When to combine oppression and wrongful dismissal claims

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The oppression remedy has been described as one of the broadest remedies available to a complainant, since it empowers courts to make any order necessary to rectify the conduct complained of.

The remedy has been consistently used to rectify oppressive conduct, which the Supreme Court of Canada recently described as conduct that is "burdensome, harsh and wrongful" and "a visible departure from standards of fair dealing" (*BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560). It is available where an officer, director or corporation has engaged in oppressive conduct that violates the reasonable expectations of the parties, typically shareholders (*Naneff v. Con-Crete Holdings Ltd.*, [1995] O.J. No. 1377).

But the courts have been traditionally reluctant to award an oppression remedy for the wrongful dismissal of employees, even where the employees in questions were also shareholders (see *Mohan v. Philmar Lumber (Markham) Ltd.*, [1991] O.J. No. 3451 and *Flatley v. Algy Corp.*, [2000] O.J. No. 3787).

However, a recent decision of the Divisional Court, *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.*, [2009] O.J. No. 1318, upheld a trial judge's decision that combined a wrongful dismissal claim with an oppression remedy application. This decision demonstrates that oppression claims in employment cases are possible where wrongful dismissal and oppressive conduct are indivisible. Given the broad discretionary nature of the oppression remedy, combining oppression claims in the right circumstances with dismissal claims is a creative avenue for counsel to explore.

Platinum Wood involved an acquisition in 2005 by the appellants, the Herwynen brothers, who owned 70 percent of the shares and the respondent employee, Barbieri, who owned 30 percent. In return for Barbieri paying a premium for his shares and obtaining only a minority interest in the company (he had wanted a 50 percent interest), it was agreed that Barbieri would be a director, president and manager of the company.

The parties entered into a letter of agreement setting out those terms and the letter was to form the basis of a unanimous shareholder agreement. Barbieri had the full day-to-day management of the company.

Barbieri successfully managed the company until March of 2008, when he was hospitalized and ultimately diagnosed with leukemia. At that time, one of the appellants visited him in the hospital to advise Barbieri that his salary would be terminated. Two days after Barbieri's return to work in June 2008, he was removed as director and president. Eight days later, he was terminated.

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Barbieri was offered six months notice in return for signing a release. Barbieri refused the offer and started an application for oppression. As part of his application, he asked that the issue of damages for wrongful dismissal be referred to trial, asserting that removing him as president and director and terminating him were oppressive.

The application judge concluded that the appellants had acted in an oppressive manner by stopping Barbieri's salary, wrongfully removing him from management and ordering a corporation they personally controlled to delay its payments to Platinum. As a result, the appellants were ordered to purchase Barbieri's shares. The judge also ordered a trial to assess Barbieri's wrongful dismissal damages.

On appeal, the respondents argued that their actions were protected by the "business judgement rule" and that wrongful dismissal claims must be separate from oppression claims. The Divisional Court found that while deference should be accorded to business decisions, the business judgement rule does not apply when these decisions violate express agreements between shareholders regarding business matters. As such, the rule could not shield oppressive conduct contrary to the reasonable expectations of the shareholders as set out in the letter of agreement.

As for the wrongful dismissal, the Divisional Court agreed, generally, that wrongful dismissal is not to be intermingled with an oppression claim. However, a wrongful dismissal is appropriate in the context of oppression where there is "an intimate connection between the employment contract and the shareholders agreement."

If the interests of an employee are found to be integrally intermingled with his or her interests as shareholder or director and the dismissal is part of the pattern of oppressive conduct, the claims can co-exist. In this case, because Barbieri's management position was inextricably linked to his agreement to acquire a minority interest, it was appropriate to conclude that Barbieri's termination was oppressive.

The decision demonstrates that the courts will allow oppression and dismissal claims to proceed together in circumstances where the claims are indivisible. This potentially grants further remedies to dismissed employees who are also shareholders or directors of a corporation. Broader remedies, such as requiring a corporation to purchase their shares and even to undo oppressive transactions, could be available.

Piercing the corporate veil with personal remedies against defendant shareholders or directors is possible if the directors or shareholders personally benefited from their oppressive conduct. Unlike claims for *Wallace* damages, the courts have found that it is not necessary to demonstrate bad faith to be awarded a remedy for oppression.

Consequently, counsel considering claims for dismissed employees where employment was intermingled with corporate interests will need to review the terms of any existing shareholder agreements and determine whether any reasonable expectations were breached. Equally, employers will need to consider the consequences of these agreements when terminating the employment of shareholders and directors, since the courts will hold the parties to the bargain and the reasonable expectations that the parties agreed to. ■

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University VP fails to prove constructive dismissal

The Supreme Court of Nova Scotia has found that the former vice-president of Acadia University in Wolfville was not constructively dismissed after 19 years of employment.

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The decision required the court to answer three fundamental questions, said Justice Gregory Warner. Those questions were: What were the express and implied terms of the employment contract of this employee? Was the president's decision to take direct oversight and responsibility for enrollment and admissions during a crisis a breach of the VP's employment contract, and was it a fundamental breach? If so, did the vice-president act reasonably in mitigating her damages in all of the circumstances?

Relying on an extensive number of decisions in this area, including *Evans v. Teamsters Local Union No. 31*, [2008] S.C.J. No. 20, *Mifsud v. MacMillan Bathurst Inc.*, [1989] O.J. No. 1967 (C.A.) and *Burns* v. *Sobey's Group*, [2007] N.S.J. No. 509, the court found in favour of the university on all three counts. ■

Reasons: *MacKinnon v Acadia University*, [2009] N.S.J. No. 411.

Dissent found clause discriminatory

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The court said that *Law* was only intended to be a "philosophical enhancement" to *Andrews*. It was not intended to create additional barriers for claimants.

After hearing the Harris case, including written submissions on the application of *Kapp*, the Federal Court of Appeal released three separate sets of reasons. Only Justice Allen Linden appeared to apply *Kapp* in his reasons. He found that the drop-out provision had a discriminatory impact on Harris as it denied her the equal benefit of the law.

Justice John Maxwell Evans determined that the purpose of the provision was to benefit parents who temporarily leave employment to look after young children. He concluded that since Harris was treated like every other parent who had a child over age seven, she did not experience any discrimination. Justice Michael Ryer concluded that Harris could not claim that she experienced discrimination because the years when her son was under seven had been excluded.

The reasons of the Federal Court of Appeal and decisions in other post-*Kapp* Charter claims reveal an apparent confusion over the current test under s. 15(1). In the application for leave to appeal, ARCH specifically asked the Supreme Court to clarify what role comparator groups and human dignity play in the current iteration of the s. 15(1) analysis.

To the disappointment of ARCH and others, the Supreme Court did not take this opportunity to provide clarity. ARCH is concerned that the vision of equality that embraces diversity and recognizes and accommodates difference will continue to elude equality-seeking groups, resulting in a sterile or formal notion of equality. ■

Dianne Wintermute and Laurie Letheren are lawyers at ARCH Disability Law Center in Toronto who represented Harris. The work of ARCH focuses on defending and advancing the equality rights of people with disabilities.