SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-032333-086

DATE: September 10, 2009

IN THE PRESENCE OF: THE HONOURABLE ROBERT MONGEON, J.S.C.

PAUL HEEG
-and-
PAUL B. HEEG HOLDINGS INC.
Plaintiffs
v.
HITECH PIPING (HTP) LTD
-and-
LES INVESTISSEMENTS ISAFRAN LTÉE
-and-
MAURICE LALONDE
-and-
LES INVESTISSEMENTS LAMBERT & TREMBLAY LTÉE
-and-
JEAN TREMBLAY
-and-
STEFANO DIFLORIO
Defendants

JM1838

JUDGMENT

INTRODUCTION

[1] Paul Heeg (Heeg) was, until October 25, 2007, the vice-president and a director of Hitech Piping (HTP) Ltd (Hitech). He also owned 20% of Hitech's Class "A" shares through his personal holding company, Paul B. Heeg Holdings Inc.

[2] Immediately prior to October 25, 2007, Defendants Maurice Lalonde, Jean Tremblay and Stefano Diflorio were the other directors and officers of Hitech, as well as 20% shareholders of the company. The remaining 20% of the share-capital of Hitech was owned by Carole St-Louis who had decided to leave the company at or about the same period and after having given a full year's prior notice of her intentions.[1] Lalonde's and Tremblay's shares are owned by their respective holding companies, Les Investissements Isafran Ltée and Les Investissements Lambert & Tremblay Ltée.

[3] On October 25, 2007, Heeg was terminated as a director, officer and employee of Hitech. He was offered three weeks' severance pay. His dismissal triggered the sale of his shares in Hitech to the other shareholders of the company. However, to this date, his shares have not yet been repurchased.

[4] Having been with the company for 17 years and having received n o prior notice of any problem justifying such action, Heeg considers that his dismissal is not justified and claims from Hitech an indemnity in lieu of notice in the amount of $351,396.00 (based on two year's global revenue) and seeks an order of repurchase of his shares at fair market value as of October 25, 2007 (to be established by an expert within fifteen days of the present judgment).

[5] The Defendants consider that Heeg's dismissal was for just cause and that Heeg's claim for unjust dismissal is ill-founded. They subsidiarily add, however, that should Plaintiff be entitled to notice, such notice be limited to two months' salary, being the actual period during which Heeg was unemployed. On the question of the value to be ascribed to Plaintiff's shares, the Defendants allege that such value be established at $346,700.00 being the alleged book value of same as at 30 September 2007. The Defendants further allege that the payment of this amount be spread over a period of fourteen months in accordance with the terms and conditions of the shareholders' agreement binding the parties, and that the interest payable thereon be "limited" without suggesting how such "limitation" should be determined.

[6] Plaintiff's recourse is framed as an oppression remedy pursuant to sections 241 and following of the Canada Business Corporations Act (CBCA) as well as an action for unjust dismissal based upon the relevant provisions of the Civil Code of Quebec.

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[1] As we will see, Carole St-Louis will sell her shares to Tremblay, Lalonde and Diflorio on the day of Heeg's dismissal. She did not vote on the question of the Plaintiff's termination.

[7] Although Defendants ask for the determination of the value of Plaintiff's shares at $346,700.00, they also contend that the oppression remedy is not available to the Plaintiff.

[8] The Defendants have also filed an Exception to Dismiss Plaintiff's action on the basis of lack of jurisdiction of the superior Court. In point of fact, the shareholders' agreement contains an arbitration clause giving exclusive jurisdiction to a private arbitrator with respect to a "dispute arising from or relating the present agreement" (see P-4).

[9] This case was heard by the undersigned on December 9, 11 and 12, 2008. In addition to the jurisdictional issue, the questions to be determined are the following:

a) Was Heeg dismissed with cause or without cause?
b) If dismissed without cause, what is the amount of damages to which he may be entitled as a result of such wrongful dismissal?
c) In either instance, what are the consequences of Heeg's dismissal on the disposition of his shares in Hitech and what would be the value of the said shares in the event of a repurchase of same by the Defendants?

THE RELEVANT FACTS

[10] The Court will review hereunder the facts which bear some relevance to the issues to be determined. The Defendants' plea raises many other items which were either not demonstrated or bear no pertinence to the present matter.

[11] As indicated in the Introduction, Heeg has been a shareholder, director and officer of Hitech for seventeen years before his dismissal. Prior to his involvement with Hitech, Heeg owned and managed a family business in the same field of activity.

[12] Hitech sells hoses, pipe fittings and similar equipment to end users.

[13] When he was invited[2] to join Hitech, Heeg was also invited to purchase[3] 25% of the outstanding shares in the company, for a price of $50,000.00. The other shareholders were Defendants Lalonde and Tremblay, together with one Gary Mitchell, each[4] owning 25% of the outstanding capital. Later on, Mitchell sold his shares and a new partner joined the group so that upon Heeg's dismissal, the shareholders of Hitech were:

Defendant Lalonde to the extent of 20%
Defendant Tremblay to the extent of 20%

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[2] The parties do not agree on the question of who solicited who. This issue has no bearing on the outcome of this case because it took place 17 years ago.
[3] The shares were purchased through Heeg's personal holding company, Paul B. Heeg Holdings Inc.
[4] Either directly or through their respective holding companies.

Defendant Diflorio to the extent of	20%
Carole St-Louis to the extent of	20%
Plaintiff Heeg to the extent of	20%

[14] Lalonde, Tremblay, Diflorio, St-Louis and Heeg all participated actively in the operation and management of Hitech.

[15] According to Heeg's testimony, throughout the whole period of his involvement with Hitech, the relationship between the five partners was satisfactory and the company progressed steadily over the years. Aside from normal day-to-day minor disagreements, Heeg alleges that he was totally unaware of any serious problems which could have justified the subsequent actions taken against him.

[16] In September 2007, the parties executed a new[5] shareholders' agreement (P-4) which purported to govern their powers, rights and recourses as shareholders, directors and employees of Hitech. The relevant provisions of this agreement are the following:

> **...**
>
> **WHEREAS the Shareholders and Controlling Shareholders wish to enter into this agreement so as to regulate certain matters regarding the management and operation of the Corporation and the disposal of their respective Shares in the Corporation.**
>
> **...**
>
> **1.1 Directors. The Board of Directors of the Corporation shall be composed of a number of Directors elected or appointed as follows. Each Shareholder representing at least twenty percent (20%) of the Class "A" shares, shall be entitled to nominate one (1) Director and the Shareholders hereby undertake to cause the nominee of each Shareholder representing at least twenty percent (20%) of the Class "A" shares to be elected Director of the Corporation who shall manage the affairs of the Corporation by majority decision of the Directors in office, except as otherwise provided by law or in the present agreement.**
>
> **1.3 Fiscal Year. The fiscal year of the Corporation shall end on the last day of September in each year or at any other date as may be decided by the Board of Directors.**
>
> **1.4 Decisions Reserved for the Board of Directors. The following resolutions shall require the approval of two thirds (2/3) of all Directors in office:**

[5] A previous shareholders' agreement had been executed on December 11, 2003, replacing a prior agreement dated 8 September 1993. See D-5

iv) Termination of employment, the remuneration and benefits of an employee of the Corporation who is a Shareholder or Controlling Shareholder;

v) Any special resolution of an emergency meeting of the Board of Directors.

…

4. DISPOSAL OF SHARES

4.1 General Restrictions

4.1.1 No transfer or disposal of Shares in any manner whatsoever shall be valid unless carried out in accordance with the terms and conditions of the present agreement.

4.1.2 Furthermore, any transaction whereby a Controlling Shareholder ceases to control a Corporate Shareholder shall be deemed a transfer of Shares and shall be null and void, without the prior written consent of the Board of Directors of the Corporation.

4.1.3 Notwithstanding the foregoing, a Shareholder who is an individual is entitled to transfer his or her Shares to a corporation controlled by him or her, provided that the controlled corporation shall first have agreed to become a party to the present agreement as a Shareholder.

…

7. TERMINATION OF EMPLOYMENT, DEATH, DISABILITY OR BANKRUPTCY

7.1 Definitions:

For the purposes of this Article:

"Book Value" The Book Value of any Class "A" Share shall be as determined by reference to the unaudited financial statements of the Corporation as approved by the Shareholders for the month previous to that month in which the event occurred which triggered the sale and purchase of Shares. For further clarity, the parties acknowledge that goodwill shall not constitute an asset for the purposes of determining the Book Value. The Book Value of any Class "A" share shall be equal to the difference between the Shareholders' equity and the aggregate of the redemption value for the Class "B", "C" and "D" shares and any declared and unpaid dividends on Class "B", "C" and "D" shares, divided by the number of all of the issued and outstanding Class "A" Shares.

