$652,322	$185,329	$204,548	110%
2006	$743,639	$272,163	$196,135	72%
2007	$919,968	$350,592	$294,685	84%
2008	$1,378,843	$615,431	$363,119	59%
2009	$1,350,865	$584,597	$262,840	45%
2010	$1,193,238	$390,437	$634,262	162%

2011	$1,459,263	$514,214	$511,156	99%
2012	$1,079,912	$527,976	$596,249	113%
Totals:	$9,381,499	$3,577,469	$3,205,494	90%

[132] The petitioner's position is that during the period 2004-2011 the company made a profit of slightly more than $3 million. The petitioner contends this was enough to sustain a reasonable management wage of $75,000-$100,000 per annum; however, the average management wage during this period was $326,000 per year, during which no shareholders' meetings were held or dividends paid, and there was only one resolution in 1994 authorizing a $15,000 bonus to Mr. Jeck.

[133] The respondents dispute this analysis. Although the petitioner contends that Mr. Jeck made $596,249 in management wages in 2012, the respondents say that the number is overstated by including a loan worth $259,894 (which has been re-paid to CSA Western), a loan to CS Analytics worth $22,352 (which has been re-paid to CSA Western), the company's legal fees, and Maria Jeck's salary of $70,000.

[134] The respondents say that Mr. Jeck's management fees were an average of $255,992 between 2004 and 2012 and that for the five years in that period in which CSA Western's revenue exceeded $1 million, Mr. Jeck earned $326,633 per annum.

[135] Although Mr. Jeck in his first affidavit confirmed the management fees that the petitioner alleges were received by him for the years 2004-2011, his current position is that the figures need to be corrected to reflect his income, and not items such as Mrs. Jeck's income. The respondents say that the figures should be as follows for the period 2004 to 2012:

Financial Year	Ralph Jeck Wages	Gross Income of CSA Western	Net Income of CSA Western	Percentage of Gross Income
2004	$142,500	$603,449	$628	23%
2005	$150,580	$652,322	$23,675	23%
2006	$137,300	$743,639	$65,714	18%
2007	$240,292	$919,968	$919,968	26%
2008	$255,864	$1,378,843	$208,948	19%
2009	$184,435	$1,350,865	$269,597	14%
2010	$551,906	$1,193,076	$153,016	46%
2011	$433,501	$1,459,263	$79,768	30%
2012	$207,463	$1,079,912	($98,455)	19%

[136] Accordingly, one issue that I need to address in considering whether Mr. Jeck's remuneration is excessive is whether it should include Mrs. Jeck's compensation. Keeping that issue in mind, let me first turn to the expert evidence.

[137] Each side filed an affidavit from an expert.

[138] The petitioner introduced the evidence of Brent Lyon, an engineering recruiter, who was qualified as an expert in employee salaries in engineering companies. He was cross-examined before me.

[139] Mr. Lyon approached the question in terms of a market salary if CSA Western were to hire an outside manager to run the business to replace the current owner/manager. He expected the employer to pay a base salary in the range of $110,000 to $120,000 plus a bonus of 10-20% such that annual compensation for the role described would not exceed $164,000 annually as an "absolute maximum".

[140] In Mr. Lyon's opinion, only companies of 50 or more employees had salaries for consulting engineering managers of more than $200,000. The respondents submit that Mr. Lyon's expert reports are inadmissible because they fail to set out his facts and assumptions; because the market salary for a manager is not relevant to the issues between the parties, as that is not the only role played by Mr. Jeck; and because Mr. Lyon testified as an advocate. I have concluded that Mr. Lyon's evidence is admissible but there are a number of factors that affect the weight that I should attach to his opinion.

[141] Mr. Lyon acknowledged that there was a significant difference between a CEO and a manager. Given that Mr. Lyon did not set out in his affidavit his assumptions and exactly what duties and responsibilities he had in mind for Mr. Jeck, it is difficult to see what role Mr. Lyon had in mind for a manager he took to perform a role reasonably comparable to that of Mr. Jeck. I agree with Mr. Morgan that there were times during Mr. Lyon's cross-examination when Mr. Lyon lapsed into advocacy. He appears to have approached the issue on the basis of finding the lowest salary, as for example when he opined in his second affidavit that CSA Western could hire a manager "for as little as $140,000 [per year]".

[142] At the completion of his evidence, I reached the conclusion that Mr. Lyon's opinion was largely an initial impression. Although I am able to place some weight on Mr. Lyon's opinion, the difficulty I have is that the role performed by the hypothetical person in Mr. Lyon's scenario that is the basis of his opinion was not the role performed by Mr. Jeck for CSA Western. I am therefore unable to conclude on the basis of Mr. Lyon's opinion alone that the compensation paid to Mr. Jeck was excessive.

[143] The respondents introduced affidavit evidence from Barry Cook, a partner with Western Compensation & Benefits Consultants, who has 30 years' experience providing compensation consulting services. He was not required for cross-examination. His approach was quite different from Mr. Lyon's.

[144] Mr. Cook opined that Mr. Jeck's role at CSA Western was appropriately described as a president and chief executive officer; that it was not appropriate to compare his salary to that of a consulting engineer; that for comparison purposes it was appropriate to review compensation in other small entities paid to CEOs; and that remuneration commonly includes certain long-term incentive plans, an annual bonus, perks and insurance and retirement benefits.

[145] Mr. Cook's opinion was that to attract, motivate and retain an individual competent to perform the CSA Western president's role, the common approach followed by companies is to set salary at the 50th percentile of the comparison market and provide incentive plans which permit a total compensation to increase to perhaps the 75th percentile or more if the company's performance and the individual's performance are judged to be very good. He opined that a salary equivalent to the 50th percentile would be $173,000, a salary equivalent to the 75th percentile would be $191,000, and that if the company wished to pay annual cash compensation (i.e. salary plus annual bonus) equal to the 50th percentile, the annual bonus would be approximately 47% of annual salary, whereas if the company wished to pay annual cash compensation equal to the 75th percentile, the annual bonus opportunity would be 80-100% of salary. On this basis, Mr. Cook deposed that the annual compensation would be in the following range between the 50th and 75th percentile: from a low of $271,000 to $280,000, to an average of $292,000 and $301,000, to a high of $365,000 to $375,000. In addition, he said the company should provide an annual car allowance, group insurance and a defined retirement arrangement where the company contributes between 4-5% of salary.

[146] One difficulty with the expert evidence in this case on both sides was that neither expert directly addressed the appropriate compensation in the marketplace for a person precisely in Mr. Jeck's position.

[147] Mr. Jeck, in my view, did not fill the role that was simply the equivalent of a manager but had responsibility for all aspects of the company's business. On the other hand, Mr. Cook's comparison of compensation paid to persons running similar small businesses as CEOs with bonuses for success was not completely accurate, because Mr. Jeck was also a majority owner of the company and in that capacity would benefit from success.

[148] Accordingly, I found the opinion evidence overall to be of limited assistance in determining whether in comparison to some industry norm it could be said that the management fees were

excessive or not.

[149] However, having reviewed the evidence, I think that the remuneration that Mr. Jeck receives should be taken to include monies that he subsequently said should be treated as payments to Mrs. Jeck. I do that because I think that his initial statement of his income in his earlier affidavit is more likely to be accurate and I was not persuaded on the evidence that the payment by the company to Mrs. Jeck was other than for income splitting purposes.

[150] Accordingly, I conclude that for the period prior to the issuance of the petition, in the eight years from 2004 to 2011, Mr. Jeck earned an average income of $326,156, and in the period from 2007 to 2011 prior to the issuance of the petition, his average income was $413,212. In the period from 2004 to 2011 there were no dividends to the shareholders. I also find that in the years 2010 and 2011, Mr. Jeck received $634,262 and $511,156, respectively.

[151] Based on all of the evidence before me, and in light of the foregoing discussion, the question remains whether the petitioner has demonstrated that the remuneration Mr. Jeck caused to be paid to himself was so high as to be excessive and oppressive or unfairly prejudicial to the rights of the minority shareholder.

