
CANADA / JUDGMENT

Boulet v. Inventys Thermal Technologies Inc.

2019 BCSC 1416

COURT

Supreme Court of British Columbia

DECIDED

22 August 2019

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2019 BCSC 1146 Boulet v. Inventys Thermal Technologies Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Boulet v. Inventys Thermal Technologies Inc.,

2019 BCSC 1416

Date: 20190822

Docket: S187036

Registry: Vancouver

Between:

Andre Boulet

Petitioner

And:

Inventys Thermal Technologies Inc.

Respondent

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Petitioner:

Kelly Osaka

David P. Konkin

Counsel for the Respondent:

Eleni Kassaris

James Hsu

Place and Date of Hearing:

Vancouver, B.C.

October 3, 2018

November 22, 2018

January 30, 2019

Place and Date of Judgment:

Vancouver, B.C.

August 22, 2019

I. Introduction

- [1] These Reasons deal with an allegation by Mr. Boulet of oppressive conduct against him by Inventys Thermal Technologies Inc. ("Inventys" or the "Company"). Mr. Boulet seeks relief under s. 241(1) of the Canada Business Corporations Act (the "Act").
- [2] He specifies the impugned conduct as follows:
- (a) Implementing a majority vote procedure: Before Mr. Boulet left the Company, he says the practice was for the four founders of Inventys to exercise their rights to appoint directors by unanimous agreement. After Mr. Boulet left the Company, Inventys took the position in 2016, 2017 and 2018 that only majority approval of the founders was required to exercise those rights. The three other founders, who remained employed by the Company, voted consistently against Mr. Boulet despite his reasoned and merit based objections. I will refer to this as the "Nominations Issue".
 - (b) Amending the 2015 Shareholders' Agreement: Inventys amended the 2015 Shareholders' Agreement in 2017 to require majority voting by the founders, and unanimous agreement by the preferred shareholders for Board appointments (the "2017 Shareholders' Agreement"). The effect was to unfairly exclude Mr. Boulet while ensuring each of the Preferred Shareholders had a veto in the appointment process. I will refer to this as the "Amendment Issue".

- (c) Reducing the founders' Board appointments from six to one: In July 2018 Inventys as part of a financing transaction agreed to further amend the 2017 Shareholders' Agreement. The effect of the amendments reduced the number of appointments of directors made by the founders from six directors (a majority) to one director (a minority). I will refer to this as the "Side Letter Issue".
 - (d) Termination of the Shareholders' Agreement: Following the initial hearing of this petition, the Inventys terminated the Shareholders' Agreement on November 5, 2018.
- [3] Mr. Boulet argues that the acts mentioned constitute oppressive conduct and the collective course of conduct demonstrates Inventys' intent to deny Mr. Boulet any role in the corporate governance of the Company following his termination, contrary to Mr. Boulet's reasonable expectations and legal rights. He submits that each action informs the character of the wrongful acts. Mr. Boulet argues that Inventys' actions show a complete disregard for his rights and animosity toward his interests as a shareholder and that they amount to bad faith and oppression.
- [4] Mr. Boulet seeks the following relief:
- (a) An order declaring Inventys has engaged in oppressive conduct against Mr. Boulet;
 - (b) An order directing Inventys to purchase all of its shares held by Mr. Boulet;
 - (c) An extension of time to file an application to set the value of Mr. Boulet's dissenting shares; and
 - (d) A declaration that the Court remains seized to determine any issues between the parties arising from the valuation of the Inventys Shares.
- [5] Inventys denies that its actions have been oppressive; that Mr. Boulet's interpretation of the subject shareholders' agreement is wrong and the steps taken by Inventys were permissible; that Mr. Boulet's grievances are allegations of breach of contract and should have been advanced as such and not as an oppression case; that Mr. Boulet released it from any and all claims to the date of and under the terms of settlement that Mr. Boulet and the Company entered into in relation to Mr. Boulet's termination of employment from the Company (the "Settlement Agreement"); that Mr. Boulet's claim regarding the nomination of directors is barred by operation of the Limitation Act, S.B.C. 2012, c. 13; and that the latest claims of Mr. Boulet are an abuse of process as it is duplicative of the dissent procedure he invoked.

II. Issues

- [6] The issues arising are:
- (a) Have the affairs of Inventys as identified been conducted in a manner that is oppressive to Mr. Boulet including whether there have been breaches of the Shareholders' Agreement? If so, is Mr. Boulet entitled to the relief sought?

- (b) Is the Nominations Issue time-barred by operation of the Limitation Act?
- (c) Is the Nominations Issue barred by the Settlement Agreement?
- [7] Despite differences between the parties in respect to significant facts, the parties have sought to proceed summarily. Neither party has sought to have this matter placed on the trial list. I have assumed the parties are content to proceed in a summary way and that conflicts in the evidence can be resolved by the court on the basis of the materials filed.

III. Background

- [8] Mr. Boulet, is a chemical engineer residing in Vancouver, British Columbia. He is a founder of Inventys and served as a director from 2007 to May 2016 and as President and CEO from February 2009 to April 2016. He remains a shareholder of Inventys but has issued a dissent notice.
- [9] Inventys is a private corporation with its head office located in Vancouver, British Columbia. Inventys engages in the practice of developing and commercializing carbon dioxide capture technologies from post combustion industrial sources for the energy and process industries.
- [10] Inventys was co-founded in 2007 by Andre Boulet, Soheil Khiavi, Brett Henkel, and Darryl Wolanski. Together Mr. Boulet and Mr. Khiavi developed the carbon capture technology that forms the basis of the Company. When Inventys was incorporated, Mr. Boulet, Mr. Khiavi, Mr. Henkel, and Mr. Wolanski were the only shareholders of the Company (the "Founder Shareholders"). The Founder Shareholders agreed to receive an equal amount of common shares and jointly be involved in the day-to-day operations of Inventys.
- [11] Since 2012, Inventys has not been a closely held company of the Founders. Its major shareholder included large sophisticated firms such as Chevron and Husky.
- [12] From the Company's formation, Inventys and its shareholders have been parties to a shareholders' agreement, providing for their rights and responsibilities as well as governing the relationship between them. Only the Founder Shareholders and Inventys were parties to the original shareholders' agreement.
- [13] There have been changes to the shareholder agreements going back several years; however, the focus of this proceeding starts with the agreement entered into on or about August 31, 2015; namely, the 2015 Shareholders' Agreement. The agreement sets out the number of directors to be appointed to the board of directors, as well as the rights of the Preferred Shareholders and Founder Shareholders to participate in the selection of Board members.
- [14] Section 2.8 of the 2015 Shareholders' Agreement provides:

Unless otherwise agreed in writing by the Founder Shareholders and the Preferred Shareholders, the Board will consist of nine (9) directors, all of whom shall be individuals who are not disqualified under the Act from acting as directors and who shall be:

- (a) two (2) individuals who are appointed and selected by the Founder Shareholders, provided that that (sic) each appointment must be a resident of Canada as defined in the Tax Act;
- (b) two (2) individuals appointed and selected by the holders of the A Preferred Shares;
- (c) one (1) individual appointed and selected by Chrysalix who must be a resident of Canada as defined in the Tax Act; and
- (d) four (4) independent directors, who shall be chosen by the Founder Shareholders from a slate (the "Slate") of a least five (5) individuals mutually acceptable to the Founder Shareholders and the Preferred Shareholders. At least two (2) such independent directors must be a resident of Canada, as defined in the Tax Act.

