

US\$53.1 million to US\$56.7 million. The "size of parties" thresholds of US\$106.2 million and US\$10.7 million have increased to US\$113.4 million and US\$11.3 million, respectively. Acquisitions of assets or voting securities valued in excess of US\$226.8 million (previously US\$212.3 million) will be reportable even if the size of parties test is not met. Similarly, the "foreign" exemption thresholds have been increased.

[CLICK HERE](#) to read more

[Return to Top](#)

---

## RECENT CASES

### **Transfer pricing system that favoured U.S. parent found oppressive of minority shareholders of Canadian subsidiary**

*Ontario court reviews law of oppression in detail in the context of minority dissent from Ford Canada's going-private transaction*

**Ford Motor Co. of Canada, Ltd. v. Ontario Municipal Employees Retirement Board et al.**

Unreported, Court of Appeal for Ontario  
Rosenberg J.A., for the court  
January 6, 2006

[SEE CASE](#)

---

The litigation arose from Ford Motor Co.'s successful 1995 effort to take its 94%-owned Canadian subsidiary, Ford Motor Co. of Canada ("Ford Canada"), private. Some of the minority, led by OMERS, dissented and in the course of a fair value hearing made the further claim that the companies' intercorporate financial arrangements—notably the transfer pricing system between two of the main Canadian and U.S. divisions—had artificially depressed the value of Ford Canada at their expense. They argued that this constituted oppression.

Ford Canada and Ford U.S. had adopted a unified internal transfer pricing system (TPS) relating to payments between various Ford divisions on both sides of the border. An analysis by Campbell Valuation Partners convinced both the trial and appellate judges that the TPS (together with certain other intercorporate arrangements) had tended to make Ford Canada, taken in isolation (as it had to be for appraisal purposes), less profitable than it would otherwise have been. Adopting the measure favoured by Campbell, the Court of Appeal found that the average return on investment in Ford Canada was negative 23.5% over the 1985-95 period, as opposed to a positive ROI of 26.8% for Ford U.S. Furthermore there was evidence that these terms had been adopted as part of a "Ford-wide" policy, with little critical examination on the part of the Ford Canada board.<sup>1</sup>

The court accordingly held that the TPS was unfair. In determining fairness, the key issue was whether Ford Canada would have agreed to the TPS if it hadn't been an affiliate of Ford U.S. The court was satisfied by the ROI figures and other evidence that the answer was no.

#### **Four arguments against oppression rejected**

That the TPS was unfair doesn't necessarily mean that it was oppressive. Ford raised four arguments to rebut the oppression claim:

- the business judgment rule;
- lack of foreseeability to the company;
- absence of reasonable expectations among the shareholders; and
- absence of a fiduciary relationship with respect to Ford U.S.

Mr. Justice Rosenberg's consideration of these reflects an understanding of the oppression remedy as fundamentally focused on the *effects* of corporate actions rather than on the intentions or states of mind of corporate actors. On this view, the oppression remedy is primarily an economic rebalancing mechanism and generally indifferent to questions of fault.

**Business judgment.** The business judgment rule is essentially a principle of judicial deference to the good-faith judgment of directors. Ford Canada couldn't take recourse to it, Mr. Justice Rosenberg held, because it had not exercised any judgment at all. It had neither conducted an independent review of the TPS nor discussed it in any meaningful way. The evidence showed that the board had "little understanding" of the intercorporate arrangements, having "simply accepted the system that was put into place by Ford U.S."

**Foreseeability.** The court held that a company need not foresee the oppressive results of its actions in order for an oppression remedy to succeed with respect to those actions. The results of corporate actions are what matters, not the reasons behind them.

**Reasonable expectations.** Shareholders' reasonable expectations can be proved inferentially from circumstantial evidence, and in particular from the written and public pronouncements of the company. In other words, this decision underscores that what a company says publicly may end up defining shareholders' reasonable expectations at trial. Notes to Ford Canada's financial statements had read "The Ford policy is that prices for products be negotiated on an arm's length basis by the affected organizations" or "The prices for items purchased or sold are calculated to approximate levels charged by competitive sources for similar goods". Either could be taken to imply that the company's policy was to work out intercorporate arrangements on an arm's length basis, Mr. Justice Rosenberg held.

