

NOVA SCOTIA COURT OF APPEAL

Citation: Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.,
2010 NSCA 17

Date: 201002xx
Docket: CA 311399
Registry: Halifax

Between: Minas Basin Holdings Limited

Appellant

v.

Paul Bryant Enterprises Ltd.
and the Registrar of Joint Stock Companies

Respondent

Judge: The Honourable Justice Oland

Appeal Heard: January 25, 2010

Subject: Sections 10(1), 10(2) and 10(3) of the Third Schedule to the
Companies Act, RSNS 1989, c. 81; Solicitor-Client Costs

Summary: A minority shareholder in a parent company asked to examine the financial statements of that company's subsidiary companies. The parent company applied for a court order barring that right of examination. The application judge determined that the parent company had not met the onus of establishing that disclosure would cause detriment to the parent company, and awarded solicitor-client costs against it. The parent company appeals.

Issues: Whether the application judge applied the correct legal test for determining whether examination of the subsidiary financial records would be detrimental to the parent company or its subsidiaries;

Whether he erred by ultimately concluding that the parent company or its subsidiaries would not suffer detriment in the particular circumstances;

Whether he applied the correct legal test for determining whether to award solicitor-client costs.

Result: Appeal against the order refusing the parent company’s application to bar disclosure of its subsidiary financial records dismissed. Appeal against the award of solicitor-client costs allowed, and that award set aside and replaced.

Section 10(3) of the Third Schedule called upon the application judge to assess the evidence placed before him and to determine whether the parent company had met the onus of establishing detriment which would warrant the granting of relief against disclosure of the subsidiary financial statements. He did not err by failing to apply the correct legal test, by failing to delineate the meaning of the term “detriment”, by narrowing his view excessively, or by requiring “undue detriment”.

In determining on the evidence before him that the parent company had not met the onus, the application judge did not make any palpable and overriding error which would attract appellate intervention.

The application judge awarded solicitor-client costs because the parent company had sought such an award in its application documents. Such costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. They may be awarded where there is anything unusual in the behaviour of a party that would justify such costs and/or in certain other circumstances. Here each of the minority shareholder and the parent company was statutorily entitled to act as they did, by requesting disclosure and by applying to court to bar disclosure of subsidiary financial records respectively. By failing to turn his mind to the correct legal test, the application judge erred in law.

This information sheet does not form part of the court’s judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 17 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.,
2010 NSCA 17

Date: 20100226

Docket: CA 311399

Registry: Halifax

Between: Minas Basin Holdings Limited

Appellant

v.

Paul Bryant Enterprises Ltd.
and the Registrar of Joint Stock Companies

Respondent

Judges: Oland, Fichaud, Beveridge, JJ.A.

Appeal Heard: January 25, 2010, in Halifax, Nova Scotia

Held: Appeal from the application judge's dismissal of the application against disclosure is dismissed; appeal against the costs award is allowed, per reasons for judgment of Oland, J.A.; Fichaud and Beveridge, JJ.A. concurring.

Counsel: Sheree L. Conlon and Scott Campbell, for the appellant
George MacDonald, Q.C. and Jane O'Neill, for the respondent

Reasons for judgment:

[1] Paul Bryant Enterprises Ltd. (“Bryant Enterprises”) owns shares in Minas Basin Holdings Limited (“Minas Basin”), a company incorporated pursuant to the laws of Nova Scotia. Minas Basin has numerous subsidiaries. As a shareholder in a Nova Scotia company is entitled to do, Bryant Enterprises sought to examine the financial statements of the subsidiaries of the company in which it is a shareholder. A Nova Scotia company which receives such a request is entitled to apply to the Supreme Court of Nova Scotia for an order barring this right. Minas Basin did so.

[2] In a decision reported as 2009 NSSC 55, Justice Charles E. Haliburton dismissed its application. He also ordered Minas Basin to pay Bryant Enterprises’ costs on a solicitor-client basis. Minas Basin appeals that dismissal and award of costs.

