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Shareholder Disagreements

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Oppression remedy

- Provincial corporations: Section 5 of the Third Schedule of the *Nova Scotia Companies Act*

- Federal corporations: Section 241 of the *Canada Business Corporation Act*

Oppression remedy

- Conduct that is “oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer.”
- Includes:
  - Acts or omissions by the corporation
  - Manner of conducting business
  - Directors’ exercise of power

(Section 5, of the Third Schedule to the *Companies Act)*

Oppression remedy

- Cornerstone: reasonable expectations
- Fact specific
- The measure of the standard of conduct under the oppression remedy is fairness

Oppression remedy

- "Complainant":
  - Former or current shareholders
  - Former or current officers or directors
  - Registrar
  - Anyone else the court deems a "proper person"

(Section 7(5)(b) of the Third Schedule to the *Companies Act*)

Types of claims

- Breach of reasonable expectation…
- That is oppressive, unfairly prejudicial, or unfairly disregards complainant's interests.
- Can include:
  - **Self-dealing:** Complainants in oppression cases typically have a reasonable expectation that majority shareholders will not treat a corporation as if it is their own property. Courts have routinely recognized that one shareholder should not be entitled to draw a disproportionate share of funds from the company or engage in self-dealing of corporate funds.

Types of claims

- Improper reduction of shareholder dividends;
- squeezing out minority shareholders because of personal desire to exclude and not because of best interest of corporation;
- non-disclosure of related party transactions;
- preventing take-over by “poison pill”; and
- much more.

Conduct Giving Rise to Oppression

Factors relevant to determining whether a party held a reasonable expectation 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.

Conduct Giving Rise to Oppression

- Not the Court's role to substitute its own business judgment for that of corporate decision-makers.
- The Court should not subject their honestly-made business decisions to "microscopic examination." Whether an expectation is reasonable is to be assessed objectively.

Action vs. Application

- Typically, application more appropriate.
- Courts have denied respondents' motions to convert (*Hong v Lavy, 2018 NSSC 54; Jeffrie v Hendriksen, 2011 NSSC 292*)
  - Application presumed preferable where risk of erosion of substantive rights over time (*CPR* 6.02(3))
  - "The very nature of an oppression remedy would suggest that it be dealt with expeditiously." (*Jeffrie v Hendriksen, 2011 NSSC 292*, para 31)

Action vs. Application

- However – complex case, large company, many shareholders → may warrant conversion to action

(Milburn v Growthworks Canadian Fund Ltd, 2012 NSSC 106)

- *Hong v Lavy, 2018 NSSC 54* : "there is no presumption that shareholder oppression matters will proceed by application, though they often do."

Derivative Action vs. Oppression Remedy

Oppression remedy (s. 5 of Third Schedule of *Companies Act*)

- Personal remedy
- Action brought in the name of personal litigant
- Self-funded
- Based in equity

Derivative Action vs. Oppression Remedy

Derivative action (s. 4 of Third Schedule of *Companies Act*)

- Complainant stepping in shoes of company
- Action brought in the name of the company
- Leave from Court required
- Conducive to protecting group of stakeholders
- Funded by the company
- Requires legal cause of action on company's behalf

Derivative Action vs. Oppression Remedy

Derivative Action (continued)

- Can occur when an individual (i.e. director) has violated obligations to company
- Since harm is being done to the corporation by parties who control it, the corporation cannot enforce its rights.

Injunctive Relief

- Nature of an oppression claim is often such that a party will seek injunctive relief to address the allegedly oppressive conduct on an interim basis pending a determination on the merits of the claim and any final order for relief.

- Test: *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311:
  - Serious issue to be tried or prima facie case
  - Irreparable harm
  - Balance of convenience

Injunctive Relief

- Status Quo
  - Although “maintenance of the *status quo*” is not explicitly listed under section 5 of the Third Schedule of the *Companies Act*, it can clearly fall within the unfettered scope of the court’s powers.
  - Arguably, a motion for interlocutory injunction is most suited to maintaining the *status quo* pending the resolution of the hearing.

Injunctive Relief

- *Hong v Lavy,* 2017 NSSC 329:
  Successful injunction

- *Tri-Mac Holdings Inc v Ostrom*, 2018 NSSC 177:
  Not always suitable for injunctive relief.

