Corporate Brief

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ONTARIO CORPORATIONS BEWARE: CHANGES TO THE LAW REGARDING RECORD KEEPING AND FORFEITURE OF CORPORATE PROPERTY

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Corporations incorporated under the Ontario *Business Corporations Act* (the "OBCA") need to be aware of some important changes to the law regarding record keeping and forfeiture of corporate property which will come into force on December 10, 2016. These changes have not been well publicized, so corporations and their legal advisers should start planning for some of these changes as soon as possible. The changes will require corporations to maintain a new record called a "register of ownership interests in land in Ontario". The changes will also affect the law relating to a corporation's personal and real property that is forfeited to the Crown (i.e., the Province of Ontario) following the dissolution of the corporation (for example, on account of failure to pay Ontario Corporations Tax).

Forfeited Corporate Property Act, 2015

On December 10, 2015, the Ontario Government passed Bill 144, the *Budget Measures Act, 2015* to implement measures contained in the 2015 Ontario Budget, including the enactment of a new statute called the *Forfeited Corporate Property Act, 2015* (the "FCPA"). The FCPA makes changes to the existing law regarding what happens when a corporation's personal and real property is forfeited to the Crown following the dissolution of the corporation. As part of these changes, the FCPA also makes certain amendments to the OBCA, which governs business corporations in Ontario, and to the Ontario *Corporations Act* and the Ontario *Not-for-Profit Corporations Act*, which govern other kinds of corporations. This paper will focus on the amendments to the OBCA and all references are to a corporation incorporated, amalgamated, or continued under the OBCA. The FCPA and the related amendments to the OBCA come into force on December 10, 2016.

Ontario law provides that, upon the dissolution of a corporation, all of its personal and real property is forfeited to and becomes the property of the Crown. Under the current provisions of the OBCA, the owners of a dissolved corporation have up to 20 years following the date of its dissolution to apply for the revival of the corporation and to recover its property. After the FCPA comes into force, the owners of the dissolved corporation will still have 20 years to apply for its revival following its dissolution, but they will not be entitled to recover its personal and real property if the revival takes place more than three years after the date of its dissolution (subject to certain exceptions).

The FCPA provides that, starting three years after the date of dissolution, the Province of Ontario can use the forfeited assets for Crown purposes, sell them, remove any encumbrances registered on title to the forfeited real property, and remove any security interests registered against the forfeited personal property under the *Personal Property Security Act*.

The FCPA states that forfeited real property and interests in real property include:

1. a charge under the *Land Titles Act* or a mortgage; and
2. a building or structure that is owned separately from the land on which the building or structure is located or an interest in such building or structure.

The FCPA also states that forfeited personal property and interests in personal property are forfeited to the Crown if one of the following circumstances applies:

1. as a result of the dissolution of the corporation, they are forfeited to or have become the property of the Crown and the personal property is:
   (a) located in, on or under forfeited real property; or
   (b) not located in, on or under forfeited real property, but the Minister of Economic Development, Employment and Infrastructure, after consulting with the Public Guardian and Trustee, is of the opinion that control over the personal property is necessary for the purposes of:
      (i) administering forfeited real property; or
      (ii) managing on forfeited real property, the ongoing operations or business of the prior corporate owner of the forfeited real property; or
2. the personal property is left in, on or under forfeited real property, regardless of who owns the personal property.

New Record Keeping Requirements Under The OBCA

In connection with the introduction of the FCPA, there are related amendments to the OBCA which impose new record keeping requirements for a corporation. A new Section 140(1)(e) has been added to the OBCA, which provides that a corporation shall prepare and maintain a register of ownership interests in land complying with Section 140.1 of the OBCA. The new Section 140.1 states that a corporation shall prepare and maintain at its registered office a register of ownership interests in land in Ontario which shall:

1. identify each property; and
2. show the date the corporation acquired the property, and, if applicable, the date the corporation disposed of it.

As supporting documents for this new register, Section 140.1(3) states that the corporation shall cause to be kept with the register a copy of any deeds, transfers or similar documents that contain any of the following with respect to each property listed in the register:

1. the municipal address, if any;
2. the Registry or Land Titles Division and the Property Identifier Number;
3. the legal description; and
4. the assessment roll number, if any.