[3] For the reasons which follow, I would dismiss the appeal from the application judge’s dismissal of the application against disclosure, but would allow the appeal against the costs award.

Background

[4] Neither party disputed the following findings of fact set out in the application judge’s decision:

24 On the basis of the evidence presented I find the following to be the relevant facts:

- Minas Basin Holdings Limited is a closely held corporation with investment interests in many other corporations. It may have in excess of 30 subsidiaries wholly owned or controlled by the holding company.
- In recent years the number of individual shareholders has diminished significantly and now consists of only the majority controlling share holder, Scotia Investment Limited, and 22 minority share holders with less than 1%.
- For the past several years Scotia Investments has been attempting to acquire all the shares of the company. The value of that offer has been increased to \$200 a share most recently paid to some of the shareholders and offered to the

remaining 22. The latter, however, believe the value of their shares to be greater than that represented by the \$200 offer.

- The dissident shareholders have taken various steps and initiatives to persuade Scotia that the offer is inadequate. They have promoted the publication of articles in allnovascotia.com, which focus on the dispute over the valuation of their shares. This action may be seen as an embarrassment to the majority owner.

...

- The dissidents have complained about the paucity of dividends given a value of \$200 per share, the annual \$1 per year dividend yields .05%. The uncontradicted evidence of Bryant was that Scotia somehow received a dividend on its investment which he calculated to be 13%.

- Many but not all of the financial statements of subsidiaries are available at the head office of the company and none of them have been made available to the minority shareholders for examination as mandated by the Statute.

- Each of the subsidiaries file income tax returns with the Canada Revenue Agency containing the statement of income, the statement of retained earnings, the statement of changes of financial position and the balance sheet.

[5] The evidence before the application judge largely consisted of the affidavits of Archie W. MacPherson, the Vice President of Finance and Assistant Secretary to Minas Basin sworn on July 25, 2008 and October 24, 2008, and the affidavit of Paul Bryant, President of Bryant Enterprises sworn October 30, 2008, together with examination of these affiants.

[6] According to that material, Scotia Investments Limited (“Scotia”) owns 99.3% of all shares in Minas Basin. The remaining 0.7% of the shares are held by 22 individuals and corporations. Bryant Enterprises is one of those minority shareholders, owning 300 shares or 0.018% of the shares of Minas Basin. Since Minas Basin is a private company, there is no public market for its shares. The value of the shares of the minority shareholders has been a long-standing and contentious issue. Since at least 2003, articles have appeared in allnovascotia.com concerning the annual shareholder meetings of Minas Basin and the dispute regarding the valuation of those shares.

[7] At its annual general meetings, Minas Basin provides its shareholders with audited consolidated financial statements. In “Access to Corporate Information” in

Jacob Ziegel, *Studies in Canadian Company Law* (Toronto: Butterworths, 1967) vol. 1, 476 at pp. 498-499, Edwin C. Harris explained the rationale behind and the content of such statements:

Today most of the larger corporate enterprises in Canada, as elsewhere, are composed of a “family” or group of corporations with interconnecting shareholdings sufficient to give the “parent” or “holding” company control over the entire enterprise. Sometimes the arrangement of several corporations in such a “family can be most intricate. Accountants have long recognized that the economic entity in which the shareholders of the holding company have invested is broader than the legal entity of the holding company and that in order to provide these shareholders with meaningful financial information on their investment it is necessary to furnish them with something more than the financial statements of the holding company alone: they should receive information reflecting the position and operations of the economic enterprise as a whole. This is done by preparing *consolidated* financial statements, which are in essence financial statements for the economic entity, combining the figures of all the component corporations and ignoring their legal separateness. . . .

[8] In the consolidated financial statements for 2006 for Minas Basin, its auditors included a qualification which read:

In our opinion, because of the departures from generally accepted accounting principals described above relative to the accounting for certain investment transactions, specifically the gain and increases in carrying value of investments recognized on the Extendicare Inc. Reorganization, ... these consolidated financial statements do not present fairly the financial position of the Company as at December 31, 2006... in accordance with Canadian generally accepted accounting principles. [emphasis added]

A similar qualification was found in its consolidated financial statements for 2007.