[152] As I mentioned at the outset of this discussion, there is little in the evidence to support what, objectively, the reasonable expectations of these shareholders were in terms of Mr. Jeck's remuneration. The respondents say although Mr. Skene deposed his expectation was that Mr. Jeck would pay himself an appropriate wage in the amount of $50,000 to $75,000 per year, he also deposed that he expected Mr. Jeck's wages to increase above 1993 levels, and he would not have objected to a comfortable management wage approaching $100,000. Mr. Skene confirmed on cross-examination that he never discussed his expectations in that regard with Mr. Jeck. He also deposed that Mr. Jeck's salary between 1993 and 2001 was not very different from what he expected, although he was "a little surprised" about Mr. Jeck's salary of $131,880 in 2001.

[153] I find Mr. Jeck has been very well rewarded for his efforts by the compensation he has received. The figures for 2010 and 2011 are high, even by Mr. Cook's analysis. However, I am drawn to the conclusion that while the remuneration Mr. Jeck awarded himself was quite high, given that he has a majority equity interest and as majority owner is able to benefit from his shareholding if the company does well, the remuneration he has received overall was not shown to be so high that, <u>in and of itself</u>, it was oppressive or unfairly prejudicial.

[154] The question however arises whether very high compensation to the majority shareholder, particularly as was the case in 2010 and 2011, if not in of itself oppressive or unfairly prejudicial, is a factor that may be taken into account when considering whether the petitioner has demonstrated oppressive or unfairly prejudicial conduct.

[155] The respondents argue that the proper approach is one that I might describe as water-tight compartments; in other words, the respondents say that the proper approach is for the court to examine each allegation in isolation to see if the claim of oppression or unfair prejudice is made out. I disagree with that approach.

[156] The law, I think, is settled that allegations of oppressive or unfairly prejudicial conduct are to be assessed in combination and context, rather than in isolation. The authors of the second edition of *Shareholder Remedies in Canada* (Markham, ON: LexisNexis Canada, 2009) put it this way at §17.18:

> Although no single event may qualify as oppressive conduct, such conduct may arise when various events are considered together. Similarly a finding of oppression depends on a consideration of all of the evidence rather than isolated incidents, and such evidence considered as a whole may suggest that no oppression occurred.

To the same effect, see David S. Morritt, Sibua K, Bjornquist & Allan D. Coleman, *The Oppression Remedy* (Canada: Canada Law Book, 2007) at 5:20; *Paley v. Leduc*, 2002 BCSC 1757 at para. 33; and *Walker v. Betts*, 2006 BCSC 128 at para. 86.

[157] Thus, I will review the findings that I make later in this judgment and then determine whether the petitioner has established conduct on the part of the respondents entitling it to a remedy under the statute.

Forgery of Engineering Reports and Related Documents

[158] I turn to the question of the alleged forgery by Mr. Jeck of Mr. Skene's signature on engineering documents. This is alleged by the petitioner to be another ground for finding oppression or unfairly prejudicial conduct.

[159] The petitioner asserts this allegation relates to the oppression claim directly, which is disputed by the respondents, in addition to matters of credibility and the issue of forgery of corporate resolutions that I have discussed above. The petitioner also asserts that it is a claim entitling the petitioner to a remedy akin to damages for unjust enrichment for the benefit that the respondents have received unlawfully by affixing Mr. Skene's seal and signature to engineering documents. The petitioner refers to this as a claim for unjust enrichment, or what Mr. Fleming refers to as the penal rule of equity.

[160] The petitioner asserts that Mr. Jeck affixed Mr. Skene's signature and professional stamp on numerous engineering reports and related documents required for CSA Western's work. The petitioner asserts, in general terms, that Mr. Jeck's improper use of Mr. Skene's signature and stamp as a professional engineer generated revenue for the company in excess of one million dollars while saving the company the cost of hiring an engineer of about $450,000.

[161] The respondents deny that any affixing of Mr. Skene's signature and stamp was done without his consent and argue, in any event, that the alleged improper use of his signature and professional stamp between 1998 and 2004 is statute barred by the *Limitation Act*. They also say that the claim based on the alleged forgeries is not an oppression claim and is at best a personal claim of Mr. Skene and not a claim of the petitioner in any event.

[162] Whether the allegation of forgery and improper use of Mr. Skene's stamp is properly the subject matter of an oppression claim, or whether it is simply a personal claim by Mr. Skene or the petitioner against the company that should be brought in a separate proceeding, if at all, is at issue between the parties. However, in my view, the issue of the authorized or unauthorized use of the stamp and Mr. Skene's signature at least relates to the question of credibility between the principals of the main parties.

[163] It is first necessary to provide some background as to how this issue arose in this litigation.

History of the Allegation of Forgery

[164] In Mr. Jeck's first affidavit, he disputed Mr. Skene's asserted contribution to the overall success of CSA Western. Mr. Jeck stated that a building envelope professional's accreditation was denied to Mr. Skene in 2000 even after a challenge to that denial by Mr. Skene. Mr. Jeck noted that in 2004 Mr. Skene's engineering license was changed to non-practicing with the APEGBC and that in 2006 a complaint was lodged by two former employees, Mr. and Mrs. Kennedy, about the lack of Mr. Skene's presence while he ought to be mentoring junior engineers. Mr. Jeck deposed that the matter was resolved by Mr. Skene's resignation and return of his professional stamp, even though he was already a non-practicing member.

[165] The petitioner responded by filing affidavits from the Kennedys, the former employees of CSA Western and the complainants to the APEGBC. Their affidavits indicated that the 2006 complaint was to the following effect. At the outset of the Kennedys' employment at CSA Western, employees would complete engineering documents and they would be couriered to Mr. Skene wherever he was working and then returned, signed. Mr. Kennedy deposed that after a short time, the process of sending draft reports to Mr. Skene for his review and approval changed. Mr. Kennedy said that Mr. Jeck would forge Mr. Skene's signature and apply Mr. Skene's professional stamp without involving Mr. Skene.

[166] In Mr. Jeck's third affidavit, sworn in August, 2012, he replied to this allegation, as follows:

> 12. In any event, I deny that I ever forged Mr. Skene's signature on any reports or other documents as alleged in the K. Kennedy Affidavit #1 and M. Kennedy Affidavit #1 or otherwise, nor did I improperly place his stamp on any documents without his knowledge as alleged or otherwise. It simply never happened and there was certainly no finding by APEGBC, despite their extensive investigations, which could have corroborated the

Kennedys' complaints in that regard.

[167] At the October 2012 hearing before me, the respondents took the position that the Kennedy affidavits were not relevant to any issue in the pleadings, although there was cross-examination of the expert witness, Mr. Green, who had opined on the apparent validity of Mr. Skene's signature on the corporate resolutions. After submissions from counsel, I directed that the pleadings be amended and ordered that documents be produced. I expected that the production of documents from the company's files would resolve the question of whether there had been forgeries to the engineering documents as was now asserted in the petition and as was asserted in the Kennedy affidavits.

[168] The amended pleadings included the allegation of forging Mr. Skene's name and putting the public at risk. In addition to the allegation of forgery concerning the shareholders' resolutions, the amended pleadings now contained this assertion, as amended in November 2012 (Part 1 at para. 1):

> m. forging Skene's signature on CSA Western's engineering reports and applying Skene's professional engineering stamp on those reports from ~~1999~~ 1998 to ~~2003~~ 2004, and by doing so putting the safety of the public at risk as well as putting both CSA Western (and Jeck and Skene personally) at risk of damage; ~~and~~

[169] No evidence of risk to the public was ever put forward by the petitioner.

[170] The response of the respondents, amended in November 2012, contained this reply (Part 4):

> 17. Mr. Jeck did not sign Mr. Skene's signature on CSA Western's engineering reports without his knowledge or without his instruction to do so.
>
> 18. If any of Mr. Skene's signatures on CSA Western's engineering reports have been forged, the forgeries were done without the knowledge or consent of the Respondents.
>
> 19. Mr. Jeck did not apply Mr. Skene's professional engineering stamp on CSA Western engineering reports without his knowledge or without his instruction to do so.
>
> 20. If Mr. Skene's professional engineering stamp was applied on CSA Western engineering reports without Mr. Skene's knowledge or at his instruction, the application of the stamp was done without the knowledge or consent of the Respondents.
>
> 21. Public safety has never been put at risk by the Respondents. Further, the Respondents have never knowingly or intentionally put Mr. Skene or themselves at risk of damages as a result of CSA Western's engineering activities.

