

Directors' Briefing

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Number 58

Gender Diversity Disclosure..... 3

Recent Cases

Oppression Remedy Ordered..... 5

CCAA Protection Order Granted..... 6

Oppression — Corporate Respondents Ordered To Pay Costs 7

Oppression — Examination of Witnesses..... 8

Action for Damages by Corporate Director Dismissed 8

Oppression — Shareholders Ordered to Offer to Purchase Shares 9

Corporate Shareholder's Claims Dismissed ... 10

Former Shareholder/ Director Permitted To Continue Derivative Action ... 11

TOP 10 CONTENTIOUS ISSUES IN THE BOARDROOM

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Introduction

Difficulties arise for Corporations which lack a formal process governing the calling and conduct of board meetings. Issues arise unexpectedly at meetings and therefore, we have chosen our top 10 contentious issues to discuss in this two part series. We will discuss the first five in this issue and the last five in the next issue of *Directors' Briefing*. It is also important to note that certain formal requirements are common among boards of private, public, and not-for-profit corporations.

1. Right to Attend Board Meetings

Meetings of the board of directors may be attended only by the directors of the corporation. Other persons such as counsel for a party may be admitted with the consent of the meeting.² This is however subject to the provisions of the by-laws of the corporations, which can provide that other individuals may attend, such as an executive director. Directors and officers are under a duty of confidentiality, which others such as the media or special guests are not. At times, guests, like observers, are asked to sign confidentiality agreements.

Every director has the right to attend and participate in all meetings of the board of directors. As such, a director cannot be excluded from meetings.³

It is however important to note that, although directors may miss board meetings, they would be wise to attend as many meetings as possible since they may be held liable for decisions that are made in their absence.

This right to attend board meetings is not qualified. It is not open to a corporation to exclude any director from a board meeting on the basis that the director is unfit, has allegedly engaged in misconduct, or also sits on the board of a competitor, subject only to the conflict rules of the corporate statutes discussed below in point 4.

2. No Attendance by Proxy

The law is settled on the issue that a director cannot attend a meeting by proxy. This is largely due to the fact that the directors cannot delegate their duties to a third party.⁴

The law providing that directors may not attend a meeting by proxy extends to resolutions in writing which cannot be signed on behalf of a director by power of attorney.

3. Who Can Chair the Meeting

The following is a quotation from an Australian case:

It is an indispensable part of any meeting that a chairman should be appointed and should occupy the chair. In the absence of some person (by whatever title he or she be described) exercising procedural control over a meeting, the meeting is unable to proceed to business.⁵

Most by-laws provide that the chair of the board, if present and willing, will preside at meetings of the board. In the absence or refusal of the chair to preside, or to continue presiding, the president shall preside, unless the constitution provides otherwise. If no such provision exists, a remaining quorum of the board may elect a new chair from among the directors.⁶

In the B.C. case of *Hastman v. St. Elias Mines Ltd.*,⁷ the applicants sought to set aside a shareholders meeting. They alleged that the chair was not a lawyer and therefore was not qualified to rule on the validity of proxies. The Court rejected this argument provided that

... from a policy point of view, it would not be desirable to restrict the group of people who could be chairs of a corporation to lawyers. The authorities are replete with situations where chairs of companies are not lawyers and I was not given any authorities to contradict that history.⁸

The chair should, however, consider having counsel to advise on issues that may arise at a meeting.

4. Conflict of Interest

Pursuant to corporate statutes, directors must disclose their interest at the meeting of directors and must also refrain from voting on any contract in which they may have an interest.

There are situations that can arise in which two directors refrain from voting on their own contracts, however, they agree to vote in favour of each other's contracts in a "you scratch my back, I'll scratch yours" situation. The courts frown on such agreements and will likely declare both contracts void.⁹

In addition, the *Ontario Business Corporations Act*¹⁰ ("OBCA") provides that a director cannot attend any part of a board meeting where the contract in which he or she has an interest is being discussed.¹¹ This provision is stricter than that of the *Canada Business Corporations Act*¹² ("CBCA"), which only provides that the director may not vote on the contract. By-laws could be expanded to incorporate the provisions of the OBCA.

5. Quorum Issues

A quorum must be maintained throughout a meeting of directors. If a quorum is not maintained, the business conducted would not be lawfully transacted. In the case of *Mega Blow Moulding Ltd. v Sarantos*¹³, the Court addressed the validity of a resolution passed where the quorum was not achieved at a board meeting. In reaching its decision, the Court referred to subsection 114(2) of the CBCA, which provides:

Subject to the articles or by-laws, a majority of the number of directors or minimum number of directors required by the articles constitutes a quorum at any meeting of directors, and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

The Court found that the meeting of the directors did not comply with the quorum requirements and accordingly ruled that the resolution passed at the meeting was invalid.

The number of shareholders or members that constitute a quorum is determined by the governing statute, the by-laws, and by any unanimous shareholder or member agreement. At common law, absent any other provision in the constituting documents, a quorum is a majority of the shareholders. Subsection 139(4) of the CBCA and subsection 101(4) of the OBCA each provide that two persons form a quorum for a shareholders' or members' meeting (*Canada Not-for-Profit Corporations Act*¹⁴ ("CNCA"), s.164(2), *Ontario Not-for-Profit Corporations Act*¹⁵, s. 57(1)). Of course, in some larger corporations, the quorum is often specified to be a stipulated percentage of shareholders' shares or members represented at the meeting.

