

**SUPREME COURT OF CANADA**

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| **Citation:** Wilson*v.* Alharayeri, 2017 SCC 39, [2017] 1 S.C.R. 1037 | **Appeal heard:** November 29, 2016**Judgment rendered:** July 13, 2017**Docket:** 36689 |

Between:

Andrus Wilson

Appellant

and

Ramzi Mahmoud Alharayeri

Respondent

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**(paras. 1 to 74) | Côté J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. concurring) |

Wilson *v.* Aalharayeri, 2017 SCC 39, [2017] 1 S.C.R. 1037

Andrus Wilson Appellant

v.

Ramzi Mahmoud Alharayeri Respondent

**Indexed as:** Wilson ***v.*** Alharayeri

2017 SCC 39

File No.: 36689.

2016: November 29; 2017: July 13.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for quebec

 *Commercial law — Corporations — Oppression — Remedy — Criteria governing imposition of personal liability on corporate directors — Corporation’s board refusing conversion of preferred shares held by former director before issuing private placement of convertible secured notes, thereby diluting former director’s portfolio — Discussions resulting in refusal being led at board level by director who subsequently had his preferred shares converted so as to benefit from private placement by increasing his control over corporation — Whether trial judge appropriately exercised statutory remedial powers by holding corporate directors personally liable for oppression — Whether pleadings sufficient to ground imposition of personal liability — Canada Business Corporations Act, R.S.C. 1985, c. C‑44, s. 241(3).*

 From 2005 to 2007, A was the President, the Chief Executive Officer, a significant minority shareholder and a director of Wi2Wi Corporation (“Wi2Wi”). In March 2007, in negotiating the merger of Wi2Wi with another corporation, A also agreed to sell it some of his common shares and signed a share purchase agreement to that effect without notifying Wi2Wi’s Board. When the Board found out about the existence of the agreement, A was censured for concealing the deal and failing to disclose the potential conflict of interest. Consequently, A resigned from his functions. W, a member of Wi2Wi’s Board and audit committee, became its President and CEO. Neither the merger nor the share purchase occurred.

 In September 2007, in response to Wi2Wi’s continuing financial difficulties, the Board decided to issue a private placement of convertible secured notes (“Private Placement”) to its existing common shareholders. Prior to the Private Placement, the Board accelerated the conversion of Class C Convertible Preferred Shares, beneficially held by an investment company for W, into common shares. It did so despite doubts as to whether or not the financial test for C Share conversion had been met. However, A’s Class A and B Convertible Preferred Shares were never converted into common shares, notwithstanding that they met the relevant conversion tests. In Board meetings, W and another director, B, advocated against converting A’s A and B Shares on the basis of A’s conduct and involvement in the parallel share purchase negotiation when he was President. Consequently, A did not participate in the Private Placement and the value of his A and B Shares and the proportion of his common shares in Wi2Wi were substantially reduced. A then filed an application under s. 241 of the *Canada Business Corporations Act* for oppression against four of Wi2Wi’s directors, including W.

 The trial judge granted the application in part. He held W and B solidarily liable for the oppression and ordered them to pay A compensation. The Court of Appeal dismissed W and B’s appeal. It held that the imposition of personal liability was justified and that the pleadings did not preclude it. W now appeals to the Court, challenging the trial judge’s conclusion that it was fit to hold him personally liable for the oppressive conduct.

 Held: The appeal should be dismissed.

 Section 241(3) of the *Canada Business Corporations Act* gives a trial court broad discretion to “make any interim or final order it thinks fit”, before enumerating specific examples of permissible orders. Some of the examples show that the oppression remedy contemplates liability not only for the corporation, but also for other parties. However, the Act’s wording goes no further to specify when it is fit to hold directors personally liable under this section. As stated in the leading decision, *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (Ont. C.A.), determining the personal liability of director requires a two‑pronged approach. First, the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression. Second, the imposition of personal liability must be fit in all the circumstances.

 At least four general principles should guide courts in fashioning a fit remedy under s. 241(3). First, the oppression remedy request must in itself be a fair way of dealing with the situation. It may be fair to hold a director personally liable where he or she has derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, breached a personal duty or misused corporate power, or where a remedy against the corporation would unduly prejudice other security holders. These factors merely represent indicia of fairness. The presence of a personal benefit and bad faith remain hallmarks of conduct attracting personal liability, but like the other indicia, they do not constitute necessary conditions. The fairness principle is ultimately unamenable to formulaic exposition and must be assessed in light of all the circumstances of a particular case. Second, any order should go no further than necessary to rectify the oppression. Third, any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders. And fourth, a court should consider the general corporate law context in exercising its remedial discretion. Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances.

 In this case, the trial judge appropriately exercised the remedial powers provided in s. 241(3) of the *Canada Business Corporations Act* by holding W personally liable for the oppression. W and B, the only members of the audit committee, played the lead roles in Board discussions resulting in the non‑conversion of A’s A and B Shares, and were therefore implicated in the oppressive conduct. In addition, W accrued a personal benefit as a result of the oppressive conduct: he increased his control over Wi2Wi through the conversion of his C Shares (which was not the case for the C Shares held by others) into common shares, which allowed him to participate in the Private Placement despite issues as to whether the test for conversion had been met. This was done to the detriment of A, whose own stake in the company was diluted due to his inability to participate in the Private Placement. The remedy went no further than necessary to rectify A’s loss. The quantum of the order was fit as it corresponded to the value of the common shares prior to the Private Placement. Finally, the remedy was appropriately fashioned to vindicate A’s reasonable expectations that (1) his A and B Shares would be converted if Wi2Wi met the applicable financial tests laid out in the corporation’s articles and (2) the Board would consider his rights in any transaction impacting the A and B shares.

