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When Will the Court Order a Trial of an Oppression Proceeding?

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WHEN WILL THE COURT ORDER A TRIAL OF AN OPPRESSION PROCEEDING?

I. Introduction

A shareholder seeking relief from conduct that is oppressive or unfairly prejudicial under s. 227 of the BC *Business Corporations Act*, S.B.C. 2000, c. 57 ("*BCBCA*") or s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*") must apply to the Supreme Court of BC by petition. However, in certain circumstances, the court will order a trial of the proceedings, either generally on a specific issue. This paper reviews and discusses the applicable test and the circumstances in which the court will make such an order.

The first part of this paper briefly summarizes the relevant provisions of the *BCBCA*, *CBCA* and the Supreme Court Civil Rules (the "Civil Rules"). The second part of this paper tracks two conflicting lines of authority and attempts to arrive at the current test for converting an oppression petition into a trial. The third part reviews the most important factors and practical considerations for counsel trying to determine whether an oppression case is suitable for summary determination or should be on the trial list.

II. The Statutory Framework and Applicable Provisions of the Civil Rules

A. Oppression Proceedings Must be Commenced by Petition under Rule 16-1

Section 227 of the *BCBCA* states that "[a] shareholder may apply to the court for an order under this section." Except to the extent that it is implied by use of the word "apply,"[1] the statute does not state what mode of procedure is to be used.

The *CBCA* does touch upon procedural matters. It provides in s. 241 that a complainant may apply; and in s. 248 that "where this Act states that a person may apply to a court, the application may be made in a summary manner by petition, originating notice of motion, or otherwise as the rules of the court provide ...".

Rule 1-2(4) of the Civil Rules provides that if an enactment authorizes an application to the court, the application must be by petition under Rule 16-1 if a final order is sought (or a requisition if by consent or where no notice is required), whether or not the enactment provides for the mode of application. Subrule (5) provides that this does not apply to an enactment of Canada if a particular mode of application is required.

Consistently with this, Rule 2-1(2)(b) of the Civil Rules provides that "a person must file a petition" where a "proceeding is brought in respect of an application that is authorized by an enactment to be made to the court."[2]

Thus, since the *BCBCA* and the CBCA both provide that a person may apply to court, and the *CBCA* does not require a particular mode of application, oppression proceedings under either statute must be commenced by petition under Rule 16-1.

B. The Procedures Applicable to Petition Proceedings and Available to the Court, Short of Converting the Matter to a Trial

Before considering when an oppression proceeding will be converted to an trial, it is useful to consider what procedures are available under the basic procedure provided for in the Civil Rules and how these basic procedures may be augmented, short of converting the proceeding to a trial.

Rule 16-1 and Rule 22-1(4) provide, as was formerly the case, that the basic procedure is that a petition proceeding is to be determined in chambers on affidavit material.

This basic procedure is highly advantageous where it is appropriate for the circumstances of the case in question. The requirement that the petitioner's evidence be served with the petition and the relatively short time limit provided for the respondent to prepare and serve its responding affidavits (even if reasonably extended in a more complicated case) means that the case is ready for determination in a very short time. The expeditious nature of this process is obviously a great advantage over the full trial process and, combined with the lack of the pre-trial discovery processes and full trial process, makes for a vastly less expensive process, which is also a major advantage.

This basic chambers procedure may be augmented by the court. Rule 22-1(4) provides that the court may order cross-examination on affidavits or the examination of a party or witness, either before the court or a reporter. It also provides for the giving of directions for the discovery of a document; the

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1 In other statutes different terminology is used. For example, s. 2(1) of the C*lass Proceedings Act* uses the terminology "may commence a proceeding."

2 In *Gittings v. Caneco Audio-Publishers Inc*., 26 B.C.L.R. (2d) 349 (C.A.), the Court of Appeal confirmed that, under the former rule, oppression remedy proceedings must be brought by petition. See also *Buckley v. The British Columbia Teachers' Federation*, 70 B.C.L.R. (2d) 210 (S.C.).

ordering of an inquiry, assessment or accounting; and the reception of other forms of evidence. These powers allow the court to tailor the proceedings to fit the requirements of the case, short of ordering a trial and bringing into play all of the usual pre-trial procedures. Once again there can be large savings of time and cost in employing such a graduated approach.

