

Shareholders' Remedies*

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Introduction

When advising business clients about doing business in Canada,¹ lawyers must turn their minds not only to the kinds of corporate vehicles which Canadian law permits but also the remedies permitted if disputes arise. In this paper, we highlight the range of remedies available in the common law jurisdictions of Canada to protect shareholders and others from abusive corporate action.

Canadian corporate statutes² place few hurdles in the way of achieving incorporation. Any individual over 18 years of age who is of sound mind and is not a bankrupt, or any corporation, may incorporate a company simply by signing articles of incorporation and presenting them to the appropriate government ministry for stamping and registration.

In the face of this enabling philosophy, corporate law has been described as a form of constitutional law that attempts to regulate the rights and obligations of those who participate in or who are affected by the corporation³. A central theme of this regulation is "the struggle to balance the protection of corporate stakeholders and the ability of management to conduct the affairs of the company in an efficient manner without undue interference".⁴

¹ Canada is divided into 10 provinces and three territories. Corporate law statutes have been enacted by each of the Canadian provinces and by the federal Parliament of Canada. These include Business Corporations Act(s) and Securities Acts. Many of these are may be accessed online at www.canlii.org. The Ontario Business Corporations Act to which reference is made in this paper is found online at www.canlii.org/on/laws/sta/b-16/index.html. The Ontario Securities Act is online at www.canlii.org/on/laws/sta/s-5/index.html. Anglo-Canadian common law principles are applicable throughout Canada except for the province of Quebec, which has a Civil Code. Statutes enacted by the federal Parliament are applicable across Canada. Provincial statutes in the common law provinces are not fully harmonized but tend to be similar. Readers are cautioned, however, to verify the applicable law in Quebec.

² See f.n. 1.

³ J.S. Ziegel et al., *Cases and Materials on Partnerships and Canadian Business Corporations*, 3rd ed. (Toronto: Carswell, 1994) at 925

⁴ D.H. Peterson, *Shareholder Remedies in Canada* (Toronto: Butterworths, 1989) at 1.6

We will begin by discussing the various sources of shareholder rights, including corporate statutes, articles of incorporation and by-laws, and shareholder agreements. Although securities laws will also be briefly mentioned, the securities regime is exceedingly complex and it is beyond the scope of this paper to address it in detail.⁵

We will then discuss the remedies provided by corporate statute to shareholders who are aggrieved by the manner in which management conducts the business and affairs of the corporation, including voting, court-ordered meetings, derivative actions, the oppression remedy, investigations, appraisals and court-ordered winding-up on the “just and equitable principle”.

The oppression remedy section, widely acknowledged to be the most powerful weapon in the shareholder's arsenal of remedies, will focus on two particular points: the broad definition of “complainant” under corporate statutes, and the manner in which the courts have defined the legitimate expectations of shareholders and other “proper persons” under the oppression remedy.

Shareholder Rights

Corporate Statutes

In Canada, a company may be incorporated under either federal or provincial legislation.⁶ Although the statutes cover broadly the same categories of rights and remedies of shareholders, there are minor variations between the statutes. For the purposes of this paper, we will use the Ontario Business Corporations Act (the “OBCA”)⁷ as our model. However, counsel should be sure to consult the

⁵ See reference to Securities Acts online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s05_e.htm for the Ontario Securities Act and for the other provinces and territories at www.canlii.org.

⁶ See f.n. 1.

⁷ R.S.O. 1990, c.B-16. online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm. For a discussion of the oppression remedy under the British Columbia Business Corporations Act, see S. Antle, S. Warnett and J. T. Li, And Now for Something Slightly Different: The British Columbia Oppression Remedy, posted March 2, 2007. <http://goo.gl/LrfDT>.

corporate statute under which the company was incorporated for the appropriate provisions.⁸

The rights provided to shareholders under corporate statute can be broadly divided into three categories: Voting rights, rights with respect to meetings, and rights pertaining to access to information. Each is discussed below.

