

CANADA / JUDGMENT

McDougall v. Knutsen

2023 BCSC 211

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 211 McDougall v. Knutsen IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: McDougall v. Knutsen, 2023 BCSC 211 Date: 20230213 Docket: S1912340 Registry: Vancouver Between: Donald Geoffrey McDougall and 0838697 BC Ltd. Plaintiffs And Scott Walter Knutsen, Anik Gagnon, Cobra Integrated Systems Ltd., KKBL No. 617 Ventures Ltd., and 614844 B.C. Ltd. Defendants Before: The Honourable Justice Funt Reasons for Judgment Counsel for the Plaintiffs: T.G. Keast, K.C. Counsel for the Defendants: A.S. Dosanjh G. Boothroyd-Roberts Place and Dates of Trial: Vancouver, B.C. February 28, March 1-4, 7-11, April 11-12, 14, May 3, 12, June 9 and 23, 2022 Place and Date of Judgment: Vancouver, B.C. February 13, 2023 TABLE OF CONTENTS

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1. introduction
- [1] The focus of this case is the breakdown in the relationship among three experienced business persons in connection with a closely-held corporation, Cobra Integrated Systems Ltd. ("Cobra Ltd.").
- [2] The parties had planned for a corporate reorganization of Cobra Ltd. to close on May 7, 2015 (the "Corporate Reorganization"). The Corporate Reorganization did not close on May 7, 2015 because shortly before April 24, 2015, a small minority shareholder refused to sign the necessary documents and then further on June 12, 2015, a court order made in family law proceedings involving the defendant, Mr. Scott Knutsen, prohibited the transfer of shares controlled by him.
- [3] The plaintiffs, Mr. Geoffrey McDougall and a company he owns with his spouse, 0838697 BC Ltd., seek relief under the oppression provisions of the Business Corporation Act, R.S.B.C. 2002, c. 57 [BCA] and also damages with respect to the September 13, 2019 termination, without cause and without notice, of employment.

- [4] For the reasons that follow, the oppression relief the plaintiffs seek is not granted. There is an award of \$98,075 for the termination without cause and without notice of the relevant employment contract.
2. background
- a) Cobra Ltd.
- [5] Cobra Ltd. is a corporation that undertakes a business specializing in alarms, remote video access, entry phones, and video surveillance. Its customers are primarily developers or managers of large residential complexes or office buildings. Before its operations were negatively affected by the COVID-19 pandemic, Cobra Ltd. had approximately 90 employees. At the time of trial, Cobra Ltd. had approximately 35 employees.
- [6] Cobra Ltd. is the successor corporation of an October 2013 amalgamation involving several related predecessor corporations, including Cobra Integrated Security Ltd. ("Old Cobra Ltd.").
- [7] In 2000, the defendant, Mr. Scott Knutsen, and Mr. Brian Sylvester, who is not a party to this action, each using holding companies, acquired Old Cobra Ltd. through the purchase of the outstanding shares in the capital of Old Cobra Ltd., using 614841 B.C. Ltd. and 614844 B.C. Ltd. respectively. I will refer to 614841 B.C. Ltd. and 614844 B.C. Ltd. as "Scott Co." and "Brian Co." in these reasons.
- [8] On April 24, 2015, Brian Co. was acquired by a wholly-owned subsidiary of Cobra Ltd. Before that time, Brian Co. had been owned by Mr. Sylvester and his spouse.
- [9] Before the April 24, 2015 transaction, Brian Co. and Scott Co. had been the controlling shareholders of Cobra Ltd. (and its predecessor, Old Cobra Ltd.). Mr. Sylvester and Mr. Knutsen were the directing minds of their respective corporations.
- [10] With the April 24, 2015 acquisition of Brian Co., Mr. Sylvester ceased to be a Cobra Ltd. director. Mr. Knutsen remained as a director and Mr. McDougall and the defendant, Ms. Anik Gagnon, became directors.
- [11] Following the acquisition of Brian Co., the parties in this action had planned for the Corporate Reorganization to occur. As noted, the Corporate Reorganization failed to close on the planned date of May 7, 2015.
- b) Mr. McDougall
- [12] In 2005, Old Cobra Ltd. hired Mr. McDougall as a salesperson.
- [13] Mr. McDougall and his spouse are the shareholders of the plaintiff, 0838697 B.C. Ltd., which I will refer as "Geoff Co." in these reasons.
- [14] In 2007, Scott Co., Brian Co., and Geoff Co. acquired Webb Solutions Ltd. ("WSL"). Scott Co., Brian Co., and Geoff Co. were equal one-third shareholders of WSL.

[15] In 2011, Geoff Co. became a minority shareholder of Old Cobra Ltd.

c) Shareholders' Agreement

[16] Later in 2011, a shareholders' agreement (the "Shareholders' Agreement") was entered into by the shareholders (and their principals where shares were held through a corporation) of Old Cobra Ltd.

[17] At the time of the October 2013 amalgamation resulting in Cobra Ltd., Scott Co., Brian Co., and Geoff Co. were all shareholders of Old Cobra Ltd. The Shareholders' Agreement survived the amalgamation.

d) Other Shareholders

[18] Over the years, Mr. Paul Hardy, Mr. Richard Wallace, and 0921244 B.C. Ltd., a company owned by Mr. Kevah Kiamanesh, became shareholders of Old Cobra Ltd. and upon the October 2013 amalgamation, shareholders of Cobra Ltd. I will refer to 0921244 B.C. Ltd. as "Kevah Co." in these reasons.

e) Webb Electronics Inc.

[19] Webb Electronics Inc., which had been owned by Scott Co., Brian Co., and 650691 B.C. Ltd., which was owned by Mr. Peter Rampf, had become, by April 2015, a wholly-owned subsidiary of Cobra Ltd. (with the acquisition price to be determined by a binding arbitration). Although sharing the Webb name, WSL and Webb Electronics Inc. are separate corporations.

[20] The corporate records of Webb Electronics Inc., a wholly-owned subsidiary of Cobra Ltd., show that Mr. Sylvester ceased to be a director of Webb Electronics Inc. on April 24, 2015 and that Mr. Knutsen remained as a director and Mr. McDougall and Ms. Gagnon became directors.

f) The April 2015 Acquisition of Brian Co.

[21] The April 24, 2015 acquisition of Brian Co. was accomplished by the acquisition of all the shares in the capital of Brian Co. by KKBL No. 617 Ventures Ltd. ("617 Ventures"), a wholly-owned subsidiary of Cobra Ltd.. 617 Ventures was a shelf corporation, which Cobra Ltd. acquired for this purpose (and possible for future acquisitions).

[22] Immediately prior to the April 24, 2015 acquisition of Brian Co., the shareholdings of Cobra Ltd. were: Brian Co. 34,000 Class A Common Shares Scott Co. 34,000 Class A Common Shares Geoff Co. 10,000 Class B Common Shares Kevah Co. 2,000 Class B Common Shares Paul Hardy 1,500 Class B Common Shares Richard Wallace 1,500 Class B Common Shares

[23] The share structure immediately before the acquisition of Brian Co. is shown at Chart A, which is attached to the end of these reasons.

[24] After the April 24, 2015 acquisition of Brian Co., the share structure is as shown in Chart B, which is attached to the end of these reasons.

