COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***May v. Circumpacific Energy Corp.***,
2004 YKCA 1

Date: 20040109
Docket: YU00505

Between:

**William May, Peter Weichler, Bert Peters,
Robert Schiesser, Dan McCarthur and David Smiddy**

Respondents
(Petitioners)

And

Circumpacific Energy Corporation

Appellant
(Respondent)

And

**Philip Francis Kelso, Charles E. Ross, Malcolm Fraser,
Michael Silver and Graham Charles Reveleigh**

(Respondents)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

W. G. Hopkins	Counsel for the Appellant
B. G. Nemetz, Q.C.	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia October 28, 2003
Place and Date of Judgment:	Vancouver, British Columbia January 9, 2004

Written Reasons by:
The Honourable Madam Justice Rowles

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[1] This is an appeal from an order dated 19 August 2003 appointing a monitor as interim relief in oppression proceedings brought under s. 243(3) of the ***Business Corporations Act***, R.S.Y. 2002, c. 20 (the "***Act***"). The reasons for judgment may be found at 2003 YKSC 49.

[2] The appellant, Circumpacific Energy Corporation ("Circumpacific"), is a publicly traded company listed on the TSX Venture Exchange. Circumpacific carries on the business of exploring for and developing petroleum and natural gas properties in British Columbia, Alberta and Saskatchewan. Trading in the shares of Circumpacific was halted by the Exchange on 24 January 2003 and suspended on 20 March 2003 pending a TSX review of its affairs. Trading in the shares remains suspended. Circumpacific is actively seeking to have trading in its shares reinstated.

[3] The respondents, the petitioners in the court below, hold approximately two per cent of Circumpacific's stock. They filed a Petition in the Supreme Court of the Yukon Territory on 13 August 2003 setting out the facts they allege would establish a case of oppression and would entitle them to

relief under the ***Act***, including the right to commence a derivative action. In June 2003, the respondents had filed a similar Petition in the Supreme Court of British Columbia on the erroneous assumption that Circumpacific, after its incorporation in British Columbia, had continued as a British Columbia company.

[4] On the same day the respondents filed their Petition in the Yukon Supreme Court, they filed a notice of motion in which they sought the appointment of a monitor and injunctive relief. The appellant opposed the granting of any interim relief and took the position, among others, that the respondents were not acting in good faith but as part of a scheme pursuant to which they and one Richard MacDermott, Circumpacific's former C.E.O., were attempting to acquire Circumpacific's assets at a discount.

[5] The chambers judge declined to grant the injunctive relief sought because he was not satisfied that the respondents had shown that irreparable harm would result without such an order but he granted the respondents' application for the appointment of a monitor.

[6] On an appeal from what the appellant recognizes is a discretionary order, the applicable standard of review is that

described by Cumming J.A. in ***Ward v. Kostiew*** (1989), 42 B.C.L.R. (2d) 121 at 127 (C.A.):

> ... an appellate court is justified in interfering with the exercise of discretion by a chambers judge only if he misdirects himself, acts on a wrong principle or on irrelevant considerations, or if his decision is so clearly wrong as to amount to an injustice.

[7] Two grounds of appeal were advanced. On the first ground, the appellant contends that the learned chambers judge erred in granting interim relief under s. 243(3) of the ***Act*** without first satisfying himself that the threshold test under s. 243(2) had been met. On the second, the appellant argues that the chambers judge erred in granting the monitor unrestricted access to all of Circumpacific's documents without any regard to relevance to the issues raised in the proceedings.

[8] For the reasons which follow, it is my respectful view that the order under appeal cannot be supported in principle and must be set aside.

II. Relevant statutory provisions

[9] The order appointing a monitor was made under s. 243 of the ***Act***, which provides:

243(1) A complainant may apply to the Supreme Court for an order under this section.

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

> (a) any act or omission of the corporation or any of its affiliates effects a result;
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> (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 Supreme Court may make an order to rectify the matters complained of.