Voting

The right to vote is the most fundamental right accorded to shareholders under Canadian corporate law statutes. Through voting, shareholders can control the makeup of the board of directors⁹, which is by statute responsible for the management of the corporation¹⁰, and participate in major business decisions affecting the company¹¹. Further, the articles of incorporation and by-laws may impose limits on corporate and intra-shareholder activities.

Meetings

A corollary of the right to vote is the right of the shareholder to attend at meetings. Corporate statutes provide for the calling of an annual meeting of shareholders not later than fifteen months following the last held annual meeting, as well as special meetings at any time.¹²

The annual meeting usually involves the election of directors, the appointment of the auditor and the presentation of the company financials, although other business may also be transacted. Business requiring shareholder approval can

⁸ It is beyond the scope of this paper to address the strategic and tax considerations which affect the selection of the most favourable jurisdiction in which to incorporate.

⁹ OBCA s.119(4)

¹⁰ OBCA s.115

¹¹ See for example OBCA s.184(3), which requires shareholders to vote on a sale of "all or substantially all" of the assets of the corporation.

¹² OBCA s.94(1)

be transacted between annual meetings by the calling of a special meeting of shareholders. The statutes also permit shareholders who hold not less than 5% of the voting shares of a corporation to requisition the directors to call a meeting for any purpose stated in the requisition.¹³

This remedy, found in Section 105 of the *OBCA*, recognizes a fundamental right of dissident shareholders holding at least five per cent of votes to requisition a meeting of shareholders. The underlying policy seeks to ensure that shareholders who can muster sufficient support to meet the five percent threshold, notwithstanding their minority position and an unwilling board of directors, are able to put forward matters for consideration by all of the shareholders entitled to vote.¹⁴

The Court has the power to intervene if the directors fail to convene a meeting within a reasonable time, fail to act honestly or in good faith or fail to exercise business judgment with a view to the best interests of the corporation.¹⁵

Access to Information

Key to a shareholder's ability to exercise the right to vote is access to information about the business and affairs of the company. The *OBCA*, similarly to other corporate statutes, provides that a corporation shall prepare and maintain in a designated place certain types of records. These include:

- (a) the articles and by-laws of the corporation and all amendments thereto;
- (b) copies of any unanimous shareholders agreements known to the directors;

¹³ *OBCA* s.105(1)

¹⁴ *Paulson & Co. Inc v. Algoma Steel Inc.*, 2006 CanLII 116 (ON S.C.) at para. 40. See also *Airline Industry Revitalization Co. v. Air Canada*, (1999), 45 O.R. (3d) 370 (S.C.J.) at 386; *McGuinness v. Bremmer Plc*, [1988] S.L.T. 891 at 895;

¹⁵ *Ibid.*, at para. 41-43. And see also *Kerr v. Danier Leather Inc.*, [2005] O.J. No. 5338 (C.A.) at para. 157, quoting with approval from *Maple Leaf Foods Inc. v. Schneider Corp.* 1998 CanLII 5121 (ON C.A.), (1998), 42 O.R. (3d) 177 (C.A.) at paras. 64-67; .

- (c) minutes of meetings and resolutions of shareholders;
- (d) a register of directors setting out specified information; and
- (e) a securities register setting out certain specified information.¹⁶

In addition, the corporation is to prepare adequate accounting records and a record of directors' meetings and meetings of any committee thereof.¹⁷ Shareholders and creditors and their agents and legal representatives are to be provided access to the books and records maintained by the corporation during the usual business hours of the corporation and are permitted to take extracts of the records where appropriate.¹⁸

Shareholders are also entitled to be provided with notice of meetings and related information. Such notices and materials, including proxy forms and circulars, must describe the nature of the business to be conducted at the meeting "in sufficient detail to permit the shareholder to form a reasoned judgment thereon".¹⁹ For example, it was held in *Pace Savings & Credit Union Ltd. v. Cu-Connection Ltd.*²⁰ that a notice was insufficient where a draft agreement had been provided to shareholders. The draft, it was held, could change substantially throughout the course of negotiation, and could not form the basis on which a reasoned judgment could be formed as to the impact of the transaction. In *Giannotti et al. v. Wellington Enterprises Ltd.*,²¹ the Ontario Superior Court held

¹⁶ OBCA s.140(1)

¹⁷ OBCA s.140(2)

¹⁸ OBCA s.145(1), (2), 146(1)

¹⁹ See OBCA s.96(6) for notice of meetings and s.30(31) of O. Reg. 62 regarding information circulars.

