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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

## Can the Director of A Corporation Be Held Personally Liable for Unpaid Wages and Termination Pay?

The Ontario Superior Court has held that the director of a closely-held corporation can be held liable for unpaid wages and termination pay under the oppression remedy.

In *El Ashiri v. Pembroke Residence Ltd.*, 2015 ONSC 1172, per Boswell J., the plaintiffs were former hotel managers of the individual and corporate defendants. They both worked at hotels in Niagara Falls and in Toronto which were owned by the two corporate defendants. The employees were hired by the sole director of the two corporate defendants (the "Director"). Ultimately, both plaintiffs were constructively dismissed on the basis that the employer failed to pay their wages over a period of time. Accordingly, both plaintiffs brought actions against the defendants for back wages and other relief. The Director died in May, 2013 and the plaintiffs then pursued the actions against his wife, as trustee of the Director's estate. The plaintiffs brought summary judgment motions on their claims and the

defendants did not defend the motions.

The Court granted both summary judgment motions for both plaintiffs and awarded each plaintiff damages for, *inter alia*, unpaid wages, overtime pay, termination pay, vacation pay and statutory holiday pay. The plaintiffs were denied their claim for punitive damages against the defendants.

In doing so, the Court held that both corporate defendants were liable to the plaintiffs for their unpaid wages and related expenses. This was because the Director used the two corporate defendants "interchangeably" and "treated his hotels as one entity".

Most important, the Court used the oppression remedy under the *Ontario Business Corporations Act*, R.S.O. 1990, c.B.16 (the "OBCA") to

find the Director personally liable for the unpaid wages and termination pay owed to the plaintiffs.

Section 248(2) of the *OBCA* codifies the common law oppression remedy as follows:

248(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

- (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
- (b) 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; or
- (c) 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 court may make an order to rectify the matters complained of.

In this case, the Court held that the oppression remedy rendered the Director liable to the plaintiffs for the following reasons:

### 1. The Plaintiffs were “creditors” of the defendant corporations.

According to the Court, the plaintiffs were creditors of the defendant corporations and therefore “complainants” within the meaning of section 248 of the *OBCA*.

**2. The oppression remedy can be used to make directors personally liable for the claim.** The Court held that under section 248, it had a broad discretion to fashion a remedy to redress the Director’s oppressive conduct. This included ordering compensation to the complainants.

Citing the leading case on corporate oppression by the Supreme Court of Canada, *BCE v. 1976 Debentureholders*, 2008 SCC 69, the Court held that the oppression remedy is an equitable remedy and gives the Court a broad discretion to enforce “what is right and what is just and fair”. In deciding what is just and fair, the Court is required to assess the “reasonable expectations of the claimant” and whether the conduct of the corporation or its directors violated those expectations by conduct that was oppressive, unfairly prejudicial, or which disregarded the interests of the complainant.

If there has been oppressive conduct on the part of the corporation’s directors, the Court can hold the directors *personally liable for the claim*. Examples of circumstances where a director can be held personally liable for her oppressive conduct include:

- (i) cases where the directors or officers personally benefitted from the oppressive conduct;
- (ii) cases where the directors “furthered their control over the company through the oppressive conduct”; or

- (iii) cases involving closely-held corporations “where a director or officer has virtually total control over the corporation”.

In the instant case, the corporate defendants were closely-held corporations and the Director had “total control over the companies”. Accordingly, the Director could be held personally liable for the damages caused by his oppressive conduct. The Court held:

[The Director] hired the plaintiffs and put them to work in responsible positions in his hotels and never, from the “get go” paid them what they were due. He must have known when he hired them that he was not in a position, financially, to pay them what they were due. They provided their labour and services in good faith and in return were treated callously as though they were his personal servants.

...[The Director] made cash payments to preferred creditors, while leaving the plaintiffs high and dry.

...[The Plaintiffs’] expectations of payment for services rendered were eminently reasonable. I am satisfied that [the Director’s] conduct, as the sole director and officer of the defendant corporations was oppressive, high-handed, callous, and unfairly prejudicial to the rights and interests of the plaintiffs. He was the sole controlling director and officer of the corporations. He benefitted, whether directly or indirectly from the labours of the plaintiffs. Their labour and efforts enabled the hotels to remain open and viable.

The decision in *El Ashiri* illustrates the flexible nature of the oppression remedy as an equitable remedy used to address prejudicial conduct, even in the context of an employment relationship.

The Court was clear that where a director of a closely-held corporation acts oppressively to her employees, the director can be held personally liable for such conduct. The oppression remedy will be used to fashion a remedy that is just in the circumstances and consistent with the reasonable expectations of the claimant.

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