Where a shareholder or member attends only to protest the meeting, such person or such person's shares should not be counted for quorum purposes.

One issue that arises from time to time is that of the "disappearing quorum." That refers to the situation where a

quorum is present at the start of the meeting but the quorum is lost at some point during the meeting itself. At common law, unless the corporation's constitution provides otherwise, the loss of a quorum during a meeting deprives the meeting of its authority. It has to be adjourned and any business transacted after the quorum is lost is invalid.

Furthermore, at common law, following the commencement of the meeting, there is no obligation to ensure that a quorum is present thereafter. If a quorum is present at the start of the meeting and no quorum count is demanded or taken, a quorum is presumed to have been present throughout.

This is no longer the case under the CBCA, the OBCA, or the CNCA. The three aforementioned statutes provide that, if a quorum is present at the opening of the meeting of shareholders or members, the shareholders or members present may proceed with the business of the meeting even if a quorum is not present throughout the meeting. However, this is subject to by-laws which could provide otherwise.

In some cases, the articles or by-laws impose a quorum higher than the general one prescribed in respect of certain matters that are considered to be of special importance.

Notes:

¹ The writers wish to express their appreciation to Joshua Disenhouse, student-at-law at Minden Gross LLP, for his assistance in the preparation of this article.

² *Mayor, Alderman and Burgesses of Tanby v. Mason*, [1908] 1 Ch. 457 (CA).

³ *Hayes v. Bristol Plant Hire Ltd.*, [1957] 1 All ER 685 (Ch D).

⁴ *McGuire & Forester Ltd. v. Cadzow* [1933] 1 D.L.R. 192 (Alb. C.A.).

⁵ *Colorado Construction Pty. Ltd. v. Platus* (1966), 2 N.S.W.R. 598 at 600.

⁶ *Klein v. James* (1986), 36 B.L.R. 42 (B.C.S.C.) affirmed (1987), 37 B.L.R. (XXV1) (B.C.C.A.).

⁷ 2013 B.C.S.C. 1069.

⁸ *Ibid.* at para 139.

⁹ See *Re North Eastern Insurance Co.*, [1919] 1 Ch 198.

¹⁰ R.S.O. 1990, Ch. B. 16.

¹¹ OBCA at s. 132(5).

¹² R.S.C. 1985, c. C-44.

¹³ [2001] 16 B.L.R. (3d) 52.

¹⁴ S.C. 2009 c. 23.

¹⁵ S.O. 2010 Ch. 15.

GENDER DIVERSITY DISCLOSURE

— Peninah Brickman, Wolters Kluwer Limited. © Wolters Kluwer Limited.

Background

On January 16, 2014, the Ontario Securities Commission ("OSC") announced that it had published proposed amendments (the "Proposed Amendments") to Form 58-101F1 of National Instrument 58-101 *Disclosure of Corporate Governance Practices*.

These Proposed Amendments arrive following comments made in Ontario's 2013 Budget regarding "the participation of women on boards and in senior management" and subsequent consultations (see, e.g., OSC Staff Consultation Paper 58-401 *Disclosure Requirements Regarding Women on Boards and in Senior Management*).¹

Many jurisdictions have taken steps either to increase the proportion of women on corporate boards or to mandate disclosure of the steps being taken in respect of gender diversity on the board.²

In November 2013, the OSC issued a survey to approximately 1,000 TSX-listed issuers and received 448 responses. Of those respondents, 57% indicated that they had no women directors, 28% indicated that they had one woman director, and 3% indicated that they had three women directors. Three issuers reported that 50% or more of their board members were women, and 3% indicated that they had a woman chair of the board. More than half of the respondents indicated that women held less than 10% of their executive officer positions.³

Set out below is a description of the Proposed Amendments and information regarding the opportunity to comment on the Proposed Amendments.

Description of Proposed Amendments

The Proposed Amendments would apply to TSX-listed issuers and other non-venture issuers reporting in Ontario ("NVI") and relate to disclosure of:

- director term limits;
- policies regarding women's representation on boards;
- consideration by the board or nomination committee of the representation of women in the director identification and selection process;
- consideration of representation of women in executive positions when making executive appointments;
- targets adopted regarding women's representation on the board and in executive roles; and
- the number of women on the board and in executive roles.

The Proposed Amendments would permit additional information relevant to understanding the above.

Director term limits

The first amendment would require that NVIs disclose whether or not they have adopted term limits for their directors. If an NVI has not adopted term limits, it would have to explain why it has not done so.

Policies regarding women on boards

The second amendment would require that NVIs disclose whether they have adopted a policy for the identification and nomination of women directors, and, if not, why not.

If a policy has been adopted, the NVI would then have to disclose:

- a short summary of the policy's objectives and key provisions;
- the measures taken to ensure that the policy has been implemented effectively;
- annual and cumulative progress on achieving the objectives of the policy; and
- whether and how the effectiveness of the policy is measured.

Consideration of the representation of women in the director selection process

The third amendment would require NVIs to disclose how the level of representation of women on the board is considered in identifying and nominating candidates for election or re-election, and, if the level of representation of women is not considered, why that is the case.

