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UNFAIR INTERCORPORATE TRANSACTIONS OPPRESSED FORD CANADA SHAREHOLDERS

An unfair intercorporate transfer price system in place between Ford Motor Company of Canada and its US parent, Ford Motor Company, oppressed Ford Canada's minority shareholders, the Ontario Court of Appeal ruled in early 2006. However, because there was no evidence as to when these shareholders owned their shares, they were each entitled to only one day's damages.

The court's decision is replete with lessons for parent companies of non-wholly-owned subsidiaries, including:

- Treating a partly-owned subsidiary as though it were wholly-owned may be oppressive toward minority shareholders of the subsidiary.
- Intercorporate transactions should be on the same basis as the subsidiary would negotiate if it were a truly independent entity.
- Disparity in profitability between a parent and a subsidiary can lead to a finding that intercorporate transactions are unfair, and thus oppressive, toward minority shareholders of the subsidiary.
- The subsidiary's managers have a duty to apply business judgment to, and negotiate, intercorporate transactions; they cannot simply take the terms imposed by the parent.
- It may even be oppressive not to change the way in which a parent and a subsidiary do business with one another in response to changing economic circumstances.

As well, this decision establishes potentially far-reaching principles relevant to oppression claims involving any public company:

- The court will presume that shareholders of public companies have certain reasonable expectations about how the business of the company will be carried out.
- Statements in financial statements and annual reports can give rise to reasonable expectations by shareholders and, if untrue, found an action in oppression.
- A public company that does not meet general "shared expectations about the way in which a public company should be run" may be liable for oppression.
- A shareholder cannot obtain a remedy for oppression that occurred before the shareholder became a shareholder.
- The court will not adjust a valuation to account for historical oppression. However, the valuation will include a going forward component (that is, increase) reflecting improvements in performance caused by cessation of the oppressive conduct.

This decision, together with recent amendments to Ontario's *Securities Act* facilitating shareholder class actions for corporate misrepresentations on the secondary market, results in an environment where public companies face much greater risk of liability for their public statements.* MO



There is a danger that self-incriminating evidence compelled from a witness in Canada could be used in a prosecution of that witness in the US.

THE CROSS-BORDER WOES OF CONRAD BLACK – THE DILEMMA OF DIFFERING APPROACHES TO SELF-INCRIMINATION IN CANADA AND THE US

Conrad Black and other officers and directors of Ravelston must attend to be examined under oath, even though there is a risk that their evidence could be used against them in criminal proceedings in the US, the Ontario Court of Appeal ruled in November 2005. This case highlights a serious conflict between the Canadian and US approaches to protection against self-incrimination. In Canada, a witness can be compelled to answer a self-incriminating question, but that evidence cannot be used against the witness in subsequent criminal proceedings. In the US, a person can “plead the Fifth” and refuse to answer on grounds of self-incrimination. However, if the person does answer, the evidence can be used against that person in criminal proceedings. There is thus a danger that self-incriminating evidence compelled from a witness in Canada could be used in a prosecution of that witness in the US.

In October 2004, with regulatory and criminal investigations well under way in the United States, Justice Colin Campbell of the Ontario Superior Court appointed Ernst & Young to investigate related-party transactions between Hollinger Inc., Ravelston and its directors and officers. In May 2005, Campbell J. ordered Lord Black and other Ravelston officers to answer questions under oath. In doing so, he rejected their argument that this infringed their protections against self-incrimination under the Charter and the US Constitution’s Fifth Amendment because their testimony could be used against them in US criminal proceedings. Lord Black and the other Ravelston officers appealed.

In upholding Campbell J.’s decision, Ontario’s Court of Appeal agreed that a constitutional exemption was not appropriate because the purpose of the inquiry under the Canada Business Corporations Act is fact-finding and not prosecutorial. The court also approved of the procedure prescribed by Campbell J. for dealing with the potential conflict between Canadian and US approaches to self-incrimination. This procedure allows Lord Black and the other officers to object to specific questions on grounds of potential self-incrimination and obtain a court ruling before being forced to answer. The court could then give appropriate directions, including directions shielding particular answers from disclosure. As well, the inspector’s information and materials can only be made available to US authorities through the Mutual Legal Assistance Treaty (“MLAT”) process, which has its own protections.

The Court of Appeal’s decision has serious implications for corporations engaged in cross-border business. It illuminates the growing tension between the different ways that Canada and the US shield witnesses from self-incrimination and the resulting vulnerability of officers and directors on both sides of the border. Canada forces a witness to speak, but immunizes self-incriminatory evidence from use in criminal proceedings. The US allows witnesses to stay silent, but if they speak, does not recognize such an immunity.

Currently, there is no requirement that a judge reviewing an MLAT application consider whether the US will honour the privilege attaching to evidence obtained through compulsion that tends to incriminate the witness. Also problematic is the finding that evidence can be compelled because the Charter does not have extra-territorial application. The right against self-incrimination under the Charter is a principle of fundamental justice. To force witnesses to provide testimony in Canada that could incriminate them abroad could significantly erode this right.* JC

Globalization of trade requires that judgments, like goods and services, should flow easily across international borders.



DOOR LEFT OPEN FOR TORT OF INVASION OF PRIVACY IN ONTARIO

If someone has their privacy violated in Ontario, can they sue? In other words, is there a tort of invasion of privacy? These questions were the subject of a motion brought by McDonald's Restaurants of Canada to strike out a claim for unlawful invasion of privacy on the basis that it disclosed no reasonable cause of action. In refusing to strike out the plaintiff's claim, Justice Stinson of Ontario's Superior Court concluded that because the law in Ontario is not settled on whether there is a common law tort of invasion of privacy, the action should be allowed to proceed.

