The oppression remedy in Ontario: Basic principles

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The oppression remedy is a statutory remedy available under section 248 of the Ontario *Business Corporations Act* (the OBCA). The statute allows certain complainants, principally but not exclusively shareholders, to apply to court for an "oppression remedy". In Ontario, this relief may be granted where a corporation's affairs have been caused to be "oppressive," "unfairly prejudicial," or "unfairly disregard" a complainant's interests.

In practice, Ontario courts will exercise their discretionary power under s. 248 where the conduct complained of is within one of the three above categories and violates a complainant's "reasonable expectations." While this publication is focused on the Ontario legislation, the oppression remedy under the Ontario legislation is highly analogous to the remedy available under the *Canada Business Corporations Act* (CBCA) which applies to federally incorporated companies.

I. Statutory authority

The source of the oppression remedy in Ontario is statutory, namely the OBCA. The applicable jurisprudence in turn is drawn from the general law of Ontario and the common law. The OBCA sets out the parameters of oppression, including which entities it applies to, the persons who may make an oppression claim, and the causes of action that give rise to oppression claims.

a. Application

The application of the OBCA is limited to companies incorporated in Ontario. The OBCA will not, therefore, apply to extra-provincial corporations, including corporations incorporated federally or in other provinces.

b. Complainant

Section 248 of the OBCA specifies that "a complainant…may apply to the court for an order this section." OBCA oppression remedies can therefore be sought by "complainants," but who qualifies as a complainant?

"Complainant" is a defined term in the OBCA, with s. 245 specifying that a complainant is:

> **a)** A registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of corporation or any affiliates,
>
> **b)** A director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> **c)** Any other person who, in the discretion of the court, is a proper person to make an application under this Part.

Security owners, such as shareholders, and officers of a corporation are therefore prima facie proper complainants. The "any other person" standard, meanwhile, provides the courts with flexibility to determine who is a "proper person" to bring a claim under the OBCA. The courts have held that this flexibility allows the courts broad discretion to determine whether an applicant is a proper person pursuant to the broad goals of the oppression remedy.

The discretion of the court makes it difficult to provide a definitive list of "proper persons" under s. 245(c), but courts have held that, in some circumstances, trustees in bankruptcy, creditors, and holders of "equity interest" may all be "proper persons" to act as complainants.

c. Cause of action

The OBCA specifies, at s. 248(2), that an oppression claim may be brought based on one of the following causes of action:

1. Any act or omission of the corporation or any of its affiliates affects or threatens to affect a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director, or officer of the corporation,
2. The business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation.
3. The powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation.

The meaning of these sections has been the subject of much interpretation by the courts and is discussed in more detail below.

II. The test for oppression

The general test for oppression is governed by the Supreme Court case of *BCE Inc. v. 1976 Debentureholders*. There, the Court held that two questions were key to establishing a successful oppression claim. First, does the evidence support a

reasonable expectation relied upon by the claimant? Second, was this reasonable expectation violated by conduct amounting to oppression, unfair prejudice, or unfair disregard of a relevant interest?

Establishing reasonable expectations is a question for the court. As the Supreme Court held in *BCE*, reasonable expectations are determined objectively with reference to contextual factors, and the subjective expectation of the complainant are not conclusive of reasonableness.

There is no conclusive list of factors a court may consider at this stage of the analysis, but the Supreme Court did list some factors that will often be important in determining whether an expectation was reasonable. These include general commercial practices, the nature of the corporation, the relationship between the parties, past practice, preventive steps the complainant could have taken for protection, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders.

The second step is determining whether a reasonable expectation was violated by conduct that was oppressive, unfairly prejudicial or unfairly disregards a relevant interest of the complainant. All three terms are distinct concepts that are nonetheless complementary, with many shared similarities.

The court in *BCE* defined oppression as conduct that is "burdensome, harsh or wrongful," a "visible departure from standards of fair dealing," and an "abuse of power." Although the term gives its name to the oppression remedy, it also captures a particular sort of oppression claim – those dealing with a wrong of the most serious sort. In determining "oppression" the emphasis lies on the character of the conduct at issue.

BCE defined unfairly prejudicial as acts which are unjustly or inequitably detrimental in the circumstances, even if they fail to reach the level of oppression. Examples include squeezing out a minority shareholder or failing to disclose related party transactions. Identifying an unfairly prejudicial act requires analyzing the effect of the conduct on the complainant.

Finally, *BCE* defined unfair disregard as the least serious of the three grounds for an oppression claim. Unfair disregard includes a director favouring a director by failing to properly prosecute claims, improperly reducing dividends, or failure to properly deliver property to the complainant. Elsewhere, unfair disregard has been defined as paying no attention to, ignoring, or treating as of no importance the interests of a stakeholder in a corporation in an unjust manner or without cause.