[25] At the time of the acquisition of Brian Co.'s shares, Geoff Co.'s cost base in the 10,000 Class B common shares it held was \$350,000.

g) Ms. Anik Gagnon

[26] Ms. Anik Gagnon is a businessperson who resides and owns a corporation in Quebec that operates a business similar to that of Cobra Ltd. (and some of its predecessors). Ms. Gagnon first met Mr. Knutsen and Mr. McDougall at a trade conference in Las Vegas in 2012. Through various business dealings involving Cobra Ltd. and Ms. Gagnon's corporation, a good business relationship developed among the three of them.

[27] Shortly following the acquisition of Brian Co.'s shares by 617 Ventures, Mr. Knutsen, Mr. McDougall, and Ms. Gagnon had planned for the Corporate Reorganization to occur. The general purpose of the Corporate Reorganization was to enable each of them (or through their respective corporation) to participate equally in the future growth of Cobra Ltd.

3. The Corporate Reorganization

[28] The general plan of the Corporate Reorganization was to "freeze" the then current value of Cobra Ltd. by the exchange of the common shares held by the various shareholders for preferred shares of equal value. This would allow for the contemporaneous subscription of common shares for a nominal cost in agreed-upon percentages. This would also enable Ms. Gagnon through a corporation incorporated for this purpose and for which Ms. Gagnon would be the sole shareholder (Anik Co.) to participate in the anticipated future growth of Cobra Ltd.

[29] The parties had planned for the Corporate Reorganization to meet the requirements of s. 86 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [ITA], and, accordingly, not trigger any immediate tax consequences. For example, the Share Exchange Agreement Mr. McDougall signed as the authorized signatory of Geoff Co. reads: The parties hereby acknowledge that the transactions contemplated herein are not intended to give rise to any income tax liability whatsoever and it is the intention of the parties that the provisions of subsection 86(1) of the Income Tax Act (Canada) apply to the transaction.

[30] The exchange of the existing common shares (other than Brian Co.'s shares) was proposed to be as follows: Before the Exchange After the Exchange Scott Co. 34,000 Class A Common Shares 34,000 Class A Preferred Shares Kevah Co. 2,000 Class B Common Shares 2,000 Class A Preferred Shares Geoff Co. 5,000 Class B Common Shares + 5,000 Class C Common Shares 10,000 Class A Preferred Shares Paul Hardy 1,500 Class B Common Shares 1,500 Class A Preferred Shares Richard Wallace 1,500 Class B Common Shares 1,500 Class A Preferred Shares Total 49,000 Common Shares 49,000 Class A Preferred Shares

- [31] Geoff Co.'s 5,000 Class B common shares and 5,000 Class C common shares represent the 10,000 Class B common shares previously set forth at para. 22 above. There had been a past mistake in the corporate records which required rectification. The value of Geoff Co.'s shares remained the same.
- [32] It was initially anticipated that the redemption value (price) of each preferred share would be \$36.7347. This was based on the then understood value of Brian Co.'s shares to be \$850,000.
- [33] For current purposes, I have not included Brian Co.'s shares because the value of its shares in Cobra Ltd. is reflected in the shares of the other shareholders set forth above. Similarly, I have not included the 3,500 Class B common shares Cobra Ltd. held in its own name: BCA, s. 82. Much like family property, if one writes a \$100 cheque to one's spouse or to oneself, the value of the family property does not increase by \$100.
- [34] Prior to the finalization of the documents for Corporate Reorganization, it was realized that the actual value of Brian Co.'s shares was \$510,000 (after taking into account a \$340,000 shareholder loan). In other words, the overall value of Cobra Ltd. (\$1,267,500) was significantly less than the parties in this action had first thought.
- [35] With this adjustment, it was determined that the redemption price for each preferred share to be issued would be \$15 (and not \$36.7347) in order to effect a full freeze. (Although not relevant to the case at bar, I note that the redemption price should have been \$15.45.)
- [36] With the then current value frozen, the next step in the Corporate Reorganization was the subscription for common shares at \$.01/share.
- [37] The subscriptions for common shares were planned to be as follows: Scott Co. 26,000 Class A Common Shares Geoff Co. 26,000 Class A Common Shares Anik Co. 26,000 Class A Common Shares Kevah Co. 2,000 Class C Common Shares Paul Hardy 1,500 Class C Common Shares Richard Wallace 1,500 Class C Common Shares 83,000 Class A and C Common Shares
- [38] It was also planned that there would be a new shareholders' agreement with terms similar to the current Shareholders' Agreement. The Class C common shares would have limited voting rights.
- [39] If the Corporate Reorganization had closed on May 7, 2015 as planned by Mr. Knutsen, Mr. McDougall, and Ms. Gagnon, the share structure immediately after closing would have been as shown in Chart C, which is attached to the end of these reasons.
- [40] In general terms, each of Scott Co., Geoff Co., and Anik Co. would share slightly less than one-third of the future growth in value of Cobra Ltd. ($26,000 \text{ common shares} \div 83,000 \text{ common shares} = .3132$ or 31.32%.)

- [41] Mr. Knutsen, Mr. McDougall, and Ms. Gagnon envisioned that they would work together (through their respective corporations) to use their respective skills to expand and make Cobra Ltd. more profitable. Each of them were to be engaged in the management of Cobra Ltd. Each would provide personal guarantees with respect to bank financing. Each would be remunerated equally and would draw their remuneration directly or through their respective corporations.
- [42] Mr. Knutsen was to serve as the Chief Technology Officer, Mr. McDougall as the Chief Operating Officer, and Ms. Gagnon as the Chief Financial Officer. In managing Cobra Ltd., the three of them understood that management decisions were to be based on the agreement of at least two of the three of them.
- [43] It was also understood that each would be a director of Cobra Ltd.
- [44] After the April 24, 2015 acquisition of Brian Co.'s shares by 617 Ventures, Mr. Knutsen, Mr. McDougall, and Ms. Gagnon managed Cobra Ltd.. Ms. Gagnon, Mr. Knutsen, and Mr. McDougall were Cobra Ltd.'s only directors. Ms. Gagnon continued as a director after May 7, 2015, the planned closing date of the Corporate Reorganization, despite not holding shares in Cobra Ltd. (unless the memorandum or articles provide otherwise, a shareholding is not required to be a director: BCA, s. 125).
- [45] The Corporate Reorganization did not close on May 7, 2015 for three reasons. First, Mr. Kiamanesh (Kevah Co.) did not agree to the Corporate Reorganization.
- [46] With Mr. Kiamanesh's (Kevah Co.'s) refusal to sign the closing documents, Scott Co., on or about April 25, 2015, invoked (as a "Controlling Shareholder") Part 5 of the Shareholders' Agreement.
- [47] Part 5 of the Shareholders' Agreement provides: 5.1 Buy Out Option: A Controlling Shareholder shall have the irrevocable option (herein, the "Buy Out Option"), exercisable at any time during the term of this Agreement, to buy out the Interests of all or any one of the Minority Shareholders pursuant to terms and conditions of this Part 5. And further, 5.2 []
- (b) for greater certainty, it is expressly understood and agreed that the Buy Out Option shall not constitute an offer that may either be accepted or rejected by the Buy Out Minority Shareholders, but, rather, shall constitute an irrevocable and compulsory option in favour of the Controlling Shareholder exercisable by the Controlling Shareholder at any time in accordance with the provisions of this Part 5.
- [48] Litigation ensued.
- [49] Mr. Kiamanesh (Kevah Co.) claimed damages for misrepresentation, breach of contract, and wrongful dismissal. The pleaded misrepresentations included misrepresentations in relation to Kevah Co.'s acquisition of shares in Cobra Ltd.