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

> (a) an order restraining the conduct complained of;
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> (b) an order appointing a receiver or receiver-manager;
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> (c) an order to regulate a corporation’s affairs by amending the articles or bylaws;
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> (d) an order declaring that any amendment made to the articles or bylaws pursuant to paragraph (c) operates despite any unanimous shareholder agreement made before or after the date of the order, until the Supreme Court otherwise orders;
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> (e) an order directing an issue or exchange of securities;

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

(g) an order directing a corporation, subject to subsection 35(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the holder for securities;

(i) an order directing a corporation, subject to section 44, to pay a dividend to its shareholders or a class of its shareholders;

(j) 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;

(k) an order requiring a corporation, within a time specified by the Supreme Court, to produce to the Court or an interested person financial statements in the form required by section 157 or an accounting in any other form the Supreme Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 245;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

> (ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

III. Material before the chambers judge

[10] In their Petition, the respondents set out what they allege would support their plea of oppression, as follows:

> 2. Philip Kelso ("Kelso") is a Director, President and Executive Chairman of Circumpacific. Kelso is also the Managing Director and largest shareholder in Drillsearch Energy Limited ("Drillsearch"), a public company listed on the Australian Stock Exchange. Drillsearch owns or controls in excess of 45% of the shares of Circumpacific. Kelso controls both Circumpacific and Drillsearch.
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> * * *
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> 6. In September and October of 2000, Circumpacific, through an equity financing, brokered by Yorkton Securities, raised in excess of $1 million. Circumpacific and Yorkton promoted the equity financing on the basis that funds were to be used for the operational requirements of Circumpacific. These funds never reached Circumpacific's normal banking facility. Kelso directed the funds to an account in Australia, the signing officers of which were Kelso, Michael Hutt, Drillsearch Energy Ltd.'s Treasurer, and Drillsearch's Sydney office Secretary. One million thirty one thousand dollars ($1,131,000) was transferred from Yorkton to Australia on November 17, 2000. These funds were thereafter, at Kelso's direction, withdrawn and advanced to Drillsearch and its affiliates or related parties, for the purpose of purchasing

petroleum property for the account of Drillsearch and ranch properties for the benefit of Transoceanic, a Drillsearch subsidiary.

7. In January, 2001 at Kelso's direction $620,000.00 was withdrawn from Circumpacific's bank account, using Circumpacific's line of credit with the Alberta Treasury Branch and these funds, again at Kelso's direction, were transferred to the Australian account thereafter to Drillsearch.

8. As a result of the actions of Kelso and Drillsearch as described in paragraphs 6 and 7 above, Circumpacific was, and continues to be, unable to meet financial obligations and pursue its stated corporate objectives.

9. In June, 2000, officers and employees of Circumpacific identified an oil and gas property ("Talbot Lake Property") in the Talbot Lake area, in the Province of Alberta, as a property suitable for purchase and development by Circumpacific. The purchase price was to be negotiated in a range between $250,000 and $350,000. Kelso, as President and CEO of Circumpacific, was advised of the opportunity for Circumpacific. Kelso on behalf of Circumpacific declined to purchase the Talbot Lake property but as Managing Director of Drillsearch negotiated the purchase of the Talbot Lake Property for the account of Drillsearch. The Talbot Lake Property was in fact purchased by a Drillsearch subsidiary, Bluenose Holdings Ltd. ("Bluenose") for a purchase price of $257,000. As President and CEO of Circumpacific, Kelso directed a loan from Circumpacific to Bluenose of $130,000 to facilitate the purchase by Bluenose of the Talbot Lake Property. The Talbot Lake Property was then at Kelso's direction. Through a series of transactions, the Talbot Lake Property was transferred over a period of two days after the purchase by Bluenose (for $257,000) to Drillsearch Energy (Canada) Ltd. for $4.2 million. Drillsearch at Kelso's direction then invited Circumpacific, being

directed by Kelso, to "farm in" on approximately one half of the Talbot Lake Property as originally purchased by Bluenose. The "farm in" agreement would allow Circumpacific a 75% interest in 50% of the original Talbot Lake Property for the price of $530,000 plus a $1.3 million work commitment. At Kelso's direction, Circumpacific paid $1.8 million for less than a 50% interest in the Talbot Lake Property. But for Kelso's intervention, Circumpacific could have purchased 100% of the Talbot Lake Property for $257,000.

10. On October 25, 2000, 2,928,000 shares in Circumpacific were issued at the direction of Kelso and other directors of Circumpacific. In its audited financial statements for the year ended June 30, 2001, Circumpacific reported that 1.111 million shares, or 38%, of this issue were acquired by related parties. In fact, 2,796,000 of these Circumpacific shares, representing over 95%, were issued to two entities closely related to or controlled by Kelso and the Respondent, Charles Ross. Circumpacific represented that it had received net proceeds from this issue of $942,762. In fact, at least $388,371 was not paid as described. Kelso and Circumpacific accepted payment "in kind" from these non-arm's length parties by way of a set off for invoices from these parties to Circumpacific. The invoices presented by the non arm's length parties and accepted by Kelso and Circumpacific did not represent accurately or fairly any work or services provided by these entities to Circumpacific and were created and presented solely to account for the unpaid balance related to the issuance of the said shares.

