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Full-bodied oppression

By Neill May

When I was much younger, my father took me to wine-tasting events. The events were fascinating but confusing, as was the vocabulary, much of which seemed to be derived from fruits not normally encountered. I thought that some of the fruits were invented and wondered why their names could not be more evocative, like the Gym Bag Berry wine that still smells stale even if left in the garage, the Rumpled Subway Guy Berry wine whose scent can be perceived by everyone from great distance but seems oblivious to itself or the Pack of Smokes Berry to describe wines that should be mandatorily paired with gum. What was most confusing about wine vocabulary was that it seemed to be very subjective, though at least it provided a framework and a form of *lingua franca* for weighty wine dialogue.

In its recent decision in *Wilson v. Alharayeri*, the Supreme Court of Canada tackled the question of when corporate directors can be held personally liable under the "oppression remedy." Few areas of corporate law are as fact and context specific as are questions concerning the application of the "oppression remedy," and reported decisions do not often address typical circumstances in a way that would give specific guidance. What the court did is outline four general principles to guide analyses for the imposition of personal directorial liability for oppression. That's similar, in my thinking, to providing a vocabulary and framework for a discussion of what will almost invariably be unique circumstances.

In *Wilson*, the board of directors of Wi2Wi Corp., in response to the company's continuing financial difficulties, completed a private placement of convertible secured notes to its common shareholders. Andrus Wilson, a shareholder (and former president and CEO) of the company, held two classes of preferred shares that were not converted into common shares prior to, and was, therefore, prevented from participating in, the private placement. Conversely, the conversion of a third class of preferred shares, some of which were beneficially owned by the company's new president and CEO, Ramzi Mahmoud Alharayeri, was accelerated, so that Alharayeri did participate in the private placement. The transaction substantially diluted Wilson's shareholdings. Notably, the company's financial statements reflected that the conversion requirements for Wilson's preferred equity had been met, but the auditors had expressed doubt as to whether the tests for Alharayeri's shares had been met. Wilson claimed oppression by the members of the company's board (including Alharayeri), alleging that the directors had unfairly disregarded his reasonable expectation that he would be permitted to convert his preferred shares. The trial court (upheld by the Quebec Court of Appeal), after finding that Wilson's expectations were reasonable and had indeed been unfairly disregarded, imposed personal financial liability on Alharayeri and one other director who had advocated against conversion of Wilson's shares.

The basic two-prong test for personal liability of directors under the oppression remedy was established in a 1998 Ontario Court of Appeal decision in *Budd v. Gentra Inc.*: the director must be personally implicated in the oppressive conduct, and personal liability must be fit in all the circumstances. The Supreme Court distilled four principles to guide in this assessment of "fitness," briefly:

- the remedy requested must be a fair way of dealing with the situation;
- the order must not go further than is necessary to rectify the oppressive conduct;
- the order may only vindicate the reasonable expectations of corporate stakeholders in their capacities as such (not personal); and
- the court should consider the general corporate law context when exercising its discretion.

Whether or not a director is personally implicated is the more straightforward element of the test; in *Wilson,* the two directors found liable were determined to have played lead roles in the board's deliberations about the conversion of Wilson's shares. Generally, the tougher question will be whether personal liability fits, which turns in meaningful part on whether personal liability is a fair way to deal with the matter. Because of the fact specificity of these cases mentioned, the court could not map out actions that would trip the wire. However, the court did helpfully clarify that although personal benefit and bad faith are the hallmarks of attracting personal liability, and at least one will commonly be present where liability is imposed (in *Wilson*, for example, personal liability was supported by the benefit Alharayeri obtained from the dilution of Wilson's interests), they're not required.

That decision may have been more helpful (in illustrating the application of the principles) if the appellant hadn't been found to have personally benefited. You often hear the expression bad facts make bad law. In *Wilson,* better facts may have made more interesting law. It begs the enduring question as to where all the good facts have gone. Ironically, in my view, the answer is that the good facts are often more readily discovered after a couple of glasses of wine. **CL**

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