²⁰ [2000] O.J. No. 3830 (Ont. S.C.)

²¹ *Giannotti v. Wellington Enterprises Ltd.* [1997] O.J. No. 574 (Ont. Gen. Div.)

that the transfer of a principal asset of a corporation was invalid when the notice of the meeting failed to specify in detail the full nature of the transaction and the proposed agreement of purchase and sale.

Articles of Incorporation and By-Laws

The articles of incorporation and by-laws of the corporation may trump the statutory provisions in some circumstances. Articles of incorporation and by-laws set out the types and classes of shares the corporation is authorized to issue and the rights of shareholders relative to both the corporation and to owners of other types of shares. They may set out voting rights, rights to dividends and rights upon dissolution of the company. They may also contain restrictions on the ability of the shareholder to transfer shares.

Shareholder Agreements

Shareholders' agreements may take many forms, from a simple agreement to vote shares in a particular way to unanimous shareholders' agreements, which restrict the powers of the directors of the corporation and transfer those rights and responsibilities to the shareholders. Such agreements may embellish or supplement rights provided under corporate law statute. For example, shareholders' agreements could include provisions such as buyout mechanisms, pre-emptive rights, or drag-along and tag-along provisions on sale of shares. They may also set out definitions of who can be a shareholder and provide for restrictions on transfer of shares.

In closely-held corporations, shareholder agreements often include provisions describing or limiting the scope of some shareholders' management functions; plans for succession and undertaking of new corporate opportunities. Abuse of these provisions by shareholders active in the management of the corporation form the genesis of assertion of shareholders' rights by the minority or other aggrieved shareholders. How the assertion of rights by minority or aggrieved

shareholders is limited by a mandatory arbitration clause is an important consideration which will be considered in this paper.

Securities Laws

At the time of publication of this article, there is no federal Securities Act in Canada. However, the government of Canada is moving toward establishment of a national securities regulator through a government policy called *Canada's Economic Action Plan*.²² The *Canadian Securities Regulation Regime Transition Office Act* was included in the *Budget Implementation Act, 2009*. The Act provides the legal authority and mandate for a Transition Office. The *Budget Implementation Act, 2009* also includes authority for the Minister of Finance to make direct payments (in an aggregate amount not exceeding \$150 million) to provinces and territories for matters relating to the establishment of a Canadian securities regulation regime and a Canadian regulatory authority.²³

On June 23, 2009, Canada's federal Minister of Finance, announced the launch of the Transition Office which will lead Canada's effort to establish the Canadian securities regulator. The Transition Office will lead all aspects of the transition, including the development of the federal Securities Act, collaborating with provinces and territories, and developing and implementing a transition plan with respect to organizational and administrative matters. As it moves ahead, the Government intends to work collaboratively with provinces and territories that are willing to participate in the establishment of a Canadian securities regulator.²⁴

Presently, Securities Acts in each province enact an entire regime regulating public companies and their actions in relation to the Canadian securities

²² www.actionplan.gc.ca/initiatives/eng/index.asp?mode=5&initiativeID=57&clientid=32

²³ *Ibid.*, www.actionplan.gc.ca/initiatives/eng/index.asp?mode=5&initiativeID=57&clientid=32

²⁴ *Ibid.*

market.²⁵ These statutes contain a set of complex rules and regulations overseen by provincial regulatory bodies. These include rules on voting and access to information, much like the corporate statutes described above, as well as rules regarding disclosure of information to shareholders. It is beyond the scope of this paper to discuss these statutes in detail.

