Commercial litigation year in review: 5 notable dispute decisions from 2023

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BLG's commercial litigation lawyers continuously review legal developments involving shareholders, directors and officers, and corporate governance under Canadian business legislation. The following is our list of five 2023 decisions from Alberta that will influence business decisions and going forward.

1. Words of caution for executing mergers

To determine whether a final order for a plan of arrangement (Arrangement) should be granted, the Court must be satisfied that (a) statutory procedures have been met, (b) the Arrangement is put forward in good faith, and (c) the Arrangement is fair and reasonable. Determining whether an Arrangement is fair and reasonable involves consideration of the purpose and necessity of the Arrangement and any objections raised in relation to the Arrangement by relevant stakeholders. In this case, the Court found that the Arrangement was not fair and reasonable, and outlined a number of factors that courts can consider when assessing whether the Arrangement is fair and reasonable.

Summary

In *HEAL Global Holdings Corp (Re)*, 2023 ABKB 45, HEAL Global Holdings Corp (HEAL), Pathway Health Corp (Pathway) and The Newly Institute Inc (Newly) brought an application for a final order approving an Arrangement. The Court rejected the Arrangement and determined that it was not fair and reasonable.

Read our full summary here.

Takeaways

- Although potential insolvency will be weighed favourably by a Court in approving an Arrangement, it is not determinative, and the Court will apply a holistic approach to determine if the Arrangement is fair and reasonable.
- The Courts will consider the existence of a fairness opinion and special committee, whether the Arrangement was voted on by shareholders not subject

to the Arrangement, whether the Arrangement treats shareholders of the same class differently, whether the Arrangement would result in a loss of dissenting rights, and if the shareholders had sufficient information.

2. Comments on the purpose and spirit of derivative actions

A derivative action allows a shareholder to bring an action on behalf of the corporation, and the test considers what is in the best interests of the corporation. In this case, the Court affirmed that when considering whether a derivative action is in the best interests of the corporation, deference should be granted to decisions made by directors (i.e., apply the business judgment rule), and the Court should not allow a derivative action to proceed if it arises from a director's decision that falls within the range of reasonable alternatives.

Summary

1719349 Alberta Ltd v 1824766 Alberta Ltd, 2023 ABKB 207 (*171 v 182*) involved a dispute between shareholders and directors of 1824766 Alberta Ltd (182) over a real estate development project, which went over budget. 182 subsequently sold off the units in the project to pay off the mortgages, builders' liens, and subcontractors. 171 brought an application for leave to commence a derivative action seeking, among other things, a declaration that 182 and 171 are entitled to constructive trusts against the project lands, a full accounting of the net proceeds of sales of the units, and judgment against the respondents for the purchases of the units in question. The Court denied the request for leave and held that the derivative action was not in the best interests of 182.

Read our full summary here.

Takeaways

- *171 v 182* demonstrates that for a derivative action to be in the interests of a corporation, the wrong must be done to the corporation itself, not to an aggrieved individual shareholder (or lender).
- Courts should exercise caution when considering a derivative action against corporate directors, particularly where the directors' decisions fall within a spectrum of reasonable alternatives.
- *171 v 182* reaffirms the importance of the business judgment rule in assessing whether a derivative action is in the best interests of the corporation.

3. Unable to unwind: Despite finding error, Alberta Court of Appeal unable to unwind plan of arrangement

Arrangements in Alberta must abide by strict statutory requirements. Despite these requirements, unwinding an approved Arrangement may be impossible once it has been approved. In this case, the Alberta Court of Appeal declined a request to unwind a plan of arrangement, despite finding that the lower court erred in approving the arrangement, given that the party had not sought a stay of proceedings of the court's approval order.

This case demonstrates that if a party wants to challenge an Arrangement, it must file an application for a stay of the approval order pending the appeal to preserve an effective remedy on appeal.

Summary

In *Taiga Gold Corp v Munday*, 2023 ABCA 12, the Court of Appeal reviewed a Court of King's Bench decision that approved an Arrangement despite the fact that the Arrangement did not include a special meeting of warrant holders as required pursuant to section 193(4) of the Alberta *Business Corporations Act* (BCA). The King's Bench reasoned that the special meeting of warrant holders would not have affected the vote's outcome given the overwhelming number of shareholders who voted in favour of the Arrangement, and therefore the failure to comply with section 193(4) of the BCA was not an impediment to approval.

Read our full summary here.

Takeaway

- To obtain a final order approving an Arrangement, it must be demonstrated that the procedural requirements of the BCA were rigidly adhered to.
- Parties seeking to appeal final approval of an Arrangement must act extremely quickly to secure a stay pending appeal, potentially from the judge approving the final order given that many Arrangements close on the same day as the final order application.
- Parties failing to do so risk being left without a remedy due to the Court of Appeal's inability to unwind the completed transaction or unwillingness to retroactively amend the terms of the Arrangement.

4. Freedom of contract: Removing shareholders' dissent rights by agreement

Most provincial corporate statutes include dissent rights for shareholders. Dissent rights allow shareholders to object to certain fundamental changes in a corporation and to require the corporation to re-purchase their shares at fair value. If dissent rights are exercised, the dissenting shareholders and the corporation are both governed by the applicable statutory procedure and share value may be determined by agreement or by court order as necessary. In this case, the Court affirmed that it is possible for shareholders to contract out of their dissent rights, and when they do so, their contractual agreements will be enforced.

Background

In *Husack v Husack et al*, 2023 ONSC 949 (Husack), the shareholders of Frank Husack Holdings Inc. (FHH), a family-controlled holding corporation, executed a unanimous shareholder agreement (USA). The USA granted the Estate the right to sell all of the assets owned by it, and also included a provision that to the extent the terms of the USA were in conflict with the Ontario *Business Corporations Act* (OBCA), the parties waived

those provisions of the OBCA. All of FHH's assets were sold, and the Applicant sought to enforce her dissent rights pursuant to section 184(3) of the OBCA.

Read the full summary here.

Takeaways

- Husack demonstrates that shareholders may enter into agreements which have the effect of validly waiving shareholders' dissent rights, even if such dissent rights are not expressly mentioned in the agreement.
- Husack has yet to be considered by higher courts, but shareholders subject to unanimous shareholders agreements will want to take note of its findings regarding the waiver of statutory shareholder protections.

5. Where there's smoke: No presumption of loss in breach of honest performance

The contractual duty of honest performance requires that parties to a contract not lie or intentionally mislead their co-contracting party. Where a party breaches this duty, the injured party can claim damages based on what the injured party could have expected had the breaching party not acted dishonestly. In this case, the Court held that a breach of a party's duty of honest performance does not automatically lead to a presumption that the party suffered damage. Rather, the party must prove evidence of actual loss.

Summary

In *Bhatnagar v Cresco Labs Inc*., 2023 ONCA 401 (Bhatinger), the Applicant shareholders of a vape company sold their shares by way of a share purchase agreement (SPA) with an intended closing date at the end of 2019. In addition to the purchase price, the SPA provided for additional milestone payments that would be paid in the event certain revenue milestones were achieved (the Milestone Payment), and provided that if there was a change of control, the shareholders would be paid any unearned Milestone Payments.

Read our full summary here.

Takeaways

- The burden of proof rests on the applicant to show evidence of actual loss, as a finding of breach of the duty of honest performance will not automatically result in an award of damages.
- A presumption of damages will only be applied if the breaching party's dishonesty precluded the injured party from conclusively proving its losses.

For further information related to shareholder, director & officer, and corporate governance disputes in Alberta, please contact the key contacts below.

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