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Key Lessons from the BCE Decision

The Supreme Court of Canada (SCC) released the long-awaited reasons for its decision in the BCE Inc. v. 1976 Debentureholders case on December 19, 2008. The SCC reaffirmed its decision in Peoples Department Stores Inc. (Trustee of) v. Wise that the directors’ fiduciary duty is owed to the corporation, and not any particular constituency, thereby rejecting a “Revlon” duty to maximize shareholder value in change of control transactions.

Although the SCC said that directors “may” but are not required to give consideration to the interests of a range of stakeholders, including shareholders, employees, suppliers, creditors, consumers, governments and the environment, the practical effect of the SCC’s decision is that directors will need to assess a range of interests when exercising their business judgment. This is because the SCC:

- characterized the fiduciary duty of directors as a “broad, contextual concept”;
- made it clear that the oppression remedy, with its focus on fair treatment, is highly relevant to understanding the nature of the fiduciary duty;
- noted that “[t]he corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly”; and
- found that “the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions fairly and equitably”. Nevertheless, it is important to note that the SCC implicitly recognized the importance of shareholder interests in director decision-making. In the change of control context, market pressures and the reality that shareholder acceptance is critical to allowing a transaction to proceed mean that, in practice, directors will continue to make a central focus of their analysis whether a transaction offers the highest value reasonably available to shareholders, even as they consider the best interests of the corporation and the impact of the transaction on other stakeholders.

The SCC also strongly endorsed the business judgment rule, both in the language of the decision and, more importantly, in the substance of the decision, when it stated that “[p]rovided that, as here, the directors’ decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was a perfect one”. The result is a board-friendly decision that provides directors with protection provided that they follow a proper process that takes into account the interests of affected stakeholders.

The decision also provides guidance on the threshold considerations for an oppression claim. The SCC found that in assessing a claim of oppression, a court must focus on whether the evidence supports the
claim that a stakeholder entitled to bring an oppression action had a reasonable expectation and, in turn, whether that reasonable expectation was violated as a result of conduct that amounted to “oppression”, “unfair prejudice” or “unfair disregard” of the relevant interest. The SCC stated that in considering such claims, courts should look at “business realities, not merely narrow legalities”. The SCC went on to note that the reasonable expectations of stakeholders, which are the “cornerstone of the oppression remedy”, are “objective and contextual” and to be assessed with reference to, among other things, 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.

Applying these principles to the case at hand, the SCC found that although the evidence supported a reasonable expectation that the directors, in making their decisions, would consider the position of the debentureholders, the evidence showed that the directors did consider their interests. Moreover, the evidence did not support a reasonable expectation on the part of the debentureholders that the directors would set as a transaction constraint that the trading value of the debentures had to be preserved. Notwithstanding the broad, contextual discussion of the board’s fiduciary duty and the oppression remedy, the SCC found no grounds to disturb the trial judge’s approval of the directors’ business judgment that the transaction was in the best interests of the corporation and did not violate the reasonable expectations of the debentureholders in all the circumstances.

The SCC’s decision will be helpful to directors in considering not only change of control situations but, more broadly, corporate actions in general. The decision reminds directors and their advisors of the importance of a deliberate and robust process and maintaining a complete and accurate record. Corporations should also be mindful of their statements and actions in instances where these might be taken to create reasonable expectations for particular stakeholders (a concept that the SCC defines expansively), lest disgruntled parties subsequently seek to bring actions alleging that they are stakeholders entitled to bring a claim and that their reasonable expectations have not been adequately considered in connection with particular corporate decisions.

The decision also deals with several technical issues relating to plans of arrangement under the CBCA. The SCC clarified the test for determining whether an arrangement is fair and reasonable. This determination involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. Importantly, the SCC stressed that the determination as to whether a plan of arrangement is substantively and objectively fair and reasonable is to be made by reference to the “legal rights” that are being arranged and, absent “extraordinary circumstances”, directors need not structure a transaction to accommodate those “whose legal rights remain intact but whose economic interests may be prejudiced”. The SCC decided that the reduction in the trading value of the debentureholders’ securities did not, without more, constitute an extraordinary circumstance.

More detailed analysis [PDF]