[171] The respondents also pleaded that Mr. Skene was put on notice at the latest by September 2006 by the Kennedys' complaint that his signature was being applied to engineering reports, and thus that the claim was statute-barred by the *Limitation Act*.

[172] During a lengthy adjournment the respondents produced numerous CSA Western files so that Mr. Skene could review them in order to advance what documents were “forgeries”. I anticipated that Mr. Skene would review the documents and point out any engineering documents purportedly bearing his signature that he alleged to be forgeries.

[173] Mr. Skene deposed that he reviewed 53,000 pages of documents over eight-and-a-half days and identified numerous signatures in the documents produced by CSA Western that he said were not his.

[174] The petitioner then filed two further expert reports dealing with the issue of whether the signatures were forgeries or not. The petitioner also took the position that the company earned significant revenue and generated savings of $75,000 per year by not having to hire an engineer and by simply forging Mr. Skene’s signature on engineering reports and what were referred to as “process documents”, a term used by Mr. Skene.

[175] After this extensive document production, but while the allegation that public safety was endangered by the forgeries was still a live issue, Mr. Jeck swore the following statement in his fourth affidavit of June 26, 2013:

> 4. I am shocked and extremely surprised that Mr. Skene is alleging that I forged his signature on engineering reports and other documents for CSA Western. As I will describe in greater detail, due to his absence from this jurisdiction and his residence in either eastern Canada or eastern U.S. at material times, Mr. Skene asked me to sign and/or stamp documents on his behalf and authorized me to do so throughout the time period during which he now alleges that those signatures are “forgeries”. I have never signed or stamped a document on Mr. Skene’s behalf unless it was at his direction and/or with his authorization. In other words, I wholeheartedly dispute Mr. Skene’s allegation that I “forged” his signature or misused his professional stamp.

[176] The issue was no longer whether the signature on the documents was actually Mr. Skene’s but whether Mr. Skene had authorized Mr. Jeck to affix his signature.

[177] The parties have directly contrasting positions on whether the affixing of Mr. Skene’s signature by Mr. Jeck to any document was ever authorized by Mr. Skene.

[178] Mr. Jeck said that the practice of signing Mr. Skene’s name began when Mr. Skene was absent from B.C. at his residence in eastern Canada and the eastern U.S. and Mr. Skene asked Mr. Jeck to sign documents on his behalf. The respondents say that Mr. Skene’s protestations that this would be a gross breach of professional standards should be ignored because Mr. Skene admitted confidence and trust in the work of CSA Western – something which is supported by the fact that he had signed off as a professional engineer on projects before construction had begun. On cross-examination, Mr. Skene agreed that he had pre-signed documents approving the work on completion, something which Mr. Morgan suggests is not far removed from allowing Mr. Jeck to

sign Mr. Skene's signature.

[179] Mr. Morgan, counsel for the respondents, argues that there is ample evidence that Mr. Skene was involved in projects that contain his "applied signature" which is circumstantial evidence that corroborates that he was aware of and approved of the work and authorized or must have authorized Mr. Jeck to sign his name.

[180] Mr. Morgan argues Mr. Skene's position that he was not aware and did not authorize Mr. Jeck to apply his signature is not tenable. He points to the earlier position of Mr. Skene, who says that he investigated and disputed the complaint by the Kennedys in 2006 and provided a complete response. At that time he spoke of regularly receiving packages from CSA Western and that he would have been shocked and surprised if anyone used his engineering stamp as described in the complaint. Mr. Morgan says that if Mr. Skene has not in fact signed nor authorized his signature on any document past 2000, as he now asserts, then it is inconceivable that when the complaint was raised in 2006 (for a period ending in 2003), Mr. Skene did not tell APEGBC that he had not signed or stamped documents for CSA Western for many years.

[181] Mr. Jeck acknowledges signing Mr. Skene's signature was not an appropriate practice but says it was acquiesced in and accepted by Mr. Skene. Mr. Jeck asserts that Mr. Skene is now "playing chicken with the truth" to gain an advantage in this litigation, knowing that neither of the principals of CSA Western could initially come forward and admit that Mr. Skene's signature as an engineer was applied by Mr. Jeck.

[182] Mr. Skene flatly denies giving Mr. Jeck this authority.

[183] The petitioner argues that Mr. Jeck's current evidence contradicts the respondents' earlier position that the production of engineering files by CSA Western would resolve the question of whether there were forgeries or not. The petitioner says it also contradicts Mr. Jeck's previous sworn evidence that there was no merit to the Kennedys' complaint. The petitioner contends that there is no corroborative evidence to support the position that Mr. Jeck had Mr. Skene's authorization to affix his signature and that there are no emails, notes or documents that reflect it. Mr. Fleming argues that small involvement or participation by Mr. Skene in a few files in which there are forgeries does not show his consent nor does the absence of documents actually signed by him, because the petitioner asserts it is unclear that CSA Western has produced all of the relevant files.

Discussion of the forgery question

[184] Did Mr. Jeck apply Mr. Skene's signature on numerous engineering documents with Mr. Skene's consent? I have concluded that I am able to resolve this conflict on the evidence.

[185] I have considered the evidence of the main witnesses under cross-examination both before me and before a court reporter. I have also considered the circumstantial evidence surrounding the alleged forgeries, the prior statements of the parties under oath, the plausibility of each version, and the presence or absence of corroborative circumstantial evidence as to whether Mr. Skene knew and authorized this alleged practice or not.

[186] The petitioner argues that it is inconceivable that Mr. Skene who has had a lengthy career as a professional engineer would risk his reputation and his practicing certificate by allowing his signature and seal to be applied during the relevant period of 1998-2004, particularly for what was at the very most modest remuneration. It seems odd that Mr. Skene would be prepared to throw away his professional reputation for almost no remuneration.

[187] That is a strong argument at first blush but of course far from conclusive.

[188] The respondents make a series of points that arise from the evidence and the cross-examination of Mr. Skene which are relevant to his credibility and whether he authorized Mr. Jeck to affix his signature.

[189] The respondents point to the evidence on cross-examination of Mr. Skene where it was shown that he had signed completion letters or other certificates to be used by the company in advance. Mr. Fleming acknowledges that Mr. Skene, on three, four or five occasions pre-signed certificates of completion because he trusted CSA Western, and acknowledged that although it was not an ideal practice there is no basis to infer that the transgressions were of a similar magnitude to the forgery scheme. On the other hand, the respondents say it is not a huge leap that Mr. Skene also authorized Mr. Jeck to sign his name on documents in circumstances where he was generally satisfied that the work was being or would be performed correctly. Although the pre-signing of documents appears to be a breach of professional protocol, is it much different than allowing a signature to be affixed by someone other than the professional engineer?

[190] In addition, although the petitioner pleaded in November 2012 that the alleged forgeries and misuse of Mr. Skene's stamp placed the public at risk, the respondents point out that after document discovery there was still no evidence of public safety concerns and none was ever asserted. This, the respondents say, suggests that the purpose of the allegation of forgery was simply to place pressure on the respondents in this litigation to acquire the shares of the petitioner.

[191] Mr. Morgan says that Mr. Skene's recent allegation to the effect that having reviewed the documents there are no genuine signatures between late 2000 and 2004 contradicts the position that he took in 2006 when responding to the APEGBC investigation into the Kennedys' complaint. Mr. Skene's position at that time was that he was working on projects and receiving packages from the company between 1999 and 2003. However, Mr. Skene now says that he did not see the

documents that APEGBC reviewed at the time of the complaint, in fact never met the lawyer he retained, and he simply trusted Mr. Jeck who at the time in 2006 told him that the Kennedys' complaint lacked merit. Mr. Skene said essentially that he made no inquiries in 2006 regarding the allegations of forgery.

[192] The respondents also point to evidence that Mr. Skene has continuing involvement in projects where his signature is alleged to be forged, and that Mr. Skene had verified work of a junior engineer and in fact toured some projects that he now says contain forgeries. The inference that the respondents ask the court to draw is that if the impugned signatures are not Mr. Skene's original signatures, he must be taken to have authorized Mr. Jeck to sign his name. The respondents characterized Mr. Skene's evidence as contradictory, argumentative, forgetful, and they ultimately submit that it should be rejected.