7.2 Termination of Employment or Death

7.2.1 ***Termination of employment or death*. In the event of:**

1. The termination of employment of a Shareholder or Controlling Shareholder (the "Terminated Shareholder") with the Corporation, either voluntary of involuntary; or,

2. The death of a Shareholder or Controlling Shareholder (the "Deceased Shareholder");

the Corporation shall purchase for cancellation and the Shareholder shall sell, all of the issued and outstanding Class "A" Shares in the Corporation held by such Shareholder for an amount equal to the Book Value of such Shares payable in twelve (12) equal, and consecutive monthly payments with the first such payment due and exigible sixty (60) days from the date of the event triggering such purchase with interest at prime rate of the financial institution of the Corporation.

7.2.2 ***Sale to the other Shareholders*. In the event of a sale and purchase of Shares pursuant to this Article 7, the vendor may elect to sell the Shares on a pro rata basis to the other Shareholders in lieu of the Corporation and the other Shareholders shall accept to purchase the Shares, the whole upon the same terms and conditions as set out in articles 7 and 8 of the present agreement;**

7.2.3 ***Options for Controlling Shareholder*. If the Terminated Shareholder or the Deceased Shareholder is a Controlling Shareholder, the vendor may, but is not obliged, to elect to:**

(a) sell to the other Shareholders all the shares of the Corporate Shareholder that is controlled by the Terminated Shareholder or the Deceased Shareholder in lieu of the sale of the Shares held by the Corporate Shareholder in the Corporation, provided that the Corporate Shareholder has no liabilities and that the principal asset of the Corporate Shareholder consists of the Shares in the Corporation; or

(b) transfer its Shares to its Controlling Shareholder who shall then, elect to sell the Shares to either the other Shareholders or the Corporation.

And the purchaser(s) shall accept to purchase the said shares, the whole upon the same terms and conditions as set out in Articles 7 and 8 of the present agreement.

7.2.4 ***Guarantee by the Corporation*. In the event of the purchase of shares by the other Shareholders or by a Controlling Shareholder, the Corporation shall guarantee the payment of the purchase price and in the event of the payment by the Corporation of any amount of the purchase price, the amount paid by the Corporation shall constitute a debt of the defaulting purchaser towards the Corporation, payable upon the same terms and conditions as set out in Article 8.1**

…

10. ARBITRATION

10.1 Arbitration. In the event of a dispute arising from or relating to the present agreement, the matter shall be arbitrated by a person agreed upon by the parties whose decision will be final and binding on the parties. The cost of arbitration shall be paid equally by the Corporation and the Shareholder requesting the arbitration process.

In the event the parties cannot agree upon the arbitrator, such arbitrator shall be appointed by a judge of a court of competent jurisdiction. The procedure to be followed shall be agreed by the parties or, in default of agreement, determined by the arbitrator. The arbitrator shall have the power to proceed with the arbitration and to deliver his award notwithstanding the default by any party in respect of any procedural order made by t he arbitrator. The arbitration shall proceed in accordance with the provisions of articles 940 and following of the *Code of Civil Procedure (Quebec)*. It is further agreed that such arbitration shall be a condition precedent to the commencement of any action at law. The decision arrived at by the arbitrator shall be final and binding and no appeal shall lie therefrom. Judgment upon the award rendered by the arbitrator may be entered in any court of the judicial district of Montreal having jurisdiction.

… (emphasis added)

[17] The updating of the shareholders' agreement was, amongst other issues, predicated upon the fact that, about a year before, Carole St-Louis had announced her intention to leave Hitech as of October 31, 2007. A memorandum was circulated to that effect as early as November 25, 2006 (P-3).

[18] On October 22, 2007, Heeg received a Notice of Special Meeting of the Directors drafted as follows:

NOTICE OF SPECIAL MEETING OF THE DIRECTORS OF HITECH PIPING (HTP) LTD/TUYAUX HITECH (HTP) LTÉE

DELIVERED BY HAND

To the directors of HITECH PIPING (HTP) LTD/TUYAUX HITECH (HTP) LTÉE:

Jean Tremblay
[...]
St-Hubert (Québec)
[...]

Paul G. Heeg
[...]
Dollard-des-Ormeaux (Québec)
[...]

Stephano Diflorio
[...]
Pierrefonds (Québec)
[...]

Carole A. St-Louis
[...]
St-Lazare (Québec)
[...]

Maurice J. Lalonde
[...]Dollard-des-Ormeaux (Québec)
[...]

NOTICE IS HEREBY GIVEN that a Special Meeting of the directors of HITECH PIPING (HTP) LTD/TUYAUX HITECH (HTP) LTÉE will be held on Thursday, October 25th, 2007 at 16h00 P.M. at 125 Brunswick Boulevard, Pointe-Claire, Quebec, for the following matter:

1. **Termination of employment; and**
2. **Date and method regarding the purchase of class "A" shares.**

Pointe-Claire, Province of Quebec, this 22nd day of October 2007.

The Secretary,

_____
JEAN TREMBLAY

[19] The date of October 25, 2007 corresponds to Carole St-Louis' departure. Upon receipt of the Notice (P-5), Heeg is convinced that the only purpose of this special meeting is the confirmation of Carole St-Louis' voluntary termination of employment and purchase of her shares. Not expecting any other business to be carried at said meeting, he attends same. He has no idea that this special meeting was also called for the purpose of terminating his own employment with Hitech.

[20] The meeting starts as Heeg had expected. He is asked to sign Exhibit P-6 which sets forth the calculation of the book value of the shares of Carole St-Louis' 20% equity in the company, fixed at the sum of $413,000.00, as determined by section 7 of the shareholders' agreement of 2007 and based upon the company's figures as at

September 30, 2007. The voluntary termination of Carole St-Louis as an employee is also confirmed.

[21] After taking care of this order of business, the other remaining directors then advised Heeg that they wished to add something to the agenda, being the termination of his own employment with the company.

[22] Heeg was, as he puts it, flabbergasted. He had received no prior notice of any kind at any time, either explicit or implicit, written or verbal. Surely enough, the notice of the meeting did not indicate this question as an item on the agenda.

[23] He asked for and was granted a recess of five minutes.

[24] He came back to the meeting, feeling that after 17 years with the company, he deserved better.

[25] He did make a comment to Diflorio stating that:

"this is about you and your son, not about me and the company."

[26] Tremblay then indicated that the company was prepared to offer severance pay of three weeks' salary. Heeg refused, being convinced that such offer was totally ridiculous.[6]

[27] The reference by Heeg to an incident involving Steve Diflorio's son will be further described below. Amongst other matters, it concerned a promotion to the "order desk" which Heeg did not endorse.

[28] Upon the termination of the meeting, Heeg left and came back the next day to take his personal belongings. As far as he was concerned, he had been terminated without proper notice and without just cause and without any proper offer for the repurchase of his shares. Given the express terms of the shareholders' agreement, he felt that he should have received at least the same offer for his shares as the one he had just been called upon to approve for Carole St-Louis (see P-6). According to Heeg, no such offer was made to him at the meeting of October 25, 2007.

[29] However, Heeg takes the position that, notwithstanding the terms of the shareholders' agreement, he would not only be entitled to the book value, but to a higher value equivalent to the fair market value of the said shares, inasmuch as he was being unjustly deprived of many future profitable earnings both as a shareholder and employee of Hitech. In point of fact, his remuneration was a direct function of the company's profitability. His basic salary was only $60,000.00 per year but, over the last preceding years, the company had paid substantial dividends so that his total

[6] Tremblay will testify before the undersigned that he considered the company's obligation in terms of indemnity in lieu of notice to be limited to three weeks' salary!

remuneration was increased by $70,000.00 for an average annual employment package of $130,000.00 (see P-13 and P-17).

[30] As for Heeg's claim for unjust dismissal, he establishes same at the amount of $351,396.00 representing two years' salary, plus the value of all his benefits and expense allowances (which he evaluates at an additional $45,000.00 per year).

[31] However, Heeg admits having found employment with a company called Amiflex Inc. as of mid-January 2008, some 2 ½ months after his dismissal. His basic salary remains approximately the same at $52,000.00[7] but he has also purchased shares in Amiflex to the extent of 15% of its share-capital, which will eventually yield an additional revenue equivalent to 15% of Amiflex's net profits. At the time of hearing, Heeg's potential share of net profits had neither been determined nor paid but Heeg did recognize that the payment of his share of profits should be retroactive to the date of his employment.

[32] Evidence adduced on behalf of Plaintiff by witness Glenn Sargeant, a supplier of Hitech, showed that Heeg was perceived to be "a very good customer" and that he was overall "a good man". Another independent witness confirmed this testimony.

