CITATION: First Walden Holdings Inc. v. Fenton, 2025 ONSC 4355
DIVISIONAL COURT FILE NO.: 159/25
DATE: 20250818

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Lococo and Shore JJ.

BETWEEN:	
FIRST WALDEN HOLDINGS INC., KRIS FERGUSON and WALDEN ELECTRICAL LTD. Applicants (Appellants)	*Harvin D. Pitch* and *Adam Brunswick*, for the Applicants (Appellants)
– **and** –	
BRENDON FENTON, NICHOLAS GATIEN and POWERNORTH UTILITY CONTRACTORS INC. Respondents (Respondents)	*Joseph Groia* and *Leanne Gruppuso*, for the Respondents (Respondents)
	HEARD at Toronto: July 9, 2025

REASONS FOR JUDGMENT

R. A. Lococo J.

I. Introduction

[1] The appellants First Walden Holdings Inc., Walden Electrical Ltd. and Kris Ferguson appeal the judgment of Justice Grant R. Dow of the Superior Court of Justice dated January 17, 2025 ("Judgment"), with reasons reported at 2025 ONSC 359 ("Reasons").

[2] First Walden Holdings Inc. and Walden Electrical Ltd. (together, "Walden") operate a low voltage electrical contracting business. The respondent PowerNorth Utility Contractors Inc. ("PowerNorth") is a high voltage electrical contractor, which began operations from Walden's premises in 2020. Walden provided PowerNorth with financial support and shared services and also introduced PowerNorth to significant business. The parties entered into a non-binding term sheet, which contemplated (among other things) that Walden would have a 45 percent interest in PowerNorth, subject to completion of several proposed transaction documents. PowerNorth was

soon engaged in significant business, but the parties' relationship broke down before the transaction documents were completed.

[3] Walden and their Chief Executive Officer brought an oppression application against PowerNorth and its principals pursuant to s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*"). Among other things, the appellants sought the issuance to Walden of 45 percent of PowerNorth's shares or the fair value of those shares. The application judge allowed the application but did not provide the remedy the appellants sought.

[4] The application judge found that the appellants were proper "complainants", entitled to claim the oppression remedies available under s. 248 of the *OBCA*. However, the application judge concluded that the issuance of a 45 percent ownership interest in PowerNorth to Walden would not be a suitable remedy. Instead, the application judge ordered respondents to pay the appellants $399,441.90 (including interest), to compensate them for Walden's investment in PowerNorth, shared services Walden provided, and the use of Walden's premises and equipment.

[5] The appellants submit that the application judge erred in his analysis by failing to determine and give effect to the appellants' reasonable expectation that Walden would become a 45 percent shareholder of PowerNorth. The appellants ask the court to set aside the Judgment and order PowerNorth to issue 45 percent of its shares to Walden or pay Walden the fair value of those shares.

[6] For the reasons below, I would dismiss the appeal.

II. Background

[7] In the Reasons, the application judge set out the factual background of the dispute between the parties. In oral argument, counsel for both sides confirmed that the application judge's factual findings (summarized below) are not in dispute.

[8] Walden is a long-established electrical contractor based in Sudbury. The applicant Kris Ferguson is Walden's Chief Executive Officer. Walden's business involves low voltage electrical installation and maintenance: Reasons, at para. 2.

[9] PowerNorth is a high voltage electrical contractor that commenced operations in Sudbury in 2020. Its co-founders and principals are the respondents Nicholas Gatien and Brendan Fenton: Reasons, at para. 3.

[10] Mr. Gatien had expertise in high voltage electric work, gained from previous employment with a company that his grandfather founded. Mr. Gatien's father was the subsequent majority owner of that company, which had recently been sold. Mr. Gatien had a desire to start his own business but lacked the infrastructure to do so. He began discussions with Walden in early 2020: Reasons, at para. 4.

