Creditors as Complainants

Business Act Lets Complainants Go Where Directors Fear to Tread

By Albert S. Frank, LL.B.

The *Canada Business Corporations Act,* the *"CBCA,"* makes it possible for a Court to give special remedies to "complainants." This includes allowing a complainant to sue or take other litigation steps on behalf of a corporation even though its directors have failed – or even refused – to do so; this is called a "derivative action." It also includes allowing a complainant the extremely broad and highly discretionary group of remedies known as the "oppression remedy."

But who can be a "complainant"?

According to section 238 of the *CBCA*:

> "complainant" means
>
> (*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (*c*) the Director, or

> (*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

Can this include a creditor? If so, a creditor, in addition to the normal remedies of a creditor, could also have the remedies set out in the *CBCA* and its provincial equivalents. The answer is ***yes***, a creditor can be a complainant.

Take for example the case of *Canadian Opera Co. v. 670800 Ontario Inc.* (1989) 69 O.R. (2d) 532, which was later affirmed on appeal. The Canadian Opera Co. paid for a car, but the respondents failed to deliver the car. It turned out that the respondents were not registered to deal in cars and faced many fraud charges. They only returned a small part of the money.

The Court, looking at the Ontario equivalent of the *CBCA* section 238, decided that the Canadian Opera Co. was a creditor. As a creditor, it was "any other person who, in the discretion of the court, is a proper person to make an application." Therefore it was a complainant.

The Court not only ordered the debtor corporation to pay the money back with interest, but also ordered the man who was the sole shareholder and sole director of that corporation to do so, making him personally liable.

The Court of Appeal for Ontario in the case of *Sidaplex-Plastic Suppliers Inc. v. Elta*

Group Inc. (1998) 40 O.R. (3d) 563 upheld a ruling that the creditor was a proper complainant in that case. Moreover, the man who was the sole director, officer, and shareholder of the corporation that had done wrong was personally liable.

In the case of *Levy-Russell Ltd. v. Shieldings Inc.* (1998) 41 O.R. 54, the corporations Levy-Russell Limited and Levy Industries Limited, the "creditors," got a judgment against Shieldings Inc. and others. The creditors then sought the oppression remedy.

Although the alleged oppressive acts had taken place before the creditors had a judgment, the Court considered them to be creditors and appropriate complainants. It was reasonable for the plaintiffs – who ultimately became judgment creditors – to expect that the defendant would not engage in conduct during and after the trial that would reasonably be expected to hinder satisfaction of the judgment if the action were successful.

It appeared that Shieldings' management was reckless in not providing for the possibility that the creditors might succeed in the lawsuit. Conduct that "unfairly disregards" the interests of a complainant can be oppression. So the motion challenging the creditors' right to seek the oppression remedy was dismissed. In other words, the creditors were allowed to continue their efforts to obtain the oppression remedy.

On the other hand, various judges have pointed out that debt actions should not be routinely turned into oppression actions. There should be something more than just a debt.

Often, the "something more" is fraud or conduct with an air of fraud, such as in the *Canadian Opera Co.* case referred to above. In the *Sidaplex-Plastic Suppliers Inc.* case the debtor corporation sold the bulk of its assets without complying with the *Bulk Sales Act* and without arranging for payment to the creditor.

In the *Levy-Russell Ltd.* case the decision was based on there being no fraud and no "bad faith or lack of probity". Nevertheless, the allegation was that the defendant engaged in conduct that would reasonably be expected to hinder satisfaction of the judgment if the creditor succeeded at trial, and this could be an action that "*unfairly disregards* the interests of the complainant."

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Research has NOT been done to see if this article is still good law. Also, this is general

information that might not apply to your particular situation.

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