 A’s pleadings were also adequate to ground the imposition of personal liability. They alleged the four named directors had acted in their personal interest to the detriment of Wi2Wi and A. Specific allegations were made against the directors and accordingly, damages were sought against them personally. The appropriate response to A’s bare pleadings was a motion for particulars or discovery prior to trial, not a plea before the appellate courts.

**Cases Cited**

 **Applied:** *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; **referred to:** *Naneff v. Con*‑*Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481; *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113; *Estate of John Wood v. Arius3D Corp.*, 2014 ONSC 3322; *GC Capital Inc. v. Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1; *Moon v. Golden Bear Mining Ltd.*, 2012 BCSC 829; *Belliveau v. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87; *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467; *Cox v. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1; *Danylchuk v. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2; *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp.*, 2008 MBQB 296, 244 Man. R. (2d) 127; *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275; *Walls v. Lewis* (2009), 97 O.R. (3d) 16; *Waiser v. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317; *Levenzon (Demetriou) v. Spanos Korres*, 2014 QCCS 258; *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481, leave to appeal refused, [1996] 3 S.C.R. viii; *Segal v. Blatt*, 2007 QCCS 1488, aff’d 2008 QCCA 1094; *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161; *Sidaplex*‑*Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563; *Gottlieb v. Adam* (1994), 21 O.R. (3d) 248; *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749; *Smith v. Ritchie*, 2009 ABCA 373; *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198; *Benhaim v. St*‑*Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74.

**Statutes and Regulations Cited**

*Canada Business Corporations Act*, R.S.C. 1985, c. C‑44, s. 241.

**Authors Cited**

Koehnen, Markus. *Oppression and Related Remedies*, Toronto: Thomson/Carswell, 2004.

MacIntosh, Jeffrey G. “The Retrospectivity of the Oppression Remedy” (1987), 13 *Can. Bus. L.J.* 219.

Miller, Paul B. “Justifying Fiduciary Remedies” (2013), 63 *U.T.L.J.* 570.

 APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Dufresne and Gagnon JJ.A.), 2015 QCCA 1350, 53 B.L.R. (5th) 43, [2015] AZ‑51207607, [2015] Q.J. No. 7670 (QL), 2015 CarswellQue 13380 (WL Can.), affirming a decision of Hamilton J., 2014 QCCS 180, [2014] AZ‑51037940, [2014] Q.J. No. 401 (QL), 2014 CarswellQue 419 (WL Can.). Appeal dismissed.

 Terrence J. O’Sullivan, Paul Michell and Zain Naqi, for the appellant.

 Douglas C. Mitchell and Emma Lambert, for the respondent.

