

## Litigation

July 20, 2017

### Supreme Court Clarifies Ambit of Directors' Personal Liability Under the Oppression Remedy

The Supreme Court of Canada (the "Court") recently released its decision in *Wilson v. Alharayeri*, 2017 SCC 39 ("*Wilson*"). In *Wilson*, the Court clarified the circumstances in which company directors can be held personally liable under the "oppression remedy". Notably, the Court clarified that personal liability can be imposed even where directors do not act in bad faith or acquire a personal benefit.

#### Background

The oppression remedy has been described as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world." Unlike remedies that protect the rights of the corporation itself, the oppression remedy protects against oppressive acts of the corporation and its directors that violate the "reasonable expectations" of corporate stakeholders regarding their legal and equitable interests. The remedy is available to a wide range of stakeholders, including legal or beneficial shareholders, creditors, directors and officers.

In *Wilson*, a shareholder (Mr. Wilson) alleged that the corporation's directors – and, specifically, the company's President and CEO (Mr. Alharayeri) – had unfairly disregarded his reasonable expectation that he would be permitted to convert a class of preferred shares that he held into common shares of the company at the same time that holders of another class of preferred shares (some of which were held by Mr. Alharayeri) were permitted to convert their shares. After finding that Mr. Wilson's expectations were reasonable and had indeed been unfairly disregarded, the Court imposed personal liability on Mr. Alharayeri on the bases that he was

primarily responsible for the oppressive conduct and that he had benefitted personally from the transaction (through his holding of the other class of preferred shares).

#### The Test for Personal Liability of Directors

The test for personal liability of directors under the oppression remedy was established in a 1998 decision of the Ontario Court of Appeal in *Budd v. Gentra Inc.* (1998), 43 BLR (2d) 27 ("*Budd*"). Since *Budd*, courts have somewhat narrowed the scope of personal liability for directors by requiring that a director acted in bad faith or acquired a personal benefit before ordering a remedy against that director personally. The Court in *Wilson*, however, clarified that while bad faith and personal benefit are "hallmarks of conduct properly attracting personal liability" and "one of them will typically be present" in cases where personal liability is warranted, a lack of bad faith or personal benefit is not necessarily a sufficient defence for directors.

Rather, personal liability will be imposed where:

- the director exercised, or failed to exercise, his or her powers so as to effect the oppressive conduct in question; and
- personal liability is an appropriate remedy in all the circumstances.

With respect to the second factor, as noted by the Court in *Wilson*, the oppression remedy is an "equitable remedy that seeks to ensure fairness". The principle that emerges is that personal liability attaches to directors where fair and reasonable, in all the circumstances. Fairness also requires that personal liability, if it is imposed, may go no further than is necessary to rectify the oppression and vindicate the reasonable expectations of corporate stakeholders. Ultimately, whether personal liability should be imposed (and if so, the quantum of that liability) is a highly fact-dependent inquiry.<sup>1</sup>

<sup>1</sup> Directors should be aware that factual findings of this nature, when made by a trial judge, are difficult to challenge on appeal (as *Wilson*, which is itself a failed appeal, exemplifies).

# Goodman's Update

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## Discussion

In *Wilson*, the Court upheld the trial judge's finding of personal liability primarily because of the sufficient evidence of Mr. Alharayeri's "lead role" in the oppressive conduct and the fact that he acquired a personal benefit as a result. However, the Court acknowledges that claims of oppression are highly fact-specific and makes clear that its decision in *Wilson* does not represent a fundamental shift in the law of oppression as it is currently known. Nevertheless, it is possible that more claims against company directors will be made as plaintiffs' counsel reconsider the ambit of director liability under the oppression remedy in light of the Court's decision. Whether the Court's clarification of the legal test for personal liability leads to an actual increase of instances of personal liability for company directors remains to be seen.

Moving forward, company directors are encouraged to apply principles of good corporate governance when evaluating and implementing corporate actions. In particular, directors should ensure that corporate decisions result from processes that are fully informed and independent, and that any conflicts of interest (or perceived conflicts of interest) are appropriately addressed. Heightened caution is warranted in the context of corporate decisions that could provide directors or officers with benefits that do not accrue to all shareholders (or other corporate stakeholders). Directors must in all instances ask themselves whether a given decision is in the best interests of the company and as fair as possible to all corporate stakeholders, understanding that a lack of personal benefit or bad faith is not necessarily a complete defence to personal liability.

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