Mr. Somwar, sued his employer, McDonald's, for intentional invasion of privacy after McDonald's conducted a credit bureau check on him without permission. McDonald's moved at an early stage of the action to strike out Mr. Somwar's claim, saying that Ontario law does not recognize the tort of invasion of privacy.

The motion centred on one question: Is it fully settled in the jurisprudence that there is no tort of invasion of privacy? In examining this question, Stinson J. reviewed prior Ontario cases in which conduct ranging from aiming a surveillance camera at a neighbour to having a debt collector harass a debtor at work were found to be actionable and concluded that it is not settled law that there is no tort of invasion of privacy. He observed that Canada's Supreme Court has consistently found privacy rights worthy of constitutional protection and found that, while the Charter does not apply to private disputes, the common law must nevertheless develop in accordance with Charter values. Stinson J. concluded that a common law remedy for invasion of privacy would be consistent with Charter values and that "the time has come to recognize invasion of privacy as a tort in its own right".

McDonald's motion to strike out Mr. Samwar's claim was accordingly dismissed, and the door opened a little wider for the tort of invasion of privacy in Ontario. KP

APPEAL COURT FINDS THAT "NON-FINAL" UK ORDER SHOULD BE ENFORCED IN ONTARIO

Ontario's Court of Appeal recently recognised a UK High Court's initial order in a scheme of arrangement aimed at winding up the reinsurance business of Cavell Insurance Company Limited. It did so despite the fact that the UK court's order did not meet the traditional requirement that only a final judgment of a foreign court for the payment of a definite sum of money will be enforced in Canada. In relaxing the traditional rules for the enforcement of the UK order, the Court of Appeal recognized the need for courts to heed the ongoing evolution toward a global economy in dealing with a corporate restructuring with international implications.

Similar to the orders made during restructuring proceedings under Canada's Companies Creditors Arrangement Act ("CCAA"), the UK court's order was far from final. It merely convened the first meeting of Cavell's creditors and was the first judicial step in what would be a long process to wind up Cavell's worldwide reinsurance business. The UK order allowed for its terms to be varied by future court orders. One of Cavell's Canadian creditors, Pilot Insurance Company, objected to the enforcement of an order that was not final. In addition, Pilot objected to enforcement because it had not been served with formal notice of the UK proceedings and because the UK court lacked a sufficient connection to the case to have jurisdiction.

In rejecting Pilot's objections, the Court of Appeal examined the three reasons underlying the traditional requirement that the foreign judgment be final: (1) the need for the domestic court to know precisely what it is agreeing to enforce; (2) the need to avoid the injustice that will result if the foreign order that is enforced is subsequently changed; and (3) the risk of undermining

(CONTINUED ON PAGE 4)

public confidence should a domestic enforcement order be granted, only to have its foreign foundation subsequently disappear. The court found that these objectives would be served by recognizing the UK order. Its terms were clear and it did not risk injustice because it did not require Pilot to pay or do anything. Further, the enforcement order required Cavell to advise the Ontario court of any changes made by the UK court and to seek such further orders as might be required. There was thus little risk of having an Ontario recognition order remain in place after its foreign counterpart had disappeared.

Cavell is the latest example of Canadian courts' recognition that the globalization of trade requires that judgments, like goods and services, should flow easily across international borders. As well, the Supreme Court will soon rule on the Ontario Court of Appeal's 2004 decision in *Pro-Swing v. ELTA Golf Inc* holding that Canada's traditional prohibition against enforcing foreign injunctions should be revisited. KD

LAWYER FORCES TD BANK TO RELEASE TRUST FUNDS

A Toronto real estate lawyer, Sheldon Benjamin, obtained an order that the Toronto-Dominion Bank release funds held in his trust account after the bank wrongly froze funds in his account to recoup its loss from a fraudulent cheque that had been drawn by another of Mr. Benjamin's clients and deposited into the trust account.

Mr. Justice Perell of Ontario's Superior Court granted an injunction requiring the bank to lift its freeze on the basis that, among other things, TD should bear the risk when it paid out funds on a fraudulent cheque (which, coincidentally had been drawn on another TD account), and Mr. Benjamin's account contained funds held in trust for other clients that the bank had no right to seize under its banking agreement with the lawyer. Finally, Perell J. found that the harm that would be caused to Mr. Benjamin and his clients from allowing the freeze to continue would clearly be serious and irreparable including, not insignificantly, the damage that would result to Mr. Benjamin's good reputation as a lawyer.* PE

NO CLASS ACTION WHERE ARBITRATOR HAS JURISDICTION, SUPREME COURT HOLDS

Class action legislation does not give courts jurisdiction over cases that would otherwise be dealt with by tribunals or arbitrators, the Supreme Court of Canada held in *Concordia v. Bisailon*. Thus unionized employees cannot institute class actions against their employers for disputes over the terms of their collective agreements. Writing for the majority, LeBel J. held that certifying a class action in such a case would be "incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of certified unions."

A unionized employee of Concordia University sought to bring a class action on behalf of all members of an employee pension plan in order to contest the University's use and administration of the pension fund.

In staying that action in favour of arbitration, LeBel J. emphasized that class action legislation is procedural and does not confer jurisdiction on the courts over cases that would not normally fall within its reach. LeBel J. also noted that it is inherent in the collective representation system that, in exchange for being able to strengthen their bargaining power by unionizing, individuals sacrifice the ability to bring claims on their own. Under relevant Quebec law and the collective agreement at issue, grievance arbitrators had exclusive jurisdiction over disputes arising under the collective agreement. Class action legislation could not alter that fact. * SG

* See www.thelitigator.ca for additional analysis.

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