

CANADA / JUDGMENT

Stahlke v. Stanfield

2010 BCSC 142

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCCA 142 Stahlke v. Stanfield

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stahlke v. Stanfield,

2010 BCSC 142

Date: 20100202

Docket: S092795

Registry: Vancouver

Between:

Lester Henry Stahlke, Stephen Fredric Roehrig,

Russel James Renneberg, Robert Ralph Morrison,

Adam Carpenter, Brian Carpenter, Andrew Ference,

Jorgen Gustavsson, Morely Lee, Dee Louis,

Gunnar Lundgren, Roy Renneberg

Petitioners

And

Ross Stanfield, Gallowai Metal Mining Corporation,

Bul River Mineral Corporation

Respondents

Before: The Honourable Mr. Justice Leask

Reasons for Judgment

Counsel for the Petitioners:

R. Josephson

K. Low

Counsel for the Respondent Ross Stanfield:

R.S. Abells, Q.C.

Counsel for the Respondents Gallowai Metal Mining Corporation and Bul River Mineral Corporation:

S. Leitzl

Counsel for the Respondents Gallowai Metal Mining Corporation and Bul River Mineral Corporation:

L. Brasil

Place and Date of Hearing:

Vancouver, B.C.

October 26-30;

November 27;

December 11, 2009

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2010

INTRODUCTION

[1] This is a petition brought under the minority shareholder oppression remedy section of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57. Twelve non-voting shareholders in two British Columbia mining companies, Gallowai Metal Mining Corporation ("Gallowai") and Bul River Mineral Corporation ("Bul River"), have sued the two companies and Ross Stanfield, the President and Chairman of the Board of both companies, who controls all the voting shares of both companies. They seek relief under s. 227(2)(a) of the Act which permits shareholders to apply to the court when they allege:

...

- (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 ...
- [2] In the alternative, the petitioners are seeking relief under s. 324(1)(b) of the Act which gives the court the power to intervene in corporate affairs when the court "considers it just and equitable to do so".

BACKGROUND

- [3] The principal business of the two companies is the development of certain mineral properties they own in south eastern British Columbia including the Gallowai Bul River Mine. Mr. Stanfield is the President of Stanfield Mining Group ("SMG"), which is an unincorporated association of various companies, including Gallowai and Bul River. Gallowai and Bul River are companies originally incorporated in the province of Alberta, and continued in 1986 as British Columbia companies.
- [4] As of June 18, 2009, Gallowai and Bul River had 3,765 shareholders who collectively own 19,042,015 shares. Of those shares, 9,070,004 are voting shares and are owned by Fort Steele Mineral Corporation ("Fort Steele") and Zeus Mineral Corporation ("Zeus"), which are also part of SMG. The rest of the shares are non-voting shares.
- [5] Mr. Stanfield has always owned all the voting shares in Fort Steele and Zeus and hence has always had control over Gallowai and Bul River. Further, since the commencement of the operations of Gallowai and Bul River, Mr. Stanfield has been a director of each of the companies, and the Chairman of their respective boards of directors.
- [6] The petitioners' complaints of oppression focus on four issues:
 - 1. the failure of the Boards of Directors of the two respondent companies to function properly;
 - 2. the delay in receiving the audited financial statements for 2008;
 - 3. the failure or refusal of Mr. Stanfield, or the companies, to respond to legitimate concerns of the shareholders; and
 - 4. the failure to bring the mine into production.
- [7] The respondents emphasize that the petitioners represent a very small minority of the shareholders of the companies. The respondents characterized the petitioners' "real" complaint as the failure to get the mine into production. The respondents say that because:

... "getting this mine into production" is not a recognized ground for relief under the Business Corporations Act, S.B.C. 2002, c. 57 (the "Act"), the Petitioners make various allegations regarding the corporate governance of Gallowai and Bul River, the degree of control exerted by the personal Respondent, Mr. Stanfield (who controls all voting shares of Gallowai and Bul River) and delivery of information, including information regarding the timelines for placing the Mine into production.

[8] The respondents assert that:

- (a) The petitioners knowingly and willingly elected to inject money into a private mining operation that was controlled by a single individual;
- (b) To the extent that the petitioners complain about the degree of control exerted by Mr. Stanfield over Bul River and Gallowai, the petitioners have always known, since they decided to purchase shares in Bul River and Gallowai, that Mr. Stanfield controlled all voting shares in these companies, and further, that the non-voting shares which the petitioners were purchasing did not entitle them to vote or to elect directors. As such, the petitioners' expectations, and the expectations of all other non-voting shareholders, could only have been that Mr. Stanfield would not only retain but exercise control over the affairs of Gallowai and Bul River;
- (c) The Board of Directors of each of Gallowai and Bul River operates in full compliance with all corporate governance requirements;
- (d) Appropriate information has been regularly provided to all shareholders on at least an annual basis, in the form of lengthy annual reports, and more frequently whenever there were additional developments; and
- (e) While the respondents remain hopeful that the Mine will be placed into production as soon as it is possible to do so, this is a decision which requires the exercise of business judgment, and which merits deference from the Court. Further, no firm timelines have ever been provided to the petitioners, as mining is not an exact science. To the extent that some petitioners maintain that specific timelines were provided to them, which the respondents deny, those petitioners themselves accept that those projections were personal expressions and were not intended nor accepted as guarantees.

