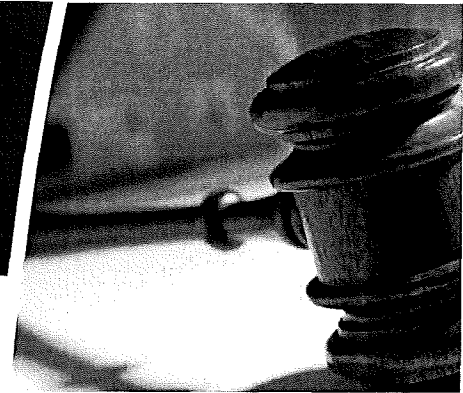


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9:00 a.m. - 4:00 p.m. EDT/EST

LOCATION

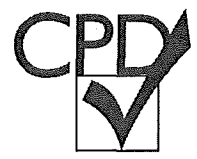
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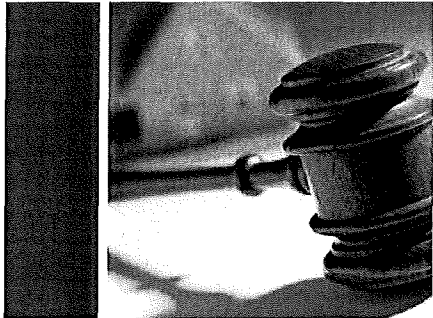
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Fraser Milner Casgrain LLP

- 8:30 **Registration and Continental Breakfast**
- 9:00 **Welcome and Introduction from the Chairs**
Gary S. Joseph, MacDonald & Partners LLP
George Karahotzitis, Thomson, Rogers
- 9:05 **Understanding Trust Issues**
Daniel J. Dochylo, Borden Ladner Gervais LLP
Archie Rabinowitz, Fraser Milner Casgrain LLP
Timothy G. Youdan, Davies Ward Phillips & Vineberg LLP
- Attacking a trust
 - sham trusts and a review of the UK case law
 - efforts to avoid spouse as creditor – the *Stone* case
 - repair and/or rectification of trusts
 - Trust concepts in family law
 - remedial, *inter vivos* and testamentary trusts
 - impact of trusts on calculating an equalization
 - trusts as an adjunct to domestic contracts
 - interests of persons other than the client
 - Estate freezes – fact or fiction in family law
 - the need for consideration in establishing valid and enforceable trusts
 - tax considerations and consequences
 - dealing with the Canada Revenue Agency
- 9:50 **Corporate Matters – My Spouse/My Partner**
Georgina Carson, MacDonald & Partners LLP
Benjamin Zarnett, Goodmans LLP
Harold Niman, Niman Zemans Gelgoot LLP
- The multi shareholder private corporation
 - Challenges in determining value for family law purposes
 - determining appropriate disposition costs and minority discounts
 - Effecting a corporate clean break with a shareholder/partner spouse
 - Spousal rollover remedies
 - Obtaining disclosure from reluctant, non-party shareholders including:
 - shareholder agreements, financial statements, working papers, Minutes of the Board of Directors, internal valuations and historical offers to purchase or sell
- 10:30 **Refreshment Break**
- 10:45 **The New Pension Regime – One + Year Later**
John Melvin Norton, J.M. Norton Consulting Inc.
 On January 1, 2012, pension-related amendments to the *Ontario Family Law Act* and related changes to the *Pension*

Benefits Act and regulations came into force. Family law practitioners continue to struggle with how these changes affect their practice. John Melvin Norton will provide a comprehensive review of:

- Changes to the way pensions are valued
- The pros and cons of the legislation and its application
- Changes to settlement options
- What every family law practitioner needs to watch out for

11:30 **Restraining Orders under the *Family Law Act* vs. Injunctions**

Patrick D. Schmidt, Thomson, Rogers

- Is there a difference?
- What is the threshold that must be met to obtain a restraining order?
- Is an undertaking as to damages necessary?
- Clarity in the scope of any order obtained
 - for compliance and for enforcement

12:15 **Luncheon & Keynote Address**

The Hon. Justice George Czutrin
 Ontario Superior Court of Justice

1:15 **Income Tax Issues and Concerns**

Brian Cohen, Fraser Milner Casgrain LLP

- The validity of gifts and net family property freezes
- Structuring tax driven settlements
 - avoiding tax pitfalls
 - the implications in using trusts for settlements
 - 21 year concerns
 - maintaining the rollover
- The difference between divorce and separation under the *Income Tax Act*
 - does it matter?