[9] Bryant Enterprises sought disclosure of the financial records of Minas Basin’s subsidiaries pursuant to s. 10(1) and (2) of the Third Schedule to the *Companies Act*, RSNS 1989, c. 81. These provisions read:

10(1) A company shall keep at its registered office a copy of the financial statements of each of its subsidiary bodies corporate and each body corporate the accounts of which are consolidated in the financial statements of the company.

(2) Shareholders of a company and their agents and legal representatives may upon request therefor examine the statements referred to in subsection (1) of this Section during the usual business hours of the company, and may make extracts therefrom, free of charge. [emphasis added]

[10] Minas Basin sought relief against disclosure of subsidiary financial information under s. 10(3) of the Third Schedule which reads:

(3) A company may, within fifteen days of a request to examine under subsection (2) of this Section, apply to the court for an order barring the right of any person to so examine, and the court may, if it is satisfied that such examination would be detrimental to the company or a subsidiary body corporate, bar such right and make any further order it thinks fit. [emphasis added]

[11] After considering the evidence and hearing submissions, the application judge concluded:

[35] The onus is upon the company to establish that permitting the shareholder to examine the financial statements in question would cause detriment to the company. That onus is established both by the wording of the Statute and by the cases which have been reviewed. That onus has not been met. This is not a case where the respondent is a competitor of the company, nor is the respondent an agency or trade group seeking to have the information for the purpose of publication. There is no suggestion that Mr. Bryant has applied to see additional financial information on the company for any illegal or improper purpose. Evaluating the shares and assessing the management of a joint stock company is a legitimate shareholder exercise.

[36] The Respondent, Paul Bryant, will not be barred from viewing the financial statements of the subsidiaries. The applicant has not established the risk of detriment to the company which would result from that examination.
[emphasis added]

[12] He ordered Minas Basin to disclose to Paul Bryant the following information for each of its subsidiary bodies corporate and each body corporate whose accounts are consolidated in its financial statements: the statement of income, statement of retained earnings, statement of changes to financial position and balance sheet. His order stipulated that Mr. Bryant was not to share that information with anyone other than his accountant(s) and/or solicitor(s). Finally, the application judge

ordered Minas Basin to pay Bryant Enterprises its costs on a solicitor and client basis.

Issues and Standards of Review

[13] In its Notice of Appeal, Minas Basin set out the issues as:

(a) Did the application judge apply the correct legal test for determining whether “examination would be detrimental to the company or a subsidiary body corporate”?

(b) Did the application judge err by ultimately concluding that Minas Basin (or its subsidiaries) would not suffer detriment in the instant circumstances?

(c) Did the application judge apply the correct legal test for determining whether to award solicitor and client costs?

[14] There is little doubt that a judge must identify and properly apply the appropriate legal test. Failure to do so is reviewable on a standard of correctness (see generally, *Housen v. Nikolaisen*, [2002] 2 S.C.R. 23). However, conclusions that result from the application of a legal standard to facts, absent an extricable error of law are to be reviewed on a standard of palpable and overriding error. (*McPhee v. Gwynne-Timothy*, 2005 NSCA 80 ¶ 33)

[15] The second issue raises a question of mixed fact and law. In *Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc.*, 2009 NSCA 114 (CanLII), this court stated at ¶ 4:

The standard of review for findings of fact and inferences drawn from facts is palpable and overriding error: *Housen v. Nikolaisen*, [2002] S.C.J. No. 31 at ¶ 10 and 25. Appellate courts are to pay great deference to a trial judge’s findings of fact or inferences drawn from those facts: *Miller v. Royal Bank*, 2008 NSCA 118 (CanLII), 2008 NSCA 118 at ¶ 6. Questions of mixed fact and law where factual determinations are not readily extricable from questions of law are also reviewed on a standard of palpable and overriding error: *Housen, supra* at ¶ 36.