[15] Section 2.9 deals with filling a vacancy on the Board and the effect of the vacancy not being filled:

2.9 Vacancy on the Board

- (a) Within ten (10) Business Days after the occurrence of a vacancy on the Board, the Founder Shareholders or the Preferred Shareholders whose nominee created the vacancy pursuant to Sections 2.8(a), (b) or (c) will nominate a person to fill the vacancy. The other Shareholders will vote their respective Shares for the election of that person to the Board, subject to such person not being disqualified to act as a director under the Act. If the vacancy results in the Board being unable to obtain a quorum for Board meetings, then until either the vacancy is filled or the ten (10) Business Day period to nominate a replacement director has expired, whichever occurs first, the Board will not transact any business or exercise any of its powers or functions save and except as may be necessary to fill the vacancy and to preserve the Business and the assets of the Company.
- (b) As soon as is reasonably practicable after the occurrence of a vacancy on the Board as a result of a director appointed pursuant to Section 2.8(d) ceasing to be a director, the Founder Shareholders and the Preferred Shareholders will appoint an independent director in accordance with Section 2.8(d). The other Shareholders will vote their respective Shares for the election of that person to the Board, subject to such person not being disqualified to act as a director under the Act. If the vacancy results in the Board being unable to obtain a quorum for Board meetings, then until either the vacancy is filled or the ten (10) Business Day period to nominate a replacement director has expired, whichever occurs first, the Board will not transact any business or exercise any of its powers or functions save and except as may be necessary to fill the vacancy and to preserve the Business and the assets of the Company.

[16] Section 2.11 specifies a quorum for Board meetings:

2.11 Quorum for Directors' Meetings

Subject to those matters requiring Special Majority Approval, the quorum required for the transaction of business at a meeting of the Board will be five (5) directors. If a quorum is not present for a meeting of the Board within 30 minutes after the time fixed for holding the meeting, then the meeting will be adjourned to a date which is not less than five (5) or more than fifteen (15) Business Days after the original date for the meeting (such date to be determined by a majority of the members of the Board who are present at the original meeting), provided that a notice of the adjourned meeting will be sent to the Board in accordance with the notice provisions for calling Board meetings in the By-laws.

[17] Section 11 of the agreement provides for various events that can lead to termination. Subsection 11.1(a) describes one such situation:

- (a) if holders of at least 75% of the Common Shares and holders of at least 75% of the Preferred Shareholders elect in writing to terminate this Agreement.

[18] Section 16.5 provides the criteria for amending s. 2.8.

16.5 Modification/Non-Waiver

This Agreement may be amended or modified and the observance of any term hereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a written instrument executed by holders of at least 75% of the Common Shares and holders of at least a majority of the Preferred Shares, provided that:

- (a) Section 2.8 shall not be amended with respect to the right of a Shareholder to appoint and select a director without such Shareholder's written approval;
- (b) Section 2.12 shall not be amended with respect to the right of a Preferred Shareholder to appoint and select an observer without such Preferred Shareholder's written approval;
- (c) Section 217 shall not be amended to alter the right of a Preferred Shareholder to have access to and receive information from the Company without such Preferred Shareholder's written approval;
- (d) Sections 4.1 to 4.7, Sections 4.9 to 4.12 and Sections 5.1 to 5.7 shall not be amended to alter the rights of a Preferred Shareholder such that they differ from those of another Preferred Shareholder (other than as a result of the number of Preferred Shares held or the class of shares held as provided for in the special rights and restrictions attaching to the Preferred Shares) without such Preferred Shareholder's written approval;
- (e) Section 4.8 shall not be amended without the written approval of all of the Preferred Shareholders;
- (f) Sections 5.8 and 5.9 shall not be amended without the written approval of holders of at least 75% of the Preferred Shares; and

- (g) Section 16.5 shall not be amended without the written approval of holders of at least 75% of the Preferred Shares.

No condoning, excusing or waiver by any Party to this Agreement of any default, breach or non-observance by any other Party at any time or times in respect or any covenant or condition contained in this Agreement will operate as a waiver of that Party's right in respect of any continuing or subsequent default, breach or non-observance, or so as to defeat or affect in any way the rights of that Party in respect of any such continuing or subsequent default, breach or non-observance, and no waiver will be inferred from or Implied by anything done or omitted to be done by the Party having those rights.

- [19] On or about April 22, 2016, Mr. Boulet was terminated for cause from his roles as President and CEO of Inventys. On June 9, 2016, Mr. Boulet commenced an action against Inventys for wrongful dismissal. The Company denied the claim taking the position that Mr. Boulet had been fired for various wrongs including: fundamentally breaching his employment contract and violating his duty of loyalty, fidelity and care he owed to the Company. A counterclaim was issued against Mr. Boulet and another employee claiming damages for breach of fiduciary duty, breach of contract, fraud, negligence and conspiracy. The parties entered into a confidential settlement agreement (the Settlement Agreement") dated March 9, 2017 wherein Inventys agreed to pay Mr. Boulet a certain amount. The Settlement Agreement did not include any admissions of liability. Mr. Boulet was represented by counsel throughout as was the Company.
- [20] Under the Settlement Agreement, the parties agreed to resolve all issues between them. Both parties agreed that they continued to have rights and obligations to one another under the 2015 Shareholders' Agreement.
- [21] On May 12, 2016, Mr. Boulet received an email from Inventys stating "we require that you execute the attached documents" in advance of the annual general meeting ("AGM"). The enclosed Nomination of Directors form showed that the Founder Shareholders had already met with the Preferred Shareholders and mutually agreed upon the Founder Directors and Independent Directors without his input or agreement.
- [22] On May 18, 2016, Mr. Boulet received a calendar invitation from Inventys for a phone call. The invitation stated "[t]his meeting will now be an opportunity for the Founder and Preferred Shareholders to agree on a slate of 5 independent directors, then the Founders will nominate 4 of the 5 on the slate".
- [23] The phone call took place on May 20, 2016 and the Founder Shareholders and the Preferred Shareholders attended. During the telephone call, a consensus was not reached by the Founder Shareholders due to Mr. Boulet's objections to the proposed nominees. Mr. Boulet expressed the following concerns:
- (a) he was not comfortable that the individuals on the slate were a match with the new direction of the Company;

- (b) he was unsure that the individuals on the slate could commit sufficient time to the Company;
 - (c) he asked to speak with each individual on the slate independently; and
 - (d) he thought there were too many Board members for the current state of the Company.
- [24] Notwithstanding Mr. Boulet's objections, the Preferred Shareholders and the Founder Shareholders proceeded to approve the appointments through a majority vote.
- [25] At a separate meeting on the same day, the Founder Shareholders met to select four nominees as Independent Directors. Mr. Boulet again tabled his concerns about "determining suitability of candidates without knowing more about the Company's business intent". The Founder Shareholders approved of the four nominees through a majority vote, Mr. Khiavi, Mr. Henkel and Mr. Wolanski voted in favour and Mr. Boulet voted against.
- [26] On May 27, 2016 Inventys circulated the materials for the 2016 AGM. The notice of the 2016 AGM stated that on May 20, 2016 the Founder Shareholders and the Preferred Shareholders "confirmed in writing" they had nominated a slate of five nominees and "confirmed in writing" that they had chosen four individuals from the slate of nominees to be the Independent Directors. Mr. Boulet objected and did not confirm in writing the appointment of any of the nominations.
- [27] On or about June 9, 2016, at the 2016 AGM, the shareholders elected Mr. Khiavi and Mr. Henkel as the Founder Directors and Denis Connor, Steven Chu, Ronald Evans and Wayne Thomson as Independent Directors.
- [28] On March 15, 2017 the Company sent a letter to shareholders advising them of proposed changes to the 2015 Shareholders Agreement, including to s. 2.8. The changes expressly authorized the Founder Shareholders to appoint directors by a majority vote and for the Preferred Shareholders to appoint directors by unanimous approval.
- [29] Pursuant to s. 2.8 of the agreement, Mr. Boulet on March 16, 2017 sent an email to the Company's shareholders that he would not sign the amendments because the proposed changes were not in the shareholders' best interest for the following reasons:
- (a) it would cause dilution of the common shares due to the issuance of new options and shares;
 - (b) the elimination of the stock option vesting schedule would allow the Board to issue a block of options that would immediately vest and alter the balance of voting shares;
 - (c) the proposed cancellation of outstanding stock options suggests that the current fair market value is less than \$0.25 per share (which diluted the value of his shares);
 - (d) a Company the size of Inventys with 20+ employees should not have an unworkable Board with 9 to 11 directors and 4 observers; and

