

Oppression remedy denied to non-shareholder of corporation

Litigation | Litigation & Dispute Resolution | Ontario Business Corporations Act | Oppression Remedy

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The oppression remedy in corporate law statutes such as the Ontario *Business Corporations Act* provides a mechanism for disgruntled shareholders or other stakeholders to obtain relief from the courts to protect their reasonable expectations. However, a person must be able to establish that they qualify as a proper “complainant” under the legislation. The case of *Bernier v. Kinzinger*, 2022 ONSC 1794 (CanLII), addressed whether the applicant was actually a shareholder of the respondent corporations who could avail himself of the oppression remedy.

The respondent corporation (“**Skilcor**”), was in the business of manufacturing meat products sold in grocery stores across the country. Skilcor was founded in the late 1960s by the father of D.K., who had become the sole shareholder by the early 1990s.

In 2005, the applicant was hired as Skilcor’s Executive Vice-President, contemporaneous with a plan to build a manufacturing facility in Ontario and consolidate food operations. The applicant had been employed in the industry and was a long-standing business acquaintance of D.K. Skilcor and the applicant entered into an employment agreement which renewed annually.

In 2005, D.K. and her husband, who was the CFO, incorporated another company (“**La Riberie**”), to set up manufacturing facilities for the business.

Finally, in early 2006, D.K.’s holding company acquired control of a food product business (“**Northbud**”). At the time of the acquisition, D.K. agreed to grant the applicant 10% of the shares of Northbud, initially at no cost.

From the outset, the food businesses of the three corporations operated collectively as a consolidated group from an organizational and operational perspective. The officers were the same for the three corporations and their annual financial statements were prepared on a consolidated basis.

The applicant was part of the management team and worked closely and collaboratively together to grow the companies’ businesses. There was no question that he was a very integral part of the management team.

As a result of concerns that the applicant had no “skin in the game,” he subsequently agreed to pay \$200,000 for shares of Northbud in exchange for a corresponding increase to his salary to cover the cost.

In late 2007, D.K. and the other principals began exploring a potential merger of the food businesses of Skilcor, La Riberie and Northbud. The discussions were complicated because Skilcor had assets that were unrelated to the food business. In addition, the participation of the applicant in the consolidated entity needed to be addressed given his share holdings in Northbud.

Eventually, D.K. and the applicant agreed that his interest in the new entity would be increased from 3% to 9% and that he would pay \$400,000 plus interest for the increase in equity participation at the time of the sale of the company. In an email to the applicant dated 1 September 2010, D.K. confirmed the increase to his salary and potential other terms, including a dividend “if declared” that could be up to 9% of the consolidated company.

The agreement was not formalized in writing, however, and in 2013 the assets of Northbud were sold to a third party. Following the sale, Northbud was wound up. The applicant netted approximately \$700,000 from the sale.

A dispute arose when the remaining two corporations, Skilcor and La Riberie, were sold in 2017. The applicant took the position that the email he received in 2010 amounted to an agreement between the parties that he was a 9% beneficial shareholder in the two corporations. The respondents took the position that there had

never been an agreement for the applicant to become a shareholder of Skilcor and La Riberie, let alone one that was contained in the September 2010 email.

For a binding agreement to be formed, there must be a “meeting of the minds,” commonly referred to as *consensus ad idem*. The test adopted by the courts to assess whether there has been a meeting of the minds is an objective one: would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract?

While the essential terms of an agreement must be sufficiently certain, a binding agreement can be formed even if there are further documents that must be prepared and signed *UBS Securities Canada, Inc. v. Sands Brothers Canada Ltd.*, (2009), 2009 ONCA 328 (CanLII), at para. 47.

In the circumstances, the court found that at some point before the September 2010 email, the applicant and D.K. entered into an oral agreement whereby the applicant would receive a 9% interest in the “consolidated group” which at the time was clearly understood by the parties to comprise the assets of the three corporations. The email itself was not the agreement.

However, the agreement to receive 9% of the consolidated group did not resolve the issue of whether, at the time of the sale of Skilcor’s food assets and La Riberie in 2017, the applicant was a shareholder of those companies. The court found that the 2010 agreement provided for a 9% interest in the food assets of Skilcor, not a 9% beneficial shareholder interest in Skilcor.

Further, the court determined that the subsequent agreement to sell the assets of Northbud and distribute the proceeds to the shareholders, including the applicant, rescinded the agreement under which he would receive a 9% interest in the consolidated group. The sale of Northbud was entirely inconsistent with the agreement as it prevented the essential terms from ever being carried out.

The agreement for the applicant’s share entitlement was based on the consolidation of the food businesses of the three entities, the food assets of Skilcor together with La Riberie and Northbud. The loss of Northbud changed the consolidated group and, in so doing, changed the applicant’s agreed share participation in the remaining group. The Northbud sale deprived the applicant of any equity contribution to the new “group” and he was therefore not entitled to an interest. Any agreement that had been made had been rescinded by the subsequent agreement to sell the assets of Northbud and distribute the proceeds to the shareholders, including the applicant.

In the result, the court found that as of the date of the sale of Skilcor’s food assets and the shares in La Riberie in 2017, the applicant was not a shareholder, beneficial or otherwise, of Skilcor or La Riberie. Since he was not a beneficial shareholder of Skilcor or La Riberie, the court determined that he was not a “complainant” as defined in the oppression remedy of the Ontario *Business Corporations Act* and he therefore had no status to bring an oppression claim. His application was dismissed.

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