[16] A palpable and overriding error will have been made if the application judge was “clearly wrong” and such error impacted the ultimate result. As was explained in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at ¶ 55-66:

Palpable and overriding error” is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority ... and the minority ... agreed that inferences of fact at trial may be set aside on appeal if they are “clearly wrong”. Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge’s findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

In my respectful view, the test is met as well where the trial judge’s findings of fact can properly be characterized as “unreasonable” or “unsupported by the evidence”. [emphasis added]

[17] The third issue relates to the application judge’s decision on costs. Such decisions are discretionary and not to be lightly set aside. In *Binder v. Royal Bank of Canada*, 2005 NSCA 94 (CanLII) this court explained when appellant intervention is warranted at ¶ 52:

Costs are in the discretion of the trial judge. This court will not interfere in a judge’s exercise of discretion unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice: *Conrad (Guardian Ad Litem of) v. Snair*, [1996] N.S.J. No. 164 at § 5; *D.C. v. Children’s Aid Society of Cape Breton (Victoria)*, [2004] N.S.J. 470 (NSCA) and *Fraser v. Westminster Canada Ltd.* 2005 NSCA 27 (CanLII), 2005 NSCA 27.

Analysis *Disclosure of Financial Records*

[18] The appellant argues the application judge erred in law in three ways: by adopting a narrow and strict view of the meaning of “detriment”; by requiring the applicant to establish “undue” detriment; and that the trial judge should have engaged in a balancing of the detriment to the company, financial and otherwise, against what the shareholder might benefit from the requested disclosure.

[19] I begin by recounting the purpose of allowing shareholders access to information. F. Iacobucci, M. Pilkington and J. Prichard explained in *Canadian Business Corporations – An Analysis of Recent Legislative Developments* (Toronto: Canada Law Book, 1977), Vol. 1 at pp. 178-179 as cited in *Shareholders Remedies in Canada*, looseleaf (Toronto: LexisNexis, 1989) at ¶ 12.1:

Information is important for at least two basic reasons. First, it allows the shareholders and the securities market as a whole to evaluate the relative strengths and weaknesses of the enterprise so that they can make informed decisions as to whether or not to invest or continue to invest in the company. Second, only with adequate information are the shareholders able to evaluate effectively the performance of the corporation's directors and officers and to exercise their rights to have the directors and officers accountable for their misdeeds. In a dispute between a dissenting shareholder and those in control, the accessibility of information becomes a key factor as management's ready access to records of the company and other inside information gives it a distinct advantage over the individual shareholder who may be unable to substantiate his suspicions of wrongdoing with documentary proof.

While that overview related to the entitlement of shareholders to examine certain corporate records under legislation such as the *Canada Business Corporations Act* R.S., 1985, c. C-44 rather than our *Companies Act*, the purpose is similarly applicable.

[20] It is also helpful to establish, at this point, what the shareholder is not seeking. He is not asking for information which is generally not available to a shareholder, such as accounting records, minutes of meetings and resolutions of the directors and any committee of the directors, or sensitive commercial information. See, for example, C.C. Nicholls, *Corporate Law* (Toronto: Emond Montgomery Publications Limited, 2005) at pp. 261-262 and D.H. Peterson, *Shareholders Remedies in Canada, supra* at ¶ 12.27. What this shareholder of a parent company is asking to examine are the financial statements of the parent's subsidiary companies.

[21] Companies incorporated pursuant to the *Companies Act*, such as Minas Basin, are required to keep a copy of the financial statements of their subsidiaries at their registered office (s. 10(1) of the Third Schedule to the *Companies Act*). Before each annual general meeting they are to place, among other things, the financial statements for the period that began and ended not more than six months before that meeting together with any report of the auditor (s. 121(1) of the *Companies Act*). The shareholders entitled to be present may inspect those documents (s. 121(2)). Those financial statements shall include those prescribed by regulation (s. 122(1)), and s. 5(1) of the Regulations provides that the financial statements prescribed for the purposes of s. 122(1) are an income statement, a

statement of retained earnings, a statement of changes in financial position, and a balance sheet prepared for and as at the end of the applicable period.