THE LAW

A. Oppression

- [9] The oppression remedy focuses on actual harm to the legal and equitable interests of corporate stakeholders affected by oppressive acts of a corporation or its directors. Oppression is fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders, objectively determined: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paragraphs 45, 58-59, [2008] 3 S.C.R. 560; and *Greenlight Capital Inc. v. Stronach*, [2006] O.J. No. 4353, 22 B.L.R. (4th) (S.C.) at paragraphs 11 and 17.
- [10] In assessing the claim of oppression, a court must answer two questions:
- (1) Does the evidence support the reasonable expectation asserted by the claimant? and
 - (2) Does the evidence establish that such reasonable expectation was violated by conduct falling within the terms "oppression" or "unfair prejudice" of a relevant interest?

BCE at paragraphs 68, 72, 89 95

B. Reasonable Expectations

- [11] The determination of the existence of a reasonable expectation is itself a two-step process. First, the complainant must subjectively identify his or her expectations qua shareholders. Second, the court must determine objectively whether such expectations were reasonable: *Greenlight Capital*, at paragraph 23.
- [12] "... [T]he shareholder expectations which are to be considered are [not] those that a shareholder has as his or her own individual 'wish list.' They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders": *Greenlight Capital*, at paragraph 17 citing *820099 Ontario Inc. v. Harold E. Ballard*, [1991] O.J. No. 266, aff'd [1991] O.J. No. 1082.
- [13] As stated by the Supreme Court of Canada in *BCE*, at paragraph 70:
- [70] At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[Emphasis added.]

- [14] In determining whether an identified expectation is reasonable, the court may consider factors such as general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect him or herself; representations and agreements; and the fair resolution of conflicts between corporate shareholders: BCE, at paragraphs 72-84.
- [15] The size, nature and structure of the corporation are relevant factors in assessing reasonable expectations. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger company: BCE, at paragraphs 74.
- [16] The court should also consider the risk willingly assumed by the complainant and the ability of the complainant to have protected him or herself, such as by negotiating a better bundle of rights against the corporation: BCE, at paragraph 78.
- [17] Significantly, as held by the Supreme Court of Canada in BCE: "[s]hareholder agreements may be viewed as reflecting the reasonable expectations of the parties ...": BCE, at paragraph 79.
- [18] Reasonable expectations may also be affected by representations and the disclosure made to shareholders in offering memoranda and other corporate communications: BCE, at paragraph 80.

C. Oppressive Conduct

- [19] Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences. In other words, wrongful conduct, causation and compensable injury must be established: BCE, at paragraphs 67-68, 89-95.
- [20] The complainant bears the burden of proof to establish that such reasonable expectations were thwarted by the respondents. The respondents do not have a burden to prove that they did not act oppressively: BCE, at paragraph 165.
- [21] It is trite that every business venture starts with a hope of profit. The oppression remedy was not designed to compensate shareholders for unrealized profit expectations. Otherwise, every unsuccessful business would be the subject of an oppression claim.
- [22] The oppression remedy is not intended to provide the court with unfettered powers to modify corporate structures or to second-guess business judgment. Further, not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression: BCE, at paragraph 71

- [23] The oppression remedy protects only the interests of a shareholder qua shareholder. Oppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation: *Research Capital Corporation v. Skyservice Airlines Inc.*, [2008] O.J. 2526 (S.C.) at paragraphs 34-36, *aff'd* 2009 ONCA 418; *J.S.M. Corp. (Ontario.) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51; and *Nanef v. Con-Crete Holdings Limited et al.*, [1995] 23 O.R. (3d) 481 (C.A.) at 489.
- [24] Similarly, allegations of insufficient corporate performance or mismanagement, even if true, do not amount to oppression. As stated by Mr. Justice Slatter, as he then was, in *Envirodrive Inc. v. 836442 Alberta Ltd.*, 2005 ABQB 446 at paragraph 87, 7 B.L.R. (4th) 61:
- [87] ... While McPeak's management style was far from ideal, it is not necessary to make findings on whether these complaints are factually well founded, because there is a big difference between mismanagement and oppression. The Minority Shareholders cannot turn a "reasonable expectation" that the corporation would be "well managed" into oppressive conduct. Just because a corporation fails, or runs out of money, or cannot compete in the marketplace does not per se amount to oppression. The fact that employees, contractors or suppliers of the company may have grievances against Envirodrive Inc. or McPeak is not oppressive of the minority. Such matters have an equal (or greater) effect on the majority as on the minority. There are many reasons why the Envirodrive was not a successful product, but they are not evidence of oppression.