- (e) by lowering the threshold for amendments from 75 to 70 percent, the influence of the common shareholders would be diminished.
- [30] The amendments were approved and adopted on June 22, 2017 over his objections.
- [31] In July 2017, Mr. Boulet provided a notice of dispute under the Shareholders' Agreement and in November 2017, provided a notice to arbitrate the dispute regarding amendments to the Shareholders' Agreement pursuant to s. 15.1 of the Shareholders' Agreement; however, the arbitrator determined that the dispute did not come within the scope of the dispute resolution provisions of the Shareholders' Agreement and he therefore did not have jurisdiction over the dispute put before him.
- [32] The 2017 nominations to the Board took place on August 3, 2017. A telephone call was held between the Founder Shareholders and the Preferred Shareholders to mutually agree on the slate of five individuals and for the Founder Shareholders to appoint four of the individuals to be the Independent Directors and to appoint two individuals to be Founder Directors. During the call, Mr. Boulet objected to the nominations and selections because the Company had continually amended his rights to have continued representation on the Board. The remaining three Founder Shareholders proceeded on the basis they represented a majority and approved the same previous four individuals to be appointed as Independent Directors and for the same previous two individuals to be appointed and selected as the two Founder Directors.
- [33] The 2017 AGM took place on August 22, 2017. At the 2017 AGM, the shareholders elected Mr. Khiavi and Mr. Henkel as Founder Directors and Denis Connor, Wayne Thomson, Steven Chu, and Ronald Evans as Independent Directors.
- [34] The 2018 nominations to the Board took place on a telephone call on May 4, 2018 where Mr. Khiavi, Mr. Henkel, and Mr. Wolanski and the Preferred Shareholders mutually agreed upon the five individuals who would be named to the slate. During the call Mr. Khiavi, Mr. Henkel, and Mr. Wolanski, as a majority vote, appointed the two Founder Directors and the four Independent Directors. Mr. Boulet did not attend the meeting or agree to the slate. Instead he sent an email to the shareholders of Inventys objecting to the appointment of the Founder Directors and the Independent Directors. In his email, Mr. Boulet reiterated his objection to the continued action of the Board as a "flawed process".
- [35] The 2018 AGM took place on May 31, 2018. At the 2018 AGM, the shareholders elected Mr. Khiavi and Mr. Henkel as Founder Directors and Denis Connor, Wayne Thomson, Steven Chu, and Jean Botti as Independent Directors.

- [36] On June 29, 2018, Inventys sent an email to its shareholders to proposing additional amendments to the 2017 Shareholders' Agreement. The proposed amendments were in regard to a financing arrangement (the "Financing") Inventys had arranged with the Oil and Gas Climate Initiative (the "OGCI"). The additional amendments were to be voted on and approved at a Special Meeting of the Shareholders, to be held on July 10, 2018 (the "July Special Meeting").
- [37] As part of the Financing, Inventys also asked the Shareholders to approve and execute a side letter agreement (the "Side Letter"). The Side Letter was a requirement by OGCI as a condition to the second tranche of the Financing and required the shareholders of Inventys to make further amendments to the 2017 Shareholders' Agreement (the "Side Letter Amendments"). The Side Letter Amendments were to become operative concurrently with the closing of the second tranche of the Financing on December 1, 2018 (the "Closing Date").
- [38] Inventys advised the shareholders that OGCI made it "a condition of their investment that the size and composition of the Board be made more practical for a Company of our scale, while preserving the voice of key stakeholders."
- [39] The Side Letter Amendments proposed to amend the composition of the Board and the method of appointing the Independent Directors under s. 2.8 of the 2017 Shareholders' Agreement. Specifically, the proposed new s. 2.8 to set out a new procedure for appointing directors to the Board. It stated that the Board will consist of seven directors:
- (a) the CEO of the Company, if any;
 - (b) one individual appointed and selected by a majority of the Founder Shareholders;
 - (c) one individual appointed and selected by the holders of a majority of the Class A Preferred Shares;
 - (d) two individuals appointed by the holders of a majority of the Class C Preferred Shares (one of whom will be appointed by OGCI); and
 - (e) two independent directors, one nominated by the board nominee of the Class A Preferred Shareholders and one nominated by the board nominees of the Class C Preferred Shareholders as described above, and reasonably acceptable to the remaining directors.
- [40] The Side Letter Amendments to s. 2.8 of the 2017 Shareholders' Agreement would:
- (a) Decrease the number of directors on the Board who are appointed by the Founder Shareholders from two to one; and
 - (b) Remove the Founder Shareholder's ability to appoint the four Independent Directors.

[41] The Side Letter expressly provided that the shareholders of the Company were to give effect to the Side Letter Amendments, including if need be by terminating the July 2018 Shareholders' Agreement and entering into a replacement agreement on terms substantially similar to those contemplated in it. Section 3(b) of the Side Letter stated:

The parties hereto each covenant and agree to execute and deliver such further agreements, documents and writing and provide such further assurances as may be required by the parties to give effect to this Letter Agreement (including if need be terminating the Shareholders' Agreement and entering into a replacement agreement on terms substantially similar to those contemplated hereby) and without limiting the generality of the forgoing to do all acts and things, execute and deliver all documents, agreements and writing and provide such assurances, undertakings and information as may be required from time to time.

[Emphasis added]

[42] The Side Letter stipulated that "the Founder Shareholders shall formulate their own amendment as to exercise their rights under the Shareholders' Agreement reasonably acceptable to the Company and OGCI".

[43] On July 10, 2018, Mr. Khiavi, Mr. Henkel, and Mr. Wolanski, the Preferred Shareholders and the Non-Founder Shareholders approved the amendments to the 2017 Shareholders' Agreement and the Side Letter.

[44] On or about July 12, 2018, the Company completed a private placement financing of 6,148,171 Class C Preferred Shares of the Company for gross proceeds of US\$6,000,000.84 (the "First Tranche"), which forms part of the Financing of up to US\$21,000,000 in aggregate. The lead investor OGCI invested US \$5 million in the First Tranche.

[45] The hearing of this matter started in October 2018.

[46] Following the hearing, Inventys by way of a special shareholders meeting terminated the then existing Shareholders' Agreement and adopted a new shareholders' agreement. Prior to the termination, the Company held a town hall meeting on October 19, 2018 (the "Town Hall Meeting") "for the purposes of discussing the proposed amendments to the shareholders' agreement". Attached to the email were:

- (a) A letter from Claude Letourneau, President and CEO of Inventys dated October 12, 2018 (the "October Letter").
- (b) A new proposed shareholders' agreement of Inventys (the "New Shareholders' Agreement").
- (c) A comparison of the Shareholders' Agreement to the New Shareholders' Agreement.

[47] The October Letter notified shareholders, that Inventys was seeking to terminate the existing Shareholders' Agreement and replace it with the New Shareholders' Agreement. As well as reorganizing the share structure of the Company. The primary differences between the Shareholders' Agreement and the New Shareholders' Agreement were:

- (a) The elimination of Founder Shareholders as a separate category of shareholder;
- (b) The removal of the rights of the Founder Shareholders to appoint any directors to the Board;
- (c) The removal of the requirement that the Founder Shareholders agree in writing to any amendment to their rights to appoint directors;
- (d) The re-designation of Non-Founder Shareholders as the "Common Shareholders", which also includes the former Founder Shareholders; and
- (e) The Common Shareholders nominate one individual by majority vote to the Board.