Rule 16-1(18) broadens still further the ability of the court to customize the procedure for resolution of petition proceedings. It provides (expressly without limiting the court's right to transfer the proceeding to the trial list) that the court may, whether or not on the application of a party, apply any other of the Civil Rules to a petition proceeding.

Thus, the courts, and counsel, have a flexible menu of procedural options for the determination of petition proceedings including oppression proceedings, without sending the matter to the trial list.

C. The Power to Send the Matter to the Trial List—Rule 22-1(7)(d)

Rule 22-1(7)(d) provides the court with the discretionary power to order that chambers proceedings be converted to a trial:

> (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
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> ...
>
> (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

This paper is occupied with the question of when that discretionary power will be exercised and an oppression proceeding sent to trial.

III. Case Law on the Applicable Test for Putting a Matter to the Trial List

A. The Early Cases on the Test to be Applied for Converting Chambers Proceedings into a Trial—Application of the Summary Judgment Test

In *Bank of British Columbia v. Pickering* (1983), 62 B.C.L.R. 136 (C.A.) ("*Pickering*"), a foreclosure proceeding, the Court stated:

> There has been some suggestion in some of the authorities to which we were referred that there is a distinction to be drawn between what must be found in order to act under Rule 18, the summary judgment rule, and that which must be found in order that the court may act under Rule 52(11). I think the distinction is somewhat illusory. To me, I think the matter is stated as clearly as it can be stated by Mr. Justice Seaton in the *Skalbania* case. There at page 202 he said:
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> > The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue? [Emphasis added.]

In *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.) ("*Douglas Lake*"), a case concerning a petition for the construction of a lease agreement, the majority of the Court stated that the test for sending a petition to the trial list was set out in *Pickering* but added the following comment:

> It can be seen that the question is not whether there is any dispute as to facts or law, but rather whether there is a dispute as to facts or law which raises a reasonable doubt, or which suggests there is a defence that deserves to be tried.

The majority then endorsed language from other decisions dealing with the test for summary judgment to the effect that the onus of establishing that there is no *bona fide* triable issue lies with the applicant and must be carried to the point of establishing it beyond a reasonable doubt; and that, in essence, the application should only be granted if the respondent would be bound to lose if the matter were referred to the trial list.

Lambert J.A., dissenting, agreed that case law cited by the majority properly set out the test to be applied. The Court split over the application of the test. The majority held that the Chamber's judge was correct to hold that respondents' assertions in the affidavit material that two oral agreements had been reached did not give rise to a triable issue because it was refuted by correspondence authored after the date of the alleged agreements. Lambert J.A. disagreed and wrote:

> ... if a chambers judge decides an issue of credibility, without hearing evidence and without any trial, on the basis of documents for which there might be an explanation, then, in my opinion, and with respect, the chambers judge is committing an error of law.

Pickering and *Douglas Lake* have been followed in many cases and continue to be followed. It can be argued that they stand for the following propositions:

1. The test to be applied on an application to convert a chambers proceeding into a trial is the same as for a summary judgment application: whether there is a bona fide (or in modern terminology "genuine") triable issue.
2. The onus is on the applicant to show that there is no genuine triable issue.
3. The applicant must satisfy the court of this beyond a reasonable doubt, in other words, that the respondent would be bound to lose any issue put forward as triable, if the matter went to trial.
4. It is open to the court to conclude that a sworn assertion does not give rise to a genuine triable issue on the basis of a contradictory documentary record.

B. The Controversy Over Whether this Test Applies to Oppression Petitions—Buckley

Neither *Pickering* nor *Douglas Lake* (nor, by definition, any of the summary judgment cases) were oppression remedy cases.

Buckley v. British Columbia Teachers' Federation (1992), 70 B.C.L.R. (2d) 210 (S.C.) ("*Buckley*") was the first case to consider whether the *Pickering* summary judgment test should apply to an oppression petition.