[193] I listened carefully to Mr. Skene's evidence on cross-examination and although I found he was occasionally forgetful and there were a number of points that gave rise to concerns that he may have allowed Mr. Jeck to sign his name, he maintained his denial and overall, I did not find him to be an unimpressive witness in terms of his credibility.

[194] Mr. Fleming argues that Mr. Jeck took no clear position on why Mr. Skene authorized him to affix his signature, as Mr. Jeck alleges he did. This would be a very significant matter and Mr. Fleming says it would be surprising if Mr. Jeck did not have a clear recollection of the circumstances in which it all began. However, as Mr. Jeck put it in his fourth affidavit, at some point which he did not recall, Mr. Skene told him to sign and stamp documents for him, likely due to project time constraints.

[195] There was no direct evidence that Mr. Skene knew that Mr. Jeck was affixing his signature. There is no document clearly authorizing Mr. Jeck to affix Mr. Skene's signature, nor anything to directly prove such an authorization.

[196] The respondents rely on two pieces of evidence to show that this authorization was given. One document was a note apparently prepared by Marilyn Hodgkiss, a secretary at CSA Western, to the effect that Mr. Jeck could sign for delivery of a package for him. However, according to Mr. Skene, he did not give authority to Mr. Jeck to sign engineering documents for him.

[197] The other document is more significant. Mr. Jeck says that in or around early 2001, Mr. Skene called to express concern about the quality of the reproduction of his signatures. Mr. Jeck says that Mr. Skene forwarded several "examples" of his signatures to improve the quality of the reproduction. The faxed documents say "Hi" and contains samples of Mr. Skene's signatures and initials, and say "Hope These 'Examples' Will Work OK For You".

[198] Mr. Skene denies that he gave the document to assist Mr. Jeck to better falsify his signature, and says that CSA Western already had numerous documents with Mr. Skene's signatures. He also says that the document relied on by the respondents is not an original and he does not know its purpose or whether it was sent to Mr. Jeck at all. In any event, he says he would have faxed sample signatures if requested without any question.

[199] The first document I find to be quite ambiguous. However, I find the second document to be suspicious. It might support the position that Mr. Skene wanted Mr. Jeck to replicate his signature, but it is uncertain what file the document came from and it is apparently not an original. Nevertheless, it is a piece of circumstantial evidence that tends to support the respondents' position that Mr. Skene gave authority to Mr. Jeck to sign his name as an engineer, although certainly not conclusive.

[200] Is it reasonable to conclude that Mr. Skene, who had the opportunity to address the Kennedys' complaint and deny it in 2006, is now being forthright when he asserts the practice the Kennedys complained of in fact took place?

[201] If Mr. Skene saw or took time to look at the engineering files that were produced in the APEGBC investigation in 2006, he presumably would have known at the time that they were not his signatures in some of those files, given the amount of forgeries that he asserts appear in the files he reviewed recently. The respondents also say that Mr. Skene's evidence contradicts what he said in 2006 when the APEGBC investigation was taking place. At that time, he said he was actively involved in CSA Western for a period ending in 2003, but now he says, in effect, that he has not been involved in projects since 2000.

[202] However it is unclear what files Mr. Skene actually saw at the time of the 2006 investigation. He said did not visit Vancouver, did not meet his counsel, and no documents were produced to him for his review. The respondents have claimed common interest privilege over communications among the solicitors for CSA Western, Mr. Skene, and Mr. Lofgren at the time of the investigation. It is unclear to me what Mr. Skene may have known of the actual documents at the time. The respondents, I find, have not demonstrated in the evidence that Mr. Skene had an opportunity to and did look at signatures that Mr. Skene now asserts to be forgeries.

[203] The respondents say that the forgery allegations were unfounded but were advanced to increase pressure on the respondents and for leverage in negotiations to buy the shares. The respondents say that the petitioner is "playing chicken". That, I think, is a possibility.

[204] However, let me turn to Mr. Jeck's evidence.

[205] In assessing Mr. Jeck's evidence, I take into consideration his earlier statements. In his

2012 affidavit he denied that he "forged" Mr. Skene's signature. There was a debate between counsel at the hearing whether that is a false statement. Mr. Morgan's position was that it is not a forgery if it was done with Mr. Skene's consent. While that technically could be correct, it should be noted that Mr. Jeck went on to depose that he did not "improperly place [Mr. Skene's] stamp on any documents without his knowledge as alleged <u>or otherwise</u>" (emphasis added). In his affidavit evidence, he also specifically denied the merits of the complaint by the Kennedys, stating that:

> 14. In light of the Kennedys' complaints in 2006 and their recently sworn affidavits, I have reflected on their time with CSA Western and attempted to decipher why they would make such allegations <u>when they clearly were not true</u>.
>
> [Emphasis added.]

[206] Mr. Jeck's sworn evidence is a clear denial of the allegation that documents went into his office and came out with Mr. Skene's signature.

[207] However, I find the Kennedys' complaint was true.

[208] The heart of the Kennedys' complaint was that Mr. Jeck would "forge Chris Skene's signature, and apply Chris Skene's professional engineering stamp, without involving Chris" (M. Kennedy, Affidavit #1 at para. 6). Based on his current evidence, Mr. Jeck should not have said that the Kennedys' complaint was clearly not true. Their complaint that documents went into Mr. Jeck's office and came out with Mr. Skene's signature was true. Like his statement that Mr. Skene had waived the audit requirement, I find Mr. Jeck's sworn statement that the Kennedys' complaint was clearly not true, at best, very misleading, and more likely knowingly untrue. I also find that Mr. Jeck must have known that signing Mr. Skene's signature over his seal or stamp was a representation to third parties that the work was actually prepared or approved by the professional engineer before the signing by the professional engineer.

[209] Why did Mr. Jeck not take the position in this litigation from an early point that any signatures that were not Mr. Skene's were signed by Mr. Jeck with Mr. Skene's authority? Is it because Mr. Jeck's present position that Mr. Skene knew and authorized Mr. Jeck to affix his signature is a recent fabrication? Or was disclosure delayed because Mr. Jeck was concerned about the impact of the revelation that he signed Mr. Skene's name on the business of CSA Western?

[210] I am mindful that Mr. Skene spent eight-and-a-half days and went through about 53,000 documents to find forgeries when all Mr. Jeck had to do was say that many of the documents in the file were in fact signed by him. Was this a game of "chicken" with both men involved in the fraud, or is Mr. Jeck involved alone in this deception and simply trying to prolong this litigation, hoping perhaps that Mr. Skene would lose interest, run out of money to fund the litigation or die?

[211] There is support in the record for the proposition that Mr. Jeck will take positions – even

positions under oath – when those are convenient to fight this litigation, and then abandon them. Mr. Jeck now takes the position, contrary to his earlier position, that he signed the engineering documents but that I should conclude that it was with Mr. Skene's permission. Mr. Jeck had his counsel (I must conclude unknowingly) cross-examine a hand-writing expert over two days, when Mr. Jeck knew that the signatures on the resolutions were forgeries, in the sense that Mr. Jeck signed Mr. Skene's signature. It was common ground at a pre-hearing conference that the issue of whether there were forgeries would be resolved by determining if the signatures on the engineering documents were the original signatures of Mr. Skene. That, it turned out, was not correct. Mr. Jeck now says that he knew all along he had affixed Mr. Skene's signature to many of the documents. Moreover, while Mr. Jeck initially took the position through his counsel that he had applied Mr. Skene's signature to the engineering documents but not the shareholders' resolutions, during his cross-examination at the most recent hearing he suggested that he had never denied signing those shareholders' resolutions.

[212] Further, the extensive document production was a central point underlying an application for a substantial increase in the security for costs, which I allowed only in part. It is significant that at the hearing of October 30, 2012, the respondents took the position that all of the documents would contain Mr. Skene's signature, and after several months and 53,000 pages of documents produced, the respondents now take a different position and rely on the assertion that they had consent to affix Mr. Skene's signature. Mr. Jeck in effect suggests that he took a false position in this litigation (that he did not affix Mr. Skene's signature) because of fear of exposure of the parties' common secret, but now that he no longer maintains that false position, he says the court should find that it is Mr. Skene who is untruthful and in fact consented to Mr. Jeck signing Mr. Skene's name.