Consideration of the representation of women in executive officer positions

The fourth amendment would require that NVIs disclose how they consider the level of representation of women in executive officer positions when making executive officer appointments, and, if they do not do so, their reasons therefor. Executives for the purpose of such disclosure would include a chair, vice-chair, president, CEO, CFO, vice-president in charge of a principal business unit, division, or function, or an individual performing a policy-making function.

Targets

The fifth amendment would require NVIs to disclose whether the NVI has adopted targets (which could be a set number or percentage or a range of the foregoing) to be achieved by a specific date regarding women on the NVI's board and in executive officer positions and, if not, why not. If targets were adopted, NVIs would have to disclose their progress (annual and cumulative) in achieving those targets.

Number of women on the board and in executive officer positions

The sixth amendment would require NVIs to disclose the number and proportion of women on the board and of executive officers who are women.

Next Steps

Written submissions on the Proposed Amendments (including in respect of specific questions, available at http://www.osc.gov.on.ca/documents/en/Securities-Category5/ni_20140116_58-101_pro-amd-f1.pdf), may be made by April 16, 2014 to comments@osc.gov.on.ca.

Notes:

¹ For an interesting report on gender diversity and corporate performance, see "Women Matter: Gender diversity, a corporate performance driver", by McKinsey & Company, available at http://www.mckinsey.com/features/women_matter.

² See, e.g., http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20130730_58-401_disclosure-requirements-women.pdf, at page 16.

³ See http://www.osc.gov.on.ca/documents/en/Securities-Category5/ni_20140116_58-101_pro-amd-f1.pdf.

RECENT CASES

Chambers Judge's Order Set Aside and Oppression Remedy Ordered by Court of Appeal

Court of Appeal for Saskatchewan, December 17, 2013

The respondents, Melanie and Kevin Boldt (the "Boldts"), along with the applicant, Mr. Cousyn and his estranged wife, Ms. Hutton, incorporated the corporate respondent Souleio Foods Inc. ("Souleio") to carry on a grocery store business. Souleio hired Ms. Sieminska as its day-to-day manager. The Boldts, Mr. Cousyn, Ms. Hutton, and Ms. Sieminska were the only shareholders of Souleio. Under the terms of a unanimous shareholders' agreement (the "USA"), Souleio was authorized to retract any shareholder's shares and to require his/her resignation as a director upon the occurrence of a "Marital Action". Under clause 7.5 of the USA, a Marital Action was stated to have occurred where any married or common-law spousal shareholder undertook legal proceedings, executed any agreements, or engaged in any mediation to formalize the separation of his/her marital relationship. After Mr. Cousyn became romantically involved with Ms. Sieminska, he and Ms. Hutton separated, as did Ms. Sieminska from her husband. Mr. Cousyn and Ms. Hutton proceeded to mediation and, shortly thereafter, Ms. Hutton commenced divorce proceedings. Ms. Sieminska and her estranged husband, however, did not commence any formal legal proceedings or mediation proceedings. The Boldts then decided to invoke clause 7.5 of the USA against each of Mr. Cousyn, Ms. Hutton, and Ms. Sieminska. They undertook a series of steps in an attempt to remove Mr. Cousyn and Ms. Hutton as directors and officers of Souleio, and to remove Mr. Cousyn, Ms. Hutton, and Ms. Sieminska as shareholders. Alleging that the methods used by the Boldts to enforce clause 7.5 of the USA against them were abusive and oppressive, Ms. Sieminska and Mr. Cousyn instituted oppression proceedings against the Boldts, but a chambers judge dismissed their originating notice of motion in its entirety, with costs, on a solicitor-client basis. Ms. Sieminska and Mr. Cousyn appealed.

The appeal was allowed. Despite the chambers judge's findings to the contrary, there was no ambiguity in the wording and intent of clause 7.5 of the USA. There was therefore nothing to justify his conclusion that a Marital Action had occurred with respect to Ms. Sieminska, particularly when this conclusion was based on his erroneous reliance on extrinsic evidence concerning the Boldts' and Ms. Hutton's intentions when clause 7.5 of the USA was being drafted (see *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC)). It was equally plain that the Marital Action provisions of clause 7.5 of the USA did apply to Mr. Cousyn, since he was engaged in mediation and divorce proceedings. That said, the factual matrix upon which the chambers judge analyzed the oppression issue was fundamentally different from the one now facing the appellate court. As a result, the oppression issue required a fresh analysis at the appellate level, and the chambers judge's order had to be set aside in its entirety, including his order for costs on a solicitor-client basis, which was totally unsupported by any reasoning he provided. Findings of oppression are based on the reasonable

expectation of the parties (see *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69). The Boldts' actions in this case clearly and profoundly breached Ms. Sieminska's reasonable expectation that clause 7.5 of the USA would not be invoked against her. In addition, the Boldts' actions were presumptuous and disrespectful of Ms. Sieminska's and Mr. Cousyn's contractual and statutory rights as shareholders, and of Mr. Cousyn's status as a director and officer of Souleio. In essence, the Boldts hijacked Souleio to serve their own purpose of removing Ms. Sieminska and Mr. Cousyn without proper regard for their interests as shareholders of Souleio, or, in Mr. Cousyn's case, as a director and officer of Souleio. Their reasonable expectations with respect to their administrative rights (i.e., to notice of meetings, to vote at meetings, and to have access to corporate information, etc.) were therefore clearly breached. Such conduct on the Boldts' part was coercive, abusive, and suggestive of bad faith, and therefore was oppressive. The purported retraction of Ms. Sieminska's shares of Souleio by the Boldts was accordingly set aside, and the Boldts were ordered to purchase those shares at their fair market value, to be determined apart from the provisions of the USA. To compensate both Ms. Sieminska and Mr. Cousyn for the breach of their administrative rights, they were entitled to compensation of \$1,000 and \$1,500, respectively for the legal costs that they incurred in attempting to prepare for and attend various directors' and shareholders' meetings of Souleio with counsel.

