Oppression, Derivative Action &
Winding Up

Three Corporate Remedies

By Albert S. Frank, LL.B.

The corporate battles that make the newspaper headlines typically involve publicly traded corporations and dramatic events like takeover battles and massive fraud on the investing public. More often, though, accountants find themselves drawn into everyday disputes involving such issues as unhappy minority shareholders and conflicting views about transactions. So here is some information about three of the corporate remedies available in most Canadian jurisdictions, applying even to small and mid-sized closely held corporations.

Oppression Remedy

The general rule is that management may conduct the affairs of a corporation as management sees fit. But where there is action or inaction "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of", according to section 241 of the *Canada Business Corporations Act,* the *"CBCA."* This is

usually referred to as the "oppression remedy."

The oppression remedy is typically invoked by minority shareholders but is not restricted to them.

The Courts have often commented that a finding of oppression is highly fact-driven. Conduct that could be acceptable under some circumstances could be oppressive under different circumstances.

The power of the Court to grant relief once there has been a finding of oppression is extremely broad and highly discretionary. Indeed, one might say that the oppression "remedy" is actually a bundle of several remedies.

According to section 241 (3) of the *CBCA* the court may make:

> ***any interim or final order it thinks fit***... including, without limiting the generality of the foregoing… an order restraining the conduct complained of… amending a unanimous shareholders agreement… directing an issue or exchange of securities… appointing directors… setting aside a transaction… compensating an aggrieved person… liquidating and dissolving the corporation…. (emphasis added).

Note that most provinces have similar legislation to the *CBCA* oppression remedy.

Derivative Action

Suppose a minority shareholder, or some other person with an interest in a corporation, is concerned that the corporation itself is being harmed by some action or inaction of management. For example, suppose management wants the corporation to breach a significant contract, or to sell property at an unreasonably low price.

A person may obviously sue for a wrong done to him or her personally but, according to such common law cases as *Foss v. Harbottle*, may not launch a lawsuit to uphold the rights of the corporation. It is up to the corporation itself to sue.

There is a practical problem here. Would management, or the majority shareholders, ever allow the corporation they control to sue them? Even where it is unconnected persons who are to be sued, management might be unwilling to start and pursue perfectly reasonable litigation.

Under the *CBCA* and similar provincial legislation, however, this problem can be solved by allowing a person to commence a

"derivative action" to uphold the corporation's rights. The Court gives leave for a person to sue – or to take other litigation steps – on behalf of the corporation.

To get leave the person must show four things:

- First, that the directors have failed to bring the action (or to take other desired litigation steps).
- Second, that the person has given reasonable notice to the directors of the intention to seek leave to commence a derivative action.
- Third, that the person is acting in good faith.
- Fourth, that bringing the action or taking the other proposed litigation steps, appears to be in the interests of the corporation (or its subsidiary).

When granting leave the Court has broad powers to decide how matters shall proceed. Thus, the Court can decide who shall have control of the litigation, the timing of various steps, and whether the corporation shall have to pay the legal fees of the person who has control of the litigation.

Winding Up

An extreme remedy would be a Court ordered "liquidation and dissolution" or "winding-up" of the corporation.

An interested person may apply for winding-up where there has been a failure to meet certain legal requirements, such as the holding of shareholders meetings and compliance with the corporation's articles. A shareholder may apply on those grounds but also has important additional grounds. The additional grounds include all the grounds listed for the oppression remedy, i.e. "oppressive or unfairly prejudicial to or that unfairly disregards…."

Courts are reluctant to destroy functioning businesses. If there is any reasonable prospect for a corporation to survive the Court might well, instead of ordering a winding-up, apply one or more of the remedies available in oppression situations, which remedies are also typically available where a shareholder applies for a winding up.

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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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