D. Just and Equitable Conduct

- [25] In the absence of findings of oppressive or unfairly prejudicial conduct, a claimant shareholder may still obtain relief by establishing under s. 324(1)(b) that it would be just and equitable to grant such a relief.
- [26] In *Walker et al. v. Betts et al.*, 2006 BCSC 128, 15 B.L.R. (4th) 114, Madam Justice D. Smith, as she then was, wrote, at paragraph 82:
- [82] ... The "just and equitable" test permits a broader or more liberal approach to assessing conduct that may have impacted on a shareholder's rights. An inquiry into what is just and equitable extends beyond an examination of the narrow legal or proprietary rights given to a shareholder under the articles of association, as was the case in *Diligenti v. R.W. M.D.* (1976), 1 B.C.L.R. 36 (S.C.), to include a broader spectrum of a shareholder's equitable rights. See *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342 (C.A.); *Pasnak v. Chura*, 2004 BCCA 221.
- [27] What is unjust and inequitable is also unfairly prejudicial. The oft-quoted words of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 (H.L.) at 500, state:

The [just and equitable] words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; consideration, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

- [28] In determining whether it is "just and equitable" to grant relief, the reasonable expectations of the parties, as determined by their past conduct, is a relevant factor: *Paley v. Leduc*, 2002 BCSC 1757 at paragraph 35, 30 B.L.R. (3d) 243.
- [29] In *Walker*, at paragraph 90, Smith J. set out examples of where the court has considered it to be "just and equitable" to grant relief under the oppression remedy:
- [90] Examples of a court having determined that it would be "just and equitable" to grant relief under s. 227(3) from conduct that was unfairly prejudicial include: (i) the loss of confidence and inability to communicate with one another, where the termination of a minority shareholder's employment was inextricably interwoven with his position as an officer and director, and the business was in fact a partnership operated under the guise of a private company (*Mroz v. Shuttleworth* (1996), 30 O.R. (3d) 205 (Ont. Ct. Gen. Div.); (ii) unequal repayment of shareholders loans and the failure to repay shareholders loans within a reasonable period of time (*Mroz*, supra); and, (iii) exclusion of a shareholder from continued participation in the management of a business, contrary to past practice (*Safarik*, supra at ¶94-95.)

E. Corporate Governance and the Conduct of Directors

- [30] Pursuant to s. 136 of the Act, the business and affairs of a corporation must be managed by or under the supervision of its board of directors.
- [31] The mere fact that people, who are directors, get together in passing does not constitute a "meeting of directors". In *Associated Color Laboratories Ltd. (Re)* (1970), 12 D.L.R. (3d) 338 at 350, 73 W.W.R. 566, Macdonald J. quoted a passage from the reasons for judgment of Martin J., as he then was, in *Harris v. English Canadian Co.* (1905), 3 W.L.R. 5 at 5 and 6, in which the question arose as to the validity of two meetings of directors. In dealing with it, Martin J. wrote:

In such circumstances, it is, in my opinion, clear that no meeting of the directors took place. Before directors can meet as such to transact the business of their company they must meet in person: *D'Arcy v. Tamar, etc. R.W. Co.*, L.R. 2 Ex. 163; in *re Haycroft Gold Reduction and Mining Co.* (1900) 2 Ch. 230; *Re State of Wyoming Syndicate* (1901) 2 Ch. 431; *McLaren v. Fiskens*, 28 Gr. 352; *Toronto Brewing, etc., Co. v. Blake*, 2 O.R. 175; and there must be an agreement express or implied, to meet in that capacity and not otherwise. To hold that certain directors could form a quorum by coming upon another in a room, or in the street, and, despite the protest of that other, could, by merely declaring the body of persons so gathered together to be a meeting, actually give it that complexion, would be going, in my opinion, to unwarrantable lengths, and encourage the carrying on of business by 'a trick or artifice,' as it is called in *Toronto Brewing, etc., Co. v. Blake*, *supra*.

[32] While the Act does not mandate meetings of a board of directors, on principle, the management of the company is vested in the board of directors collectively and the directors must, as a general rule, act as a group. The language of s. 136 makes that clear: "[t]he directors of a company must, subject to this Act, the regulations and the memorandum and articles of the company, manage or supervise the management of the business and affairs of the company". This principle "ensures that the collective wisdom of the board is available to the company on important decisions, and enables discussion to take place before a decision is taken.": *Associated Color Laboratories Ltd. (Re)*, at 350.

[33] On the other hand, neither the Articles of the respondent corporations nor the Act mandate that board meetings be formally convened.

[34] Paragraph 11.1 of the Articles of Bul River and paragraph 18.1 of the Articles of Gallowai provide that:

The directors may meet together for the conduct of business, adjourn and otherwise regulate their meetings as they think fit, ...

[35] Section 140 of the Act expressly permits written consent resolutions in lieu of meetings. The petitioners have inspected the minute books of the companies and have adduced no evidence of irregularities.

[36] Mr. Justice Myers recently reviewed the requirements to hold formal directors' meetings to properly authorize corporate business in *Witzel Capital Corp. v. LED Medical Diagnostics Inc.*, 2009 BCSC 1000 at paragraph 63. Notably, the wording of the articles of the company there under consideration is similar to the wording of the Articles of the respondent companies.

