



To: John Smith

From: OnPoint Legal Research Law Corporation

Date:

Re: Valuation of Shares in Oppression Action- Your File *A v. B*.

Introduction:

You have informed me that your clients (the “A’s”) are defending an oppression action in the context of a wrongful dismissal action commenced by a 1/3 shareholder (“B”) of the parties’ company.

B would like his shares valued at X, the date upon which he was terminated. The A’s would like his shares valued at a current value.

We have agreed that I would spend up to 15 hours researching the law across Canada and drafting a memorandum on the following issue.

Issue:

1. What should the court use for a valuation date when shares are valued in pursuance to considerations under s.200 of the *Company Act*?

Brief Answer:

The valuation date applied by courts across Canada in the context of the oppression remedy appears to depend on whether the oppressive conduct has affected the value of the company. Where it has, the application date is often employed as the valuation date. Where it has not, the valuation date will be set on the basis of what is the fairest date on the particular facts. In any case, it is clear there is no rigid rule and a wide discretion is given to the court to decide what is equitable and suitable to the circumstances of each case: *Nagata v. Teramura* [1990] B.C.J. No. 2905 (QL)(S.C.); *Safarik v. Ocean Fisheries Ltd.* (1993), 10 B.L.R. (2d) 246 (B.C.S.C.).

I note that in British Columbia, the court has frequently set the valuation as at the date of the filing of the petition: see for example, *Safarik v. Ocean Fisheries Ltd. supra*; *Oakley v. McDougall* (1987), 14 B.C.L.R. (2d) 128 (C.A.), and *Diligenti v. RWMD Operations Kelowna Ltd.* (1977), 4 B.C.L.R. 134 at 139 (S.C.). However, the court will stray from using this date where to do so would be unfair: see *De Cotiis v. De Cotiis* [1995] B.C.J. No. 1423 (S.C.)(QL), where the court established that the valuation date was more appropriately set at the date upon which the judgment was issued.

Analysis:

1. What should the court use for a valuation date when shares are valued in pursuance to considerations under s.200 of the *Company Act*?
 - a) *Where the Oppressive Conduct has Reduced the Value of the Corporation*

Where the oppressive conduct has reduced the value, the general rule is that the valuation date is the date on which the application was commenced: see *Re Van-Tel T.V. Ltd.* (1974), 44 D.L.R. (3d) 136 (B.C.S.C.) and *Re Johnson and West Fraser Timber Co.*

(1982), 133 D.L.R. (3d) 77 (B.C.S.C.), rev'd on other grounds without considering the valuation issues at (1982), 37 B.C.L.R. 360 (C.A.). As Peterson, D. concluded in "Shareholder Remedies in Canada" at para.18.194.1, it is unlikely that a departure from this rule would ever be justified given that the valuation is to be made as if the oppression never occurred, and that an expropriation premium can be awarded in appropriate circumstances. The general rule also has the advantage of protecting the applicant from declines in value during the time that it takes to resolve the action: *Safarik v. Ocean Fisheries Ltd.*, *supra* at 313.

However, several cases have departed from this general rule where the conduct in question arose before the oppression remedy was proclaimed. For example, in *1329207 Ontario Inc. v. D&R Custom Millwork Ltd.* (2002), 29 B.L.R. (3d) 238 (Ont.S.C.J.), the complainant was improperly removed from management. At that time the complainant and its associates were major customers and they stopped providing orders. As a result, the value of the business declined. There was only a 45-day period between the expulsion and the commencement of the oppression proceeding. The date of expulsion was found to be the fairest date and a valuation was ordered on the basis of continued business from the complainant and its associates.

b) *Where the Oppressive Conduct has not Reduced the Value of the Corporation*

Where the oppressive conduct has not reduced the value of the corporation, the courts have been flexible in setting the valuation date. The valuation date will be set on the basis of what is the fairest date on the particular facts. In *In re London School of Electronics Ltd.* [1985] 3 W.L.R. 474 (Ch.), the application date was selected by default as the appropriate valuation date. The applicant was excluded from the management of a company that he co-founded. Using the date of his removal from management would not recognize efforts he made that were not yet reflected in the company's accounts. On the other hand, using the date of the determination of 'fair value' would include the contributions of the remaining shareholders. It has been suggested that the case stands for this proposition: "The valuation date should not (a) deprive the petitioner of any of the

benefits of any contributions he has made to the business success of the company, or (b) confer on the petitioner any benefits of contributions to the company's business for which he has not been responsible.”: see the attached article, D. Prentice, “Minority Shareholder Oppression: Valuation of Shares” (1986), 102 Law Q. Rev. 179 at p.184.

The Canadian cases appear to take the same approach: see *Chiaramonte v. World Wide Importing Ltd.* (1996), 28 O.R. (3d) 641 (Gen.Div.); *Garland v. Blackwood* (1998), 39 B.L.R. (2d) 266 (Ont.Gen.Div.). In *Nagata v. Termaura, supra*, it was held that the valuation date should be set on the basis of what would be the fairest date on the particular facts of the case. In that case it was held that the date of the application was the most equitable valuation date. Some real estate of the respondent had increased by more than \$120,000 between the date of the application and the date of the court order requiring a buy-out. There were lengthy delays in the proceedings, but none of these were caused by the party making the buy-out. Furthermore, the value of the real estate was increasing some time before the application was issued while the respondent was not helping the companies operate, and the respondent will be sharing equally in that part of the increase. In *Millar v. McNally* (1991), 3 B.L.R. (2d) 102 (Ont.Gen.Div.) (1992), the court selected the date of the order requiring the buy-out as the valuation date. It is not clear why this date was chosen, but it may have been a combination of the most recent date to use for this purpose and the apparent lack of change in the way the business was operated or its underlying value. In *Garland v. Blackwood, supra*, the court also selected the date of the order requiring the buy-out as the valuation date. The court reasoned that this date better enabled the valuations to assess the company, based in part on post-evaluation financial statements.

c) *Cases Supporting Different Dates*

There is no clear answer to your query as to upon what date the court should value the shares in an oppression action; the court will choose the date that is most equitable under the circumstances. It is possible to locate cases that will support either your position (that the date should be based upon a relatively current value or at least at the time of the filing

of the petition, which appears to be the most commonly determined valuation date in the British Columbia cases) or that of the plaintiff (at the time of termination).

Although it is not a case from British Columbia, I note that *Chiaramonte v. World Wide Importing Ltd. supra*, is the most supportive case that I located for your argument that the date should be based upon a current value. The case involved the applicant's removal from the board. The court held that the conduct of the majority of the shareholders was oppressive but that this behaviour was not the cause of the decline in value of the company. The court concluded that the appropriate date of valuation was the current value of the shares since:

“to select a valuation date in the past would be punitive and unfair to the respondents in all the circumstances. The conduct Franco complains of did not cause the existing economic condition of the companies and, in light of his unreasonable conduct throughout, I can see no justification for him to be insulated from World Wide Group's plight.”

Garland v. Blackwood, supra, is also supportive of your position if it can be established that your clients' alleged oppressive behaviour did not cause the decline in the value of the company. In that case, the court concluded that the date closest to judgment was the fairest to both parties as the oppressive conduct did not reduce the value of the corporation.

I have provided you with a list of several cases in addition to those that you have noted in your memorandum dated September 22, 2003. I have not summarized the cases as I chose to spend the majority of my allotted time researching for relevant cases. It is possible that further searches would unearth additional useful cases; please let me know if you would like me to conduct further research.

i) Cases Where Shares Valued At Termination

- (a) *Stephenson v. Derdall* (1994), 126 Sask.R. 67 (Q.B.)
- (b) *Nanef v. Con-Crete Holdings Ltd.* (1995), 23 B.L.R. (2d) 286 (Ont.C.A.)
- (c) *Beaubien v. Campbell* (2003), 33 B.L.R. (3d) 33 (Sask.Q.B.)

ii) Cases Where Shares Valued At Filing of Application

- (a) *Discovery Enterprises Inc. v. Ebco Industries Ltd.* [2002] B.C.J. No. 1957 (S.C.)(QL)
- (b) *Nagata v. Teramura* [1990] B.C.J. No. 2905 (S.C.)(QL)
- (c) *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont.Gen.Div.)
- (d) *Schwabe v. Heilborn* (2002), 28 B.L.R. (3d) 309 (Ont.Sup.Ct)
- (e) *Westfair Foods v. Watt* (1992), 5 B.L.R. (2d) 179 (Alta.C.A.)
- (f) *Johnston v. West Fraser Timber Co.* (1982), 133 D.L.R. (3d) 77 (B.C.S.C.)
- (g) *Jekel v. Siprak & Associates Developers Ltd.* [1996] B.C.J. No. 2202 (S.C.)(QL)

iii) Cases Where Shares Valued at Current Value or Date of the Judgment

- (a) *Chiaramonte v. World Wide Importing Ltd.* (1996), 28 O.R. (3d) 641 (Gen.Div.)
- (b) *Garland v. Blackwood* (1998), 39 B.L.R. (2d) 266 (Ont.Gen.Div.)
- (c) *Millar v. McNally* (1991), 3 B.L.R. (2d) 102 (Ont.Gen.Div.)
- (d) *Rummery v. Matthews* (2001), 15 Man.R. (2d) 229 (C.A.)
- (e) *de Cotiis v. de Cotiis* [1995] B.C.J. No. 1423 (S.C.)(QL)

Please contact me should you have any questions or require further research on this matter.