11. As at April 1, 2003, Circumpacific (at Kelso's and the Board of Directors' direction) has executed a General Security Agreement in favour of Drillsearch for monies allegedly advanced by Drillsearch to Circumpacific. Kelso's acknowledgment on behalf of Circumpacific that it is indebted to Drillsearch is a gross distortion of the true state of the inter-

company accounts and intended to benefit Kelso as the majority shareholder in Drillsearch.

12. The affairs of Circumpacific are being conducted and the powers of the directors are being exercised in a manner that is oppressive to the minority shareholders including the Petitioners.

13. The acts of Circumpacific as described above, are unfairly prejudicial to the minority shareholders of Circumpacific, including the Petitioners.

[11] The following relief is sought in the Petition:

1. This Court appoint a monitor (the “Monitor”) to review and report all corporate transactions of Circumpacific Energy Corporation (“Circumpacific”) to this Court and to the Petitioners.

2. The Court appoint an investigator (the "Investigator") to investigate the business and affairs of Circumpacific, including all inter-company accounts between Circumpacific and Drillsearch Energy Limited ("Drillsearch"), Drillsearch Energy (Canada) Inc., 860272 Alberta Limited and Transoceanic Securities Pty. Ltd. ("Transoceanic"), Jordac Investments Ltd. ("JorDac") and Fresh-In Investments Limited ("Fresh-In") and report to this Court and the Petitioners accordingly.

3. Circumpacific be prohibited from further encumbering, pledging or selling any of its assets, whatsoever, except for petroleum, natural gas and similar hydrocarbon substances produced in the normal course of operation of an oil and gas property, without further order of this Court.

4. Drillsearch and Philip Kelso or any related, associated or affiliated party are specifically prohibited and enjoined from realizing on or attempting to realize or rely on any existing

> security agreement involving the property, assets or business of Circumpacific without prior approval of this Court.
>
> 5. The Petitioners be authorized to commence proceedings in the name of Circumpacific against Drillsearch, Drillsearch Energy (Canada) Inc., 860272 Alberta Limited, Transoceanic, JorDac and Fresh-In, Philip Kelso, Charles F. Ross, Malcolm B. Fraser, Michael Bernard Silver and Graham Reveleigh for breach of their fiduciary duty owed Circumpacific, misuse and appropriation of Circumpacific funds, breach of trust and a further order permitting and directing that the Petitioners shall direct and control the said action which shall be funded by Circumpacific.
>
> 6. Circumpacific pay the interim costs incurred by the Petitioners in the within Petition, including solicitor and client costs.
>
> 7. All costs related to the Monitor and Investigator be borne by Circumpacific.

[12] Circumpacific's response to specific facts alleged in the Petition, based on the affidavit material it filed, is summarized in the appellants' factum as follows:

> (a) Circumpacific and Drillsearch are related parties. Drillsearch Canada is a wholly owned subsidiary of Drillsearch. Drillsearch is also the majority shareholder of Circumpacific. Circumpacific and Drillsearch share offices and staff in Calgary, Alberta. The Talbot Lake property was initially acquired by Drillsearch Canada at a time when Circumpacific did not have the resources to pursue the project. The interest that Circumpacific subsequently acquired in the project was acquired from Drillsearch (Canada) at fair market value on May's recommendation.
>
> (b) Circumpacific and Drillsearch have a history of supporting each other with inter-company loans. All

> loans made by Circumpacific to Drillsearch or its subsidiaries have been repaid with interest. As at June 24, 2003, Circumpacific owed Drillsearch Canada approximately $1,850,000.00.
>
> (c) All of the shares of Circumpacific issued in connection with the October 2000 private placement were paid for in full. The majority of the shares were paid for in cash but a portion were paid for by way of offset in connection with services rendered. Contrary to what May states the services were in fact provided.
>
> (d) There is nothing improper about Drillsearch Canada taking security on commercially reasonable terms in connection with loans in excess of a million dollars.

[13] The respondents' motion for interim relief was filed on the same day as their Petition and they obtained short leave for the motion to be heard. However, there were a number of affidavits before the chambers judge including those that had been filed in the earlier British Columbia proceeding.

[14] The material before the chambers judge showed that in December 2000, one of the respondents, William May, had accepted the position of Vice President Exploration for Circumpacific and Drillsearch Energy Corporation. Mr. May deposed that in February 2001, he became concerned about potential personal liability in connection with certain transactions undertaken in 2000 and sought legal advice. In October 2001, Mr. May purchased 34,000 common shares in Circumpacific.