[48] Mr. Boulet attended the Town Hall Meeting on October 19, 2018 by conference call. At the Town Hall Meeting, counsel for Inventys, made the following comments to shareholders:

Unfortunately Inventys has a shareholder that is not currently aligned with everyone else, suing the company, trying to stop some things from going forward, to be determined if that's what ultimately is going to happen or so on, but Matt and Claude have to continue to run the company for the benefit of all shareholders, in the hope that they can be constructive and positive.

So one of the things we couldn't do, was amend the shareholders agreement. Because to do that, we required the cooperation of shareholders who were no longer cooperating. What we can do, even without their cooperation, is terminating the shareholders agreement, and adopt a new one that is substantially the same. So that's what we're doing.

[49] Mr. Boulet deposes that he believes he is the shareholder referred to by counsel for Inventys at the Town Hall Meeting. Mr. Boulet is the only shareholder with an ongoing legal action against the Company.

[50] He also refers to what counsel for Inventys stated at the meeting:

We need to pass a shareholders resolution to do that. If the shareholders don't approve it, then this all goes away. We will have to abandon this whole thing and continue to live under the old shareholders agreement. It doesn't work very well, it's very cumbersome, and it allows - - puts us at the mercy of, you know, a minority of shareholders and so on.

[51] On October 25, 2018 the Company's shareholders, including Mr. Boulet, were provided with a Notice of Special Meeting of Shareholders and Management Proxy Circular (the "October Circular"), which included copies of the proposed termination agreement, and the new shareholders' agreement along with a comparison to the July 2018 Shareholders' Agreement to highlight the changes being made. Included in the October Circular was an explanation that each shareholder had a right to dissent regarding the proposed reorganization under s. 190 of the Act as well as an explanation on how the dissent process works.

[52] At the Special Meeting on November 5, 2018 the required number of shareholders terminated the July 2018 Shareholders' Agreement and approved the special resolutions required to approve the reorganization.

- [53] The Side Letter was executed by 83% of the Preferred Shareholder and 75.27% of the common shareholders. This met the threshold to terminate the shareholders agreement under s. 11.1. A new shareholders' agreement reflecting the amendments consistent with the Side Letter was entered into, giving effect to certain amendments to the Special rights and restrictions of the Company's articles as required pursuant to the second tranche of the Financing.
- [54] As a result, Mr. Boulet sought and received leave to amend his petition to include further conduct alleged to be oppressive; namely the aforementioned termination and reorganization, and a buyout of his Inventys shares. The hearing of the amended petition occur on January 30, 2019.
- [55] On November 2, 2018 Mr. Boulet exercised his dissent in respect to the proposed reorganization by delivering a notice of dissent under s. 190(5) of the Act.
- [56] On November 7, 2018 the Company delivered to Mr. Boulet a notice of resolution pursuant to s. 190(6) of the Act advising Mr. Boulet that the resolutions approving the reorganization had been approved.
- [57] On November 27, 2018, Mr. Boulet served a demand for payment in respect of his dissenting shares on Inventys pursuant to s. 190(7) of the Act. On December 4, 2018, the Company delivered an offer to pay for his 941,416 Class A voting shares; the amount of \$97,530.70 CAD. On January 3, 2019, the Company's offer to pay lapsed because the offer did not receive its acceptance within 30 days after it was made to Mr. Boulet.

IV. Discussion

- [58] I will address the issues in the following order: whether the Nominations Issue is barred by the Settlement Agreement; whether the Nominations Issue is barred by the Limitation Act; whether the breaches of the alleged Shareholders' Agreement have been established; whether the Amendment Issue has been established; whether oppression has been established; and the effect of the dissent notice issued.

A. Nominations Issue

- [59] In terms of whether relief from oppression is available in relation to the Nominations Issue, in my view it is not.
- [60] The respondent submits that the matter is barred by the Settlement Agreement on the basis that by executing the Settlement Agreement, Mr. Boulet released the Company from any and all claims he may have against the Company that were known to Mr. Boulet, unknown or could have been anticipated by Mr. Boulet as of March 9, 2017 "at law or in equity" excluding only contractual claims under the shareholders' agreement. Oppression is a claim arising under statute and in equity. As of March 9, 2017, Mr. Boulet had been advised that the others Founders and the Company took the position that the Founders' process for internal decision making under s. 2.8 under the August 2015 Shareholders' Agreement was to decide

by majority vote. The 2016 Board had already been elected. Mr. Boulet knew, or should have anticipated that the Founders and the Company would proceed to act based on this (which the Founders and Company did). He proceeded to release the Company and its directors and shareholders from the conduct he alleges is "oppression". Accordingly, the Settlement Agreement acts as a full defence to any claims Mr. Boulet might have available to him in regard to the Nominations Issue.

- [61] The respondent cited in support of this argument *Francassi v. Cascioli*, 2011 ONSC 178, where the claim for oppression was barred based on the provisions of a Release which stated that the "plaintiffs released any and all claims they "ever had, now have or may have in the future against any released person, relating to or arising out of any cause, matter or thing existing up to and including this date" of closing." Inventys argues that since the Settlement Agreement in this case states that Boulet released all claims "known as well as unknown or anticipated, arising which he has, or which hereafter he can, shall, or may have for or by reason of or arising out of any claim, cause, deed, matter, thing, omission, whatsoever and howsoever existing up to the date of this Agreement."
- [62] The response of Mr. Boulet is that a proper interpretation of the Settlement Agreement indicates that the agreement is grounded in an employment dispute and was entered into for the purpose of resolving all issues arising solely from Mr. Boulet's employment with Inventys. It is submitted that the parties to the Settlement Agreement intended to preserve certain rights and mutually agreed that their rights under the 2015 Shareholders' Agreement were not to be affected by the Settlement Agreement.
- [63] Mr. Boulet points to paragraph 1 of the Settlement Agreement that provides a mutual acknowledgement that the parties agree that they have continual contractual obligations towards each other and that the Settlement Agreement does not prevent claims brought under the 2015 Shareholders' Agreement:

Notwithstanding the mutual releases and covenants in this Settlement Agreement, the parties acknowledge that they have ongoing contractual obligations to each other, including, without limitation, under the Amended and Restated Shareholders' Agreement dated August 31, 2015, Amended Patent License Agreement dated April 14, 2014 and sections 5, 7, 9, 10 and 11 of the Employment Agreement dated February 5, 2015 (the "Employment Agreement"). The parties' rights under these contracts, including with respect to enforceability and interpretation, are not intended to be affected by this Settlement Agreement. The parties acknowledge and agree that neither will take the position that the above-mentioned provisions of the Employment Agreement are unenforceable based on the legal position taken by Inventys in the proceedings with respect to the validity of the Employment Agreement.

- [64] The mutual releases and covenants in the Settlement Agreement read as follows:

Subject only to the obligations set forth in Paragraph 1 of this Agreement, Boulet on behalf of himself and each of his successors, assigns, affiliates and employees, completely releases, remises and forever discharges Inventys and each of its successors, assigns, affiliates,

subsidiaries, employees, officers, directors, legal counsel, insurers and sureties, of and from any and all actions, causes of actions, claims, demands, debts and losses whatsoever and howsoever at law or in equity, including but not limited to those under the Employment Standards Act and the Human Rights Code, known as well as unknown or anticipated, arising which he has, or which hereafter he can, shall, or may have for or by reason of or arising out of any claim, cause, deed, matter, thing, omission, whatsoever and howsoever existing up to the date of this Agreement, including but not limited to any claims arising out of or in any way connected with the Claim, Response and Counterclaim, or which arise directly or indirectly from, or relate to the facts underlying the Claim, Response and Counterclaim [emphasis added].