As to the form of the above records, Section 139(1) states that where the OBCA requires a record to be kept by a corporation, it may be kept in a bound or a loose leaf book or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device.

The new amendments to the OBCA specify that the register of ownership interests in land must be maintained at the corporation's registered office. If the registered office is at a location other than the corporation's place of business (such as the office of the corporation's lawyer or accountant), then the register must be maintained at that location. If so, then the corporation will need to provide on a timely basis to its lawyer or accountant (as the case may be) all of the information required to maintain its register of ownership interests in land.

According to the new Section 140(4), if a corporation was incorporated before December 10, 2016, then the corporation has two years to comply with the new record keeping requirements, that is, until December 10, 2018. However, according to the new Section 140(5), if a corporation is incorporated on or after December 10, 2016, then the real property register requirements apply to it commencing on the date of its incorporation.

The OBCA does not define the term "ownership interest in land in Ontario". It has been suggested that this phrase includes both beneficial interests in land, as well as registered interests in land. Assuming that this interpretation is correct, this means that the corporation's register must list and contain the necessary information for each property with respect to which the corporation is the registered owner on title and also those properties, in which the corporation has a beneficial ownership interest. For example, if a corporation is a bare trustee or nominee which holds the registered title to land in trust for another corporation as the beneficial owner, then the subject lands should be listed in the registers maintained by both the bare trustee/nominee corporation and the beneficial owner corporation, together with all the required supporting documents.

What else could be regarded as an "ownership interest in land in Ontario"? As noted above, the FCPA states that forfeited real property and interests in real property include a charge under the *Land Titles Act* or a mortgage. Assuming that an "ownership interest in land" as referred to in the OBCA has the same interpretation, then a corporation which holds a charge or mortgage over land in Ontario would be required to list the subject lands in its register together with copies of the supporting documents including the charge or mortgage.

Presumably, these amendments to the OBCA are intended to make it easier for the Province of Ontario to locate the assets of dissolved corporations and to make it easier for the Province to use or sell any forfeited corporate property. However, these new requirements impose a burden on many corporations, especially ones that have extensive real estate holdings. Not only are corporations required to keep a list of their real estate holdings, but they are also required to record all dispositions of their properties. For example, a corporation which is a real estate developer that sells properties on a regular basis will need to keep its register up-to-date regarding all of its dispositions.

Although it is highly unlikely that the Ontario Government will enforce these record keeping requirements, problems may arise if the corporation is not in compliance with these requirements. For example, many loan agreements contain covenants, representations and warranties by a corporate borrower that it is in compliance with all applicable laws. If a corporation is not maintaining its register of land ownership as required by the OBCA, then the corporation may be in breach of its loan agreement. If so, then its lawyers may not be able to provide the necessary legal opinion to the corporation's lender, unless the lender is willing to accept a qualification relating to these requirements.

In view of the fact that these changes to the OBCA affect so many corporations, it is surprising that the Ontario Government has done so little to inform the general public and the legal profession about these new record keeping requirements. It is now too late to do anything except get ready to comply with the new legislation.

IN THE NEWS

Competition Bureau Concludes Investigation into TMX Group Without Finding Contravention

The Competition Bureau (the "Bureau") closed its investigation into allegations of anticompetitive conduct against TMX Group Limited ("TMX"), concluding that the conduct of TMX, the operator of the Toronto Stock Exchange, was not likely to violate the abuse of dominance provisions in the *Competition Act*.

Aequitas Innovations Inc. ("Aequitas"), which operates the rival Aequitas NEO Exchange, launched in March 2015, complained to the Bureau that TMX was abusing its dominant market positon regarding market data. Aequitas alleged that some of the clauses contained in contracts between TMX and investment dealers prevented the dealers from sharing private market data with third parties, such as Aequitas, without the express written consent of TMX.

