COURT OF APPEAL OF YUKON

Citation: *Cheng v. Glencore plc*, 2025 YKCA 8

Date: 20250609
Docket: 24-YU921

Between:

Libei Cheng

Appellant
(Plaintiff)

And

Glencore plc (in its own capacity and as successor by merger to Katanga Mining Limited), Hugh Stoyell and Robert Wardell

Respondents
(Defendants)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Alibhai

On appeal from: An order of the Supreme Court of Yukon, dated June 7, 2024 (*Cheng v. Glencore plc*, 2024 YKSC 27, Whitehorse Docket 20-A0119).

Counsel for the Appellant:	P.J. Bates S. Nematollahi
Counsel for the Respondent, Glencore plc (in its own capacity and as successor by merger to Katanga Mining Limited):	M.A. Feder, K.C. P.D.H. Williams
Counsel for the Respondents, Hugh Stoyell and Robert Wardell:	J.N. Blinick
Place and Date of Hearing:	Whitehorse, Yukon May 12-13, 2025
Place and Date of Judgment:	Whitehorse, Yukon June 9, 2025

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Alibhai

Summary:

The appellant appeals the dismissal of his action alleging oppression under the Business Corporations Act, R.S.Y. 2002 c. 20 (BCA). The judge determined that the Yukon Supreme Court lacked subject matter jurisdiction because the corporation whose conduct was allegedly oppressive had subsequently discontinued under the BCA and continued in a foreign jurisdiction, and was therefore no longer a corporation as defined in the BCA. The appellant submits this was an error because the corporation remains liable in Yukon for oppressive conduct that occurred before it discontinued.

Held: Appeal dismissed. The appellant's position fails to account for the clear statutory language setting out the effects of discontinuance. When a corporation discontinues under the BCA and continues in another jurisdiction, it ceases to be a corporation within the meaning of the Act. The Yukon Supreme Court does not have subject matter jurisdiction over an oppression claim brought against a body corporate not incorporated or continued under the BCA, or its affiliates or directors.

Reasons for Judgment of the Honourable Madam Justice Fisher:

Overview

[1] The singular issue in this appeal is whether the Supreme Court of Yukon (the Yukon Court) has subject matter jurisdiction to hear an application for an oppression remedy under s. 243 of the *Business Corporations Act*, R.S.Y. 2002, c. 20 (the *BCA* or the *Act*) in respect of conduct committed by a corporation that is subsequently discontinued under the *Act*.

[2] The appellant, Libei Cheng, representing the minority shareholders of a company known as Katanga Mining Limited (Katanga), brought an action against the respondents, Glencore plc, Hugh Stoyell and Robert Wardell alleging oppression by Katanga under s. 243 of the *BCA*. The order under appeal was made following applications by the respondents to dismiss the action on several grounds, including a lack of subject matter jurisdiction and territorial jurisdiction over the proceeding, and no viable claim against any of the respondents. The chambers judge dismissed the action on the basis that the Yukon Court did not have subject matter jurisdiction because Katanga was not a corporation as defined in the *BCA*, having been discontinued under the *Act*.

[3] The appellant contends the chambers judge erred in her interpretation of the *BCA*. He says the Yukon Court does not lose subject matter jurisdiction over oppressive conduct that occurs before a corporation discontinues in Yukon and continues in another jurisdiction.

[4] As I will explain, it is my view that the chambers judge made no error in her interpretation of the *BCA* and I would dismiss the appeal.

Background

[5] The appellant was a minority shareholder of Katanga, a mining company incorporated in the Yukon under the *BCA*, which had mining properties and assets in the Democratic Republic of Congo. In November 2019, Katanga carried out a Rights Offering Transaction, and Glencore International AG, which was at the time

Katanga's majority shareholder, acquired 99.5% of Katanga's shares. In June 2020, Katanga was taken private and Glencore International AG acquired the rest of Katanga's shares from the minority shareholders. Katanga was then amalgamated with a numbered Yukon corporation to form a company also called Katanga Mining Limited (New Katanga). Six months later, in December 2020, New Katanga was discontinued out of Yukon under the *BCA* and continued in the Isle of Man, where it is presently incorporated.

[6] The respondent Glencore is a company incorporated in Jersey. It owns all the shares of Glencore International AG, which as noted above holds 100% of the shares of New Katanga. The respondents, Hugh Stoyell and Robert Wardell, were directors of Katanga when the Rights Offering Transaction was carried out. Glencore was sued "in its own capacity" (as an affiliate of Katanga) and "as successor by merger" to Katanga.