2:00 **Limitation Periods and Trust Claims**

Bryan R.G. Smith, Bastedo Stewart Smith LLP

- Constructive trust claims
- Request for ownership interest in land
- An “action to recover land” under section 4 of the *Real Property Limitations Act* – what the court said in *McConnell v. Huxtable*
- Alternative claim for monetary compensation
- Understanding the limitation periods

2:45 **Refreshment Break**

Agenda [Cont'd]

3:00 Ethical Considerations for Family Law Practitioners

William M. Trudell

William Trudell Professional Corporation

- Review of specific rules of professional conduct and the commentaries
- Civility in practice
- Effective and necessary communication
- Managing expectations
- Special issues for family law practitioners
- The Law Society of Upper Canada discipline process
 - self-regulation
 - how complaints start
 - the duty to respond
- Avoiding problems
 - mentoring
- Review of recent decisions

4:00 Conference Concludes



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Oppression and Disclosure in Closely-Held Family Corporations

Benjamin Zarnett
Jonathan Edge¹

Prepared for Recent Developments and Complex Issues in Property and Equalization
June 5, 2013

¹ Benjamin Zarnett is a partner in the Litigation Department of Goodmans LLP. Jonathan Edge is a student-at-law with the firm.

I. OPPRESSION REMEDY IN FAMILY CORPORATIONS

1. Entitlement

The oppression remedy has been described as “the broadest, most comprehensive and most open-ended shareholder remedy in the common law world.”² Unlike remedies that protect the rights of the corporation itself, the oppression remedy rectifies harm to the legal and equitable interests of a corporation’s stakeholders caused by oppressive acts of the directors.³ The remedy is available to a wide range of persons, including legal or beneficial shareholders (including minority shareholders), creditors, directors and officers. Some form of the remedy has been adopted federally and in most of the provinces of Canada.⁴

The wording of the provincial and federal statutes which provide for an oppression remedy express the entitlement to it in similar terms. The *CBCA*⁵ provides in section 241 as follows:

Application to court re oppression

241. (1) A complainant may apply to a court for an order under this section.

Grounds

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

² Stanley M. Beck, *Minority Shareholders’ Rights in the 1980s* (Toronto: Law Society of Upper Canada, 1982) at 311-312.

³ *Re BCE Inc.*, 2008 SCC 69 [*BCE*] at para. 45.

⁴ *Canada Business Corporations Act*, R.S. 1985 c. C-44, as amended [*CBCA*] at s.241; *Business Corporations Act*, R.S.O. 1990, c. B.16 [*OBCA*] at s.248; *Business Corporations Act*, S.B.C. 2002, c. 57 at s.227; *Business Corporations Act*, R.S.A. 2000, c. B-9 at s.242; *Corporations Act*, C.C.S.M. c. C255 at s.234; *Business Corporations Act*, S.N.B. 1981, c. B-9.1 at s.166; *Corporations Act*, R.S.N.L. 1990, c. C-36 at s.371; *Companies Act*, R.S.N.S. 1989, c. 81 Third Schedule at s.5(2); *Business Corporations Act*, R.S.S. 1978, c. B-10 at s.234.

⁵ *CBCA*, *supra* note 4.

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of. (Emphasis added).

“Complainant” is defined in section 238 of the *CBCA* as a current or former registered or beneficial security holder, a director or officer of the corporation or any of its affiliates, or “any other person who, in the discretion of a court, is a proper person to make an application under this Part.”⁶

In *BCE*, the Supreme Court of Canada authoritatively dealt with the oppression remedy. The Court set out the two-step process to determining oppression remedy entitlement:

[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in s. 241(2) of the *CBCA*.⁷

Importantly the Court in *BCE* characterized the oppression remedy as an equitable one, giving the Court jurisdiction to enforce not just what is legal but what is fair. It noted that judges considering claims for oppression should look at business realities, not merely narrow legalities.