Sieminska v. Boldt

CCAA Protection Order Granted; Charges To Secure Administration Costs and To Protect Corporate Directors Also Ordered

Ontario Superior Court of Justice, January 16, 2014

The corporate applicant, Jaguar Mining Inc. ("Jaguar"), was incorporated under the Ontario *Business Corporations Act*. In late 2013, Jaguar defaulted on a series of its notes. As a result of Jaguar's default, certain remedies were available to the note holders, including the acceleration of the \$160.3 million in interest and principal outstanding. Jaguar therefore sought protection for itself and its three wholly owned Brazilian operating subsidiaries under the *Companies' Creditors Arrangement Act* (the "CCAA"). Its principal objective was to effect a recapitalization through a plan of compromise and arrangement. It also sought a meeting order, a claims procedure order, and orders establishing certain charges on its current and future assets to a maximum of \$5 million.

The application was granted. Jaguar was facing a liquidity crisis and was insolvent. Jaguar was subject to claims in excess of \$5 million, and had complied with the statement and report requirements of section 10(2) of the CCAA. Jaguar also operated in a fully integrated manner, and depended upon its subsidiaries for their value generating capacity. Absent a stay of proceedings in favour of Jaguar and its subsidiaries, its various creditors would be in a position to take enforcement steps that could conceivably lead to a failed restructuring which would not be in the best interests of its stakeholders. In light of the foregoing analysis, a CCAA protection order was granted. An administration charge not to exceed \$5 million on Jaguar's current and future assets was also ordered to secure the fees and disbursements of various professionals who had rendered services to Jaguar both before and after the commencement of the CCAA proceedings. In addition, a directors' charge on Jaguar's current and future assets in the amount of \$150,000 was ordered to protect its directors and officers to the extent that such an amount was not available through existing insurance. A claims procedure order and a meeting order were also provided for, although these procedural steps did not require any assessment by the Court as to the fairness and reasonableness of Jaguar's reorganization plan at this stage in the proceedings.

Jaguar Mining Inc. (Re)

In Oppression Proceedings, Corporate Respondents Ordered To Pay Portion of Applicants' Interim Costs

Ontario Superior Court of Justice, January 20, 2014

The applicant, Hames Family Trust, a family trust established by the individual applicant Richard Hames ("Hames"), owned 30 per cent of the common shares of a holding corporation ("Holdco"). The respondent family trusts owned the remaining common shares of Holdco. Holdco owned the shares of two operating companies that are the corporate respondents in this dispute. Hames was an officer and director of Holdco and the two corporate respondents. The individual respondents were directors, officers, and controlling shareholders of the corporate respondents. Hames and the Hames Family Trust instituted oppression proceedings against the respondents, alleging, in essence, that: (a) the individual respondents, as directors, officers, and controlling shareholders of the corporate respondents, had improperly ousted Hames from any decision-making authority over the corporate respondents; and (b) the individual respondents had wrongfully caused the corporate respondents to cease paying Hames his salary, benefits, and bonuses, while continuing to make such payments to the individual respondents in contravention of an existing shareholders' agreement. Hames and the Hames Family Trust were therefore seeking an accounting of the corporate respondents' profits, together with orders requiring that: (a) the corporate respondents purchase the shares of Holdco owned by Hames and the Hames Family Trust without minority discount; and (b) Hames be compensated for his loss of salary, benefits, and bonuses. During the course of the oppression proceedings, and prior to discovery, the applicants moved for orders: (a) requiring the corporate respondents to pay the applicants' interim costs of the application; (b) restraining the corporate respondents from indemnifying the individual respondents for their costs of the proceedings; and (c) requiring the individual respondents to refund to the corporate respondents any amounts already paid for their legal costs.

