Ontario Courts Utilize "Beneficial Owner" in Oppression Remedy Cases
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Two recent oppression remedy cases affirmed by the Ontario Court of Appeal, applied the definition of "beneficial owner" in the Ontario Business Corporations Act.

The case of *Fedel v. Tan* 2010 ONCA 473 confirmed that the oppression remedy is available to a person who is not a registered shareholder. The case involved a fact situation which the trial judge referred to as an "incorporated partnership".

Fedel and Tan became friends as university students and there was a fourteen year working relationship before litigation commenced. Tan invited Fedel to join him in selling carrageenan, a seaweed extract used a as thickening agent, for a Philippine company owned by his brother-in-law on a commission basis. The friends agreed to split the commission with Tan receiving the larger share because he was to look after the administrative side of the business as well as make sales. The commissions were received and held by Tan outside Canada. Fedel was to receive his share when requested. None of this was documented. The business was successful. Subsequently, a Canadian corporation, GPI, was incorporated to carry on the business in Canada and the friends orally agreed that Tan would be a 60% owner and Fedel would be a 40% owner. On incorporation, shares were issued only to Tan although he apparently assured Fedel that he had a 40% ownership interest.

Fedel worked on both the sales and management sides of the business. He participated in meetings with the company's bankers and played a role in establishing product pricing. The business grew over a decade and by 2006, had accumulated gross sales of greater than $76M.

Fedel became concerned that Tan was improperly depriving him of his rightful interest in the company, using money for personal expenses and using funds for other business opportunities with Tan- controlled corporations. Fedel commenced an oppression action seeking a broad range of remedies including a declaration that Tan held 40% of the shares of GPI for him.

Under the OBCA, only a "complainant" as defined has standing to bring an application for oppression. The term "complainant" is defined to mean a registered holder or beneficial owner of a security, a director or officer, or any other person whom the court in its discretion considers to be a proper person to make an oppression application. The trial court in the exercise of its discretion, held that Fedel was a proper person to bring the application. The question of standing was not decided on the basis of beneficial ownership although a beneficial owner is expressly included in the definition of complainant. The Court of Appeal noted the 14 year business relationship between the parties and affirmed the decision of the trial court.

The oppression remedy serves to protect the interests of a security holder, director or officer. The actions complained of must be oppressive, unfairly prejudicial or unfairly disregard the interests of one of the listed persons.

The term "security holder" is not defined in the legislation but Mr. Fedel was considered a security holder for this purpose. The court looked to the term "beneficial owner" which is defined in the OBCA to include "ownership through a trustee, legal representative, agent or other intermediary". The trial court held that the term "beneficial owner" was to be interpreted broadly and expansively and that same was not limited merely to ownership through a trustee or legal representative, agent or other intermediary. Fedel's equitable rights, by virtue of the oral agreement and Mr. Tan's repeated promises that he had an equity interest, were sufficient to be considered beneficial ownership within the meaning of the OBCA. The Court of Appeal expressly noted that for this purpose, a beneficial owner of shares was a security holder.

The concept of "beneficial ownership" was applied by the Court of Appeal in another oppression remedy case, *Paragon Development Corp. v. Sonka Properties Inc.* 2011 ONCA 30. In this case, a finding of "beneficial ownership" was not used to support an applicant's right to the oppression remedy, but rather applied to rationalize an equitable remedy.

Paragon was the successor by amalgamation of a number of corporations owning real estate in which four families were shareholders - two families in Toronto and two families in Europe. An estate freeze was implemented and it appears that each of the original four families ended up with its own holding company owning shares in the parent corporation, Paragon, the real estate company. The first generation passed away and Mr. Kaiser, a son of one of the first generation families, assumed an active role. Claims ultimately surfaced that he acted in breach of his fiduciary duties as director by advancing funds from Paragon for use in his personal business opportunities and an oppression action ensued. The trial court held that Kaiser was liable to repay in excess of $800,000 to Paragon plus interest. Kaiser was however, apparently insolvent.

Both Paragon and its parent holding company were in the process of winding up. On the winding up, a liquidating distribution would be made to the holding company of each family, including Sonka, the Kaiser family holding company. There was no minute book and limited corporate records for Sonka.

One issue which the trial court considered was whether the liquidating distribution to be made to Sonka could be reduced by the amount owing by Kaiser to Paragon. It was in this context that beneficial ownership was considered. Kaiser asserted that his late wife was the legal and beneficial owner of the shares of Sonka. The trial court considered Kaiser's actions, noted that he was a chartered accountant and thus knew the importance of documenting ownership and suggested that his failure to do was 'to keep his options open". But the trial court also noted that Kaiser had at one point in the litigation offered to repay certain amounts secured by a pledge of the shares of the holding company

owned by Sonka. The court considered that this was "strong evidence of his treatment of Sonka as his personal corporation".

The trial court found that Kaiser was the beneficial owner of the shares of Sonka and applying a look-through type of approach, ruled that the amount to be paid to Sonka on the liquidation could be reduced by the amount payable by Kaiser to Paragon. The theory was that Kaiser as the beneficial owner of Sonka was the person who would benefit from the liquidating distribution, ignoring the separate legal existence of the corporation.

On appeal, the Court of Appeal held that there was no need for an express finding of trust as a prerequisite to a finding of beneficial ownership and citing the *Fedel v. Tan* case, stated that beneficial ownership is not limited to ownership through a trustee. The Court of Appeal held that based on the findings of fact at trial, the trial court had implicitly found Mrs. Kaiser to be bare trustee for Mr. Kaiser.

The above cases illustrate that notwithstanding a failure to properly record beneficial ownership in the corporate records, in an oppression application, a Court will review all relevant facts to ascertain the person with equitable rights to shares and control over same.