

# DIRECTOR LIABILITY: THE CORPORATE VEIL MAY NOT BE PIERCED, BUT IT WILL NOT PROTECT YOU FROM AN OPPRESSION REMEDY CLAIM

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Directors can face personal liability if the corporate veil is lifted, or under the oppression remedy. But when are these remedies appropriate?

The Ontario Court of Appeal's ("**ONCA's**") decision in *FNF Enterprises Inc. v Wag and Train Inc.* [\[1\]](#) provides a framework for when a director may be personally liable under each remedy. The Court reinforced the doctrine of corporate separateness and refused to pierce the veil, but nevertheless ruled that a commercial landlord may pursue an oppression remedy claim personally against a director who value-stripped a corporation when it faced liabilities under a lease.

## Takeaways to Know

- The doctrine of corporate separateness is respected by Ontario courts. The corporate veil should not be pierced in cases where there has been improper conduct, but that conduct did not cause or give rise to the disputed liability.
- Even if the doctrine of corporate separateness is respected, directors may face personal liability under the oppression remedy. If a director uses corporate powers to prefer themselves in priority to stakeholders, personal recourse against the director may be justified.
- If suing a director personally, it may be prudent to plead the oppression remedy in addition to piercing the corporate veil.
- A director value-stripping a corporation may provide grounds for creditors to pursue the oppression remedy personally against a director, especially in a case where the creditor has no effective means of protecting itself from this risk (like through a contract).
- Despite directors owing no fiduciary duties to anyone other than the corporation itself, a creditor may, as in *FNF Enterprises*, use the oppression remedy to protect its reasonable expectations.

## Facts

The appellants were landlords who owned a commercial premise. The landlords leased the premises to the respondent, Wag and Train Inc. (“**W&T**”) in 2015. The lease ended in 2021.

W&T had one sole director, officer, and shareholder: Ms. Ross.

Ms. Ross was sued personally by the landlord, who sought to pierce the corporate veil for alleged improper conduct by Ms. Ross. The landlord also pursued an oppression remedy claim under s. 248 of the *Business Corporations Act* (“**OBCA**”) against Ms. Ross personally for her conduct as a director of W&T.

W&T abandoned the premises early in 2020, left the property in a state of disrepair, stopped paying rent, and relocated to another location and begun operating under a different name. Ms. Ross also stripped all value from W&T, knowing that W&T had incurred liabilities and was in breach of its lease.

### **Piercing the Corporate Veil**

While the lower court ruled that the corporate veil should not be pierced as the pleadings did not disclose fraud, improper conduct, or conduct that exhibits a separate identity from the corporation, the ONCA agreed but for different reasons.

The ONCA began by squarely stating a two-part test to pierce the corporate veil:

1. There must be complete domination or abuse of the corporation by the individual (and not just ownership or control); and
2. There must be fraudulent or improper conduct by the individual that gives rise to the liabilities a plaintiff seeks to enforce.<sup>[2]</sup>

The landlord sought to hold Ms. Ross liable for W&T’s breach of its lease, which consisted of arrears, the remainder of rent that was supposed to be paid, and the state of disrepair of the property. The ONCA stated that for the corporate veil to be pierced, “the wrongful conduct alleged against Ms. Ross must have given rise to those lease liabilities.”<sup>[3]</sup>

To make this argument out, the landlord argued that: (1) Ms. Ross made the decision of W&T to breach its lease, and that (2) she treated W&T’s assets and business as her own, stripping value from W&T knowing of the lease liabilities.<sup>[4]</sup>

In respect of argument 1, the ONCA ruled that a director or officer deciding that a corporation should breach a contract does not constitute fraudulent or improper conduct sufficient to pierce the veil.<sup>[5]</sup>