[7] The appellant alleged that the Rights Offering Transaction did not comply with the procedures required by Part 5 of Multilateral Instrument 61-101 (Protection of Minority Security Holders in Special Transactions), nor with s. 195 of the *BCA*, which requires a shareholder vote and court approval for specific business arrangements. He pleaded that the arrangement allowed Glencore International AG to acquire Katanga's shares for a substantially lower price than it would otherwise have had to pay and argued that this amounted to oppression. He sought declarations of oppressive conduct by the respondents and vicarious liability of the respondents for the conduct of Katanga, and financial compensation for the minority shareholders.

[8] After the judge granted the respondents' applications and dismissed the action, the appellant requested a reconsideration of her decision, but that request was dismissed. This appeal is from the original order.

The legislation

[9] Before setting out the basis of the decision below and the parties' respective positions, I will briefly outline the provisions of the *BCA* relevant to this appeal, with emphasis added to the most pertinent parts.

[10] The *BCA*, in s. 1, defines "corporation" as:

> … a body corporate incorporated or continued under this Act and not discontinued under this Act…

[11] Under s. 5(1), the *BCA* applies to "every corporation and Yukon company, except if otherwise expressly provided".

[12] Section 183 permits two or more corporations to "amalgamate and continue as one corporation". The effect of amalgamation is set out in s. 188:

> On the date shown in a certificate of amalgamation:
>
> (a) the amalgamation of the amalgamating bodies corporate and their continuance as one corporation becomes effective;
>
> (b) the property of each amalgamating body corporate continues to be the property of the amalgamated corporation;
>
> (c) the amalgamated corporation continues to be liable for the obligations of each amalgamating body corporate;
>
> (d) an existing cause of action, claim or liability to prosecution is unaffected;
>
> (e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating body corporate may be continued to be prosecuted by or against the amalgamated corporation;
>
> (f) a conviction against, or ruling, order or judgement in favour of or against, an amalgamating body corporate may be enforced by or against the amalgamated corporation; and
>
> (g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.

[13] Section 191 addresses continuances of Yukon corporations into other jurisdictions:

> (1) Subject to subsection (9), a corporation may, if it is authorized by the shareholders in accordance with this section, apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction.
>
> (2) A notice of a meeting of shareholders complying with section 136 shall be sent in accordance with that section to each shareholder and shall state that a dissenting shareholder is entitled to be paid the fair value of their

shares in accordance with section 193, but failure to make that statement does not invalidate a discontinuance under this Act.

(3) Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote.

(4) An application for continuance becomes authorized when the shareholders voting on it have approved of the continuance by a special resolution.

…

(5.1) After a continuance has been authorized by the shareholders and before applying to the appropriate official or public body of the other jurisdiction, the corporation shall file with the registrar

(a) an application for authorization to continue in the prescribed form; and

(b) reasonable proof that the laws of the other jurisdiction authorize the continuance and comply with the conditions set out in subsection (9).

…

(6) The continued body corporate shall immediately send to the registrar a certified copy of any certificate of continuance or comparable record issued under the laws of the other jurisdiction to effect or confirm the continuance and the registrar shall file it and issue a certificate of discontinuance.

…

(8) On the date shown in the certificate of discontinuance, the corporation becomes an extraterritorial body corporate as if it had been incorporated under the laws of the other jurisdiction.

(9) A corporation shall not be continued as a body corporate under the laws of another jurisdiction unless those laws provide in effect that

a) the property of the corporation continues to be the property of the body corporate;

(b) the body corporate continues to be liable for the obligations of the corporation;

(c) an existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the corporation may be continued to be prosecuted by or against the body corporate; and

(e) a conviction against, or ruling, order or judgment in favour of or against the corporation may be enforced by or against the body corporate.

[14] Section 243 provides for the oppression remedy:

> (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 of 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 the complainant or of any registered holder or beneficial owner, or any former registered holder or beneficial owner, of a share of the corporation, 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;
>
> (b) an order appointing a receiver or receiver manager;
>
> (c) an order to regulate a corporation's affairs by amending the articles or bylaws;
>
> (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;
>
> (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) [Repealed S.Y. 2010, c.8, s.155]
>
> (p) an order requiring the trial of any issue;
>
> (q) an order granting leave to the applicant to bring or intervene in an action described in subsection 241(1).