[22] Despite the extensive argument by the appellant that the application judge fell into an error of law, I am not convinced he did so. The question before the application judge was not the precise delineation of the meaning of the term “detriment”. Rather, s. 10(3) of the Third Schedule called upon him to assess the evidence placed before him and to determine whether Minas Basin had met the onus of establishing detriment which would warrant the granting of relief against disclosure of the subsidiary financial statements. I do not accept the suggestion that the application judge narrowed his view of “detriment” by his reference to competitors or trade groups seeking information for publication, and that the respondent did not seek the information for an illegal or improper purpose. From the record before the judge, these were some of the kinds of detriment that the appellant argued directly, and by inference, at the hearing.

[23] The application judge does not indicate, in deciding whether or not he was satisfied detriment would result, that he equated “detrimental” with “unduly detrimental”. Furthermore the application judge did not commit error in failing to engage in a balancing of detriment, real or potential, to the company as against the potential benefit to the shareholder. There is no basis in the language or purpose of s. 10(3) of the Third Schedule to support that the application judge is to engage in a balancing type test. The judge is simply to assess the evidence to determine if the requested disclosure would be detrimental to the company or a subsidiary. This the application judge plainly did, and found that the onus on the company had not been met. In my opinion, he committed no extricable error of law in doing so.

[24] Minas Basin does not dispute the application judge’s findings that many of the financial statements of its subsidiaries are available at its head office and that each subsidiary files income tax returns containing the financial statements described in s. 5(1) of the Regulations.

[25] Section 10(3) of the Third Schedule required the application judge to determine whether Minas Basin had established that disclosure of the subsidiary information to Bryant Enterprises would be “detrimental to the company or a subsidiary body corporate”. Minas Basin argues that in finding it did not, the

application judge made three palpable and overriding errors, any of which would attract appellate intervention:

1. He erred in concluding that there was no evidence Mr. Bryant would disclose any information he received;
2. He erred in concluding that allnovascotia.com had no interest in disclosing that financial information; and
3. He erred in failing to recognize that Mr. Bryant was seeking this subsidiary financial information for an improper purpose.

[26] I will address each in turn after setting out the passages in which the application judge made the first two conclusions. In his decision, the application judge stated:

[17] When cross examined on his affidavit, [Mr. Bryant] conceded that he may have discussed his concerns with others but testified that he was requesting the information as a result of his own concerns. He related that at the annual meeting he had asked a series of questions about a particular debt and about the dividends which provide a yield of 0.03% to him. In response to a question about who he intended to share this information with, if he obtained it, he expressed the thought that he might share it with his accountant and his lawyer but “can’t think of who else I might wish to share it with.

[18] Mr. MacPherson states, at the very beginning of this (*sic*) affidavit, that he will “not disclose” the details of the anticipated detriment. The bulk of his affidavit rather relates to conflict with and the behaviour of the minority shareholders. He has recited instances of their behaviour which he has found objectionable. “In their attempt to obtain a higher price for their shares” they advocated changes to the financial reporting policies, complained about the paucity of dividends in a prosperous company and have conducted themselves in a manner designed to embarrass or annoy the officers and directors.

[19] Mr. MacPherson's affidavit makes the assumption that the requested information in the hands of this shareholder would place it in the "public domain" where it could be used to advantage by competitors and impair the viability of these businesses, many of which operate in very competitive markets. That publicity concern is certainly understandable because matters which had transpired at the annual meetings over a period of years had been published in allnovascotia.com. David Bentley of allnovascotia.com is one of the

shareholders, his share being held by him as a trustee "for informational purposes only". It does not necessarily follow, however, that because this publication has shown an interest in reporting the ongoing fight among the shareholders it would have any interest in publishing financial details about the accounting policies of Minas Basin or its subsidiaries.

...

[24] On the basis of the evidence presented, I find the following to be the relevant facts:

...