 The judgment of the Court was delivered by

 Côté J. —

1. Introduction
2. Section 241(3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (“*CBCA*”), allows a court to “make any interim or final order it thinks fit” to rectify the matters complained of in an action for corporate oppression. The principal question raised by this appeal is when an order for compensation under this section may properly lie against the directors of a corporation personally, as opposed to the corporation itself.
3. For almost 20 years, the leading authority on this question has been the Ontario Court of Appeal’s decision in *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (“*Budd*”), and in my view, there is no reason to depart from the guidance provided in *Budd* now.
4. In this case, the trial judge did not err in his application of *Budd* or the principles governing orders under s. 241(3) when he found the appellant director personally liable for the oppressive conduct. Appellate intervention is therefore unwarranted, and I would accordingly dismiss the appeal.
5. Background
	1. Context and the Corporation’s Capital Structure
6. From 2005 to 2007, the respondent, Mr. Alharayeri, was the President, the Chief Executive Officer (“CEO”), a significant minority shareholder and a director of Wi2Wi Corporation (“Corporation”), a technology company incorporated under the *CBCA*. Prior to the events leading to the instant litigation, he held 2 million common shares, 1 million Class A Convertible Preferred Shares (“A Shares”) and 1.5 million Class B Convertible Preferred Shares (“B Shares”) in the Corporation. The respondent was the sole holder of the A and B Shares, which were issued to him as performance-linked incentives. The A Shares were convertible into common shares if the Corporation met certain financial targets in the 2006 fiscal year, and the B Shares were convertible into common shares if certain financial targets were met in the 2007 fiscal year. If the targets were not met, the shares were to be converted into a reduced number of common shares prorated according to the shortfall.
7. The Corporation also issued Class C Convertible Preferred Shares (“C Shares”) as an incentive to those involved in finding financing for it. Like the A and B Shares, the C Shares were convertible into common shares if the Corporation met a financial target laid out in its articles of incorporation. The appellant, Mr. Wilson, was one of the C shareholders and beneficially owned or controlled 100,000 C Shares through YTW Growth Capital Management Corp. (“YTW Corp.”). Like the A and B Shares, the C Shares were non-participating, non-voting, non-transferable and non-assignable.
	1. Origins of the Dispute
8. In March 2007, as a result of recurring cash flow issues, the Corporation began to seriously consider merging its operations with those of another business, Mitec Telecom Inc. (“Mitec”). While negotiating the merger, the respondent was also separately negotiating with Mitec the sale of his own shares in the Corporation in order to alleviate personal financial difficulties. Without notifying the Corporation’s Board, the respondent agreed to sell some of his common shares to Mitec, and he signed a share purchase agreement to that effect on April 2, 2007. On May 31, 2007, when the Corporation’s Board finally learned of the respondent’s personal share purchase agreement, he was censured for concealing the deal and failing to disclose the potential conflict of interest. This triggered his resignation as President, CEO and director of the company on June 1, 2007.
9. After the respondent’s resignation, the appellant became Wi2Wi’s President and CEO. The Corporation’s Board consisted of seven remaining directors. However, its audit committee comprised only two directors: the appellant and Dr. Hans Black — the chairperson of the audit committee.
10. During the months following the respondent’s resignation, further negotiations were conducted by the respondent, the Corporation, and Mitec, but none materialized into a merger or a share purchase agreement.
11. In September 2007, the Corporation’s Board decided to issue a private placement of convertible secured notes (“Private Placement”) to its existing common shareholders in response to its continuing financial difficulties. Under the terms of the issuance, each shareholder was entitled to subscribe for $1.00 of notes for every two common shares the shareholder had in the Corporation. The notes were convertible into common shares at the rate of 50,000 common shares per $1,000 principal amount of notes. The Private Placement would therefore substantially dilute the proportion of common shares held by any shareholder who did not participate in it.
12. Prior to the Private Placement, the Board accelerated the conversion of 100,000 C Shares, beneficially held by YTW Corp. for the appellant, into common shares. It did so despite doubts expressed by the auditors as to whether or not the test for the C Share conversion had been met. The other two holders of C Shares did not benefit from their expedited conversion.
13. On the other hand, the respondent’s A Shares were never converted into common shares. The Board never approved the 2006 audited financial statements, which contained a note stipulating that, on the basis of the financial test laid out in the articles of incorporation, the A Shares were convertible into 1 million common shares at the option of the holder. In Board meetings, both the appellant and Dr. Black expressed doubts as to whether it was appropriate to permit the conversion of the A Shares in light of the respondent’s conduct, particularly his involvement in parallel share purchase negotiations with Mitec. Consequently, the Board never sent the respondent a formal notice of his crystallized conversion rights, and his A Shares were never converted into common shares, despite his requests for conversion at Board meetings, in emails, and otherwise.
14. Similarly, the respondent’s B Shares were never converted into common shares, notwithstanding that, based on the approved 2007 financial statements, the respondent’s B Shares were convertible into 223,227 common shares.
15. As a result of the Private Placement, the respondent’s proportion of common shares, and the value thereof, were significantly reduced. Consequently, the value of the respondent’s A and B Shares — convertible as they were into common shares — was also greatly reduced. This prompted the respondent to file an application for oppression under s. 241 of the *CBCA* against four of the Corporation’s directors, including the two members of the audit committee: the appellant and Dr. Black.
16. Judicial History
	1. Quebec Superior Court, 2014 QCCS 180
17. At trial, the respondent alleged seven specific acts of oppression against the four defendant directors. The Corporation was joined as an impleaded party. Hamilton J. addressed all seven of the respondent’s allegations using the framework laid out by this Court in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 (“*BCE*”). He found that the respondent had a reasonable expectation that his A and B Shares would be converted if they met the applicable financial tests laid out in the Corporation’s articles and that the Board would consider his rights as an A and B shareholder in any transaction impacting the A and B Shares. He concluded that two of the four defendants, the appellant and Dr. Black, were personally liable for the Board’s refusal to convert the respondent’s A and B Shares into common stock and the failure to ensure that the respondent’s rights as an A and B shareholder were not prejudiced by the Private Placement.
18. Hamilton J. adopted the test for a director’s personal liability in an oppression case from *Budd*. Applying *Budd*, he held that it was “fit” to order the appellant personally to pay damages to the respondent because (1) along with Dr. Black, the appellant had personally benefitted from the Private Placement and the dilution of the respondent’s shares, and (2) the appellant alone had benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the conversion test had been met (para. 167 (CanLII)).
19. In the result, Hamilton J. held the appellant and Dr. Black solidarily liable for the oppression and ordered them to pay the respondent compensation in the amount of $648,310.
	1. Quebec Court of Appeal, 2015 QCCA 1350, 53 B.L.R. (5th) 43
20. On appeal, Mr. Wilson and Dr. Black argued, among other things, that the trial judge had erred by holding them personally liable on the basis of the lead roles they had played in the oppression, especially in the discussion at the Board level, and that the trial judge had violated the *audi alteram partem* rule by relying on facts that had not been alleged and arguments that had not been raised (para. 30).
21. The Court of Appeal rejected both of these grounds and dismissed the appeal.
22. On its review of the facts, the Court of Appeal held that the imposition of personal liability was justified, noting that both Mr. Wilson and Dr. Black must have known that Mr. Alharayeri’s A Share conversion rights had crystallized because of their positions on the audit committee (para. 41). As the only audit committee members, Mr. Wilson and Dr. Black wielded significant influence over the conversion decision and used this influence to advocate against conversion of Mr. Alharayeri’s shares while also advocating for the Private Placement (paras. 43-47). Further, Mr. Wilson admitted at trial that the issue concerning Mr. Alharayeri had “disappeared because he was no longer a shareholder in a position to block and be a big influence on all of the stuff that the company was doing” (para. 47). In light of these facts, the Court of Appeal held that the trial judge’s conclusions — that Mr. Wilson and Dr. Black had played a lead role in the oppression and that the circumstances justified the imposition of personal liability — contained no errors warranting their reversal (paras. 33 and 48).
23. Regarding the *audi alteram partem* issue, the Court of Appeal held that the pleadings did not preclude the trial judge’s imposition of personal liability. In doing so, it reasoned that the matter of the appellant’s personal advantage could not have surprised him, because multiple pleadings — including amended versions of the Motion to Institute Proceedings, the parties’ Joint Declaration That a File Is Complete, and the Defence and Amended Defence — had specifically identified this to be at issue. The Court of Appeal also distinguished *Budd* — in which the pleadings were held to disclose no reasonable cause of action and the plaintiff’s claim was against, *inter alia*, 30 directors, 9 officers, and 5 portfolio companies — as involving a different situation altogether. The Court of Appeal therefore refused to give effect to this ground of appeal, before going on to uphold the trial judge’s decision.
24. Issues
25. The trial judge’s conclusions regarding the oppressive conduct are not at issue before this Court. Rather, Mr. Wilson challenges the conclusion that it is “fit” to hold him personally liable for that oppressive conduct. In particular, this appeal raises two issues relating to the imposition of personal liability in an oppression action:
	* + 1. When may personal liability for oppression be imposed on corporate directors?
			2. Were the pleadings sufficient to ground the imposition of personal liability in this case?
26. Analysis
	1. When May Personal Liability for Oppression Be Imposed on Corporate Directors?
27. It is helpful to begin by situating the analysis within the context of an oppression action under the *CBCA*. Sections 241(1) and 241(2) of the *CBCA* provide:

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

. . .

**(2)** If, on an application under subsection (1), the 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,

**(b)** the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

**(c)** the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

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

1. The nature of the oppression remedy is well recognized in our jurisprudence. Section 241 creates an equitable remedy that “seeks to ensure fairness — what is ‘just and equitable’” (*BCE*, at para. 58). It gives “a court broad, equitable jurisdiction to enforce not just what is legal but what is fair” (*ibid.*).Courts considering claims for oppression are therefore instructed to engage in fact-specific, contextual inquiries looking at “business realities, not merely narrow legalities” (*ibid.*).
2. The two requirements of an oppression claim are equally well known. First, the complainant must “identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held” (*BCE*, at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of “any security holder, creditor, director or officer,” pursuant to s. 241(2). As stated above, the presence of these two elements is not at issue in this appeal.
3. What is at issue is whether the trial judge appropriately exercised the remedial powers provided in s. 241(3) by holding Mr. Wilson personally liable for the oppression. Section 241(3) reads as follows:

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

* + **(a)** an order restraining the conduct complained of;
	+ **(b)** an order appointing a receiver or receiver-manager;
	+ **(c)** an order to regulate a corporation’s affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
	+ **(d)** an order directing an issue or exchange of securities;
	+ **(e)** an order appointing directors in place of or in addition to all or any of the directors then in office;
	+ **(f)** an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
	+ **(g)** an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;
	+ **(h)** an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
	+ **(i)** an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
	+ **(j)** an order compensating an aggrieved person;
	+ **(k)** an order directing rectification of the registers or other records of a corporation under section 243;
	+ **(l)** an order liquidating and dissolving the corporation;
	+ **(m)** an order directing an investigation under Part XIX to be made; and

**(n)** an order requiring the trial of any issue.

1. Section 241(3) thus gives a trial court broad discretion to “make any interim or final order it thinks fit,” before enumerating specific examples of permissible orders. But this discretion is not limitless. It must be exercised within legal bounds, and, as a starting point, it must be exercised within the bounds expressly delineated by the *CBCA*.
2. Any order made under s. 241(3) exists solely to “rectify the matters complained of”, as provided by s. 241(2). The purpose of the oppression remedy is therefore corrective: “. . . in seeking to redress inequities between private parties”, the oppression remedy seeks to “apply a measure of corrective justice” (J. G. MacIntosh, “The Retrospectivity of the Oppression Remedy” (1987), 13 *Can. Bus. L.J.* 219, at p. 225; see also *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.) (“*Naneff*”); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. C.J. (Gen. Div.)) (“*Ballard*”), at p. 197). In other words, an order made under s. 241(3) should go no further than necessary to correct the injustice or unfairness between the parties.
3. However, where, as in this case, the trial judge has determined that a monetary order is fit, applying the principle that the oppression remedy is corrective tells us only about the proper extent of a party’s liability. It does not help us decide whether the monetary order should have been made against the corporation or the director personally.
4. Some of the examples enumerated in s. 241(3) show that the oppression remedy contemplates liability not only for the corporation, but also for other parties. For instance, ss. 241(3)(f) and 241(3)(g) allow for orders against “any . . . person,” requiring them to purchase securities, or pay to the security holder monies paid by him for securities, respectively. Section 241(3)(j) considers an “order compensating an aggrieved person”, but does not identify against whom such an order may lie. The *CBCA*’s wording goes no further to specify when it is fit to hold directors personally liable under this section. We must therefore turn to the case law for illustrations.
	* 1. *Budd v. Gentra Inc.*
5. In *Budd*, Doherty J.A. considered the personal liability of directors under the oppression remedy. Doherty J.A. rejected the proposition that common law principles as to when directors will bear personal liability applied equally in an oppression case (*Budd*,at paras. 31, 34-36 and 40). In particular, he rejected the view that a director’s conduct must reveal a separate identity or interest from that of the corporation by falling outside the normal scope of his or her duties in order to attract personal liability (paras. 26, 32 and 35-36). In doing so, Doherty J.A. held that

[a] director or officer may be personally liable for a monetary order . . . if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties. [Emphasis added; para. 46.]