In *Buckley*, Mr. Justice Hood considered a motion to have oppression remedy proceedings converted into a trial pursuant to Rule 52(11)(d).[3] He began his analysis by noting that oppression remedy proceedings must be commenced by petition. His reading of the statutory language (which, as we have seen, authorizes a shareholder to "apply" to court) led him to the view that the statute provided that such proceedings should proceed in a summary way and to state that "the sections must contemplate that in resolving the cause in the summary way some disputed facts will have to be resolved."

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3 The petitioners, members of the B.C.T.F., brought their petition on the basis that they were in a position analogous to shareholders of a company. Mr. Justice Hood accepted that the proceedings before him were, or were analogous to, oppression proceedings under s. 224 of the *Company Act* (now s. 227 of the *BCBCA*).

Mr. Justice Hood then addressed the test from *Pickering* and the comparison of a motion pursuant to Rule 52(11)(d) to the test for summary judgment (at 213):

> It does not seem necessary that I decide how these provisions of the *Company Act* generally stand in relation to Rule 52(11)(d); but they do not appear to clash. It seems to me that generally a s. 224 application will not involve substantial issues being in dispute; and if a substantial issue is in dispute, or if for some other reason such as complexity of issues or fairness a trial of an issue, or even a full trial, is necessary, the judge hearing the motion can direct the trial of the issue (a procedure which I note has already been followed by the respondent) and in effect may turn the proceedings into a trial, if necessary. However, in my opinion, at least initially, the resolution of the members' complaints is to be by summary procedure, subject, as I say, to the directions of the judge hearing the application. *It is not simply a question of whether, on the relevant facts and applicable law, there is a bona fide triable issue, but whether as well that issue can be tried within the summary procedure framework* as were the issues before Maczko J. In any event the protection afforded by Rule 52(11)(d) is available from the hearing judge. I think it important to note as well that he or she will be in a better position to appreciate what really is at issue between the parties and how those issues should be resolved.
>
> Counsel for the respondent relies on the principles applicable to a Rule 52(11)(d) application without regard, it seems, to those which may be applicable to a s. 224 application. But those provisions are meant to meet the very situation which arises here and deal with it in a summary and less expensive way. *Indeed present-day 18A trials serve a similar function and on a similar evidentiary basis. While s. 224 proceedings may not be analogous to an 18A trial, in my view they are closer thereto than to a Rule 18 application; and in the end may have roughly the same effect. Further, as I have already noted, during the s. 224 proceedings if it appears that some other proceeding is necessary to obtain or clarify some evidence, or even a full trial, the hearing judge may order that which is necessary to be done.* [emphasis added]

The reference to using other procedures is no doubt a reference to the procedures authorised by what was then Rule 52(8) (now, Rule 22-1(4)), which we have set out above.

Hood J. highlighted the delays that would be occasioned by putting the matter on the trial list:

> While counsel for the respondent says that further delays will not prejudice the petitioners, I am concerned about further delays. A full trial would certainly cause much further delay. *The petitioners should be entitled to proceed in the summary way unless the respondent can clearly show that a full trial is necessary, although, as I say, the matter is up to the hearing judge.* [emphasis added]

It may be said that some of Hood J.'s statements are strictly *obiter* because of his conclusions that no *bona fide* triable issues had been demonstrated at that stage and that the hearing judge would be in a better position to judge how the matter should proceed, but they have been applied in subsequent cases. The case appears to set out the following propositions:

1. The test should not simply be whether there is a genuine triable issue, but whether that issue can be fairly determined using the procedures available for the hearing of petitions.
2. The parties are entitled to proceed in a summary way unless the party that wishes to have the matter put on the trial list can clearly demonstrate that a full trial is necessary.
3. The summary judgment test may not be appropriate for oppression petitions given the legislative direction that they be brought by application.

It is interesting to note that *Buckley* did proceed summarily and the Court was able to resolve a multi-million dollar oppression dispute without the necessity of a trial.

C. The Case Law after Buckley

Just months after the decision in *Buckley*, in *Furry Creek Timber Corp. v. Laad Ventures Ltd.* (1992), 75 B.C.L.R. (2d) 246 (S.C.) ("*Furry Creek*"), Madam Justice Newbury (then on the Supreme Court), briefly considered *Buckley* and alluded to the conflict between it and *Pickering* in a passing note. Newbury J. did not attempt to resolve the conflict in approach, finding that the case before her had, on its facts, to go to trial due to various disputed allegations and questions of credibility that required oral evidence and cross-examination. She also noted that the case before her included at least two other actions that should be heard at the same time as the oppression issue.

