A primer on the oppression remedy

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Provincial and federal corporate statutes permit a shareholder or other proper complainant to apply to court for an "oppression remedy". Under the British Columbia *Business Corporations Act* (BCBCA), to grant such relief the court must be satisfied there has been "oppressive" or "unfairly prejudicial" conduct. Under the federal *Canada Business Corporations Act* (CBCA) and the provincial Acts modelled on it, an additional available trigger for such relief is conduct which "unfairly disregards" a complainant's interests.

In what circumstances will the Supreme Court of British Columbia actually exercise its broad discretionary power to grant this relief? The general principle is that oppression, unfairly prejudicial conduct, or conduct which unfairly disregards a complainant's interests, as the case may be, is conduct which violates the complainant's reasonable expectations.

BLG's securities disputes lawyers have extensive experience with shareholder activism and oppression claims. For more information, reach out to the authors or key contacts below.

I. Statutory framework

BCBCA companies

a. Complainant

Under section 227 of the BCBCA shareholders and any other person the court considers appropriate may apply for an oppression remedy.

The overriding consideration in determining whether an applicant is an "appropriate person" is whether they should be afforded the benefit of the remedy conferred by s. 227 in order to achieve justice and equity in the circumstances of a particular case. Examples of complainants considered to be appropriate persons include:

- a shareholder of a shareholder of the company;
- creditors of a company;
- a person who alleges to own shares of a company;

- a person who formerly held shares in a company; and
- a security holder.

Although the court has broad discretion to determine that someone is a proper complainant, oppression claims by entities other than shareholders, for example creditors, are less common in British Columbia than in other jurisdictions, for example Ontario.

b. Trigger

In British Columbia, a complainant may apply for the oppression remedy based on one of the following two grounds:

1. The affairs of the company are being or have been conducted, or the powers of the directors are being or have been exercised, in a manner **oppressive** to one or more of the shareholders, including the applicant; or
2. Some act of the company has been done or is threatened, or some resolution of the shareholders has been passed or is proposed, that is **unfairly prejudicial** to one or more of the shareholders, including the applicant.

CBCA companies

a. Complainant

A "complainant" under the CBCA includes a current or former registered or beneficial owner of a security, a current or former director or officer of the corporations, the Director appointed under the Act and any other person who is a proper person.

b. Trigger

As noted above, under the CBCA there is an additional trigger of conduct that **unfairly disregards**.

II. Limitations issues

Timing is an important factor to consider in bringing an oppression action. A delayed filing of an oppression action may render it statute-barred or non-compliant with the necessary statutory conditions.

Oppression claims are subject to two different timing requirements. First, pursuant to s. 227(4) of the BCBCA, oppression claims must be brought "in a timely manner". Second, oppression claims are subject to the general two-year limitation period set out in s. 6 of the *Limitation Act*, SBC 2012 c. 13 (the Limitation Act).

Determining whether an oppression claim is brought in a timely manner requires a fact-driven analysis on a case-by-case basis. Nevertheless, the courts have provided some guidance in this respect. For example, in *Runnalls v. Regent Holdings Ltd.* the court held that an application is timely if a course of conduct that constitutes oppression is continuing or if its effects are continuing.

The two-year limitation period starts to run when the oppressive conduct is discovered. The discovery occurs when the petitioner knows or reasonably ought to know, that their reasonable expectations are being injuriously breached by those controlling a corporation, and that commencing a proceeding by way of petition is an appropriate means to seek a remedy.

Unlike the courts in Ontario the courts in B.C. have held that a continuing oppressive act does not reset the limitation period. The clock starts running when the oppressive conduct is discovered or reasonably ought to have been discovered. Therefore, the court proceeding in respect of an oppression claim must be commenced no more than two years from the date on which the claim is discovered, even if the conduct is continuing.

III. The two-part test

To assess a claim of oppression, a court must answer two questions. First, does the evidence support the reasonable expectation asserted by the claimant? Second, does the evidence establish that the reasonable expectation was violated by conduct falling within the terms 'oppression,' 'unfair prejudice' or 'unfair disregard' of a relevant interest?[1]

Establishing the presence of reasonable expectations itself involves a two-step procedure. The petitioner must first establish his subjective expectations, and second the court must conduct an objective analysis of the petitioner's expectations to determine if those expectations are reasonable. In evaluating whether the identified expectations are reasonable, the court considers various factors. These include: general commercial practice the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

The terms "oppressive", "unfairly prejudicial" or "unfairly disregard of a relevant interest" share similarities but are distinct concepts. Oppressive conduct is conduct that is "burdensome, harsh or wrongful". This constitutes a wrong of the most serious sort.[2]

Unfairly prejudicial conduct refers to acts which are unjustly or inequitably detrimental in the circumstances, even if they fall short of reaching the level of oppression. It may involve, for example, squeezing out a minority shareholder, or failing to disclose related party transactions.[3] In determining "oppression" the emphasis lies on the character of the conduct complained of, whereas identifying an "unfairly prejudicial" act requires shifting focus to the impact of the impugned conduct on the complainant.

