

March 8, 2017

Door left open for negligence claims by investors against corporate directors

Does the director of a corporation owe a common law duty of care to that corporation's security holders? The prevailing view has been that directors do not owe a duty of care to a corporation's investors. However, the Ontario Superior Court in *Poole v Phillips* determined that the answer to this question is not clear enough to permit summary dismissals of such negligence claims. In *Poole*, the Court refused the Defendants' motion for summary judgment, holding that a negligence claim brought by investors against a corporation's directors disclosed a genuine issue requiring trial.

The Plaintiffs in *Poole* were investors in various corporate security instruments, who lost a significant portion of their investments following protection proceedings under the *Companies' Creditors Arrangement Act*. The various causes of action advanced by the Plaintiffs included a negligence claim against the Defendant directors of the corporations issuing the securities. The Defendant directors brought a motion for summary judgment, seeking to dismiss each of the Plaintiffs' actions.

The Defendants secured summary judgment against each of the Plaintiffs' actions, except for the claim in negligence. The Court in *Poole* rejected the Defendant directors' position that the negligence claims should be summarily dismissed on the basis that there was no duty of care at common law and the claims, therefore, disclosed no genuine issue for trial.

The Court in *Poole* began its analysis by acknowledging the historic approach to shareholder negligence claims against directors. Under the traditional approach, findings that directors owe a duty of care to someone other than the corporation have been limited to cases of: (1) participation in tortious conduct towards persons who have not knowingly elected to deal with a corporation; and (2) fraud, dishonesty, want of authority or other such conduct specifically pleaded.

Indeed, as courts have previously observed, directors cannot have separate duties of the same nature owing to both the corporation and its shareholders. Such parallel duties would create untenable and unrealistic conflicts, particularly where the

corporation is faced with adverse economic circumstances. Moreover, courts have noted that shareholders' interests are protected by section 241 of the *Canada Business Corporations Act* ("CBCA") (or s. 248 of the *Ontario Business Corporations Act* ("OBCA")) which permit oppression actions by stakeholders.

However, in *Poole* the Court took note of the Supreme Court of Canada's comments in *BCE Inc*, in which the Supreme Court observed that while the statutory duty of care set out at section 122(1)(b) of the CBCA could not itself form an independent cause of action, it could nevertheless be considered as the "standard of behaviour that should reasonably be expected". Accordingly, a breach of s. 122(1)(b) (or s.134(1)(b) of the OBCA) could in at least some circumstances ground a shareholder action in negligence under the common law.

Turning to the facts in *Poole*, the Court noted several instances in which it was unclear whether the Defendant directors exercised the skill and diligence required by the duty of care under section 134(1)(b) of OBCA. Accordingly, the Court concluded that it was premature to summarily dismiss the negligence action, given that the record did not allow for a full analysis as to whether a duty of care was owed, and the corresponding determination as to whether the law of negligence should be extended to cover the present circumstances. The summary judgment motion concerning the negligence claim was dismissed. However, as of the date of this entry, the Defendant directors sought leave to appeal that decision.

Ultimately, once the Court in this matter has the benefit of a full trial record and is in a better position to conduct a more fulsome analysis, it may face strong arguments militating against an extension of the duty of care in these circumstances. However, this decision serves as a cautionary note to parties facing similar negligence claims against corporate directors, and who are considering expending the resources to attempt to have such claims dismissed summarily at an early stage of the litigation.

With notes from Nilou Nezhat