[11] Mr. Gatien began operating PowerNorth out of an equipment shop on Walden's premises in July 2020, while negotiations with Walden were proceeding. Walden acknowledged that Mr. Gatien was not to be an employee of Walden but was seeking to build his own business. Mr.

Gatien's father was also involved in the negotiations with Walden, including as set out in emails from Mr. Gatien's father to Walden. Those emails related to "Shared Services" Walden would provide to Power North and lease arrangements for the premises, which were to be "free of charge" for the first two years: Reasons, at paras. 5-6.

[12] In October or November 2020, the parties reached agreement on a "Non-Binding Term Sheet", setting out PowerNorth's intended corporate structure. Walden was to own 45 percent of PowerNorth's common shares. Walden was to (and did) invest $100,000 and provided shared services and infrastructure, as contemplated in the emails from Mr. Gatien's father. Mr. Ferguson and Mr. Gatien were to be directors of PowerNorth: Reasons, at para. 7.

[13] The Non-Binding Term Sheet provided that it was not a binding agreement, stating that it "will not impose any obligation or liability on any such Party if such transaction is not consummated. Any such agreement will be made only and if and when the Transaction Documents are agreed to and executed": Reasons, at para. 8. No provision was made for what would happen if no final agreement was reached: Reasons, at para. 9.

[14] With Walden's assistance, PowerNorth became successful, but progress toward completion of the Transaction Documents "languished". The application judge found it "relevant and important that no documented complaint was made about the assistance Walden was providing until early 2022 and the respondents' refusal to proceed with executing Transaction Documents": Reasons, at para. 10.

III. Oppression application and decision

[15] In June 2020, the appellants brought an oppression application, seeking a remedy against the respondents under s. 248 of the *OBCA*, which is in Part XVII of that statute (Remedies, Offences and Penalties). The relevant part of s. 248(1) provides:

> **Oppression remedy**
> **248(1)** A complainant … may apply to the court for an order under this section.

[16] The term "complainant" is defined in s. 245 as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. [Emphasis added.]

[17] For an order to be made under s. 245, the court must be satisfied that the conduct complained of "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation", in which case "the court may make an order to rectify the matters complained of": *OBCA*, s. 245(2). In connection with an

oppression application, the court may make "any interim or final order it thinks fit", including without limitation, the 14 types of orders specified in s. 245(3).

[18] In their oppression application, the appellants sought 15 heads of relief that included;

a. A declaration that Mr. Gatien and Mr. Fenton engaged in oppressive conduct with respect to the business affairs of PowerNorth;

b. An order appointing Mr. Ferguson as a director of PowerNorth;

c. An order requiring the issuance to Walden of shares of PowerNorth representing 45 percent of its issued shares; and

d. An order requiring Mr. Gatien and Mr. Fenton to purchase Walden's PowerNorth shares at fair value or, in the alternative, requiring that all the shares of PowerNorth be sold, with the appellants receiving 45 percent of the net proceeds.

[19] Before the application judge, the respondents argued that the appellants were not proper "complainants" (as defined in s. 245) entitled to claim the oppression remedies available under s. 248. The respondents contested the appellants' reliance on the decision of the Court of Appeal for Ontario in *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481, leave to appeal refused, [2010] S.C.C.A. No. 360, where the court stated that subparagraph (c) of the "complainant" definition provides the court with "a broad discretion to determine who is a proper person to bring an application under s. 248": *Fedel*, at para. 68. The respondents sought to distinguish *Fedel*, arguing that the factual basis for that decision was far stronger in that case: Reasons, at para. 13. The application judge rejected that submission, stating, at para. 14:

> The fact that the parties reduced their business relationship to writing where Walden was to be an issued 45 percent of the common shares (which did not occur) and invest $100,000 plus provide itemized services (which did occur) is compelling. I am satisfied Walden's investment would not have occurred without some prospect of a return on same if the business was successful and that the investment of cash and services significantly increased PowerNorth's likelihood of success.