[213] Earlier in these reasons, I have set out Mr. Jeck's response to the allegation in the Kennedys' complaint where he deposed "nor did I improperly place his stamp on any documents without [Mr. Skene's] knowledge as alleged <u>or otherwise</u>" (emphasis added). He also deposed "[i]t simply never happened".

[214] In my view, Mr. Jeck's evidence under affirmation about affixing Mr. Skene's signature has changed, was misleading at best, and is a significant consideration in assessing the credibility of Mr. Jeck.

[215] I recognize that there is contradictory evidence on these questions. But weighing the evidence as a whole, and recognizing the burden of proof is on the petitioner, it is my conclusion that the signatures of Mr. Skene were affixed by Mr. Jeck to the engineering reports and to the shareholders' resolutions without Mr. Skene's consent. Although Mr. Skene did acknowledge signing some completion documents in advance, he denied that he gave authority to Mr. Jeck to sign his name and apply his stamp. I did not find Mr. Skene to be seriously shaken on cross-

examination or shown on substantive matters to be significantly inconsistent in his evidence.

[216] I also find that Mr. Jeck must have been aware that the cross-examination of an expert and the production of voluminous files for Mr. Skene to review were tactics to make this litigation more difficult for Mr. Skene to advance. I conclude that counsel for the respondents was not aware of the position that Mr. Jeck had signed Mr. Skene's name to the resolutions when he cross-examined the expert witness on that issue.

[217] If Mr. Jeck affixed Mr. Skene's signature without his consent to numerous engineering documents, as I find he did, how is that issue relevant in this oppression litigation?

[218] The petitioner says that the relevance of the forgeries is the unjust enrichment of the company: Mr. Skene estimated that CSA Western obtained $1 million in revenue from the forged signatures. The position of the petitioner is that the respondents have benefitted unjustly from their wrongdoing and must disgorge the $1 million, which they say Mr. Jeck admitted was consistent with a 2.5 times profit to salary ratio based on a $70,000 per annum salary for an engineer. The petitioner relies on the law of unjust enrichment in this regard, or alternatively what Mr. Fleming refers to as the penal rule of equity.

[219] However, the respondents say that the oppression remedy is concerned with claims *qua* shareholder, and is not a proxy for personal causes of action against the company. They submit the forgery claim is not a claim *qua* shareholder, but a personal claim of Mr. Skene's against the company, and should not be part of the consideration of whether the petitioner has established oppression.

[220] Secondly, the respondents take the position that the claim for damages or unjust enrichment, or for relief under the penal rule of equity, even if it had any merit or is relevant to the oppression claim, is statute-barred and/or was not brought in a timely manner as required by the *BCA*. The forgeries, if they were that, occurred at the latest by 2004 and Mr. Skene had clear knowledge of the allegation that Mr. Jeck had forged his name by, at the latest, 2006. The forgery claim was made by the petitioner in this proceeding more than six years later when the pleadings were amended in 2012.

Timeliness or Limitation

[221] Before I consider the other claims, asserted by the respondents to be derivative claims, and whether the alleged conduct that I have found to be proven constitutes oppression or unfairly prejudicial treatment, I will deal with the timeliness and the limitation defence.

[222] Claims pursuant to the statutory oppression remedy must be brought in a "timely manner". Section 227(4) reads, in reference to the remedies which may be imposed by way of s. 227 (3), as

follows:

> The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

[223] Apart from the requirement that the application be brought in a timely manner, the *Limitation Act* also has application. I refer to this passage of N. Smith J from *Runnalls v. Regent Holdings Ltd.*, 2010 BCSC 1106 (at paras. 52-56):

> The *Business Corporations Act* is clear that the court can grant relief for oppression only if the application is made in a "timely manner". That provision has no direct equivalent in the oppression remedy section of the federal statute that was before the Supreme Court of Canada in *BCE Inc.* However, the Court at para. 78 inferred a comparable requirement in that, among the factors to be taken into account in determining reasonable expectations, it included the question of whether there were any "steps the claimant could have taken to protect itself". I take that to mean that if the claimant was aware or should have been aware of the conduct in issue and did not take available steps to prevent it, the continuation of that conduct cannot be said to be outside his or her reasonable expectations.
>
> In regard to the specific timeliness provision of the B.C. statute, an application is timely if a course of conduct that constitutes oppression is continuing or if its effects are continuing: *Orr v. Sojitz Tungsten Resources Inc.*, 2010 BCSC 66. However, an oppression claim is still subject to the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266: *Jaska v. Jaska* (1996), 141 D.L.R. (4th) 385 (Man. C.A.); and *Carr v. Cheng, Dorset College Inc.*, 2007 BCSC 1693.
>
> In *Jaska*, the Manitoba Court of Appeal noted that there is little case authority on the relationship between the oppression remedy and general limitation statutes because oppression claims are "almost by definition, matters of urgency". The Court held that the Manitoba *Limitation of Actions Act*, R.S.M. 1987, applies to all proceedings, including oppression claims.
>
> In *Carr*, this Court dismissed both a derivative action and an oppression claim on a number of grounds, including the fact they had been commenced more than six years after the causes of action arose and after they came within the plaintiff's means of knowledge. The six year period referred to derives from s. 3(5) of the *Limitation Act*, which deals with actions not specifically mentioned in the *Limitation Act* or other statute as having a different limitation period. The six years run from the date the right to bring an action arose, subject to the postponement provisions of s. 6(3), which are based on the date the facts giving rise to the action come within the plaintiff's means of knowledge.
>
> In this case, the petition was filed on March 18, 2008. I have already held there to be oppression based on the facts found in my earlier Reasons for Judgment. But to the extent that the specific transactions now at issue are said to be distinct acts of oppression, I must be satisfied under s. 227(4) that the application was brought in a "timely manner". Although timeliness is a flexible concept that will depend on the circumstances of each case, the clear outer limit of what may be considered timely is the period that would be allowed by the *Limitation Act*.

[224] In *Carr v. Cheng*, 2007 BCSC 1693 (referred to above) the court said (at paras. 104-105):

> The *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(5) provides for a six year limitation period in respect of the claims in the Derivative Action. The limitation period runs with certain exceptions from the day when the right arose. In cases of fraud the period is postponed and

> only begins to run from the date when the defendant is identified and the relevant facts are within the party's means of knowledge (ss. 6(3) and 6(4)). In other words the period runs either from when the facts are discovered or when they ought to have been discovered by exercise of reasonable diligence: *De Shazo v. Nations Energy Company Limited*, 2005 ABCA 241, 256 D.L.R. (4th) 502.
>
> The allegations against Mr. Cheng for fraud, negligence and breach of fiduciary duty in the Derivative Action are about his conduct in managing Dorset BC. The Derivative Action was not commenced until November 18, 2005, more than six years after the claims arose and were known to the Carrs. No reply was filed in the Derivative Action asserting postponement of the limitation period. The burden of proving a postponement rests with the person claiming it (s. 6(6)), and there is no evidence to support a postponement beyond Mr. Carr's vague assertions that Mr. Cheng did not keep him informed: see *Tyson v. Canada (Attorney General)*, 2000 BCSC 201.

[225] In *Jaska v. Jaska* (1996), 141 D.L.R. (4th) 385 (Man. C.A.), (also referred to above) the Manitoba Court of Appeal concluded an oppression claim was statute-barred. After discussing case law on the application of limitation periods to oppression claims, the court stated (at paras. 29-30):

> In my opinion these decisions are consistent with the fundamental policy behind the oppression remedies in the various *Corporations Acts*. The purpose of these provisions is to provide protection from unfair conduct, usually perpetrated by majority shareholders or management. The element of timeliness arises directly from the scope and purpose of the oppression provisions themselves and is distinct from the statutory limitation period or the equitable principle of *laches*. If the minority shareholders or creditors do not need to be protected, then there is no reason to invoke the remedies under the statute since other remedies are still available, most notably the commencement of an ordinary lawsuit for damages ….
>
> In this case Walter knew in 1988 the facts and circumstances concerning the alleged wrongful conduct that was not asserted against Robert until May 1995. Simply put, when Walter decided to sit on his rights for an extended period of time, this conduct took him outside the purpose and scope of the statutory remedy. The oppression remedy now invoked was available to Walter in 1988 when he first discovered the misconduct complained of. On this ground as well I would allow the appeal.

