January 2012

mcmillan

securities and corporate governance litigation newsletter

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winding-up, without limitation (periods)

Does the two year limitation period in Ontario apply when the court is determining a just and equitable distribution of a company's assets in a winding up proceeding? In *2011680 Ontario Inc. v. 968831 Ontario Inc.*, 2011 ONSC 4595, the Honourable Justice Perell considered this issue, on an application to wind up 968831 Ontario Inc. ("Cashcode") pursuant to the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16.

In the proceeding, both of the shareholders of Cashcode, 2011680 Ontario Inc. ("Levitan") and Saltsov Holdings Inc. ("Saltsov") agreed that Cashcode should be wound up. At issue was whether adjustments should be made in favour of Saltsov when distributing the assets of Cashcode. One the adjustments related to cash distributions made in the period 2003 to 2005 to shareholders and their wives which provided them with compensation above that of the Saltsov shareholder and his wife. The second adjustment sought by Saltsov related to tax liabilities incurred as a result of a shareholder dividend.

One of the grounds upon which the Levitan opposed the adjustments requested by Saltsov was the application of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B. Levitan argued that Saltsov was aware of the claims by August 2006, and that it was therefore too late to raise the issue during the 2011 winding up proceeding.

The judge believed that it was "fair and equitable" that the second adjustment related to tax liabilities be made pursuant to the remedial powers in sections 248(3) and 207(2) of the *Business Corporations Act*. The judge reasoned that if the shareholders had elected to receive bonuses rather than dividends, Cashcode would not have had to pay tax, interest and penalties. The judge called it "the right thing", regardless of the understanding between the parties or when the issue was first raised, to adjust the accounts of Cashcode accordingly.

Although the judge remarked that he believed that an oppression claim related to the second adjustment would have been statute-barred, he held that he was not barred from making the second adjustment as part of the

wind-up order. Before referring to limitations periods as a "technical defence", he stated:

> "It is to be remembered that a limitation period defence does not extinguish the legal rights. The expiry of a limitation period does not make the plaintiff's claim a nullity, but it provides the defendant with a defence that if pleaded and proven will bar the plaintiff's claim."

However, it appears that the expiry of a limitations period may still be considered as part of the test as to what the court considers to be "fair and equitable". The judge ruled that the first adjustment requested by Saltsov, relating to asymmetrical distributions of executive salaries, would not be just and equitable. He held that the existence of a limitations period which may have barred the equivalent oppression remedy "added weight" to his decision.

The learning arising from the decision of 2011680 Ontario Inc. v. 968831 Ontario Inc. is that a judge may make an order which would otherwise be statute-barred as an oppression remedy on the winding-up of a corporation. However, applicants must be prepared to justify why the relief sought would be just, fair and equitable and, perhaps, why limitations periods should not be given overriding "weight" in such a consideration.

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recent Yukon Supreme Court decision provides relief for shareholders in exceptional circumstances

The Yukon Supreme Court recently determined that based on exceptional circumstances, certain Norwegian shareholders of Crew Gold Corporation should not be prohibited from accessing the dissent remedy under section 193 of the *Yukon Business Corporations Act*; this despite the Norwegian shareholders non-conformity with a technicality in the dissent procedure.

The right of dissent is a remedy available to shareholders who disagree with the value offered for their shares in various types of transactions. Dissent rights and dissent procedures are prescribed by corporate statute and include a process by which shareholders may apply to court for a valuation of their shares. Only shareholders who give notice of dissent in

accordance with applicable dissent procedures are permitted to access the valuation remedy.

In the Crew Gold case, the Norwegian shareholders were beneficial shareholders of Crew Gold. In an effort to exercise their dissent rights in connection with a plan of arrangement proposed by Crew Gold, they sent their dissent notices directly to Crew in the manner, time and at the place required. As beneficial holders of their shares, the Norwegian shareholders were technically required to give notice of dissent through their registered intermediary or after having taken steps to become registered shareholders themselves.

Crew Gold took the position that each of the forty four dissent notices received was invalid on the basis that when the Norwegian shareholders gave notice, they were not registered shareholders of Crew Gold.

In rejecting Crew Gold's position that the dissent notices were invalid, the Yukon Supreme Court applied the principle that "form should not trump substance" when a beneficial shareholder is making an honest effort to become a dissenting shareholder.

There is a substantial body of case law across Canadian jurisdictions where the courts have interpreted company legislation as providing dissent rights only to registered shareholders of a corporation. Shareholders of publically traded companies often hold their shares beneficially through an intermediary. That intermediary is recorded as the registered shareholder in the share register of the corporation. In order for a beneficial shareholder to obtain the benefit of the dissent remedy, notice of dissent must be given in accordance with applicable dissent procedures, which are prescribed for registered shareholders.

In finding that the Norwegian shareholders should not be prohibited from dissenting on a technicality, the Court noted the following facts.

The Crew Gold shares were listed both on the TSX and the Oslo Stock Exchange and the rules for listing on the Oslo Stock Exchange required that all shares be registered in the Norwegian central securities depository (called VPS). The information circular sent by Crew Gold to its shareholders instructed that "persons who are Non-Registered Shareholders who wish to dissent with respect to their CG [Crew Gold] shares should be aware that only Registered Shareholders are entitled to dissent with respect to them". However, none of the information provided to the shareholders outlined how a beneficial shareholder would go about exercising their right of dissent.

In the plan of arrangement, Crew Gold claimed an exemption from obtaining an independent valuation of the Crew Gold shares. The dissent procedure was the only mechanism available to the Norwegian shareholders to have any say in the arrangement and the price offered for their shares.