[20] In their submissions before the application judge, the respondents contested the appellants' reliance on the Non-Binding Term Sheet as a basis for finding that the appellants were proper complainants, citing the Court of Appeal's decision in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.). The application judge rejected that submission, stating that "while the 'Non-Binding Term Sheet' may not be enforceable, I find it can be utilized as evidence in the form of determining whether the applicant can be found to be a 'complainant' under the *Business Corporations Act*": Reasons, at para. 16.

[21] As a result, the application judge found the appellants to be proper complainants under s. 245 of the *OBCA* "and entitled to claim the remedies available under section 248": Reasons, at para. 17; see also Judgment, at para. 1(a). In support of that finding, the application judge also noted the broad scope of the court's authority under s. 248(3) to make any interim or final order, including "14 different possible orders", without limitation: Reasons, at para. 18.

[22] At paras. 19-20 of the Reasons, the application judge went on to state:

> I find it is clear PowerNorth has become more successful and done so more quickly as a result of the initial assistance from Walden. In fact, during submissions it was raised that PowerNorth refused to provide its more recent financial statements. This raises the inference it has been more successful than it wishes to disclose.
>
> I also find it is clear that these parties no longer wish to nor should be business partners. That is, directing Walden be issued a 45 percent ownership interest in PowerNorth would not be a suitable remedy. Both companies appear to be successful and should be allowed to continue with a minimum of interference by, for example, the involvement of receivers, valuators, or court intervention.

[23] In the Reasons, at paras. 22-28, the application judge set out the elements of an award of $399,441.90, payable by the respondents to the appellants, as follows:

a. $100,000 to repay Walden's cash injection into PowerNorth;

b. $8,486.01 for use of a trailer on Walden's premises;

c. $87,400 in rent for the use of Walden's premises;

d. $61,200 for the use of other Walden equipment, including a truck;

e. $71,250 for shared services including the value of controller services, accounting software and administrative support; and

f. $71,105.89 in interest, as noted further below.

[24] In calculating the amount due to Walden, the application judge declined to award a portion of PowerNorth's profits, explaining, at para. 27 of the Reasons:

> Regarding a claim for a portion of the profits of PowerNorth, I decline to do so. The main reason would be the non-binding term sheet was never completed. I also have concerns about the incomplete financial records of PowerNorth given they were limited to 2021 and the lack of clarity over the statement of earnings of $617,681. However, PowerNorth clearly had the benefit of Walden's investment as of late 2020 and ongoing support through to April, 2022. As a result, I have determined it would be appropriate to award interest in accordance with the discretion available to me under Section 130 of the *Courts of Justice Act*, R.S.O. [1990,] c. C.48.

[25] At para. 27, the application judge calculated interest on amounts due to the appellants from December 2020 to April 2022 at the rate of six percent per annum, for a total $71,105.89, as noted above.

[26] In his subsequent costs decision dated March 20, 2025 (2025 ONSC 1709), the application judge gave effect to the respondents' submission that each side should bear their own costs, on the basis of divided success.

[27] By Notice of Appeal dated February 18, 2025, the appellants appeal the Judgment.

IV. Jurisdiction and standard of review

[28] The Divisional Court has jurisdiction to hear an appeal from a court order under the *OBCA*: see *OBCA*, s. 255. The appellate standards of review apply, as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10, 19, 26-37.

[29] The standard of review is correctness for questions of law, including legal principles extricable from questions of mixed fact and law.

[30] The standard of review is palpable and overriding error for questions of fact and for questions of mixed fact and law (where there is no extricable question of law) including with respect to the application of correct legal principles to the facts.

[31] A palpable and overriding error is an obvious error that is sufficiently significant to vitiate the challenged finding: *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 39. The appellant must show that the error goes to the root of the challenged finding such that it cannot safely stand in the face of the error: *Waxman v. Waxman* (2004), 186 O.A.C. 201 (C.A.), at para. 297, leave to appeal refused, [2004] S.C.C.A. No. 291.

