

# Commercial Litigation Bulletin

AIRD & BERLIS LLP

A litigator's perspective on current legal issues and recent case decisions affecting businesses and individuals.

## **The Oppression Remedy: A Useful Tool When Mixing Business and Family**

In the context of relationships within closely held corporations, it is important to adhere to principles of good corporate governance to avoid the application of the oppression remedy. The oppression remedy is a broad equitable mechanism that gives the court power to respond to unfairly prejudicial or oppressive conduct by companies. The oppression remedy protects the reasonable expectations and interests of stakeholders, a broad definition which includes not just shareholders but, in certain circumstances, also creditors and dismissed employees. When problems arise in privately held companies, particularly family-owned businesses, more and more claimants are resorting to the oppression remedy when seeking relief.

### **What is an Oppression Remedy?**

Section 248<sup>1</sup> of the *Ontario Business Corporations Act*, R.S.O. 1990, Chap. B. 16, (the "OBCA") gives the courts the power to intervene in the affairs of a corporation at the request of a "complainant" to grant relief from conduct that is oppressive or unfairly prejudicial to or that unfairly disregards the complainant's interests.

### **Who can seek an Oppression Remedy?**

The legislation does not define "complainant," suggesting a broadly encompassing term. The case law deals primarily with security holders, creditors, and directors or officers of the corporation who, in most cases, are also shareholders. The claim will be considered regardless of how one acquired an interest in the corporation.

### **What does an Oppression Remedy Protect Against?**

Deliberately oppressive conduct or other behaviour that is harsh, burdensome or wrongful and which disregards the interests of a legitimate stakeholder. It is not necessary to show bad faith. It is sufficient to show that a complainant's interests have been unfairly disregarded or prejudiced (including conduct which pays no attention to, ignores or treats as of no importance the interests of the complainant). The classic case of oppressive conduct is where a corporation conducts its business or affairs so as to confer a benefit on some of its shareholders and not all or at the expense of other shareholders.

### **What Relief Can be Sought Through an Oppression Remedy?**

The policy behind this legislation is to secure just and equitable treatment of minority shareholders and other complainants interested in the corporation who have no control over it. The remedies available to a complainant under section 248 of the OBCA are extremely broad. The court is given wide discretion to determine what remedy will fit the circumstances at hand. More specifically, subsection 248(3) provides that the court may make any interim or final order it thinks fit, including:

- (a) an order restraining the conduct complained of;
- (b) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (c) an order directing the corporation, or any other person, to purchase the securities of a security holder;
- (d) an order compensating the aggrieved person; or
- (e) an order winding up the corporation.

### Why is an Oppression Remedy Important?

In situations where shares or interest in a corporation have been left or gifted to family members, many potential problems may arise. When the recipient family member has little to no control over the corporation, they are especially vulnerable to unfair treatment by the majority shareholders. When shares or other interests in a corporation are left to multiple family members, infighting and family relationships can negatively impact business interactions. An oppression remedy may be a useful tool to ensure that a complainant's interest is protected and that they are fairly treated.

### Examples

#### **(A) *Nanef v. Con-Crete Holdings Ltd. (1995)*, 23 O.R. (3d) 48 (C.A.).**

In this case, the father started the business, which grew into a multi-million dollar group of companies. In 1977, the father, by means of an estate freeze, made his two sons equal owners of all the common shares of the company through which the entire business was being operated. The father gave equity to his sons, but retained complete control through redeemable voting, special or preference shares. In the early 1980s, the sons began to work full time with their father after completing their post-secondary studies. The business was defined by the court as a “team effort” during the years the three worked together. On Christmas Day, 1990, differences between the family and the eldest son’s “lifestyle choices” came to a head and he was “thrown out of the family.” The father, at a director’s meeting, removed the eldest son as an officer from all of the companies and ordered the eldest son to stay off the business premises. The eldest son was also excluded from all participation in and management of the business. The eldest son was also “virtually cut off” from any business income. As a result, the eldest son sought an oppression remedy.

The trial court held that:

“in their corporate capacity as directors [the family and others] are required to act in good faith and in the best interests of the company, and not for some extraneous purpose...[The eldest son’s] personal life had no adverse effect on his business/company life...”

Mr. Justice Blair therefore held that the eldest son should be granted an oppression remedy and that there should be a public sale of the company forming the business. The Court of Appeal overturned the trial decision, in part, stating:

- (a) “the fact that this is a family matter must be kept very much in mind when fashioning a remedy”; and
- (b) “the order of Blair J. gave [the eldest son] something which he knew he could never have while his father was alive and active – the opportunity to obtain full control of the family business.”

The Ontario Court of Appeal noted that:

- (a) when dealing with a closely-held corporation the court may consider the relationship between the shareholders, not just simply their legal rights; and
- (b) a family business being involved is a relevant consideration when fashioning an appropriate remedy, to the extent that it relates to the reasonable expectations of the parties.

Applying the above principles, the Court of Appeal reasoned that the eldest son understood that until death or voluntary retirement, his father would retain ultimate control over the business. Further, the eldest son must have known that it would be impossible for him to continue working with the business if the family bonds ceased to exist. Therefore, the Court of Appeal found that the eldest son's reasonable expectations must be "looked at in the light of the family relationship." Ultimately, the Court of Appeal ordered the company to buy out the eldest son's shares at fair market value, thus maintaining the father's control over the company, but relieving the oppression of the eldest son.