The motion was granted in part. Section 249(4) of the Ontario *Business Corporations Act* permits courts to order corporations to pay oppression complainants' interim costs, including reasonable legal fees. In *Alles v. Maurice* (1992), 5 BLR (2d) 146 (Ont. Gen. Div.), Blair J held that an applicant for relief under section 249 must establish that "there is a case of sufficient merit to warrant pursuit" and that the applicant is in such financial circumstances that, but for an order under the section, the claim could not be pursued. Despite some authority to the contrary, Blair J's interpretation of the legislation is more consistent with a purposive approach to the section and with the equitable nature of the oppression remedy than the interpretation of this section given in a differing line of cases. Accordingly, for an order under section 249(4) to be justified, a judge must be satisfied that the claims being advanced are well beyond the "frivolous and vexatious" mark. However, such claims do not have to be established on a balance of probabilities. In this case, the oppression claims of Hames and the Hames Family Trust relating to Hames's alleged wrongful expulsion from participation in the management of the corporate respondents demonstrated a case of sufficient merit to warrant pursuit, despite certain factual disputes that would necessitate a trial. In addition, since Hames stopped receiving his salary, his income dropped significantly, and the legal fees relating to these proceedings represented his single largest liability. Hence, Hames's financial circumstances justified an order under section 249(4). In addition to the \$86,000 in reasonable legal costs already incurred, an additional \$22,000 represented a reasonable amount for the future costs needed to prepare a supplementary application record and to complete discoveries. However, the Hames Family Trust failed to disclose its relevant financial information. Hames, therefore, was awarded \$54,000 (i.e., one-half of \$108,000) in interim costs. An order prohibiting the corporate respondents from indemnifying the individual respondents and the family trust respondents was also made in the absence of any opposition to such an order by any of the respondents.

Hames v. Greenberg

Applicants in Oppression Proceedings not Permitted To Examine Witnesses Before Hearing of Limited-Purpose Receiver's Motion for Discharge

Ontario Superior Court of Justice, January 27, 2014

The corporate respondents (collectively "Langston Hall") owned property intended for condominium development (the "Property"). The applicant shareholders in Langston Hall instituted oppression proceedings under section 248 of the Ontario *Business Corporations Act* that involved, in part, questions concerning the propriety of increases made to first, second, and third mortgages against the Property. In the course of these proceedings, the applicants obtained an order in December 2012, appointing a limited-purpose investigative receiver to investigate and report on the particulars of Langston Hall's financial activities. After filing two reports, the receiver moved for its discharge. The discharge hearing was set for March 2014. The applicants then sought, by motion, to examine five persons under Rule 39.03 of the *Rules of Civil Procedure* as witnesses on the receiver's discharge motion.

The motion was dismissed. Although Rule 39.03 permits a party to examine a person as a witness before the hearing of a pending motion, the receiver had been appointed at the instance of the applicants in their oppression application. The applicants could have cross-examined responding affiants or could have conducted Rule 39.03 examinations in their application, but the applicants elected not to do so. The applicants were now seeking, through their motion for Rule 39.03 examinations, to conduct the inquiries of Langston Hall that they feel the receiver should have made. This was not a proper use of Rule 39.03. If the applicants believed that the receiver had not done a proper job, or that its powers should be expanded, these submissions could be made at the March 2014 discharge hearing. No Rule 39.03 examinations were therefore scheduled.

Monaco v. Langston Hall Real Estate Corp.

Action for Damages by One Corporate Director Against the Other Corporate Director Dismissed; Other Directors' Counterclaim Also Dismissed

Ontario Superior Court of Justice, January 2, 2014

The defendants, Mr. Bourke and Mrs. McBain-Bourke (the "Bourkes"), were the shareholders and directors of Professional Painting & Decorating Inc. ("PPD"), a painting contractor, although Mrs. McBain-Bourke was never actively involved with PPD's operations. The plaintiff, Ms. Susi, was hired by PPD as a bookkeeper in 2001. In the spring of 2005, Ms. Susi and Mr. Bourke entered into an oral share purchase agreement pursuant to which she would purchase all of the 100 outstanding shares of PPD owned by the Bourkes. At that time, Ms. Susi paid Mr. Bourke a \$25,000 deposit and she paid him a further \$60,000 in 2007. From the spring of 2005, however, both parties considered themselves business partners in the operation of PPD, and Mr. Bourke began spending more time away as Ms. Susi managed PPD. In 2006, PPD's business began to decline, source deduction remissions to the Canada Revenue Agency (the "CRA") fell into arrears, and PPD was continuing to support the Bourke family and Ms. Susi, although it could not afford to do so. Pursuant to a written agreement, signed in March 2008, 25 per cent of PPD's 100 shares were transferred to Ms. Susi in return for the \$85,000 that she had previously paid to Mr. Bourke in two instalments. In July 2008, another written agreement was signed by Mr. Bourke and Ms. Susi providing, in part, for: (a) Ms. Susi to pay Mr. Bourke \$260,000 on June 30, 2009 (the "Closing Date"); (b) 24 shares of PPD to be transferred to Ms. Susi forthwith; (c) the balance of the shares of PPD to be transferred to her on the Closing Date upon her "payment in full" of the amounts owing to Mr. Bourke; and (d) Mr. Bourke to resign as a director and officer of PPD. The March 2008 agreement was never completed. In November 2008, Ms. Susi took a leave of absence from PPD for health and personal reasons and Mr. Bourke returned to operate PPD on a full-time basis. At that point, he determined that PPD was not financially viable and, in January 2009, caused it to make an assignment into bankruptcy. Just prior to the bankruptcy filing, Mr. Bourke established a new business as the successor to PPD that was immediately successful. In January 2009, Ms. Susi commenced an action against the Bourkes for damages and other relief by way of oppression remedies under section 248 of the Ontario *Business Corporations Act* (the "OBCA"). By way of counterclaim, the Bourkes also claimed damages and an oppression remedy against Ms. Susi.