Buckley has been followed in a considerable number of Supreme Court decisions. For example, in *Gaylor v. Galiano Trading Co.* (1996), 65 A.C.W.S. (3d) 570, [1996] B.C.J. No. 2004 (S.C.) (cited to B.C.J.) ("*Gaylor*"), Mr. Justice Bauman (as he then was) accepted and followed *Buckley* without reference to *Pickering* or *Douglas Lake*.

In *Gaylor*, the respondent to an oppression remedy petition sought to have the petition remitted to the trial list under Rule 52(11)(d). Quoting at length from *Buckley*, Bauman J. accepted that "the petitioner should be entitled to proceed in a summary way unless the respondent could clearly show the hearing judge that a full trial was necessary" (at para. 14). The influence of *Buckley* is also evident in the following paragraph:

> 16 Delay to the petitioner is prejudicial and in that light he should not be denied his *prima facie* right to a disposition of the matters herein by way of summary proceedings. Difficulties with this approach may arise before the hearing judge, and he or she enjoys a number of alternatives by which to address the problem, other than by ordering a full trial of the proceedings.

In *Louis Juhasz v. K. Gary Sloane*, 2007 BCSC 1319 ("*Juhasz*"), the Court cited *Buckley* for the proposition that summary proceedings are the anticipated procedure for oppression remedy petitions.

In *Orr v. Primary Metals Inc.*, 2008 BCSC 73 ("*Orr*"), the Court cited only *Buckley* before finding that the petition respondents' application to have the matter set for a trial was premature because no disputed facts or issues of credibility had emerged.

In *Kinzie v. The Dells Holdings Ltd.*, 2010 BCSC 1360, the Court relied exclusively on the test from *Buckley* in declining to order a trial and in holding that the Court could determine the fair market value of the property at issue using summary proceedings if necessary.

In *Auton v. BC* (1999), 32 C.P.C. (4th) 315, Allan J. came to a similar conclusion to that reached by Hood J. in *Buckley*. In that case, a judicial review application for relief in the nature of mandamus, she determined that the underlying policy reasons for summarily disposing of issues involving mandamus rendered the application of the principles of *Douglas Lake* inapplicable to proceedings under the *Judicial Review Procedure Act*.

On the other hand, there is authority that the correct test in applications under the *BCBCA* or arguably analogous enactments, is that set out in *Douglas Lake*.

In *Dia-Kas v. Virani*, CA020820 (Court of Appeal judgment database, February 5, 1997), Newbury J.A. stated that the chambers judge erred in law by failing to apply the *Douglas Lake* test in an application to wind up a company on the just and equitable ground.

In *Dockside Brewing Co. Ltd. v. Strata Plan LMS 2837*, 2007 BCCA 183, the Court heard a petition brought under the provision of the *Strata Property Act* that provides for an application to court for an order in certain situations of conflict of interest involving a strata council member. The Chambers judge treated the matter as if it were a summary trial application under the former Rule 18A, determined that it was suitable for determination under that rule and granted relief sought in the petition. The Court of Appeal noted that there was no summary trial application before the chambers

judge and stated that the test for whether a petition will be heard or referred to the trial list is the same as the test for summary judgment: essentially whether there is a triable issue, citing *Douglas Lake*.

However, the majority of the Court accepted the respondents' argument that the Court should not allow the appeal on this ground, because, as a practical matter, if the petition had been referred to the trial list, the outcome would have been the same because the respondents would have brought an application for judgment under Rule 18A and the chambers judge had correctly determined that the case was suitable for disposition under that rule. Effectively then, having stated that the applicable test was the *Douglas Lake* test, the Court of Appeal allowed the case to be decided on the test for suitability for summary trial.