- [65] In my view, Mr. Boulet waived his rights to oppression remedies and only preserved his rights to contractual remedies. The language of paragraph 1 which refers to the parties acknowledging that "they have ongoing contractual obligations to each other, including without limitation, under the Amended and Restated Shareholders' Agreement dated August 31, 2015" and the broadly worded release by Mr. Boulet of the Company from any and all actions and claims "at law or in equity" justify this conclusion.
- [66] Given the foregoing, the relief sought in relation to the Nominations Issue is not available. The proper course would be one based on contract. As well, this issue is not a valid consideration to the extent collective acts are argued to establish oppression.
- [67] I turn next to the question of whether the Nominations Issue is time-barred.

B. Nominations Issue and the Limitation Act

- [68] The respondent submits that, if the Settlement Agreement is not determinative of the Nominations Issue, then nonetheless, the matter is time-barred under the Limitation Act. The act operates to bar claims more than two years after the date on which such claims were discovered.
- [69] The chronology that the respondent relies upon are the meetings that took place between the Preferred Shareholders and the Founders to agree on the 2016 Slate, and a meeting between the Founders when they appointed and selected the 2016 Founders Directors in May 2016. Mr. Boulet attended a meeting of the Board on May 25, 2016 where the Board specifically determined that the selection of the directors does not require unanimous written approval of the Founders.
- [70] Since Mr. Boulet filed his petition on June 21, 2018 which is more than two years after these events. It is argued that he is statute-barred from pursuing any claim in oppression or contract related to the events that occurred in May 2016.
- [71] Mr. Boulet argues that the limitation period does not apply while the oppression is ongoing. He submits that oppressive conduct that is continuous and ongoing avoids any limitation period and is deemed to continue until the wrongdoing is rectified or the last act occurs. While Inventys' original oppressive acts commenced in 2016, Inventys continues to engage

in oppressive behaviour on an on-going basis. This is exemplified as recently as June 2018, where Inventys entered into the Side Letter that will further amend Mr. Boulet's rights as a Founder Director without his consent. Mr. Boulet argued that only when Inventys ceases to engage in oppressive conduct, will the limitation clock begin to run. Reliance for this proposition is placed on *Fernandes v. Jennings Capital Inc.*, 2016 ABQB 594 which states at para. 85:

Rolling limitation periods, or continuous limitation periods, arise when claims are based on a series of acts or continuous behavior, rather than one indivisible act. As the acts or behaviour giving rise to the claim are ongoing, the cause of action is being continuously renewed -- hence the 'rolling' limitation period.

[72] Mr. Boulet relies as well on *Seidel v. Kerr*, 2003 ABCA 267 at para. 55. In that case in *Seidel v. Kerr*, the Alberta Court of Appeal held that the determination of the limitation period in an oppression claim requires that the series of acts constituting the oppressive behaviour be considered. The Court held that in a cause of action that arose from a series of acts, not one indivisible act, the claim arises when the conduct terminates or the last act or omission occurs. While the Alberta Court of Appeal examined the new Alberta Limitations Act, which provides for a continuing course of conduct exception, they noted that the same policy considerations should apply in the absence of such a statutory provision.

[73] The use of the rolling limitation period prevents a defendant from sheltering their oppressive actions:

The result, may, however, be different where the oppression takes the form of a series of acts. In such cases it may make sense to have the limitations period run from the time of the last act. To hold otherwise would allow a defendant to shelter his misconduct because of the very fact that he had engaged in so much of it.

[74] The difficulty with the petitioner's submission is that principal cases relied upon are from the Alberta courts where the Limitation Act provides for expressly for a "continuing course of conduct" exemption to the expiry of the standard two-year limitation period. This is found in s. 3(3)(a) which states:

- (3) For the purposes of subsections (1)(b) and (1.1)(b),
 - (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs.

[75] There is no such exemption to the basic limitation period under the British Columbia act. More importantly, the cases in this province do not support the view that regardless of the exemptions that the limitation period is extended by each subject act. As the respondent submits, *Runnalls v. Regent Holdings Ltd.*, 2010 BCSC 1106 makes it clear that an oppression claim is subject to the provisions of the Limitation Act; and that *Palmer v. Gerbrandt*, 2005 BCSC 1711 makes it clear that continuing breaches do not create new causes of action with a

restart of a limitation period.

- [76] As pointed out by the respondent, the "oppressive conduct" which Mr. Boulet complains about in relation to the Nominations Issue first took place over two years before he filed his petition. At the time Mr. Boulet was aware that the Founders and the Company would continue to conduct the annual process for selecting and appointing Founder Directors and choosing Independent Directors on the understanding that the Founders' internal decisions would be done by majority vote. That understanding would necessarily form part of Mr. Boulet's reasonable expectations going forward. At that time, Mr. Boulet did not take available steps to prevent the continuation of this conduct and instead signed a release of the first incident of the impugned conduct when they executed the Settlement Agreement.
- [77] In these circumstances, I conclude that Mr. Boulet's oppression claim on the Nominations Issue is time-barred as he failed to take appropriate steps to preserve his cause of action and bring his oppression claim in a timely way, contrary to the principles enunciated in *Runnalls*. This is also relevant when it comes to reasonable expectations.

C. Breach of the Shareholders' Agreement

- [78] The central focus of Mr. Boulet's claim of oppression is related to breaches of s. 2.8 and 16.5 of the Shareholders' Agreement. The question then is to determine if such breaches have been established.
- [79] The general approach governing contractual interpretation has been recently set out by D.A. Smith J.A. in *Athwal v. Black Top Cabs*, 2012 BCCA 107 at paras. 42 and 43 states:
- [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
- [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. (London, UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention."

- [80] Applying the general rules governing contractual interpretation I find that the breaches of the shareholders agreement have not been established. I arrive at my determination on the basis that follow.
- [81] In terms of the requirement of unanimity in the nomination of directors, there is no language in the contract that requires Mr. Boulet's written consent or a requirement for unanimity in s. 2.8. Nowhere under s. 2.8(a) or 2.8(d) does the word unanimity, or unanimous, or that all Founders must agree appear. As the Company points out the absence of such language indicates a contrary intention, that the decision-making did not have to be unanimous only that the Founders as a group had to reach a decision. Obviously, the requirement for unanimity would give one Founder a veto or enable a deadlock. This would be an extraordinary power in the circumstances here, sufficient to potentially impair the company's ability to carry out its business, see for example s. 2.9(a) and s. 2.11. With respect to the latter provision, I agree with the Company's submission that since the quorum under s. 2.11 is five directors and that the Founders effectively select six out of the nine directors, were Mr. Boulet's interpretation of the shareholders agreement given credence, the Board could never transact business as he could simply refuse to agree with the other Founders. Reading s. 2.8, 2.9 and 2.11 together make it clear that the intention of the parties was indeed not to permit such a circumstance to occur. Board seats would be filled quickly so as to limit interference with the daily operations of the Company. Mr. Boulet's submission that that dispute resolution process under the shareholders' agreement would address any failure to reach unanimity is faulty in light of s. 2.9. The procedures in Article 15 are too lengthy to be applicable to director appointments under s. 2.8(a) and 2.8(d). In this case, Mr. Boulet filed a dispute note on July 10, 2017. The Arbitrator's decision was delivered on March 22, 2018. It cannot have been in the contemplation of the parties to the 2015 Shareholders' Agreement that the Company would not be able to transact business for months and months. To the contrary, the parties contemplated that the Company may only find itself unable to transact business for ten business days.
- [82] There is nothing in the language or the factual matrix which establishes such power to be in the hands of one Founder.
- [83] An interpretation that the Founders - acting as a group and having made a decision as amongst the group, and the Preferred Shareholders, acting as a second group and making a decision as amongst the group, would then come together to finalize nominees to six out of nine positions on the Board is a reasonable interpretation of the words used when those words are considered in the context of the contract as a whole.
- [84] For example, the language in s. 2.8(d) is mandatory. The four independent directors "shall" be chosen "by the Founder Shareholders", indicating that the Founders must make a decision as a group with one voice - which is indicative of majority voting and contrary to unanimity.