⁶ *CBCA*, *supra* note 4 at s.238.

⁷ *BCE*, *supra* note 3 at para. 56.

And it noted that the oppression remedy is fact specific – thus conduct oppressive in one situation may not be in another, as reasonable expectations must be judged in context and having regard to the relationships in play.⁸

BCE holds that an oppression claimant must establish the reasonable expectation contended for, and that it was violated by conduct falling within the terms “oppression”, unfair prejudice” or “unfair disregard.”⁹

To prove reasonable expectations, evidence is required. The subjective expectation of the claimant may be relevant but it is not sufficient. The expectation is required to be reasonable. In most cases the reasonableness of the expectation is inferred from the circumstances and in light of the violation alleged. Where the impugned conduct is unlawful, or wrongful even if not unlawful, the reasonableness of the expectation that that conduct would not occur is more easily derived.

In *BCE*, the Court pointed to seven factors relevant to determining reasonable expectations – (i) general commercial practice; (ii) the nature of the corporation; (iii) the relationship between the parties; (iv) past practice; (v) steps the claimant could have taken to protect himself or herself; (vi) representations and agreements; and (vii) the fair resolution of conflicting interests between corporate stakeholders.¹⁰

Although all factors could have relevance to family businesses, the third factor would seem to have special relevance. In respect of it, the Court said:

⁸ *Ibid* at para. 59.

⁹ *Ibid* at para. 60.

¹⁰ *Ibid* at paras. 71-72.

“Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships based on ties of family or friendship may be governed by different standards than relationships between arm’s length shareholders in a widely held corporation”¹¹

2. *The Court’s Remedial Powers*

The oppression remedy provides the court with very broad judicial discretion to fashion relief in response to the specific facts of each case. One judge has observed that it allows the court to use its “ingenuity to effect the remedy most suitable to the situation.”¹² Under the *CBCA*, the power of the court to grant relief is provided in subsection 241(3) in extremely broad terms. It reads:

Powers of court

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation’s affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

¹¹ *Ibid* at para. 75.

¹² 820099 *Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at para. 124.

- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of a corporation under section 243;
- (l) an order liquidating and dissolving the corporation;
- (m) an order directing an investigation under Part XIX to be made; and
- (n) an order requiring the trial of any issue. (Emphasis added).¹³

As the emphasized portions show, compelled sales or buy-outs, which are frequently sought by one party or the other when a family business relationship has ended, are specifically contemplated in the remedy.

3. Oppression Remedy Cases Dealing With Family Corporations

As has been aptly noted, although some of the major cases involving the oppression remedy have been public company cases, discord within small, closely-held corporations has “provided much of the fuel for this remedy.”¹⁴ Given the oppression remedy’s focus on reasonable expectations and the protection of them even when strict corporate legalities have been observed, the remedy often comes into play in family corporations, where personal relationships and the expectations they have engendered may have been more important in the set-up and operation of the

¹³ *CBCA*, *supra* note 4 at s.241(3).

¹⁴ Sheila Block, *Corporate Matrimonial Law – An Unofficial History of the Oppression Remedy* (Torys LLP, 2000).

corporation than precise legalities, and where upon a breakdown of such relationships, those expectations may be defeated if the precise legalities were allowed to prevail. Due to the parallel between some of the considerations in play in a family corporation when relationships have broken down, and the considerations which arise in the resolution of other aspects of those family members' affairs, the oppression remedy has with some justification been described as "corporate matrimonial law".¹⁵

In her article, *The Oppression Remedy: When Family Law and Corporate Law Intersect*, the Honourable Justice Lynne C. Leitch observes:

In the context of an acrimonious matrimonial dispute, a minority shareholder is particularly vulnerable to unfair treatment by majority shareholders. An oppression remedy can provide appropriate relief and, in my view, better relief than is available under family legislation.¹⁶

Justice Leitch further observes that oppression remedy principles, which require the consideration of family dynamics in determining liability and fashioning a remedy, make the oppression remedy an ideal tool for resolving cases involving marital breakdown, as it is able to address problems in family businesses which are not contemplated under family law legislation. As she notes, sometimes "the best recourse, indeed perhaps the only recourse, to remedy conduct resulting from marital conflict between spouses with interests in a family business is an oppression remedy."¹⁷

A sampling of some of Ontario cases in which the oppression remedy has been invoked in family corporations are described below.