In respect of argument 2, the ONCA ruled that because Ms. Ross stripped value from W&T knowing of its lease liabilities, as opposed to Ms. Ross causing a breach of lease by stripping value from W&T, the veil could not be

pierced. This is because the lease liability is what the landlord sought to impose on Ms. Ross – thus, to pierce the veil, improper conduct on the part of Ms. Ross must have given rise to the lease liability.<sup>[6]</sup> On the facts, the conduct pleaded (stripping value) took place after the lease liabilities arose. Consequently, the link between the wrongful conduct, and the liabilities sought to be imposed on Ms. Ross personally, was missing.<sup>[7]</sup>

*FNF Enterprises* provides comfort to directors of closely held corporations that to be liable personally, any alleged fraudulent or improper conduct *must* be the *source* of the liability a plaintiff seeks to impose on you. If such conduct does not cause the corporation's liability, the veil should not be pierced.

### **The Oppression Remedy Claim**

For an oppression remedy claim under s. 248 of the OBCA to succeed, the complainant must:

1. Identify that it held reasonable expectations which have been violated by the conduct at issue; and
2. Show that the expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of any stakeholder.<sup>[8]</sup>

To have oppression remedy relief granted against a director, as opposed to the corporation, two further criteria must be met:

1. The director must have a requisite degree of involvement in the oppressive conduct; and
2. Personal liability must be fit in the circumstances.<sup>[9]</sup>

The lower court rejected the oppression remedy claim. It reached the conclusion that Ms. Ross, as the sole shareholder of W&T, was entitled to use W&T's money as her own, and that the oppression remedy cannot be used to "refashion" a contract with a corporation to, in effect, make the directing mind a personal guarantor.

The ONCA rejected the lower court's finding. It identified that "the obtaining of a personal benefit by the director, or the director misusing a corporate power" are situations where it is typically fair to impose personal liability on the director.<sup>[10]</sup>

The ONCA concluded that the motion judge erred, as the judge regarded the landlord as a creditor who *could*, but *did not*, protect itself from the risk of value stripping via a contract with W&T. Rather, the fact was that the landlord was truly a creditor which "finds his interest as a creditor compromised by unlawful and internal corporate maneuverers against which the creditor cannot effectively protect itself", such that the landlord was entitled to "much more room for relief under the oppression provisions" as opposed to a creditor who could protect itself from risk via contract.<sup>[11]</sup>

Further, the motion judge was incorrect to rule that Ms. Ross, as the sole shareholder, could use W&T's money as her own. A shareholder does not have a right to a corporation's assets while it is ongoing.<sup>[12]</sup> Additionally, Ms.

Ross as sole director could not confer benefits upon herself as the power of a director to declare a dividend to shareholders is subject to the corporation being able to pay its creditors (the landlord).<sup>[13]</sup>

In the end, the oppression remedy test was passed. There was a reasonable expectation that value would not be stripped from W&T to avoid lease liabilities.<sup>[14]</sup> A personal remedy was also fit as the stripping of value in priority to unpaid creditors was a misuse of corporate powers to Ms. Ross' own benefit, which makes a personal remedy fair.<sup>[15]</sup>

[1] [2023 ONCA 92](#) [*FNF Enterprises*].

[2] *FNF Enterprises* at para 20.

[3] *FNF Enterprises* at para 22.

[4] *FNF Enterprises* at para 23.

[5] *FNF Enterprises* at para 24.

[6] *FNF Enterprises* at para 26.

[7] *FNF Enterprises* at para 28.

[8] *FNF Enterprises* at para 31.

[9] *FNF Enterprises* at para 33.

[10] *FNF Enterprises* at para 34.

[11] *FNF Enterprises* at para 38.

[12] *FNF Enterprises* at para 40; OBCA s. 221(1)(a); *BCE Inc. v 1971 Debentureholders*, [2008 SCC 69](#) [*BCE Inc.*].

[13] *FNF Enterprises* at para 40; OBCA s. 38(3).

[14] *FNF Enterprises* at para 41; *BCE Inc.* at para 62.

[15] *FNF Enterprises* at para 42.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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