Injunctive Relief

Generally speaking, injunctive interim relief has been granted in the following scenarios:

- When compensatory damages would be inadequate;
- To restrain conduct that will so dramatically affect the rights of the parties that the harm is irreparable;
- Where minority shareholder holdings would be severely diluted by a proposed rights offering, despite the significant consequences to the corporation itself; and
- Where the shareholder has a “high degree of assurance” of their capacity to obtain injunctive relief (reasonable shareholder expectations).

Nova Scotia Case Law

Hong v Lavy:

- Document production issues.
- Interim injunction: *Hong v Lavy*, 2017 NSSC 329.
- Application v. Action: *Hong v Lavy*, 2018 NSSC 54.
- Relief sought: *Lavy v Hong*, 2018 NSCA 28

Nova Scotia Case Law

Jeffrie v Hendrikson:

- Relief granted in oppression remedy **must serve to rectify the oppressive conduct.**

- No relief where the applicant had the means to address the conduct himself.

(2013 NSSC 50, reversed on other grounds in 2015 NSCA 49)

Types of relief

- A broad, equitable remedy - “the court may make an order to rectify the matters complained of” (s. 5)
- Range of relief available:
  - Majority shareholder purchase of minority shareholder’s shares
  - Monetary compensation;
  - Order for the payment of dividends;
  - Disclosure of documents;
  - Setting aside or varying a transaction;
  - Buy-sell agreement (“shotgun clause”);
  - Etc.

Questions?

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Tendering and RFPs: Issues in Procurement

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Bidding and Tendering

- Since 1981 in *R (Ont) v Ron Engineering & Construction (Eastern) Ltd*, 1 SCR 111, it has been established that there are two contracts involved in the tendering and bidding process:
  - **Contract A** formed with all bidders who submit a compliant bid; and
  - **Contract B** formed with the successful bidder on the selection of the winning bid
- Certain terms are implied to be a part of Contract A, regardless of their explicit inclusion
  - Duty of Fairness
- What obligations are created, explicitly or implicitly under Contract A?

Tender, or RFP?

- The first step is deciding on the process.
- A RFP (Request for Proposals) can result in finding all pertinent information about bidders with avoiding some of the formal obligations which attach to tenders.
- The key difference is the whether Contract A is created, and the ambit of the duty of fairness.

Tender, or RFP?

- Stricter obligations attach to conventional tenders, whereas with a request for proposals the owner only owes less onerous obligations.

- As a general rule, tenders create contractual relations between the parties whereas “true” RFPs just ask for expressions of interest.

- However, just calling something a RFP will not be sufficient. Courts will look at the intention and substances of the procurement to determine whether or not it is a formal tender.

Tender, or RFP?

- Criteria considered
- *Tercon v British Columbia*, 2010 SCC 4 – some of the criteria (see the criteria discussed in trial division 2006 BCSC 499 ¶ 81).
  - Formality of the procurement process
  - The use of specified evaluation criteria
  - Whether compliance with specifications is a condition of the tender / proposal
  - Whether there is a deadline for submissions and the performance of the work
  - Whether the proposal is irrevocable
  - Whether public or solicited from selected parties
  - The requirement for a security deposit

Bid Compliance

- The golden rule of tendering is basic: only compliant bids may be accepted

- However, the law has been updated in recent years to reflect a reality that only certain requirements are actually mandatory, and therefore that compliance with those requirements is essential

- Compliance depends on the precise facts and terms of the tender call

Bid Compliance

- Unless the tender documents clearly provide otherwise, compliance has been interpreted by the courts to mean “substantial” or “material” compliance.
- Further, the Supreme Court of Canada, in ***Double N Earthmovers Ltd v Edmonton***, 2007 SCC 3 the majority of the Court made it clear that the bid must only be compliant on its face.
  - There is no duty to investigate the assurances made in the Contract A
  - ***Force Construction Ltd v Nova Scotia (Attorney General)***, 2008 NSSC 327 (affirmed in 2009 NSCA 96).

Bid Compliance

- The tender can also be drafted to allow waiver of non-compliance
- Tenders are often drafted with language which allows the owner to waive irregularities or accept a non-compliant bid
- However, courts will only permit this clause to be used to a certain extent
- Some courts have been unwilling to allow such a clause to cure a materially non-compliant bid, stating that it would be a breach of the duty of fairness
- In some circumstances, the court may apply the substantial compliance test before the privilege clause is considered

Material Compliance

- The next question is then, what is material?
- The test for materiality varies with different courts.
- ***Double N Earthmovers Ltd v Edmonton***, 2007 SCC 3 defined the test for material compliance, as opposed to informalities required in the contract, as:
  - Generally, an informality would be something that did not materially affect the price or performance of Contract B.