Although somewhat beyond the scope of this article, readers interested in securities regulation should note that in Ontario, securities legislation is enforced and administered by the Ontario Securities Commission.²⁶ Securities commissions also exist in the other provinces.²⁷

The Canadian securities and investment dealer/broker industry is also administered by several self-regulating organizations. The Investment Industry Regulatory Organization of Canada (IIROC)²⁸ was established in December 2008 as a result of the consolidation of the Investment Dealers Association of Canada and Market Regulation Services Inc. There are stock exchanges in Toronto (TSX and TSX Venture),²⁹ and Montreal (Canadian Derivatives Exchange)³⁰.

Shareholders' Remedies

If the rights given to shareholders are to be effective and worthwhile, it is clear that corresponding remedies must be available to the shareholder to cure their

²⁵ See reference to Securities Acts of all Canadian provinces and territories online at <http://www.e-laws.gov.on.ca/navigation?file=tools&lang=en>. The *Ontario Securities Act* is found online at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s05_e.htm.

²⁶ Information about the OSC is available online at www.osc.gov.on.ca/.

²⁷ Links to websites of other Canadian provincial securities commissions are found at <http://goo.gl/qvq5v> and www.bcsc.bc.ca/related_links.asp. In *Reference re Securities Act, 2011 SCC 66*, <http://canlii.ca/t/fpdwb>, the Supreme Court of Canada held that the proposed Canadian Securities Act was ultra vires the Parliament of Canada.

²⁸ www.iiroc.ca/English/Pages/home.aspx

²⁹ www.tmx.com/en/about_tsx/

³⁰ www.m-x.ca/accueil_en.php

breach. In the following sections of the paper, we examine some of the remedies made available to shareholders and their application.

Court Ordered Meetings

As discussed above, the shareholder meeting plays an important role in the successful exercise of voting rights by shareholders. The corporate statutes therefore provide the Court with discretion to order a shareholder meeting where a meeting is impeded by lack of quorum or other disruptive action by one or a group of shareholders.

In particular, section 106(1) of the OBCA states that the court may "order a meeting to be called, held and conducted in such manner as the court directs" where it is "impracticable" to call a meeting of shareholders or to conduct a meeting in the manner provided for under the articles and by-laws of the corporation or under statute or "for any other reason the court thinks fit".³¹ The remedy is available on application by a director or shareholder entitled to vote at a meeting. The classic statement of what is meant by "impracticable" in the context of section 106(1) comes from the judgment of the English Court of Appeal in *Re El Sombrero Ltd.*³²:

It is to be observed that the section opens with the words "If for any reason," and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are "...it is impracticable to call a meeting of a company..." The question then arises, what is the scope of the word "impracticable"? It is conceded that the word "impracticable" is not synonymous with the word "impossible"; and it appears to me that the question necessarily raised by the introduction of that word

³¹ OBCA s.106(1) As to timing of the meeting, the Court relies on the reasonable business judgment of the directors acting honestly, in good faith and in the best interests of the corporation and will interfere only if that standard has not been met: *Paulson & Co. Inc v. Algoma Steel Inc.*, 2006 CanLII 116 (ONSC) paras. 43 et seq.

³² [1958] 1 Ch. 900 (U.K. C.A.)

"impracticable" is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held.

"Impracticability" must be interpreted broadly in order "to govern the affairs of practical men engaged in business."³³ In addition, the courts have held that "the right of the shareholders to democratically determine the future course of the company is paramount consideration, even when there is ongoing litigation" between the parties.³⁴ The fact that the application is opposed should not preclude the calling of the shareholders' meeting.