**Fiduciary duty.** When the dissenting shareholders attempted to broaden the oppression claim to include Ford U.S., the American parent argued that oppression could not be found because there was no legally recognized fiduciary duty between a corporation and the minority shareholders of its partly-owned subsidiary. The court held that the oppression remedy is broad enough to encompass situations in which no fiduciary relationship exists.

The ruling on the shareholders' attempt to bring Ford U.S. into the action is significant. Overruling the trial judge on this point, the court held Ford U.S. liable under the CBCA oppression provision. It came to this conclusion despite a failure to find that the minority had any reasonable expectations about the conduct of Ford U.S. It appears that the simple fact of Ford U.S.'s control of Ford Canada, and in particular its ability to change the TPS, was sufficient to bring it within the ambit of an oppression action by fellow shareholders of the Canadian company. The court is clear, however, that Ford U.S. was not open to an oppression action merely because of its status as an affiliate of Ford Canada—the prerequisite appears to be a capacity to control the oppressive act.

#### **No recovery for oppression occurring before shareholders bought in**

For strategic reasons, the shareholders had not produced any evidence of the dates of their share ownership. As a result, they were presumed by the court to have owned their shares only on the last day before the vote from which they had dissented. This left them in the awkward position of arguing that they should recover for oppression occurring before they were (demonstrably) shareholders. They tried to do this in two

ways, arguing (1) that retrospective recovery is possible because the oppression remedy is broadly defined; and (2) that even if retrospective recovery is not possible, the effects of past oppression can still be factored into the "fair value" under the appraisal remedy.

With respect to (1), counsel noted that remedies ordered under the oppression remedy have frequently been directed to the benefit of the corporation as a whole, and as such have benefitted all existing shareholders regardless of whether they were shareholders at the time of the oppression. However, the court responded that this happens only where a court orders an oppression remedy that benefits the corporation as such, and never where the *direct* beneficiaries of the proposed remedy are the shareholders themselves. Oppression is compensatory, the court reiterated, and in particular must reflect the shareholder's reasonable expectations, "the touchstone to entitlement to compensation for oppression".

The dissenting shareholders argued, with respect to (2), that the fair value of their shares should include the amount of value lost over the years as a result of the oppressive TPS. But this didn't fly either. While acknowledging that "fair value" for the purposes of the CBCA appraisal remedy is a more flexible concept than "fair market value", Mr. Justice Rosenberg held that a "fair value" valuation pursuant to a CBCA appraisal cannot be used as a back-door route around the limitations of the oppression remedy.

However, the court held that the fair value calculation under the appraisal remedy *can* take account of oppression on a "going-forward" basis. Where there has been ongoing oppression, fair value should be based on the assumption that the oppressive activity will cease at the moment of sale. Thus, while fair value cannot be calculated to rewrite history by regarding the company as though the oppression never happened, it *can* rewrite the future (so to speak) by valuing the company as though it were being sold to an arm's-length buyer that had insisted on ending the oppressive arrangement.

### **The result**

The outcome of the litigation was mixed. The dissenting shareholders received a significantly increased valuation under the appraisal remedy (\$207 per share, as determined by the trial judge, rather than \$185 previously offered by Ford Canada). The Court of Appeal rejected the dissenters' argument that it should choose a figure at the high end of the experts' range of estimates, rather than at the midpoint, noting that the appraisal process is not intended to operate as though squeeze-outs are somehow nefarious or deserving of sanction.

In spite of their success on the valuation front, however, the shareholders received virtually nothing on account of the oppression, having failed to prove ownership of the shares during nearly all of the relevant period.

### **FOOTNOTE**

1] Given space constraints, this is a simplified account of the court's complex discussion of Ford's transfer pricing and other intercorporate arrangements. Interested readers can find out more about the details of these arrangements in the full text of the judgment as hyperlinked in the electronic version of this newsletter.

[Return to Top](#)

---

## **Scheduling of a requisitioned shareholders meeting is a matter of business judgment**

***Court refused to fast-track a meeting requisitioned by shareholders on the basis***