

Supreme Court clarifies test for personal liability of directors for oppressive conduct

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Authors: [Kevin O'Brien](#), [Robert Carson](#), [Waleed Malik](#)

In this Update

- In *Wilson v Alharayeri*, the Supreme Court of Canada affirmed the test as to when liability may be assigned to directors personally (as opposed to the company) under the oppression remedy.
- The Supreme Court outlined four general principles to guide courts in fashioning an appropriate remedy in oppression cases.
- This decision may assist directors and counsel in considering whether corporate conduct could lead to personal liability in future cases.

In its decision released today in *Wilson v Alharayeri* (*Wilson*), the Supreme Court of Canada has affirmed the test (originally articulated by the Court of Appeal for Ontario in its 1998 decision *Budd v Gentra Inc* [*Budd*]) as to when liability may be assigned to directors personally (as opposed to the company) pursuant to the oppression remedy.

As in all oppression cases, the decision was highly fact specific. However, it did clarify some uncertainty that had arisen in the law since *Budd*, articulating general principles for courts to follow in considering whether personal liability should be found in subsequent cases.

The oppression remedy and personal liability of directors

The oppression remedy provided in Canadian corporate statutes (i.e., the *Canada Business Corporations Act* and its provincial equivalents) grants courts broad powers to remedy conduct that is determined to be oppressive or unfairly prejudicial to, or which unfairly disregards, the interests of a company's security holders, directors, officers or creditors. This includes the power to hold directors and officers personally liable for such conduct.

In *Wilson*, the Supreme Court reiterated the two-pronged test established in *Budd* for determining whether a director should be held personally liable under the oppression remedy: (i) the oppressive conduct must be properly attributable to the director because he or she is implicated in the oppression, and (ii) the imposition of personal liability must constitute a "fit" remedy in all the circumstances.

While the test itself is long established, the Supreme Court sought to clarify some of the confusion that has arisen since *Budd* regarding the particular circumstances in which personal liability can be assigned. To that end, the Supreme Court rejected the invitation to impose a requirement that the impugned conduct of the director had to first be held to

“exhibit a separate identity or interest from that of the company” (i.e., a prerequisite under the common law principle for finding directors personally liable). The Supreme Court held such a restrictive approach was inconsistent with the oppression remedy’s remedial focus. The Supreme Court also refused to impose additional prerequisites for personal liability – including that it first be determined that the director exercised effective control of the company, acted in bad faith or obtained a specific personal benefit – although it acknowledged that each of these may be important considerations in a court’s analysis.

Instead, the Supreme Court outlined four general principles to guide courts in oppression cases, including those in which they are asked to find a director personally liable. Those principles are that

- the remedy requested must be a fair way of dealing with the situation (which would include considerations of whether the director breached a personal duty, obtained a personal benefit or acted in bad faith);
- the order must not go further than is necessary to rectify the oppressive conduct;
- the order may only vindicate the reasonable expectations of security holders, creditors, directors or officers *in their capacity as corporate stakeholders*, and not in any personal capacity; and
- the court should consider the general corporate law context when exercising its remedial discretion. In particular, director liability should not be used as a surrogate or substitute for other forms of statutory or common law relief, especially where such other relief may be more fitting in the circumstances.

Application to the facts in *Wilson*

In *Wilson*, the Supreme Court upheld the decisions of the trial judge and the Québec Court of Appeal in finding that the respondent shareholder (who was also the former CEO, president and director of the company) was entitled to compensation pursuant to the oppression remedy. The private company had accelerated the right to convert one class of its preferred shares into common shares: (i) notwithstanding its auditors’ doubts as to whether the test for conversion of that class of shares had been met, and (ii) without offering the respondent the right to convert his separate classes of preferred shares, where the tests for conversion of those shares had been met.

The appellant director was found personally liable for that oppression under the test articulated in *Budd* and affirmed in *Wilson* because he played a leading role in the determination not to convert the respondent’s shares. In board meetings, the appellant director had expressed doubts as to whether it was appropriate to permit the conversion of the respondent’s shares in light of the respondent’s conduct when he was CEO. Further, the appellant had accrued a personal benefit from his own conduct: in particular, as he owned certain of the shares that had been converted, his control of the company had increased to the detriment of the respondent who, as a consequence of the oppressive conduct, was denied the opportunity to which he was entitled to prevent the dilution of his shares.

Takeaway

Although the decision in *Wilson* was highly contextual and based on its unique facts, it is nevertheless a useful reiteration by the Supreme Court of directors’ potential personal exposure. The general principles articulated by the Supreme Court may help guide directors and counsel in considering whether corporate conduct could lead to personal liability in

future cases.

In an article for the Financial Post, author Drew Hasselback uses this Osler Update as a reference in discussing the implications of Wilson. Read the full article "[Supreme Court of Canada clarifies law on directors' personal exposure to oppression claims.](#)"