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Standing to Bring an Oppression Claim Against a Stakeholder

The question of standing to commence oppression actions is a complex one that frequently arises in commercial cases.

In Ernst & Young Inc v Essar Global Fund Ltd, the court-appointed Monitor for Essar Steel Algoma Inc. ("Algoma"), a company that was undergoing a restructuring under *CCAA* proceedings, brought an oppression action against Algoma's parent company, Essar Global Fund Limited, pursuant to s 241 of the *Canada Business Corporations Act* (the "CBCA"). Justice Newbould granted standing to the Monitor for Algoma's *CCAA* restructuring process, which the Court of Appeal subsequently affirmed. The Court of Appeal articulated a non-exhaustive list of factors that a *CCAA* supervising judge should consider when deciding whether to grant authority to a monitor to serve as a complainant in an oppression action. The Court of Appeal's test for standing as articulated in *Essar* in oppression matters has been subsequently considered by trial judges in non-*CBCA* contexts.

At the first instance, Justice Newbould addressed the issue of whether or not a Monitor has standing as a complainant under the oppression provisions of the *CBCA*. Justice Newbould noted that as "an officer of the court" a Monitor normally plays a neutral role. Justice Newbould also noted that the Monitor is empowered under the *CCAA* to "carry out any function in relation to the debtor that the court may direct," and that in this particular case, the Monitor was authorized by the *CCAA* supervising judge to bring the oppression action as the Monitor for Algoma's restructuring process. Justice Newbould pointed to precedents that established the judge's discretion in determining a complainant in an oppression matter. The Court of Appeal confirmed that a court's discretion when determining who qualifies as a complainant under the *CBCA* is "broad." The Court of Appeal also noted that a monitor "is neither automatically barred from being a complainant nor

automatically entitled to that status," but rather, in exceptional circumstances it "may be appropriate for a monitor to serve as a complainant." The Court of Appeal outlined factors that a *CCAA* supervising judge should consider when deciding whether to grant authority to a monitor to be a complainant. These factors included whether:

> (i) there was a prima facie case that merits an oppression action or application;
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> (ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and
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> (iii) any other stakeholder is better placed to be a complainant.

In *The Campaign for the Inclusion of People who are Deaf and Hard of Hearing v Canadian Hearing Society*, Justice Wilton-Siegel assessed whether or not the three factors outlined by the Ontario Court of Appeal for determining a complainant in *Essar* were applicable in the not-for-profit context. In this case, the applicant was The Campaign for the Inclusion of People who are Deaf and Hard of Hearing ("the Campaign"), which was a corporation that was incorporated under the *Canada Not-for-Profit Corporations Act* for the sole purpose of bringing the oppression action against the Canadian Hearing Society, a national registered charity that was founded to provide services and programming to the Deaf and Hard of Hearing community. The Campaign brought the oppression action, asserting that certain changes in the Society's membership policy were oppressive because the new policy limited the membership of the Society and excluded certain members, including those who brought forward the complaint.

Justice Wilton-Siegel found that the Board of the Society's action did not raise a *prima facie* case of oppression, as per the first factor set out in *Essar*, and that there was "serious reason to doubt" that granting the relief sought to the Campaign would "meaningfully further the Campaign's stated purpose of restoration of an important consultative mechanism between the [Society] and the culturally deaf community." With regards to the third factor outlined in *Essar*, Justice Wilton-Siegel found that the two former lifetime members of the Society whose membe

policy were “well placed to pursue the claims of oppression” as complainants. As a result, Justice Wilton-Siegel dismissed the Campaign’s oppression claim on the basis that the Campaign was not a complainant for the purposes of the *Canada Not-for-Profit Corporations Act* and therefore lacked standing to bring the claim. In doing so, Justice Wilton-Siegel relied on the test set out in *Essar* Global, even though that test was established in the context of assessing the standing of a Monitor bringing an oppression action pursuant to the *CBSA*.

It remains unclear whether *Essar Global* should be applicable to oppression actions that are brought in the not-for-profit context, or whether the test is even suitable for application in contexts other than that of granting authorization to a Monitor to bring an oppression action. Until such time as the Court of Appeal is able to revisit the test in these other contexts, it appears that the Court is open to applying the *Essar Global* test is a wide-range of contexts.

With notes from Halla Ahmed.