

# President of not-for-profit corporation reinstated following oppression application (Carr v. O'Reilly)

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In *Carr v. O'Reilly*, 2024 ONSC 4412 (CanLII), the President of a not-for-profit corporation successfully brought an oppression application under section 253 of the *Canada Not-for-profit Corporations Act* (the "Act") after she had been placed on "administrative leave" by the directors.

The applicant was the elected President of the Professional Institute of the Public Service of Canada (PIPSC), a not-for-profit corporation under the Act. At the time of the events at issue, the applicant was the subject of several complaints which were being investigated.

The directors of the PIPSC placed the applicant on "administrative leave" with pay because they were concerned that her conduct could put the integrity of the investigations at risk. In their view, the applicant had been interfering in the investigations by failing to keep the complaints and the investigation process confidential, ignoring warnings not to speak with the complainants, and accessing information discussed in closed Board meetings.

However, the applicant was not given notice of the motion before the Board or an opportunity to make submissions to the Board before she was placed on administrative leave, nor was the matter referred to a Special General Meeting of the corporation's members.

The applicant brought an application to be reinstated to her position under the "oppression" remedy section 253(1) of the Act, which provides the court with wide discretion to grant relief if it is satisfied, among other grounds, that the exercise of the powers of the directors of the corporation has been oppressive, unfairly prejudicial to, or unfairly disregards the interests of any shareholder, creditor, director, officer or member.

The wording of section 253 is substantially the same as the oppression provision in the *Canada Business Corporations Act* and the general principles of oppression apply: *ACTRA Performers' Rights Society v. Re: Sound*, 2023 ONSC 3533, at paragraph 7.

The courts generally engage in a two-part inquiry for oppression claims: (i) does the evidence support the reasonable expectation asserted by the claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at paragraph 95.

The applicant argued that she had a reasonable expectation that the respondent directors would not suspend her without permitting her to make submissions, providing her with a right of appeal, or seeking the authorization of PIPSC's members at a Special General Meeting. She claimed that she reasonably expected that the respondents would conduct the complaints process and any discipline of her in a manner consistent with PIPSC's By-laws and Policies.

In response, the directors attempted to draw a distinction between administrative leave with pay pending the outcome of an investigation and a disciplinary suspension under PIPSC's Policies. They say that an administrative leave did not constitute a removal from office requiring the authorization of PIPSC's members. They also argued that the applicant's alleged expectation not to be placed on administrative leave was unreasonable because it would "tie the hands" of the Board in its efforts to protect the integrity of the investigations.

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The application judge first turned the issue of whether the applicant was effectively suspended when she was placed on administrative leave. When the applicant was elected as President she agreed to the terms of a written Service Agreement which contained a "President Policy" dealing with allegations of misconduct. The applicant argued that she was not afforded the procedures and protections set out in the relevant governance documents for the corporation including the President Policy.

The application judge commented that the President Policy was consistent with s. 130(1) of the Act which provides that removal of directors can only occur if authorized by members of the corporation by ordinary resolution at a special meeting.

There was, however, no provision in the President Policy, the Service Agreement, or the corporation's by-laws, for placing the applicant on "administrative leave". In the application judge's view, this was akin to suspension, which had specific procedures to be followed.

The court had no hesitation in concluding that administrative leave was functionally equivalent to being suspended. Of note, the corporation's own website suggested that the applicant had been removed from her role as President, giving rise to vacancy to be filled.

Based on the corporation's President Policy, Service Agreement and by-laws, the applicant held a reasonable expectation that she would be afforded procedural fairness and that the corporation would follow due process before suspending her. The President Policy provided her with a right of appeal, and suspension required an ordinary resolution at a Special General Meeting of members. The application judge put no weight on the respondents' various arguments to the contrary.

The penultimate issue was whether the respondents had acted in a manner that was oppressive, unfairly prejudicial to, or unfairly disregarded the applicant's interests. The respondents argued that they complied with the "business judgment rule" since their decision to place the applicant on administrative leave was reasonably necessary and justified to preserve the integrity of the investigations and made in good faith.

The business judgment rule provides for a general judicial deference to decisions of a corporation's board of directors that were made "within a range of reasonableness": *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 1998 CanLII 5121 (ON CA); *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, at paragraph 65.

The application judge stated that it would be premature to make any findings of oppression while the investigations were ongoing and the complaints themselves were not before the court.

In this case, however, the fact that the administrative leave was little different from a formal suspension belied the respondents' position. The process failed to comply with the corporation's own governance documents and the respondents specifically chose to ignore the procedures therein. The decision was therefore a marked departure from any measure of procedural fairness and was unreasonable.

The application judge concluded that the appropriate remedy in the circumstances was to quash the decision of the Board placing the applicant on leave and to immediately reinstate her to the position of President with all the attendant duties, powers and rights. The respondents were further ordered not to exclude the applicant from her role without seeking authorization from the corporation's members at a Special General Meeting that was conducted in accordance with the proper procedures.

The decision does not deal with the distinction between a corporate officer, such as a president, and a director. It is common in the non-profit sector for the members to directly elect a president, who will also serve as a director. Sometimes other officers, such as a vice-president or secretary, will also be elected in this manner. This gives the elected officer a position which differs from that of most officers, who are appointed by and hold office at the discretion of the board. The question left unanswered is whether the board has the power to suspend or terminate an officer who was elected by the members. The CNCA and other non-profit statutes do not provide for this situation, and it will be interesting to see how the courts will deal with it when an appropriate case presents itself.

The decision shows the importance of following a not-for-profit corporation's governance documents and by-laws. Had the board done so, the applicant would likely not have been in a position to object to the result. See our firm's comment on a previous similar situation in which the board also failed to follow the procedures set out in its by-laws and policies: [Court Finds Not-for-Profit Unfairly Terminated Co-President's Membership](#). One wonders whether there will be a different result at the PIPSC Special General Meeting or whether the decision is merely a delay of the inevitable. A PDF version is available for download [here](#).

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