



Oppression does not guarantee relief

By G. L. Sonny Ingram, Affleck Greene McMurtry LLP

Last spring an Ontario court held that in spite of suffering oppressive conduct, a corporate stakeholder was not entitled to monetary relief.

In *Hu v. Sung*,¹ Superior Court Justice David Brown confronted the question of what to do when a shareholder in a private corporation has wrongfully excluded another from the affairs of the company, but by the time of trial the company has ceased operations, has not turned a profit and there is no evidence the offending shareholder personally benefited from the oppression.

In this case, the answer was to do very little.

In late 2004, the plaintiff Hu and the defendant Sung decided to start a business, namely, the corporate defendant, 16411833 Ontario Limited (the "Company") in order to acquire and operate a combined Second Cup and Great Canadian Bagel store in Aurora.

In this action Hu sought repayment of his investment, claiming he had been wrongfully excluded from the Company's affairs and that the individual defendants sought to unilaterally reduce his holdings in the Company. The court agreed, in part.

Following the Supreme Court decision in *BCE Inc. v. 1976 Debentureholders*,² Brown J. considered Hu's reasonable expectations and whether his expectations had been violated thereby amounting to oppressive conduct?

The court found Hu reasonably expected to be a director and enjoy a 50% shareholding in the Company. Attempting to exclude Hu from the Company and purporting to expel him as a director was indeed oppressive conduct contrary to section 248 of the *Business Corporations Act*.³ In addition,

by unilaterally attempting to alter the shareholdings of Hu and Song (Sung's wife and the other individual defendant), the individual defendants engaged in further oppressive conduct.

As a result, the court found that Hu was entitled to a declaration that he was and remains a director of the Company and the holder of 50 common shares of the Company, which represent 50% of the Company's common shares.

However, that was the extent of Hu's relief. Why?

The oppression remedy is an equitable remedy that seeks to ensure fairness but it avoids retribution.

In this case the facts did not warrant additional compensation: the Company ceased operations in late 2008, had no assets at the time of trial and owed significant sums for the arrears of sales taxes. Thus, no order was made compelling the Company to purchase Hu's shares.

In addition, no order was made requiring the individual defendants to compensate Hu as they did not benefit from their oppressive conduct. In fact, they also lost their investment in the Company.

This was not a case where one party sought to exclude another from the corporation in order to divert resources for its own benefit.

While ultimately somewhat of a pyrrhic victory for Hu, this case is nonetheless a strong reminder that even in situations of clear oppressive conduct, some compensable injury is necessary for any damages or other monetary relief to be awarded.



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¹ [2009] O.J. No. 2272 (S.C.)

² [2008] 3 S.C.R. 560

³ R.S.O. 1990, c. B.16