[15] According to the appellant's affidavit material, on 30 April 2002, Richard MacDermott, the appellant's former C.E.O., along with one of the respondents, David Smiddy, mis-appropriated funds sent by Drillsearch to Circumpacific to pay a loan facility fee with the Alberta Treasury Branch. In May 2002, Messrs. MacDermott and Smiddy were dismissed for cause because of the alleged misappropriation of the funds sent to pay for the facility fee.

[16] The appellant's affidavit material also asserted that Mr. MacDermott, after being discharged as the C.E.O. of Circumpacific, approached the Alberta Treasury Branch in an effort to purchase Circumpacific's Alberta Treasury Branch debt.

[17] During the period from 1 July 2002 to 30 June 2003, Drillsearch Canada was said to have advanced approximately $1.8 million to Circumpacific to enable it to discharge its bank debt when it was under threat of receivership from the Alberta Treasury Branch.

[18] In July 2002, May retained Zikla Management Corp. in an attempt to persuade the Exchange to investigate Circumpacific. Circumpacific has been under investigation by the Exchange since approximately December 2002.

[19] Mr. May resigned from his position in Circumpacific on 15 May 2003.

[20] Messrs. May and MacDermott are now working together at Excite Energy, which is said to be a competitor of Circumpacific.

IV. Decision of the chambers judge, the formal order, the stay of the order and the order directing a trial of the issues

[21] We were informed by appellant's counsel during oral argument that when the motion was before the chambers judge, the arguments focused mainly on the question of whether an interim injunction ought to be granted. The chambers judge dismissed the application for injunctive relief because, in his view, the respondents had failed to prove that they would suffer irreparable harm if the order were not granted. In reference to the relief claimed, including the injunctive relief, the chambers judge said:

> [4] The petitioners rely on, amongst other provisions, s. 243 of the *Business Corporations Act* of the Yukon, which gives broad powers to the court in respect of oppression, unfairly prejudicial activity or unfair disregard to the interests of a security holder, creditor, director or officer. Without limiting the generality of the foregoing, it provides many remedies in subsection 3. The petitioners also say that they will suffer irreparable harm if Drillsearch Energy Limited and its affiliates are in a position to strip the assets

of Circumpacific Energy and suggest that the balance of convenience favours the granting of interim relief on the basis that there will be no harm to Circumpacific Energy and the status quo will be preserved.

* * *

[12] On behalf of the respondents it is said that it would be wrong to grant any interim injunctive relief at this time. An interim injunction at this time in respect of a publicly traded company, even if it is not trading right at the moment, could cause irreparable harm. There is no evidence whatsoever as to the assets of May and the other petitioners and, indeed, it is said that and pointed out that there is no undertaking in damages given by them to answer for any damages to the corporation should the injunction be later determined not to have been properly granted.

[13] It is also pointed out that there are many disputed facts, and that this matter can be heard at the end of October, on a one or two day hearing, where the issues will be fully aired on the basis of complete affidavits and what I assume would be extensive cross-examination on the affidavits. In addition, the respondents, the respondent, I should say, since it is only Circumpacific who is responding, the respondent Circumpacific also says that granting a monitor is unprecedented and, indeed, there is monitoring taking place as a result of the participation of the Alberta Securities Commission and the TSX Venture Exchange.

[14] Most compelling on behalf of the respondent is the suggestion that Drillsearch is now in a position where it has advanced funds to Circumpacific. Even if there are arguably bad deeds that have occurred in the past, which is not conceded but denied, there is no reason to believe in the future that it would be advantageous in any way shape or form for Drillsearch or Mr. Kelso to strip the assets of Circumpacific.

[15] In addition, an argument is made as to good faith on the part of the petitioners.

> [16] In my view, it is not appropriate to grant an injunction at this time. I am not satisfied on the basis of either the two-pronged test that is set out in *British Columbia (Attorney General) v. Gitanmaax Band*, [1986], B.C.J. No. 1395, or on the basis of *American Cyanamid Company v. Ethicon Limited*, [1975] A.C. 396 (H.L.), that there is the possibility of irreparable harm to the petitioners at this time.