- [85] Other aspects of the 2015 Shareholders' Agreement show the intention to ensure a process where the Board would be properly constituted. In s. 2.9, the parties detailed a mechanism to fill a Board vacancy. Again, mandatory language is used - the group whose seat is vacant "will" nominate a person to fill the vacancy "within 10 business days of the occurrence of the vacancy"; the other shareholders "will" then vote for such nominee to fill the vacancy. Where the Board does not have a quorum during the period of such vacancy, the Board cannot transact business. The whole of s. 2.9 reads to limit the period of time during which the Board cannot transact to a maximum of 10 business days, no longer.
- [86] Significantly, where the concept of unanimity appears in the agreement is in s. 3.2 which deals with loans to a shareholder by the Company. Thus, it is apparent that this exceptional requirement was understood by the parties in the formation of the Shareholders' Agreement as requiring a specific expression.
- [87] To the extent extrinsic evidence can be resorted to, Mr. Boulet's evidence of the Founders adhering to unanimity is countered by Mr. Khiavi who is also a Founder who deposes that Founders' practice was to decide by majority. I note here, that to the extent a unanimous vote was reached in any particular situation does not negate a majority rule process and does not affirm a unanimity process.
- [88] In the same vein, I also note that past language of versions of the shareholders agreement mention unanimity. The 2008 agreement included the requirement for unanimity in respect to:
- (i) Alterations, variations or changes to the authorized or issued capital of the Company;
 - (ii) The issue, redemption or purchase of any Shares;
 - (iii) Changes in the number of directors of the Company; or
 - (iv) Termination of the shareholders' agreement.
- [89] However, even in those circumstances "Unanimous" did not mean 100%. Instead, "Unanimous Shareholders Resolution" was defined to allow for changes based on the will of the majority as follows:
- "Unanimous Shareholders Resolution" means a resolution passed at a properly constituted meeting of the Shareholders of the Company, at which meeting at least 75% of the Share are voted in favor of the resolution, or, in lieu of such confirmation, a resolution which is consented to by the signatures of all the Shareholders of the Company.

[90] As pointed out by the Company, the 2008 Shareholders' Agreement had only four shareholders - Mr. Khiavi, Mr. Henkel, Mr. Wolanski and Mr. Boulet, each holding 1,000,000 Common Shares for a total of 4,000,000 Common Shares meaning that three shareholders could pass a Unanimous Shareholders Resolution regardless of the disagreement of the fourth. It is clear that as early as 2008, the Founders contemplated making decisions regarding Board composition by majority, consistent with the evidence of Mr. Khiavi.

[91] In the 2012 version of the shareholders' agreement, s. 2.8 was introduced. It stated:

2.8 Board of Directors

Unless otherwise agreed in writing by the Founder Shareholders and the Preferred Shareholders, the Board will consist of five (5) directors, all of whom shall be individuals who are not disqualified under the Act from acting as directors, and who shall be:

- (a) two (2) individuals who are appointed by the Founder Shareholders that are members of the management team of the Company;
- (b) two (2) individuals appointed by the Preferred Shareholders; and
- (c) one (1) independent director, as mutually acceptable to the Founder Shareholders and the Preferred Shareholders.

[92] This version deleted the definition of "Unanimous Shareholders Resolution but the shareholders' agreement was still terminable by 75% of the common shareholders electing in writing to terminate the agreement with a new requirement that all of the Preferred Shareholders elected termination as well.

[93] I do not accept Mr. Boulet's assertion that unanimity was required contractually and I am not persuaded by his evidence that such a practice was in place and that Mr. Boulet had a reasonable expectation of unanimity, given all of the foregoing, including Mr. Khiavi's evidence which is more consistent with the contractual analysis.

D. The Amendment Issue

[94] In respect to the Amendment Issue, Mr. Boulet argues that the insertion of highlighted words into s. 2.8 of the Shareholders' Agreement was a breach:

Unless otherwise agreed in writing by a majority of the Founder Shareholders and all of the Preferred Shareholders

[95] Specifically, that the Company breached s. 16.5 of the Shareholders' Agreement by not obtaining his written approval. Section 16.5 reads as follows:

Section 2.8 shall not be amended with respect to the right of a Shareholder to appoint and select a director without such Shareholder's written approval.

- [96] The impugned words in respect to "a majority of the Founder Shareholders" actually reflects the intention of the parties as I have discerned earlier from the contractual analysis.
- [97] Further, the plain and ordinary meaning of s. 16.5 applies to the right of a shareholder to "appoint and select a director" and does not extend over to a shareholder to determine the size of the Company's board nor in this case to a Founder Shareholder in regard to a Preferred Shareholder.
- [98] With respect to the Side Letter, to the extent the reference to the termination of the shareholders' agreement was a breach, I can find no such breach. There is express provision under s. 11.1 of the agreement which provides for termination. Perforce, the actual termination of the shareholders' agreement was not a breach.
- [99] As submitted by the respondent pursuant to s. 11.1 of the 2015 Shareholders' Agreement (and subsequent versions), the shareholders' agreement can be terminated where at least 75% of the Preferred Shareholders and 75% of the common shareholders agree in writing to terminate it. The Side Letter acceptance met those thresholds. Under such circumstances, the Company's actions to give effect to the Side Letter and the amendments contemplated thereunder does not breach any duty owed to Mr. Boulet as a Founder under the shareholders' agreement. It is clear that a significant majority of the shareholders have agreed the Financing is necessary in the circumstances of the Company's business.
- [100] I turn now to the question of whether Mr. Boulet was subjected to oppressive conduct.

E. Test for Oppression Remedy

- [101] The oppression remedy is an equitable remedy that exists to allow stakeholders to seek rectification from oppressive conduct. The remedy is available under s. 241 of the Act when any act or omission of a corporation effects a result, or the affairs of the corporation have been conducted in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any stakeholder.
- [102] There are two parts to the oppression remedy test. The first is to consider whether a stakeholder's reasonable expectations have been breached in a manner that is oppressive or unfairly prejudicial. In determining whether a reasonable expectation exists, the subjective expectations of the stakeholder must first be established and then an objective analysis of the stakeholder's expectations must be conducted to determine whether the expectations were reasonable.
- [103] The second is to consider whether the conduct amounts to "oppression", "unfair prejudice" or "unfair disregard of relevant interest". The evidence is reviewed to determine if corporate actors failed to meet the reasonable expectations of stakeholders with unfair conduct and prejudicial consequences.

[104] Oppression is an equitable remedy, which seeks to ensure fairness. Courts must look at the factual context and the relationships at play to determine the reasonable expectations of the stakeholder.

[105] The Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholder*, 2008 SCC 69 at para. 72 identified several factors to consider in determining whether reasonable expectations exist:

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.

[106] A shareholders' agreement can be used as a guide when determining the reasonable expectations of the shareholders. A plain reading of s. 241(2) of the Act includes any private contracts between shareholders that will affect their relationships as an appropriate ground for an oppression claim.

F. Reasonable Expectations

[107] I have set out the complained of acts are set out in para. 2 of these Reasons.

