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Must Creditors be “Analogous to Minority Shareholders” to Obtain Standing for Oppression?

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Case Commented On: *Pricewaterhouse Coopers Ltd v Perpetual Energy Inc*, [2021 ABCA 16 \(CanLII\)](#)

A creditor seeking an oppression remedy must qualify as a “proper person” to make an application. While deciding whether to grant standing, courts have at times maintained that a creditor must be in a position analogous to a minority shareholder. In *Pricewaterhouse Coopers Ltd v Perpetual Energy Inc*, [2021 ABCA 16 \(CanLII\)](#) (*Perpetual Energy*), the Alberta Court of Appeal objected to the shorthand of that analogy while appearing to confirm its substance. This post will address when and how creditors can get complainant status under the oppression remedy, and the effect of the comment in *Perpetual Energy* on that understanding.

Under Alberta’s *Business Corporations Act*, [RSA 2000, c B-9 \(BCA\)](#), a “complainant” can seek an oppression remedy (s 240(1)). Some complainants have standing as of right, such as registered holders or beneficial owners of securities of a corporation, and some complainants, such as creditors, must qualify as a “proper person” at the court’s discretion in order to obtain standing (s 239(b)(iii) and (iv)). Complainant status is determined, according to the Court in *Perpetual Energy*, “based on affidavit evidence presented by the potential plaintiff/complainant, outlining the nature of the alleged oppression, and the proponent’s suitability to seek a remedy for that oppression” (at para 124).

There is no black letter law outlining when creditors will get complainant status, though as a matter of policy, they cannot pursue the oppression remedy for simple debt collection. Having failed to insert proper measures in their contracts to protect themselves against the risks of doing business with the debtor does not later entitle them to use the oppression remedy to compensate for that failure. *Perpetual Energy* is the latest in a long line of cases to reiterate this position, maintaining, “[r]equiring a creditor to apply for complainant status reflects a policy that oppression claims are not to be used as a method of debt collection. The mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression” (at para 126) (see also *Ernst & Young Inc v Essar Global Fund Limited*, [2017 ONCA 1014 \(CanLII\)](#) at para 144; *Burnett v Axxa Realities*, [2004 CanLII 39752 \(QC CS\)](#) at para 24; and *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, [2008 ONCA 138 \(CanLII\)](#) at para 65).

Conversely, creditors can be found to be “proper persons” when they have a sufficient interest in how the corporation is being managed, but do not have the power to effect change when abuses of management impact them. In *JSM Corp*, the court identified the position to be one where, “a creditor... finds his interest as a creditor compromised by unlawful and internal corporate maneuvers against which the creditor cannot effectively protect itself” (at para 66). The court in

N'Quatqua Logging Co v Thevarge, [2006 BCSC 1122 \(CanLII\)](#), commenting on who would be an “appropriate person” (which is the language used in the British Columbia *Business Corporations Act*, [SBC 2002, c 57](#) at s 227(1), and which was found to be substantively the same as “proper person” (at para 18)), maintained that the “reference to an appropriate person is intended to provide a remedy for persons who are not shareholders but who, by virtue of their relationship to, or dealings with, the company, have an interest that is not dissimilar to that of a shareholder” (at para 19). Some courts have referred to this position as analogous to a minority shareholder.

As a result, unpaid debt is generally the reason creditors claim oppression, but creditors can only obtain standing when debt collection is secondary to the main claim. For example, in *Perpetual Energy*, the trustee in bankruptcy was seeking complainant status as a “proper person”, alleging that the corporation had been reorganized in such a way as to render it unable to pay its debts (at para 126).

The analogy between minority shareholders and the type of complainant who could be a “proper person” originated in *Daon Development Corporation (Re)*, 54 BCLR 235, [1984 CanLII 877 \(BC SC\)](#) (*Re Daon*), though that was in the context of derivative actions. The definition of complainant is the same for derivative actions as it is for oppression. Later, and in the context of oppression, the court in *Bank of Montreal v Dome Petroleum Ltd*, 54 Alta LR (2d) 289, [1987 CanLII 3177 \(AB QB\)](#), referring to *Brant Inv't Ltd Can v Keeprite Inc*, 60 OR (2d) 737, [1987 CanLII 4366 \(ON SC\)](#), said, “I fully subscribe to those views [about the nature of the conduct that would attract oppression for minority shareholders] and would adopt the same approach in dealing with the rights of creditors when it is alleged same are being unfairly dealt with in some fashion and relief is sought under s. 234” (at para 33). The analogy has since been used in several other decisions (see *PRW Excavating Contracts Ltd v Louras*, [2016 ONSC 5652 \(CanLII\)](#) at paras 17–19).

In *Perpetual Energy*, while determining whether the trustee in bankruptcy was a “proper person,” the Alberta Court of Appeal objected to the minority shareholder analogy and provided three reasons for doing so. It maintained, “[t]here is no hard rule that the creditor must be in a position analogous to that of a minority shareholder to qualify as a complainant, if only because s. 242 identifies ‘creditor’ as a distinct category of complainant. Further, that requirement is somewhat circular, because if the business of the corporation is conducted in a way that unfairly disregards the interests of the creditors, one could argue that the creditors are in a position analogous to that of an oppressed minority shareholder” (at para 130). The Court’s reasons do not explain its objection.

First, there is, in fact, no hard rule. The analogy has no inherent meaning; it simply conveys the position creditors should be in to obtain standing. It refers to the principle that a creditor should have a “direct financial interest in how the company is being managed and... have no legal right to influence or change what they see to be abuses of management or conduct contrary to the company’s interest” (*Re Daon* at para 38, quoted in *Levy-Russell Ltd v Shieldings Inc*, 41 OR (3d) 54, [1998 CanLII 14685 \(ON SC\)](#) at 11 and *PRW Excavating* at para 17).

Second, section 242 of the *BCA* does identify “a creditor” as a distinct category of complainant, but one that must obtain standing at the discretion of the court, unlike minority shareholders. The Court itself notes that when it says, “a creditor has no automatic status as a complainant in an oppression action” (at para 120). Minority shareholders do have standing as of right, and they use the oppression remedy to protect their interests because they cannot exert influence over the operation of the company. It is in that way that a creditor is in a position analogous to a minority shareholder.

Finally, the Court objected to the requirement on the basis of it being “circular”, “because if the business of the corporation is conducted in a way that unfairly disregards the interests of creditors, one could argue that the creditors are in a position analogous to that of an oppressed minority shareholder” (at para 130). That is also correct, though the fact that it is circular does not mean it is wrong. By analogising the position of a creditor whose interests have been unfairly disregarded to that of an oppressed minority shareholder, creditors are prevented from using oppression for simple debt enforcement and limited to using it when they were treated unfairly and could not have protected themselves. This would capture, for example, a company being unable to repay its debt because it conveyed away assets for less than fair market value, or because it paid its directors’ personal expenses. In other words, the circularity confirms the principle that a creditor cannot pursue the oppression remedy simply by virtue of being an unpaid creditor.

Overall, the Court’s reason for objecting to the analogy is unclear, in particular because in the previous paragraph of the decision, it appears the Court confirmed its substance. Its explanation of creditors’ position, “the creditors of a corporation do have a legitimate interest in preventing management from conducting the business of the corporation in a way that prevents it from satisfying its obligations” (at para 129), is similar to how other courts have described being in a position “analogous to a minority shareholder.”

This is a small point in a rather lengthy decision, and technically, the Court of Appeal is correct – there is no “hard rule.” But by objecting to the analogy, the Court of Appeal appears to be overturning that point from the decision below, while already having validated the substance.

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