[22] As to the application for the appointment of a monitor, the chambers judge said this:

> [19] Now, Mr. Hopkyns [sic], has pointed out to me that he is not aware of authority in relation to the granting of a monitor. Mr. James has pointed out, although he did not bring his authorities with him, there is Alberta authority for that proposition found in the Westfair Foods case, a decision of Madam Justice Perperny [sic], and for which I do not have a cite.
>
> [20] In my view, the *Business Corporations Act* provides a broad range of potential remedies to me. I find and hold that, even though I do not find the prospect of irreparable harm to be present, that the facts alleged with respect to the Talbot Lake property, the question of the diversion of funds raised by Yorkton Securities, and the drawing down on the line of credit, and indeed the question of the non-brokered private placement funds give rise to a need for monitoring.
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> [21] I am hopeful that this matter will be heard in late October, but I am not so sure that I can be as optimistic as counsel, who I am sure will do their best to have this matter heard in the near future, but there will be extensive cross-examination on affidavits. I am heartened by the representation, or I should say advice as opposed to representation, by the advice that Mr. Kelso will be in Alberta in the near future on another matter, and thus presumably will be available for the purposes of cross-examination on affidavits.

> [22] As I say, the facts that have been alleged taken in conjunction with the affidavit evidence, including the repayments which I have already commented on, do not really satisfy me that there is an adequate explanation for events that in the absence of full exploration of the facts give rise to real concerns about the way Drillsearch and Mr. Kelso have been dealing with Circumpacific.
>
> [23] Therefore, I am going to agree to the appointment of a monitor to review and report all corporate transactions to the court and to the petitioners, and that the monitor be granted continued and non-restricted access to any and all of the books, records, documents, and accounts of Circumpacific Energy.

[23] The relevant portion of the formal order reads as follows:

> 8. The appointment of the Monitor shall not constitute the Monitor as taking control of the management operations or decision making of Circumpacific, nor shall the Monitor be deemed to be in possession, control or management of the property or business and affairs of Circumpacific.
>
> 9. The Monitor shall report to this Court on the current financial position of Circumpacific, including the accounting, by Circumpacific, of receipts and disbursements, any material adverse changes in the business and affairs of Circumpacific from August 19, 2003 and in particular any transactions out of the ordinary course of business, including all asset purchases in excess of $100,000, all dispositions of assets, (other than sale of oil and gas production in the ordinary course of business) and any transaction involving Circumpacific with any party not dealing at arms length with Circumpacific, including any affiliates of Circumpacific or any director, officer or employee of the foregoing.

> 10. Circumpacific and its directors, officers, employees, agents (all of the foregoing collectively the "CER Group") shall forthwith provide to the Monitor such access to Circumpacific's books, records, assets and premises as the Monitor requires to exercise its powers and performance of its obligations under this Order.
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> 11. Insofar as the Monitor reviews or otherwise becomes aware of any confidential information regarding the oil and gas properties of Circumpacific, or any other party, the Monitor shall not publish or otherwise disseminate any such information to the Petitioners or otherwise. If the Monitor determines that such information is required to be provided to the Court for a proper understanding of any part of a report by the Monitor to the Court, the Monitor shall provide a copy of such information to the Court only, which will be sealed by the Court and disseminated by the Court only upon its order upon application by either the Petitioners or Respondents.
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> 12. The Monitor shall review and report in the format the Monitor in its sole discretion deems appropriate with respect to the above-described matter to this Court and to the Petitioners within thirty (30) days from the effective date of this appointment and at least every two (2) months thereafter.

[24] The chambers judge acceded to the appellant’s request that the order be stayed for a period of two weeks so that an appeal from the order could be brought. As a result of a further order made in the Yukon Supreme Court and subsequent orders made in this Court, a stay of the order appointing a monitor has remained in place since the order under appeal was granted.

[25] Very shortly after the impugned order had been granted, the appellant brought a motion for an order that the issues arising from paragraph 5 of the Petition (set out in paragraph 11 of these reasons) be tried as an action. The motion, which was heard by another judge of the court, was granted and, according to counsel before us, the proceedings, including discovery of documents, are being expedited by the trial management judge with a view to an early hearing date.

V. Did the chambers judge err in principle in appointing a monitor in this case?

[26] The appellant contends that the trial judge erred in principle in granting relief under s. 243 of the ***Act*** without having satisfied himself that the threshold test under s. 243(2) of the ***Act*** had been met. For ease of reference, I will repeat s. 243(2). Section 243(2) requires that before making an order under s. 243, the court must be:

> ... satisfied that in respect of a corporation or any of its affiliates
>
> > (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 Supreme Court may make an order to rectify the matters complained of.

[27] The reasons of the chambers judge do not reveal what foundation he had for making the order he did. After noting that he had not been provided with any case authority in which a monitor had been appointed in oppression proceedings, he observed that s. 243(3) provides wide power to make interim orders.