Both the action and the counterclaim were dismissed. This case could be decided on the issue of director's duties alone, but in the event that such a finding was incorrect, an oppression analysis should also be provided. Section 134(1) of the OBCA requires corporate directors to act honestly and in good faith with a view to the best interests of the corporation. This fiduciary duty, however, is owed only to the corporation and not to its shareholders (see *Brant Investments Ltd. v. Keeprite Inc.*, 1991 CanLII 2705 (Ont. CA)). Ms. Susi neglected to inform Mr. Bourke of PPD's declining financial situation, including its indebtedness to the CRA, and its cash flow problems. Conversely, Mr. Bourke failed to make any meaningful inquiry about these issues, and even established a competing business to that of PPD without consulting Ms. Susi, even though she was still a shareholder of PPD (although she had resigned by then as a director). Neither Mr. Bourke nor Ms. Susi, therefore, met their fiduciary duty as directors to PPD, and their combined neglect led to PPD's collapse. This finding alone was sufficient to dispose of both Ms. Susi's action and the counterclaim. However, if an oppression analysis were required, it would necessitate an examination of the parties' reasonable expectations (see *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69; *Nanff v. Con-Crete Holdings Ltd.* (1995), 23 OR (3d) 481 (Ont. CA); *Greenlight Capital Inc. v. Stronach*, 2008 CanLII 35359 (Ont. SCJ-Div. Ct.); and *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.*, [2008] OJ No. 3715 (Ont. SCJ)). By November 2008, it was no longer objectively reasonable to resolve PPD's issues and close the deal. Both parties would have known this had they exercised due diligence. As a result, neither party was entitled to a compensation order based on their allegations of oppression, since their expectations in this context were simply not reasonable. Mr. Bourke's reliance on the business judgment rule in support of his defence to Ms. Susi's oppression claim did, however, have merit. That rule requires corporate directors' decisions to be made honestly, in good faith, and in the best interests of the company. PPD's bankruptcy was its only option, and Mr. Bourke's decision to implement this fell within the range of reasonableness, despite his failure to discharge his fiduciary obligations to PPD.

Susi v. Bourke and McBain-Bourke

In Oppression Proceedings, Respondent Shareholders Ordered to Offer to Purchase Petitioner's Shares

Supreme Court of British Columbia, February 14, 2014

The corporate respondent, Pacific Art Stone Inc. (the "Company"), operated a construction stone and masonry supply business. The petitioner held 18 per cent of the common shares of the Company and was a director. The individual respondents, Messrs. Dhadwal and Singh, each held 41 per cent of the Company's shares, and were also directors. Under the terms of two shareholders' agreements, the petitioner was to be the general manager of the Company, and Mr. Singh was to have no active role in its management. Following a violent physical confrontation in May 2013 between Mr. Singh and the petitioner in the Company's stockyard, Mr. Singh was charged with assault. On June 1, 2013, Messrs. Singh and Dhadwal held a directors' meeting at which the petitioner's position as the Company's general manager was terminated, allegedly as a result of the physical altercation between him and Mr. Singh. At a further directors' meeting held on June 6, 2013, which the petitioner did not attend, the petitioner was not re-elected as a director of the Company. The petitioner received no notice of the directors' meeting held on June 1, 2013, and late notice of the one held on June 6, 2013. The parties were also unable to agree on the value of the Company's shares. In oppression proceedings subsequently commenced by the petitioner against the respondents, the petitioner alleged, in part, that: (a) the respondents were treating the Company as a sole proprietorship and were using its assets and funds as if they were their own; (b) the Company's sales had diminished after the petitioner's departure as its general manager, and the respondents were diverting business opportunities and assets away from it; and (c) the shareholders of the Company were deadlocked and were no longer able to carry on its operations. The petitioner therefore sought an order requiring the respondents to purchase his shares of the Company at a price to be determined by them, subject to a "shotgun" type of remedy enabling the petitioner, upon refusing the respondent's offer, to purchase their shares at the same price as the one fixed by them in their original offer to him.

The petition was granted. Some of the criteria to be used in oppression proceedings in determining the oppressed parties' "reasonable expectations" are: general commercial practice, the nature of the company, the relationships between the applicant and the other corporate actors, past practice, whether the applicant could have taken steps to protect itself against the prejudice he/she claims to have suffered, agreements and representations made by the parties, and the fair resolution of conflicting interests between corporate stakeholders (see *1976 BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69). In addition, "oppression" was said, in *Scottish Co-op Wholesale Soc. Ltd. v. Meyer*,

[1958] 3 All ER 66 ("*Scottish Co-op*"), to mean "conduct that is burdensome, harsh, and wrongful" or "conduct that lacks probity and fair dealing in the affairs of the company to the prejudice of some of its members." In the present proceedings, the respondents conceded that the petitioner was not given proper notice of the directors' meeting of June 1, 2013, at which his appointment as the Company's general manager was terminated. Nor was the petitioner provided with access to the Company's financial information. In fact, the petitioner was excluded from the Company's management and was denied the Company's financial information, to which he was entitled. This constituted oppressive conduct of the kind referred to in *Scottish Co-op*. Nor were the parties able to continue as shareholders in the Company. The respondents were therefore ordered to offer, in writing, to purchase the petitioner's shares of the Company for a share price to be determined by the respondents. If, after 30 days, this offer was not accepted by the petitioner, he would then be entitled to purchase the respondents' shares of the Company at the same price. Until the sale of the Company's shares was completed, the petitioner was entitled to full financial information regarding the Company.