The Court noted that the Norwegian shareholders had the impression that they were registered shareholders of Crew Gold and therefore understood that they could directly given notice of dissent to Crew Gold. The Court found that the following factors had given the shareholders the impression they were registered:

- their inclusion on the list of shareholders provided by Crew Gold on its website, which included beneficial shareholders who held a certain threshold of shares;
- the instruction letter from the Norwegian intermediary, which indicated in arguably confusing language, that the Norwegian shareholders were "registered" in the VPS (although beneficial shareholders) and contained instructions on how to exercise voting rights only;

the lack of any meaningful instruction in the information circular (even though the Court found that information circular was not materially misleading) or in the material from the Norwegian intermediary on how they could exercise their rights of dissent; and

- the fact that Jostein Matre (a representative of the group of Norwegian shareholders trying to exercise dissent rights) attempted to contact counsel for Crew Gold directly to ensure that his notices of dissent were properly filed and was not advised that their was a deficiency in the notices due to the shareholders not being registered.

Finally, the Court found that the Norwegian shareholders had provided full and clear particulars of their dissent to Crew Gold in the manner and time required, including their identity and which shares they each held. The Court said that "the purpose of requiring registered shareholders to file dissent notices is for the benefit of the corporation in knowing the number of dissenters for voting purposes." In the circumstances, Crew Gold could claim no prejudice in that regard.

The Crew Gold decision is currently under appeal. Subject to the determination on appeal, the Norwegian shareholders will be permitted to proceed with a fair and independent valuation of their shares. There are two previous cases where dissent rights were granted in exceptional circumstances to overcome technicalities, one out of the Alberta Court of Appeal and one out of the Alberta Court of Queen's Bench. Both cases were referred to by the Yukon Supreme Court in its decision.

For the time being, the decision demonstrates the court's willingness, in exceptional circumstances, to protect shareholders from technicalities that would deprive them of their rights. Exceptional circumstances can be founded not only on the history of the relationship between the parties and the efforts of shareholders to comply with requirements based on the information provided to them, but also on the absence of any real prejudice to the corporation.

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when is a creditor not a complainant under the oppression remedy

The oppression remedy under the *Ontario Business Corporations Act*[1] is a broad remedy, that can be used in a wide range of circumstances. One of these circumstances is where a corporation has acted improperly in attempting to avoid paying a creditor. As seen in the recent Court of Appeal case of *Remo Valente v. Real Estate (1990) Limited v. Portofino Riverside Tower Inc.*[2], it is not every creditor that can take advantage of the oppression remedy.

In *Remo Valente*, the plaintiff was a real estate company that had a listing agreement to sell condominium units in a project to be constructed by one of the corporate defendants, Portofino Riverside Tower Inc. ("Portofino 1"). Before any units were sold, Portofino 1 was restructured in a way that transferred its interest in the corporation out of Portofino 1 and into the hands of other related companies. The new corporate owners then locked the plaintiff out of the project, replaced it with another real estate agent. The plaintiff then sued the corporations and their principal under the oppression remedy provisions of the *OBCA*, as well as for breach of contract[3].

Although successful at trial, the plaintiffs oppression remedy claim was dismissed on appeal by a three member panel of the Divisional Court. The Divisional Court's decision was further upheld by the Court of Appeal. One of the issues on appeal was whether the plaintiff was a proper "complainant" under the oppression remedy. In turn, whether the plaintiff was a "complainant" depended on whether the court agreed, as a matter of law, that the plaintiff was a creditor of Portofino 1 at the relevant time.

In a typical oppression case, a "complainant" will be either a security holder or a director or officer of a corporation. Section 241 of the *OBCA*, which defines a "complainant, also has a catch-all provision, where a person can be a "complainant" if they are "any other person who, in the discretion of the court, is a proper person to make an application [under the oppression remedy provisions]". This has long been interpreted to include a person who is a creditor, provided there is something that satisfies the court that it is more than just a typical debtor-creditor situation. Typically, this will involve a situation where those in control of a corporation have stripped the company of its assets to render it immune from judgment.[4]

The *Remo Valente* case shows that this basic concept is not always easily applied by lawyers and judges. At trial, both the lawyer for the defendants and an experienced trial judge accepted, without challenge, that the plaintiff was a creditor, and therefore an appropriate complainant. In the trial decision,[5] the trial judge approached the issue on the basis of whether the plaintiff had a reasonable expectation that the defendants would protect its interest. This, as noted by the minority concurring decision at the Divisional Court, as well as the Court of Appeal, missed, in essence, the first step of the analysis: whether the plaintiff was a true creditor at the time of the alleged oppression.

Unfortunately for the plaintiff, it was determined that it was not truly a creditor in the manner required by the oppression remedy. Under its listing agreement, the plaintiff was entitled to a 50% commission once certain conditions precedent were satisfied. Although close, all of the prerequisites were not satisfied, as no formal financing commitment had been finalized at the time of the restructuring. As such, it was only a contingent creditor at the time of the alleged oppression, and was not entitled to avail itself of the oppression remedy.

This case demonstrates one of the pitfalls that a potential plaintiff may face in bringing a claim based on the oppression remedy. While the oppression remedy is a broad remedy, that often leaves a great deal of discretion in the hands of a judge, there are a number of technical aspects to an oppression claim that must be addressed. It is often easy to get lost in considerations of the equities of a case, and lose track of the technical requirements. Care must be taken to ensure that these technicalities are not overlooked.

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[1] RSO 1990, c B 16, s. 248 (the "OBCA")

[2] 2011 ONCA 784

[3] Although The claim for breach of contract was not dealt with at trial, and as a result, was ultimately sent back for a retrial by the Ontario Court of Appeal.

[4] Remo Valente Real Estate v Portofino Riverside Tower, 2010 ONSC 280 (Div Ct) at para 20

[5] Remo Valente Real Estate v Portofino Riverside Tower, 86 OR (3d) 667 (Sup Ct)