[33] The Defendants attempted, mainly through the testimony of Jean Tremblay, to depict a different reality. However, many, if not all the so-called negative facts so adduced go quite far back in time.

[34] Describing the situation at the time of Heeg's introduction within Hitech, Tremblay points out that Heeg had represented that he could bring one million dollars in gross sales, a promise made 17 years prior, which apparently never materialized. Nevertheless, gross sales of Hitech went from $192,474.00 in 1989 to $7,554,365.00 in 2007. In 2008, sales were $7,229,374.00 (see D-1). Over the said 17 years, no formal complaint was addressed to Heeg on this point.

[35] Tremblay also complains that Heeg did not see eye to eye with the other partners in terms of the contents of the shareholders' agreement and that he was very strongly against certain modifications to the 2003 agreement. Tremblay describes the negotiation process leading to the revised shareholders' agreement of 2007 as "long et pénible". Heeg's position was that there was nothing wrong in showing intransigence in the negotiation of his personal interests as a shareholder, an issue which had nothing to do with his duties as an employee. Once again, the parties finally agreed and the new agreement was signed. It was also renewed in September 2007. Difficult negotiations of an agreement successfully concluded is hardly a valid cause of termination.

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[7] See Heeg's Examination, page 152 (D-6). Heeg will testify at trial that as at the trial date, his basic salary is $55,000.00.

[36] Essentially, Tremblay did not feel that Heeg was behaving properly. He states:

> **"Déjà après deux ans, je ne le trouvais pas professionnel…On devrait le racheter…"**[8]

[37] However, Tremblay could not act alone. He acknowledges that the shareholders' agreement provided that, in order to dismiss a partner and to re-purchase his shares, the vote of at least two-thirds of the directors of the company was needed. There being 5 directors and 5 shareholders holding 20% each of the shares of Hitech the dismissal or "involuntary termination" of a shareholder/director had to be supported by at least 66.66% of the shareholders. In other words, out of the five existing partners, four out of five had to be in agreement to expel and buy-out the fifth one. This opportunity did not present itself until October 2007.

[38] Tremblay further alleges that what "culminated" into rallying the vote of the required majority to oust Heeg, is a series of incidents which took place in early 2007, the first one involving Diflorio and another employee (working in the warehouse, an area falling within the responsibility of the Plaintiff). Apparently, the employee in question had been quite rude and impolite towards Defendant Stefano Diflorio. When asked to intervene and sanction the employee in question, Heeg refused to do so.

[39] The second incident took place at around the same time. Diflorio's son was a junior employee of Hitech and wanted to be promoted to the "order desk". This became possible because another "order desk" employee, one Nadia Boismenu" wanted to become a salesperson "on the road". Tremblay and Diflorio supported the idea of having Matthiew Diflorio applying for a position at the "order desk". But Heeg, responsible for the "order desk" did not agree with this scenario and opposed it. The other partners could have overruled Heeg's decision but chose not to do so.

[40] Tremblay further describes a deterioration of the relationship between Defendant Diflorio and Heeg on other issues where Heeg, in the Fall of 2007, would have rebuffed Diflorio by saying "Fuck you, mind your own business". According to Tremblay, this kind of verbal outburst was nothing new to Heeg's manners. The Plaintiff had, throughout the years, always been very direct, outspoken, loud and using a "strong" vocabulary towards his partners as well as members of the Hitech staff. Once again, Heeg was neither reprimanded nor put on notice and the partners continued to keep him on as a partner, director and employee, year after year.

[41] Tremblay also adds that Heeg's work habits had always been problematical. For example, throughout the 17 years of his involvement with Hitech, Heeg refused to become "computer literate" and preferred the old "cardex method" to management of the order desk by computer. Whenever he got involved on the day-to-day operations of that department, he was "causing more problems than he was resolving".

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[8] Personal trial notes of the undersigned.

[42] Nevertheless, over the same 17 years, Heeg found the way to retain the support of the required majority of the other shareholders/directors and stay in position.

[43] Tremblay also complained about Heeg's alleged poor performance with the alleged need to adjust the costing of certain items, which would have resulted into higher selling prices. Salespersons on the road (whose income depends greatly on commission) complained vigorously that certain products were priced out of a competitive market as a result of Heeg's lack of proper follow-up.[9]

[44] This whole costing issue actually goes back to 2003. Tremblay explains that until 2003, costing of products caused no problem. From 2003 onwards, costing became an issue due mainly to fluctuations in the Canada/U.S. dollar exchange rate. Depending on the method used for adjusting landed cost of inventory, such costs could vary from 20% to 35%, thus affecting sale prices by a substantial margin or affecting net profits. Heeg was of the view that the products were properly costed and resisted making any changes. Other partners felt otherwise. One thing is certain: the costing of products remained unaltered from 2003 to 2007.

[45] In September 2007, Heeg was allegedly given specific instructions to correct the landed costs of a series of products in order to make them more attractive and facilitate their re-sale at competitive prices. He apparently did not do so in a timely manner (i.e. between September 2007 and the date of his dismissal at the end of October 2007) although the problem had been known and identified several months if not years before. This problem allegedly affected the value of the company's inventory on hand in 2007 which was apparently over-valued by $98,719.00 over a total of $954,022.00, an alleged over-valuation of approximately 10%. Aside from causing certain difficulties with the re-sale price of the items affected by the US/Canadian exchange rate, this issue also resulted into a higher value of the inventory on hand and drove the "book value" of the Hitech shares at a level which, according to Tremblay, should have been lower. However, as we shall see below, this adjustment in inventory value was not taken into account in the calculation of the price paid to Carole St-Louis for her 20% equity in the company.

[46] Tremblay also criticized Heeg's extra-professional activities while at work. For example, he noted the fact that Heeg was very often looking at the stock-market during working hours, that he regularly booked golf games during the summer[10], etc...

[47] Tremblay adds further complaints concerning Heeg's performance over the 17 years he was associated with Hitech. All such complaints are quite minor and

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[9] The evidence is silent, however on the issue of whether or not the company's profits turned out to be higher as the result of this price determination.

[10] Heeg admitted having taken Wednesday afternoons and sometimes Friday afternoons to play golf during the 17 summers he was with Hitech. Some of those outings were business related (inviting or being invited by clients, suppliers, etc…), some were not

presented in a very subjective manner by a witness who would have preferred that Heeg be dismissed fifteen years before. These further complaints include:

a) Heeg's resistance to new electronic technologies;

b) Heeg's poor performance with respect to the installation of "mezzanine" shelving in the warehouse.

[48] In cross-examination, Tremblay will confirm that the problem relating to the costing of inventory goes back to 2003 and, if it took until the end of 2007 to fix it, this would tend to show that there was no real urgency to address this issue. He also confirmed that the adjustment in the valuation of inventory for 2007 was not taken into account in the calculation of the book value of Carole St-Louis' shares.

[49] More importantly, Tremblay will admit that there has been a personal conflict between Heeg and himself, which lasted 15 of the 17 years of their business association. This is sufficient for the Court to question the integrity of the testimony of Mr. Tremblay and to put all of Tremblay's testimony in a different perspective.

[50] Tremblay's attitude and general opinion toward Heeg does not appear to the undersigned as being objective. There is obviously a great deal of acrimony between Tremblay and Heeg. This is so strong and apparent that Tremblay will not hesitate to accuse Heeg of attempting to commit a fraud upon Carole St-Louis by proposing an approach to causing certain sales to be accrued to the net profits of the company at a later date, or taking into account certain losses which had not yet occurred but were definitely expected to occur at a later date.

[51] Tremblay did not hesitate to accuse his former partner of a behaviour equivalent to criminal fraud, without, however, being able to prove his allegations.

[52] Such exagerations on the part of Tremblay forces the undersigned to appreciate his testimony with great circumspection.

[53] It should not be forgotten that Heeg worked for the company for 17 years and during all of this period, the majority of his partners decided, by not taking any action against him, to keep him and accept him the way he was, rather than to dismiss him. This shows that despite a rather aggressive approach to management and a certain resistance to technological changes, Heeg must have performed well enough to rally enough support from other shareholders/directors and to remain in function.

[54] Maurice Lalonde testified briefly to declare that he supported Tremblay's testimony throughout. He did not bring any additional facts to light, which could have justified Heeg's dismissal.

[55] Stefano Diflorio joined Hitech in 1991, at about the same time as Heeg. His responsibility was sales. He acted as sales manager as of 2003.

[56] His testimony focused mainly upon the events of 2007. Until then, he considered Heeg as a friend and supported him against the other partners.