- The dissident shareholders have taken various steps and initiatives to persuade Scotia that the offer is inadequate. They have promoted the publication of articles in allnovascotia.com, which focus on the dispute over the valuation of their shares. This action may be seen as an embarrassment to the majority owner. The management of the company has made the assumption that any information obtained by Bryant would be made public presumably through allnovascotia.com. There is no evidence before me to support that assumption. Quite the contrary, the articles submitted in evidence reflect only an interest in the shareholder dispute over valuation. [emphasis added]

[27] Minas Basin points out that under cross examination, Mr. Bryant had said he wanted to share the information with "other minority shareholders and others." It seizes upon the words "and others" to base its argument that Mr. Bryant would disseminate this information broadly. However, he was questioned as to who those "others" might be. Mr. Bryant could not say, other than his legal advisors and accountants. The application judge was clearly aware of this testimony and addressed it in ¶ 17 of his decision. I see no palpable and overriding error in his conclusion that nothing before him suggested Mr. Bryant intended to publicize the financial information he sought.

[28] For its submission that Mr. Bryant would make this information public through allnovascotia.com, Minas Basin relies upon the application judge's findings of fact in ¶ 24 of his decision which states that "the dissident shareholders . . . have promoted the publication of articles in allnovascotia.com, which focus on the dispute over the valuation of their shares." Minas Basin argues that "dissident

shareholders” includes Mr. Bryant, and thus the application judge found as a fact that he has promoted the reporting in allnovascotia.com.

[29] With respect, I cannot accept this argument. The application judge did not identify Mr. Bryant as one who had actively sought the involvement of allnovascotia.com. Indeed, the remainder of that paragraph which specifically refers to Mr. Bryant refutes Minas Basin’s argument. The application judge found that there was no evidence this person would publicize subsidiary financial information through that publication. Finally, the affidavit evidence of Mr. Bryant, which was not disturbed under cross-examination, is that he had never instructed Mr. Bentley of allnovascotia.com, nor any other member of the media, to publish any information relating to Minas Basin. In referring to “the dissident shareholders” in this passage of his decision, the application judge was simply summarizing in general terms the history of the valuation dispute between Minas Basin and the minority shareholders.

[30] I also observe that in his order, the application judge imposed a condition preventing Mr. Bryant from sharing that information with anyone other than his professional advisors. It is noteworthy that Mr. Bryant has not appealed against that confidentiality order, and it is not suggested that he has breached its terms.

[31] Having reviewed the articles from allnovascotia.com that were in evidence on the application, I can find no palpable and overriding error in the application judge’s assessment of the articles as reflecting only an interest in the shareholder dispute over valuation. I would add that nothing in Mr. MacPherson’s affidavits establish detriment to Minas Basin or its subsidiaries from the reporting to date by that publication.

[32] Finally, I turn to Minas Basin’s argument that the application judge failed to consider the improper purpose for which this shareholder was seeking the subsidiary financial information. Minas Basin says that Bryant Enterprises should be satisfied with the audited consolidated financial statements which take its subsidiaries into account, urges that this shareholder does not understand the reasoning behind its auditor’s qualifications to the 2006 and 2007 statements, and suggests that a close examination of those consolidated financial statements would indicate that those qualifications do not impact upon the valuation of the shares of the parent company. In his affidavit, Mr. MacPherson deposed that he believed

that the request for disclosure is not for purposes beneficial to Minas Basin or its subsidiary corporations.

[33] I am not persuaded that the application judge erred in rejecting Minas Basin's arguments in this regard. Quite simply, s. 10(2) of the Third Schedule to the *Companies Act* gives a shareholder the right, upon request, to examine and to make copies of the financial statements of each of the subsidiary bodies corporate of the company in which he owns shares, unless the company can obtain relief from the court. The shareholder is not obliged to give any reason whatsoever for his request. He does not need to first satisfy the parent company as to the legitimacy of his request, nor is he required to negotiate the terms under which he may see or copy those financial statements. Rather, as the application judge correctly identified, it is the company which bears the onus of persuading the court that permitting the requesting shareholder to do so would cause detriment to the company or to its subsidiaries.