During the course of its investigation, the Bureau considered whether the clauses imposed by TMX contravened the restrictive trade practices provisions of the *Competition Act*. In particular, the Bureau focused on whether the clauses were likely to substantially prevent competition in the market.

The Bureau found that TMX had refused requests by investment dealers to share private market data.H owever, in considering the effect of this conduct on competition, the Bureau concluded that TMX's contractual restrictions did not lessen or prevent competition in any relevant market in Canada.

The Bureau determined that, even in the absence of TMX's contractual clauses, it was unlikely that sufficient future competition from Aequitas would materialize. Therefore, the Bureau concluded that the alleged anti-competitive clauses were not likely to have the effect of preventing competition substantially in a market by preventing entry by Aequitas.

TMX welcomed the announcement that the Bureau was discontinuing its investigation, noting that TMX had co-operated fully during the investigation and remained fully committed to conducting business with integrity in full compliance with the *Competition Act*.

Aequitas expressed disappointment about the Bureau's decision. Jos Schmitt, President and CEO of the Aequitas NEO Exchange, said, "We have no doubt the Bureau did a thorough assessment of the issue and we thank them for their effort. This decision was reached because not enough investment dealers demonstrated support for a competitive solution that would give retail investors and investment advisors access to consolidated market data at a reasonable price."

Business Law Advisory Council Recommends OBCA Amendments

In March 2016 the government of Ontario established a new Business Law Advisory Council (the "Council") to recommend changes to corporate and commercial laws to strengthen Ontario's position in the global economy.

The Council is comprised of professionals with expertise in commercial and corporate law and is chaired by Carol Hansell, the founder of Hansell LLP, an independent firm which provides expert, independent legal advice in all areas of corporate governance. The vice-chair is E. Patrick Shea, a partner in Gowling WLG's Toronto office with expertise in bankruptcy and insolvency law.

On November 16, 2016 the Council issued its Fall 2016 Report (the "Report"), which proposed amendments to the Ontario *Business Corporations Act* (the "OBCA"). The Report contained the following recommendations:

1. The current requirement under the OBCA that 25% of directors be resident Canadian should be eliminated. We further recommend that the written consent which directors provide in advance or within 10 days of their first election be accompanied by an agreement on the part of the prospective director that he or she will attorn to the laws of Ontario with respect to the corporation.
2. Shareholders should have the right to resubmit a proposal each year if it received a prescribed (and minimal) level of support in the first year or achieved a prescribed increased level of support in subsequent years.
3. The time period for shareholders of a non-offering corporation to submit a proposal should be set out in the corporation's by-laws (subject to certain limits).

The Ontario Ministry of Government and Consumer Services is seeking comments on the Report, which are due by December 12, 2016.

To view the Report, please visit: http://www.ontariocanada.com/registry/showAttachment.do?postingId=23184&attachmentId=33271

LEGISLATIVE UPDATE

Manitoba

Government Introduces a Bill Providing for Reciprocal Enforcement of Extra-Provincial Securities Orders

The Securities Amendment Act (Reciprocal Enforcement) (Bill 2) received first reading on November 23, 2016.

Currently under *The Securities Act*, an order or settlement agreement from another Canadian jurisdiction takes effect in Manitoba only after the Manitoba Securities Commission (the "Commission") holds a hearing and issues a reciprocal enforcement order.

This legislation provides for the automatic enforcement of orders made by and agreements with other Canadian securities regulators imposing sanctions, conditions, restrictions or requirements when there has been a finding or admission of a breach of securities laws or conduct contrary to the public interest.

A market participant affected by automatic reciprocity has the right to seek a ruling from the Commission.

Newfoundland and Labrador

Government Introduces a Bill Regulating Payday Lenders

An Act to Amend the Consumer Protection and Business Practices Act (Bill 52) received first reading on November 29, 2016. This legislation amends the *Consumer Protection and Business Practices Act* by requiring payday lenders to be licensed and imposes certain restrictions and obligations on payday lenders for the protection of borrows.

The legislation would:

- limit the total cost of borrowing for payday loans;
- require payday loan agreements to include specified terms, information and disclosure statements;
- give borrowers early cancellation rights;
- provide for certain payday lender practices to be prohibited by regulation; and
- provide borrowers with remedies for payday lender contraventions.