The decision below (2024 YKSC 27)

[15] The chambers judge considered the central question to be decided was whether the Yukon Court was the proper forum for the dispute i.e., whether the Court had subject matter and territorial jurisdiction. Integral to this determination was the nature of the dispute, a matter of disagreement between the parties.

[16] The appellant submitted that the oppression claim is a statutory tort. In rejecting this submission, the judge concluded that the oppression remedy involves concepts and principles distinct from tort and "draws its genesis from equity":

> [24] … Thus, the court's approach and remedies in oppression remedy cases is different than in tort cases. As in equity, when applying the oppression remedy, the court has the authority to do what is fair and is not confined to doing only what is legal. In addition, in determining whether oppression has occurred the court considers "company realities" and not "narrow legalities" (*Mennillo v Intramodal inc,* 2016 SCC 51 at para. 8).

[17] She considered the onus of proving oppression specific to this remedy, as applicants must identify their expectations, show they were reasonably held and how they were violated by corporate conduct, citing *Wilson v. Alharayeri*, 2017 SCC 39 [*Wilson*] at para. 24. The judge also referred to *Ford Motor Company of Canada Ltd. v. Ontario Municipal Employees Retirement Board* (2006)*,* 263 D.L.R. (4th) 450 (O.N.C.A.) at para. 111, which noted that the oppression remedy should not be placed into the mould of the "formal construct of causes of action" as Parliament

could not have intended to include the complexities of the common law in the oppression remedy. Moreover, she found nothing in the *BCA* to suggest that the oppression remedy should be treated as a tort.

[18] The judge went on to conclude that the Yukon Court did not have subject matter jurisdiction over the dispute.

[19] She rejected the appellant's submission that the test of "real and substantial connection" between the proceedings and the Yukon Court should be used to determine subject matter jurisdiction. She considered the cases relied on by the appellant, *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 [*Unifund*] and *Sharp v. Authorité des marches financiers*, 2023 SCC 29 [*Sharp*], to address territorial jurisdiction. She also rejected the appellant's submission that because the Rights Offering Transaction occurred when Katanga was incorporated under the *BCA*, the jurisdiction of the Yukon Court to adjudicate claims relating to those events did not terminate when the amalgamated company, New Katanga, discontinued under the *BCA*.

[20] The judge held that the determination of subject matter jurisdiction turned on the interpretation of s. 243 of the *BCA*. The essence of her analysis is set out in her reasons as follows:

> [39] … Section 243 states that, on application by a complainant, the Supreme Court may provide a remedy if it is satisfied that a "corporation or any of its affiliates" acted in an oppressive manner. The question then is what the word "corporation" includes. "Corporation" is a defined term in the *BCA*. It is defined as "a body corporate incorporated or continued under this Act and not discontinued under this Act". A body corporate that is discontinued, in turn, includes a company that was incorporated under the *BCA* but has moved to another jurisdiction.
>
> [40] Thus, under the *BCA* the word "corporation" refers only to companies that are currently incorporated under the legislation. It does not include companies that were previously incorporated under the legislation but have moved to another jurisdiction. As a result, s. 243 applies only to companies presently incorporated under the legislation.
>
> [Emphasis added.]

[21] The judge considered s. 243 and the *BCA* more broadly to support this conclusion. Her view was that under s. 5, the *Act* as a whole applies only to companies currently incorporated under the *BCA* and that it would be unworkable for the Yukon Court to apply the broad powers over the governance of corporations in s. 243 to companies incorporated in other jurisdictions. She noted that s. 191, which governs the process for corporations moving from Yukon to another jurisdiction, draws a clear line between companies currently incorporated under the *BCA* and companies previously incorporated under the *BCA.* She also noted the protections provided for shareholders in s. 191 that include shareholder approval for proposals to discontinue a company from Yukon and continue elsewhere, and a requirement under s. 191(9)(c) for the company to demonstrate that the law of the other jurisdiction provides that an existing cause of action, claim or liability to prosecution remains unaffected. She considered this to provide a response to the appellant's concern about companies evading oppression remedies by leaving the jurisdiction and incorporating elsewhere. She did not interpret s. 191(9)(c) to protect the appellant because he did not commence his action until after New Katanga had been discontinued under the *BCA* and continued in the Isle of Man.