- [50] On or about October 25, 2018, the litigation involving Mr. Kiamanesh (Kevah Co.) resolved. The resolution included Kevah Co. transferring its 2,000 Class B common shares in the capital of Cobra Ltd. to Cobra Ltd.
- [51] Second, in mid-June 2015, Mr. Knutsen's spouse commenced legal proceedings, seeking, inter alia, a divorce and property division. On June 17, 2015, Mr. Knutsen's spouse obtained a court order restraining the disposition of property by Mr. Knutsen (which included the shares in Scott Co. and the shares owned by Scott Co. in Cobra Ltd.).
- [52] On or shortly after July 18, 2019, the family litigation was resolved with a formal closing involving the necessary documentation occurring.
- [53] Third, with the passage of years, counsel for Cobra Ltd. advised that an updated valuation of Cobra Ltd. would be required to ensure the correct freeze value for the Corporate Reorganization, with other necessary revisions, to close. Section 86(1) of the ITA refers to the disposition of shares "at a particular time in the course of a reorganization of the capital of a corporation".
4. proof
- [54] In *F.H. v. McDougall*, 2008 SCC 53, Justice Rothstein, writing for the Supreme Court of Canada, stated that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": at para. 46.
5. reliability
- [55] Mr. McDougall, Mr. Knutsen, and Ms. Gagnon each testified.
- [56] I found Mr. Knutsen and Ms. Gagnon to be reliable witnesses.
- [57] Mr. McDougall's testimony reflected aggrievement and for this reason was not firmly reliable. For example, he was reluctant to accept that the freeze value for each common share he held was to be \$15 (or approximately so) per share even though counsel for Cobra Ltd. had explained the basis of the calculation (based on Brian Co.'s shares being worth \$510,000) and he had signed the documents for the Corporate Reorganization on this basis.
- [58] Mr. McDougall's testimony also often reflected unreasonable expectations. As an example, Mr. McDougall did not agree with Ms. Gagnon loaning funds to Cobra Ltd. with more favourable terms and conditions than that were offered by the Business Development Bank of Canada ("BDC") at the same rate as offered by BDC. In cross-examination, Mr. McDougall testified: Q And that Ms. Gagnon said that she would personally lend the money on the terms and conditions provided by BDC -- sorry, except without all the terms and conditions provided by BDC, except for the interest rate of 12 percent. Do you recall a discussion like that? A What do you mean without the -- with the exception of the 12 percent? Q So let me rephrase it. Ms. Gagnon stated words to the effect that she would lend the money to Cobra at 12 percent interest, but that she wouldn't be asking for the same terms and conditions that BDC were, for example the fees, the bonuses and so on. Do you recall a conversation like

that? A Oh, the specifics, no, but I would -- I wouldn't say that's -- that's incorrect. Q And I suggest to you that you and Mr. Knutsen agreed for Ms. Gagnon to lend the money on that basis? A I agreed that she should make an -- because she was a shareholder of -- of Cobra that she should make an in -- a financial investment to the company. I had put in over \$300,000 in cash, 350; Scott had 2 -- \$200,000, so I -- I felt a loan -- her financial commitment was in line with - with you know, with others that had invested money, but -- Q And-- A -- I did not agree to the -- to the rate of 12 percent and I -- I wrote a long email and I described why specifically I -- I was against that rate. Q Did you produce that email in these proceedings? A I was -- I was unable to, because it was in the -- it was on the CIS server and I didn't have access to it. Q Did you request that email in these proceedings? A No, I didn't -- I didn't request it, but it exists. Q Was -- was Ms. Gagnon going to receive extra shares for providing the money to Cobra? A Not to my understanding. Q And it's your position that you - you specifically had a problem with Ms. Gagnon earning 12 percent for -- A Yes. Q -- that loan? A Yes, and I - Q Do you recall -- A -- I articulated my -- my thoughts. Q Do you recall another option that was available for financing for Cobra? A Yes. Q Beyond the BDC letter of intent? A Yes. Should I clarify? When you say option - Q What -- let me ask the specific question. Was there another entity that was prepared to lend Cobra the money for less than 12 percent? A Was there -- not that I was aware of -- Q All right. A -- but it would have been appropriate for Anik to loan money at the rate -- the same rate that everyone -- every other shareholder who was lending money to the company, whether it was myself, Brian or Scott, at 9 percent. Q And that's even if Ms. Gagnon refused to do so? A I wouldn't see why she would refuse. That's seems reasonable, that she would be offered a rate as every other principal shareholder providing money to the company. Why would that be unreasonable? Q I suggest to you that you were offered to participate in this loan for 12 percent and you refused. Do you agree with that? A I was offered to -- to lend money, correct, and I didn't -- Q And -- A And I didn't lend money for the reason that -- that I mentioned two or three minutes ago. I made an investment in the company. Scott had made a previous investment and I felt it was appropriate that we would be more aligned having a - a financial commitment, all of us. That's why I didn't.

6. current share Structure

- [59] On July 3, 2016, Brian Co. acquired Mr. Hardy's 1,500 Class B common shares he held in the capital of Cobra Ltd.
- [60] Since the planned Corporate Reorganization date of May 7, 2015, there have been no other share transactions involving Cobra Ltd. other than Kevah Co.'s transfer of its 2,000 Class B common shares to Cobra Ltd. as part of the October 2018 litigation settlement.
- [61] The current shareholdings are shown in Chart D, which is attached to the end of these reasons.

- [62] With the 34,000 Class A common shares and 1,500 Class B common shares owned by Brian Co., a wholly-owned subsidiary (indirectly through 617 Ventures), as noted, the value of these shares is reflected in the value of the shares held by Scott Co., Geoff Co., and Mr. Wallace in the capital of Cobra Ltd. Accordingly, for our purposes, Brian Co.'s shareholdings are not relevant.
- [63] The overall effect is that the relative percentages of Scott Co., Geoff Co., and Mr. Wallace are: Scott Co.: 74.73% Geoff Co.: 21.97% Richard Wallace: 3.30% 100.00%
- [64] Anik Co. (and Ms. Gagnon) holds no shares in Cobra Ltd.
- [65] As described below, the relief the plaintiffs seek includes:
- a) \$150,000 based on the freeze price for the 10,000 Class A preferred shares the plaintiffs expected to be issued to Geoff Co. under the Corporate Reorganization; and
 - b) the value of the 26,000 Class A common shares the plaintiffs expected to be issued to Geoff Co. under the Corporate Reorganization as of September 13, 2019 (the date the employment contract was terminated).
- [66] The plaintiffs say that the s. 227 oppression provisions of the BCA are engaged. The amounts sought are based on the Corporate Reorganization as having closed. The plaintiffs are not seeking that the 5,000 Class A common shares and 5,000 Class B common shares held by Geoff Co. in Cobra Ltd. be purchased.
- [67] The defendants deny that they oppressed (including unfairly prejudiced) either of the plaintiffs.
7. Law of oppression
- [68] Section 227(2) of the BCA reads:
- (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.
- [69] Under s. 227(3) of the BCA, the Court has broad powers to make an order with "a view to remedying or bringing to an end the matters complained of".