The legislation defines "payday lender" as "a person who offers, arranges or provides payday loans to or for consumers."

The legislation defines "payday loan" as "an advance of money with a principal of $1,500 or less and a term of 62 days or less made in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature, but not for a guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbrokering, a line of credit or a credit card."

RECENT CASES

Shareholder Vote on Plan of Arrangement Ordered Where Arrangement Was Essentially Merger but Structured so that Shareholders of One Corporation Not Entitled to Vote

Alberta Court of Queen's Bench, October 7, 2016

Alberta Oilsands Inc. ("AOS") received approximately $35 million from the Alberta government when its Oilsands licences were cancelled. It had no other assets. Marquee Energy Ltd. ("Marquee") had conventional oil and gas assets but needed capital. AOS and Marquee discussed a merger. Smoothwater Capital Corp. ("Smoothwater"), a shareholder of AOS, wanted AOS to distribute the money it had received from the government to its shareholders and was opposed to a merger between AOS and Marquee. An amalgamation would have required the approval of the shareholders of both corporations pursuant to section 183 of the Alberta *Business Corporations Act* (the "Act"). Instead, AOS and Marquee agreed to effect a merger by way of a plan of arrangement pursuant to section 193 of the Act whereby AOS would acquire all of Marquee's shares. This arrangement would not require the approval of AOS shareholders. Marquee applied *ex parex* parte for an order approving the proposed arrangement. Prior to the hearing of Marquee's application for final approval of its proposed arrangement, Smoothwater brought an application for an order requiring a special meeting of AOS shareholders to consider and vote upon the proposed arrangement.

The application was allowed. The essence of the proposed transaction was a merger of AOS and Marquee. The only reason for the proposed arrangement was to enable a vertical amalgamation to take place under section 184 of the Act without an AOS shareholders' vote. The directors of both companies wanted to avoid the risk of any special shareholders' resolution failing, as well as the possibility that the transaction might attract the exercise of dissenting shareholders' rights by AOS shareholders. Subsection 193(3) provided that if an arrangement could be effected under any other provision of the Act, an application under section 193 could not be made unless it was impracticable to effect the arrangement under any other provision. Here, the primary reason for the proposed arrangement was for Marquee to become a wholly owned subsidiary of AOS so that an amalgamation could take place under section 184 without a vote by AOS shareholders. The proposed arrangement did not have a valid business purpose because its only purpose was to deprive AOS shareholders of a vote on the amalgamation under section 183. There was, therefore, doubt that Marquee's application for approval of the proposed arrangement was put forward in good faith. Fairness and reasonableness demanded that AOS shareholders be entitled to vote and have the same rights as if there was an amalgamation under section 183.

Marquee Energy Ltd. (Re),
2016 ACLG ¶ 79,726
2016 BCLG ¶ 79,150
2016 CCLR ¶ 201,307
2016 CCSG ¶ 51,587
2016 OCLG ¶ 51,963

Arrangement Providing for Sale of Corporation's Shares Approved by Chambers Judge Despite Shortcomings in Supporting Fairness Opinion but Approval Overturned on Appeal because Arrangement Not Fair and Reasonable