Recently, in *Chambers v. Hamersley Holdings Ltd.*, 2009 BCSC 558 ("*Chambers*"), the petitioners sought relief under several sections of the *BCBCA*, though not under s. 227. In considering whether it was appropriate to decide the issues in summary proceedings, Mr. Justice Sewell referred to *Buckley* but expressed the view that the proposition that a petition hearing is analogous to a summary trial is inconsistent with *Douglas Lake* (which is not referred to in *Buckley*) and noted that the summary trial rule has since been amended to permit an application for summary trial to be made in a matter that has been referred to the trial list. He noted that he would have proceeded to decide the issues before him if he had been able to decide them by reference to the documents alone, as was the case in *Douglas Lake,* but was unable to do so.

D. So What is the Applicable Test?

Clearly the matter is one of some controversy and conflicting authority.

We respectfully offer the view that the summary judgment test is not the correct test to apply to an oppression proceeding. In our view it should not be the case that an oppression petition will be referred to the trial list whenever there is a genuine triable issue.

The summary judgment test adopted in *Pickering* and *Douglas Lake*, does not take into account the availability of the specific procedures set out in Rule 22-1(4), or the more general power set out in Rule 16-1(18). The availability of these procedures must surely be taken into account before deciding whether to refer the matter to the trial list, as suggested by Mr. Justice Hood in *Buckley*. Otherwise full effect is not being given to augmenting procedures provided for in Rules 16 and 22. This consideration is strengthened by the fact that Rule 16-1(18) is a new rule which did not exist when *Pickering* or *Douglas Lake* was decided.

More specifically, as a practical matter, it seems unsatisfactory that, where an oppression proceeding comes on for hearing and the court is satisfied, despite the existence of triable issues, that the case would be suitable for determination under the test for summary trial (Rule 9-7), for the Court to be required by application of the *Douglas Lake* test, to refuse to decide the case but instead put it on the trial list, when it would then be possible to renew the application as a summary trial. That is surely elevating form over substance, creates unnecessary expense and delay and is inconsistent with Rule 16-1(18), which presumably authorises the Court, if necessary, to exercise the powers granted to it under the summary trial rule upon the hearing of a petition.

Even in cases under the former rules which state that the test is that set out in *Douglas Lake*, it seems to have been increasingly recognized that the mere existence of a *bona fide* triable issue was not, of itself, enough to warrant conversion to the trial list and that, if lesser measures will suffice, such as ordering cross-examination on affidavits and allowing some document disclosure, then it is open to the Court to decide against exercising its discretion to order conversion. (See *Boffo Developments v. Pinnacle* 2009, BCSC 1701 at para. 49, citing *Woodward's Ltd. v. Montreal Trust Co*., [1992] B.C.J. No. 1263, 69 B.C.L.R. (2d) 348 (S.C.) ("*Woodward's*") and *Canada Trust Co. v. Ringrose*, [2008] B.C.J. No. 1790, 2008 BCSC 1268.)

The summary judgment test was not applied by the Court of Appeal to the hearing of a petition in *British Columbia (Minister of Forests) v. Jules*, 2001 BCCA 647 ("*Jules*"). In that case, Newbury J.A. (with whom the other members of the Court agreed) stated, at para. 38:

> [38] On the other hand, I am not persuaded that the Chambers judge erred in concluding that the Minister's amended petition should be referred to the trial list. In reaching that conclusion, the Chambers judge was mindful of his duty in all cases to ensure the just and expeditious determination of legal questions, which would require that the petition be heard summarily if at all possible - i.e., that a trial is the only reasonable way in which justice can be done, not that it is the "best way," as Ms. Mandell interpreted the Chambers judge's reasoning. He found that the particular complexities of this case, which will necessitate the examination or oral histories and the difficult questions of credibility and reliability they involve, required a full trial. Apparently, the parties have not been able to agree on any "compromise" arrangement under which limited rights of discovery and cross-examination might be acceptable.

This approach mirrors very closely the approach of Hood J. in *Buckley*. It makes summary process the preferred process, which is not to be displaced unless a trial is the only reasonable way on which justice can be done. There is no mention of this test being satisfied wherever there is a "triable issue." The possibility of augmenting the procedures available for hearing a petition, is mentioned as a relevant consideration, albeit in the context of agreement. Presumably they could also be considered as an option for an order.