¹⁵ *Ibid* at 5-7.

¹⁶ 29 C.F.L.Q. 287.

¹⁷ *Ibid* at 9.

In *Ferguson v. Imax Systems Corp.*¹⁸ a husband's and wife's marriage had broken down, but they continued to own shares in a private corporation. During negotiations over a separation agreement, the husband attempted to persuade the wife to sell him her shares. The wife opted to remain a shareholder. After the separation, the husband took various unfriendly steps relying on his "legal" position in the corporation. He had the wife terminated from her employment with the corporation. Although the corporation was in a position to declare dividends, he convinced the other directors not to do so in the hope that this would prompt the wife to sell her shares. Finally, he proposed to have the corporation convert the wife's shares from participating non-redeemable shares to redeemable shares with a limited dividend. The Court of Appeal, after holding that a court can consider, in determining oppression, the relationship between the parties to the dispute as well as the good faith or otherwise of the intentions behind a corporate transaction, found that the transactions at issue had no corporate purpose and were instead aimed at resolving, in the husband's favour, the issue of the wife's shareholdings. The Court of Appeal made an order remedying the oppression and prohibiting the proposed reorganization of shares.

Though not involving spouses, *Nanef v. Con-Crete Holdings Ltd.*¹⁹ is a seminal oppression case dealing with the remedy in the context of a private family corporation. In *Nanef*, a father had started a concrete producing business which grew steadily over many years. Though most of the growth occurred prior to their involvement, the father's two sons eventually became actively involved in the family business. An estate freeze provided the sons with all of the common shares, while the father obtained redeemable voting preferred shares. One son then entered into a relationship with a woman of whom his parents disapproved. After a major family argument

¹⁸ 43 O.R. (2d) 128 (Ont. C.A.); leave to appeal refused (1983), 2 O.A.C. 158 (S.C.C.).

¹⁹ [1995] O.J. No. 1377 (Ont. C.A.) [*Nanef*].

over this relationship, the son was removed as an officer, excluded from management of the corporation and virtually cut off from any corporation related income. The son's claim of oppression was accepted. The trial judge ordered a public sale of the company. The Court of Appeal, while agreeing that oppression had occurred, overturned the remedy and replaced it with an order that the company buy out the son's shares at fair value. In doing so, the Court of Appeal noted that just as the entitlement to a remedy flows from a defeating of reasonable expectations, the remedy to be granted must remedy the oppression and no more. Since the opportunity to obtain full control of the company during his father's lifetime through a public sale was not a reasonable expectation of the "oppressed" son, he was not entitled to that remedy. Rather, his reasonable expectation, in the context of the family relationship, envisaged the business remaining in the family; thus the more circumscribed remedy which was granted.

*Maloney v. Maloney*²⁰ applied the oppression remedy in the context of the breakdown of a common law relationship. The Defendant had told the Plaintiff that both she and their daughter were equal owners with him in a family-run pet store where the Plaintiff worked; however, the Defendant actually retained full registered ownership of all of the shares in the company. The Court held that the Plaintiff was entitled to one half of the business and through the oppression remedy ordered the Defendant to transfer one half of his shares to the Plaintiff. The Court went on to consider the dynamics of the family relationship and the practical realities of a jointly owned business and crafted a detailed order outlining the role of each party in the ongoing operation of the business.

²⁰ (1993), 109 D.L.R. (4th) 161 (Ont. Gen. Div.).