- [70] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, the Supreme Court of Canada considered the oppression remedy under the Canada Business Corporations Act, R.S.B.C. 1985, c. C-44 [CBCA].
- [71] The relevant CBCA provisions are broader than s. 227 of the BCA. In addition to "oppression" and "unfair prejudice", the CBCA also includes "unfair disregard" of relevant interests. In these reasons, I will use the word oppression to include unfair prejudice.
- [72] In *BCE Inc.*, the Court set forth a two-prong analysis. The Court stated:
- [56] []. 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.
- [73] With respect to "reasonable" expectations, the Court, in *BCE Inc.*, stated:
- [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.
- [74] With respect to the second prong, and having regard to s. 227(2) of the BCA, the effect of the impugned conduct is key in determining whether the affairs of *Cobra Ltd.* were conducted in a "manner oppressive to one or more of the shareholders": *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 at para. 71
- [75] Returning to *BCE Inc.*, the Court specifically noted that "as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression": *BCE Inc.* at para. 90. (Emphasis added.)
- [76] The focus of the governing provisions is on fairness. In *BCE Inc.*, the Court stated:
- [71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": *Dickerson Committee* (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*, [1987 ABCA 84]. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

- [77] In BCE Inc., the Court further set forth various factors that may come into play, including the nature of the corporation and preventive steps that the claimant could have taken to afford protection. The Court further noted that shareholders' agreements "may be viewed as reflecting the reasonable expectations of the parties": BCE Inc. at para. 79.
- [78] In BCE Inc., the Court also stated the oppression remedy (and similar provisions) "has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces": BCE Inc. at para. 87.
8. oppression-relief sought
- [79] The plaintiffs say that Cobra Ltd., Mr. Knutsen, and Ms. Gagnon should be ordered to pay Geoff Co.:
- a) \$150,000 based on the freeze price for the 10,000 Class A preferred shares the plaintiffs expected to be issued to Geoff Co. under the Corporate Reorganization;
 - b) the value of the 26,000 Class A common shares the plaintiffs expected to be issued to Geoff Co. under the Corporate Reorganization as of September 13, 2019 (the date the employment contract was terminated).
- [80] The plaintiffs' calculation of the value associated with the expected 26,000 common shares is premised on the formula set forth in the Shareholders' Agreement respecting the calculation of the value of shares where employment is terminated without cause. The plaintiffs' rough calculation of the value of the expected 26,000 common shares is approximately \$1,213,000.
- [81] The plaintiffs also say that the termination of the employment contract was also oppressive. As described further below, in reviewing the termination of the relevant employment contract, the Shareholders' Agreement is engaged. Under the Shareholders' Agreement, employment may be with a "Minority Shareholder" or the "Principal" of a Minority Shareholder as those terms are defined in the Shareholders' Agreement. Under the Shareholders' Agreement, Geoff Co. is a Minority Shareholder and Mr. McDougall its Principal.
9. OPPRESSION - ANALYSIS
- a) Context
- [82] The Corporate Reorganization, as planned, was the result of Mr. Knutsen, Ms. Gagnon, and Mr. McDougall each negotiating as arm's length individuals each acting in their own self-interests. There were not any non-arm's length relationships commonly found in a closely-held corporation controlled by one or more families or family members.

- [83] With this context, each of the three individuals would expect the other two individuals would negotiate in their respective self-interests, including protecting their respective self-interests. Such would be expected even where the parties are pursuing a common goal (the expansion and profitability of Cobra Ltd.).
- [84] Negotiating parties will often recognize the experience, talents, contacts, or finances that other parties may bring to help accomplish a common goal, while taking steps to protect their respective self-interests.
- [85] In the case at bar, there was the Shareholders' Agreement negotiated in 2011. It was contemplated that there would be a new shareholders' agreement with terms and conditions similar to the Shareholders' Agreement.
- [86] The Shareholders' Agreement "may be viewed as reflecting the reasonable expectations of the parties" which would be updated for, among other matters, the inclusion of Ms. Gagnon, Anik Co., and the departure of Mr. Sylvester and Brian Co.
- [87] The foundational nature of the Shareholders' Agreement is reflected particularly in its sections 12.2 and 12.7, which read: 12.2 Application: This Agreement will apply, without further act or formality, with any necessary changes to any new class, series or numbers of securities to which any Shares may be changed by virtue of any reorganization or recapitalization of the Company, its consolidation, amalgamation or merger into or with another company, or after a consolidation, sub-division or other change in the Shares or capital of the Company. [] 12.7 Severability: If any provision of this Agreement is unenforceable or invalid for any reason whatsoever, it will be modified rather than voided or read restrictively, if possible, to give effect to the interests of the parties to the extent possible, and if not possible, it must be severed. In any event, all other provisions of this Agreement are valid and enforceable to the extent such result is not inequitable.
- [88] In sum, a party's expectations must be considered in the context of arm's length dealings of experienced business people with the then Shareholders' Agreement.
- [89] The Shareholders' Agreement afforded protection in various ways. As noted above, the plaintiffs rely on the Shareholders' Agreement for the calculation of the value of the 26,000 common shares contemplated to be issued to Geoff Co. under the Corporate Reorganization which the plaintiffs say were not issued as a result of the defendants' oppressive conduct.
- b) Protective Steps
- [90] The Shareholders' Agreement provided significant protection by addressing common matters that may arise among shareholders and thereby affording certainty.
- [91] As discussed below in addressing the termination, without cause and without notice, of the plaintiffs' employment relationship with Cobra Ltd., the Shareholders' Agreement specifically deals with the employment services being provided through a corporation, such as the arrangement among Cobra Ltd., Geoff Co., and Mr. McDougall.

- [92] Having regard to the fact that Mr. McDougall and Ms. Gagnon were each to provide a personal guarantee with respect to Cobra Ltd.'s bank indebtedness prior to the closing of the Corporate Reorganization, an agreement titled "Security Agreement" dated April 24, 2015 (the "Security Agreement") was entered into by Cobra Ltd., 617 Ventures, Mr. McDougall, and Ms. Gagnon.
- [93] Recitals D and E of the Security Agreement read: D. Anik Co. and Geoff Co. are expecting to receive shares in Cobra pursuant to a reorganization that is occurring subsequently to the Guarantees being granted. E. Cobra wishes to provide Anik and Geoff with security for any loss incurred in connection with the Guarantees, as set out in this agreement. 617 Ventures acknowledges that granting financial assistance to Cobra is in the best interests of the Company.
- [94] The security included shares owned by 617 Ventures in the capital of Brian Co. During legal argument, the parties agreed that for the purposes of the action, the provisions of the Security Agreement could only be triggered if either Mr. McDougall or Ms. Gagnon suffered loss or expense with respect to their respective guarantees.
- [95] The existence of the Security Agreement shows that the plaintiffs, in particular, took steps to protect their self-interests. The Security Agreement reflects the fact that the parties contemplated the possibility that Cobra Ltd. might fail to issue shares for two years. That said, as described below, at the time the Security Agreement was executed, Ms. Gagnon and Mr. McDougall shared the reasonable expectation that the Corporate Reorganization would close in a timely manner.
- [96] Mr. McDougall also sought an agreement referred to by the parties as the "Comfort Agreement", which was to address various matters among the parties. Agreement was not reached.
- [97] In their Notice of Civil Claim, the plaintiffs identify the defendants' refusal to sign the Comfort Agreement as oppressive conduct.
- [98] In April 2015, Mr. McDougall retained counsel on behalf of Cobra Ltd. to draft the Comfort Agreement. Counsel was separate from Cobra Ltd.'s corporate counsel. It was only Mr. McDougall who communicated with counsel.
- [99] Several drafts of the Comfort Agreement were prepared and circulated for comment and discussion by Mr. Knutsen, Ms. Gagnon, and Mr. McDougall.
- [100] In the first or an early draft, the following was included: Until 1 April 2017, Geoff or his nominee on the Board of Directors of Cobra Integrated will have the right to veto any decision of the Board of Directors.
- [101] The Court can readily see why Mr. Knutsen and Ms. Gagnon would not wish to accede to veto power for Mr. McDougall. The power of the Board would be usurped.