Yukon Court of Appeal, November 4, 2016

The corporate petitioner, InterOil Corporation ("InterOil"), an oil and gas company with assets in New Guinea, entered into an arrangement agreement to sell all of its issued and outstanding common shares to Exxon Mobil Corporation ("Exxon") in return for shares in Exxon. The arrangement was approved by approximately 80% of InterOil's shareholders, exceeding the requisite threshold required by section 195 of the *Business Corporations* Act (the "Act"). InterOil applied for an order approving the arrangement. Mr. Mulacek, a former director and chairman of InterOil, who held a 5.5% shareholder interest in InterOil, opposed the arrangement on the grounds that: (a) the fairness opinion (produced by Morgan Stanley for a fee dependent in part upon the success of the arrangement, and presented at the shareholders' meeting) omitted an analysis of a key part of the arrangement, namely the contingent payment component; (b) the InterOil board failed to provide its shareholders with material information concerning some of the analyses and supporting material contained in the fairness opinion, and also failed to obtain a second independent fairness opinion from a financial adviser who was not "incentivized" (as Morgan Stanley was) to have the arrangement proceed; (c) the Management Information Circular and the fairness opinion did not adequately describe the valuation of InterOil's assets in such a way as to enable its shareholders to adequately determine that the arrangement provided them with fair value for their shares; and (d) as a result of the foregoing, InterOil failed to demonstrate that the arrangement was "fair and reasonable". The chambers judge approved the arrangement, despite finding deficiencies in the fairness opinion and the presentation of it to shareholders by the InterOil board. According to the chambers judge, to comply with best practice corporate governance, there should have been a flat fee fairness opinion to assist shareholders and the Court with assessing the arrangement, a success fee did not meet the standard of good corporate governance, and an independent financial adviser "retained on a flat fee" to produce a "robust, rigorous and independent" fairness opinion was an important factor in assisting the Court to scrutinize any arrangement before it. However, the chambers judge held that the foregoing deficiencies in the fairness opinion were less important, or perhaps unimportant, in comparison to the fact that a substantial majority of InterOil shareholders had voted in favour of the arrangement, that any shareholder reading the Management Information Circular could discern the lack of detail regarding certain aspects of the arrangement, and that criticisms based on corporate governance should not prevent the shareholders from realizing substantive increases in value arising out of the arrangement. Mr. Mulacek appealed.

The appeal was allowed. The arrangement was not shown to be fair and reasonable. The chambers judge erred in setting aside the identified deficiencies in considering the fairness and reasonableness of the proposed arrangement. Instead of delving into the question of value, he relied on the truism that the shareholders were "entitled to make the decision". It was the shareholders' decision to make, but court approval was also required by the Act. It was the Court's task to decide whether the proposed arrangement was shown to be fair and reasonable in the sense of being based on information and advice that was adequate, objective, and not undermined by conflicts of interest. The Court was required to do more than accept the vote of the majority as a "proxy" for fairness, or the cash amount of Exxon's offer as a proxy for reasonableness. It was not open to the Court to set to one side the identified deficiencies and simply accept the verdict of the majority of the shareholders. It will almost always be the case in applications under section 195 that the arrangement in question has been approved by a substantial majority of shareholders, obviously voting in their own interests. The Court must be satisfied, however, that the arrangement is objectively fair and reasonable in a more general sense. The chambers judge's order was set aside and the application for approval of the arrangement was dismissed.

InterOil Corp. (Re),
2016 ACLG ¶ 79,727
2016 BCLG ¶ 79,151
2016 CCLR ¶ 201,308
2016 CCSG ¶ 51,588
2016 OCLG ¶ 51,964

In Action Against Corporation and its Directors for Wrongful Dismissal and Breach of Promise To Provide Shares of Corporation, Outside Directors Unable To Rely on Business Judgment Rule in Unsuccessful Application for Summary Dismissal of Claim Against Them

Alberta Court of Queen's Bench, November 7, 2016

The four defendant holding corporations were the voting shareholders of the corporate defendant ComplyWorks Ltd. ("CWL"). The individual defendants were the eight directors of CWL, four of whom were outside directors not actively involved in CWL's day-to-day operations. The plaintiff, Flock, who had been employed by CWL, alleged that he was promised 5% of the shares of CWL if he committed to staying with CWL until March 1, 2013. Flock never received such shares and his employment was terminated on March 4, 2013. Flock commenced an action alleging wrongful dismissal and breach of promise in failing to provide him with 5% of CWL's shares. The outside directors applied to have Flock's claim against them summarily dismissed or struck. The outside directors submitted that directors acting in good faith within the scope of their authority and in the best interests of the corporation were entitled to immunity from personal liability for claims brought against the corporation.