In *Godinek v. Godinek*,²¹ the husband owned two-thirds of a corporation, the other third being owned by his wife. During the marriage the husband controlled the business and made all operational decisions; indeed he had provided his wife with her interest gratuitously, and she had received significant income from the business. Upon the breakdown of the marriage, the wife applied for a share buyout under the oppression remedy. She alleged that her husband was operating the corporation in a manner that was unfair, prejudicial and oppressive; for example, he did not provide even the minimum statutory information which shareholders are entitled to, or call annual meetings. The Court found that any infractions on the part of the husband were largely technical, arising from his informal management of the corporation, and that the wife had been treated fairly both before and after the marital breakdown. However, the Court found the failure to disclose statutorily required information and hold statutorily required annual meetings to be oppression. As the husband's conduct was not a direct attack on the wife's interest as a minority shareholder, the Court refused the wife's request that the husband buy her interest in the corporation and instead ordered only that the corporation comply with the provisions of the *OBCA* as to disclosure and meetings, and that the husband be restricted from taking any action that would diminish the value of the wife's holdings in the corporation.

In *Belman v. Belman*,²² the husband and wife were equal shareholders in a business in which they had both been actively involved. After a period of separation, the wife brought an application for oppression. She claimed that during their separation, the husband had terminated business relations with her after hearing of the wife's alleged resumption of a prior personal relationship. She claimed that she lost confidence in her husband as a business partner and

²¹ (1992), 40 R.F.L. (3d) 78.

²² [1995] O.J. No. 3155 (Ont. Gen. Div.).

sought an order winding up the corporation or compelling the husband to sell his shares to her. The Court held that the husband's repudiation of their business association was a violation of reasonable expectations formed upon the parties entering into their business relationship. The Court ordered the husband to transfer his shares to his wife for their fair value, holding that it would not be "just and equitable" to wind up the corporation.

In *Baxter v. Baxter*,²³ the husband commenced a divorce action and leave was granted by the court to join with it an action for oppression, as the property and business affairs of the parties were inextricably entwined. The husband sought relief as a minority shareholder requiring that he be appointed the sole director of the corporation in which he and his wife were shareholders, and restricting the wife from participating in the operation of the corporation. The wife had challenged the husband's ability to bind the corporation, denied the husband access to all of the corporate records, and prevented the husband from renewing a lease essential to the business he operated and from which he maintained his livelihood. The Court found the conduct of the wife to be oppressive and as the relations between the parties were so strained, determined that only one of the parties could remain in the corporation. The Court ordered the wife to purchase the shares of the husband at fair value.

In *Proulx v. 2006550 Ontario Inc.*,²⁴ the husband was the majority shareholder of a corporation; his wife and another couple owned minority shares. The wife had never been involved in the company's operations; however, she had served as a director of the corporation and had been paid a salary and bonuses prior to the separation in order to split the family income. After separation, the corporation ceased payments to the wife. The husband argued that his wife's

²³ [2000] O.J. No. 1172 (Ont. S.C.J.).

²⁴ [2006] W.D.F.L. 513 (Ont. S.C.J.).

expectation of a proportionate share of the corporate profits was unreasonable as a non-contributing shareholder. The Court found the termination of payments to the wife to be oppressive conduct on the part of the husband and ordered the husband to purchase the wife's shares for fair value. This remedy, according to the Court, was in line with the wife's reasonable expectations that her minority shareholding interest be purchased by the majority shareholder spouse upon marriage breakdown.

II. DISCLOSURE OF CORPORATE RECORDS FOR THE PURPOSE OF FAMILY LITIGATION

1. Access to Corporate Records

Where a party to family law litigation needs or requests access to financial records of a corporation, family law and corporate law concepts are both in play. When a spouse requests access to the financial records of a private corporation in which the other spouse owns shares for the purpose of calculating net family property for equalization purposes, the records may from a family law perspective clearly be relevant. But under corporate law access to any corporate records is typically limited to certain stakeholders in the corporation, and some of these, such as shareholders, are often restricted in what records they may access. Moreover, even where there are rights of access to corporate records, corporate stakeholders may be precluded from disclosing information to external parties by confidentiality agreements or confidentiality requirements imposed by law.

