Dena N. Varah

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Personal liability in the corporate context: open-ended, unclear and expansive

The Supreme Court of Canada's recent decision in *Wilson v Alharayeri*, may have far reaching implications for corporate director liability. The unanimous decision affirmed an award for compensation for oppression directly against two directors of a corporation by relying on the leading case on the issue, *Budd v Gentra*.

The case concerned the liability of two corporate directors who approved a conversion of one director's preferred shares into common shares in advance of a dilutive private placement in circumstances where the plaintiff's shares—which also could have been converted into common shares—were not converted. As a result, the plaintiff's position in the corporation was significantly diluted when the privacy placement was closed.

The question before the Court was: in an action for corporate oppression, when does an order for compensation under s. 241(3) of the *Canadian Business Corporations Act (CBCA)* properly lie against the directors personally, rather than against the corporation itself?

Justice Côté began by outlining the two requirements of an oppression claim: namely, the complainant must: (1) identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held (BCE Inc. v. 1976 Debentureholders); and (2) show, pursuant to s. 241(2), that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of any security holder, creditor, director or officer.

Section 241(3) then gives the court broad direction to "make any interim or final order it thinks fit" and provides a non-exhaustive list of the remedial powers available following a finding of oppression.

However, the wording of the provision does not go so far as to specify when it is "fit" to hold directors personally liable under this section. As such, the Court relied on the leading case of *Budd v Gentra* to fashion a two-pronged approach to the issue of personal liability of corporate directors: (1) the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression; and, (2) the imposition of personal liability must be "fit" in all the circumstances.

To clarify the "amorphous concept" of whether liability is "fit", the Court set out four criteria, the first of which opens to door to potential liability,

and the latter three could potentially limit it:

- The oppression remedy request must be a “fair” way of dealing with the situation. It may be fair to hold a director personally liable where he or she has derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, breached a personal duty or misused corporate power, or where a remedy against the corporation would unduly prejudice other security holders. However, are no fixed rules as to what is “fair,” as the fairness principle is ultimately “unamenable” to formulaic exposition and must be assessed on case by case basis. Bad faith is not necessary condition of liability.
- Any order made under s. 241(3) should go no further than necessary to rectify the oppression;
- Any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders; and
- A court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances.

In setting out these criteria, the Supreme Court rejected the appellant’s invitation to adopt a clearer and more systematic test. The Court heavily emphasized that a more rigid test would be inappropriate in such a fact-specific context and provided the open-ended criteria above as “guideposts informing the flexible and discretionary approach the court have adopted to orders under s. 241(3) of the CBCA.”

This decision raises concerns that this approach to personal liability will result in the increasing exposure of directors to claims, whether or not such claims ultimately become successful. Given the criteria of “fairness” that form the entry to director liability, it will be much harder for directors and officers to summarily dismiss personal claims against them – something that could result in more litigation and more uncertainty.

The decision unfortunately fails to provide much clarity with regards to directors’ personal liability in oppression remedies. It remains to be seen whether jurisprudence that follow this decision will provide the needed guideposts for when oppression claims against directors will succeed.

With notes from Julia Flood