The application was dismissed. There was no non-hearsay evidence in which the outside directors disavowed any involvement in the 5% share issue. Counsel sought to make up for this lack of evidence by referring to the "business judgment rule", a rebuttable presumption that directors and officers act on an informed basis, in good faith, and in the best interests of the corporation. However, a rebuttable presumption could not establish that the outside directors' case was unassailable, which was the standard of proof required to achieve summary dismissal of the case against them. In addition, it was not clear that the business judgment rule could apply to a corporate decision dealing with shareholdings, as opposed to the business of the corporation. Flock alleged, moreover, that the 5% share agreement was reached between him and CWL and its directors. The outside directors provided no evidence to the contrary, as they were required to do for their application to be successful. Such an allegation, which for the purposes of this application had to be taken to be true, and which was in essence unrefuted, meant that the outside directors were proper defendants to Flock's action.

Flock v. ComplyWorks Ltd.,
2016 ACLG ¶ 79,728
2016 BCLG ¶ 79,152
2016 CCLR ¶ 201,309
2016 CCSG ¶ 51,589
2016 OCLG ¶ 51,965

Plaintiff Commenced Action Against Dissolved Corporation and Other Defendants; Corporation Revived and Able To Participate in Motion for Dismissal of Action Against Other Defendants

Ontario Superior Court of Justice, November 8, 2016

On October 16, 2015 the corporate plaintiff launched an action to enforce an arbitral award against two individuals and two corporations, although one corporate defendant, Avenue Security Centre Inc. ("Avenue Security"), had been dissolved since 1999. Avenue Security was revived on June 17, 2016 and was thus deemed, under section 209 of the *CanadaCanada Business Corporations Act,* never to have been dissolved. The defendants brought a motion for: (a) summary dismissal of the plaintiff's action against the two individual defendants and the other corporate defendant; and (b) security for costs against the plaintiff which was an admitted shell corporation with no assets apart from its entitlement to the arbitral award. Avenue Security contended that the action against the other defendants had no merit.

The motion was granted in part. There was no basis for the claim against the other defendants and the plaintiff's claims against them were therefore summarily dismissed. Upon revival, any acts undertaken in the name of a dissolved corporation by its principals during the period of dissolution were "cured" so that such acts were deemed to have been taken by the corporation even though it was dissolved at the time. The recent retroactive revival of Avenue Security gave life to the defendants' argument that the claim against the other defendants had no merit. It would be inequitable to order security for costs, for the plaintiff had a meritorious claim, and, since Avenue Security was only recently revived, the reasonable inference was that it had little or no assets.

Central Station Security Services Inc. v. Avenue Security Centre Inc.,
2016 ACLG ¶ 79,729
2016 BCLG ¶ 79,153
2016 CCLR ¶ 201,310
2016 CCSG ¶ 51,590
2016 OCLG ¶ 51,966

Trial Judge and Court of Appeal Found Appellant Auditors Liable for Damages; Judgment Stayed Pending Outcome of Appellants' Application to Supreme Court of Canada for Leave to Appeal; Duty of Care of Auditor of Public Corporation Issue of Importance

Ontario Court of Appeal, May 24, 2016

The trial judge found the appellant auditing firms liable for damages in an action arising from their auditing of a public company. The Ontario Court of Appeal dismissed their appeals. The appellants applied to the Supreme Court of Canada for leave to appeal. The appellants applied to the Ontario Court of Appeal for a stay of the judgment against them pending the outcome of their application to the Supreme Court for leave.

The application was granted. There was a serious question to be determined. The duty of care owed by an auditor of a public company and the applicable standard of care were issues of public importance, and the appellants presented a serious argument for leave. They also demonstrated irreparable harm, in that enforcing the judgment would be sufficiently disruptive of their business to amount to irreparable harm. The appellants also provided financial evidence of their own solvency, so that the balance of convenience in this case clearly favoured them, particularly since it was anticipated that the Supreme Court would deal with their application for leave in a timely manner.

Livent Inc. (Special Receiver and Manager of) v. Deloitte & Touche&,
2016 ACLG ¶ 79,730
2016 BCLG ¶ 79,154
2016 CCLR ¶ 201,311
2016 CCSG ¶ 51,591
2016 OCLG ¶ 51,967

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