[34] Here, the application judge considered Mr. MacPherson's affidavits. They made claims of detriment, including financial detriment arising from the need to edit and distill the financial statements of at least fourteen of Minas Basin's subsidiaries to remove strategic and organizational information provided only for the directors, officers and management of those companies. Mr. MacPherson stated that disclosure would create an unfair competitive advantage for their competitors. He also stated his belief that disclosure would have a detrimental impact on the marketing of goods and services, dealing with creditors and ongoing litigation matters (either actual or anticipated), and that Mr. Bryant's request was not made for legitimate purposes or in the interests of Minas Basin, but rather to create public embarrassment and other results with the objective of extracting a higher price for the minority shares.

[35] The application judge observed that the *Companies Act* mandated that each company have financial statements prepared for submission at its annual meeting, and Mr. MacPherson had conceded that the statements for its subsidiaries Mr. Bryant had requested exist although not all are held at the registered office of Minas Basin. After considering evidence deposed by affidavits and oral testimony of Mr. MacPherson and Mr. Bryant, the application judge determined that Minas Basin had not met the onus of establishing that permitting the shareholder to examine the financial statements of its subsidiaries would cause detriment such

that disclosure should be barred. He ordered disclosure, but required Mr. Bryant not to share the information with anyone other than his professional advisors.

[36] I am unable to detect any of the palpable and overriding errors, i.e. findings of fact which are clearly wrong or unsupported by the evidence and which impacted the final result, that Minas Basin submitted are apparent in the application judge's reasons. Where Minas Basin is statutorily obliged to have financial statements available for all its subsidiaries, the cost of editing those which include information inappropriate for viewing by a shareholder is not a detriment which could be determinative. Mr. MacPherson was in a delicate position in trying to disclose enough information to establish detriment without providing specifics which might be harmful to Minas Basin, but much of this affidavit evidence amounted to statements of belief of detriment without an evidentiary foundation for that belief. I agree with the application judge's characterization of these affidavits as largely relating to conflict with and the behaviour of the minority shareholders in general.

[37] Accordingly, I would dismiss the appeal against the application judge's order dismissing the application.

Costs Award

[38] The application judge's reasons with respect to his award of costs were brief:

[41] In advancing this application Minas Basin sought an order for costs on a solicitor/client basis. Having lost the application I deem it appropriate to grant costs to the Respondent on that basis. The parties may agree on costs or costs may be taxed in the customary way.

[39] Minas Basin made no submissions whatsoever regarding costs in its written submissions to or at the hearing before the application judge. Nor did the judge seek any costs submissions from either party.

[40] Costs on a solicitor-client basis are not the rule but the exception, and are awarded only in certain circumstances. In *Young v. Young*, [1993] 4 S.C.R. 3 (WL) at ¶ 66, McLachlin, J. wrote:

The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs; nor is the fact that part of the cost of the litigation may have been paid for by others. The Court of Appeal meticulously considered all the proceedings in the light of these principles to arrive at its conclusion that only partial solicitor-client costs were justified. [emphasis added]

[41] In *Brown v. Metropolitan Authority*, [1996] N.S.J. No. 146 (C.A.) at ¶ 94 - 98, this court emphasized that such awards are not routine:

Solicitor and client costs may only be awarded in “rare and exceptional circumstances, to highlight the court’s disapproval of the conduct of one of the parties in the litigation.” This is a high threshold to meet, and it does not contemplate an award of solicitor and client costs as a matter of routine.