[57] He recalls the disagreement he had with a warehouse employee called Mike Szczur. The confrontation itself had nothing to do with Heeg. However, Diflorio asked Heeg to go "fix up" Mike Szczur and sanction him for his lack of respect towards a partner and shareholder of the firm. Heeg was not prepared to do this in that he did not think that Szczur, a good and reliable employee under Heeg's direct responsibility, deserved to be reprimanded by him. Diflorio insisted and Heeg, in his rather abrupt usual manner, told Diflorio to "Fuck you and mind your own business". Diflorio was infuriated and from then on decided to join in with Tremblay and Lalonde and vote for Heeg's dismissal.

[58] Diflorio thought that he did not deserve to be treated like this by Heeg and this confrontation brought an end to their friendship and to Diflorio's support.

[59] With respect to the incident involving his son, Matthiew, Diflorio wanted him to go to the "order desk" and Heeg thought that someone else would do a better job. The "order desk" was under the direct responsibility of Heeg. Because of Heeg's resistance[11] , Diflorio thought that "he deserved to be better treated than that" by his partner.

[60] It appears, therefore, that Diflorio's change of attitude towards Heeg was the consequence of Heeg's refusal to blame another employee who had been impolite towards him as well as of Heeg's refusal to give a job to Diflorio's son at the "order desk". In both instances, nothing in the evidence shows that Heeg's decisions were objectively wrong, ill-founded or against the best interests of Hitech. They did, however cause to Heeg the loss of support of Diflorio and provoked a swing of the shareholder/director vote against him.

[61] Nadia Boismenu also testified to emphasize the fact that Heeg's attitude was somewhat bully and disrespectful towards her, an attitude which lasted from 1998 to 2007. Heeg consistently refused to accept her as a salesperson on the road. She finally got the position in 2007.

[62] The testimony of Carole St-Louis was the most articulate and reliable of all of the witnesses adduced by the Defendants.

[63] She joined Hitech in 1988 and became partner in 1992.

[64] She began her career at Hitech as a salesperson under the presidency of Defendant Lalonde. At that time, there were already problems between some of the

[11] It should be noted that Paul Heeg's own son also wanted to be hired and fill the same position at the "Order desk". This was turned down by the other partners and Paul Heeg accepted their decision. His son was not offered the job.

partners. In an effort to keep the peace between them, Lalonde agreed to resign and be replaced by her.

[65] In point of fact, Heeg did not support Lalonde as president and openly opposed him. The problem was solved not by removing Heeg but by having Lalonde step down and replaced by Carole St-Louis.

[66] In 2004, she left the presidency and Defendant Tremblay was elected president.

[67] Carole St-Louis indicated that she had her own differences of opinion with Heeg. She described the Plaintiff as being more interested in matters which could yield more revenues and profits to the partners rather than to develop the business. She also recalls that the other partners did not particularly appreciate the manner in which Heeg was expressing himself and the manner in which he was treating the general staff. Carole St-Louis further indicated that Heeg was somewhat always a partisan of imposing his views rather than to collaborate and join in with a consensus.

[68] In other words, Carole St-Louis describes Heeg as an individualist not necessarily inclined to work harder than necessary, very much interested in his own comfort zone and taking an arrogant and somewhat belligerent position every time his behaviour was being challenged.

[69] On the specific question of over evaluation of the inventory due to exchange rates between the Canadian and the U.S. dollar, Carole St-Louis confirmed that the problem really dated back to three (3) or four (4) years prior to her departure in 2007. She also confirmed that the book value of her 20% equity participation in Hitech as at October 31, 2007 was not affected by the readjustment of the inventory valuation.

[70] Overvalued inventory meant that the salespersons were complaining that they were not selling as much as they could have and not realizing as many profits as they could have if those particular items had been priced more competitively.

[71] The undersigned feels that if the problem was as serious as Tremblay and St-Louis have described it, it would have been easy to correct the situation within weeks, if not days, but the tolerance of the situation over so many years suggest that the problem was certainly not critical.

[72] Generally speaking, Carole St-Louis describes Heeg's input into the company as lacking the appropriate degree of solidarity between partners required to make things work properly. The disagreements between Heeg and the others partners therefore appear to have been a constant problem every since Heeg joined the company. This situation finally developed into a collective decision to dismiss Heeg. In order to do so, St-Louis confirms that the support of Diflorio was necessary to achieve this. Consequently, following the change of attitude of Diflorio vis-à-vis Heeg in the earlier part of 2007, this situation caused the partners to reconsider their position towards the Plaintiff. At the end of October 2007, Diflorio was now prepared to support

a vote of dismissal of Heeg from the board of directors, and as an employee and officer of Hitech. This decision automatically triggered the elimination of Heeg as a shareholder of the company, under the terms and conditions of the shareholders' agreement. The partners had the right to act in this fashion but not without giving proper notice to Heeg. Such notice was not given.

[73] In cross-examination, Carole St-Louis acknowledges the fact that Heeg was never informed of a possible dismissal and was never informed of the fact that the degree of disagreement between the others partners and himself was at such a high level that a vote of dismissal could be taken against him, let alone being successfully carried. She also acknowledged that, year after year, Heeg was kept on as a partner and the other partners agreed to execute and renew their shareholders' agreement with the Plaintiff in 1993, 2003 and as late as September 2007. It seems to be quite contradictory to execute such renewal and proceed to dismiss Heeg a month later, unless, of course, the alleged causes for dismissal are more trivial than serious.

[74] Carole St-Louis' testimony confirms that the problem between the Plaintiff and the Defendants had been long lasting, mostly based on a different management approach. On the other hand, the problem is much more a problem between partners in a business who are unable to work together than a problem between a senior employee and his employer sufficiently important to justify a dismissal..

ANALYSIS

A) The jurisdictional issue

[75] Plaintiff's action was instituted on 17 January 2008. Defendants appeared on the 30th January and immediately[12] raised the question of jurisdiction of this Court based upon paragraph 10.1 of the shareholders' agreement. Defendants allege, at paragraphs 4, 5 and 6 of their Exception to Dismiss:

> **…**
>
> **4. Or, la Requête des Demandeurs témoigne du différend entre les parties quant à la valeur des actions et plus généralement quant à leurs rapports entre actionnaires, matières couvertes par ladite Convention;**
>
> **5. Quant aux allégations et aux conclusions recherchées par les Demandeurs visant la réclamation d'une indemnité de fin d'emploi pour la personne de Paul Heeg, elles ne peuvent non plus faire l'objet d'une requête pour oppression;**

[12] See Defendants' Exception to Dismiss dated 31st January 2008.

6. En conséquence, cette Honorable Cour n'est pas le tribunal approprié dans les circonstances, compte tenu du sens à donner à la convention entre actionnaires commandant que les différends soient soumis à un arbitrage;

…

[76] The conclusions sought by the Plaintiff are as follows:

Conclusions pertaining to the interim relief sought:

ORDER the Defendants to remit to the Plaintiffs a copy of Hitech's financial statements for the fiscal year ending September 30th, 2007, the whole within ten (10) days of the judgment to intervene herein;

ORDER the Defendants to provide the Plaintiffs on a timely basis with full access to all of the books, records, registers and contracts of Hitech and to provide him with electronic access to same;

ORDER the Defendants to provide the Plaintiffs with copies of all minutes, agendas and resolutions of the Board of Directors since October 25th, 2007 and provide copies of all future minutes, agendas and resolutions of the Board of Directors on a timely basis;

ORDER the Defendants to give the Plaintiffs' expert access to all the books and records of Hitech in order for Plaintiffs' expert to establish the fair value of Hitech's shares as of October 25th, 2007;

ORDER provisional execution notwithstanding appeal;

AUTHORIZE the service of the orders to be granted hereunder to be made even after legal hours or on a non-juridical day or by fax machine or by leaving a copy of the order in a sealed envelope addressed to the person for whom it is intended at their residence or place of business.

DISPENSE the Plaintiffs from furnishing security.

MAINTAIN the present Motion to Remedy an Oppression, to Order the Purchase of Shares at Fair Value and to Order Payment of Amounts Owed to Plaintiffs pursuant to section 241(3) of the *Canada Business Corporations Act;*

ORDER the Defendants Les Investissements Isafran Ltée, Les Investissements Lambert et Tremblay Ltée and Steve Diflorio to purchase Plaintiff Paul B. Heeg Holdings Inc.'s shareholding interest in Defendant Hitech Piping (HTP) Ltd at the fair value as of October 25th, 2007 established by the Plaintiffs' expert within fifteen (15) days of the judgment to intervene herein;

ORDER that the amount paid by the Defendants Les Investissements Isafran Ltée, Les Investissements Lambert et Tremblay Ltée and Steve Diflorio to the Plaintiff Paul B. Heeg Holdings Inc. for its shareholding interest in Defendant Hitech Piping (HTP) Ltd be paid with interest and the additional indemnity provided for at article 1619 of the *Civil Code of Quebec* as of October 25th, 2007;

ORDER the Defendants to give the Plaintiffs' expert access to all the books and records of Hitech in order for Plaintiffs' expert to establish the fair value of Hitech's shares as of October 25th, 2007;

CONDEMN Defendant Hitech Piping (HTP) Ltd to pay to Plaintiff Paul Heeg an amount of $351,396.00 with interest and the additional indemnity provided for at article 1619 of the *Civil Code of Quebec*, the whole as of October 25th, 2007;

CONDEMN Defendants solidarily to pay to the undersigned attorneys the totality of their extra-judicial fees;

THE WHOLE with costs, including the costs of experts' reports.