Uraizee v. Pacific Art Stone Inc.

Corporate Shareholder's Claims for Oppression, Wrongful Dismissal, and Return of Investment Dismissed

Alberta Court of Queen's Bench, February 18, 2014

The individual defendant, Mr. Lipscombe, was the majority shareholder and a director and officer of the corporate defendant PHAT Training Inc. ("PHAT"). In 2008, Ms. Hogbin became a shareholder of PHAT, having paid \$25,000 for 25 per cent of its outstanding shares. In 2008, PHAT hired the plaintiff, Mr. Jacobs, as a trainer under the terms of a consulting contract. Mr. Lipscombe and Mr. Jacobs later reached a verbal agreement pursuant to which Mr. Jacobs would buy six per cent of the shares of PHAT for \$24,420, and during September and October 2010, Mr. Jacobs commenced paying this \$24,420 with a series of payments culminating with a cheque dated October 18, 2010 for \$9,000 and a money order dated October 19, 2010 for \$3,920. PHAT used these payments to effect certain leasehold improvements. PHAT held a shareholders' meeting in December 2010 while Mr. Jacobs was on vacation, and later informed Mr. Jacobs that he would have to take a greater marketing role to bring in new clients. On January 10, 2011, Mr. Jacobs told Mr. Lipscombe that he wished to leave PHAT and to have his \$24,420 investment returned.

Mr. Lipscombe offered to let him remain employed as a trainer, but on January 28, 2011, Mr. Jacobs sent Mr. Lipscombe an email saying that he would no longer work for PHAT. All of Mr. Jacobs' clients eventually left PHAT. Mr. Lipscombe and Ms. Hogbin later incorporated Wevive Inc. in order to transfer branding from PHAT. Mr. Jacobs later sued both PHAT and Mr. Lipscombe for damages for wrongful dismissal, and also sought oppression remedies under section 242 of the *Alberta Business Corporations Act* (the "ABCA"). The alleged oppression was said to consist, among other things, of: (a) failing to provide Mr. Jacobs with adequate financial information; (b) excluding him from PHAT's decision-making process; (c) failing to hold Mr. Jacobs out as a "partner" shareholder; (d) generally oppressive conduct involving calling him at late hours, asking him to become involved in janitorial and other menial work for PHAT, and to donate his time to free training programs to encourage PHAT's clients; (e) failing to comply with the technical requirements of the ABCA relating to election of directors (s. 108), annual meetings (s. 132), and presentation of annual statements (s. 155); and (f) failing to issue share certificates evidencing his shareholding in PHAT. Both defendants counterclaimed against Mr. Jacobs for damages, alleging that he had: (a) breached his consulting contract by failing to give proper notice, which caused PHAT a financial loss; and (b) breached the terms of his share purchase agreement, that required him to perform various marketing and manual labour tasks, in addition to giving his time to train clients for free. Share certificates for PHAT shares were issued to Mr. Jacobs after this action was commenced.

The action was dismissed; the counterclaim was allowed in part. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, which is the leading case on oppression, the Supreme Court held that the plaintiff must establish: (a) a breach of his/her reasonable expectations, and (b) whether such breach amounts to "oppression", "unfair prejudice", or "unfair disregard" as set out in section 242(2) of the ABCA. Mr. Jacobs was given access to all of PHAT's financial information even though, before agreeing to pay for his shares of PHAT, he did not have his accountant carry out proper investigations by contacting PHAT's accountant. He was also fully informed of PHAT's shareholders' meetings, none of which was held behind his back or without his knowledge. Nor was there any evidence that PHAT had prevented him from announcing in the company newsletter or elsewhere that he had become one of PHAT's shareholders. In addition, he was also told by the other shareholders that he would have to engage in allegedly menial and other allegedly

distasteful tasks to make a small company like PHAT work. Nor were his interests prejudiced or unfairly disregarded by PHAT's failure to comply with the technical provisions of the ABCA. In essence, he was merely dissatisfied that he had not been offered an ownership in PHAT sooner, and that, when he became a shareholder, he disliked its financial situation as of December 2010. He had also been told by Mr. Lipscombe and Ms. Hogbin that PHAT's minute book could be updated and a share certificate issued to him if he would pay the \$800 cost, which he refused to do. In short, Mr. Jacobs agreed to purchase an interest in PHAT, paid for that interest, and was treated like a shareholder until January 2011 when he indicated that he no longer wanted to be involved in PHAT's operations. He was, however, a shareholder and his shares had some value, whatever that value might be. The incorporation of Wevive Inc., moreover, was for publicity purposes to overcome the reputational damage done to PHAT following the commencement of Mr. Jacobs' action, and did not have the sinister overtones alluded to by Mr. Jacobs. Mr. Jacobs' expectations of PHAT, therefore, were not reasonable. It was not a company that was going to provide him with a nine-to-five job in a corner office with dividend income. The oppression portion of his action was dismissed accordingly. Furthermore, Mr. Lipscombe did nothing to Mr. Jacobs that exceeded his authority as a corporate director or which lacked a *bona fide* corporate purpose, which was the test set out in *Said v. Butt*, [1920] 3 KB 497, [1920] All ER Rep. 232. Nor was there any reason to pierce the corporate veil in order to justify a finding of personal liability against Mr. Lipscombe. Mr. Jacobs' action against him personally was therefore dismissed. Also, Mr. Jacobs terminated his own employment and was unable to establish his constructive dismissal. His action for wrongful dismissal was without foundation. Conversely, Mr. Jacobs breached his consulting contract by failing to give notice. He also breached his verbal share purchase agreement by failing to become an active "partner" in PHAT's business and failing to contribute his own time and effort to its operations. He was therefore liable to PHAT (but not to Mr. Lipscombe) for damages of \$10,643 for breach of the consulting contract, and \$1,758.50 for breach of the share purchase agreement. A declaration that he was a six per cent shareholder of PHAT was also issued.