V. Issues to be determined

[32] The appellants submit that the application judge erred in his analysis by failing to determine and give effect to the appellants' reasonable expectation that Walden would become a 45 percent shareholder of PowerNorth. The appellants ask the court to set aside the Judgment and order PowerNorth to issue 45 percent of its shares to Walden or pay Walden the fair value of those shares.

[33] The appellants say that the application judge made the following errors:

a. The application judge erred in failing to consider the appellants' reasonable expectations before fashioning a remedy for oppression;

b. The application judge erred in failing to find that the appellants' reasonable expectation was that PowerNorth would issue shares to Walden; and

c. The application judge erred in declining to order PowerNorth to issue shares to Walden or to pay the shares' fair value to Walden.

[34] As explained below, I have concluded that the application judge did not make any reversible errors.

VI. Analysis

A. The application judge did not err by failing to consider the appellants' reasonable expectations

[35] The appellants argue that the application judge erred in his analysis by failing to consider the appellants' reasonable expectations before determining a remedy for oppression.

[36] The appellants submit (and the respondents do not dispute on appeal) that the application judge was correct in deciding that the appellants were proper complainants who were entitled to assert an oppression claim under s. 248 of the *OBCA*. The appellants argue, however, that having done so, the application judge erred in failing to consider whether the respondents engaged in oppressive conduct, which involves answering the following questions (see *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 68):

a. Does the evidence support the reasonable expectation that the claimants assert?

b. 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?

[37] The appellants submit that the application judge did not consider what their reasonable expectations were, nor did he analyze whether there was oppression, but simply determined that the appellants were proper complainants and then proceeded with crafting a remedy for oppression under s. 248. The appellants say that in doing so, the application judge made an extricable error of law.

[38] Among other things, the appellants argue that the application judge failed to consider (or erred in considering) factors that the Supreme Court indicated are useful in determining whether a reasonable expectation exists, as outlined in *BCE*, at para. 72:

> Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. [Emphasis added.]

[39] The appellants note in particular the alleged inconsistency in the application judge's analysis relating to the Non-Binding Term Sheet. In the Reasons, at para. 16, the application judge properly relied on that document in finding that the appellants were complainants under s. 245, while noting that the document "may not be enforceable". However, when explaining why he declined to award a portion of PowerNorth's profits to the appellants, the application judge inconsistently stated that the "main reason would be the non-binding term sheet was never completed" and also expressing "concerns about the incomplete financial records of PowerNorth": Reasons, at para. 27.

[40] As discussed further in the next section of these reasons, the appellants submit that while the parties did not initially intend the Non-Binding Term Sheet to be an enforceable agreement unless all the Transaction Documents were completed, the parties waived that condition by acting as though they had a binding agreement. In support of that position, the appellants noted Walden's $100,000 cash injection into PowerNorth, shared services Walden provided, and PowerNorth's use of Walden's premises and equipment. The appellants also rely on evidence in the application record that Mr. Gatien provided "sign-off" on a final draft Shareholders' Agreement, which the respondents ultimately refused to sign. The appellants say that as a result of the parties' conduct, the Non-Binding Term Sheet became an enforceable agreement.

[41] The appellants argue that the application judge made an extricable error of law by failing to properly assess the appellants' reasonable expectations, which in turn, precluded him from arriving at an appropriate remedy. The appellants say that their reasonable expectations were that the parties had a binding agreement, and that Power North would fulfill its obligations under the agreement. The appellants submit that PowerNorth's failure to issue shares to Walden after the appellants had performed their substantive obligations violated that agreement. They say that the appropriate oppression remedy that gave effect to the appellants' reasonable expectations would have provided Walden with those shares or their true value.

[42] As explained below, the appellants have not established that the application judge erred in law by failing to consider the appellants' reasonable expectations before determining a remedy for oppression.