[77] The Exception to Dismiss was presented to the undersigned for adjudication on 6th February 2008, together with an Application for Interim Orders on behalf of Plaintiff. This resulted in the following judgment:

Considérant que les circonstances du présent dossier justifient l'émission d'ordonnances intérimaires:

Le Tribunal ORDONNE à Hitech Piping (HTP) Ltd de transmettre au requérant Paul Heeg:

a) copie des états financiers vérifiés pour l'année fiscale se terminant le 30 septembre 2007,

b) copie des états financiers mensuels et non vérifiés,

dans les cinq (5) jours de leur disponibilité lesdits documents étant préparés dans la même forme et contenant la même information que celle qui est communiquée aux autres actionnaires de l'entreprise.

ORDONNE à Paul Heeg de ne pas divulguer à quiconque le contenu desdits états financiers ni des méthodes comptables utilisées et reflétées dans lesdits états financiers sauf à ses avocats et à ses experts, le tout sous toute peine que de droit;

La présente ordonnance sera pour valoir jusqu'à jugement sur le fond de la requête introductive d'instance;

Le Tribunal CONTINUE *sine die* la requête en irrecevabilité (séquence 7) et CONTINUE la requête introductive d'instance (séquence 3) au 29 février 2008, salle 16.10, pour dépôt de l'échéancier.

[78] The jurisdictional question was never presented again as a preliminary incident. At Trial, the issue was once again raised by the Defendants and the Court was asked to dispose of the question in its judgment on the merits.

[79] The Court is of the opinion that Defendants' Exception must be dismissed, even if some of the conclusions sought by the Plaintiff may fall within the application of the arbitration provision.

[80] Firstly, by not proceeding upon the question in a timely fashion, the Defendants have waived its application. It would be at this stage inappropriate, after a three-day trial, to dismiss Plaintiff's action in whole or in part, and delay the final and complete resolution of this litigation by referring some or all of the issues to an arbitrator. If the parties had wished to avail themselves of the arbitration provision they should have caused the question to be decided before trial.

[81] Secondly, it is obvious that the arbitration provision does not cover all of the questions raised herein.

[82] The arbitration provision covers only "disputes arising from or relating to the present agreement". The agreement in question does not deal with most of the issues raised by the present proceedings. More particularly, the following are clearly not covered:

a) access to financial statements (interim relief)
b) access to records of the company (interim relief)
c) damages for wrongful dismissal

[83] See as authority for the foregoing:

Acier Leroux Inc. c. Tremblay, REJB2004-55099 (C.A.)
Camirand c. Ross, REJB2003-3989 (C.A.)
Josephson c. Twins 2 Investments Inc., EYB2007-123408 (C.S.)
Simon v. Ramsay, EYB2003-47141 (C.S.)
2160-8948 Québec Inc. c. Simplex Phonographs Inc., EYB1992-75343 (C.S.)
Walker v. Walker [1996] S.J., no. 850 (Q.B. Sask.)
1329207 Ontario Inc. v. D&R Custom Millwork Ltd [2002] O.J. no. 2554 9S.C.J. Ont.)

[84] The above jurisprudence also confirms that although a private arbitrator could be entrusted with the responsibility of deciding upon an oppression situation, unless the recourse and relief sought is clearly stipulated in the arbitration provision (which is not the case here), an application for an oppression remedy pursuant to section 241 and following CBCA will not fall within the jurisdiction of the arbitrator.

[85] The present instance is a multi-faceted recourse where the combination of Plaintiff's dismissal, together with the non-repurchase of Plaintiff's shares in Hitech causes an effect which is oppressive (see *Laviolette c. Prud'homme*, 2008 QCC 5108; *Joffre v. A.V.I Financial Corporation*;., REJB 2003-40956). This combination and the effect it causes upon Plaintiff is not, in the opinion of the undersigned, covered by the arbitration provision of section 10.1 of the shareholders' agreement.

[86] What is covered, however, is the determination of the price to be paid for Plaintiff's shares.

[87] The shareholders' agreement does specifically cover the question of the re-purchase of Plaintiff's shares at "book value", in the case of a voluntary or involuntary termination. This includes the determination of which "book value" should apply. In addition, if a value other than "book value" should apply, this is also an issue which would normally fall within the jurisdiction of the arbitrator.

[88] But, as a whole, the Court is of the opinion that it would not, now, be appropriate to divide the recourse and have the Superior court look at all the other issues raised and leave it to the arbitrator to decide solely upon the value of Plaintiff's shares. This would cause inappropriate delays and force the parties to incur costs beyond proportion.

[89] Accordingly, the Court finds that having regard to the specificity of this case and to the timing at which the jurisdictional question is finally submitted for adjudication, the Defendants' Exception to Dismiss should not be granted.

[90] Furthermore, the Court has a broad discretion in matters of oppression and the remedies to be applied when an oppressive conduct occurs. The Court's powers go as far as suspending, re-writing or eliminating shareholders' agreements, in whole or in part, including an arbitration clause. Once again, given the specificity of this case, it would not have been a good solution for any of the parties to have one Tribunal decide on all issues except the price for the Plaintiff's shares and force the holding of another trial before another Tribunal to decide only the issue of price, more particularly when the evidence would have to be common to both trials.

A) The issue of dismissal with or without just and sufficient cause

[91] Paul Heeg is not only an employee of Hitech. He is a shareholder, co-owner and a partner with the other shareholders and directors of the company. The context of his dismissal from Hitech must be appreciated having regard to all these elements.

[92] Over the 17 years during which Heeg was involved in Hitech, he was treated as a co-owner and partner.[13] His remuneration was as much, if not more, in the form of dividends than in the form of a straight salary. In point of fact, his salary was in the amount of $60,000.00 in 2006 and 2007 while his total remuneration was between $123,000.00 and $130,000.00 for both years.

[93] Finally, his employer, Hitech, has power, only in appearance, to put an end to his employment with the company. The board of directors of Hitech has such power but, equally, only in appearance. The real decision-making power has been transferred, with the consent of all interested parties including Hitech, to the partners/shareholders of the company, as per the terms and conditions of the shareholders' agreement . More particularly, the shareholders' agreement provides that any holder of a 20% equity participation has the right to nominate a director to the board. By having five equal shareholders each holding a 20% participation, it follows that all such five shareholders automatically become directors. By further providing that the vote of at least 2/3 of the "members of the board" is required to dismiss an employee-shareholder, it follows that no such employee-shareholder can be dismissed unless all other partners/shareholders/directors are in favour of such dismissal (2/3 of 5 equals 3.332 which must be rounded to 4 out of 5)).

[94] Consequently, the legal relationship between Heeg and Hitech cannot only be qualified as a standard employer-employee relationship inasmuch as the "power to fire" an essential condition of same , does not vest in the hands of Hitech alone but, in the end result, in the hands of Hitech's shareholders. It vests in the hands of the partners of the business whose consent is essential. As demonstrated above, the unanimous consent of all other four partners/shareholders/directors is required to oust the fifth one.

[95] What constitutes "just and sufficient cause" has been defined as follows by the jurisprudence and the doctrine.

[96] In *Telesystem Entreprises Inc. (T.E.L.) Ltd and Microcell Telecommunications Inc. c. Martin O'Neill*, CSM 500-05-006871-956; CAM 500-09-004702-973, the Quebec Court of Appeal (Delisle J.) wrote:

> **L'article 2094 C.c.Q. se lit:**
>
> > **Une partie peut, pour un motif sérieux, résilier unilatéralement et sans préavis le contrat de travail**
>
> **L'expression «motif sérieux» utilisée dans cet article équivaut à la notion de «cause juste et suffisante» définie par la jurisprudence.**

[13] See Paul Heeg's Examination (P-6), pp. 24 and 25, questions 96 to 99 inclusive on the notion of partnership binding the parties.