[108] Mr. Boulet submits that his expectations were that:

- (a) Each Founder Shareholder equally retained the ability to exercise his rights in regards to the Company's corporate governance; including the requirement of unanimity in the appointment of directors.
- (b) That Inventys would support Mr. Boulet's participation in its governance based on his rights under the 2015 Shareholders' Agreement, and that Inventys would not take steps to curtail his rights under that agreement.
- (c) That Inventys would not alter his right to select or appoint directors would not be altered without his written consent.
- (d) That Inventys would not terminate the Shareholders' Agreement to eliminate the rights of Mr. Boulet as shareholder. He says that he does not claim to have held a reasonable expectation that the Shareholders' Agreement would never be terminated; rather, he expected Inventys would honour his rights under the Shareholders' Agreement to participate in the Company by appointing directors to the board and that Inventys would not terminate the Shareholders' Agreement for the express purpose of eliminating his rights.

[109] Mr. Boulet submits his expectations were reasonable on the following bases:

- (a) Commercial practice and agreements: the 2015 Shareholders' Agreement which formalized equality in exercising rights, particularly s. 2.8 and 16.5 of the agreement:

Inventys' conduct is a sharp departure from the regular commercial practice of companies conducting their affairs in accordance with their contractual obligations, including shareholders' agreements. Inventys' breaches of the Shareholders' Agreement is an attempt to deny Boulet his

rights to participate in the corporate governance of the Company, and its termination of the Shareholders' Agreement is evidence that the Company has ceased to act in the even-handed and fair manner that shareholders are entitled to expect. Commercial practice requires that neither party to a contract engage in opportunistic or vindictive behaviour. As stated in BCE, departures from commercial practice undermine a claimant's legal rights and generally give rise to a remedy.

- (b) The nature of Inventys: Inventys is a start-up technology company that Mr. Boulet co-founded and of which he was the CEO until shortly before the beginning of Inventys' oppressive conduct towards him. As his creation, it is reasonable to expect that Mr. Boulet would be permitted to remain involved in the corporate governance of Inventys through the special rights afforded to him on the basis of his status of Founder Shareholder. It is reasonable to expect, given the nature of the Company, that Mr. Boulet's role in Inventys would not be ended on a targeted basis for his failure, as described by Inventys' counsel at the Town Hall Meeting, to "cooperate" with the majority. The shareholders and Company's intention in this regard is evidenced in the Shareholders' Agreement's protection of the Founder Shareholders' director appointment rights, but that is not to say that the intention, and therefore the reasonableness of a related expectation, is dependent on the Shareholders' Agreement remaining in effect. Inventys' unlawful attempts to amend the Shareholders' Agreement and its subsequent termination have no bearing on what Mr. Boulet reasonably expected--they are merely attempts by the Company to change the status quo of the relationship, understandings and expectations flowing from Mr. Boulet's involvement in Inventys.
- (c) Past Practice: the past practice of Founder Shareholders were unanimously agreeing on the appointment of directors. Mr. Boulet's expectations are further reinforced by the Company's past practice in amending the Shareholders' Agreement. In each successive amendment, including the July 2018 amendments, the Shareholders' Agreement was amended in order to meet the requirements of further investments, rather than being terminated. Throughout, the Founder Shareholders remained a privileged class with rights to select and appoint a majority of the directors of the Company. Before Inventys began its oppressive conduct, there were no indications that the understanding of the Founder Shareholders' role in the Company had changed or that Mr. Boulet should not expect to have the same rights in the future, including if further investments were made by third parties in the Company. Further, there is no evidence to suggest that Inventys had ever terminated or amended its Shareholders' Agreement in order to disadvantage one group in favour of another.
- (d) Fair Resolution of conflicting interest: While companies are permitted to resolve conflicts between the interests of stakeholders, they may not do so in a manner that "abusively or unfairly maximizes a particular group's interest at the expense of the other stakeholders". Where an alternative structure is available that is more beneficial, a company's rejection of it in favour of a course of action that is contrary to the interests of a stakeholder is a failure of a company to act reasonably and fairly.

In amendments the Company set out in the Side Letter, Inventys proposed to continue the Founder Shareholder category, which would appoint one director to the Board instead of their previous involvement with six appointments. While the rights contemplated are materially worse than those provided to Mr. Boulet by the Shareholders' Agreement, the New Shareholders' Agreement goes further than the Side Letter and abolishes the Founder Shareholder category. Founder Shareholders cease to have any rights to appoint their own director(s). Their only right is to vote on a majority basis with all of the Common Shareholders for the appointment of one director, which was to be appointed by the Founder Shareholders under the Side Letter amendments.

Notwithstanding the Side Letter contemplating a continued category of Founder Shareholders, Inventys chose to abolish the category, further disadvantaging Mr. Boulet. Inventys further chose to terminate the Shareholders' Agreement, which was even more unfair to Mr. Boulet, in breach of the reasonable expectation that a corporation will act fairly and reasonably in resolving conflicting interests. This use of Inventys' power cannot be a responsible exercise of business judgment and therefore supports the reasonability of Mr. Boulet's expectation of fair treatment and the abusive nature of Inventys' conduct.

- (e) No Preventative steps available: No further preventative steps were available to Mr. Boulet that would have protected him from the Company's conduct. Mr. Boulet has relied on the provisions of the Shareholders' Agreement that require his written consent to the modification of his rights regarding the appointment of directors and that Inventys would treat him fairly.

While Inventys submits that Mr. Boulet had an opportunity to participate in the determining his rights as part of the Side Letter amendments, this "opportunity" related only to the method that the Founder Shareholders would use to select a single director. In fact, the only step available to Mr. Boulet to protect his rights to select and appoint directors was to continue with this proceeding, which Mr. Boulet did. There are no steps that Mr. Boulet could have taken to prevent the termination or protect his rights and interests.

[110] Mr. Boulet submits the specified conduct amounts to oppression, unfair prejudice, or unfair disregard:

- (a) Through appointing the 2016, 2017, and 2018 Founder Directors and Independent directors by way of majority vote, he has been unable to exercise his rights over the corporate governance of Inventys in an unequal manner to Mr. Khiavi, Mr. Henkel, and Mr. Wolanski. He notes in contrast, during the same period equality between the Preferred Shareholders has been preserved through unanimous agreement.
- (b) Through amending s. 2.8 of the 2015 Shareholder Agreement to permit the majority vote process, the Company contradicted s. 16.5 of the 2015 Shareholders' Agreement and Mr. Boulet's rights as a Founder Shareholder including the need for his prior written consent for the appointment of directors - which is a breach of the agreement.

- (c) Through the Side Letter, Amendments, the Founder Shareholders' ability to appoint six directors (a majority) was removed, permitting only one to be selected. This change is submitted to be drastic and fundamental that it will dictate the future direction of the Company. Further, the attempted consultation with Mr. Boulet and the other Founder Shareholders regarding the Side Letter Amendments was an unfair process as to do so would require Mr. Boulet to accept all of the oppressive actions taken by the Company to that date. He submits Inventys conducted a process to shut Mr. Boulet out to achieve what Inventys wanted at the expense of minority shareholders.
- (d) Inventys has employed every tool in its legal toolbox in seeking to impose the majority will and disadvantage Mr. Boulet. After terminating Mr. Boulet from his position as CEO, Inventys unlawfully sought to exclude him from Founder Shareholder meetings for the selection and appointment of directors to the Board. In response to Mr. Boulet's protests of illegality, Inventys purported to amend the Shareholders' Agreement to allow it to bypass Mr. Boulet, contrary to the requirement therein that any amendments to the rights of Mr. Boulet as a Founder Shareholder have his written approval."