Finally, unfair disregard of a relevant interest means paying no attention to, ignoring, or treating as of no importance the interests of a stakeholder in the corporation in an unjust manner or without cause. For example, favouring a director by failing to properly prosecute claims, or improperly reducing a shareholder's dividend.[4]

As the Supreme Court of Canada highlighted in BCE, the aforementioned grounds are not rigidly compartmentalized; instead, they often overlap. Collectively, they signify the kind of wrongdoing or conduct that the oppression remedy seeks to address.[5]

IV. Examples: oppressive conduct

Previous decisions of courts on whether conduct is oppressive provide guidance that may help potential complainants determine whether the conduct they have experienced may rise to the level of oppression.

Courts have found conduct to be oppressive in the following situations:

- A company applying for a mortgage, and only paying the benefit to the majority shareholders and not to the minority shareholders.
- A company failing to provide audited financial statements to minority shareholders, failing to hold annual meetings, misleading the minority shareholder about the company's performance, and paying a majority shareholder high management fees without declaring dividends.
- A company using a new proxy voting system in a contested shareholder meeting or a public company without prior disclosure to shareholders.
- A company abruptly stopping repayment of shareholder loans owed, unilaterally changing the manner in which the company's profits are distributed and reinvesting a shareholder's share of profits without consent.
- A company excluding a shareholder from management where that shareholder has a reasonable expectation of participating in the affairs of the company.

Courts have declined to find that the conduct complained of was oppressive in the following circumstances:

- A company excluding a shareholder from management of the company, where the shareholder agreement does not suggest that the shareholder's involvement in management would be permanent.
- Directors forging signatures on corporate resolutions and a cheque to withdraw funds from the company, followed by a sale of the corporate assets without the shareholders' knowledge and consent (as this set of circumstances is better suited for a derivative action).
- A company's directors making decisions about the company that make it more difficult for a shareholder to sell their shares, but which are not financially detrimental to the company.
- A company's board of directors approving a financing arrangement that is in the best interests of the company, but dilutes a shareholder's shares.
- A company is unable to complete a corporate reorganization, when the parties contemplated from the start that the reorganization may be delayed.
- Terminating a shareholder's employment with the company, when that decision is made in good faith and is in the best interests of the company.
- A mining company not bringing a mine into production "within a reasonable period of time", where the shareholders knew their investment was speculative.

V. Available remedies

Where it finds oppressive conduct, the court has a wide discretion to grant any interim or final order it thinks appropriate. Both the BCBCA[6] and the CBCA[7] provide specific examples of orders which a court can make, including the following:

- restraining or prohibiting certain actions or conduct;
- appointing a receiver;
- regulating the company's affairs;
- directing an issue or exchange of shares;
- appointing new directors to replace, or in addition to, existing directors;
- ordering the company or any other person to purchase part or all the shares of a complainant;
- varying or setting aside a transaction or contract to which the company is a party;
- requiring the company to produce financial statements within a specified time period;
- ordering compensation for an aggrieved person;
- directing rectification of the company's registers or records;
- directing dissolution of the company;
- directing an investigation; and
- requiring the trial of any issue.[8]

Such lists do not restrict the court's discretion to make any other order it considers appropriate. The court has a wide discretion to grant any interim or final order it considers appropriate to remedy oppressive conduct.

It is important to remember that the court's discretion to grant relief must be exercised with a view to remedying the conduct found to be oppressive. This is explicit in both the BCBCA[9] and the CBCA.[10] The court's discretion in granting an appropriate remedy in an oppression action is informed by the equitable nature of the remedy and its remedial purpose. In this vein, the court, considering the reasonable expectations of the corporate stakeholder, focuses only on rectifying the oppressive conduct without going further than necessary.[11] The Supreme Court of Canada has articulated the following guiding principles informing the flexible and discretionary approach in making an interim or final order in an oppression action:

- the oppression remedy request must in itself be a fair way of dealing with the situation;
- any order should go no further than necessary to rectify the oppression;
- any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders; and a court should consider the general corporate law context in exercising its remedial discretion.

Footnotes

[1] BCE Inc., Re (2008), 2008 CarswellQue 12595 (S.C.C.).

[2] BCE at para. 92.

[3] BCE at para. 93.

[4] BCE, at para. 94.

[5] BCE, at paras. 91-94.

[6] BCBCA, supra at s. 227(3).

[7] CBCA, supra at s. 241(3).

[8] The BCBCA provides additional examples of relief: directing any act, directing conversion of shares, removing any director, reducing a company's capital, directing the company or any other person to repay a shareholder all or part of the amounts the shareholder paid for shares of the company, directing any party to a transaction which the court has varied or set aside to compensate another party, varying or setting aside a resolution, and appointing one or more liquidators with or without security, or granting leave for or directing derivative proceedings.

[9] BCBCA, *supra* at s. 227(3).

[10] CBCA, *supra* at s. 241(2).

[11] *Radford v MacMillan*, 2018 BCCA 335 at para 87.

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