In appropriate circumstances, the Court may order a meeting to be "called held and conducted in such manner as the court directs", which provides broad jurisdiction to the court in terms of the types of orders granted under section 106(1) of the OBCA. The legislation also provides for ancillary orders that may be granted in the context of the meeting. For example, the court may order that the quorum required by the articles of incorporation and by-laws of the corporation or by the statute "be varied or dispensed with" at a meeting ordered pursuant to section 106.³⁵

Derivative Action

The powerful but infrequently-used remedy of "derivative action" permits a shareholder or other "complainant" to advance an action on behalf of the corporation when the corporation refuses to bring the action itself. The action is available to rectify wrongs done to the corporation itself rather than to the individual shareholder. The intent of the remedy is to circumvent the problem of

³³ *B. Love Ltd. v. Bulk Steel & Salvage Ltd.* (No. 2) (1982), 40 O.R. (2d) 1 (H.C.J.)

³⁴ *FTS Worldwide Corp. v. Unique Broadband Systems Inc.* [2001] O.J. No. 5126 (Ont. Sup. Ct.) (QL)

³⁵ OBCA s.106(2)

management not taking action to rectify a wrong where they may have been involved in or responsible for the wrong sustained by the corporation.³⁶

Standing to begin a derivative action is given to a "complainant", a defined term under the OBCA. Section 245 of the OBCA defines a "complainant" 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.

A person with standing may seek leave to do one of two things: to "bring an action in the name and on behalf of a corporation or any of its subsidiaries", or to "intervene in an action to which any such body corporate is a party" in order to prosecute, defend or discontinue the action on behalf of the body corporate.³⁷

The four statutory pre-conditions necessary to bring a statutory derivative action may be summarized as follows:

- (a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;

³⁶ The derivative action is intended to provide statutory relief from the common rule in the old English case of *Foss v. Harbottle* (1843) 67 E.R. 189 (H.L.), which provided that a shareholder of the corporation, even a controlling shareholder, has no personal cause of action for a wrong done to the corporation. The rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders. See *Salomon v. Salomon*, [1897] A.C. 22, 66 L.J. Ch. 35 (H.L.). A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation: *Meditrust Healthcare Inc. v. Shoppers Drug Mart* 2002 CanLII 41710 (ON C.A.), (2002), 61 O.R. (3d) 786 (C.A.)

³⁷ OBCA s.246(1)

- (b) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his or her intention to seek leave to commence a derivative action;
- (c) the complainant is acting in good faith; and
- (d) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.³⁸

There has been a recent judicial development in the law of Ontario in respect of the approach to the derivative action. In the 2008 decision of *Malata Group (HK) Limited v. Jung*,³⁹ the Ontario Court of Appeal held that there is not a bright-line distinction between a derivative action under s. 246 and an oppression remedy claim under s. 248 OBCA.

With respect to the notice provision, it was held by the British Columbia Supreme Court in *Re Daon Development Corp.*⁴⁰ that the condition could not be waived, in part because the "condition can be easily performed without undue expense of effort".

In *Re Loeb and Provigo Inc.*,⁴¹ the Supreme Court of Ontario discussed the onus of proof for leave to begin an action, stating that "There is an onus on an applicant to bring before the court more than mere suspicion to warrant the granting of leave." The requirement has been interpreted broadly, and it has

³⁸ See OBCA s.246(2) and Peterson, supra note 2 at 17.35

³⁹ 2008 ONCA 111 (CanLII), paras. 26-29

⁴⁰ (1984) 54 B.C.L.R. 235 (S.C.) (QL)

⁴¹ (1978), 88 D.L.R. (3d) 139 (Ont. H. C.)

been decided that the notice is not required to contain every cause of action that is eventually brought in the derivative action. The notice should, however, contain enough information to permit the directors to determine the nature and extent of the complaint and it must be delivered to the appropriate parties.⁴²

“Good faith” is not a defined term in the in corporate law statutes. Each case is therefore analyzed on its own terms for indications of bad faith. Where the Court finds indications of bad faith on the part of majority shareholders, leave to commence the derivative action will be granted if the other pre-conditions are met. The Court must be satisfied that the derivative action is likely to benefit the corporation and that the corporation will not be unduly exposed to legal costs.