[22] In the result, the judge held that a claim in oppression could not be brought against Glencore or any of the other corporations implicated by the litigation, as none of these corporations were currently incorporated under the *BCA*. She therefore concluded that the Yukon Court did not have subject matter jurisdiction over the dispute and dismissed the appellant's action.

On Appeal

[23] The only issue on appeal is whether the chambers judge erred in concluding that the Yukon Court lacks subject matter jurisdiction in respect of the appellant's oppression claim against the respondents. As this is a question of law, the standard of review is correctness.

The appellant's position

[24] The appellant makes essentially the same arguments on appeal as he did in the court below. He takes particular issue with the judge's conclusion, at para. 48 of her reasons, that the "*BCA's* applicability is clear and narrow" and that s. 243 applies "only to companies that are currently incorporated" under the *BCA*. In support of his position, the appellant makes the following submissions:

a. Katanga—that is, the company pre-amalgamation and pre-discontinuance—is a "corporation" within the meaning of the *BCA* because it was incorporated under the *BCA* and never discontinued. Although New Katanga discontinued under the *BCA* and continued in the Isle of Man, Katanga never did, so it remains a corporation within the meaning of the *BCA*.

b. Section 243, when read together with s. 191(9)(c), preserves the exclusive jurisdiction of the Yukon Court over a claim of oppression that arises before a corporation is discontinued. This interpretation avoids the unintended consequence of a corporate wrongdoer avoiding liability by exiting the jurisdiction once it is already subject to a claim or a cause of action.

c. Based on *698828 Alberta Ltd. v. Elite Homes (1998) Ltd.*, 2020 ABCA 154 [*Elite Homes*], Katanga's status as a corporation must be measured at the time the oppressive conduct occurred, not at the time the claim is brought.

d. Although the appellant acknowledges there is "some debate" whether a common law tort of oppression still exists, he contends his claim is akin to a "statutory tort", or "sounds in tort" because he seeks damages for the respondent's "tortious conduct". He says his cause of action is within the jurisdiction of the Yukon Court as the place where the tort was committed.

e. The Yukon Court's subject matter jurisdiction is also sustained on a consideration of the equitable interests and reasonable expectations of the

parties. He says both the minority shareholders of Katanga and the respondents expected that claims arising from events in November 2019 would be determined in Yukon.

f. The procedural safeguards under s. 191 never applied to the appellant because he was not a shareholder at the time New Katanga was discontinued. He was only a shareholder of Katanga, so he did not receive the notice or voting opportunities accorded to shareholders in New Katanga under s. 191.

[25] The appellant raised the applicability of the principles in *Unifund* and *Sharp* to the jurisdictional question here but did not address the judge's conclusion (with which I agree) that these principles do not apply to subject matter jurisdiction. In this regard, the authorities are clear that a real and substantial connection between the action, the parties and the territory over which the court exercises jurisdiction is relevant to the question of territorial, not subject matter, jurisdiction. I agree with the statement of Justice Strathy (as he then was) in *Gould v. Western Coal Corporation*, 2012 ONSC 5184 that "[t]he fact that a court may have territorial jurisdiction over a particular party in relation to a particular cause of action cannot give it jurisdiction over that party in relation to a subject matter that is outside its jurisdiction": at para. 327. See also *Conor Pacific Group Inc. v. Canada (Attorney General)*, 2011 BCCA 403 at paras. 38, 43.

[26] In his factum, the appellant raised a new, alternative argument that the requirements under s. 191(9)(c) of the *BCA* were not met at the time New Katanga discontinued under the *BCA* and sought an order declaring New Katanga's discontinuance null and void. However, he did not pursue this argument and abandoned it at the hearing of the appeal.

The respondents' position

[27] While Glencore and the individual respondents filed separate factums, they make the same general arguments, and I will set out their joint position drawing on arguments made by both.

[28] The respondents say the timing of the oppressive conduct does not matter because the Yukon Court has no jurisdiction under s. 243 of the *BCA* over companies not incorporated in Yukon. They answer the appellants arguments as follows:

a. The appellant misunderstands or ignores the fundamental legal effects of corporate amalgamation. The provisions of the *BCA* and the caselaw clearly establish that Katanga did not continue to exist as a corporation under the *Act* when it amalgamated with the numbered company into New Katanga. Upon amalgamation, the two companies continued as or "fused" into one company, New Katanga, which owns the property of each amalgamating company and continues to be liable for the obligations of each, including for existing causes of action, claims or liability to prosecution.

