

Shareholder Rights: More than Meets the Eye

By Stephen Antle

Suppose that you advise a shareholder whose company has not produced audited financial statements or held an annual general meeting for several years. Your client complains to the company. You write to the chair of the board of directors. No result. Is there anything you can do?

Suppose, instead, that you advise one of several equal shareholders in a company—one who has always been involved in its management. After a falling out with the other shareholders, your client is voted off the board of directors and fired. The other shareholders stop providing your client with corporate information. Attempts to resolve the situation dissolve into confrontation. Does your client have options?

Or suppose that your client is the majority

shareholder of a corporation, and also controls its board of directors. Your client proposes to seek the board's approval to be paid an extraordinary dividend or abnormally high management fee. You review the articles of the company, which leave such matters to the discretion of the board. Are there any risks to proceeding as proposed?

The answer to all three questions is: "Yes." While the companies or shareholders in these scenarios may be within their strict legal rights to take the steps described, that is not the end of the story. In all common-law jurisdictions in Canada, the legislatures have added other obligations to those legal rights. Collectively, these obligations comprise what is commonly known as the law of "shareholder oppression," and everyone who advises a company or a shareholder needs to be familiar with it.

Simply put, if a shareholder can persuade the court that they had a reasonable expectation¹ about how their company would be run, and that the company failed in meeting that expectation by treating them in a manner that was "oppressive,"

"unfairly prejudicial," or that "unfairly disregarded" their interests in the company, the court has a very broad power to remedy the situation.

For conduct to be deemed "oppressive," it must be coercive, demonstrate an abuse of power, or suggest bad faith or a departure from standards of fair dealing. Examples of such conduct include the following: excluding from management a shareholder who has a reasonable expectation of continued involvement; paying unwarranted management fees; making wasteful loans to shareholders; appointing or removing directors improperly; not providing required or customary financial information; and not holding required shareholder meetings.

With regard to "unfairly prejudicial" conduct, the term itself may seem redundant, but it is, in fact, possible for conduct to be considered prejudicial but fair—for example: excluding a shareholder from management because their

¹ The shareholder's expectation must be both subjectively held and objectively reasonable, given the corporate situation.

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working relationship with the other managers has collapsed. As for conduct that “unfairly disregards” a shareholder’s interest, remedies in such cases are only available where provincial legislation is modelled on the *Canada Business Corporations Act*.

The additional protection of the shareholder oppression remedy is not just available to minority registered shareholders of closely held companies. Registered and beneficial shareholders, minority and majority shareholders, and shareholders of closely held and publicly traded companies, all have the same protection. So do entities such as parents of corporate shareholders, beneficiaries of trust shareholders, and even creditors. Under the legislation modelled on the *Canada Business Corporations Act*, former shareholders, as well as directors and former directors, also have this protection. Note, however, that in British Columbia, in order for this protection to be available, a shareholder must seek a remedy both in a “timely” manner (while the conduct about which they’re complaining can still be remedied) and, in any event, within six years of that conduct.

To seek a shareholder oppression remedy, a shareholder must start a lawsuit by filing a petition with the Supreme Court of British Columbia. In this petition, they must set out the remedy they seek and the facts on which they’re basing their request. They must also file an affidavit setting out the evidence proving these facts to be true. Such lawsuits are intended to be resolved summarily, on affidavit evidence, which usually takes a matter of months. However, corporate situations are often complex, with lengthy histories; in such cases, lawsuits may have to be tried, and this can take significantly longer.

If a shareholder persuades the court that there has been oppression, unfairly prejudicial conduct, or conduct that unfairly disregards their interest, the court can grant any remedy it deems appropriate to resolve the situation. If we refer back to the three examples set out at the beginning of this article, the court might: 1) order the company to produce audited financial statements or hold the shareholders’ meeting within a specific time; 2) order the majority shareholders to make a “shotgun” offer to either buy the excluded shareholder’s shares or sell theirs to the excluded shareholder at the same price; or 3) forbid the company from paying the management fee and order the majority shareholder to repay any fees already paid. Other possible remedies include adding or removing directors; varying or setting aside transactions; correcting corporate records; ordering the com-

pany or other shareholders to buy the complaining shareholder’s shares at a value set by the court; and liquidating the company.

While the oppression remedy is a flexible and powerful tool, the specific facts of each case will dictate what can be accomplished. The key thing to remember is that shareholders are not always limited by their legal rights, nor are companies and majority shareholders always free to exercise theirs. Therefore, if you are advising a shareholder who is unhappy about the way things are going at their company, or you’re advising a company that is pushing its actions to the letter of its legal entitlement, you should consider consulting with a lawyer who is familiar with this area to ensure that you get the full picture.

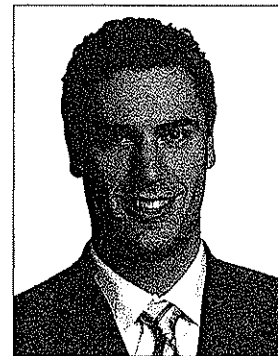
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