In the Supreme Court, Sigurdson J. had put the test as follows (2000 BCSC 1135):

> [16] A court exercises its discretion under Rule 52(11)(d) based on whether a particular dispute brought to the court by petition can be justly determined between the parties by way of a petition's summary process. The court's discretion must be exercised with regard to the particular circumstances of each individual case. Since a trial generally involves pleadings, examinations for discovery and cross-examination of witnesses before the trial judge, presumably it is more expensive than a summary proceeding.

An approach which asks whether justice can be done by proceeding summarily, taking into account all of the circumstances of the case and all of the procedural avenues available gives the Court a wider scope to give proper effect to the object of the Civil Rules as redefined in Rule 1-3 than does restricting the issue to the application of the test for summary judgment.

Whatever the test, it is clear that there are a number of factors and practical considerations that are particularly influential on the decision whether to proceed summarily or send the matter to trial. It is to those that we now turn.

IV. Important Factors and Practical Considerations

In *Haagsman v. British Columbia (Minister of Forest)* (1998), 64 B.C.L.R. (3d) 103 (S.C.) ("*Haagsman*"), Sigurdson J. stated that there are five factors that should be considered in determining whether summary proceedings should be remitted for trial:

1. the undesirability of multiple proceedings;
2. the desirability of avoiding unnecessary costs and delays;
3. whether the particular issues involved require an assessment of demeanour and credibility of witnesses;
4. the need for the court to have a full grasp of all of the evidence; and
5. whether it is in the interests of justice that there be pleadings and discovery in the usual way in order to resolve the dispute between the parties.

This list of factors has proved influential and been repeatedly referred to in the oppression remedy context (such as *In the Matter of Anthem Works Ltd.*, 2005 BCSC 766 ("*Anthem*"); *Louis Juhasz v. K. Gary Sloane*, 2007 BCSC 1319 ("*Juhasz*"); *Goodyear v. H.A.B.I.T. Research Ltd.*, 2008 BCSC 167 ("*Goodyear*")) and other petition proceedings.

We will briefly review each of these factors and a number of other considerations that emerge from the case law.

A. The Undesirability of Multiple Proceedings

If referring a petition proceeding to the trial list will enable it to be decided together with other matters (actions) arising out of the same facts, this is a factor that supports such an order. So, in *Furry Creek*, Newbury J. stated:

> ... there are also pending four other full-fledged actions, at least two of which should be heard at the same time as this matter.

See also, *Juhasz*, at para. 18 and *Goodyear* at paras. 33 to 35.

Presumably, if it were possible to persuade the Court that all of the outstanding matters could be heard summarily, this factor would not apply. This might require arranging for summary applications to be brought in all of the related matters simultaneously.

B. The Desirability of Avoiding Unnecessary Costs and Delays

These factors are obvious and have always been a consideration. (See, for example, in addition to *Haagsman*, the references to cost and delay in *Buckley*, *Gaylor* and, outside the oppression context, in *Jules*).

In *Orr*, the Court noted that under s. 227(4) it is a condition precedent to the making of an order that it be satisfied that the application was brought by the shareholder in a timely manner, and that this heightens the importance of such matters being dealt with without delay.

Given the redefined object of the Civil Rules as set out Rule 1-3, and the emphasis on proportionality, we should probably expect that increased prominence will be given to these factors, particularly in light of the amount involved, the importance of the issues and the complexity of the proceeding.

From the point of view of clients, it is hard to overstate the importance of these factors. Having an oppression proceeding put on the trial list may be the difference between the petitioner being financially able to pursue it and letting the matter go; or the difference between the proceeding being relevant in a fast-moving corporate story or reduced to a historical waste of time and money. (Consider, the necessity of speed in the *BCE* case, [2008] 3 S.C.R. 560. In the *Lions Gate* case, 2011 BCCA 228, judgment was delivered in a complex case involving transactions in the approximate amount of $100 million less than four months after the proceeding was commenced after extensive document production and cross-examinations.)

Limited resources or extreme urgency may be the most important factors in a particular case. They may define the practical reality.