b. The timing of the oppressive conduct does not matter. New Katanga discontinued under the *BCA*, which means it is not a corporation within the meaning of the *BCA*. Section 191(8) deems a discontinued corporation "an extraterritorial body corporate" on the date of the certificate of discontinuance "as if it had been incorporated under the law of the other jurisdiction".

c. The principle that oppressive conduct is measured at the time the oppressive conduct occurred does not apply to discontinued corporations. It may apply to dissolved corporations, which, under s. 228 of the *BCA*, continue to be subject to the jurisdiction in which they were originally incorporated even after dissolution.

d. The oppression remedy is not a tort but rather a statutory remedy designed to correct corporate misconduct when reasonable expectations are violated. Nor is oppression a cause of action, but rather a right to apply to the court for a discretionary remedy that includes orders affecting the governance of the corporation. Jurisdiction under s. 243 does not depend on how an applicant wants to remedy allegedly oppressive conduct, such as the appellant's choice in this case to seek only financial compensation.

e. There is no basis to say that the parties expected that claims arising from events in November 2019 would be determined in Yukon after New Katanga was discontinued. The Isle of Man has its own oppression remedy and there is no evidence that the appellant could not pursue his claim in that jurisdiction.

f. Although the appellant did not receive notice of the discontinuance, he had over a year after the allegedly oppressive conduct to bring his oppression application but failed to do so.

[29] The respondents submit that the appellant's interpretation of s. 191(9)(c), as preserving any claims against the continued corporation in the jurisdiction, is inconsistent with the other provisions of the same section. They say these provisions, when read together, can only mean the requirement in s. 191(9)(c) that "an existing cause of action, claim or liability to prosecution is unaffected" refers to the ability to bring such an action, claim, or prosecution in the new jurisdiction, not the old one. They submit that foreign law is presumed to be the same as domestic law in the absence of expert evidence to the contrary, and in any event, they also refer to the provisions of the applicable corporate legislation in the Isle of Man that provide for a facially similar oppression remedy as that in s. 243 of the *BCA*.

[30] In short, the respondents say there must be a Yukon corporation to invoke the oppression remedy under s. 243. Without a Yukon corporation, the Yukon Court lacks subject matter jurisdiction over the former corporation's directors as well as an affiliate company, wherever situate.

Analysis

[31] It is my opinion that the chambers judge was correct in her interpretation of the *BCA*. Section 243 applies only to corporations as defined in the *BCA*, and that definition does not include a corporation that has been discontinued under the *BCA*. Once Katanga amalgamated with the numbered Yukon company, it continued as New Katanga, and once New Katanga discontinued out of Yukon, it continued as a corporation under the laws of its new jurisdiction and was no longer a corporation within the meaning of the *BCA*.

[32] The appellant's position is that his rights to the oppression remedy crystallized at the time of the alleged oppressive conduct, in this case November 2019. What flows from this, he says, is that New Katanga's discontinuance in December 2020 did not affect this "prior cause of action". However, he concedes that a discontinuance under the *BCA* affects a cause of action that arises after the discontinuance. He also concedes that the remedies in s. 243 that regulate the corporation would have to be made by the court in the new jurisdiction. The appellant relies on s. 191(9)(c) to support his contention that the exclusive jurisdiction of the Yukon Court under s. 243 is preserved for existing causes of action.

[33] I cannot accept the appellant's position for the following reasons.

1. Effect of amalgamation

[34] First, the appellant misconceives the effect of amalgamation. The fact that Katanga was never discontinued is irrelevant because it amalgamated into New Katanga under the *BCA*. New Katanga was then the "body corporate incorporated or continued" under the *Act*. It has long been settled law that upon amalgamation, while each constituent company does not cease to exist, each loses its separate existence. Section 183, which allows corporations to "amalgamate and continue as one corporation", means that the original companies are fused into the amalgamated company: *R. v. Black & Decker Manufacturing Co.*, [1975] 1 S.C.R. 411 at 418 [*Black & Decker*]; *Envision Credit Union v. Canada*, 2013 SCC 48 at para. 47; *RC Limited Partner Inc. v. British Columbia*, 2023 BCSC 1010 at para. 43, aff'd 2024 BCCA 86, leave to appeal to the Supreme Court of Canada denied September 26, 2024. In *Black & Decker*, Justice Dickson (as he then was) astutely described the effect of the applicable statute (the equivalent to s. 183 of the *BCA*) at 422:

> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.