1. Two requirements emerge from this passage. The first is that the director or officer must be implicated in the oppressive conduct. In other words, the oppressive conduct must be attributable to the individual director because of his or her action or inaction. The second is that the order must be fit in all of the circumstances. These two criteria comprise the *Budd* “test”.
2. However, *Budd* also featured a survey of the case law illustrating when personal orders against directors may be appropriate. In an oft-cited passage, author Markus Koehnen suggests that this survey revealed five situations in which personal orders against directors might be appropriate:
	* + 1. Where directors obtain a personal benefit from their conduct.

* + - 1. Where directors have increased their control of the corporation by the oppressive conduct.
			2. Where directors have breached a personal duty they have as directors.
			3. Where directors have misused a corporate power.
			4. Where a remedy against the corporation would prejudice other security holders. [Footnotes omitted.]

(M. Koehnen, *Oppression and Related Remedies* (2004), at p. 201)

1. According to Koehnen, *Budd* may have also referred to a sixth category of cases: those “involving closely held corporations where a director or officer has virtually total control over the corporation” (p. 202; *Budd*, at para. 44).
2. *Budd* has since been applied and endorsed by courts across the country (see, e.g., *Estate of John Wood v.* *Arius3D Corp*., 2014 ONSC 3322 (“*Wood Estate*”), at paras. 133-34 (CanLII); *GC Capital Inc. v.* *Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1, at para. 41; *Moon v.* *Golden Bear Mining Ltd*., 2012 BCSC 829 (‘‘*Moon*’’), at para. 315 (CanLII); *Belliveau v. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87, at para. 85; *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467 (S.C.J. (Div. Ct.)), at para. 54; *Cox v. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1, at para. 158; *Danylchuk v. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2, at para. 59).
3. However, courts have also diverged in their understanding of the case law examples identified in *Budd*. Some courts appear to treat the examples as discrete categories in which a personal order may be appropriate or as factors to be considered in fashioning a remedy (see, e.g., *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp.*, 2008 MBQB 296, 244 Man. R. (2d) 127, at para. 46; *Moon*,at para. 315). Others appear to treat either the “personal benefit” category or the “closely held” category, or both, as giving rise to necessary conditions for the imposition of personal liability (see, e.g., *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.), at para. 30; *Walls v. Lewis* (2009), 97 O.R. (3d) 16 (S.C.J.), at para. 48; *Waiser v. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317 (Ont. S.C.J.), at paras. 57-58). Still others appear not to apply *Budd* at all (see, e.g., *Levenzon (Demetriou) v. Spanos Korres*, 2014 QCCS 258, at para. 69 (CanLII)).
4. It is apparent that Canadian courts are unsettled as to when the guidance in *Budd* should lead to the imposition of personal liability. Unsurprisingly, then, the jurisprudential debate in this appeal centred on the content of the personal liability “test”. The appellant does not submit that *Budd* was wrongly decided, but rather that it put forth no stringent “test” at all. He urges the Court to adopt necessary criteria governing the imposition of personal liability in every case.
	* 1. The Appellant’s Proposed Criteria
5. According to the appellant, oppressive conduct should be attributable to a director only where the director has control of the corporation and acts in bad faith by using the corporation to advance his or her own personal interest, or where the corporation functions as the director’s alter ego. Overall, the appellant says, “the oppressive conduct must take on the character of personal conduct of the director” (emphasis deleted). On this theory, the trial judge would have erred in holding the appellant personally liable because the Corporation had some 50 shareholders, none of whom was independently controlling, so he alone was not “pulling the strings.” The appellant therefore invites the Court to narrow the remedial scope of s. 241(3) by reference to principles traditionally limiting director liability at common law. In my view, this invitation should be declined.
6. In *Budd*, Doherty J.A. warned against “overlaying restrictive common law principles on the broad statutory language of s. 241” (para. 40). The appellant’s proposed reading of the attribution prong of the *Budd* test boils down to integrating the same common law rule rejected in *Budd*:

. . . officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. [Emphasis added.]

(*Budd*, at para. 25, citing *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), at p. 491, leave to appeal refused, [1996] 3 S.C.R. viii.)

1. While this proposition may remain true at common law, s. 241’s remedial purpose lies in applying general standards of commercial fairness given that the sometimes “clumsy tools” of the common law failed to promote such standards (Koehnen, at p. 2). Realizing this purpose may require imposing personal liability on a director where the director is not a controlling shareholder but is nevertheless implicated in the oppression. For example, where otherwise fit, it may be open to a court to impose liability on a director who strongly advocates for an oppressive decision motivated by a personal gain unique to that director, despite lacking control. But adopting the appellant’s proposed control criterion would preclude this.
2. Additionally, adopting this criterion would effectively give the directors of public companies (including small public companies and new ventures) an additional layer of protection against liability unavailable to the directors of private companies. However, neither the *CBCA* nor the case law support such a distinction. To the extent that some cases emphasize control, they do so not to provide “a more lax standard for public company directors”, but rather to recognize “that personal benefit and increased personal control” — two hallmarks of conduct attracting personal liability — “are more likely to arise in private companies than in public companies” (Koehnen, at p. 202). Therefore, although the presence or absence of control may be considered as a factor in determining whether it is fit to impose personal liability, it is not a necessary criterion for personal liability.
3. Further, while a director’s bad faith may militate strongly in favour of holding him or her personally liable, bad faith is not a necessary condition to imposing personal liability. Conduct may run afoul of s. 241 even when it is driven by lesser states of mental culpability:

“Oppression” carries the sense of conduct that is coercive and abusive, and suggests bad faith.  “Unfair prejudice” may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, “unfair disregard” of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders’ reasonable expectations . . . .