C. Whether the Particular Issues Involved Require an Assessment of Demeanour and Credibility of Witnesses

This may well be the single most important factor.

If there is a disputed issue of fact, and the Court is satisfied that it cannot be fairly resolved by weighing the available evidence, particularly the documentary record, and that the Court needs to see

the witnesses and assess their credibility, an order that the matter be sent to trial will usually follow as night follows day.

This factor has been decisive or highly persuasive in many cases. (See, for instance, *Furry Creek*, *Goodyear* at paras. 28 to 36, and *Douglas Lake*, where it was the application of that factor that split the Court.)

One possible way of avoiding this is if the issue is relatively discrete and the Court can be satisfied that it would be practical to have cross-examination of some affiants in Court, as opposed to before a court reporter.

Another way of getting around the problem is if, as found by the majority in *Douglas Lake*, the issue is decisively addressed by reference to the documentation. See also the comments of Sewell J. in *Chambers* referred to above.

But generally, if there is a genuine credibility issue on an issue that needs to be decided, the case should go to trial.

The point that the credibility issue must be material to the determination of the critical issues in the case is an important one. It may be possible to decide the case without determining the credibility issue, in which case it is obviously not necessary to have a trial: *Whistler Service Park Ltd. v. Glacier Creek Development Corp.*, 2005 Carswell BC 2271, aff'd 2005 BCCA 472.

Put another way, as counsel, you may have to decide whether you wish to advance a theory that will require the Court to make credibility findings, in which case you know that the case will likely have to go to trial if not resolved, or restrict your case to matters that do not conjure up the necessity for credibility findings and maintain the ability to proceed summarily.

D. The Need for the Court to Have a Full Grasp of all of the Evidence

In our view this is a factor that, by itself, should rarely persuade counsel that it is impractical to proceed summarily, unless what is meant by it is really captured by the next factor. Upon the hearing of a petition the parties have the obligation to bring forward all the evidence that bears upon the point. Unless the evidence cannot be obtained using the summary procedures provided, it should be possible for the parties to provide the Court with a full grasp of all the evidence, even if it is lengthy and complex.

There is no doubt that a highly complex and detailed case, with a large amount of evidence, is in many ways more challenging for counsel and court when advanced summarily than in the course of a trial, but properly organized and presented, this should not be a bar to proceeding summarily. The cost and expediency advantages should not be given up by reason of this factor alone, but counsel should realize that the responsibility upon them to present the case in a rational, well-organized and well-explained way is correspondingly higher. It does not do to simply throw a mass of material at the court and expect the judge to sort it out.

E. Whether it is in the Interests of Justice that there be Pleadings and Discovery in the Usual Way in Order to Resolve the Dispute Between the Parties

The reference to pleadings has been somewhat overtaken by the requirement in Rule 16-1 that both parties to a petition proceeding set out (at least in brief summary form) the material facts and legal bases upon which they intend to rely. There is now little advantage to moving to an action for the purposes of having a better pleading, unless, perhaps, there are complications such as the need for counterclaims or third party proceedings.

The question of whether discovery is needed is an important one. Once again, it is necessary to consider whether the procedures available to the court within the summary process can sufficiently fill this need, or whether a "fully-fledged action" is required. In this regard, there are several cases in which

the court has warned against going too far in "hybridizing" the process and creating an impractical process that becomes more unwieldy, costly and slow to resolve than a normal action. (See, for instance, the comments of the Court in *Anthem* and *Boffo* and the concern about litigating in slices expressed in this context in *Chambers*.)

Judicious consideration must be given to whether the full discovery processes afforded by converting the matter to an action are required. In our view, while there are certainly oppression cases in which full discovery is an absolute necessity, it is seldom the case, and counsel should not easily come to this conclusion. If further procedures beyond the basic summary procedures are required, limited document discovery and cross-examination on affidavits usually suffice.

F. Other Practical Considerations

The case law indicates that an application to have an oppression petition put onto the trial list may be brought in advance of the hearing of the petition. (See, for instance, *Buckley* and *Woodward's*.)