[43] While the application judge did not explicitly set out the well-known two-part test for oppression, that does not amount to an error, and it does not mean that the test was not properly applied. The same error was alleged and rejected in *Kikites v. York Condominium Corporation No. 382*, 2024 ONCA 34, an appeal from a decision in an oppression application arising under a parallel provision of the *Condominium Act, 1998*, S.O. 1998, c. 19. In doing so, the court, at para. 33, cited as instructive the following passage from a criminal decision, *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para 74, which the court indicated also applied in non-criminal cases:

> Legal sufficiency is highly context specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application – the presumption that "the trial judge understands the basic principles of criminal law at issue in the trial" …. As stated in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, "[t]rial judges are presumed to know the law with which they work day in and day out"…. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles. [Citations omitted.]

[44] In *Kikites*, the appellant argued that the application judge failed to state and then properly apply the two-part test for oppression recognized in the case-law: *Kikites*, at para. 32. The Court of Appeal rejected that submission, finding that the application judge's reasons, "when read as a whole … reveal an appreciation of the principles engaged by [the oppression] provision": *Kikites*,

at para. 34. The court further held that in reviewing an application judge's reasons where oppression is alleged, the two steps of the oppression test may tend to merge; failure to consider the two steps separately does not itself amount to an error: *Kikites*, at paras. 35-39.

[45] As noted above, the application judge is presumed to know the two-part test for oppression, relating to the claimant's reasonable expectations. Before the application judge, there was no dispute as to the applicable test. At para. 17 of the Reasons, the application judge found that the appellants were "entitled to claim the remedies available under section 248" of the *OBCA* and proceeded to fashion a remedy available under that provision. Reading the Reasons as a whole, it is clear that the application judge considered the respondents' conduct and decided that it constituted oppression within the meaning of s. 248(2), a conclusion that the respondents do not dispute on appeal. I do not agree with the appellants that in reaching that conclusion, the application judge erred by failing to consider their reasonable expectations.

[46] With respect to the first step of the oppression test, the application judge considered applicable factors for determining the appellants' reasonable expectations (which the Supreme Court identified non-exclusively in *BCE*, at para. 72), including "the relationship between the parties", "steps [Walden] could have taken to protect itself", "representations and agreements", and "the fair resolution of conflicting interests". In the Reasons, the application judge made the following findings of fact relating to the appellants' reasonable expectations:

a. "The fact that the parties reduced their business relationship to writing where Walden was to be issued 45 percent of the common shares (which did not occur) and invest $100,000 plus provide itemized services (which did occur) is compelling" [*relationship between the parties*]: Reasons, at para. 14;

b. The Non-Binding Term Sheet is not enforceable and was never completed (Reasons, at paras. 16, 37) and did "not impose any obligation or liability on any such Party if such transaction [was] not consummated. Any such agreement [would] be made only and if and when the Transaction Documents are agreed to and executed" [*representations and agreements*]: Reasons, at para. 8;

c. Walden's understanding that Mr. Gatien was not to be an employee of Walden but was seeking to build his own business, and that Mr. Gatien was presented with but did not sign an employment contract with Walden [*representations and agreements*]: Reasons, at para. 5;

d. The parties' understanding that Walden was to provide Shared Services to PowerNorth, as well as "premises to be occupied and rent to be paid. Importantly, the first two years from September 20, 2020 are to be free of charge" [*representations and agreements*]: Reasons, at para. 6;

e. No provisions were made for how the investment by each party was to be divided if no final agreement was reached [*steps Walden could have taken to protect itself*]: Reasons, at para. 6;

f. "Walden's investment would not have occurred without some prospect of a return on same if the business was successful", and that the investment of cash and services significantly increased PowerNorth's success [*Walden's reasonable expectations*]: Reasons, at para. 14; and

g. "[T]hese parties no longer wish to nor should be business partners. That is, directing Walden be issued a 45 percent ownership interest in PowerNorth would not be a suitable remedy" [*the fair resolution of conflicting interests* and *Walden's reasonable expectations*]: Reasons, at para. 20.

