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The Expanding use of the Oppression Remedy may give legal teeth to Corporate Social Responsibility

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Case Considered:

Wrzesien v Arnett & Burgess Pipeliners Ltd., 2013 ABQB 59

The oppression remedy is a statutory right available under section 242 of the *Alberta Business Corporation Act*, RSA 2000, c B-9 [*ABCA*] and other corporate statutes in Canada. The remedy is a powerful tool for correcting prejudicial, unfair and oppressive conduct. It is available to shareholders, directors and officers who have been oppressed or unreasonably prejudiced through corporate conduct. Under the legislation a creditor may utilize the oppression remedy only if the court exercises its discretion to find that the creditor is a 'proper person' to make an application under the oppression remedy (*ABCA*, s 239).

In *Wrzesien v Arnett & Burgess Pipeliners Ltd*. Justice Manderscheid considered a creditor's ability to bring an oppression claim. The plaintiff, Ed Wrzesien was a creditor and shareholder of the defendant corporation. Wrzesien applied to amend his Statement of Claim to bring forward an oppression action pursuant to section 242 of the *ABCA*. Wrzesien argued the directors of Arnett & Burgess Pipeliners Ltd. failed to value his shareholdings accurately resulting in a depressed value.

In order bring an oppression claim Wrzesien must show he has standing as a 'complainant' under the statute. In considering whether Wrzesien qualified as a creditor Justice Manderscheid cites *Builders' Floor Centre Ltd. v Thiessen* (2012 ABQB 86 - I should note in full disclosure I acted as counsel in this case). Master Wacowich gave wide meaning to the term 'creditor' in relation to the oppression remedy. It was held that a creditor includes any person with an existing claim or action against the corporation. Further Master Wacowich said a "Court has broad powers to determine that an applicant is a proper person to apply for the oppression remedy. This is a broad power of justice and equity whereby a Court may allow a person who would not otherwise be a "complainant" to take proceedings" (at para 38). Further, in *Ed Wrzesien v Arnett & Burgess Pipeliners Ltd*. Justice Manderscheid noted the seminal case of *BCE Inc. v 1976 Debentureholders* in which the Supreme Court of Canada said, "oppression is an equitable remedy. It seeks to ensure fairness... It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (2008 SCC 69 at para 68).

In following *BCE* the Alberta Court of Queens Bench has firmly asserted that it has a broad and equitable discretion to allow an applicant to bring an oppression claim. I question whether this means the class of stakeholders bringing claims under the oppression remedy will expand? I note the work of Igor Ellyn who suggests that the oppression remedy "allows any type of corporate activity to be the subject of scrutiny, and makes the remedy available to a broad class of

individuals." See Igor Ellyn and Karine de Champlain "Shareholders' Remedies in Canada" Ellyn Law LLP: online here.

I suggest it is tenable for socially active shareholders to enforce environmental objectives that have been pledged by corporations using the oppression remedy. Socially minded investors that consider corporate social responsibility as part of their investment strategy exist. As one example, Northwest & Ethical Investments L.P. (NEI) is Canada's largest provider of socially responsible mutual funds. See About Ethical Funds, (August 2, 2010) NEI Investments, online here. NEI invests in natural resource sector companies that embrace sustainability. As one example, Suncor Energy Inc. is currently held in two of NEI's funds. Perhaps one of the reasons is due to Suncor's commitment to "beyond-compliance environmental performance goals" see Suncor 2012 Report on Sustainability here.

Suncor has spent over a billion dollars developing and implementing a reclamation technology leading one commentator with an environmental NGO to state that Suncor "raises the bar for all companies operating in the oilsands." See Simon Dyer, "Pembina reacts to Suncor's proposed new tailings technology" The Pembina Institute (October 23, 2009), online here. At the same time, Suncor has performed a rigorous review of budgetary costs and is cutting half of all projected spending in the Fort McMurray region. See *Globe & Mail* "Suncor scales back 2013 oil sands spending plan" (December 3, 2012) here. Hypothetically, if the directors of Suncor scaled back their reclamation projects, NEI could bring an oppression claim based on cutbacks to environmental initiatives. I suggest NEI could bring forward this claim even if Suncor was not required to fulfill these environmental initiatives by the regulators.

Whether a complainant could successfully bring forward a corporate social responsibility claim through an oppression remedy is speculative. However, Canadian courts have been willing to use their equitable discretion to include unsecured creditors with a *de minimis* legal basis to bring an oppression claim. For instance, in *Gignac Sutts & Woodall Construction Co. v Harris*, (1997 CarswellOnt 2915) the amount claimed by the applicant was founded in unjust enrichment and had not been billed or payment demanded when the action was commenced. Nevertheless, the Court held that the applicants were creditors for the purposes of the oppression remedy. This case was followed by the Alberta Court of Queen's Bench in *Wrzesien v Arnett & Burgess Pipeliners Ltd*. and *Builders' Floor Centre Ltd. v Thiessen.*

Given these developments, I suggest it is a reasonable extension to permit a socially active shareholder such as NEI to bring forward an oppression claim based on environmental concerns. However, there will need to be further case law on point to determine whether the oppression remedy may become a tool for corporate social responsibility to gain legal teeth.