[226] Turning first to the allegations addressed earlier in these reasons concerning the provision of financial information and excessive management fees, given my conclusions on the representations made to Mr. Skene about the company's performance and the forging of the consent resolutions waiving the audit requirement without the authorization of the petitioner, I find these claims in relation to what I have termed the corporate governance or financial information issues are not statute barred, were subject to wilful concealment, and in the circumstances were brought in a timely manner. The failure to provide audited financial statements, or financial statements with a waiver, were continuing breaches by the respondents, and given the conduct of the respondents in terms of the information that was provided and Mr. Jeck's signing of Mr. Skene's signature to the resolutions, I think that the treatment of the petitioner was clearly outside the petitioner's reasonable expectations.

[227] The more involved question is that of the forgery allegations in relation to the engineering documents. Although the petition was initiated on December 23, 2011, the forgery allegations in connection with the engineering documents were not advanced until November 2012, and at that time the respondents reserved the right and pleaded a limitation defence.

[228] The allegations of forgery of engineering documents, given that they concern events before 2004, are out of time unless the petitioner can establish postponement.

[229] The relevant sections of the *Limitation Act*, R.S.B.C. 1996, c. 266, s. 6 are as follows:

> (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
>
> > …
> >
> > (e) in which material facts relating to the cause of action have been wilfully concealed;
> >
> > …
>
> (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> …
>
> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[230] Although Mr. Skene did not know that his signature was being forged and his stamp misused when it occurred in the 1998-2003 or 2004 period, I find that during and by reason of the APEGBC investigation in 2006, Mr. Skene knew of those allegations, that it was Mr. Jeck who was alleged to have done so, and that Mr. Skene had within his means of knowledge access to files which would have refuted or substantiated those allegations. I find that, consistent with the test for postponement set out in *Ounjian v. St. Paul's Hospital*, 2002 BCSC 104, a reasonable person knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard an action as having a reasonable prospect of success and that the petitioner ought to be able to pursue the action.

[231] The respondents' point is that for the postponement provision in s. 6(3)(e) to be triggered the petitioner must establish wilful concealment, which has been interpreted to mean knowingly or

deliberately keeping the material facts relating to the cause of action from the plaintiff or knowingly preventing the plaintiff from seeking legal redress: *Cimolai v. Hall*, 2005 BCSC 31 at para. 355, aff'd 2007 BCCA 225. That is not made out here by the petitioner in relation to the forgery allegations concerning the engineering documents.

[232] I do not see how Mr. Skene's position that he relied in 2006 upon Mr. Jeck's comment to the effect that the Kennedys' complaint had no merit can postpone the limitation date. Mr. Skene knew that the allegation was Mr. Jeck was the one who forged the signatures and improperly applied the stamps – in those circumstances a reasonable person, taking advice, would not have relied on the word of the alleged forger and would have investigated and found out if the allegations had merit.

[233] As such, I conclude that the allegations of forgery on engineering reports, if they are a proper oppression claim, are out of time. Accordingly, I find that the allegations of forgery of engineering documents or reports, whether purportedly in support of a claim for oppression or unjust enrichment are statute-barred. Moreover, I have concluded that this claim is a personal claim by Mr. Skene as a professional engineer and not a claim of the petitioner. In terms of the alleged unjust enrichment claim, it is not a claim that affects the interests of the petitioner as a shareholder. Finally, apart from the limitation defence, if this is a proper oppression claim, which I conclude it is not, I find in the circumstances it was not brought in a timely way as required by the statute.

Other Allegations in this Proceeding

[234] Apart from the allegations addressed above, under a heading in its argument entitled "further allegations", the petitioner points to other conduct that it alleges is oppressive.

[235] It says that the respondent company guaranteed a personal mortgage on Mrs. Jeck's property on Fawcett Road in Coquitlam; and that Mr. Jeck wrongfully appropriated to himself a corporate opportunity by purchasing a half interest in the land on which the company operates in 1997, and further appropriated to himself and his wife a corporate opportunity to purchase the remaining half interest in 2008. The petitioner also alleges that Mr. Jeck failed to disclose his conflict of interest arising from ownership of the company's premises, collected rent from the company since 1997, and that the respondents diverted CSA Western business to a company owned by Mr. and Mrs. Jeck called CS Analytics.

[236] The above claims are alleged to be particulars of oppressive conduct, and in the case of certain claims, the petitioner also seeks leave to bring them as derivative claims in the name of the company against the individual respondents. As I understood the petitioner's submission, it sought a remedy in the oppression proceeding with the hope that it would effectively conclude the litigation between the parties. However, the petitioner said that if its claims are not considered by this court

to be appropriate oppression claims, it seeks leave to bring the claims on behalf of the company as derivative proceedings.

[237] The respondents say that these further claims are not oppression claims and at best are derivative claims for which leave should be denied for a number of reasons, including an absence of merit and because they are out of time.

[238] Let me briefly refer to some general principles that apply in determining whether claims are oppression or derivative claims, and in determining whether to grant leave to start an action in the name of the company.

[239] Unless claims have affected the complaining shareholder in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally, they cannot form the basis of an oppression proceeding for which leave is not required.

[240] The requirement in *Furry Creek* that the petitioner show a loss that is different from or in addition to loss to the company was explicitly confirmed in *Pasnak v. Chura*, 2004 BCCA 221 at para. 5:

> The authorities are clear that a shareholder must show direct and special harm in order to maintain a personal action for oppression, otherwise he must seek leave to bring a derivative action in the name of the company.

[241] It is well accepted that there is a degree of overlap such that claims which could be brought as derivative claims may in some cases also be pursued as oppression claims: Markus Koehnen, *Oppression and Related Remedies* (Canada: Thomson Canada Limited, 2004) at pp. 445-48. Those claims have historically included ones for excessive management fees (as I referred to above) and unauthorized corporate transactions: *Oppression and Related Remedies* at pp. 446-47.

[242] Section 232 of the *BCA* permits a shareholder to seek leave of the court to bring a derivative action in the name, and on behalf of, the company to enforce a right, duty or obligation enforceable by the company or to recover damages for any breach of those rights, duties, or obligations:

> Derivative actions
>
> 232(1) In this section and section 233,
>
> > "complainant" means, in relation to a company, a shareholder or director of the company;
> >
> > "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company
>
> > (a) to enforce a right, duty or obligation owed to the company that could be enforced

by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

[243] Mr. Justice Pearlman summarized the substantive requirements for the granting of leave to prosecute a derivative action in *Luft v. Ball*, 2013 BCSC 574 at paras. 46, 53-55:

> *Good Faith*
>
> The applicant bears the onus of establishing that it is acting in good faith in bringing derivative proceedings. Good faith is not presumed; the applicant must adduce evidence to establish good faith: *Creative Realty Corp. v. 333 Terminal Holdings Ltd.*, 2011 BCSC 638 (B.C. S.C.) at para. 19. The test of good faith is whether the action is brought primarily for the purpose of pursuing the claim on the company's behalf. The factors to be considered include the applicant's belief in the merits of the proposed claim, existing disputes between the parties, and alleged ulterior motives: *Bennett v. Rudek*, 2008 BCSC 1278 (B.C. S.C.) at para. 46. As Adair J. observed in Lost Lake Properties Ltd. at para. 56, ultimately good faith is a question of fact to be determined on all of the evidence and the particular circumstances of the case.
>
> …
>
> *Interests of the Corporation*
>
> The court must be satisfied that it appears to be in the interests of the corporation to bring the derivative proceedings: *Bellman* at para. 19. The applicant must show that there is an arguable case that the derivative action is in the interests of the company: *Gartenberg v. Consolidated Stone Industries Inc.*, 2005 BCCA 462 (B.C. C.A.) at para. 26.
>
> The court should not attempt to try the case when deciding whether the requirement that the derivative action is in the interests of the corporation has been met. The court should determine whether the proposed action has a reasonable prospect of success or is bound to fail: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), 40 B.C.L.R. (3d) 43 (B.C. S.C.) at para. 19, citing *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R. (3d) 300 (B.C. S.C. [In Chambers]) appeal dismissed (1996), 26 B.C.L.R. (3d) 357 (B.C. C.A.), leave to appeal to S.C.C. dismissed April 24, 1997 [[1997] S.C.C.A. No. 4 (S.C.C.)].
>
> In assessing the interests of the corporation, the court, in addition to considering whether the plaintiff's case has a reasonable chance of success or is bound to fail, also takes into account whether the defence raised is bound to be accepted and whether the potential relief will justify the cost and inconvenience to the company: *Discovery Enterprises Inc.* at para. 20.