La professeure Marie-France Bich écrit[14]:

105. […] Bien que certains entretiennent là-dessus quelques (sic) doutes, nous croyons que les deux expressions sont équivalentes. […] Un motif sérieux, c'est, il nous semble, tout à la fois un motif grave et suffisant, gravité et suffisance devant être appréciées selon les circonstances de l'espèce. C'est parce que l'autre exécute mal ou n'exécute pas l'une de ses obligations (selon le standard proposé par l'article 1604, second alinéa, C.c.Q.), que le cocontractant peut résilier le contrat: voilà le motif sérieux. […]

106. A notre avis, l'article 2094 C.c.Q. ne change rien à ces règles […].

(soulignage ajouté)

L'auteur Robert P. Gagnon est du même avis[15]:

L'expression «motif sérieux» utilisée à l'article 2094 C.c.Q. se démarque de l'emploi par ailleurs courant dans la législation du travail des termes «cause juste et suffisante» pour désigner un motif légitime de renvoi du salarié. Quelle que soit l'expression retenue, il aurait été utile que le législateur précise que la cause de la résiliation doit être imputable à l'autre partie, en l'occurrence au salarié en cas de congédiement. Néanmoins, le poids de la jurisprudence tant des instances spécialisées du travail que des tribunaux de droit commun est si significatif relativement aux motifs susceptibles de justifier un licenciement sans indemnité ni préavis que le sens à donner à l'expression «motif sérieux» devrait être celui d'une faute grave commise par le salarié ou d'une cause juste et suffisante qui se rapporte à sa conduite ou à son défaut d'exécuter le travail. Cette interprétation est d'ailleurs la seule qui puisse se concilier avec le principe général énoncé au deuxième alinéa de l'article 1604 C.c.Q. […]

(Soulignage ajouté)

Quant aux auteurs Morin et Brière;, ils s'expriment ainsi[16]:

[…] Pour cette raison, il faut croire et espérer que les tribunaux reconnaîtront qu'un motif sérieux justifiant la brusque rupture doit être

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[14] Marie-France Bich, Le contrat de travail: Code civil du Québec, Livre cinquième, titre deuxième, chapitre septième (article 2085-2097 C.c.Q.) dans Barreau du Québec et Chambre des notaires du Québec, La réforme du Code civil: obligations, contrats nommés, Tome 2, Sainte-Foy, P.U.L., 1993, pp. 779 et 780. Voir au même effet: *Giguère c. Imasco Retail Inc. (le groupe U.C.S.),* J.E. 96-2307 (C.Q.) ainsi que *Duguay c. Prémoulé Inc*., J.E. 98-299 (C.Q.).

[15] Robert P.Gagnon, Le droit du travail du Québec, 2ième éd., Cowansville, Éditions Yvon Blais, 1993, pp. 74 et 75.

[16] Fernand Morin et Jean-Yves Brière, Le droit de l'emploi au Québec, Montréal, Wilson et Lafleur, 1998, pp. 384 et 385.

> **tributaire de son degré de suffisance, de son caractère juste et raisonnable.**
>
> **[…]**
>
> **Cette harmonisation des critères nous semble nécessaire par respect même des attributs fondamentaux du droit que sont la sécurité, la stabilité et la cohérence. […]**
>
> **(Soulignage ajouté)**
>
> **Le fardeau de prouver que le congédiement a été fait pour un motif sérieux repose sur l'employeur[17]. Il s'agit là d'une lourde tâche, surtout si les motifs de licenciement sont subjectifs.**

[97] Termination of employment is the "capital punishment" in employment law. The fault of the employee must be so important, so serious, that a prior warning (even though a warning may be accompanied with severe sanctions) is necessary before the termination occurs. No such grave and serious fault has been proven here and the evidence before the Court is in no way to be interpreted as showing a valid cause of termination.

[98] In *Lecavalier c. United Parcel Service du Canada Ltée*, REJB 2003-47304 (S.C. Fraiberg J.) appeal to Court of Appeal dismissed on Motion 500-09-013824-032, the Court wrote the following in a similar context where several issues raised by the employer in order to justify the dismissal of an employee (director of human resources):

> **…**
>
> **59. In paragraphs 65 to 96 of its Amended Plea UPS alleges Ms. Lecavalier's various deficiencies of personal conduct or job performance which it claims justified dismissing her without notice.**
>
> **60. The shortcomings, in no order of importance, are occasional profanity in the presence of colleagues, three debatable and unremarkable breaches of the UPS dress code for women, disagreement with the dress code expressed on a few occasions, disagreement expressed to Mr. Cole over UPS's "hire from within" policy to fill HR vacancies, discourtesy to Mr. Cole, the company president and a district manager by openly disagreeing with them at three separate meetings of the "Business Planning Council for People" and late or incomplete statistical and employee evaluation reports to Mr. Cole.**
>
> **61. Practically all of these alleged breaches seem to be manifestations of personal style, preference or opinion differentiating Ms. Lecavalier from some**

[17] *Sauvé c. Banque Laurentienne du Canada* (1994) R.J.Q. 1679, p. 1682 (C.S., jugement infirmé en appel, le litige n'y portait cependant pas sur le fardeau de preuve); *Del Duca c. Arcon Canada inc.*, J.E. 98-780 (C.S.); *St-Pierre c. Industries fil métallique Major Ltée*, J.E. 98-2163 (C.S.).

> **colleagues and Mr. Cole in particular. In the UPS environment, as perceived by Mr. Cole who had worked there almost since boyhood, they may understandably have made for a wary employment relationship, but they did not go to its heart. None of the examples, if true, can reasonably be seen to give rise to an irredeemable breach of an employer's trust.**
>
> **…**
>
> **65. The Court does not have to linger on these alleged breaches, however. Even if they were truly perceived as such by UPS, Ms. Lecavalier was never given written notice of default to cure any of them, as the employment contract P-1, the Civil code of Quebec and an abundant jurisprudence all require. Instead of receiving written warnings or reprimands, she received promotions, salary increases and bonuses all the while she supposedly breached the agreement so egregiously that she deserved to be fired without notice! Indeed, on April 8, 2001, only 10 days before she was fired, she received the most important bonus, that involving her *pro rata* participation from March1, 2000 in the Managers' Incentive Plan for the period ended September 30, 2000.**
>
> **66. Since none of these breaches, if true, was important enough to justify instant dismissal without first putting Ms. Lecavalier in default, UPS cannot invoke them after the fact. That they were alleged only after she had sued is a telling indication of their lack of seriousness.**
> **… (emphasis added)**

[99] See also *Proulx v. Communications Voir Inc.*, REJB 2002-33230 (S.C. Hilton J.) more particularly paragraphs 15 and following.

[100] Throughout the period, Heeg received dividends, participations to profits, etc…

[101] Even though the relationship between Heeg and his business partners may not have been as smooth as expected and even if one admits that Heeg's management may have been problematical in some instances, the fact of the matter remains that the four other partners (Tremblay, Lalonde, St-Louis and Diflorio) have chosen to accept the situation and, year after year, have decided not to exercise their rights under the shareholders' agreement to terminate Heeg's employment. It would be contradictory both in fact and in law to agree to sign a shareholders' agreement in September 2007 with a partner/employee and then dismiss that same partner/employee less than two months later based on facts which for the most part, if not in their entirety, have occurred prior to the signature of the said agreement.

[102] The sudden change of heart of Diflorio in 2007 seems to be predicated upon a conflict of a personal nature between Heeg and himself. Diflorio was apparently insulted and/or treated with ill-respect by an employee under the direct supervision of Heeg. When asked by Diflorio to reprimand the said employee, Heeg refused in no unclear terms. Heeg felt that Diflorio's request for a such a reprimand was not appropriate given the circumstances and considered that the long time employee in

question should not be reprimanded. This was a decision within the managerial powers of Heeg and the solution here would have been for the other partners to overrule Heeg's decision and have someone else speak to the employee in question.

[103] All of this does not constitute a valid cause for termination of a 17 year long business relationship. This may have provoked the shift of Diflorio's support in favour of Heeg into a support of the position of his other partners. This may have caused Diflorio to vote in favour of Heeg's termination but this incident is not a valid cause for termination for cause of such a long-standing employment/partnership relationship.

[104] The foregoing reasoning also applies to the other incident involving Diflorio and Heeg, having to do with Heeg's refusal to promote Diflorio's son at the "order desk", a department under the direct supervision of Heeg. Once again, this is a managerial decision within Heeg's responsibilities. His reasons may not have been to the liking of Diflorio and may have been altogether wrong or inappropriate towards Diflorio's son but the "order desk" remained under Heeg's sphere of management. If the decision was inappropriate, then Diflorio should have brought the matter to the other partners, get their support and circumvent Heeg's decision. This was the pattern used by the partners to reject Heeg's proposal to name his own son at the "order desk", a decision which Heeg accepted and followed. In point of fact, Heeg has never refused to respect a formal decision or resolution of the Board.