[37] Myers J. reviewed the law and upheld the validity of a corporate transaction in the absence of a single formal board meeting or written resolution: *Witzel*, at paragraphs 64-66.

- [38] Similarly, considering oppression allegations involving corporate governance issues in Greenlight Capital, Mr. Justice Ground criticized the applicants in that case for concentrating on form and process over the substance of any action taken by the board of directors. He reviewed the Ontario statutory equivalent of s. 142 of the Act (the duties and standard of care of directors), and concluded, at paragraph 63, that:
- [63] The imperfections in the corporate governance process with respect to certain of the challenged transactions cannot, in my view, form the basis for a finding of oppression. ...

DISCUSSION

- [39] Based on the foregoing, I will turn to analysing the merits of the four bases of the petitioners' claims of oppression: corporate governance; delayed audited financial statements; failure or refusal to respond to the shareholders; and failure to bring the mine into production.

A. Corporate Governance

1. Petitioners' Reasonable Expectations

- [40] The petitioners claim that at the time they purchased their respective shares in one or both of the corporate respondents, they had the expectation that:
- (a) There would be a functioning Board of Directors;
 - (b) The Board of Directors would act in accordance with the law, and their legal obligations;
 - (c) The chairperson of the Board of Directors would act in accordance with the law and his legal obligations;
 - (d) There would be regular and necessary meetings of the Board to enable the Directors of the Board to perform their legally mandated role within the corporation.

2. Respondent's Position

- [41] As of 1995, the Board of Directors for Bul River had six directors, namely: Mr. Stanfield; Owen Campbell; Patrick Campbell; Kenneth Wong; Melvin Taskey; and John Borger. The petitioners acknowledge that their names and principal occupations in the previous five years were disclosed in the Offering Memorandum for each of Bul River and Gallowai.
- [42] The Board of Directors for Gallowai had the same directors, with the exception of Dr. Taskey, who was only a director in Bul River.
- [43] The directors remained the same in the 1997 Offering Memorandum that was issued in relation to each of Bul River and Gallowai.

- [44] To the extent that the petitioners take issue with the fact that the directors of Bul River and Gallowai carried on their business without holding in-person meetings of all directors, the Offering Memorandum for each of the companies also disclosed that their directors resided in different places: Mr. Stanfield resided in Calgary, Alberta; Owen Campbell resided in Regina, Saskatchewan; Patrick Campbell resided in Red Deer, Alberta; Mr. Wong resided in Vancouver, British Columbia; and Messrs. Taskey and Borger resided in Edmonton, Alberta.
- [45] The Articles adopted by each of Bul River and Gallowai do not require that their respective directors hold in-person meetings of all directors. On the contrary, the Articles expressly confer upon the directors a wide discretion to regulate their meetings:

The directors may meet together for the conduct of business, adjourn and otherwise regulate their meetings as they think fit, and meetings of the board held at regular intervals may be held at the place, at the time and on the notice, if any, that the board may by resolution from time to time determine.

- [46] Further, while the directors of Bul River and Gallowai did not conduct in-person meetings of all directors, the business of the companies is routinely, albeit informally, discussed among the directors, and to the extent that any resolutions were proposed, they were circulated to all directors for their written consent, all in accordance with the requirements of the Act.
- [47] In addition, those directors who resided in the same city or were in close geographical proximity were free to meet, and did in fact meet to discuss the companies' business

3. Discussion

- [48] I have no difficulty in finding that the petitioners' expectations were reasonable with respect to the existence of a functioning Board of Directors and Chairperson who acted in accordance with the law and their legal obligations. Considering that both companies were private corporations and that the petitioners held non-voting shares and knew that Mr. Stanfield controlled all the voting shares, I do not regard their expectation that there would be "regular and necessary" meetings of the Board, as objectively reasonable.
- [49] In submissions, counsel for the petitioners stressed the importance of this issue. The substance of the allegations under this heading is that the directors do not meet together in formal board meetings, do not keep proper minutes and, in effect, that the Board does not exercise its proper function of managing the affairs of the corporation. The petitioners allege that the Board simply functions as a "rubber stamp" for the decisions of the Chairman, and majority shareholder, Ross Stanfield.
- [50] The respondents say that there is no requirement for face-to-face Board meetings. Section 140 of the Act expressly permits written consent resolutions in lieu of meetings and that has been the general practice of the two companies. More importantly, the respondents say this entire complaint involves treating form as having greater significance than substance. The petitioners are not alleging any particular wrongful decision by the Board. I agree with the respondents that the petitioners have failed to prove any oppressive or unfair act or

omissions by the Board of Directors of either respondent company based on the corporate governance allegations.

B. Delayed Audited Financial Statements

1. Petitioners' Reasonable Expectations

[51] The petitioners claim to have reasonable expectations that there would be audited financial statements of the corporations delivered to them on an annual basis, within a reasonable time after the year-end of the corporations. They say that the delivery of audited financial statements was of even greater importance to the non-voting shareholders, since that was essentially their primary source of independent information about the affairs of the corporations.