[102] In a later draft, a section provided for the mandatory sale of Cobra Ltd. by the parties if certain financial metrics were not met. The section reads:

15. Notwithstanding the terms of any present or future shareholders agreements to which the parties are signatories (other than an agreement expressly and specifically abrogating the terms of this agreement), the parties agree that if the profit of Cobra Integrated for the first fiscal year ending after the second anniversary of the date of this agreement is less than 5% of the revenue of Cobra Integrated before interest, taxes, and depreciation Scott, Anik and Geoff will cause the Board of Directors to Resolve to offer the shares or the assets of Cobra Integrated for sale as a going concern. Each of Scott, Anik and Geoff will vote in favour of all reasonably necessary Directors' and Shareholders' resolutions as may be required to effect that objective.

[103] In April 14 and 15, 2015 email discussions, Mr. Knutsen wrote to Mr. McDougall (with a copy to Ms. Gagnon): 2 year commitment: For two years none of the 3 principals can be terminated or quit for any reason while rebuilding the Cobra Group. The three principals agree, after 24 month after the signing of this agreement, if the company is earnings are an EBITA of less than 5% of revenue they must take a vote [to] sell Cobra group and with unanimous approval will pursue a third party investor to divest ourselves of the Cobra Group. The group may also elect to vote to sell the Cobra Group at the 24 month mark if the entity is over 5% EBTIA but again this decision must be unanimous. [Emphasis in original.]

[104] During these discussions, Mr. McDougall replied: I don't see the concept of setting a minimum ebita as a legitimate option. We all agree accounting is a highly subjective, interpretive process that allows us to manipulate the numbers to paint whatever picture we'd like to financials to show. It's far from black and white math. The next 5-10 years of my life will be the most critical earning years for my family. Based on how remuneration has been proposed, the numbers and format are not making sense for me at this point when I look past 2-3 years. I'm prepared to dedicate 2 more years to help rebuild but I need an ability to re-assess my future at the two year mark to ensure this still makes sense for me personally and financially.

[105] In cross-examination, Mr. McDougall testified: Q And -- and that email from Mr. Knutsen dated April 14, 2015, with your comments in red, I'm going to suggest to you that in your comments you're conveying the idea that you still wanted the ability to essentially back out after two years. Is that a fair assessment? - A That -- that is a fair assessment. I don't think anyone would be interested in -- in being part of a long-term dog, and that was not a -- that was not a point that others disagreed on in -- in my understanding it was a fair comment. It was a reasonable position and I don't -- I don't believe that was ever a point of contention. Q But you understood that Mr. Knutsen, certainly based on his email, didn't want a mandatory sale. He wanted a mandatory vote that had to be unanimous in order to achieve a sale, would you agree with that? A Yes. That wasn't my concern.

[106] In connection with the negotiation of a Comfort Agreement, the Court finds that the parties engaged in discussions and negotiations in good faith but failed to reach an agreement. The plaintiffs have not established a reasonable expectation that all parties would agree to the Comfort Agreement. Business persons often negotiate without reaching agreement. I do not find oppression.

c) Other Matters the Plaintiffs Claimed were Oppressive

i. Unequal Cash Flow Loans and Payments on Shareholders Loan

[107] As of March 2016, Mr. Knutsen had loaned approximately \$192,000 to Cobra Ltd. Over time, his loans were almost fully repaid, without further advances to assist with cash flow, with a balance of approximately \$7,600 as of March 29, 2019. During this period, Ms. Gagnon and Mr. McDougall loaned funds to Cobra Ltd. By April 15, 2019, Mr. McDougall's loans had been fully repaid with the agreed upon interest.

[108] While the repayment of Mr. Knutsen's loan without him making further advances as the need arose was not consistent with the general understanding, in context, Mr. Knutsen had provided his personal guarantee for bank financing for \$500,000 where Ms. Gagnon and Mr. McDougall had each guaranteed \$250,000. In June 2017, Mr. Knutsen's guarantee was increased to \$750,000 while Ms. Gagnon's and Mr. McDougall's guarantees each increased to \$375,000. Mr. McDougall did not suggest that his personal guarantee should be increased to \$333,333 and then to \$500,000.

[109] The plaintiffs also pleaded that Mr. Knutsen used corporate funds to pay personal legal fees. As the cross-examination of Mr. McDougall made clear, this was a mistaken categorization: Q Now, you understood Mr. Knutsen's legal fees were paid from the loan repayments that were made by Cobra to Mr. Knutsen, correct? A Yes.

[110] The simple explanation was that some of the repayments of Mr. Knutsen's shareholder loan were used to pay his legal expenses related to his family litigation.

[111] In sum, corporate funds were used to repay Mr. Knutsen's shareholder loan. The use to which Mr. Knutsen then used the funds is irrelevant. In the usual course of business, corporate funds are used to repay a shareholder's loan.

[112] I do not find that the plaintiffs were oppressed in connection with these financial matters. In context, Mr. McDougall's expectations were not reasonable. Further, I do not see Mr. McDougall as suffering financial harm (compensable injury) and, if there were such, the causation. ii. Mexican Timeshare

[113] While in Mexico on a trade conference, on March 30, 2018, Mr. Knutsen and Ms. Gagnon had Cobra Ltd. purchase a timeshare of a condominium unit at a vacation resort.

[114] On January 20, 2019, the Mexican timeshare was upgraded. The total cost of the timeshare with upgrade was approximately \$122,000 USD.