Late Bids

- In a tender situation, courts have imposed an obligation that owners will only accept timely bids (as a part of their duty of fairness).
- As a general rule, a late bid is a non-compliant bid.
- It has been stated that “a bid submitted after the tender deadline is invalid, and an owner that considers a late bid would breach its duty of fairness to the other tenderers.”
- Any bid *an instant* after the deadline is a late bid.

Bid Compliance

- A standard privilege clause allowing non-compliant bids does not permit the acceptance of late bids (*NAC Constructors Ltd v Alberta Capital Region Wastewater Commission,* 2006 ABCA 246).
- In some instances, the owner wants to retain the right to accept late bids.
- This is possible, but risky, and only if the privilege clause is drafted in such a way that it is precise, specific, and not contrary to the intent or purpose of the instructions to bidders as a whole.

Examples of Non-Compliant Bids

- Failure to include an environmental protection plan, plan to mitigate impact on local residents, and $2,000,000 error was found to be materially non-compliant, despite a clause allowing the owner to determine whether a defect was non-compliant (***Graham Industrial Services Ltd v Greater Vancouver Water District***, 2004 BCCA 5).
- Failure to express prices properly was found to be material non-compliance when the bidder should have stated prices for one year, three years, and five years but only expressed prices for five years (***Canadian Logistics Systems Ltd v Canadian National Transportations Ltd***, 2000 BCSC 339).

Examples of Non-Compliant Bids

- In ***Johnson's Construction Ltd v Newfoundland (2000)***, 185 NLFD & PEIR 106 the winning bid was missing one unit price:
  - The tender documents, however, stated that "if any unit price is omitted by the bidder, then the bid shall be considered incomplete and automatically rejected."
  - Due to the explicit nature of the clause, it was found that it would be unfair to other bidders to accept the non-compliant bid.
  - The court did not accept the argument that the Government ought to be able to take advantage of the omission, and that was obtaining good value for government funds.

Examples of Non-Compliant Bids

- When a 90-day bid bond was required and a 60-day bid bond was submitted it was found the mistake did result in material non-compliance (***Silex Restorations Ltd v Strata Plan VR 2096***, 2004 BCCA 376)
- A failure to sign a page of the tender which included an acceptance that the contract terms would apply to Contract B was considered a materially non-compliant bid (***Inter Rail Auto Handling Inc v Canadian Pacific Ltd***, 2000 BCSC 1011)
- Inclusion of an unqualified bidder as a joint venture was considered material non-compliance (***Tercon contractors Ltd v British Columbia (Minister of Transportation & Highways***))

Examples of Compliant Bids

- A failure to provide performance security at the time of the tender bid did not make it materially non-compliant as practice was that it was paid within a reasonable timeframe (***Rhyno Demolition Inc v Nova Scotia (Attorney General***), 2006 NSCA 16)
  - However, it was also stated that if it were a bid bond situation there would have to be strict compliance because it is a material requirement

Examples of Compliant Bids

- Failure to secure a permit for a transfer station was considered a convenience and not a necessity and therefore was not enough to make the bid materially non-compliant (***Tantramar Sanitation & Trucking Ltd v Sackville (Town)*****,** 2006 NBQB 13)
- Failure to seal bid and performance security was not found to be materially non-compliant (***Curwood & Sons Limited v Ottawa-Carlton (Regional Municipality*****) (2000)**, 50 CLR (2d) 184 (OSCJ))
  - However, in another situation the failure to sign an agreement to bond was considered materially non-compliant even though the bidder later provided an affidavit that the original agreement was signed before the bid closed but was inadvertently left out (*Fullercon Limited v Ottawa (City*), 2003, 44 BLR (3d) 150 (CA) and 41 BLR (3d) 183 (SCJ)).