Inventys' termination of the Shareholders' Agreement was done in a bad faith attempt to thwart Mr. Boulet's reliance on the Shareholders' Agreement and the potential for a court order rectifying the oppressive conduct. These comments show, at a minimum, that Inventys has had no regard for Mr. Boulet's interests and reasonable expectations, which amounts to "unfair disregard" and justifies resort to the oppression remedy.

- [111] In my view, Mr. Boulet has not established that the conduct of Inventys was oppressive. The Company's actions were within the scope of the Shareholders' Agreement. The evidence does not persuade me that Mr. Boulet was "targeted".
- [112] As Inventys points out, there is nothing nefarious regarding the actions of the Company in attempting to secure financing and new investors. In fact, virtually all enterprises at the stage of Inventys are in search of and in need of funding such as what occurred in this case. The terms required of Inventys by new investors are reasonable and understandable in the circumstances.
- [113] Mr. Boulet's assertion of bad faith on the part of the Company has not been made out. Though he refers to select statements made at the Town Hall meeting references him throughout by name. The Company refers to other comments which provide a broader context; namely, that the reorganization was in furtherance of obtaining financing for the Company on terms required by its investor. The Company needed to move forward.
- [114] As I have determined, Mr. Boulet's assertions that he had the expectation that the Founder Directors and the Independent Directors would be unanimously selected by all of the Founders is not objectively reasonable based on my analysis of the 2015 Shareholders' Agreement. In any event it would be obvious that following Mr. Boulet's firing as CEO of the Company, that any commonality or support for Mr. Boulet from the Co-Founders' selection of directors given the loss of confidence in Mr. Boulet as CEO and otherwise could not be

reasonably expected. Reliance on past practice, to the extent it existed (which I have not found in this case), in these circumstances carries little weight. Moreover, the Nominations Issue is time-barred and the failure to take steps within the limitation period diminishes the reasonableness of the expectation. As well, via the Settlement Agreement Mr. Boulet contractually has released the Company from equitable relief in relation to the Nominations Issue.

- [115] Further, Mr. Boulet's complaint of not being treated equally qua Founding Shareholder has not been established. His rights as such under the Shareholder Agreement have not been diminished relative to the other Founders.
- [116] With respect to the expectation that his rights under the Shareholders Agreement would not be curtailed. I find that this expectation not objectively reasonable. Mr. Boulet through the Shareholders' Agreement agreed his rights would not only be amended in accordance with s. 16.5; but also fully terminated under s. 9 and 11. In such circumstances his expectation that the Company would not take steps to make any changes is not reasonable.
- [117] I also find that the Side Letter a reasonable requirement by the lender and the acceptance by shareholders 83% of the preferred shareholders and 75.27% of common shareholders, met the threshold to terminate the shareholders' agreement.
- [118] As to his expectation that the Shareholders' Agreement would not be terminated; I do find this expectation reasonable given that the right to terminate the agreement is expressly provided for in the agreement; and has been since 2008. Moreover, the motivation for the change was a legitimate business reason and not one of targeting Mr. Boulet. The Financing was a significant step in realizing the value in the business. I also agree with the respondent's submission that despite being given the opportunity on multiple occasions, Mr. Boulet refused to participate in a process whereby the Founders could demonstrate to OGCI how they could exercise their rights under an amended shareholders' agreement. It is disingenuous for Mr. Boulet, who was fully aware of OGCI's demands, to claim that he has been oppressed because the Company, acting with the required approval of its shareholders, gave effect to the Side Letter Amendments by carrying out its commitment to OGCI to terminate the July 2018 Shareholders' Agreement and replace it with another shareholders' agreement on terms substantially similar. Again, the presence of the termination provision in the circumstances is an answer to his complaints.
- [119] Further, the oppression action is meant to deal with a "personal" wrong, as opposed to a representative or derivative one. This personal harm must impact the interests of the complainant personally - giving rise to a personal action - and not simply the complainant's interests as part of the collectivity of stakeholders. Contrary to Mr. Boulet's allegation, this is not a personal attack on him. The Reorganization affected and impacted all shareholders. The elimination of the special rights previously conferred to the Founders impacted all of the Founders. It is faulty logic to suggest that because Mr. Boulet is the only shareholder who has commenced legal proceedings against the Company in relation to the

Reorganization, that the Reorganization as part of the Financing was an oppressive act against Mr. Boulet specifically. Just because a shareholder's views do not prevail and he has to live with the will of the majority does not lead to "compensable injury" sufficient to establish oppression.

- [120] To the extent that Mr. Boulet had any expectations that his Founder rights (as characterized by Mr. Boulet) would be preserved, any breach of those expectations does not rise to the level of oppression. The court in BCE makes it clear that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation. Likewise, not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. As I have explained the actions of the Company in totality were for a legitimate and realistic business purpose to maximize value for the enterprise and not a targeting of Mr. Boulet.
- [121] As to his expectation that the Company would not alter his right to select or appoint directors without his written consent; I agree with the Company's view, that while the number of directors which can be selected and appointed has changed, the right to select and appoint has not. This latter right is to which Mr. Boulet has a right and expectation. With regard to the assertion by Mr. Boulet that the 2017 amendment to s. 2.8 requiring unanimity by the Preferred Shareholders provides a veto to that group and that this unanimity to that group illustrates the targeting of Mr. Boulet is faulty. The "veto" is not comparable to the veto Mr. Boulet asserts that he had under s. 2.8 and 16.5. Further, the amendments requiring all of the Preferred Shareholders to agree to a change in the size of the Board is not a veto at all. The Board size was set at nine directors and could be increased to ten directors (or later reduced back to nine) with the agreement of the majority of the Founders and all of the Preferred Shareholders. The Board continues to operate and transact business if these requirements are not met. Where there is a failure of the Preferred Shareholders to act unanimously in changing the size of the Board then the size simply does not change. The Board continues to be properly constituted. There is no deadlock. The Preferred Shareholders' "veto" is not comparable to the veto Mr. Boulet would have if his interpretation of the operation of s. 2.8 and 16.5 were accepted.
- [122] To the extent the inclusion of the words "a majority of the Founders Shareholders" was a breach, I do not find it oppressive, given my analysis that it reflected the original intentions of the parties to the Contract.

V. Dissent Right

- [123] Mr. Boulet initiated his dissent right under s. 190(5) of the Act by delivering such notice on November 2, 2018.
- [124] On November 27, 2018 he made demand for payment under s. 190(7) of the Act.
- [125] On December 4, 2018 pursuant to s. 190 Inventys delivered an offer to pay. Mr. Boulet did not respond to the offer and the offer expired.

[126] Under s. 190(11) a dissenting shareholder who has sent a notice under s. 190(5):

Ceases to have any rights as a shareholder other than to be paid the fair value of their shares as determined

None of the stated exceptions to this provision are present.

[127] Given the foregoing events, the relief Mr. Boulet seeks in respect to oppression is moot.

VI. Conclusion

[128] The dispute in this case reflects the not uncommon difficulties that arise when a founding member of an enterprise finds himself no longer having the authority or influence that he once had in the organization but still challenges the very structure and processes he had a direct role in creating. Though he was a founder, he also says he was Inventys' creator, this does not mean his position as a Founder Shareholder was immutable given the terms of the Shareholders' Agreement. Mr. Boulet's beliefs may be sincere, but his assertion of breaches and oppressive conduct have not been made out.

[129] The steps taken by Inventys were reasonable and consistent with a legitimate and necessary step for the Company to achieve growth and enhance value. They are reflective of the business realities faced by Inventys and were not a targeting of Mr. Boulet's interests.

[130] The provisions in place to deal with the dispute between the parties are s. 190(15) and (16) of the Act.

[131] The petition is dismissed.

"The Honourable Mr. Justice Masuhara"

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