- [115] Mr. McDougall was not informed of the purchase on a timely basis. That said, the relevant contracts were kept in Cobra Ltd.'s files and Cobra Ltd.'s bookkeeper was informed on a timely basis.
- [116] The Mexican timeshare was shown on Cobra Ltd.'s financial statements. Under the Shareholders' Agreement, the purchase of the Mexican timeshare was a "Major Decision" (i.e., a capital expenditure exceeding \$50,000) requiring the approval of a majority of the directors present at any meeting of the Board of Directors.
- [117] The decision to purchase the Mexican timeshare was done without a Board meeting. This breached the plaintiffs' reasonable expectations.
- [118] Mr. McDougall and Ms. Gagnon testified that they viewed the Mexican timeshare as a way to reward and retain achieving employees.
- [119] The purchase price of the Mexican timeshare was not large relative to Cobra Ltd.'s revenue at the time.
- [120] In cross-examination, Ms. Gagnon acknowledge that she was intimate with Mr. Knutsen several times after 2015. She was not cross-examined as to a more steady intimate relationship with Mr. Knutsen. She denied that they were ever a couple. I find that there was occasional intimacy but it did not give rise to a non-arm's length relationship or influence the purchase of the Mexican timeshare.
- [121] The purchase of the Mexican timeshare and its upgrade were subsequently approved at a Board of Directors meeting.
- [122] I am satisfied that the business judgment rule applies. I can see the business sense having regard to the number of Cobra Ltd. employees and the fact that the expenditure was for a timeshare and not a purchase of a property outright.
- [123] With the business judgment rule satisfied, I do not find that the plaintiffs suffered financial harm (compensable injury). The Mexican timeshare was an asset of Cobra Ltd. with a plan to use the asset for corporate purposes.
- [124] The Mexican timeshare purchase and upgrade were isolated instances of Mr. McDougall not being informed on a timely basis. The Mexican timeshare purchase (with upgrade) does not meet the threshold of conduct required for oppression. In any event, I do not see that the failure to comply with the Shareholders' Agreement caused the plaintiffs financial harm.
- [125] In sum, I do not find oppression in connection with the Mexican timeshare. iii. Failure to Adopt a \$5,000 Limit for Non-Ordinary Expenses
- [126] The plaintiff says that the defendants failed to adopt a \$5,000 limit for non-ordinary expenses.

- [127] I find that the plaintiffs did not have a reasonable expectation (when viewed objectively) that Mr. Knutsen and Ms. Gagnon would adopt a \$5,000 limit.
- [128] First, other than the Mexican timeshare, there were few, if any, such expenditures.
- [129] Second, Mr. McDougall had full access to the financial records kept by Cobra Ltd.'s bookkeeper. Mr. McDougall was Cobra Ltd.'s Chief Operating Officer. He was free and in the position to ask the bookkeeper to identify, retrieve, or otherwise analyze Cobra Ltd.'s financial records and to keep him informed on a timely basis on out-of-the-ordinary expenditures greater than \$5,000.
- [130] I am satisfied that a \$5,000 limit for non-ordinary expenses was not practically necessary and may have led to unwanted controversy. Again, the business judgment rule applies.
- [131] I will add that Ms. Gagnon was often the tie-breaker when Mr. Knutsen and Mr. McDougall were in disagreement. She often sided with Mr. McDougall. She referred to Mr. Knutsen as a bit of a "dreamer" while recognizing his engineering skills. Ms. Gagnon as Chief Financial Officer would generally side with Mr. McDougall on financial matters. iv. Failure to Implement the Corporate Reorganization
- [132] From the outset, Mr. McDougall, Ms. Gagnon, and Mr. Knutsen knew that the full implementation of the Corporate Reorganization might be delayed. In the commercial world, it is not unusual for planned matters not to close for one or more reasons, including a requisite consent is not forthcoming with litigation then ensuing (often lengthy). With the prospect of delay, Mr. McDougall and Ms. Gagnon had entered into the Security Agreement contemplating but not reasonably expecting a significant delay.
- [133] The Kevah litigation was not resolved until 2018 with the share transfer occurring on October 25, 2018. As noted, on or about April 25, 2015, Scott Co. exercised the Buy Out provision of the Shareholders' Agreement to acquire Kevah Co.'s shares. Unfortunately, despite the provisions of the Shareholders' Agreement, Kevah Co.'s shares in Cobra Ltd. were not obtained within a few months. I do not find that Mr. Knutsen or Scott Co. caused any delay. Kevah Co. had pleaded a variety of wrongs, including misrepresentations leading to Kevah Co.'s purchase of shares.
- [134] Family litigation is also often arduous and lengthy. There was no evidence that Mr. Knutsen deliberately thwarted an earlier resolution of his family litigation.
- [135] In cross-examination, Mr. McDougall conceded that neither Mr. Knutsen nor Ms. Gagnon have denied that he (Geoff Co.) is a "one-third shareholder" (the parties commonly referred to one-third shareholdings while realizing that the actual percentage was somewhat less for each of them having regard to the small percentage shareholders, now only Mr. Wallace).
- [136] It was also not in Ms. Gagnon's self-interests to have the implementation of the Corporate Reorganization delayed.

- [137] In the case at bar, Ms. Gagnon (Anik Co.) has received no shares whatsoever while acting with the reasonable expectation that her "one-third interest" would be forthcoming. She has been actively involved in Cobra Ltd.'s operations, serving as its Chief Financial Officer, has loaned funds to Cobra Ltd., and has provided significant personal guarantees to Cobra Ltd.'s bank to help secure financing.
- [138] Mr. McDougall (Geoff Co.) also has a 21.97% interest rather than the reasonably expected "one-third interest" (based on the currently issued shares after disregarding the shares held by Brian Co.). Geoff Co.'s shareholder's claim is based on the expected issuance of 10,000 Class A preferred shares (\$150,000) and a valuation of the expected issuance of 26,000 Class A common shares.
- [139] I do not find that Mr. Knutsen, Scott Co., Ms. Gagnon, or Anik Co. (or any of the other defendants) caused the Corporate Reorganization not to be implemented. As noted in BCE Inc., causation must be proven to ground a remedy for oppression.
- [140] In sum, the failure of the Corporate Reorganization to close does not give rise to oppression.
- v. Failure to have Audited Financial Statements for 2019 and 2020
- [141] Most closely-held corporations do not have audited financial statements. Audited financial statements are expensive relative to notice to reader financial statements.
- [142] In filing corporate income tax returns, an authorized representative must make the necessary certification with the threat of significant penalties for failing to do so.
- [143] A corporate tax return requires the key financial information to be reported.
- [144] As previously noted, Mr. McDougall had easy access to any financial information he may have sought and also would have the assistance of Cobra Ltd.'s bookkeeper.
- [145] On March 31, 2020, Cobra Ltd. held its annual general meeting. Mr. McDougall voted for audited financial statements. In previous years, Cobra Ltd. did not have audited financial statements prepared.
- [146] I am satisfied that Ms. Gagnon made good faith efforts to have audited financial statements prepared but her efforts were frustrated by the pandemic, the unanticipated requirements of the auditors (e.g., tracing the inputs of assembled equipment) the impossibility of auditing previous years (e.g., inventory already sold), and for all practical purposes the prohibitive costs.
- [147] I do not find that there was oppression on the basis that audited financial statements were not prepared. There is neither the cause nor the conduct to base the plaintiffs' claim for an oppression remedy. vi. The Termination of the Employment Relationship between Cobra Ltd. and Geoff Co. (and Mr. McDougall)

[148] I have dealt with the termination of employment below within the law normally engaged with respect to a termination of employment without cause and without notice. The termination was not oppressive. It was in Cobra Ltd.'s best interests that the relationship be terminated. As discussed below, the Shareholders' Agreement provides for the termination of employment without cause and the treatment of any related shareholdings.