[28] When the respondents' motion was heard in this case, the proceedings were obviously in their infancy. The chambers judge refused to grant any injunctive relief, stating that he was not persuaded that the respondents would suffer irreparable harm if that relief were not granted. Just before stating that conclusion, the chambers judge observed that there were many disputed facts, that the matter could be heard in the fall where the issues could be fully aired on the basis of complete affidavits and extensive cross-examination on the affidavits and that there was a "good faith" argument concerning the respondent petitioners.

[29] The appellant contends that it is apparent from the reasons of the chambers judge that he granted the order for a

monitor so as to permit an investigation into the allegations of oppression and, in doing so, he overlooked or ignored the threshold requirement of s. 243(2).

[30] In argument before us, respondents' counsel resisted any suggestion that the appointment of a monitor had been made for the purposes of investigation. The essence of the respondents' argument supporting the order appointing a monitor is contained in the following paragraph of their factum:

> 34. ... pursuant to subsection 243(3), Mr. Justice McIntyre had discretion to provide any interim remedy he thought suitable and, as disclosed in the quotation from his Reasons for Judgment above [paras. 20 to 23], he was satisfied that the appointment of a monitor was required. Circumpacific incorrectly characterizes Mr. Justice McIntyre's appointment of a monitor as the appointment of an investigator pursuant to section 232 of the Act and misapprehends the law regarding interim remedies available in oppression proceedings. As it has evolved, the law regarding such remedies clearly includes the appointment of a monitor, as an officer of the Court, with powers that are not as broad as those granted to receivers or receiver managers (expressly provided for in sub-section 243(3)(b)) <u>but with powers sufficient to ensure that the Court will acquire, from an independent person, the information required to come to a final decision in the oppression proceedings.</u>
>
> [underlining added]

[31] Appellant's counsel argues that the respondents' position fails to distinguish between the appointment of a monitor in

oppression proceedings and the appointment of a monitor under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (the "***CCAA***"). In support of his argument, appellant's counsel referred us to *Bennett on Receiverships*, 2d ed. (Toronto: Carswell, 1999) in which the author states, at pp. 8-9, that companies taking protection under the ***CCAA*** often sought the appointment of a monitor or administrator in the initial order to deflect an application by the creditors for the appointment of an interim receiver. The author also notes that before the 1997 amendments to the ***CCAA***, the appointment of a monitor was a creation of insolvency practitioners but after the amendments, if a company takes protection, the court must appoint a monitor for the protection of the creditors and shareholders while the company formulates a plan of arrangement. A monitor appointed under the ***CCAA*** is required to monitor the business and financial affairs of the company.

[32] Appellant's counsel argues that while the appointment of monitors are now made as a matter of course in ***CCAA*** proceedings, such an appointment cannot be made in oppression proceedings under s. 243 of the ***Act*** unless a finding of oppression has already been made or, where an interim order is sought, a strong *prima facie* case of oppression has been shown. Appellant's counsel referred us to ***Greka Energy Corp.***

V. Northsun Energy Ltd. (2001), 21 B.L.R. (3d) 10, 2001 YKSC 527, to support his proposition that the threshold test which must be met before an interim order will be made under s. 243 of the ***Act*** is a strong *prima facie* case.

[33] In support of their submissions that it was open to the chambers judge to make an interim order appointing a monitor in this case, the respondents referred us to four cases: ***Osborne v. Bucci***, [1998] O.J. No. 3736 (QL) (Gen. Div.); ***Sileika v. Solcom Group Inc.***, [1993] O.J. No. 300 (QL) (Gen. Div.); ***Little v. TGI-VMS Visual Based Performance Systems Inc.***, [2000] O.J. No. 4980 (QL) (Sup. Ct.); and ***HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.***, [1999] 11 W.W.R. 281, 1999 ABQB 406. (***HSBC Capital*** is apparently the decision of Paperny J. to which the chambers judge had been referred by respondents' counsel, who provided neither the citation nor the correct name of the case.)

[34] The cases to which the respondents have referred us confirm that there are circumstances in which interim orders have been made for the appointment of a monitor in oppression proceedings but, in my respectful view, those cases do not provide support for the order made in this case.

[35] In ***Osborne v. Bucci***, *supra*, the litigants each owned 50% of the shares in a closed corporation. They had agreed to

part ways and the essence of their agreement was that Mr. Bucci would purchase Mr. Osborne's shares at a price to be negotiated with a valuation date of 31 October 1997. As an aid to the negotiation the parties agreed to have a jointly appointed valuator place a value on the shares of the company but their agreement was never brought to fruition. Mr. Osborne brought proceedings alleging that Mr. Bucci was taking steps which would strip the company of its value.