[52] The evidence is that the shareholders received these audited statements in April and May of each year. However, in 2008 there was a delay in the delivery of the audited financial statements.

[53] It was never the expectation of the petitioners that for one fiscal year, the delivery of the audited financial statements would be delayed for a period of a year. This is of particular concern to them given that the delay in the delivery of the audited financial statements of the companies from 2008 was taking place at a time when there was ongoing litigation between the petitioners and the companies, both in Alberta and British Columbia.

[54] They also claim that their reasonable expectations would have been that, if the auditors of the companies resigned for whatever reason, and the shareholders issued an authorization and instruction to the audit committee of the Board of Directors to find replacement auditors, the audit committee of the Board of Directors (or the Board of Directors itself) would act on that authorization and instruction and do so expeditiously.

2. Discussion

[55] The petitioners' expectations to receive audited financial statements annually is perfectly reasonable. However, the claim that the events of 2008 and 2009 with respect to the audited financial statements could give rise to an oppression remedy or be considered unjust or inequitable within the meaning of s. 324(1)(b) of the Act is patently unreasonable.

[56] The normal practice of both respondent companies was to send to shareholders audited financial statements in the spring. In September 2008 the company's auditors indicated an intention to resign. In that same month a shareholder resolution was passed instructing the audit committee to find new auditors. On this hearing, evidence was presented that without consulting any other directors Mr. Stanfield and another director, Mr. Campbell, decided not to conduct the search for new auditors immediately. In June 2009, the company sent out letters seeking audit proposals from accounting firms. New auditors were appointed on September 15, 2009.

[57] The petitioners direct the Court's attention to some additional evidence:

- (1) In May 2009 the shareholders learned that there was no auditor;
- (2) In the same month the affidavit of Lanny Howell was served on the company;
- (3) In June 2009 this matter was originally set for hearing in August 2009;
- (4) This hearing was actually commenced on October 26, 2009 and was scheduled to conclude on October 30, 2009; and
- (5) During that initial hearing period the audited financial statements were expected to be received at the end of October or early November, 2009.

[58] The petitioners submitted that the timing of the hiring of the auditors and the timing of their expected report was influenced by the schedule of this Court's hearing. I was unpersuaded by this submission and also by the suggestion that the delay in receiving the 2008 audited financial statements was intended to conceal some form of financial chicanery. I saw no evidentiary basis for this suggestion.

[59] Nevertheless, I granted two adjournments sought by the petitioners so that they would have an opportunity to receive the audited financial statements, have them reviewed by their accountants, and present evidence and submissions to the Court concerning the contents of those statements.

[60] That evidence was presented and those submissions made on December 11, 2009. No financial impropriety was found in the audited financial statements. The respondents, including the respondent Ross Stanfield, have not been implicated in any form of inappropriate behaviour in the 2008 audited financial statements. I find as a fact that there is no basis for oppression of the petitioners or unjust and inequitable conduct toward them on the basis of the delay in providing the 2008 audited financial statements nor in the content of those statements.

C. Failure or Refusal to Respond to Shareholders

1. Petitioners' Reasonable Expectations

[61] The petitioners claim to have a reasonable expectation that, despite the fact that they could not elect the Board of Directors, they would have access to members of the Board of Directors, particularly the Chairman, Ross Stanfield, to answer any questions that they might have and to satisfy themselves that matters were on track with the affairs of the companies.

[62] Particularly in light of the fact the petitioners were non-voting shareholders, and therefore did not have the opportunity to put their questions or concerns to the Directors at any annual general meeting of the companies, they claim that their expectation of access to the Directors was entirely reasonable, and indeed more so than would normally be the case.

[63] The petitioners expected that the Chairperson of the Board of Directors would respond to reasonable and legitimate inquiries from shareholders regarding their shares in the corporation within a reasonable time.

2. Discussion

[64] This aspect of the petition relates to the manner in which Mr. Stanfield responded to the petitioners' approaches to him, primarily after they had organized themselves as a group. I found the formulations of their "reasonable expectations" to be artificial and without substance. A brief review of the facts is all that is required to deal with this complaint.

[65] In July 2005, the lead petitioner, Lester Henry Stahlke, wrote a letter to Mr. Stanfield requesting information and did not receive a reply. Between November 2007 and February 2008 six letters were sent by the group of 12 non-voting shareholders, the present petitioners, seeking information about various matters and requesting a meeting with Mr. Stanfield.

[66] Counsel for the respondent Stanfield made two responses to this complaint:

- (1) While Mr. Stanfield has always been willing to meet with shareholders, as acknowledged by the petitioners themselves in their November 12, 2007 correspondence, Mr. Stanfield had received information that the petitioners' intention was to somehow attempt to usurp control of Bul River and Gallowai and to remove him from management. Given this information, and the overall tone of the November 12, 2007 correspondence, Mr. Stanfield was not prepared to meet with the petitioners on their unilateral terms.
- (2) On April 12, 2008, the petitioners sent Mr. Stanfield a further letter, this time identifying six areas of concern. Mr. Stanfield responded on May 14, 2008, with a letter addressed to all shareholders, and specifically addressed each of the six areas of concern identified by the petitioners. In doing so, Mr. Stanfield noted that he did not think it was appropriate to provide information to some but not all shareholders.