10. terminaton of employment

a) Employee

[149] The relevant portions of the Shareholders' Agreement read: 1.1 Definitions: In this Agreement: [] (ee) "Minority Shareholder" means any Shareholder or group of Shareholders holding less than fitly percent (50%) of all the issued Shares at any given time which, as at the date hereof, is any one or more of KiamaneshCo, RampfCo, McDougallCo, Hardy, Wallace, PickeringCo and ColbyCo; [] 2.11 Employment Contracts with Principals and Shareholders: Any employment contract between any Principal of a Shareholder or a Shareholder (in either case "Shareholder Employee") and the Company or a Subsidiary of the Company and any material change in, termination of or reimbursement of any expense aggregating more than \$100.00 in any calendar month under any such contract will require the consent of the majority of the Board (which majority must include the approval of the directors nominated by the Controlling Shareholder). Any director whose employment contract as a Shareholder-Employee is in question will abstain from voting on such matter. [] 8.1 Option Events: For the purposes of Section 8.2 of this Agreement, an option event (an "Option Event") in respect of a Minority Shareholder means any one of the following: []

(b) the termination of the Principal of the Minority Shareholder or the Minority Shareholder as an employee of the Company without "cause" for the termination of employment under the laws of the Province of British Columbia; or [] 8.2 Options: Notwithstanding any other provision of this Agreement, upon the occurrence of an Option Event in respect of a Minority Shareholder (the "Optionor") and for a period expiring on the first Business Day that is twelve (12) months thereafter the following shall apply:

- (a) the other Shareholders shall have the option (the "Buy Option") to purchase from the Optionor an, but not less than all, of the Interest then owned by the Optionor (the "Option Interest") at a purchase price equal to the aggregate of the following:
- (i) in respect of each Share comprising the Interest of the Optionor, a purchase price based upon the price of all of the issued Shares of the Company being equal to 3 x EBITA of the Company plus the net book value of the assets of the Company as determined by the balance sheet of the Company prepared by the internal accountant of the Company as of the end of the month prior to the date of the Option Event; and (ii) the price for each dollar (expressed in Canadian finds) of any Loan forming part of the Optionor's Interest, together with the aggregate price for the Loan; []

- [150] Geoff Co. was a Minority Shareholder. Mr. McDougall was the Principal of Geoff Co. The Shareholders' Agreement specifically defines Geoff Co. to be a Minority Shareholder.
- [151] As may be seen from subsection 8.1(b), the parties to the Shareholders' Agreement had contemplated and had agreed that a Minority Shareholder (a corporation such as Geoff Co.) would, for the purposes of the Shareholders' Agreement, be viewed as an employee. In particular, subsection 8.1(b) reads (in part): "the termination of the Minority Shareholder as an employee of the Company".
- [152] The defendants submitted that because the payments to Geoff Co. were not impressed with the usual income tax hallmarks of that of an employee (e.g., source deductions) that Geoff Co. could not be an employee.
- [153] While I accept that Geoff Co. may not be an employee for income tax purposes, in my view, the parties to the Shareholders' Agreement agreed that a Minority Shareholder, such as Geoff Co., would be treated as an employee under the Shareholders' Agreement.
- [154] The defendants also submitted that Geoff Co. was an independent contractor and, accordingly, Geoff Co. (or Mr. McDougall) should not be viewed as an employee. Again, the language of section 8.1(b) governs in viewing a Minority Shareholder as an employee under the Shareholders' Agreement. Moreover, it is apparent that Mr. McDougall's employment was effectively provided through Geoff Co.
- [155] Mr. McDougall served as Cobra Ltd.'s Chief Operating Officer and devoted the time and energy usually associated with a private corporation operating an active business in more than one jurisdiction, enjoying significant revenues, and employing more than 50 employees.
- b) Best Interests
- [156] The defendants admit that the employment of Geoff Co. (Mr. McDougall) was terminated without cause and without notice. Section 8.1(b) of the Shareholders' Agreement addresses a "without cause" termination triggering an Option Event.
- [157] As of September 13, 2019, the date of termination of the employment, the once business-like relationship between Mr. McDougall and Mr. Knutsen was irreparably broken. It was in Cobra Ltd.'s best interests that Mr. McDougall left.
- [158] By the fall of 2018, the working relationship between Mr. McDougall and Mr. Knutsen deteriorated as a result of apparent dissatisfaction of several major Cobra Ltd.'s customers.
- [159] In reaction to the loss of a large potential contract, on September 20, 2018, Mr. McDougall emailed Mr. Knutsen: 6 months of work and a great opportunity blown over this. Feel free to add another one to your 'not our fault' excuse pile.

- [160] Mr. Knutsen replied: Take your high an mighty attitude and stick it! I don't need it nor appreciate it! If you think all of your decision have perfect in your contributions to this organization you better take a closer look in the mirror! EXAMPLE [customer name deleted] thinks we are a bunch of [expletive] nuts and it was under your WATCH! Don't email me with your problems unless your bringing solutions!
- [161] Mr. McDougall replied: Time and place brother. Just make sure its away from the office. Leave your skirt at home. Its big boy time.
- [162] Mr. Knutsen replied: I'm in town 11:30 tomorrow you ASS now who has the stones!!
- [163] Mr. McDougall replied: Oh I got solutions alright big guy. lots of them, you won't like any of them. Just do your job, we're 2 years behind with webb with zero plan. Stay out of anything I work on and we'll be fine. Btw if you the stones, call me we can discuss. Better yet, get your ass on a plane and we'll talk in person. But we both know that won't happen.
- [164] Mr. Knutsen replied: 1:30 pm Ricky's behind the office
- [165] Mr. McDougall replied: No prob, we can start there, as long as you realize it may involve us moving to a more private location so I can really get my point across. You picking what I'm layin down big guy? chew on that for plane ride home.
- [166] Mr. Knutsen replied: Grow up Geoff you sound like you in a school yard, be professional.
- [167] Mr. McDougall replied: No excuses, just show up tomorrow.
- [168] The following day, Mr. Knutsen and Mr. McDougall met at Ricky's (a restaurant near Cobra Ltd.'s Vancouver office).
- [169] In cross-examination with respect to an April 4, 2019 email chain between Mr. Knutsen and Mr. McDougall, Mr. McDougall testified: Q On the first page, at the bottom, is an email from Scott to you, among others, and the body of the email starts on the next page. "After a 90-minute berating in Ricky's Restaurant last year where you even threatened me with physical violence and was twice almost thrown out of the restaurant to which there were lots of witnesses, combined now with we have legal action, you will excuse me if I have no interest in speaking with you." Just pausing there and I think you gave this evidence already, you did meet with Scott at the Ricky's Restaurant? A I did. Q And then you respond, and this email has been taken through but I'll just read the first paragraph. "We were both hurling insults, I recall, both saying some nasty things in the heat of the moment. I don't hold that against either of us, tends to happen when we have our families' investments future at stake. I also remember some tears as well when you calmed down and told me about some of your personal issues." And you -- you threatened Scott with physical violence; correct? A I don't recall that. Q It may have happened? A I don't recall. I don't recall, it was a 90-minute conversation and we said a lot of disparaging things to each other. Q You may have said something to the effect that, yeah, if you're using Cobra as your own piggy bank if you do this again, you know, it may escalate? A Yeah, I may have said something like that, sure. Q

And you'll agree with me that you threatened him with physical violence? A No, I wouldn't agree with that. I would agree with the statement that you just said. Q In your email you don't deny threatening him with physical violence, correct? A Say that again. Q In your email responding to Scott nine minutes later - A Yeah. Q -- you don't deny threatening him with physical violence, correct? A I -- I don't recall I did. If he took some of these disparaging comments as threats, that's what I was referring to. Q In your email you don't deny threatening him with physical violence; correct? A I didn't have to deny it because I didn't believe that there was. So why would -- why would I have to deny something that I believe may not have happened. Q In your email you don't deny threatening him with physical violence; correct? Says yes or no, answer the question. A Sorry, is that what you're looking for, a yes or no? Q In your email you don't deny threatening him with physical violence; correct? A I don't deny it, no. THE COURT: I take it that means correct? A Correct, yeah, sorry.