[36] In that case, the judge was satisfied that oppression had been established in relation to the management of the company and that Mr. Bucci had unfairly disregarded Mr. Osborne's interests. He ordered Mr. Bucci to purchase Mr. Osborne's shares at fair market value, as at the original valuation date set by the parties, and that the value should be determined by negotiation. Lane J. ordered that Mr. Osborne and his advisors would have access to all financial records of the company. A request for a receiver/manager was denied, as Lane J. did not consider it appropriate to take management of the company away from Mr. Bucci at that time. Instead, he appointed a monitor "to oversee and report on the management of the company with leave to either party to apply to change [the monitor's] role".

[37] The purpose of the monitor's role in ***Osborne v. Bucci*** may be more fully understood in light of the further orders Lane J. made. Leave was granted to Mr. Osborne to bring a derivative action but that portion of the judgment was stayed so as to give the negotiating process an opportunity to succeed. It was further ordered that any further steps to strip the company of its value through a particular integration Mr. Bucci had been pursuing with the company's only real customer were prohibited until further order or until the purchase of Mr. Osborne's shares was completed. Payments to Mr. Osborne for an agreed draw that had been unjustifiably terminated were also ordered to be paid. Finally, the sums that could be drawn out of the company by Mr. Bucci and his wife were restricted to the amounts specified in an earlier order.

[38] In ***Osborne v. Bucci***, a finding of oppression had been made and the monitor was appointed to oversee the company while the purchase and sale of the shares was concluded. In the case before us, a finding of oppression had not been made and, in light of the reasons of the chambers judge including what he said in refusing to grant injunctive relief, it is not possible to infer that he found a strong *prima facie* case of oppression had been made out.

[39] In ***Sileika v. Solcom Group Inc.***, *supra*, the respondents brought a motion to convert the application brought under the Ontario ***Business Corporations Act***, R.S.O. 1990, c. B.16, into an action or, alternatively, to direct a trial of the following issues: "(a) whether the Respondents have acted in such a manner as to breach the oppression remedy sections of the Act; (b) the proper interpretation of a memorandum of agreement entered into by Sileika & Associates Inc. and the Solcom Group Inc.; and (c) the value of the shares owned by Sileika & Associates Inc. in the Solcom Group Inc." In that case, O'Driscoll J. granted the motion for a trial of the issues and, in doing so, he described the issue respecting the memorandum of agreement this way: "Is it a "shotgun" buy-sell agreement or is it a "one way street" at the option of [one of the parties]?" He also observed that questions of credibility pervaded the issues and, in relation to the interpretation of the buy-sell agreement, he concluded that the introduction of parol evidence would likely be sought. He agreed with counsel for one of the respondents that there should be a "watch dog" in place who would report to the parties and to the court. The order specified the chartered accountant who was to be appointed as the monitor, and required that he provide bi-monthly written reports to the parties and that his fees would be paid equally by them. The particular files to be monitored

were restricted to those the monitor had previously reviewed for the preparation of an earlier report. A cross-motion brought by the applicants to appoint an inspector was dismissed.

[40] Unlike the case before us, ***Sileika v. Solcom Group Inc.*** involved a shareholder's dispute in a closely held corporation where the dispute centred on the proper interpretation of the buy-sell agreement. Also unlike the case before us, it was the respondents, not the applicants, who sought the appointment of a monitor. The purpose of the appointment was so the monitor could act as a “watch dog” pending the determination of the issues ordered to be tried. From those background facts, I think it is reasonable to infer that there was a *prima facie* case of oppression but the resolution of the proceedings would depend on how the buy-sell agreement was ultimately interpreted.

[41] In ***Little v. TGI-VMS Visual Based Performance Systems Inc.***, *supra*, the applicants sought a declaration of oppression under s. 248 of the Ontario ***Business Corporations Act***, R.S.O. 1990, c. B.16, as well as other relief including damages for wrongful termination. The oppression application was resolved by agreement of the parties directing an evaluation of the shares through the appointment of a valuator/arbitrator. The

agreement was given force by an order signed by Patterson J. but the order in settlement of the oppression proceedings exempted the applicant's right to claim damages for wrongful termination which was to proceed as a separate claim. The order made incorporated an earlier order that the respondent deliver monthly monitor reports of the corporation to include the total expenditures on behalf of any shareholder charged to his shareholder's account with the reporting to continue until further order. In his reasons, Cusinato J. directed the respondents (at para. 43):

> ... to continue to deliver monthly monitor reports with specifics of the extent of the total share-holders' liability, to the Corporation from time to time. For this purpose, the reports do not require a breakdown of personal charges by each shareholder. The intent of the original order is to monitor the shareholders' liabilities until the completion of the purchase and sale of the minority shares to determine there is no wasting of assets. The monitoring and the report that follows is also to identify any abuse in the Corporation, of in-appropriate expenditures not in keeping with former policy. With the exception to the above direction, the monitoring and the reports provided are to be in keeping with the specifics outlined in the order of Brockenshire J.
>
> [underlining added]

[42] In light of the fact that the parties in ***Little v. TGI-VMS Visual Based Performance Systems Inc.*** had agreed to a purchase and sale of the shares of the minority, it seems

reasonable to infer that whether there was oppression was no longer in issue.