[67] In my respectful view, failing to respond to the letter from the petitioners could not have amounted to oppressive conduct even in the absence of any explanation. Both these responses are reasonable ones in the circumstances. There is no substance to this complaint.

D. Failure to Bring the Mine into Production

[68] During the cross-examination of Mr. Stanfield, petitioners' counsel described the failure to put the mine into production as "the key to the whole case".

(1) Petitioners' Reasonable Expectations

[69] The petitioners say that at the time they purchased their shares in the corporate respondents they had the expectation that:

(1) the mine would be put into operation and production within a reasonable period of time; and

(2) they would get a return on their investment within a reasonable period of time.

[70] These expectations were drawn from direct evidence or by drawing reasonable inferences from the following circumstantial evidence.

[71] From the periods of December 12, 1996 to May 14, 2008, the respondent Mr. Stanfield sent shareholder newsletters and letters to the shareholders of the corporate respondents in his position as President and CEO of Gallowai and of the Stanfield Mining Group of which the corporate respondents are members.

[72] In these shareholder newsletters and letters are numerous representations made by Mr. Stanfield regarding the status of the mine.

[73] Mr. Stanfield intended these representations to be relied upon by the shareholders.

[74] In particular, the petitioners say they relied upon statements made by Mr. Stanfield in the 1996 Shareholder Christmas newsletter including:

Active mining is now proceeding at Gallowai Bul River.

[75] One of the petitioners, Russel Renneberg, asserts that in 1996 Mr. Stanfield said that the mine would be in production within 18-24 months. Other representatives of the corporate respondents, including Dr. John Borger, also made representations to some or all of the petitioners; thus causing some or all of the petitioners to have the expectation that the mine would be put into operation and production within a reasonable time and that the investors should expect a return on their investments within a short period of time.

[76] The petitioners also assert they relied upon another quote from Mr. Stanfield in the 1999 Shareholder Christmas newsletter:

But what of our Ore Grades? - I am always asked. We have them - Oh Boy, do we ever!"

[77] In the December 14, 2000 Shareholder Christmas Newsletter, Mr. Stanfield wrote:

... Platinum and Palladium pay for all the envisaged Mining and Milling Costs!! i.e. Gold, Silver and Copper are pure Profit!!! Now you know why we are so happy this Christmas.

[78] The petitioners also relied upon the fact that in June of 2000 Mr. Stanfield wrote to the shareholders stating:

We will be applying for a Production Permit soon.

[79] In the Shareholder Christmas Newsletter dated December 29, 2004, Mr. Stanfield wrote that a production permit had been applied for. In a letter dated August 9, 2005, Mr. Stanfield wrote:

On Friday August 5th, 2005, late in the afternoon, we received our Permit to bring the Gallowai Bul River Mine into production.

What a Momentous Day.

...

We now move to the next steps - property acquisition, final plant design, construction and pouring.

...

[80] In a Report to Shareholders dated May 14, 2008, Mr. Stanfield wrote:

Yes we intend to go into production at Gallowai-Bul River; but give me 2 ½ months to run this zone down first. If it proves to be successful, we would have conditions very different to deal with. We could dispense with setting up a Pincer Creek type of extractor and ship ore directly to the smelter which would save many millions of dollars. Further we would be in production with a much higher grade of ore. We anticipate knowing our results within 2 ½ months at which time all shareholders will be informed as to what direction we will proceed for production at the Gallowai-Bul River Mine.

[81] These public announcements and representations made by Mr. Stanfield to the petitioners led the petitioners to expect that the mine was going to be put into production soon, or at a minimum, within a reasonable period of time.

2. Respondents' Position

[82] The respondents' position is that the petition alleges that there is a "viable and valuable resource in the form of gold or platinum group metals" on the Gallowai Bul River properties. Each of the petitioners who testified swore that they believe that there is a valuable mineral deposit owned by the companies.

[83] Mr. Stanfield testified that he and his management team continue to locate better ore although they have not yet reached a point where they can say they have definitely defined the ore body. Mr. Stanfield testified that he continues the process to fully define the ore bodies and that the work conducted to date is placing the companies closer to active production.

[84] The petitioners claim, at paragraphs 2(d) and 46 of the Amended Petition, that they held an expectation that the mine would be brought into active commercial production "within a reasonable period of time". The respondents submit that, while the hope has always been, and continues to be that the mine will be brought into commercial production, and to this end, exploration and development work continues to take place at the mine, the petitioners' claims as to their production expectations cannot be sustained.