[105] But the use of all these above-noted arguments "*ex post facto*" in an attempt to support a dismissal based on just and reasonable cause without compensation is, in the view of the undersigned, totally inappropriate.

[106] In conclusion, the Court of the view that notwithstanding some differences of opinion between Heeg and his other partners, his dismissal was not based on just and sufficient cause, whether this matter is analyzed on the basis of an employer/employee situation or whether it is analyzed on the basis of the termination of a partnership (even though the Court is of the view that the former approach is more appropriate than the latter).

[107] Many other issues were raised in Defendants' Plea containing not less than 303 paragraphs over thirty-seven pages. The Court has chosen to refer to the most important facts alleged and proven at trial. Most of the other facts alleged were either not proven with a sufficient degree of preponderance or were not serious enough to form the basis of a dismissal for a proper serious and sufficient cause. Once again, all of the issues complained of by the Defendants date back to several years and, given the terms and conditions of the shareholders' agreement, could not be retained against Heeg as long as there was not enough support from the other partners in Hitech. If all those issues had been serious enough to justify a dismissal, then the consensus amongst the other partners to get rid of Heeg would have been reached long before the Fall of 2007. What really triggers the dismissal of Heeg is the conflict with Diflorio

who decides to withdraw his support in favour of Heeg, which permits the application of section 7.2.1.1 of the shareholders' agreement.

[108] Consequently, Heeg's dismissal and expulsion from Hitech is much more a consequence of a change of heart of his partners towards him leading to the termination of their partnership (the shareholders' agreement constituting also a partnership agreement) than a strict question of termination of an employment contract.

[109] Article 2186 of the Civil code of Quebec reads as follows:

> **A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share any resulting pecuniary profits.**
>
> **A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association.**

[110] By executing a shareholders' agreement and by agreeing to manage Hitech as a business where all important managerial decisions were left in the hands of the partners/shareholders, the Plaintiff and individual Defendants have therefore agreed to be bound "amongst themselves" by the rules relating to partnerships by opposition to the general rules of employment contracts. The shareholders' agreement became the real contract between the parties.

[111] Here, all the essential elements of a contract of partnership exist.

[112] A partnership agreement may be terminated with or without cause but, if it is, the partners have to assume the legal consequences of such termination.

[113] The mere fact that the partners have agreed to enter into a shareholders' agreement (the last version thereof having been signed as late as September 2007) clearly indicate that as f that date they were all still willing to continue to work together as partners and that they looked at section 7 of the shareholders' agreement as a protection for all of them.

[114] Articles 2228 and 2229 C.c.Q. are noteworthy:

> **Art. 2228. A partner of a partnership constituted for a term that is not fixed or whose contract of partnership reserves the right of withdrawal may withdraw from the partnership by giving it notice of his withdrawal, in good faith and <u>not at an inopportune moment</u>.**
>
> **A partner of a partnership constituted for a term that is fixed may withdraw only with the agreement of a majority of the other partners,**

> **unless other rules for that eventuality are contained in the contract of partnership.**
>
> **Art. 2229. The partners may, by a majority vote, agree on the expulsion of a partner who fails to perform his obligations or hinders the carrying on of the activities of the partnership.**
>
> **A partner may, in similar circumstances, apply to the court for authorization to withdraw from the partnership; the court grants such a demand unless it considers it more appropriate to order the expulsion of the partner at fault.**
>
> **(emphasis added)**

[115] Forced expulsion of a partner based on his alleged fault requires strong evidence of such partner's violation of the very reason why the partners have agreed to form and operate the partnership in the first place. Mere disagreement or differences of views spreading over a long period of time, ratified and regularly condoned (either by silence, inaction or by positive confirmation of such relationship such as the execution of a new shareholders' agreement one month before the 17-year relationship is abruptly terminated) cannot, by reason of a disagreement of a personal nature, suddenly be resuscitated, amalgamated and suddenly and without proper notice, used as a valid cause for termination of such a relationship. The decision of the remaining partners may be a valid one in terms of excluding the Plaintiff from the partnership but they must support the legal and financial consequences of such a termination and compensate the expelled partner for his losses resulting therefrom.

[116] There is also a certain element of lack of good faith on the part of the Defendants in signing a shareholders' agreement in September with one of their partners who they allegedly and collectively wish to expel from the business, without telling him anything and then, a few weeks later, proceed to blame him with all his alleged mistakes of the last 17 years. If the situation and Heeg's behaviour were so critical, the Defendants should have had the honesty and courage to tell him. They did not and there was no reason not to tell him.

[117] Even if the current situation should be analyzed having regard only to the legal principles of an employer/employee relationship, it is obvious that the facts adduced in evidence by the Defendants do not support a valid cause of termination of Heeg's employment as director, officer and employee of Hitech. This is so even if all the facts are considered as a whole or if each such fact is considered separately. In addition, the Court is not prepared to see in this series of facts a situation of "cumul" where one could argue that the situation had become so intolerable that the only solution left to Hitech, as an employer of Heeg, was to terminate his employment without compensation. In any event, Heeg was entitled to proper notice that his performance was problematical. He was also entitled to warnings and to the benefit of a certain

form of graduation of sanctions before the imposition of a complete and permanent termination of his employment.

[118] Consequently, the Court of the opinion that Heeg's dismissal, either analyzed under the general principles of partnership law or under the principles of employment law , constitutes an abuse of process which renders the company and the partners liable for the damages suffered by Heeg as a result of such termination.

B) The oppression remedy

[119] As for the oppression remedy itself, the above facts give rise to Heeg's reliance on section 241 and following of the CBCA. For a more complete review of the law applicable to a situation of this kind, see *Laviolette c. Prud'homme* 2008 QCCS 5108; *Richard Robert et al c. Martin Kaine*, AZ-00021837 (S.C. Dalphond J.)

[120] Oppression results in the effect of the conduct of the parties and not as a consequence of a specific fault or contractual violation. The combined effect of the Plaintiff's dismissal, the "offer" of severance pay based on three weeks' salary, the silence of Heeg's co-shareholders upon the renewal of the shareholders' agreement, the non-repurchase of Heeg's shares and Heeg's immediate expulsion from the premises (he was allowed to come back the next day to pick up his personal belongings), may all be added up to conclude that the conduct of the Defendants amounted to oppression.

[121] To avoid the application of sect. 241 CBCA, the other shareholders and/or partners of the Plaintiff should have immediately followed their vote of dismissal with the repurchase of Heeg's shares under the terms and conditions provided in the shareholders' agreement which they had just executed one month before. This new agreement, like the previous one[18], limited the maximum value of the said shares to book value. The neglect or refusal to repurchase Heeg's shares therefore caused an immediate effect of oppression upon Heeg as a minority shareholder which will permit the Court to intervene and order the immediate repurchase of the said shares.

[122] The Defendants have alleged that on October 25, 2007 they offered to re-purchase Heeg's shares on the same basis as what had been offered to Carole St-Louis (i.e. book value at $413,000.00). Heeg does not confirm this. The Defendants argue that Heeg apparently declined this offer but it must be noted that this alleged offer, if made, was also linked to an offer of three weeks' severance pay, which, of course, was totally unacceptable and inappropriate.

[123] Furthermore, if made, this offer was not renewed in the form of any formal offer and tender of the amount in question nor was it reiterated in the Defendants' Plea, as it should have been.

[18] See section 5 of Exhibit D-5.

[124] What was alleged, instead, was that the book value of the shares was to be reduced (only in the case of Plaintiff Heeg and not in the case of Carole St-Louis), to be reduced to $346,700.00 instead of $413,000.00.

[125] As in *Laviolette v. Prud'homme*, cited *supra*, the Court considers, based upon the foregoing, that the negligence and refusal of the Defendants to tender the amount of $413,000.00 for Plaintiff's shares as well as their revised position on the book value of the shares of Hitech as at October 25, 2007 combined with an offer of three weeks' severance pay to their 17-year-long partner caused an effect of oppression upon the Plaintiff which justifies the recourse to, and application of, the remedies of section 241 CBCA.

C) The monetary consequences of the foregoing

[126] Defendants' actions carry monetary consequences which the Court will now examine:

a) What is the amount of the compensation or indemnification to be paid to the Plaintiff as a result of the untimely termination of his partnership agreement with the other Defendants and/or what is the amount of the same compensation to be paid to him as a result of the untimely termination of his relationship as an employee of the corporation?

b) Should the price to be paid for Plaintiff's shares in Hitech be in any way different than the price paid to Carole St-Louis and if so, on what basis should this price be calculated?