Under the *CBCA*, access to corporate records is very different for directors and officers on the one hand, and for shareholders on the other. While directors can essentially have access to any corporate record, shareholders' access is far more limited. Shareholder access is governed by section 21, which reads:

Access to corporate records

21. (1) Subject to subsection (1.1), shareholders and creditors of a corporation, their personal representatives and the Director may examine the records described in subsection 20(1) during the usual business hours of the corporation, and may take extracts from the records, free of charge, and, if the corporation is a distributing corporation, any other person may do so on payment of a reasonable fee. (Emphasis added).²⁵

The records to which shareholders have access are listed in section 20, which reads:

Corporate records

20. (1) A corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, records containing

- (a) the articles and the by-laws, and all amendments thereto, and a copy of any unanimous shareholder agreement;
- (b) minutes of meetings and resolutions of shareholders;
- (c) copies of all notices required by section 106 or 113; and
- (d) a securities register that complies with section 50. (Emphasis added).²⁶

Additionally, section 155 of the *CBCA* entitles shareholders to annual financial statements of the corporation or its subsidiaries.²⁷

Shareholders, *qua* shareholders, do not have statutory rights of access (beyond annual financial statements) to many of the types of records a valuator usually requires – detailed financial

²⁵ *CBCA*, *supra* note 4 at s.21(1).

²⁶ *Ibid* at s.20(1).

²⁷ *Ibid* at s.155(1).

breakdowns, contracts, projections or forecasts, budgets, internal or prior valuations, offers, business plans, etc.

2. Disclosure of Corporate Records to Parties In Litigation

Parties are under a duty to disclose “Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action...”²⁸ As such, any corporate records within the power or control of a party to litigation that are relevant to the matters at issue must be disclosed. For a party who is a shareholder, but not a director, this obligation may not extend to documents beyond those to which the corporate statute provides access.

Where the opposing party is not only a shareholder but is also a director, certain additional considerations may apply. The director, *qua* director, has broad rights of access to corporate records, but he or she may have signed a confidentiality agreement with the corporation restricting any disclosure. Even aside from such an agreement, a director may be under a duty imposed by law restricting disclosure. Under section 122 of the *CBCA* directors and officers of a corporation have a duty to act in the best interests of the corporation.²⁹ In *Peoples Department Store Inc. v. Wise*, the Supreme Court of Canada characterized the duty of a director as a fiduciary duty or a duty of loyalty.³⁰ These duties may require that a director or officer refrain from disclosing confidential corporate information to third parties, including opposing parties, where to do so does not further, and may indeed harm, the corporation’s interests. Moreover the law distinguishes between documents acquired in a personal capacity and those acquired through

²⁸ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Rules*] at s.30.02(1).

²⁹ *CBCA*, *supra* note 4 at s.122(1)(a).

³⁰ [2004] 3 S.C.R. 461 at para. 32.

other means.³¹ Corporate records that a party could arguably obtain through his or her role as a director of a corporation may not be under that party's power or control for the purposes of discovery in a case against him or her in a personal capacity.

When these production obligations are insufficient to secure disclosure from a party of records of a corporate third party, resort may be had to provisions for third party disclosure. *Rule 30.10* reads:

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

- (a) the document is relevant to a material issue in the action; and
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. (Emphasis added).³²

The party seeking production bears the onus of establishing that a particular document sought from a third party is relevant and that unfairness would result should the party fail to obtain production of the document. The factors to be considered in determining whether a court should exercise its discretion to order production from a third party were set out by the Court of Appeal in *Ontario (Attorney General) v. Ballard Estate*³³ as follows:

[15] In deciding whether to order production in the circumstances of this case, the factors to be considered by the motion judge should include:

- the importance of the documents in the litigation;

³¹ *Himel v. Greenberg*, [2011] ONSC 2325 [*Himel*] at para. 19.

³² *Rules*, *supra* note 28 at s.30.10(1).

³³ (1995), 26 O.R. (3d) 39 (Ont. C.A.) [*Ballard*] at para. 15.

- whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the appellant;
- whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
- the position of the non-parties with respect to production;
- the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
- the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

Thus relevance alone is insufficient to justify production. The court must be satisfied that production is required to prevent unfairness, based upon an analysis of the factors in *Ballard*.

A recent case applying these considerations in a family law context is *Himel*.³⁴ In that case, the wife brought a motion in the midst of matrimonial litigation seeking an order that her husband to provide financial disclosure to her valuation experts for the purposes of determining net family property, including information of a corporation to determine the value of his holdings in that corporation. In the alternative, she sought disclosure from the corporation itself. The wife and her valuation experts had signed a confidentiality agreement and the husband had voluntarily provided certain of the company information that he had in his possession. This included a prior valuation report of the corporation's shares prepared by an accounting firm. The husband had

³⁴ *Himel*, *supra* note 31.

requested certain additional information from the corporation that was sought by his wife, but this request was denied by the corporation.

Spies J. addressed the issue of whether the husband or the corporation itself should have to produce the documents requested by the wife. In doing so, she considered to both sections 30.02 and 30.10 of the *Rules*, as well as their counterparts in the *Family Law Rules*,³⁵ sections 19(1) and 19(11). She held that the phrasing of section 19(1) created a duty on family law litigants to “make a formal request for documents from a non-party with the expectation that the request, if reasonably made, will be granted.”³⁶ The husband was under a duty to produce all documents available to him as a shareholder under the relevant provisions of the corporate statute (and the Shareholders’ Agreement for the corporation to which he was a party). She held, however that the husband did not have to produce documents available to him as a director as he owed the corporation a duty of loyalty requiring confidentiality and could not obtain company documents for use in his personal capacity as a party to personal litigation. However, under section 30.10 of the *Rules*, section 19(11) of the *Family Rules* and the factors from *Ballard*, Spies J. ordered the production of the requested documents by the corporation itself. She considered the documents central to the material issue in the case, the net family property of the husband, and held that unfairness would result were they not produced.

In *Bailey v. Bailey*,³⁷ the wife brought a motion for disclosure against three non-party corporations in which her husband held an interest, so as to provide additional information to the wife’s valuation expert. The non-party corporations did not dispute the relevance of the

³⁵ O. Reg. 389/12 [*Family Rules*].

³⁶ *Himel*, *supra* note 31 at para. 12.

³⁷ 2012 ONSC 2486.

documents requested, but refused production due to privacy concerns. As a minority shareholder, the husband did not have control of the non-party corporations as required for production of documents under the *Federal Child Support Guidelines*.³⁸ Citing *Himel*, Mulligan J. relied on section 19(11) of the *Family Rules* and the factors in *Ballard*. After consideration of issues pertaining to legal privilege, he ordered production of the requested documents to the wife on the condition that she sign a confidentiality agreement.

In *Marcoccia v. Marcoccia*,³⁹ a wife sought disclosure from her husband of records of a corporation from which he had derived a significant portion of his income. However, by the time the wife sought the order for disclosure, the husband had sold his interest. He asserted he no longer had access to such information and that a request to the corporation had been denied. The Court of Appeal relied on section 19(11) of the *Family Rules* and upheld a order for production of the relevant documents by the corporation. In doing so, it noted:

[9] ...The judge must be satisfied by the party seeking access to the documents that it would be unfair to the party to go on with the case without the document. That judges have previously found the documents to be relevant does not necessarily determine that issue, especially where, as here, the non-party was not a party to the proceedings that led to the making of an earlier disclosure order against a party.⁴⁰

Similarly, in *Boisvert v. Boisvert*,⁴¹ a wife sought disclosure from a closely-held third party company of documents relevant to the determination of her husband's net family property at the time of separation. The husband had held an interest at the time of separation but had become

³⁸ SOR/97-17 at 21(1)(f) and (2).

³⁹ 2009 ONCA 162.

⁴⁰ *Ibid* at para. 9.

⁴¹ [2006] W.D.F.L. 3415 (Ont. S.C.J.).

estranged from his partners and could no longer access the requested documentation. When the company refused voluntary disclosure the Court, relying on the *Rules* and *Family Law Rules*, ordered production from the company directly.

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