- [85] Having regards to the reasonableness of these alleged expectations, first, there was no indication in any of the subscription agreements, extension agreements or Offering Memorandum for either Bul River or Gallowai as to when the mine would be brought into production.
- [86] In fact, while the petitioners and Mr. Stanfield hoped, and in the case of Mr. Stanfield, continues to hope that the mine will be brought into commercial production, the Offering Memorandum for Bul River and Gallowai expressly disclosed the risk that Bul River and Gallowai might never bring the mine into production, for a number of reasons. Each of the petitioners who swore affidavits in support of their expectations admitted, on cross-examination, that they were aware of this risk when they chose to make their original investments in Bul River and Gallowai: Morrison XXE 59/60 and Stahlke XXE 25/2-14; 53/27-54/1-4; 61/18-23.
- [87] Mr. Stahlke expressly acknowledges that he understood the investment he was making in Gallowai to be of a "speculative" nature, and explained that "no not for profit organization could consider investing in an exploratory precious metal mine" because there was no guarantee that there would be returns: Stahlke affidavit, paragraph 8 and Stahlke XXD 8/15-27; 9/1-7.
- [88] In fact, in a letter sent to Mr. Stanfield on July 12, 2005, Mr. Stahlke confirmed he stood to lose all of his investment, and was prepared to take that risk:

I have shared with John [Borger] that I accept all the risk I have taken in making these investments without the information provided by publicly traded corporations. In fact, I have said that if I were to lose my investment entirely, I would be honoured to be in the company of people like John Borger and Del Louis, whose integrity is beyond approach [sic] and an example for others to follow.

Stahlke affidavit, Ex. "DD", p. 185

- [89] Mr. Morrison also admitted that he understood his investment in the companies to be "speculative" in nature, and that there was no guarantee that the mine would be brought into production: Morrison XXE 121, 122
- [90] Second, the petitioners also acknowledge that none of the annual reports that were delivered to them contained specific timelines as to when the mine would be put into production: Morrison XXE, 102 and Stahlke XXE 32/18-21; 60/2-7
- [91] Third, Mr. Stanfield categorically denies having made any promises or representations with respect to production timelines: Stanfield affidavit, paragraph 23.

- [92] In cross-examination, Mr. Morrison's evidence is that, when he discussed making an investment in Bul River in 1997 with then-director Harry Lutzer, he was told that production would be forthcoming in a reasonable amount of time. While he claims he understood this to mean two years, Mr. Morrison was unable to say that Mr. Lutzer, or anyone else from Bul River or Gallowai, actually provided any specific timelines in relation to bringing the mine into operation: Morrison affidavit, paragraphs 29 and 32 and Morrison XXE 64-67, 135.
- [93] The respondents submit that Mr. Morrison's evidence with respect to production timelines allegedly provided in 1997, cannot form the basis for any reasonable expectations, even if such evidence is accepted. To the extent that Mr. Morrison believed, when he purchased his original shares in July 1997, that the mine would be in production within two years, he understood, in December 14, 1999 and in 2003, that this projection had not materialized. Still, Mr. Morrison proceeded to purchase additional shares, and signed an extension agreement.
- [94] Mr. Morrison's continuing purchase of shares and extension of existing agreements at times when he knew that the production projections made had not materialized, makes it clear he understood that such projections, even if made, were only projections, and were not to be accepted as guarantees.
- [95] Mr. Renneberg is the only one of the petitioners who maintains that Mr. Stanfield made specific projections with respect to production timelines prior to his decision to invest in the companies. More specifically, Mr. Renneberg claims that, during a visit to the mine in October 1996, Mr. Stanfield told him and other shareholders that he expected the mine to be in production within 18 to 24 months: Renneberg affidavit, paragraph 25(a).
- [96] As indicated above, Mr. Stanfield denies having made any such representations: Stanfield affidavit, paragraph 23.
- [97] To the extent that Mr. Renneberg maintains Mr. Stanfield advised him and other shareholders, in 1998, that he expected the mine to be in production within 18 to 24 months, Mr. Renneberg also admits that:
- (1) he understood such statement to be Mr. Stanfield's personal experience (Renneberg XXE 12/4-12);
 - (2) he understood that such statement was not a guarantee that the mine would be absolutely and unconditionally in production with 18 to 24 months (Renneberg XXE 12/18-25); and
 - (3) he had an opportunity to review the Offering Memorandum for Gallowai before he visited the mine, and was already aware of the risks that it disclosed as he attended Mr. Stanfield's presentation (Renneberg XXE 12/18-25).