[47] Read as a whole, the Reasons also demonstrate that the application judge considered the second part of the oppression test and made findings about whether Walden's reasonable expectations were violated as a result of the respondents' conduct.

[48] Among other things, the application judge rejected the respondents' explanation as to why they ultimately refused to complete the Transaction Documents, finding that it was "relevant and important that no documented complaint was made about the assistance Walden was providing [to PowerNorth] until early 2022 and the respondents' refusal to proceed with executing Transaction Documents": Reasons, at para. 10. The application judge also found that PowerNorth became more successful more quickly as a result of Walden's assistance ("more successful than [PowerNorth] wishes to disclose", given its refusal to provide recent financial statements), that Walden's investment of cash and services significantly increased PowerNorth's success, and that Walden's investment would not have occurred without some prospect of a return if the business was successful: Reasons, at paras. 14, 19.

[49] As discussed further below, the application judge went on to fashion a remedy under s. 248 of the *OBCA* that reflected the value of the appellants' investment in PowerNorth plus interest: Reasons, at paras. 20-28.

[50] Accordingly, I do not agree that the application judge erred in his analysis by failing to consider the appellants' reasonable expectations before determining a remedy for oppression. While he did not expressly set out the two-part test for oppression, it is clear from the Reasons, read as a whole, that the application judge considered the respondents' conduct and decided that it constituted oppression within the meaning of s. 248(2). He did so after considering (and making findings of fact relating to) the appellants' reasonable expectations and whether they had been violated. I see no basis for appellate intervention.

B. The application judge did not err in failing to find that the appellants' reasonable expectation was that PowerNorth would issue shares to Walden

[51] The appellants submit that the application judge erred in failing to find that their reasonable expectation was that PowerNorth would issue shares to Walden.

[52] As previously noted, the appellants say that their reasonable expectation was that the respondents would perform their obligations under the Non-Binding Term Sheet, which became a binding agreement after being substantively performed by the parties. In *Bawitko*, at p. 104, the Court of Appeal explained that as a matter of business practice, it is not unusual for parties planning

to enter into a formal written agreement to settle the terms of the agreement before the formal document is executed, thereby making it a binding "contract to make a contract":

> When [the parties] agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

[53] The appellants submit that other than the respondents' refusal to sign the Shareholders' Agreement and issue 45 percent of PowerNorth's shares to Walden, the parties performed their obligations under the Non-Binding Term Sheet, in particular as to Walden's supply of shared services and the premises lease. The appellants say that their reasonable expectation was that PowerNorth would honour its obligations by issuing its shares to Walden.

[54] In addition to *Bawitko*, the appellants rely on other caselaw to support their position that the Non-Binding Agreement became an enforceable agreement. For example, in *Wallace v. Allen*, 2009 ONCA 36, 93 O.R. (3d) 723 (C.A.), the Court of Appeal found that the parties to a Letter of Intent relating to the sale of a business were bound to complete the transaction in the absence of a final written agreement, even though the Letter of Intent stated that it "must be reduced into a binding agreement of purchase [and] sale by the parties within the next 40 days." The court found that the Letter of Intent, when read as a whole, evidenced the intention that the parties be bound: *Wallace*, at para. 27. The court also found that "the conduct of the parties after signing the Letter of Intent clearly demonstrates that the parties considered themselves legally bound to its terms": *Wallace*, at para. 32.

[55] As explained below, the appellants have not established that the application judge erred in failing to find that their reasonable expectation was that PowerNorth would issue shares to Walden equal to 45 percent of the outstanding shares.

[56] As the application judge stated in the Reasons, at para. 15, the passage in *Bawitko* relating to a binding "contract to contract" should be read in conjunction with the following paragraph of that decision:

> However, when … the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all.

