ARTICLES

Be Careful Up There: Special Aspects of Director and Officer Liability in Canada

By Stephen Brown-Okruhlik and Jeffrey Levine

The economies of the United States and Canada are deeply integrated both in terms of trade and cross-border investment. A large number of businesses operating in the United States are incorporated in Canada and are subject to Canadian corporate law and remedies. The cannabis industry provides a good current example of this phenomenon, as capital formation for cannabis businesses remains inhibited by U.S. federal law. Corporations are often created under one of Canada's federal or provincial corporate statutes and listed on a Canadian stock exchange to raise capital for the cannabis operations of their subsidiaries in the United States. Ontario, Canada's largest province, recently joined British Columbia in removing director residency requirements for corporations set up under legislation of those provinces. Thus, the importance of Canadian corporate law to businesses operating in the United States will very likely grow, as more U.S.-based directors are appointed to the boards of Canadian corporations.

While much of Canadian corporate law and practice will seem familiar to Americans, there are important differences, including some that affect the duties of directors and officers, as well as the remedies available to corporate stakeholders. This article discusses two examples: the fiduciary duty and the "oppression remedy" under Canada's corporate statutes.

The Fiduciary Duty in Canada

As in other jurisdictions, directors and officers owe a fiduciary duty to the corporation they serve in Canada. This duty is codified in various federal and provincial corporate statutes as an obligation to "act honestly and in good faith with a view to the best interest of the corporation." *See, e.g.*, Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a); Business Corporations Act (Ontario), R.S.O. 1990, c. B.16, s. 134(1)(a). This duty restricts how directors and officers can act when faced with a conflict of interest and prevents them from taking for themselves opportunities that belong to the company, among other things.

Unlike in the United States, in Canada the fiduciary duty is owed exclusively to the corporation itself and *not* to any specific group of stakeholders, irrespective of the circumstances. There is no duty to maximize shareholder value. And the fiduciary duty does not shift toward the interests of creditors when the company enters the "vicinity of insolvency," as it does in other jurisdictions. *People's Dep't Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, paras 43 and 46. The duty "looks to the long-term interests of the corporation." *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, para. 39.

In its seminal decision on the subject, *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, the Supreme Court of Canada explained that directors and officers may (but are not required to) consider the interests of various stakeholders of the corporation when exercising the fiduciary duty. *Id.* paras. 39–40. That may include the interests of shareholders, employees, creditors, consumers, governments, and the environment. *Id.* This framework was recently codified into Canada's federal corporate statute at section 122 (1.1) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122. While there is no bright-line test for establishing when directors *ought* to consider such interests, it appears that some consideration of all major stakeholder interests is almost always appropriate.

Under Canadian common law, directors enjoy significant deference by virtue of the "business judgment rule." The rule recognizes that, often, there are no "right" answers to decisions that directors face, including judgments as to the assumption of risk by the corporation. Courts will not second-guess those judgments as long as they are within a range of reasonableness and taken in good faith. Canadian courts' application of the business judgment rule has developed away from a *results*-oriented analysis to a *process*-oriented one. Under this approach, directors' decisions attract deference if they are "scrupulous in their deliberations and demonstrate diligence in arriving at decisions." *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] OJ No. 2412, para. 153. Some commentators have criticized this approach as too easily permitting directors to avoid scrutiny by creating a record of an apparently robust decision-making process. Courts will consider whether directors sought and relied on appropriate advice, so the role of independent committees is often crucial for directors in defending controversial decisions. Importantly, directors will not receive any deference under the business judgment rule in respect of an obligation that is prescribed in a statute or for acts that are outside of their authority. *See Kerr v. Danier Leather Inc.*, 2007 SSC 44, paras. 52–58; *Silver v. Imax Corp.*, [2009] OJ No. 5573 (S.C.J.), paras. 375 and 376.

The "Oppression Remedy" in Canadian Corporate Statutes

One of the most powerful tools available to stakeholders of Canadian companies is the "oppression remedy." *See*, *e.g*., Business Corporations Act (Ontario), R.S.O. 1990, c. B.16, s. 248. This is actually a suite of remedies that a court may grant to certain parties where their "reasonable expectations" have been oppressed or unfairly prejudiced or disregarded by the actions of the corporation, by one or more of its shareholders, or by the conduct of its directors. *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, para. 56. To demonstrate their reasonable expectations, complainants may point to commercial practice, the nature of the corporation, the relationships between corporate actors, past practice, representations and agreements, among other things. Otherwise, reasonable expectations may be undermined where the aggrieved stakeholder could reasonably have negotiated contractual protection from the impugned conduct.

Where oppression is established, courts have the power to restrain conduct, appoint a receiver, amend the corporation's constating documents, direct an exchange of securities, appoint directors, order the corporation or a person to purchase securities, vary or set aside a transaction, pay compensation to an aggrieved party, and more. In fact, the court has broad discretion to make any order "it thinks fit." Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241(3).

While the oppression remedy was created to protect the interests of minority shareholders from abusive corporate practices, the scope of eligible claimants under all of the corporate statutes is far more broad and includes the company's creditors. The Supreme Court of Canada has described the oppression remedy as providing "the broadest rights to creditors of any common law jurisdiction." *People's Dep't Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, at 48. However, courts have declined to let sophisticated lenders find shelter under the oppression remedy where they failed to obtain necessary protections in their credit documents. *See*, *e.g.*, BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, para. 108; *Computershare Tr. Co. v. Crystallex Int'l Corp.*, 2010 ONCA 364, at 14.

Historically, there has been uncertainty about the overlap between the oppression remedy and derivative actions, which allows certain stakeholders to carry on litigation in the name of the corporation with leave of the court. However, recent appellate authority has emphasized that these should be mostly non-overlapping procedures outside the context of small closely held corporations. *Rae v. Wildeboer*, 2015 ONCA 373. The oppression remedy is available only for harm that is unique to the claimant or a class of stakeholders, rather than for harm to the corporation itself that can be remedied by way of derivative action.

Conclusion

Canada is an attractive place for Americans to do business. Many of the trappings of corporate governance look and feel much like what Americans are used to at home. However, it is important for foreign directors and officers serving Canadian corporations to be aware of some unique aspects of Canadian corporate law. The fiduciary duty and oppression remedy are important examples. Directors and officers of Canadian companies can be in for a nasty shock, inadvertently exposing themselves to liability, if they fail to understand and appreciate these differences.

Stephen Brown-Okruhlik and Jeffrey Levine are partners with McMillan LLP in Toronto, Ontario. Stephen is a cochair of the M&A Litigation subcommittee of the ABA Litigation Section's Commercial & Business Litigation committee.