(*BCE*, at para. 67)

1. As Gascon J. (as he then was) recognized, the oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor:

In oppression matters, it is the effect of the acts and omissions of directors and officers of a company, rather than their intentions, that determines whether the conduct complained of is unfairly prejudicial.  The rights conferred by Section 241 *CBCA* turn on effect, not intent.  What is important is the result. Effect is key.

(*Segal v. Blatt*, 2007 QCCS 1488, at para. 43 (CanLII), aff’d 2008 QCCA 1094, at paras. 16-17 (CanLII); see also *Wood Estate*,at para. 127, per D. M. Brown J. (as he then was).)

1. Emphasizing the motivation of the defendant director, to the exclusion of other considerations, would inappropriately shift the focus of the analysis away from the effects of the oppression, and the director’s role therein. Courts have accordingly recognized the possibility of director liability for oppression in the absence of bad faith conduct (*Downtown Eatery (1993) Ltd. v.* *Ontario* (2001), 54 O.R. (3d) 161 (C.A.), at paras. 55-57; *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (C.A.) (“*Sidaplex*”)). However, while bad faith is not a necessary condition, it is an important consideration. A director who acts out of malice or with an eye to personal benefit is more likely to attract personal liability than one who acts in good faith.
2. The appellant also submits that a personal order against a director can be “fit” only where the director has obtained a personal benefit at the expense of the oppressed party and where there is a direct connection between the impugned conduct and that benefit. On this view, a personal order against the appellant was inappropriate because there was no correlation between the Board’s failure to convert the A and B Shares and the benefits accruing to the appellant in the form of increased control of the Corporation and the expedited conversion of his C Shares.
3. In my view, this argument is unavailing. As explained above, the oppression remedy exists to rectify harm to the complainant. It is not a gain-based remedy. Gain-based remedies “are, in any context, a striking form of redress insofar as they represent a departure from the norm of loss-based or compensatory relief” (P. B. Miller, “Justifying Fiduciary Remedies” (2013), 63 *U.T.L.J.* 570, at pp. 570-71). Treating a personal benefit as a necessary condition to a director’s personal liability inappropriately emphasizes the gain to the director, at the expense of considering the oppressive conduct leading to the complainant’s loss. For example, oppressive conduct that does not yield a personal benefit may trigger personal liability where the director acts in bad faith or in a Machiavellian fashion (for instance, where the director seeks to punish a shareholder for interpersonal reasons regardless of whether that punishment brings the director any personal benefit). But treating a personal benefit as a necessary condition would preclude personal liability in such a case, where it may otherwise be a fit and fair remedy. Further, demanding a strict correlation between the complainant’s loss and the director’s benefit would imbue an otherwise discretionary, equitable remedy that looks to commercial realities with a legal formalism inimical to its remedial purpose.
4. Like the appellant’s tendered criteria of control and bad faith, personal benefit should not be treated as a necessary criterion for personal liability. That said, an archetypal case of personal liability will often feature a personal benefit. And courts have regularly looked — and should continue to look — to the presence or absence of a personal benefit in determining whether an order may properly lie against a director personally.
	* 1. The Principles Governing Orders Under Section 241(3) and the Application of the Personal Liability Test Going Forward
5. To reiterate, *Budd* provides for a two-pronged approach to personal liability. The first prong requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression (see *Budd*, at para. 47). In other words, the director must have exercised — or failed to have exercised — his or her powers so as to effect the oppressive conduct (*Sidaplex*, at p. 567; see also *Budd*, at paras. 41-44, citing *Gottlieb v. Adam* (1994), 21 O.R. (3d) 248 (Gen. Div.), at pp. 260-61).
6. But this first requirement alone is an inadequate basis for holding a director personally liable. The second prong therefore requires that the imposition of personal liability be fit in all the circumstances. Fitness is necessarily an amorphous concept. But the case law has distilled at least four general principles that should guide courts in fashioning a fit order under s. 241(3). The question of director liability cannot be considered in isolation from these general principles.
7. First, “the oppression remedy request must in itself be a fair way of dealing with the situation” (*Ballard*, at para. 142). The five situations identified by Koehnen relating to director liability are best understood as providing indicia of fairness. Where directors have derived a personal benefit, in the form of either an immediate financial advantage or increased control of the corporation, a personal order will tend to be a fair one. Similarly, where directors have breached a personal duty they owe as directors or misused a corporate power, it may be fair to impose personal liability. Where a remedy against the corporation would unduly prejudice other security holders, this too may militate in favour of personal liability (see Koehnen, at p. 201).
8. To be clear, this is not a closed list of factors or a set of criteria to be slavishly applied. And as explained above, neither a personal benefit nor bad faith is a necessary condition in the personal liability equation. The appropriateness of an order under s. 241(3) turns on equitable considerations, and in the context of an oppression claim, “[i]t would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise” (*Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (“*Ebrahimi*”), at p. 379). But personal benefit and bad faith remain hallmarks of conduct properly attracting personal liability, and although the possibility of personal liability in the absence of both of these elements is not foreclosed, one of them will typically be present in cases in which it is fair and fit to hold a director personally liable for oppressive corporate conduct. With respect to these two elements, four potential scenarios can arise:
	* 1. The director acted in bad faith and obtained a personal benefit;
		2. The director acted in bad faith but did not obtain a personal benefit;
		3. The director acted in good faith and obtained a personal benefit; and
		4. The director acted in good faith and did not obtain a personal benefit.