Jacobs v. PHAT Training Inc.

Former Corporate Shareholder/Director Permitted To Continue Derivative Action on Corporation's Behalf

Supreme Court of British Columbia, March 17, 2014

The corporate plaintiff, Briere Sound Ltd. ("BSL"), was incorporated in 1997 by the defendant, Mr. Briere. In 1998, Mr. Reis purchased a one-half interest in BSL, and later advanced \$250,000 to it by way of shareholder loans. In June 2005, Mr. Reis commenced oppression proceedings against Mr. Briere and BSL seeking as relief the purchase of his shares by Mr. Briere, or, in the alternative, the sale of BSL by a receiver. In July 2005, an interim consent order was issued providing, among other things, for: (a) Mr. Briere to be limited to a stipulated salary; (b) BSL's power to encumber its assets, or to make new capital purchases in excess of \$3,000, to be subject to prior scrutiny by Mr. Reis or his advisors; and (c) full financial disclosure and inspection privileges with respect to BSL's financial affairs in favour of Mr. Reis. In May 2006, while he still held 50 per cent of the shares of BSL and was one of its two directors, Mr. Reis obtained an order granting him leave to commence a derivative action on behalf of BSL against Mr. Briere and others (the "Derivative Action"). His concern was that Mr. Briere had allegedly indirectly acquired a secured debt against BSL, and forced the sale of its assets to a new corporation that he operated and controlled indirectly. In granting leave, the Court concluded that: (a) many of BSL's assets seemed to have disappeared before a receiver had been appointed; (b) the Derivative Action was not "bound to fail", and was in the best interests of BSL; and (c) Mr. Reis was acting in good faith. In March 2011, the parties to the oppression proceedings agreed to a consent order pursuant to which Mr. Reis received \$150,000 for his shares of BSL and resigned as one of its officers and directors, although he was still owed \$130,000 pursuant to the shareholder loans. Mr. Briere subsequently applied for: (a) an order disqualifying Mr. Reis from continuing to have conduct of the Derivative Action; (b) an order granting Mr. Briere himself conduct of the Derivative Action, so that he could obtain an order for its dismissal; and (c) summary dismissal of the Derivative Action in any event.

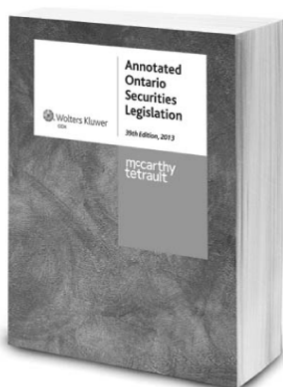
The application was dismissed in part and deferred in part. Whether or not Mr. Briere or the other defendants in the Derivative Action had standing under section 233(3) of the *Business Corporations Act* (the "Act") to bring the disqualification application against Mr. Reis, the Court had inherent jurisdiction to stay the proceedings or to dismiss them under section 233(5) of the Act. The issue was whether, under section 232(1) of the Act, Mr. Reis was an "appropriate person" to continue maintaining conduct of the Derivative Action. There appeared to be no reported cases

in British Columbia in which a creditor who is not a shareholder or a director has been granted leave to commence a derivative action on the corporation's behalf. The narrower issue in these proceedings, however, was whether a party who was previously granted leave to commence a derivative action while being a shareholder and director, and then ceased to be either, could, as a creditor, continue to have carriage of that action. Counsel referred to no authority on this point. According to the prevailing jurisprudence, a bare creditor, without more, may not have a sufficient interest in the corporation to qualify as an "appropriate person", since such a person must have something more. However, if the applicant for leave to commence a derivative action on behalf of a corporation has a financial interest in that corporation and the corporation's interests have also been harmed, the applicant would be considered an appropriate person in accordance with the requirements of justice and equity (see *First Edmonton Place Ltd. v. 315888 Alta. Ltd.*, (1988) 640 Alta. LR (2d) 122 (Alta. QB)). Mr. Reis fell within these parameters. He was a shareholder and director of BSL when it was placed in receivership, and still held approximately half of its debt as one of its creditors. BSL, moreover, was insolvent and Mr. Reis's interests were, therefore, those of BSL. Also, Mr. Reis was acting in good faith and there were arguable causes of action that gave BSL an opportunity to recover assets that had allegedly been misappropriated from it. Accordingly, he was not disqualified from continuing to have conduct of the Derivative Action. A decision on the defendants' applications seeking summary dismissal of the Derivative Action, however, was deferred to enable their counsel to call further evidence from Mr. Reis.

Briere Sound Ltd. v. Briere

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