[35] As expressly provided in s. 188 of the *BCA*, the property of each amalgamating company "continues" to be the property of the amalgamated corporation, and the amalgamated corporation "continues" to be liable for the obligations of each amalgamating company. In addition, existing causes of action, claims or liabilities to prosecution are unaffected—meaning that all these liabilities become the obligation of the amalgamated corporation. It is therefore not open to the appellant to assert that New Katanga did nothing wrong. If Katanga did something wrong, New Katanga is responsible for that wrong as the amalgamated corporation.

2. The nature of the oppression remedy

[36] Second, the appellant fails to acknowledge the nature of the oppression remedy. Although he concedes there is some debate as to whether a common law tort of oppression still exists, he continues to assert, as he did before the chambers judge, that his claim is akin to a "statutory tort", or "sounds in tort". On this basis, he says the court has jurisdiction because the "tort" was committed in Yukon.

[37] I agree with the chambers judge that oppression is not a statutory tort. Corporate legislation such as the *BCA* has codified (and expanded) the common law oppression action: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 92–94 [*BCE*]; *Jellema v. American Bullion Minerals Ltd*., 2010 BCCA 495 at para. 12. Oppression is an equitable remedy which grants the court broad discretion to remedy unfairness and injustice in favour of the shareholder. As the Supreme Court of Canada held in *BCE,* the oppression remedy seeks to ensure fairness based on what is "just and equitable" and gives a court "broad, equitable jurisdiction to enforce not just what is legal but what is fair": at para. 58. The Court considered "the cornerstone of the oppression remedy" to be the reasonable expectations of affected stakeholders: at para. 61.

[38] I agree with the respondents' description of an oppression claim as a statutory remedy designed to correct corporate misconduct when reasonable expectations are violated. Whether or not it can be described as a "cause of action"

(regardless of the procedural requirements under the Rules of Court), the nature of an application under s. 243 is clearly different from a cause of action in tort, not only because of its underlying equitable principles but also the discretionary remedies available to the Yukon Court to make orders affecting the governance of the corporation.

[39] As for the appellant's assertion that his claim "sounds in tort" because he seeks relief from the respondents' oppressive conduct in the form of monetary compensation, I also agree with the respondents' submission that jurisdiction under s. 243 does not depend on how an applicant chooses to remedy allegedly oppressive conduct. It is noteworthy, in my view, that only one of the orders set out in s. 243(3) of the *BCA* provides for compensation of "an aggrieved person" while almost all the remaining orders affect the governance of the corporation in some way. The primary purpose of s. 243 is to provide the Court with broad powers over the governance of corporations. I agree with the chambers judge that it would be unworkable for the Yukon Court to apply any of these powers over companies incorporated in other jurisdictions.

3. Interpretive principles

[40] Third, and most importantly, the appellant's interpretation of the *BCA* does not accord with the well-known principle of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 [*Rizzo*], citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983). Nor does it accord with the principle that that the legislature does not intend to produce absurd results: *Rizzo* at para. 27.

[41] In my view, the interpretation proposed by the appellant would produce an absurd result by requiring some oppression claims, but not all, to be determined in a corporation's former jurisdiction—i.e., only claims that involve conduct committed while in the former jurisdiction, and only where the claimant does not seek a remedy

that would affect or regulate the governance of the corporation. Section 243 expressly applies to both past and current conduct. It cannot have been the intention of the legislature to ground subject matter jurisdiction over a corporation that has discontinued out of Yukon for an oppression claim based only on past conduct that seeks only monetary compensation.

[42] I do not accept the appellant's suggestion that the judge's interpretation results in a corporation avoiding liability by discontinuing under the *Act* and continuing in another jurisdiction once it is already subject to a claim or a cause of action. No liability is avoided because the continued body corporate continues to be liable for the obligations of the corporation and any existing cause of action or claim can be pursued in the new jurisdiction.

[43] Section 191, which governs the process of a Yukon corporation continuing into another jurisdiction, is contained in Part 14 of the *BCA.* Part 14 imposes specific restraints on how a corporation may implement fundamental changes to corporate structures such as amalgamations and continuances. A corporation seeking to discontinue in Yukon and continue in another jurisdiction must first obtain the authorization of its shareholders. Dissenting shareholders are entitled to be paid the fair value of their shares: s. 191(1)–(4). The corporation must then apply to the registrar of corporations for approval of the continuance by filing "reasonable proof that the laws of the other jurisdiction authorize the continuance and comply with the conditions set out in subsection (9)": s. 191(5.1). Once the continuance in the foreign jurisdiction is confirmed, and the registrar is satisfied that the conditions in subsection (9) are met, the registrar issues a certificate of discontinuance.