9. In general, the first and fourth scenarios will tend to be clear-cut. If the director has acted in bad faith and obtained a personal benefit, it is likely fit to hold the director personally liable for the oppression. On the other hand, where neither element is present, personal liability will generally be less fitting. The less obvious cases will tend to lie in the middle. In all cases, the trial judge must determine whether it is fair to hold the director personally liable, having regard to all the circumstances. Bad faith and personal benefit are but two factors that relate to certain circumstances within a larger factual matrix. They do not operate to the exclusion of other considerations. And they should not overwhelm the analysis.
10. Further, even where it is appropriate to impose personal liability, this does not necessarily lead to a binary choice between the directors and the corporation. Fairness requires that, where “relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe” (*Ballard*, at para. 140). Where there is a personal benefit but no finding of bad faith, fairness may require an order to be fashioned by considering the amount of the personal benefit. In some cases, fairness may entail allocating responsibility partially to the corporation and partially to directors personally. For example, in *Wood Estate*, a shareholder made a short-term loan to the corporation with the reasonable expectation that it would be repaid from the proceeds of a specific transaction. Those proceeds were instead applied to corporate purposes, as well as to repayment of the loans made to the corporation by the defendant directors and officer and by another shareholder. D. M. Brown J. held the defendant directors and officer liable for the amounts used to repay their own loans and the shareholder loan, and also ordered the corporation to pay an equal amount towards the balance of the loan. As this last example shows, the fairness principle is ultimately unamenable to formulaic exposition and must be assessed on a case-by-case basis having regard to all of the circumstances.
11. Second, as explained above, any order made under s. 241(3) should go no further than necessary to rectify the oppression (*Naneff*, at para. 32; *Ballard*, at para. 140; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (C.A.) (“*Themadel*”), at p. 754). This follows from s. 241’s remedial purpose insofar as it aims to correct the injustice between the parties.
12. Third, any order made under s. 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders (*Naneff*, at para. 27; *Smith v. Ritchie*,2009 ABCA 373, at para. 20 (CanLII)). The oppression remedy recognizes that, behind a corporation, there are individuals with “rights, expectations and obligations inter se which are not necessarily submerged in the company structure” (*Ebrahimi*, at p. 379; see also *BCE*, at para. 60). But it protects only those expectations derived from an individual’s status as a security holder, creditor, director or officer. Accordingly, remedial orders under s. 241(3) may respond only to those expectations. They may not vindicate expectations arising merely by virtue of a familial or other personal relationship. And they may not serve a purely tactical purpose. In particular, a complainant should not be permitted to jump the creditors’ queue by seeking relief against a director personally. The scent of tactics may therefore be considered in determining whether or not it is appropriate to impose personal liability on a director under s. 241(3). Overall, the third principle requires that an order under s. 241(3) remain rooted in, informed by, and responsive to the reasonable expectations of the corporate stakeholder.
13. Fourth — and finally — a court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). As Farley J. put it, statutory oppression “can be a help; it can’t be the total law with everything else ignored or completely secondary” (*Ballard*, at para. 124). This means that director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances (see, e.g., *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. S.C.J.)).
14. Under s. 241(3), fashioning a fit remedy is a fact-dependent exercise. When it comes to the oppression remedy, Carthy J.A. put the matter succinctly:

The point at which relief is justified and the extent of relief are both so dependent upon the facts of the particular case that little guidance can be obtained from comparing one case to another and I would be hesitant to enunciate any more specific principles of approach than have been set out above.

(*Themadel*, at p. 754)

1. The four principles articulated above therefore serve as guideposts informing the flexible and discretionary approach the courts have adopted to orders under s. 241(3) of the *CBCA*. Having surveyed these principles, I turn now to their application in the instant case.
	* 1. Application of the Principles Governing Orders Under Section 241(3) and Director Liability in This Case
2. The trial judge’s decision to hold the appellant personally liable for the oppression does not reflect any errors warranting appellate intervention.
3. As stated above, s. 241 vests the trial court with broad discretion. Appellate courts should therefore adopt a deferential stance when reviewing judgments rendered on oppression applications. Three principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court’s findings of fact (see also *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36 and 90). Second, an appellate court may intervene and substitute its own decision for the trial court’s if the judgment is based on “errors of law . . . erroneous principles or irrelevant considerations” (*Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII)). Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust (*ibid.*).
4. The first prong of the test for personal liability requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression. In this case, the trial judge found that, although each of the four named defendant directors had been involved in the oppressive conduct, it was the appellant and Dr. Black — the only members of the audit committee — who had played “the lead roles” in Board discussions resulting in the non-conversion of the respondent’s A and B Shares (para. 167). In making that finding, the trial judge held that Mr. Wilson and Dr. Black were implicated in the oppressive conduct. It was therefore open to the trial judge to determine that the oppression was properly attributable to these two defendants.
5. As explained above, attribution alone is insufficient to ground a director’s personal liability. It follows that merely adopting a “lead role” at Board meetings, without something more, can never suffice to ground a director’s personal liability. Here, however, that “something more” consisted of the factors properly considered at the second prong of the personal liability inquiry.
6. The second prong requires that the imposition of personal liability be fit in all the circumstances. In this case, the trial judge found that, in addition to the “lead role” he had played, Mr. Wilson had accrued a personal benefit as a result of the oppressive conduct:

. . . although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of [the respondent’s] A and B Shares.  Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is “fit” to order the Defendants Black and Wilson personally to pay the damages to [the respondent]. [para. 167]

1. Notably, the Board accelerated the conversion of the appellant’s C Shares into common shares (but not the C Shares held by others) to allow him to participate in the Private Placement, despite issues as to whether the test for conversion had been met. This benefitted him by increasing his control over the Corporation, to the detriment of the respondent, whose own stake in the company was diluted due to his inability to participate in the Private Placement — a consequence of the oppressive conduct.
2. Nothing about this line of reasoning reflects an incorrect invocation of principle or improper consideration on the part of the trial judge. The trial judge was entitled to consider that the appellant played a “lead role” in advocating for the oppressive conduct and that he ultimately increased his control over the Corporation as a result.
3. Additionally, the remedy went no further than necessary to rectify the respondent’s loss. After adjusting for exchange rates, the trial judge found that the value of the common shares had been Can$0.53 per share prior to the Private Placement. He also found that, but for the oppressive conduct, the respondent’s A and B Shares would have been converted into 1,223,227 common shares. This put the respondent’s loss at $648,310 — the extent of the appellant’s and Dr. Black’s personal liability.
4. Finally, the remedy was appropriately fashioned to vindicate the respondent’s reasonable expectations as a Series A and B shareholder. The respondent reasonably expected that his A and B Shares would be converted if the Corporation met the applicable financial tests laid out in the Corporation’s articles and that the Board would consider his rights as a Series A and B shareholder in any transaction impacting the A and B Shares. The appellant concedes that the Board’s failure to meet these expectations amounted to oppression. Given the absence of any palpable and overriding errors in the trial judge’s calculation, the amount of $648,310 represents the value that would have accrued to the respondent had his reasonable expectations been respected.
5. Accordingly, the trial judge’s order against the appellant represents a fair way of rectifying the oppression that goes no further than necessary to vindicate the respondent’s reasonable expectations. In my view, it should be permitted to stand.
	1. Were the Pleadings Sufficient to Ground the Imposition of Personal Liability in This Case?
6. The appellant further submits that the respondent’s pleadings were inadequate to ground the imposition of personal liability, consequently depriving the appellant of his basic right to know the case against him. This argument may be addressed summarily.
7. First, the respondent’s pleadings named four individual directors, including the appellant, as defendants. As the Court of Appeal recognized, the respondent specifically alleged that these four defendants “acted in their own personal interest” and “to the detriment of Wi2Wi and its shareholder in focusing mainly on their personal financial gains” (paras. 51-52). In turn, the defendants specifically denied these allegations in their Defence dated January 25, 2011, pleading that “[t]he business decisions at issue were i) made by the Defendants in good faith, ii) not motivated by self-interest, iii) based on informed judgment and on the honest belief that each action was taken in the best interest of Wi2Wi” (A.R., vol. II, at p. 34). I agree with the Court of Appeal that “[i]n such conditions, it may be difficult to argue that the matter of the appellants’ personal interest (or the advantage they derived) came as a surprise to them” (para. 52).
8. Second, in his initial Motion to Institute Proceedings, the respondent specifically sought damages against the four named defendants — not the Corporation — under s. 241(3)(j) of the *CBCA*. Coupled with the fact that the pleadings made specific allegations against the defendant directors, this alone sufficed to put the appellant on notice that his own personal liability was engaged.
9. Third, the main authorities invoked by the appellant on this point, namely *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) (“*Rodaro*”), and *Budd*, are distinguishable. In *Rodaro*, the trial judge relied on a theory of liability that had been neither pleaded nor argued by either party over the course of a 92-day trial (paras. 59-63). In *Budd*, the complainant’s claim targeted more than forty defendants, including thirty directors, nine officers and five portfolio companies, an accounting firm and Gentra. As a result, Doherty J.A. found that the claims against the individual directors amounted to an abuse of process:

I am left with the uneasy impression that the claim against the directors and officers personally is included in the appellant’s statement of claim for purposes other than to ultimately establish their personal liability. If this impression is correct, those claims are properly characterized as an abuse of process. [para. 50]

1. The pleadings here, albeit sparse, specifically alleged that all four defendants had acted in their personal interest to the detriment of the plaintiff. This is worlds apart from both *Rodaro* and *Budd*.
2. Finally, a right of appeal is not a backstop for procedural choices made prior to trial. In this case, the more appropriate response to the respondent’s bare pleadings lay in a motion for particulars or discovery prior to trial, not in a plea before the appellate courts.
3. Conclusion
4. For these reasons, I would dismiss the appeal, with costs.

 *Appeal dismissed with costs.*

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