When to bring the application is, however, an important strategic consideration. If the application is brought early in the proceedings, it may be difficult to persuade the court that the hearing judge will not be able to deal with the case fairly, taking advantage of all the procedural tools available. (This was the case in *Buckley* and *Orr*.) On the other hand, if it is obvious from the outset that there is an insurmountable credibility issue, or that, when all the factors are considered it is not practical to have the case proceed summarily, an early application makes sense.

The proper approach may also depend on the other parties' needs and strategic approach, and the nature of its counsel. Much can be accomplished when both (or all) parties are agreed (perhaps for different strategic reasons) that the matter should proceed summarily. The court, of course, retains the right to disagree with the parties and determine that the matter is not capable of summary determination, but unless the parties joint approach is wholly unreasonable or impracticable, the court will generally do what it can to accommodate it.

FACT PATTERN NO. 1

1. Due to a change in legislation several hundred members (the "Claimants") of a Society could no longer receive the primary benefit that the Society had formerly provided to them. Previously they had been required by statute to be members of the Society. This was no longer the case but nothing in the statute prevented them from remaining members and participating in its other activities.

2. A resolution of the members was passed at a special general meeting excluding the Claimants from active membership in the Society, without compensation.

3. The Claimants had paid dues for many years and those dues had contributed significantly to the assets of the Society which had amounted to approximately $16.5 million in value.

4. The Claimants alleged that they had effectively been expelled from the Society without compensation and sought monetary compensation on the basis that this treatment was unfairly prejudicial to them.

A. Referred to the trial list

B. Decided in chambers with no additional procedures

C. Decided in chambers after cross-examination and document production

FACT PATTERN NO. 2

1. The respondent directors of a company caused shares to be issued for a price of $1.00 plus an agreement to loan the company $10,000. The shares were issued to a party that was related to the directors. The petitioner alleged that the shares had been issued at an undervalue and thus had resulted in a dilution of its interest in the company to the benefit of the related party. It alleged that the conflict of interest provisions of the statute had not been complied with in regards to the share issuance

2. The respondents defended on the basis that the company was in dire financial straits and the impugned transactions were the only way of hanging on until a purchaser could be found (which ultimately happened). They asserted that they had acted in the best interests of the company and denied, in the circumstances, that the shares were issued at an undervalue. The petitioner disputed that the directors had acted in the best interests of the company .

3. The respondents alleged that the petitioner had not acted with clean hands. In particular, the respondents deposed that all the shareholders, including the petitioner, had been invited to participate in the share issuance and that the petitioner had agreed that the proposal was a very fair way of raising funds. The petitioner denied this and indeed denied knowing about any opportunity for all shareholders to participate in the share issuance.

4. There were two other related actions in which the petitioner's entitlement to its shares was challenged.

A. Referred to the trial list

B. Decided in chambers with no additional procedures

C. Decided in chambers after cross-examination and document production

FACT PATTERN NO. 3

1. The petitioner and respondent are equal shareholders in a company formed by them to pursue the development of residential lots. Each nominates one director of the company.

2. They agreed that the petitioner would provide site servicing, pursuant to a contract with terms to be agreed. The respondent would coordinate financing and sales of lots and receive $10,000 per month in management fees. For a period of time lots were to be sold as a package which included a home to be built by the respondent.

3. The petitioner complained that (1) the respondent had overcharged management fees by tens of thousands of dollars; (2) had continued to insist on trying to sell the lots as packages (largely unsuccessfully) beyond the time limit, to the benefit of the respondent and detriment of the company; (3) the respondent had caused sales to be made to its associates on favourable terms; (4) the contracts for sale negotiated by the respondent were likely unenforceable; (5) the respondent has charged commissions contrary to the agreement.

4. The respondent denied the allegations on the basis that it had complied with the terms of the agreement as varied, or on the basis that the allegations were not true, or that its conduct was justified by the circumstances.

5. The respondent also caused an action to be commenced by the company against the petitioner claiming that the site servicing fees payable should be restricted to $2.9 million and not the $4.5 million invoiced.

6. The petitioner alleged oppression and unfair prejudice and that the circumstances demonstrated that it was just and equitable that the company be wound up. It sought an order for a shotgun buyout.

A. Referred to trial list

B. Decided in chambers with no additional procedures

C. Decided in chambers after additional procedures.