**(B) *Buttarazzi Estate v. Bertolo* (2004), 40 B.L.R. (3d) 287 (Ont. S.C.J.).**

In this case, a shareholder owned 20 per cent of shares in a corporation. Following the shareholder's death, the remaining shareholders began taking oppressive steps against the shareholder's estate, including:

- (a) the failure to give notice of shareholders' meetings;
- (b) the failure to provide corporate financial information to the executors of the estate; and
- (c) the distribution of corporate profits in the form of bonuses to themselves without accounting to the estate and without the estate's knowledge or consent.

The court assessed the "reasonable expectations" of the estate and found that an oppression remedy was warranted. The court ordered payment of all monies found to be due and owing to the estate and required the oppressive shareholders to purchase the shares of the estate for a fair market value.

**(C) *Proulx v. 2006550 Ontario Inc.* (2005), 15 B.L.R. (4<sup>th</sup>) 72 (Ont. S.C.J.).**

This case deals with shareholders who were husband and wife. The husband started the company in 1983 and gifted his wife 18.02 percent of the shares for income splitting purposes. The company was later organized into three separate companies. The husband was the sole officer and director of the companies and held 62.68 percent of the shares, with the remaining balance being held by another couple. Although the wife never worked for the companies, prior to separating from her husband, she received a salary and bonuses from the companies for income splitting purposes. These payments stopped in 1991, after the parties separated. The wife applied for a declaration that her husband's conduct was oppressive or unfairly prejudicial to, or had unfairly disregarded her minority interests. The Court found that the wife had no reasonable expectation to continue incoming splitting but did, as a shareholder, expect to benefit from the growth of the companies after separation. Therefore, she reasonably expected to either receive her proportionate share of the profits of the companies or for her husband to buy out her shares for fair market value after separation. It made no impact that the shares were gifted to her. Interestingly, while the Court ordered a buy out of the wife's shares at fair market value, it declined to order payment for two of the years that she was denied profit by way of bonuses. The Court found that during those two years, the bonuses paid out to the husband went almost entirely to costs of building the matrimonial home, of which she will receive the benefit through family law, because it was jointly held.

## Conclusion

An oppression remedy is a useful tool to keep in mind when family disputes spill over into business relationships. It can ensure that the business relationship is maintained or severed fairly.

<sup>1</sup> Similar provisions can be found under federal and provincial corporations legislation across Canada.

If you have questions regarding litigation,  
please contact any member of the  
Aird & Berlis LLP Litigation Group:

**Lawyers:**

Eldon Bennett	416.865.7704	ebennett@airdberlis.com
Hilary Book	416.865.3404	hbook@airdberlis.com
Fred D. Cass	416.865.7742	fcass@airdberlis.com
William A. Chalmers	416.865.3435	wchalmers@airdberlis.com
Michael Doyle	416.865.3421	mdoyle@airdberlis.com
Christopher Dunn	416.865.4742	cdunn@airdberlis.com
John Harild	416.865.7746	jharild@airdberlis.com
Philip Patrick Healey	416.865.7751	phealey@airdberlis.com
Martin Henderson	416.865.7725	mhenderson@airdberlis.com
Timothy J. Hill	416.865.3432	thill@airdberlis.com
Christopher P. Lloyd	416.865.3436	clloyd@airdberlis.com
John J. Longo	416.865.7785	jlongo@airdberlis.com
Atoosa Mahdavian	416.865.4733	amahdavian@airdberlis.com
Paul V. McCallen	416.865.7723	pmccallen@airdberlis.com
Bernie McGarva	416.865.7765	bmcgarva@airdberlis.com
Pamela Miehls	416.865.3965	pmiehls@airdberlis.com
Barbra H. Miller	416.865.7775	bmiller@airdberlis.com
Dennis M. O'Leary	416.865.4711	doleary@airdberlis.com
Emily Orchard	416.865.4641	eorchard@airdberlis.com
David Reiter	416.865.4734	dreiter@airdberlis.com
Cynthia Sefton	416.865.4730	csefton@airdberlis.com
Sanj Sood	416.865.3083	ssood@airdberlis.com
David Stevens	416.865.7783	dstevens@airdberlis.com
Scott Stoll	416.865.4703	sstoll@airdberlis.com
Ellen V. Swan	416.865.4636	eswan@airdberlis.com
Howard W. Winkler	416.865.3062	hwinkler@airdberlis.com

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## AIRD & BERLIS LLP

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Barristers and Solicitors

Brookfield Place  
181 Bay St., Suite 1800  
Toronto, Ontario, Canada  
M5J 2T9  
T 416.863.1500 F 416.863.1515  
[www.airdberlis.com](http://www.airdberlis.com)

Editor:

**John J. Longo**

T 416.865.7785

E [jlongo@airdberlis.com](mailto:jlongo@airdberlis.com)

Any of the articles or papers written by  
our professionals can be viewed at:

[www.airdberlis.com](http://www.airdberlis.com)

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