[170] On September 11, 2019, Mr. Knutsen, Mr. McDougall, and Ms. Gagnon met, with Mr. Knutsen now in a position to deal with his shares (his family litigation had settled).

[171] With respect to a September 11, 2019 meeting among Mr. Knutsen, Mr. McDougall, and Ms. Gagnon, Mr. McDougall, in cross-examination, testified: Q And now moving to the September 11 meeting, and I think you've testified to this, that you met with Mr. Knutsen and Ms. Gagnon to try to resolve the conflict in Cobra? A We -- we met, correct, yes. Q And you and Mr. Knutsen met in person? A Yes. Q And that was in Mr. Knutsen's office? A Yes. Q And Ms. Gagnon was on speakerphone? A Yes. Q And Mr. Knutsen asked you what did you want to move forward? A Something to that effect, correct. Q And Mr. Knutsen asked you if your shares were issued to you would you be interested in moving together as one happy family? A He said something to that effect. Q And you told Mr. Knutsen that the two of you could not work together and that you needed to talk to your lawyers? A That's in -- that's incorrect. Q And you told Mr. Knutsen that you did not want to work with him anymore? A That's also incorrect.

[172] Earlier, Mr. McDougall in examination-in-chief had testified that he could not give an answer as to moving forward until his questions and concerns had been addressed. He testified: Q And tell me what happened at that meeting. A Scott called me into his office and was obviously concerned about where we were, and asked me, you know, about the, you know, he -- he made a comment about, you know, what would it take to -- for me to end the legal and for us to move forward. That was basically the opening statement. Q All right. And did you respond to that? A I did. I had -- I had said to him that I was - I was not prepared to give him an answer until he answered my questions, which were outlined in more than one letter from -- from my lawyer. So up to that point I had received no response on any of the items and I felt like I deserved a response. So in fairness to me I said, "I wasn't going to give you an answer until you addressed my concerns previously," which he didn't.

- [173] In cross-examination of Mr. McDougall, it was apparent that responses had been given. In particular, his counsel's April 1, 2019 letter had been responded to in a direct and fair manner. Much of the sought information was also readily available to Mr. McDougall as a director and Chief Operating Officer.
- [174] I find that the September 11, 2019 meeting made it clear that there were irreconcilable differences between Mr. Knutsen and Mr. McDougall. After the meeting, Ms. Gagnon concluded that Mr. McDougall's (Geoff Co.'s) employment needed to be terminated. Her thinking was that "otherwise we will never get anything done".
- [175] On September 13, 2019, Ms. Gagnon and Mr. Knutsen terminated the employment relationship with Mr. McDougall (Geoff Co.). I find that the decision was made in good faith and in the best interests of Cobra Ltd.: BCE Inc. at para. 37.
- [176] As Mr. McDougall acknowledged in cross-examination, Mr. Knutsen had the vision to create products. It made business sense for Ms. Gagnon to side with Mr. Knutsen in the best interests of Cobra Ltd.

c) Quantum

- [177] In first instance, Mr. McDougall did not fail to mitigate. By July 1, 2000, he had full-time employment with DDS Wireless International Inc. ("DDS") enjoying a compensation package somewhat greater than what he had with Cobra Ltd.
- [178] From September 13, 2019 to July 1, 2020 is approximately nine-and-a-half months. The defendants did not argue that the reasonable notice period should have been less than nine-and-a-half months (they submitted 12 months).
- [179] Before becoming a full-time employee of DDS, starting in late March 2020, Geoff Co. provided Mr. McDougall's services as an independent contractor to DDS, with Mr. McDougall working two to three days a week.
- [180] As an independent contractor, Geoff Co. charged DDS \$80/hour for Mr. McDougall's services. Geoff Co.'s invoices for Mr. McDougall's services total \$24,320 (before GST).
- [181] By August 21, 2020, Mr. McDougall had quit DDS. He was not fired. He also did not quit because DDS was asking him to do something unethical, illegal, or unsafe.
- [182] I find that Mr. McDougall quit DDS because DDS was not adopting his recommendations. He was frustrated that his recommendations, as he testified, "fell on deaf ears".
- [183] I find that Mr. McDougall failed to mitigate further his damages by quitting DDS. He acted impatiently and without some longanimity.
- [184] In short, Mr. McDougall is not entitled to damages for wrongful dismissal after the time he quit DDS.
- [185] The defendants calculate Mr. McDougall's annual compensation as follows:

- a) Annual salary \$130,000
- b) Health spending account \$4,669
- c) Life spending account \$13,247
- d) \$10,000 travel rewards \$10,000 Total: \$157,916 or monthly: $\$157,916 \div 12 = \$13,160$.

[186] Mr. McDougall says that he also had the use of a car provided by Cobra Ltd. and that this benefit should be included in computing compensation.

[187] Mr. McDougall has not provided "sufficiently clear, convincing, and cogent evidence" to show the personal use percentage (if any) of the car. Accordingly, I will not include any amount with respect to the car.

[188] The defendants calculate the appropriate award for damages for wrongful dismissal (if such were to be awarded) to be \$95,940.

[189] The defendants' calculation is derived by taking the monthly compensation over nine-and-a-half-months of \$125,020 ($\$13,160/\text{month} \times 9.5 \text{ months}$) and then deducting the \$24,320 Mr. McDougall received from DDS as an independent contractor and a further amount of \$5,250 received from Cobra Ltd. on September 24, 2019.

[190] Mr. McDougall notes that the \$5,250 straddles the termination date and, accordingly, only one-half should be deducted. I agree.

[191] I find that the appropriate award for the termination of employment should be \$98,075, calculated as follows: $\$125,020 - \$24,320 - \$2,625 = \$98,075$.

11. conclusion

[192] The plaintiffs have not been oppressed or unfairly prejudiced under s. 227(2) of the BCA.

[193] Cobra Ltd. is ordered to pay Geoff Co. \$98,075 as damages for the termination, without cause and without notice, of Mr. McDougall's "employment".

[194] With the failure of the Corporate Reorganization to close, Geoff Co.'s shareholdings in the capital of Cobra Ltd. consist of 5,000 Class B common shares and 5,000 Class C common shares.

12. Costs

[195] If the parties wish to speak to costs, I ask that they, within 30 days of these reasons, arrange through Supreme Court Scheduling a 9 a.m. 55-minute hearing before me. "Funt J." Chart A - Prior to the Sylvester Transaction Chart B - After the Sylvester Transaction Chart C - The Share Structure Immediately After the Corporate Reorganization (If It had Closed) Chart D - The Current Share Structure

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Prepared on 26 October 2026 · Esheria