[244] Although *Luft v. Ball* dealt with the federal statute’s derivative action provisions, its analysis was applied to the B.C. statute in *Khela v. Phoenix Homes Ltd.*, 2013 BCSC 2079. The substantive requirements of good faith and that the action is in the best interests of the company are the same in both statutes. The substantive requirements are in addition to the requirements of notice and that

reasonable efforts have been made to have the company bring the action.

[245] The leading case on when a director is precluded from taking for himself a corporate opportunity is *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, where the court said, at 607:

> An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

[246] Let me deal with the additional claims in turn.

Purchase of Business Premises

[247] The petitioner says that Mr. Jeck purchased a half interest in the property in which the company carries on business in 1997 with Jim Ferrie. The petitioner says that Mrs. Jeck purchased Mr. Ferrie's half interest in 2008.

[248] The respondents say that Mr. Skene was aware of the purchase of the company's premises by Mr. Jeck and Mr. Jim Ferrie in 1997 and visited the premises on several occasions. The respondents say that Mr. Skene was aware that the company leased the premises from those owners and that Mrs. Jeck, who is not an officer or director of CSA Western, bought Mr. Ferrie's interest in 2004 although it was not registered until 2008. Mr. Skene apparently denies knowledge of the purchase.

[249] The respondents say that it was not a corporate opportunity as CSA Western was not in the business of land assembly or real estate development or holding. The respondents say that the company paid commercial rent and there is no suggestion or evidence that the company was in a position to purchase the premises. As to the allegation that Mr. Jeck failed to disclose a conflict of interest, the respondents say that the relevant section of the statute did not come into force until 2004, and is inapplicable as it would only apply to a contract with the company. Although the petitioner points to s. 15.2 of the company's articles as requiring disclosure of a conflict of interest, no loss to the company was suggested.

[250] I do not think that this is an oppression claim. If anything it is a possible derivative action but on the material before me, I have concluded that I would not grant leave to the petitioner to sue in the name of the company. Given that the purchase by Mr. Jeck was in 1997 and the purchase by

Mrs. Jeck, a non-fiduciary, from a third party was in 2004, I think that even if the possible acquisition was a corporate opportunity in 1997 that the claim is bound to fail because of the limitations issue. Given this apparent absence of merit to the claim, I would not exercise my discretion to grant leave.

Guarantee of Mrs. Jeck's liability to the Bank

[251] This allegation concerns a resolution of the director authorizing the company to grant an unlimited guarantee of the debts of Mr. and Mrs. Jeck and that the company did guarantee the mortgage of Mrs. Jeck on Fawcett Road.

[252] The respondents say that there was a limited guarantee of Mrs. Jeck's mortgage on Fawcett Road, the premises where the company carried on its business, but that it has been discharged and that at the time it was given there was an appraisal showing the bank to be well secured. The respondent says that at the time of the guarantee the petitioner did not "exist" as it had been struck.

[253] Although arguably the granting of a guarantee in favour of a non-member of the company might support the contention that Mr. Jeck was treating the company as his own, I do not place great significance on this, given that on the evidence the bank was well secured. As no loss has apparently been suffered by the company, I would in any event decline to grant leave to start a derivative action on this allegation.

CS Analytics / Citadel

[254] The petitioner alleges that Mr. Jeck wrongfully appropriated to himself and his wife a corporate opportunity to operate CS Analytics as a separate business starting in 2012 and that this was first revealed to the petitioner in the April 2012 financial statement that was produced in audited form in January 2013. The petitioner says that the reserve fund studies business is closely related to the work of CSA Western and that the change to not run the business through CSA Western only arose part way through the audit.

[255] As to CS Analytics, the respondents say that it was incorporated in 2009, that the Jecks are each 50% shareholders, and that it has since had a name change to Citadel Building Consultants. The business initially of Citadel Building Consultants ("Citadel") was window testing and providing maintenance manuals. In 2011, the business of Citadel shifted to its present business of performing reserve fund studies. The allegation is that CS Analytics/Citadel shares office space with CSA Western, has a closely related business, and has paid dividends to the Jecks in the sum of $214,000 in the 2009-2012 fiscal year period.

[256] The respondents say that the company cannot provide window testing services as that

would be in conflict with the business that is done by CSA Western for its clients, and that the business it does do – that is, perform reserve fund studies – is not a corporate opportunity, as Maria Jeck was not obliged to provide that service through CSA Western.

[257] The respondents submit that this service is not "closely related" to CSA Western's work – it is not the typical service provided by an engineering firm. Even if Mrs. Jeck at one time intended to provide the service through CSA Western, the respondents say that it is not a corporate opportunity such that she was obliged to conduct the business through CSA Western.

[258] I will leave further discussion of this claim until the conclusion of my reasons but at this point I am not satisfied that it is an oppression claim but only a possible basis for a derivative action.

Trust Claims

[259] Lastly, there are a number of trust claims to properties owned by the Jecks, but they have been adjourned on the basis that there must first be a determination of whether funds had been removed by the company without authority. Given that I have not found monies were removed from the company without authority, it follows that the various trust claims must be dismissed.

Conclusions on Allegations of Oppression and Unfair Prejudice

[260] At this point, I will summarize my conclusions on what conduct has been proven.

[261] I have found the respondents failed to provide the petitioner with full and accurate financial information about the company for a lengthy period of time. That failure began in the early 2000s and ended in late 2010 when the petitioner was supplied unaudited financial statements by the respondents.

[262] I have found the respondents' failure to provide the petitioner with full and accurate financial information about the company for a lengthy period of time was a failure to comply with important provisions of the statute, and that the context in which this occurred is significant in this case.

[263] I have found the petitioner, as a minority shareholder, was entitled each year to have, in the absence of a waiver and unanimous agreement of the shareholders, audited financial statements.

[264] This is an important protection for a minority shareholder. I referred to the decisions in *Discovery Enterprises* and *Burdeny*, which indicate the significance of the provision of audited financial statements to a minority shareholder.

[265] I have found the circumstances of this case are also unique.

[266] The respondents' position that the petitioner was struck in 2006; that there were discussions

that continued from 2007-2011 but Mr. Skene had no interest in reviving the petitioner, although he could have perhaps done so at modest cost; and that Mr. Skene's failure to reinstate the petitioner placed Mr. Jeck in a difficult position regarding the corporate structure and any other matters that required shareholder approval, has to be placed in context.

[267] It was not only a statement from Mr. Jeck that led Mr. Skene to believe the company was just muddling along. I have found the minority shareholder had not received and did not receive financial information to which it was entitled. I have found the statutory requirement was never waived and a purported waiver of the requirement for audited statements had been forged for four years; thereafter the financial statements were not provided, audited or otherwise, and no waiver of the audit requirement was sought.

[268] I do not accept that Mr. Jeck believed the petitioner was receiving the financial statements. The company, through Mr. Jeck, had purported to provide financial information in a very general sense but that information was inaccurate and misleading. I have found that the information that was provided led Mr. Skene to believe his interest in the company was of marginal value. If he had waived the requirement for audited statements or expressed no interest in the company, he would have no basis to complain – but here I have found the petitioner did not waive the audit requirement. Although the corporate records purported to show that it did, those resolutions contained a signature that was not Mr. Skene's and, I have found, not applied with his consent.

[269] Although the petitioner was dissolved, under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B. 16, s. 241(5), the corporation, when revived, is – subject to the rights acquired by persons during the period of dissolution – "deemed for all purposes to have never been dissolved".