[127] The evidence shows that Heeg's total annual taxable remuneration including bonuses and dividends vary between $125,000.00 and $130,000.00. for the two years preceeding his dismissal.

[128] An appropriate average annual income of $125,000.00 for purposes of assessing the Plaintiff's losses resulting from his unjustified dismissal is therefore appropriate in the circumstances.[19]

[129] However, the evidence also reveals that as of January 15, 2008, some two and a half months after his dismissal, Heeg was able to find employment at a base salary of $52,000.00 subsequently raised to $55,000.00 plus other benefits somewhat equivalent to those which Hitech offered. In addition, Heeg invested into the share-capital of his new employer and acquired a 15% equity participation therein. According to Plaintiff, such participation would normally provide an additional dividend income

[19] Plaintiff has submitted that his"revenue" should include other benefits such as expense account and group insurance. The Court believes that these items have not been sufficiently proven to be included in the total remuneration package of Plaintiff. Furthermore, Plaintiff has admitted that his new position with Amiflex also included similar benefits.

which would supplement his total revenue substantially. At the time of trial, neither the Plaintiff nor the Defendants were able to evaluate said potential additional income. It will therefore fall upon the Court's global appreciation of the evidence as a whole to put an appropriate revenue to be derived from said equity participation which, as the Plaintiff has acknowledged, will be retroactive to the date of his employment.

[130] Given Plaintiff's testimony, the Court is of the opinion that an annual income of $100,000.00 is what the Plaintiff will be generating or, if not, what the Plaintiff is capable of generating, as of January 15, 2008.

[131] In terms of the length of the notice, the Court considers that a 10 month period from January 15, 2008 is quite sufficient to permit the Plaintiff to regain an equivalent income stream to the one he enjoyed prior to his dismissal from Hitech. A review of the recent jurisprudence in similar cases support this 10 month period.

[132] In *Lecavalier v. United Parcel Service du Canada Ltée,* Mr. Justice Fraiberg reviewed certain key decisions[20] on this question and concluded to a period of 8 months as applicable in the circumstances.

[133] *In Proulx v. Communications Voir Inc*. cited above, the indemnity was limited to a notice equivalent to 6 months.

[134] *In Drolet v. Remax Québec Inc*. EYB 2006-103879 (S.C. Riordan J.) an indemnity of 20 months was awarded, in view of the fact that the Plaintiff was unable to find a new employment during such period despite many efforts on Plaintiff's part.

[135] The cases of *Groupe DMR v. Benoit,* EYB 2006-110561 (C.A.)*, Hemens v. Sigvaris Corporation,* REJB 2004-80061 (C.A.), *Musitechnic services éducatifs Inc. v. Ben-Hamadi,* REJB 2004-68375 (C.A.), *Aksich v. Canadian Pacific Railway* EYB 2006-107599 (C.A.) and *Mulhearn v. Bombardier Inc*. REJB 2001-25737 (C.S.) were submitted to the Court, to justify a two-year period of indemnity. Each of these cases constitutes a "cause d'espèce". The Court is of the opinion that the question to be addressed here is the appropriate length of time required by the Plaintiff to reasonably expect to regain a similar position and revenue. In the opinion of the undersigned, a period of 10 months is sufficient, given the fact that:

- he has reinstated himself a position in the same line of business less than three months after his dismissal, with the opportunity to become a 15% equity partner in same.

- although this position is not as prestigious and remunerative as the one he enjoyed in Hitech, Heeg is prepared to invest in the said business to the extent of 15% thereof, thus expecting

[20] *Hippodrome Blue Bonnets v. Jolicoeur C.A. Montreal*, 500-09-000266-908 (C.A.); *Sauvé v. Banque Laurentienne du Canada* [1999] RJQ 79 (C.A.).

that this new position will yield similar, if not more revenues than his previous involvement in Hitech;

- Within ten months, Heeg should be in a position to attain a similar "cruising speed" after a normal and expected slow "take-off".

[136] For the period October 25, 2007 to January 15, 2008, the Plaintiff has received no income whatsoever. His loss for that period is therefore equivalent to 11.7 weeks' remuneration calculated on the basis of a yearly income of $125,000.00, or $28,125.00

[137] For the 10 months following, the Plaintiff should earn $83,333.30 (10 twelvths of $100,000.00) whilst he would have earned $104,166.66 for the same period at Hitech. The difference is therefore equivalent to $20,833.33.

[138] These two amounts of $28,125.00 plus $20,833.33 represent, in the opinion of the Court, a fair indemnity in lieu of notice of termination of his employment/partnership relationship with Hitech and/or his partners. Heeg's total indemnity for such loss amounts to $48,958.33, which the Court rounds up to $50,000.00

[139] The Court has applied a period of 10 month's indemnity in lieu of notice as if this question was to be dealt as an employment contract only. However, the Court feels that the untimely expulsion of Heeg from the partnership will cause an identical loss and entitles Heeg to an identical compensation.

[140] As indicated above, the Defendants have failed to repurchase Heeg's 20% equity in Hitech, notwithstanding their obligation to do so under the provisions of the shareholders' agreement. Their failure to act in a timely fashion (i.e. within 60 days of Heeg's dismissal) or to tender this amount, will deprive them of the benefit of the term of 12 months granted to them to effect payment. Consequently, the full amount of the repurchase was due as of the date of institution of the action.

[141] Heeg argues that he is entitled to fair market value for his shares which should normally be higher than book value. He asks for an order appointing an expert who would be entrusted with the task of evaluating his shareholdings at fair market value.

[142] With respect, the Court disagrees.

[143] The parties have entered into a valid and binding contract calling for the repurchase of the shareholdings of a departing partner at book value whatever the cause or justification of such departure. This includes the case of an "involuntary" departure with or without just and sufficient cause. This agreement is binding upon Plaintiff and there is no need to seek another method of evaluating the 20% equity participation of the Plaintiff in Hitech.

[144] In short, the Court is of the opinion that Heeg is entitled to the same amount for his shares as was paid to Carole St-Louis, that is to say $413,000.00, and not more. Reliance upon expert testimony to attempt to justify another method of valuation was neither appropriate nor helpful to the Court.

[145] The Defendants' attempt to reduce the book value of the shares of Hitech as at October 25, 2007 to a lesser sum than what was paid to Carole St-Louis is totally inappropriate, given the fact that the "excuse" or justification for doing so is related to the issue of costing of inventory, a "problem" which existed since 2003. The partners' decision not to take it into account in the case of Carole St-Louis eliminates the possibility of invoking it against the Plaintiff. If it was so important to correct, a mandate to the auditors of the company to re-evaluate the inventory on hand could have been given as early as 2004. It is to be noted that as of September 30, 2007 and 2008, the auditors of the company produced audited financial statements using the uncorrected inventory valuation. When this was pointed out by the Court to the Defendants and their attorneys, a revised set of so-called audited statements were presented. This attempt to correct the previous audited statements comes much too late to bear any credence on reliability. Accordingly, the Court is not relying upon these alleged new figures.

[146] Several weeks after the conclusion of the trial, the attorney for the Defendant requested a re-opening of the evidence to adduce additional evidence and documentation in a last-minute effort to justify a lower book value. This was opposed by Plaintiff. The Court feels that such request and additional evidence are ill-founded and did not grant the application. To this date the issue still remains open. By this judgment, this application is dismissed.

FOR ALL THE FOREGOING REASONS, the Court

DISMISSES Defendants' Motion to dismiss the action on the basis of lack of jurisdiction of this Court;

WITHOUT COSTS

GRANTS Plaintiff's action as follows:

a) **CONDEMNS** Defendant Hitech Piping (HTP) Ltd to pay to the Plaintiff, as damages resulting from Plaintiff's dismissal from Hitech, the sum of $50,000.00 with interest plus the additional indemnity of article 1619 C.c.Q. from the date of service of the present action;

b) **CONDEMNS** Defendants Hitech Piping (HTP) Ltd, Les Investissements Isafran Ltée, Maurice Lalonde, Les

Investissements Lambert & Tremblay Ltée, Jean Tremblay et Stefano Diflorio, jointly and severally, to pay to Plaintiff the sum of $413,000.00 together with interest at the legal rate plus the additional indemnity of article 1619 C.c.Q. from the date of institution of these proceedings and to proceed to the repurchase of his shares in Hitech, the whole within fifteen (15) days of the date of the present judgment.

WITH COSTS except for expert fees incurred by Plaintiff

_____
ROBERT MONGEON, J.S.C.

Me Janet Michelin
Irving Mitchell Kalichman
Attorney for the Plaintiffs

Me Claire Brassard
Mercier Leduc
Attorney for the Defendants

Date of hearing: December 9, 11,12, 2008