IV. Examples of oppressive conduct

Previous decisions provide guidance that may help potential complainants determine whether the conduct they have experienced may rise to the level of oppression.

Courts have found conduct to be oppressive in the following situations:

- A corporation paid substantial dividends and fees to directors, management, and consultants without authorization

- A director using their position to affect an acquisition of a majority of shares
- Majority shareholders causing a property to be sold contrary to shareholders agreement was oppressive
- The respondent corporation issued a prospectus indicating debenture holders would be entitled to a conversion price for special dividends, but failed to honour those terms
- The applicant shareholder was excluded from shares, the appointment of a representative to the board, and access to funds contrary to a joint venture agreement
- The applicant shareholder was not provided disclosure of explanation of additional mortgages taken out by the respondent
- The applicant was unfairly excluded from equity in a corporate entity, contrary to an agreement
- The applicant was denied access to financial and banking records and, upon receiving access, discovered improper expenditures concealed by the lack of disclosure
- The applicant was improperly deprived of voting shares upon the defendant's creation of a new class of shares with voting power, allowing them to take over the corporation
- A corporation dismissed a director and shareholder from their position contrary to a previous acquisition agreement
- Following a breakdown in a family relationship in closely held family corporation, a shareholder was improperly excluded from decision making
- To escape an adverse judgment, the respondent corporation arranged to sell its assets

Courts have declined to find that the conduct complained of was oppressive in the following circumstances:

- A company being taken public over the objections of a minority shareholder did not constitute oppression
- A purported failure of a corporation to disclose information could have been prevented by the minority shareholder standing on their rights
- A corporate transaction that may otherwise have been oppressive was necessitated by the applicant's own actions
- A corporation, following a board review, purchased assets of a major shareholder

V. Remedies for oppression

Once a court finds that an oppression claim is made out, the question turns to the appropriate remedy. The OBCA itself enumerates at s. 248(3) certain orders that may be imposed by the court, including an order (a) restraining the conduct complained of; (b) appointing a receiver or receiver-manager; (c) to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement; (d) directing an issue or exchange of securities; (e) appointing directors in place of or in addition to all or any of the directors then in office; (f) directing a corporation, or any other person, to purchase securities of a security holder; (g) 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; (h) requiring a corporation, within a time specified by the court, to produce financial

statements or an accounting in such other form as the court may determine; (i) winding up the corporation under section 207; and (j) directing an investigation under Part XIII.

In addition to the above examples, courts retain a broad discretion to make any order they consider appropriate, provided this power is exercised to remedy the oppressive conduct. The court's discretion is restrained by the equitable nature of the remedy and its remedial purpose. The court is expected to consider the reasonable expectations of the complainant when ordering a remedy, and to focus only on redressing the injury to these reasonable expectations.

The guiding principles for a discretionary oppression remedy are set out in the Supreme Court case of *Wilson v. Alharayeri*, and include the following precepts:

- The oppression remedy request must in itself be a fair way of dealing with the situation;
- Any order should go no further than necessary to rectify the oppression;
- Any order may serve only to vindicate the reasonable expectations of the complainant and other stakeholders,
- Any order should consider general corporate law when exercising discretion.

Provided an ordered remedy does not stray from these principles, there is nothing preventing a court from proceeding as it thinks is just to restrain oppressive conduct.

II. Application of the Limitations Act to oppression claims

As with all claims in Ontario, oppression claims are subject to the general rules and statutes that govern civil claims. This includes the two-year limitation period set out in s. 4 of the *Limitations Act*, 2002 S.O. 2002, c. 24, Sched. B. which imposes the general rule that complainants have a two-year window in which to make an oppression claim.

This two-year window begins when the oppressive conduct is discovered. Discovery occurs when the complainant knows or reasonably ought to know that the elements of an oppression claim are reasonably made out, and that a claim is the appropriate method of seeking redress.

One interesting wrinkle in the above is continuing oppression. Courts in Ontario have suggested that continuing oppression may reset a limitation period. The impugned act must be truly continuing, however, and must truly be a single act. The courts have held that a series of oppressive acts, each distinct from each other, will be treated as discrete rather than ongoing oppression, and not allow a complainant to circumvent the limitation period.

As a result of the *Limitations Act*, potential complainants should consider pursuing a claim as soon as they become reasonably aware of the potential oppression. Although "continuing oppression" may provide some complainants a chance to avoid having a claim barred under the *Limitations Act*, resting on that principle could pose significant risks.

By

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