- [98] Further, Mr. Renneberg continued to purchase additional non-voting shares in Gallowai on two separate occasions in 1999 and in May 2007, after he knew that the projections Mr. Stanfield allegedly made during his visit to the mine in 1996 had not materialized: Renneberg XxE 16/4-17; 16/18-24; 17/25.
- [99] Mr. Stahlke admits he did not meet with Mr. Stanfield prior to making his original purchase in Gallowai, and cannot recall Mr. Stanfield making any specific projections as to production timelines: Stahlke XxE 19/26 to 20/2; 48/23-49/6.
- [100] Mr. Stahlke deposes to meeting with John Borger on July 7, 1989, and being told that the mine "would generate revenues the next year". Fourteen years later, Mr. Stahlke purchased his first set of shares in Gallowai. Although Mr. Borger's alleged representation as to production timelines had not even come close to materializing, Mr. Stahlke proceeded to invest \$106,000 in Gallowai, which as noted above, he described as a "speculative investment": Stahlke affidavit, paragraphs 6, 9 and 13 and Stahlke XxE 5/19-21; 23/12-21.
- [101] Although Mr. Stahlke deposes in his affidavit that, in the years 1995, 1996 and 1997, he understood that the mine would go into production "in two to three years", he proceed to renew his subscription agreement in 2000, a time when clearly these alleged production timelines, and those he claims were initially provided by Mr. Borger, had not materialized: Stahlke affidavit, paragraph 37 and Stahlke XxE 64/9-20; 65/1-8; 78/1-9.
- [102] In cross-examination, Mr. Stahlke acknowledged that these "two to three year" production projections, to the extent they were made, were not intended to be accepted as guarantees:

Q So in those discussions to the extent that there was any discussion as to when the mine would go into production, you understood there was no guarantee?

A Oh, clearly, yes.

Stahlke XxE 23/7-11

And:

Q Now you told me about some discussions you had with I guess primarily Mr. Borger but others in relation to production timelines and you said you couldn't pinpoint exactly words or days but the implication, your understanding, was the gist of the communication was that the mine would go into production and you say it was suggested to you in two to three years. Now to the extent that these discussions took place, there was no implication that these projected timelines would be a guarantee, right?

A Correct.

Q And I take it it's fair to say that you hoped that production would happen within that timeline but it wasn't a guarantee?

Mr. Josephson: two questions there, ask them one at a time

A I hoped it would come into production on the basis of what I was being told but I knew that it was not a guarantee.

[Emphasis added.]

Stahlke XxE 53/1-21

[103] In fact, Mr. Stahlke himself admitted that, when he extended his subscription agreement on November 6, 2000, he was prepared to wait until he was "old and grey" for a return on his investment.

Q So at the time you were prepared to wait the amount of time that was required for that investment to generate a return?

A Until I was old and grey if necessary.

Stahlke XxE 64/5-8

[104] The respondents submit:

... that the decision of management, and in particular the respondent Stanfield, as to when to commence production is a matter of business judgment meriting deference from this Honourable Court. It is submitted that the Petitioners have failed to adduce evidence that the business judgment, to date, to defer production is the result of any negligent or improper intention act by Stanfield, as alleged in paragraph 46 of the Amended Petition.

3. Discussion

[105] I agree with the petitioners' counsel that this issue is "the key to the whole case" and I am also in complete agreement with the respondents that when to begin production at the mine is a matter of business judgment on which this Court should defer to company management.

[106] On the evidence before me, I am satisfied that, if some or all of the petitioners had an expectation that the mine was going to be brought into production "soon" or "within a reasonable period of time", that expectation was not a reasonable one. The petitioners all realized, or should have realized, that their investments in the corporate respondents were highly speculative. They all believed there was an "ore body" which the corporate respondents intended to mine. The larger the ore body is, or is believed to be, the more expensive and time-consuming the process of bringing it into production will necessarily be. Mr. Stanfield's extremely conservative position on financing, known to all of the petitioners, meant that he would not permit the corporate respondents to finance exploration or development work by taking loans, either from banks or other potential lenders. This simple fact meant that progress toward production depended upon successful fundraising from investors.

- [107] Without a favourable climate for securing substantial further investments from current and potential future shareholders, the Gallowai Bul River Mine will never be brought into production, regardless of the extent or quality of the available mineral reserves.
- [108] As to the expectation that the petitioners "would get a return on their investment within a reasonable period of time", this is a classic formulation that does not give rise to an oppression remedy. All investors hope to get a return on their investments; none are entitled to bring a successful oppression law suit if their hopes are disappointed.

CONCLUSION

- [109] As discussed earlier in these Reasons, I am satisfied, on the evidence before the Court, that the respondents have engaged in no oppressive conduct as alleged by the petitioners. Furthermore, the petitioners have established no basis for the Court to grant relief under s. 324(1)(b) because the respondents' conduct has been just and equitable. Mr. Stanfield, and the officers and directors of the Gallowai Metal Mining Corporation and the Bul River Mineral Corporation obviously believe in the viability of the mine they are attempting to develop. Over \$100 million has been spent developing the mine; there are over 13 miles of underground tunnels and appropriate subsurface infrastructure. These are not the actions of "con men" or fraudsters.
- [110] Having said that, I welcome the submissions made by Mr. Stanfield's counsel. He assured the Court that Mr. Stanfield intended to reconstitute the two Boards of Directors; have more formal and regularly scheduled Board meetings; and provide reports of Board activities to the shareholders. I would also encourage increased sharing of objective information concerning the ore body and progress reports on the steps necessary to realize the dreams of both Mr. Stanfield and his investors - bringing the mine into production.
- [111] The petition is dismissed with costs to the respondents on Scale C.

"P. LEASK, J."

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