[57] *Bawitko* related to a proposed franchise agreement, under which the appellant would grant to the respondent a franchise to operate a retail store. The proposed franchisor provided a draft formal agreement, and the parties orally agreed to certain terms of the agreement. On the facts of that case, the Court of Appeal found that the parties' oral agreement did not constitute a binding contract to make a contract, since the oral agreement "did not encompass essential elements of the intended formal agreement. Accordingly, it did not satisfy the standards of certainty which the law

requires as a prerequisite to incurring binding and enforceable contractual relations": *Bawitko*, at p. 108.

[58] In *Wallace*, the Court of Appeal reached the opposite conclusion, finding on the facts of that case that the Letter of Intent constituted a binding agreement. At paras. 27-30, the Court of Appeal found that the language of the Letter of Intent, when read as a whole, "evidences the intentions of the parties to be bound", including by "critical clauses" that were "clear and unambiguous", referring to the document as "this agreement". That was not the case with the Non-Binding Letter of Intent signed by the parties in this case.

[59] Contrary to the appellants' submission, the evidence before the application judge did not establish that the Non-Binding Term Sheet became a binding agreement, under which PowerNorth was obligated to issue 45 percent of its outstanding shares to Walden. The application judge made no such finding. The application judge relied on the Non-Binding Term Sheet to support his finding (now undisputed) that the appellants were proper complainants within the meaning of s. 245 of the *OBCA*: Reasons, at paras. 16-17. However, he declined to give effect to the appellants' claim for a portion of PowerNorth's profits, finding that the Non-Binding Term Sheet "was never completed": Reasons, at para. 27. I see no error in his doing so.

[60] The Non-Binding Term Sheet expressly provided that it was "not a binding agreement", contemplating that the parties would fully execute 11 other Transaction Documents before PowerNorth became obligated to issue any shares to Walden. At the time that the relationship broke down in early 2022, no Share Purchase Agreement had been finalized or executed, and the parties were still exchanging comments on the other draft Transaction Documents. Only one of the Transaction Documents (a financing facility) had been executed.

[61] As previously noted, in the process of their discussions related to the Non-Binding Letter, Walden and PowerNorth reached a level of agreement about certain components of the proposed transaction, including Walden's provision of shared services and the use of its premises and equipment. However, the evidence does not support the conclusion that there was final agreement on aspects of even those matters. Like the result in *Bawitko*, the evidence does not establish that the parties had a binding agreement relating to "essential elements" of the Non-Binding Letter of Intent", including the Shareholders' Agreement intended to govern the intended holders of PowerNorth's shares. As the appellants submit, "it is possible for an agreement 'subject to contract' … to become legally binding if the parties later agree to waive that condition": *RTS Flexible Systems Ltd. v. Molkerei Alois Müller Gmbh & Co. KG*, [2010] UKSC 14, [2010] 3 All E.R. 1, at para. 55. However, contrary to the appellants' position, I see no basis for concluding that the parties by their conduct waived the requirement to finalize and execute the Transaction Documents before the parties become bound by the terms of the Non-Binding Letter of Intent.

[62] Accordingly, the appellants have not established that there was a binding agreement that PowerNorth would issue shares to Walden or a reasonable expectation of such issuance. In these circumstances, I see no basis for concluding that the application judge erred in failing to find that the appellants' reasonable expectation was that PowerNorth would issue shares to Walden.

C. The application judge did not err in declining to order PowerNorth to issue shares to Walden or to pay Walden the fair value of those shares

[63] The appellants submit that the application judge erred in declining to order PowerNorth to issue 45 percent of its shares to Walden or to pay Walden the fair value of those shares.

[64] While the application judge awarded an oppression remedy to the appellants under s. 248 of the *OBCA*, it was not the remedy the appellants requested. The application judge declined to direct PowerNorth to issue 45 percent of its outstanding common shares to Walden, finding that it would not be a suitable remedy: Reasons, at para. 20. He also declined to award a portion of PowerNorth's profits to Walden: Reasons, at para. 25. Instead, he ordered the respondents to pay the appellants $399,441.90 (including interest), to compensate them for Walden's investment in PowerNorth, shared services Walden provided, and the use of Walden's premises and equipment.

