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No Discretion to Refuse Shareholder's Request for Audited Financial Statements

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The Court does not have discretion under the Ontario *Business Corporations Act* ("OBCA") to refuse a shareholder's request for the corporation to produce audited financial statements. In *Lagana v. 2324965 Ontario Inc.* et al. 2022 ONSC 7286, the Superior Court of Justice held that a shareholder's right to information or material under the OBCA, including audited financial statements, is clear and mandatory. Justice Muszynski rejected the corporation's submissions that the request was unreasonable and not required under the parties' shareholders' agreement.

This decision will have far-reaching impact for closely-held corporations because it opens the door for shareholders to require audits of the corporation's financial statements, even where the shareholders have not agreed to do so. Audited financial statements are often not prepared in closely-held corporations due to the expense involved and the fact that the shareholders are often family or friends who start the business amicably, trusting each other to share corporate information. It is only when the relationship sours and one or more shareholders are denied information about the corporation's finances that a demand for audited financial statements is made.

Based on this decision, the corporation may have no choice but engage and pay an auditor to prepare financial statements, which could alter the balance of power in the shareholding relationship.

Background

One shareholder brought an application to compel the corporation to produce audited financial statements and to appoint an auditor under OBCA sections 140, 149 and 253.

While the parties agreed on production of the financial statements and on appointment and remuneration of the auditor, they did not agree on the scope of the audit.[1]

The applicant requested that the audit include years 2013 to present. The respondents argued that the audit should only be for fiscal years 2020 to present on the basis that: a) no earlier request to appoint an auditor was made and thus, the shareholder was estopped from requesting it now; b) the shareholders' agreements had no provision requiring the appointment; c) the request for audits prior to 2020 was statute barred by the *Limitations Act, 2002*; and d) given the OBCA only required retention of records for six years, financial statements may no longer be available that would be required for earlier audits.[2]

Court's Analysis

In its analysis, the Court relied on the Court of Appeal's holiding in *Packall Packaging Inc. v. Ciszewski*, 2016 ONCA 6 that: "A shareholder's right to information or material, including audited financial statements, as granted to her under the OBCA is a clear, mandatory right, and it is not necessary for a shareholder to give any reason in exercising her directly held rights under the OBCA."[3]

Justice Muszynski rejected the respondents' submission that the court had discretion to reject an "unreasonable" request for production of audited financial statements going back a number of years. Instead, Muszynski J. followed *Packall* and held that there was no discretion to exempt the corporation from compliance with its obligation to provide annual audited financial statements.[4]

The fact that the shareholders' agreements made no mention of an auditor was not material to the court's analysis, nor was this a basis to exempt the corporation from the requirements of the OBCA.[5]

Justice Muszynski further held that the applicant's request for compliance with the OBCA was not a "claim" within the definition of the *Limitations Act*, and accordingly, that the request for pre-2019 audited financial statements was not statute-barred. As part of this

[1] para. 4
[2] para. 5
[3] para. 17
[4] paras. 21-22
[5] para. 23

analysis, the court found that the applicant had not sought any broader relief than its statutory entitlement under the OBCA as a shareholder.[6]

Finally, the court held that the applicant recognized that the corporation may not have retained records that were older than six years and that it may be limited in what it can produce for the preparation of audited financial statements.[7]

[6] para. 27
[7] para. 28-29