[44] Subsection (9) expressly states that the laws of the jurisdiction in which the corporation proposes to continue must provide "in effect" that:

> (a) the property of the corporation continues to be the property of the body corporate;
>
> (b) the body corporate continues to be liable for the obligations of the corporation;
>
> (c) an existing cause of action, claim or liability to prosecution is unaffected;

> (d) a civil, criminal or administrative action or proceeding by or against the corporation may be continued to be prosecuted by or against the body corporate; and
>
> (e) a conviction against, or ruling, order or judgment in favour of or against the corporation may be enforced by or against the body corporate.

[45] The appellant's interpretation of the *BCA* assumes that under s. 191(9)(c) a cause of action is "unaffected" by a continuance only if it does not become subject to the law of the new jurisdiction. This is contrary to both the text and the scheme of s. 191, which permits a corporation to apply for a continuance only if authorized by the shareholders and only if the registrar is satisfied on "reasonable proof" that the laws of the intended jurisdiction provide adequate safeguards for shareholders and creditors. In my opinion, adequate safeguards are protections that are substantially equivalent to those provided in the *BCA*: see, for example, *Canada Business Corporations Act (Re)*, [1991] O.J. No. 714 (C.A.). The same restraints are imposed under s. 189.1 of the *BCA* where a corporation amalgamates with an extraterritorial body corporate into another jurisdiction. Neither of these sections can be interpreted to preserve subject matter jurisdiction over an oppression claim against an extraterritorial body corporate. While the text must be considered in light of the context and object of the *Act*, the text remains "the anchor of the interpretive exercise": *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protections de la jeunesse du CISSS A*, 2024 SCC 43 at para. 24.

[46] I agree with the respondents that an assessment of equivalent protections between the *BCA* and laws of the Isle of Man has already been undertaken in this case by the registrar prior to approving the continuance of New Katanga under s. 191. Before the registrar, and included in the record before this Court, is s. 166 of the Isle of Man *Companies Act 2006*, which provides an oppression remedy that is on its face substantially equivalent to s. 243 of the *BCA*. There is no expert evidence in the record that opines on s. 166 and there is nothing to suggest the Isle of Man oppression remedy does not provide adequate protection for shareholders or is not substantially equivalent to s. 243.

[47] The circumstances here are a long way from those in *Balestreri v. Couture*, [1981] 1 F.C. 321, a decision cited by the appellant. That case involved the continuation of an investigation authorized under the *Canada Corporations Act*, R.S.C. 1970, c. C-32 [*CCA*] after the *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33 [*CBCA*] was enacted. Both statutes remained in force. The corporation being investigated had been incorporated under the *CCA* and continued under the *CBCA*. Despite that, the investigation was permitted to continue under the *CCA* in light of s. 181(6)(c) and (d) of the *CBCA*, which provided, in respect of corporations continuing under the *CBCA,* that an existing cause of action, claim or liability to prosecution would be unaffected and an action or proceeding pending against the body corporate could be continued to be prosecuted. These are the same protections provided in s. 188(c) and (d) of the *BCA* in respect of amalgamating corporations. In both circumstances, the continuing corporation is clearly subject to the jurisdiction of the applicable statute.

[48] In my view, the words in s. 191, when read along with the definition of "corporation" and in the context of the scheme of the *BCA* and its purpose, clearly establish that the *BCA* will no longer apply to a corporation that is approved by the registrar to continue in a foreign jurisdiction. This interpretation is reinforced by s. 191(8), which expressly provides that the corporation, on the date of its certificate of discontinuance, "becomes an extraterritorial body corporate as if it had been incorporated under the laws of the other jurisdiction".

4. Affiliates and directors

[49] In dismissing the appellant's claim for lack of subject matter jurisdiction, the chambers judge did not distinguish the status of the respondents (an extraterritorial corporation and directors of Katanga) from that of the non-party corporation (New Katanga). The appellant did not seek an oppression remedy against New Katanga but only against Glencore as the "successor by merger" or an affiliate of Katanga and against Mr. Stoyall and Mr. Wardell as directors of Katanga at the time of the alleged oppressive conduct. His reasons for not pursuing New Katanga stem from his approach to assessing this dispute as of November 2019, before Katanga

amalgamated and continued as New Katanga, and before New Katanga discontinued in Yukon and continued in the Isle of Man. He says he can obtain relief against a corporation's affiliates and directors without pursuing the corporation itself as this is more "practical" in the circumstances.