[65] The appellants submit that since the Non-Binding Term Sheet was a binding agreement, their reasonable expectation was that the parties would carry out their obligations under that agreement, including PowerNorth's obligation to issue 45 percent of its shares to Walden. In the previous section of these reasons, I found that the appellants have not established that there was a binding agreement that PowerNorth would issue shares to Walden or a reasonable expectation of such issuance. My reasons for doing so support the conclusion that the application judge did not err in declining to order PowerNorth to issue shares to Walden or to pay Walden the fair value of those shares.

[66] As set out in the Reasons, at paras. 13-17, the application judge accepted the appellants' submission that they were proper complainants under s. 245 of the *OBCA*, including their reliance on the Court of Appeal's statement in *Fedel v. Tan*, at para. 68, that an application judge had a "broad discretion" to make that determination. The decision in *Fedel* is also instructive when considering the issue of remedy for oppression.

[67] In *Fedel*, the parties entered into an oral agreement that the applicant was to have a 40 percent ownership interest in a company and the respondent was to have the other 60 percent. No shares were ever issued to the applicant, but he relied on the respondent's promise and made significant contributions to the business for ten years. The applicant brought an oppression application, which was allowed at first instance. The applicant was awarded financial compensation, but the application judge declined to direct the respondent to deliver 40 percent of the company's shares to the applicant. Upon the applicant's cross-appeal, the Court of Appeal upheld that decision.

[68] With respect to the remedy for oppression, the Court of Appeal stated, at para. 100:

> Section 248 is remedial legislation that provides a court with considerable latitude in deciding on a fair and just remedy in the circumstances of a particular case. A trial judge's decision with respect to an appropriate award of compensation under s. 248 of the OBCA is entitled to considerable deference in this court.

[69] In deciding to defer to the application judge's remedial decision, the Court of Appeal noted the application judge's finding that the relationship between the parties was beyond repair militated

against directing the transfer of shares to the applicant: *Fedel*, at para. 101. The court also noted (among other things) that the application judge was in a better position to appreciate the whole of the evidence, including the opportunity to hear the parties' testimony and assess their reliability in reaching his conclusions, which were entitled to deference: *Fedel*, at paras. 102-5.

[70] The respondents rely on *Fedel* to support their position that this court should not interfere with the application judge's remedial order. The appellants disagree. They argue in reply that *Fedel* is distinguishable on its facts, including by reason of the generous financial award the applicant received even after waiting ten years to bring the matter to court.

[71] I disagree. As in *Fedel*, the application judge considered whether directing the issuance of shares to Walden was a "suitable remedy" and appropriately decided against it, since "these parties no longer wish to nor should be business partners": Reasons, at para. 20. He also declined the appellants' claim for a portion of PowerNorth's profits and fashioned a substantive remedy to reflect the value of the appellants' investment in PowerNorth (plus interest). He did so with the benefit of the parties' testimony and extensive documentary evidence in the application record.

[72] As was the case in *Fedel*, I see no basis for interfering with the application judge's decision on remedy. It is entitled to deference.

VII. Disposition

[73] For the above reasons, I would dismiss the appeal and order the appellants to pay costs of the appeal to the respondents in the agreed amount of $25,000 all inclusive.

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Lococo J.

I agree

_____

Backhouse J.

I agree

_____

Shore J.

Date: August 18, 2025

CITATION: First Walden Holdings Inc. v. Fenton, 2025 ONSC 4355
DIVISIONAL COURT FILE NO.: 159/25
DATE: 20250818

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Lococo and Shore JJ.

BETWEEN:

FIRST WALDEN HOLDINGS INC., KRIS FERGUSON and WALDEN ELECTRICAL LTD.

Applicants (Appellants)

– and –

BRENDON FENTON, NICHOLAS GATIEN and POWERNORTH UTILITY CONTRACTORS INC.

Respondents (Respondents)

REASONS FOR JUDGMENT

R. A. Lococo J.

Date: August 18, 2025