[42] In *Winters v. Legal Services Society*, [1999] 3 S.C. R. 160 at ¶ 79, Binnie J. set out the general test and provided a review of some of the circumstances which justify solicitor-client costs:

The appellant seeks his costs in this Court and in the courts below on a solicitor client basis. It is well settled that solicitor client costs are unusual. They should not be awarded unless there is something in the behaviour of the losing party that takes the case outside the ordinary. See K. Roach, *Constitutional Remedies in Canada* (loose leaf), at para. 11.860. For example, solicitor client costs were awarded when this Court was of the opinion that the unsuccessful party should not have pursued the litigation or the unsuccessful party had been unreasonable in some other way. See *Palachik v. Kiss*, [1983] 1 S.C.R. 623. They have also been awarded when a respondent without financial resources who had not wished to pursue the case to this Court was successful in a case which was of considerable importance to a large group or class: *Roberge v. Bolduc*, [1991] 1 S.C.R. 374. An exception was also made where a respondent public interest group was successful. See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80, in which La Forest J. awarded solicitor-client costs “given the Society’s circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court”. [emphasis added]

[43] Other than indicating that Minas Basin had sought solicitor-client costs in the application documents it filed, the application judge gave no reasons for awarding costs on that basis. In particular, his decision does not mention the general test for the award of solicitor-client costs, namely reprehensible, scandalous or outrageous conduct. Nor does it include any analysis of the matter before him that would bring it within any of the examples in *Winters, supra*. Nor does he suggest there was anything unusual in the behaviour of Minas Basin that would justify such costs. Simply because a party had asked for them in its application documents is not a sufficient reason for awarding solicitor-client costs against that party. Were this the case, such costs would cease to be unusual or would be available even absent behaviour “outside the ordinary.”

[44] Bryant Enterprises argues that such costs are appropriate in this case because it was statutorily entitled to ask Minas Basin to see the financial records of its subsidiaries, and then it was obliged to retain counsel and respond when Minas Basin met its request with a court application seeking to bar disclosure and asking for solicitor-client costs. It also submits that solicitor-client costs are warranted because the matter is akin to oppression cases.

[45] Costs on a solicitor and client scale are indeed often awarded in oppression cases. See, for example, *Nanef v. Con-Crete Holdings Ltd.*, 11 B.L.R. (2d) 218 at 260 (Ont. Ct. J. (Gen. Div.)), varied but not as to costs in 23 B.L.R. (2d) 286, 23 O.R. (3d) 481 (C.A.). Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at pp. 393-394 summarized:

The rule of thumb in oppression cases appears to be that solicitor client costs are appropriate unless there is a compelling reason to order otherwise. To restrict the applicant to party and party costs merely compounds the oppression. At times, however, courts have awarded less than party and party costs to the successful party where circumstances were thought to merit it. ...

[46] However, this matter is not an oppression case, and there has been no finding of oppressive conduct or wrong-doing such as would attract solicitor-client costs. Rather, here both parties proceeded in accordance with their statutory rights. Bryant Enterprises sought disclosure of subsidiary financial information, and Minas Basin resisted that disclosure. Each was entitled to act as it did pursuant to s. 10(1), (2) and (3) of the Third Schedule of the *Companies Act*. In these circumstances, it cannot be said that Minas Basin’s application to court to

determine whether it could refuse to make that information available constitutes reprehensible, scandalous or outrageous conduct or behaviour outside the ordinary that would justify a costs award against the parent company on a solicitor-client basis. In ordering costs on that basis, and in failing to turn his mind to the correct legal test, the application judge applied wrong principles of law. Appellate intervention is warranted.

[47] The solicitor-client costs awarded on the application amounted to \$15,794.19, \$13,867 of which represented fees. I would set aside this award and, in its place, award Bryant Enterprises partial costs of \$7,500 plus disbursements as agreed or taxed.

Disposition

[48] I would dismiss the appeal against the decision and order of the application judge which refused Minas Basin's application to bar disclosure of its subsidiary financial records. I would allow the appeal against the award of solicitor-client costs, set aside that award, and order Bryant Enterprises to repay those costs and disbursements to Minas Basin. I would order Minas Basin to pay Bryant Enterprises costs of \$7,500 plus disbursements as agreed or taxed on the application, and costs of \$2,500 plus disbursements on the same basis on the appeal.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.