[43] In ***HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.***, *supra*, HSBC Capital, as custodian of a number of investor funds, sought the appointment of an investigator to seek information on a number of matters relating to funds which were intended to be invested in a hotel project. There was an issue in that case as to whether HSBC had standing, but once it was found that it did, HSBC Capital was entitled to have an investigator appointed and to have access to the records sought. The respondents in that case did not deny the concerns raised by HSBC and conceded that the information sought by HSBC was information to which the investors were legally entitled. The judge in that case said:

> [45] Without deciding on the merits, the evidence filed by the Funds to this point does not deny the major concerns raised; many appear to be confirmed by the documents presented. In addition, the Funds confirmed that the information sought by HSBC is information to which the Investors are legally entitled in any event. HSBC is not seeking an active or intrusive remedy at this stage, but is merely seeking further information to clarify what it fears may have been occurring. It is *prima facie* evidence from the material before me that there has been a consistent lack of full and timely disclosure to the Investors. That which had been provided has largely been through court order. This lack of disclosure raises a strong *prime facie* case of unfair disregard of the Investors' interests. As

> such, it is appropriate to make an interim order under s. 234.
>
> [underlining added]

[44] In ***HSBC Capital Canada Inc. v. First Mortgage Alberta Fund (V) Inc.***, the test applied appears to have been the one for which the appellant contends in this case, that is, “a strong *prime facie* case”.

[45] To support his argument that the order appointing a monitor was simply made for the purposes of investigation in this case, appellant’s counsel points to the language the chambers judge used in his reasons (at para. 23) in relation to the access the monitor was to have to corporate documents; that is, “continued and non-restricted access to any and all of the books, records, documents and accounts of Circumpacific Energy”.

[46] The formal order does not specify the classes of documents to which the monitor is to have access and places no limits on the scope of the monitor’s review of Circumpacific’s affairs. I agree that the order is sufficiently broadly worded that it would permit the monitor to review all corporate transactions and permits the monitor to report to the court and to the respondents in any format the monitor deems appropriate.

[47] The appellant contends that the order gives the respondents the right to conduct a full forensic audit of the appellant's affairs without regard to relevance and, in effect, permits a fishing expedition for evidence to support the respondents' application for leave to commence a derivative action.

[48] Indeed, as noted above at paragraph 30, the respondents themselves submit that the role of a monitor includes providing the court with "the information required to come to a final decision in the oppression proceedings". Rather than a monitor who acts as a "watch dog" and reports to the court and the parties pending the determination and resolution of proceedings, the respondents' model envisions a monitor who reports so as to contribute to the determination of proceedings.

[49] From the judge's reasons and the terms of the formal order, it appears to me that the order under appeal may have been intended to serve two purposes: (1) to report any adverse change in the business affairs of Circumpacific, as well as any transactions that might be out of the ordinary course of business or any non-arm's length transactions of the company and (2) to permit or assist an investigation into the

circumstances that might support an order allowing the respondents to bring a derivative action.

[50] Regardless of whether the order had a dual purpose rather than being aimed at providing the means to investigate Circumpacific's affairs, as the appellant contends, I agree with the appellant that the order was made without regard for the requirements of s. 234(2) of the ***Act***. It is not enough that there has been a complaint made by a security holder or that there is some evidence of oppressive conduct. The court must examine the evidence and make a finding as to whether there is a *prime facie* case of oppressive conduct. The court cannot order an investigation merely to assist in determining whether such a finding should be made. In that regard I agree with the decision in ***Re Ferguson and Imax Systems Corp.*** (1984), 47 O.R. (2d) 225 (H.C.J. Div. Ct.) that the finding must be made before an investigation can be directed.

VI. Conclusion

[51] In summary, it is my respectful view that the chambers judge erred in principle in not considering whether the applicants, now respondents, had made out a strong *prima facie* case of oppression before granting an order appointing a

monitor. I would allow the appeal and set aside the order appointing a monitor.

[52] The order allowing the appeal is made without prejudice to future applications for interim relief that may be brought in light of the ongoing proceedings in the trial court.

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Low"