[50] In my opinion, the appellant's claim against these respondents is ill conceived in the absence of subject matter jurisdiction over New Katanga. As Glencore submits, an affiliate may be pursued in an oppression claim but it must be affiliated with a Yukon corporation to invoke s. 243 jurisdiction. The same principle applies to Mr. Stoyall and Mr. Wardell. This is because the alleged oppressive conduct of any of these entities must be linked to the claimant's protected interests in a *BCA* corporation: *Chyc v. Concentric*, 2020 ONSC 7820 [*Chyc*] at para. 23, citing *Casurina Ltd. Partnership v. Rio Algom Ltd.* [2002] O.J. No. 3229 (S.C.) at para. 106, aff'd [2004] O.J. No. 177 (C.A). As for the corporation's directors, their liability must, as a threshold requirement, arise from the exercise of (or failure to exercise) powers that effected the oppressive conduct by the corporation: *Wilson* at para. 47.

[51] The appellant relies in part on *Elite Homes* to support his position. In my view, this reliance is misplaced. *Elite Homes* involved a dissolved corporation, not a discontinued corporation. The definition of "corporation" in the *BCA* includes a body corporate incorporated under the *Act* and does not exclude a dissolved corporation as it does a discontinued corporation. Moreover, s. 288(2)(b) expressly provides that an action or proceeding may be brought against a dissolved corporation within two years after its dissolution "as if the corporation had not been dissolved".

[52] In *Elite Homes*, the plaintiff brought an action against the sole director of a dissolved corporation (as well as against the dissolved corporation and numerous affiliated entities) that included an allegation of oppressive conduct under s. 242 of the Alberta *Business Corporations Act*, R.S.A. 2000 c. B-9 (which contains the same definition of "corporation" and similar provisions for dissolved corporations and the oppression remedy as the *BCA*). The trial judge concluded that an oppression claim

against the director was not precluded by the dissolution of the corporation prior to the commencement of the action and rejected the proposition that corporate liability must be found before personal liability may be imposed on the corporation's director. In upholding this conclusion, the Court of Appeal noted that the oppression remedy would be defeated if a controlling director of a corporation could avoid potential personal damages for oppressive conduct through the dissolution of the company at any time before being sued, and found that nothing in s. 242 required a successful oppression claim against a corporation to be a precondition to finding oppressive conduct by its director.

[53] In that context, the concern about avoiding liability is a real one. The Alberta courts considered the status of the dissolved corporation at the time of the oppressive conduct because the entity had no status once it was dissolved. As discussed above, there is no equivalent avoidance of liability for a corporation that has been continued in another jurisdiction.

[54] I appreciate that the appellant did not have the benefit of the procedural safeguards in s. 191 of the *BCA* because New Katanga's application for a continuance occurred after the appellant had been divested of his shares. However, the appellant's complaint was not that New Katanga was permitted to discontinue in Yukon, but rather that the Rights Offering Transaction in 2019 was the result of oppressive conduct. Had he commenced an oppression claim at any time before December 2020, when the discontinuance in Yukon was effected, things may have turned out differently. As the judge noted, New Katanga would at least have had notice of his claim within the s. 191 approval process. In any event, there is nothing in the record to suggest any impediment to the appellant bringing his oppression claim in the Isle of Man.

[55] It is undisputed that the jurisdiction to adjudicate an oppression claim under s. 243 of the *BCA* can only be exercised by the Yukon Court. This is the case with the equivalent corporation statutes across Canada and in other jurisdictions: see *Gould* at paras. 326–339 and the cases cited therein; *Ghorbankarimi v. Bergeron*,

2020 ONSC 6864 at paras. 34–35 (which involved a discontinued corporation). Where oppression claims have been struck for lack of subject matter jurisdiction, they have been struck not only as against the corporation but also as against affiliates and individual directors: *Gould* at paras. 319, 339; *Chyc* at paras. 25, 27.

Conclusion

[56] For these reasons, it is my opinion that the chambers judge did not err in concluding that the Yukon Court lacks subject matter jurisdiction over the appellant's oppression claim.

[57] I would therefore dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Alibhai"