[270] Notwithstanding the respondents' arguments to the contrary, I did not see any detriment or prejudice to the respondents in the petitioner failing to maintain itself as a registered entity. There was inconvenience, perhaps, but if the respondents had complied with the statutory obligations, and not forged shareholders' resolutions but presented them for signature or informed the petitioner of the true state of the company's financial performance, I have found this inconvenience would not have occurred. Financial information about the company could easily have been provided at any time by Mr. Jeck to Mr. Skene, the principal of the petitioner. Had the company complied with the audit requirement, I have found the petitioner and Mr. Skene's actions and interest in the affairs of the company would have been quite different.

[271] While I recognize that the failure of the petitioner to maintain its status as a registered company and expressly demand financial statements might indicate a lack of interest in the ongoing affairs of the company and arguably affect the reasonable expectations of the shareholder, I have concluded, in the circumstances of this case, that occurred because there seemed to be little

point to reinstatement from the petitioner's perspective, given the modest financial performance that the petitioner believed the company was generating. I have found the petitioner's conduct was not unreasonable given the information that it had received from the majority shareholder.

[272] In making these findings, I have taken into consideration that in the last financial statements the petitioner saw before the drought of information there was reference to certain retained earnings, but I am not satisfied that the petitioner ought to have known the true state of the company's affairs.

[273] It is an understatement to say that the respondents' conduct in failing to comply with important corporate governance provisions and in forging the signature of the minority shareholder on the impugned consent resolutions in the period 2002-2006 lacks probity and fair dealing. I have found the petitioner was not aware of this conduct until around the time this litigation started in late 2011.

[274] In light of these findings, I have concluded that the petitioner's claims concerning the provision of financial information are not statute-barred, were brought in a timely manner in the circumstances, and are not barred by an estoppel. I have also found the failure of the respondents to comply with the statutory requirements of audited financial statements and annual meetings, absent a waiver, acted to the prejudice of the petitioner.

[275] The authorities indicate that the oppression cases are quite fact specific. Here, in these particular circumstances, I have concluded that the majority shareholder essentially operated the company as if it was his private entity, without regard for the minority shareholder. While I do not suggest that Mr. Jeck did not work hard, as he apparently did, I have found that the remuneration he directed to be paid to himself for his efforts is another important aspect of the context of this case. Mr. Jeck was the majority shareholder but he was not the only shareholder. I have found that Mr. Jeck's conduct in relation to the provision of financial information to Mr. Skene and the forging of the impugned shareholders' resolutions, taken with the substantial management fees he received, particularly in 2010 and 2011, supports the position that he was treating this company as if it was his alone.

[276] Notwithstanding that the petitioner was told the company was muddling along, under Mr. Jeck's stewardship the company was doing very well. I have concluded the reasonable expectations of the shareholders as to Mr. Jeck's remuneration had to account for Mr. Jeck's position and role at CSA Western. It is important to recognize that Mr. Jeck was a sole manager; CSA Western would not necessarily pay a dividend which was at the discretion of the director in any event; Mr. Jeck would set his management fees as permitted by the articles; and Mr. Skene had no reasonable expectation to participate in management. All of that I think is true – however,

Mr. Jeck's determination of his management fee had to be tempered by the fact that he would ultimately share in any profits as a majority shareholder and that Mr. Skene was entitled to full disclosure of financial information about the company.

[277] Although I did not find the management fees taken by the majority shareholder were in themselves oppressive as excessive in comparison to some norm, I have found that the payments made to Mr. Jeck were high – particularly, very high in the years 2010 and 2011, which were the fiscal years just before the petition was launched.

[278] Overall, I have found that the failure to fulfil the requirement to provide audited financial statements or hold annual meetings, the misleading information about the company's performance coupled with the payment to Mr. Jeck of management fees that were high, and in the years 2010 and 2011 very high, were cumulatively contrary to the reasonable expectation of both shareholders. They demonstrate the operation of the company's affairs in a manner that was oppressive and unfairly prejudicial to the minority. While the minority did not have a unfettered right to dividends or the right to set the manager's remuneration – that was Mr. Jeck's as the sole director – the petitioner was entitled to accurate financial information and at any meeting try to protect its proprietary interest.

[279] I recognize that the petitioner's counsel has made many allegations. I have found on the evidence that some of the allegations have not been proven in this proceeding, and that some of the allegations are for conduct that is out of time and not brought in a timely manner. But I find the conduct that is proven, not time-barred, and was raised in a timely manner cumulatively establishes oppression and unfair prejudice.

[280] When addressing the appropriate remedy in this case, I will return to the complaint of the petitioner with respect to CS Analytics, which the petitioner says is a business opportunity that the principal of the company has taken for himself and his wife in breach of his fiduciary duty. Aside from the merit of that assertion, the evidence suggests that the matter came to the petitioner's attention only as a result of the audited financial statements that were delivered following the commencement of this proceeding.

<u>Remedy</u>

[281] Given my conclusions, the question that arises is the appropriate remedy.

[282] The respondents argue that given they have now provided financial statements and, in 2012, audited statements, that should cure any deficiency. I disagree.

[283] In the circumstances, I find it would not be possible for the minority shareholder to retain any confidence in the impartiality and fairness of the majority in the administration of the company's

affairs.

[284] I find that the conduct of the majority, particularly viewed through the lens of what has occurred in this litigation, suggests a reasonable expectation that the improper treatment of the minority will continue.

[285] In all of the circumstances I have concluded the hope of Mr. Jeck was that he would be able to acquire the shares of Mr. Skene for a very modest amount. While it was argued that he went to lengths to have the petitioner reinstated, I expect that was done as part of his goal to acquire the minority interest of the petitioner at a very reasonable cost. However, when that failed and the minority attempted to assert its rights, the petitioner was met with positions in this litigation which were time-consuming and costly for the petitioner but were then abandoned by the respondents. In this respect, I am referring to the position that the consent resolutions “appear to bear Mr. Skene’s signature” and the cross-examination of the writing expert for a lengthy period, then the suggestion much later it was never disputed the signatures were applied by Mr. Jeck. The same type of conduct appeared in the defence of the allegation that Mr. Skene’s signature was improperly applied to engineering reports and documents. After indicating that the accuracy of that allegation would be established by the production of files, and after Mr. Skene spent over eight days looking at files in a boardroom, the respondents said that Mr. Jeck had applied the signatures and that Mr. Skene knew of this all along.

[286] In my opinion, the appropriate order in these circumstances is for the respondents to purchase the petitioner’s shares, pursuant to s. 227(3)(a) and (h) of the *BCA*. In making that order, I am mindful that the remedy is to protect the petitioner’s interests as a shareholder and such an order in my view is necessary to bring the matters complained of to an end.

[287] Given the collapse of trust and absence of probity, I think this is the only reasonable order, and a more limited order would not achieve the aims of the statute. Although the petitioner had no reasonable expectation to participate in management, it was entitled to have its interests as a shareholder respected.

[288] I will hear further submissions from counsel on the appropriate terms of the buyout order including which respondent should be directed to purchase the shares and a possible joint retention of a valuator.

[289] For the reasons that I have given, in fixing the valuation date, I decline to make the requested orders that Mr. Jeck repay management fees over $175,000 per year, or that the business premises be conveyed at the 1997 price, or that Mr. Jeck repay rent that was received.

[290] As the adjourned claim against Mrs. Jeck was dependent on a finding that monies were

unlawfully removed from the company, which finding I did not make, that claim must be dismissed.

[291] Apart from costs, the outstanding issue I must decide is whether I ought to grant leave to the petitioner to be allowed to commence a derivative action in the name of the company concerning the alleged misappropriation of a corporate opportunity in the business of CS Analytics. I recognize the underlying facts are much in dispute, but on the evidence, I find that the claim appears to be arguable and brought in good faith. However, it may be academic or largely academic, given the recent establishment of that business and the suggested valuation date of 2011 for the buyout that was proposed by the petitioner. I will hear further argument on whether it is appropriate to grant leave to commence a derivative action in the name of the company in connection with CS Analytics, and if so, on what terms, at the time I give directions for the purchase of the petitioner's shares.

[292] The parties if they wish may speak to the question of costs at that time as well.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson