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# OPPRESSION, JUST AND EQUITABLE WINDING-UP AND THE FAMILY COMPANY: Safarik v. Ocean Fisheries Ltd.

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## INTRODUCTION

Recent case law has indicated that in applying the oppression and unfairly prejudicial conduct provisions of the federal and provincial Company Acts, Canadian courts are basing their analyses on protecting the reasonable expectations of shareholders [1]. In Safarik v. Ocean Fisheries Ltd. et al [2] the British Columbia Court of Appeal, while retreating from this analysis of the oppression provisions of the B.C. Company Act, has extended it in the context of family corporations to the just and equitable winding-up provisions of that Act.

Safarik is also a cogent example of the courts using the inter-relationship of the oppression and winding up provisions, and their broad remedial powers under those provisions, to fashion a drastic solution for an intractable problem - resolving a breakdown in family relationships by potentially auctioning off the family company.

The court also touched on a number of issues concerning remedies and procedure in such cases. It suggested that it is generally inappropriate to order a company, as distinct from its shareholders, to purchase the shares of a complaining shareholder. It held that where it is just and equitable to wind-up a company, its shareholders' and creditors' interests ought to be considered in fashioning a remedy. It questioned whether a company should contest an

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1 Naneff v. Con-Crete Holdings Ltd. (1993), 11 B.L.R. (2d) 218 (Ont. Ct. (Gen. Div.)); affirmed (1994), 19 O.R. (3d) 691 (Div. Ct.); reversed (1995), 23 O.R. (3d) 481 (C.A.)
Lyall v. 197250 Canada Ltd. (1993), 84 B.C.L.R. (2d) 234, at 248 (C.A.)
Westfair Foods Ltd. v. Watt (1991), 79 D.L.R. (4th) 48, at 702-3 (Alta. C.A.)
Koehnen, "The Oppression Remedy: Reasonable Expectations" (1994) 73 Can. Bar Rev. 274

2 (1995), 12 B.C.L.R. (3d) 342; additional reasons (1996), 17 B.C.L.R. (3d) 354

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oppression/winding-up proceeding which is a dispute between its shareholders, or pay the legal costs of its shareholders in such a dispute.

## FACTS

Ocean Fisheries is a British Columbia company, operating an integrated fishing, fish processing and fish distribution business. It was established in 1962 by Edward Safarik, Sr. and his wife. From humble beginnings the company grew to a multi-million dollar business, one of the biggest such companies on the west coast of Canada.

The Safariks had four sons, all of whom were involved in Ocean Fisheries. By 1987 Edward Jr. was its president and a director, Gordon its vice-president corporate development, and Murray its vice-president finance. They each held 31% of its common shares and 1/3 of a non-voting class of preferred shares. The fourth son was employed in a more junior capacity and held 7% of the common shares. Edward Sr. held preferred shares with voting rights equal to those of the outstanding common shares, and was the other director.

In the 1980's the relationship between Edward Jr. and Gordon deteriorated until they could no longer work together. From 1987 to 1989 the rest of the family shareholders progressively excluded Gordon from the management of Ocean Fisheries, although he remained an employee. They excluded him from management meetings, they cut off his access to corporate and financial information, they abolished his department of corporate development, and they excluded him from one of his most significant responsibilities, herring roe sales. Whereas previously significant corporate decisions had been at least discussed among all family members, in 1989 Ocean Fisheries borrowed $45 million from a syndicate of lenders and invested and lost about $16 million in a failing American subsidiary (including a transfer to the subsidiary of $2.6 million in breach of a loan agreement with Ocean Fisheries' bankers), both without consulting him. Coincidentally with Gordon's exclusion Ocean Fisheries ran into serious financial difficulties, at least partly because of a downturn in the cyclical fishing industry.

There were negotiations for the other family shareholders to buy Gordon's shares, but they collapsed over the purchase price. Gordon tried to sell his shares to an outside investor, but the rest of the family made it clear they would not include the investor in management and he would

not proceed. In September 1990 Gordon filed a petition seeking relief under the British Columbia Company Act. In May 1991 Ocean Fisheries dismissed him.

## THE TRIAL

In his petition Gordon sought an order under the oppression and unfairly prejudicial conduct provisions of s.224 of the Company Act requiring either Ocean Fisheries or the rest of the family shareholders to purchase his shares in the company at their fair value. Alternatively, he sought an order winding-up Ocean Fisheries under ss.295 and 296 of the Act.

The petition proceeding was converted to an action and tried for 65 days between May 1992 and March 1993 before Harvey J. of the Supreme Court of British Columbia. On September 7, 1993 he granted judgment for Gordon, holding that the other family shareholders had oppressed Gordon and treated him in an unfairly unprejudicial manner. He held there was a lack of probity and fair dealing in their conduct, and that they did not deal honestly and fairly with Gordon in conducting the affairs of the company. He held that their removal of Gordon from management and denial of his access to corporate and financial information without cause had unfairly prejudiced his status as a shareholder. [3]

Harvey J. ordered Ocean Fisheries to purchase Gordon's shares in Ocean Fisheries. He refused to order the other family shareholders to do so, saying they had not personally benefited from their conduct. He valued Gordon's shares as of the date he had filed his petition, with no minority discount. He fixed that value at $2.75 million.[4] With prejudgment interest and costs the award totalled about $4 million. Harvey J. did not consider Gordon's application to wind up the company.

## THE APPEAL

Ocean Fisheries appealed to the British Columbia Court of Appeal. Gordon cross-appealed, seeking, among other things, orders that his shares be valued as of June 1989, the date his

[3] 10 B.L.R. (2d) 246, at 310-311

[4] Ibid. at 311-319

exclusion from management was complete, and setting their fair value as of that date at $22.26 million. Gordon also independently appealed Harvey J.'s judgment seeking an order that, if Ocean Fisheries did not purchase his shares as ordered, the other family shareholders do so on the same terms.

The appeals took several interesting turns. Gordon sought to execute on Harvey J.'s judgment by having the Supreme Court issue a writ of sequestration ordering Ocean Fisheries to purchase his shares. Paris J. rejected that attempt, holding he had no jurisdiction to issue such a writ when the trial judgment required Ocean Fisheries to deliver to Gordon money, not shares.[5] Leave to appeal was refused.[6]

Ocean Fisheries waited until the last possible day to file its notice of appeal. Gordon then filed a notice of cross appeal against both Ocean Fisheries and the other family members (who were not appellants). The other family members applied to strike out that part of his notice of cross appeal against them as being filed out of time. Gordon applied to extend the time for filing the notice. Southin J.A. decided that Gordon's cross appeal against the other family members was not a proper cross appeal and ordered that part of the notice struck out. But she extended the time for him to file a separate notice of appeal against the other family members because the evidence established he had formed the intention within the permitted time to appeal the dismissal of his claim against them if Ocean Fisheries appealed the judgment against it.[7]

Ocean Fisheries sought a stay of execution on the judgment pending appeal on the posting of $500,000 security. Goldie J.A. dismissed that application, finding the proposed security was "wholly inadequate" given the size of the judgment and the difficult financial circumstances of Gordon, who had been largely unemployed since his dismissal by Ocean Fisheries three years before. [8]

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5 (17 Feb. 1994) Vancouver Registry No. C902591

6 (25 Feb. 1994) Vancouver Registry No. CA018415

7 (24 November 1993) Vancouver Registry No. CA017791; see Wineberg, "A Story About Cross-Appeals" (1994) 52 The Advocate 185

8 (2 Feb. 1994) Vancouver Registry No. CA017791

Ocean Fisheries applied to a three justice panel of the Court of Appeal for a "review" of that decision, this time proposing to post a $4 million letter of credit to secure the entire award. This time the court granted the stay, but ordered that Gordon was entitled to draw $100,000 from the letter of credit immediately and a further $10,000 a month until disposition of the appeal. [9]

Gordon's ex-wife had obtained an ex parte order seizing his shares in Ocean Fisheries to recover arrears of child and spousal maintenance. That jeopardized the entire proceeding by making it impossible for Gordon to sell his shares to the other family shareholders as ordered by Harvey J. The ex parte order was set aside by consent and the arrears of maintenance paid out of the money drawn from the letter of credit.

## THE FIRST APPEAL HEARING - WINDING UP

The parties agreed that the appeal and cross-appeal involving Ocean Fisheries and Gordon should proceed before Gordon's independent appeal against the other family shareholders. The other family shareholders agreed to be bound by factual findings in those appeals. They were argued June 26-29, 1995 before Carrothers, Southin and Donald JJ.A.

On September 20, 1995 the majority of Southin and Carrothers JJ.A. held that Harvey J. had been wrong to conclude the other family shareholders had oppressed Gordon or treated him in an unfairly prejudicial manner. They held his exclusion from management had not affected him as a shareholder. He had only been dismissed from his employment. That was no violation of his shareholder's rights. [10] One odd thing about this is that Gordon's claim was not based on his dismissal. Ocean Fisheries did not dismiss him until eight months after he had filed his petition seeking relief.

However, the majority went on to hold that it would be just and equitable to wind-up Ocean Fisheries. They articulated this test for when it is just and equitable to wind-up a family company:

[9] (1994), 92 B.C.L.R. (2d) 273

[10] 12 B.C.L.R. (3d) 342 at 382-383

> "Family companies are very different from non-family companies. They are different because, usually when a young man joins his father in the business, he does so trusting his father to do right by him and the father intends to do right. Thus no contracts are drawn up. It is not unusual for differences to arise as they did here, not because either father or son is dishonourable but because each sees the world through different eyes.
>
> If this were not a family company, but a company in which [Gordon] had bought his common shares and in buying them had decided not to be a director for whatever reason. There would be no case for an order [winding-up the company].
>
> But, in my opinion, it is not erroneous to take a more liberal approach to the words 'just and equitable' in the case of a family company in which one of the family after which many years of service is no longer permitted to participate in the business.
>
> Taking such an approach, I am of the opinion that it is just and equitable to wind-up this company. I do not found this conclusion on any of the learned judge's findings which may be said to amount to findings of 'wrongdoing'". [11]

The majority then noted that the winding-up provisions of the Company Act permitted the court, having reached the conclusion it would be just and equitable to wind-up Ocean Fisheries, to make other orders as well. They held that the effects a particular order would have on the other shareholders and the creditors of Ocean Fisheries were proper considerations in determining what order to make. They therefore directed a further hearing at which the other family shareholders were to be represented. [12]

[11] Ibid. at 385

[12] Ibid. at 385-6

The court was able to do this, rather than just winding-up Ocean Fisheries, because of the inter-relationship of the oppression and winding-up provisions of the Company Act. Section 296 of the Act provides:

> "Where an application for an order to wind-up a company is made by a member on the ground that it is just and equitable that the Company should be wound-up, the court may, if it is of the opinion that the applicant is entitled to relief either by winding-up the company or under s.224, either make an order for winding-up or make an order under s.224 as it considers appropriate."

The Court of Appeal had previously held in Oakley v. MacDougall [13] that the effect of this provision is that the remedies available under the oppression provisions of s.224 are also available where the court has concluded under s.295 that it would be just and equitable to wind-up the company. The Safarik decision is a cogent illustration of this inter-relationship, which is important because while it may be easier to convince a court that it is just and equitable to wind-up a company than that there has been oppression or unfairly prejudicial conduct, both conclusions make available the same remedies. To obtain a finding of oppression or unfairly prejudicial conduct shareholders face the task of proving the company's or other shareholders' conduct was burdensome, harsh, wrongful or lacking in fair dealing, or that it was unjustly or inequitably detrimental to their legitimate interests, so as to affect them as shareholders. This can be difficult. To give one example, with the reversal of Harvey J.'s trial decision in Safarik there is no case in Canada of which the author is aware holding that the exclusion from management of a shareholder who is not a director is oppression or unfairly prejudicial conduct.

On the other hand, satisfying a court that it is just and equitable to wind-up a company can be less onerous, particularly where the company is a family company or is closely held. In such situations it may be sufficient that the principals of the company are deadlocked or that one shareholder has a justifiable lack of confidence in the others' conduct of the company's affairs.

[13] (1987), 14 B.C.L.R. (2d) 128

Section 296 allows the court to use the "just and equitable" analysis without being forced to apply the draconian remedy of winding up the company.

Donald J.A. delivered his own reasons for judgment, concurring in the result. While he agreed with Harvey J. that the exclusion of Gordon was prejudicial to him, he held that given the deteriorating relationship between Edward Jr. and Gordon and Ocean Fisheries' need to deal with that problem, Gordon had not been treated in an **unfairly** prejudicial manner. However, he did hold Gordon's exclusion was unfair in the ordinary sense, and agreed with the majority that his exclusion from management in that fashion made it just and equitable to wind-up Ocean Fisheries. [14]

## THE SECOND APPEAL HEARING - THE REMEDY

Following this decision, in another twist, the syndicate which had lent Ocean Fisheries $45 million in 1989 successfully applied to intervene in the appeal. A further one day hearing was held on December 11, 1995, at which both the other family shareholders and the lenders' syndicate were represented.

The court handed down unanimous reasons for judgment on January 19, 1996 [15]. It first noted that none of the parties involved really wanted Ocean Fisheries wound-up. It then considered Harvey J.'s order that Ocean Fisheries purchase Gordon's shares. The court took the view that, in the difficult financial circumstances of Ocean Fisheries, such an order would be potentially damaging to its creditors. The court felt entitled to consider that consequence because the order it was considering was in lieu of winding-up the company and the winding-up provisions of the Company Act give a company's creditors standing in a winding-up proceeding.[16] The court also concluded that Ocean Fisheries, as distinct from the other family shareholders, had committed no wrong. The exclusion of Gordon from the company's management had been by

[14] supra, footnote 10 at 387-8

[15] (1996) 17 B.C.L.R. (3d) 354

[16] Ibid. at 358 and 360-1

the other family shareholders. [17] The court therefore allowed Ocean Fisheries' appeal and set aside the order requiring it to purchase Gordon's shares.

This result suggests that, except in the uncommon scenario where a company has sufficient funds to purchase the shares of a complaining shareholder at their fair value without adversely affecting its creditors, it is not appropriate for the court to order a company to buy out a shareholder in lieu of winding up the company.

The court expressly declined to comment on whether a company's unsecured creditors' interests should be considered in fashioning a remedy where there has been a finding of oppression or unfairly prejudicial conduct, as distinct from where it is just and equitable to wind-up. [18]

In place of Harvey J.'s purchase order, the court ordered a buy/sell arrangement between Gordon and the other family shareholders. As finally settled after another hearing on February 22, 1996 and further written submissions, the order required the other family shareholders to deliver to Gordon within 60 days a written offer to sell their shares to him at a fixed price per share, audited financial statements for Ocean Fisheries for its last two fiscal years, a certification either that they knew of no material change in the financial position of the company since its last financial statement or of what the material changes were, and a complete list of the company's assets sufficiently described to enable their value to be assessed. Gordon had 60 days from receipt of that offer to accept it, but his acceptance could be conditional on further financial inquiries and a release by the other family shareholders of any claims for wrongful dismissal following his purchase of their shares. If Gordon did not accept the other family shareholders' offer, they were required within 30 days to buy all his shares at the same pro rata price they had fixed for their own. [19]

This arrangement is notable in at least two respects. First, it was not the first choice remedy sought by any of the parties. Gordon sought to uphold Harvey J.'s order requiring Ocean

[17] Ibid. at 365

[18] Ibid.

[19] Ibid. at 361-3

Fisheries to purchase his shares. Ocean Fisheries was willing, if there was to be any remedy, to agree to a "compensation order" requiring it to pay Gordon $60,000 to $100,000 per year. The lenders were prepared to agree to that, so long as Gordon remained a shareholder of the company and so long as the company was in a position to make those payments. The other family shareholders proposed that Harvey J.'s order requiring Ocean Fisheries to purchase the shares be upheld only if the company's lenders would consent.

Second, the remedy is noteworthy because it is so drastic. As in the Ontario decisions in Naneff v. Con-Crete Holdings Limited [20] and Witelin v. Bergman [21], the court was prepared to exercise its statutory power to bring to an end or remedy the matters complained of to fashion a detailed remedy designed to produce what it viewed as a fair result, even though that meant potentially putting a closely held company up for auction. The court was prepared not just to order the other family shareholders to buy Gordon out but, perhaps because they felt it was the only way to force a sale at a fair price, to order them to set a price on their own shares and give Gordon an opportunity to buy them out. This created an opportunity for others to finance Gordon's purchase and, effectively, take over Ocean Fisheries.

In this decision the court also touched on the propriety of a company defending an oppression/winding-up proceeding and paying the legal costs of its shareholders in such a dispute. The issue arose when the court, having allowed Ocean Fisheries' appeal, went on to consider costs. The court held that "as this was truly a contest between shareholders" the other family shareholders should pay Gordon's ordinary costs of the trial [22]. In reaching that conclusion the court noted Gordon's argument before Harvey J. that it would be inequitable to only award him only ordinary costs when the company in which he owned 31% of the common shares was paying the other family shareholders' full costs. The court then commented:

> "Indeed, one can question the propriety of the company, in contradistinction to the respondent shareholders, contesting these proceedings as it did. I infer that the directors considered that the

[20] supra, footnote 1.

[21] (1994), 19 O.R. (3d) 145 (Gen. Div.)

> interests of the company and their interests as shareholders were coincident." [23]

The court then noted the irony of the successful minority shareholder paying part of the legal fees of the unsuccessful, oppressive majority. The court concluded by leaving this issue open:

> "I shall say no more on that point because, whether it was proper for the directors, on behalf of the company, to instruct counsel, at considerable expense, to defend the proceedings below, and whether it would now be proper for the directors to use the company's funds to indemnify the other [shareholders] for any liability for costs, is not before us." [24]

**COMMENT**

All these interesting twists and points of law aside, the Safarik decisions are important for two reasons.

First, they represent a peculiar combination of backing away from the focus on reasonable expectations of shareholders in the context of oppression and unfairly prejudicial conduct, while emphasizing the same expectations in the context of just and equitable winding up. The Court of Appeal accepted that Gordon was excluded from the management of Ocean Fisheries after many years of intimate involvement. It apparently was satisfied he had a reasonable expectation of continued participation in management. But, contrary to the thrust of recent Canadian case law, the court did not accept his exclusion in those circumstances as oppression or unfairly prejudicial conduct.

The court did not explain why. Was it because Gordon was not a director of Ocean Fisheries? If he had a reasonable expectation of continued participation in management, why should his position matter?

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[22] supra, footnote 15 at 365

[23] Ibid.

[24] Ibid.

Even more puzzling, in the same decision in which the court retreated from basing its oppression and unfairly unprejudicial conduct analysis on the shareholder's reasonable expectations, it used those same expectations as the basis for considering a just and equitable winding-up. This extends the circumstances in which such a winding-up is available beyond previous jurisprudence. For example, in Eiserman v. Ara Farms Ltd. the Saskatchewan Court of Queen's Bench held that a minority shareholder in a small corporation "must bear the consequences of non-liquidity and subordination to the will of the majority **provided** he is not treated oppressively, prejudicially or unfairly" [25] (emphasis in original). In Safarik the B.C. Court of Appeal has suggested that even though shareholders are not treated oppressively or in an unfairly prejudicial manner, if they are excluded from management it may be just and equitable to wind-up the company. As other courts have done in oppression cases, the Court of Appeal appears to focus in this winding up context on the reasonable expectations of the complaining shareholder.

Perhaps the explanation is that while the shareholder may not have had a reasonable expectation **as a shareholder** to participate in management so as to give rise to oppression, they had that expectation **as a family member**, so it may be just and equitable to wind-up the company. The court offers no explanation of why it is "not erroneous to take a more liberal approach" to a shareholders' entitlement to wind up a company, while it does seem to be erroneous to take a similar approach to a shareholder's entitlement to relief for oppression or unfairly prejudicial conduct.

Second, the approach of the Court of Appeal and the result of these decisions are based on an unexplained interference with the trial judge's findings of fact. The trial judge found the other family shareholders to have dealt dishonestly with Gordon. The other family shareholders were Ocean Fisheries' directors and officers. If the trial judge was correct then their dishonesty must have been that of the company. The Court of Appeal has repeatedly said it should not interfere with a trial judge's findings of fact in the absence of "palpable and overriding error", but it

[25] (1985), 44 Sask. R. 61; reversed (1988), 52 D.L.R. (4th) 498 (Sask. C.A.)

reversed this finding without comment. The court identified no error in the trial judge's findings of fact, it simply held "There was no dishonesty."[26]

That conclusion led to Ocean Fisheries' appeal being allowed and so to the buy/sell scenario. The Safarik decisions appear to be flawed by their basis on the reversal of the trial judge's finding of fact in the absence of palpable and overriding error.

## DENOUEMENT

As ordered, the other family shareholders offered to sell their shares. Gordon accepted, subject to further financial inquiries and a release of wrongful dismissal claims. He proposed a 60 day due diligence process, including a confidentiality agreement and a share purchase agreement. The other family shareholders rejected that proposal, taking the position the information supplied with their offers complied with the Court of Appeal's order and Gordon was entitled only to a review of supporting documentation by an independent accountant.

On October 16, 1996, Gordon applied to the Court of Appeal for an order requiring that the transaction proceed as he had proposed. In reasons for judgment pronounced December 11, 1996, the court, in yet another twist, held that the other family shareholders had not complied with the order requiring them to offer to sell their shares, because they had set a price based on what they could afford to pay Gordon to purchase his shares rather than on the value of their own shares. The court nullified the offer and gave the other family shareholders a further month to make a "proper" offer. The court also ruled that if Gordon accepted that offer, he was entitled to the due diligence he sought.[27]

The other family shareholders did eventually purchase Gordon's shares, without further court proceedings.

Yet another issue raised but never resolved in this litigation was the release of the other family shareholders' wrongful dismissal claims. Had Gordon purchased the other family shareholders' shares his financial backers would almost certainly have required their dismissal as officers and

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[26] supra, footnote 15 at 358

[27] (16 December, 1996) Vancouver Registry No. CA017791 p.5

directors of Ocean Fisheries. Gordon had consistently taken the position that the value of any wrongful dismissal claims of the other family shareholders should be included in the price at which they offered to sell. They maintained such claims would survive a sale. As events transpired, the Court of Appeal never had to address this issue.

## CONCLUSION

The Safarik decision is a statement of the law on when it is just and equitable to wind up a family company, and an illustration of the broad spectrum of remedies available to shareholders in family companies. Where family members participate in such a business on the understanding they will all be treated equally and fairly, and where a shareholder contributes to the business over time and is then excluded from management without being bought out, the courts may well find it just and equitable to wind-up the company. Having reached that conclusion, the courts have available to them all the remedies in the oppression and unfairly prejudicial conduct provisions of the corporate statutes. That may be as well, because Safarik also suggests those same facts may not entitle a shareholder to those remedies through the oppression and unfairly prejudicial conduct provisions directly. As exemplified in Safarik, the remedies available in either case can be far reaching.

The Safarik decision also emphasizes that these kinds of disputes are really among the company's shareholders. For that reason, it may be inappropriate to order the company to purchase the complaining shareholder's shares. It may also be inappropriate for the company to defend the proceedings or to pay the legal fees of its shareholders doing so.

Perhaps the ultimate lesson to be learned from these decision is that if the relationships underlying family companies disappear, the consequences for the company, as for the family, will be drastic. It would be unrealistic for those involved to expect the family or the company to continue without fundamental changes. If they cannot resolve their own differences a court may do so for them, with results which are no one's first choice.