Mandatory Compliance

- The first step in expressing mandatory compliance is with the word “shall” or “must.”
- The conditions which are not mandatory should be expressed with permissive language.
- To be absolutely sure that an owner may reject bids which do not conform with a particular list of requirements, those conditions should be separated and delineated in a section labelled “mandatory”

Negotiating

- As a general rule, negotiating with bidders is not permitted in the tendering process (*MJB*, [1999] 1 SCR 619 41 – "replaces negotiation with competition").
- Owners must be careful as negotiating to lower bids before the tender closing is considered "bid shopping."
- It has been said that "any post-closing price manipulations that could negatively impact the integrity of the bidding system" have no place in tendering and bidding (***Stanco Projects Ltd v British Columbia (Ministry of Water, Land and Air Protection***), 2006 BCCA 246
- But – *CHM Construction v Town of Victoria*, 2010 NLTD(G) 145 ¶ 94

Negotiating

- Two definitions of bid shopping:
  - "the practice of soliciting a bid from a contractor, with whom one has no intention of dealing, and then disclosing or using that in an attempt to drive prices down amongst with whom one does intend to deal …" ***Naylor Group Inc v Ellis-Don Construction Ltd***, 2001 SCC 58 ¶ 9
  - "Conduct where a tendering authority uses the bids submitted to it as a negotiating tool, whether expressly or in a more clandestine way, before the construction contract has been awarded" ***Stanco***, 2004 BCSC 1038 ¶ 100 af'd 2006 BCCA 246.

Retendering

- What do you do when all of your bids come in over-budget?
- Or, if there is a mistake in the documents, it is uncertain whether bidders are compliant, etc.?
- There may be situations where it is prudent to retender – but retendering improperly can be considered a breach of your duty of good faith and an owner cannot “bid shop.”
- A peculiar case on this matter is ***CMH Construction Ltd v Victoria (Town)***, 2010 NLTD(G) 145
  - Town of Victoria had a number of renovations they had funding approved for at around $120,000.00
  - Tender went out, and there was only one bidder at $183,000.00

Retendering

- The Town ultimately could not afford that cost, so they cut some of the costs and issued portions of the project to other contractors on a project management basis.
- The tender was not cancelled, and CMH was not invited to participate in the newly-defined projects.
- The Town was found to be in breach of Contract A by causing CMH to “spend time, effort and money on a hopeless bid, then completely ignoring CMH’s interests, which it was contractually bound to consider.”

Retendering

- For retendering you should ensure that you give yourself the ability to do that in the form of a privilege clause.
- Also, ensure that you are treating the bidding parties fairly throughout the process and advise the parties that the tender is being cancelled.
- If you change the scope of work to adhere to a budget, ensure all bidders get notice and a fair change to rebid on the new scope of work.
- Keep your bidders informed of what is going on throughout the process.

Damages

- A trilogy of decisions from 1999 – 2001 set parameters for damages that may be recoverable by victims of unfair tendering practices:
  - *MJB Enterprises Ltd v Defence Construction (1951) Ltd,* [1999] 1 SCR 619.
  - *Martel Building Ltd v R*, 2000 SCC 60.
  - *Naylor Group Inc v Ellis-Don Construction Ltd,* 2001 SCC 58.

Damages

- Breach by an owner
  - Contractor will be entitled to expectation damages amounting to the profits she would have earned had she been awarded the contract.
    - She must prove that the owner failed to treat the bidders fairly
    - And also that she would have gotten, or had a chance to get Contract B otherwise.
  - The contractor may also have a claim for the cost of the bid preparation *(Dunphy's Transport Limited v Avalon West School Board*, 2004 NLSCTD 199)
- Breach by contractor
  - Owner is entitled to the difference of that contractor's bid and the eventual contract price.

Damages

- Proving the damages can be difficult.
- What if the unsuccessful bidder had little or no profit built into their work-up, hoping to get extras along the way?
  - There is no claim. They must have lost profits.
  - Consider ***Hamilton Open Windows***, 2004 SCC 9.
- Also, where unfairness in the process is found, if other contractors also had an equal chance of being awarded the contract the plaintiff may only get a percentage of her lost profits.
- If contractors do not have a clear work-up of what profit could be it will not absolve the owner of liability. Industry standards will be used as benchmarks.

Recent Nova Scotia Supreme Court Tendering Injunction

Recent NS Case Law

- ***CF Construction Ltd v Town of Westville***, 2018 NSSC 123 – Bid Compliance

- ***Winbridge Construction Ltd v Halifax Regional Water Commission***, 2015 NSSC 275 – Duty of Fairness

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