Under Canadian common law procedure, "costs" refers to the power of the Court to award some or substantially all of a successful party's legal expenses to be paid by the losing party. In a complex action, an allegation of shareholder or management fraud or other abuse will result in expensive legal proceedings.

In these circumstances, the Court must assess whether the corporation should fund the action and whether the applicant should be obliged to indemnify the corporation for legal costs, including those payable to the impugned party if the action does not succeed. Further, if the derivative action is against the controlling shareholder or principal manager of the corporation, the Court must assess the impact on the continued operation of the corporation's business.

The final pre-condition to obtaining leave to commence a derivative action is that it "appear to be in the interests of the corporation" that the action move forward. This differs from other provisions of the OBCA which require the courts to be "satisfied" that certain conduct has been carried out. This pre-condition affords the Court a mechanism to provide relief to a deserving complainant where

⁴² D.H. Peterson, *supra* note 4 at 17.37

access to all the relevant information was not possible at the time of bringing the motion for leave to bring the action.

It is also worth noting that in the typical claim for leave to commence a derivative action, a majority shareholder or senior management have abused his or her power and usurped the rights of the corporation. However, the derivative action is not limited to claims against other shareholders or management.

Where a complainant is successful in persuading the Court that leave to commence a derivative action should be given, the Court may make "any order it thinks fit," including, but not limited to:⁴³

- an order authorizing the complainant or any other person to control the conduct of the action;
- an order giving directions for the conduct of the action;
- an order requiring that any amount adjudged payable by the defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and
- an order requiring the corporation or its subsidiary to pay reasonable legal fees and any other costs reasonably incurred by the complainant in connection with the action.⁴⁴

⁴³ OBCA, s.247

⁴⁴ See OBCA s.247

The Oppression Remedy

The oppression remedy⁴⁵ is widely acknowledged as being one of the most powerful weapons in the arsenal of the shareholder. The remedy was introduced largely in response to the difficulties encountered by minority shareholders in a corporate environment that runs by majority rules.

Nearly 80 years ago, the Ontario Court of Appeal enunciated the dilemma of minority shareholders in these words in *Re Jury Gold Mine Development Co.*:⁴⁶

He is a minority shareholder and must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the rule of the majority. In the absence of fraud or transactions ultra vires, the majority must govern, and there should be no appeal to the Courts for redress.

Where one group of shareholders abuses their power over another group, inequitable results can occur. The result was the introduction of the oppression remedy. Since its introduction, and since the coming into force of the oppression remedy provision of the *Business Corporation Acts* in July 1983, the remedy has gained prominence and has developed a large body of jurisprudence across Canada.

The Ontario Court of Appeal reiterated the state of the law in the oft-referred to case of *Waxman et al. v. Waxman et al.*⁴⁷ in which Morris Waxman succeeded in recovering nearly \$50 million following his dismissal and exclusion from a family business by his brother, Chester Waxman and others. It was the culmination of a 10-year legal battle, which may see another round as leave to appeal to the

⁴⁵ See OBCA s.248

⁴⁶ [1928] 4 D.L.R. 735 (Ont. C.A.)

⁴⁷ [2002] O.J. No. 2528, (2002) 25 B.L.R. (3d) 1 (Ont. S.C. Sanderson J.) aff'd with minor variations [2004] O.J. No. 1765, (2004) 44 B.L.R. (3d) 165 (Ont. C.A.)

Supreme Court of Canada is pending at the time of this paper. The decision applied the principles espoused 20 years earlier by the same Court in *Ferguson v. IMAX Systems Corp.*⁴⁸, a case decided under the *Canada Business Corporations Act*.

In essence, the oppression remedy amounts to this: the Court has a broad remedial authority where it finds conduct that qualifies as oppressive. It may make any order it thinks fit to rectify the matters complained of. This explicitly includes setting aside a transaction or contract to which the corporation is a party or amending unanimous shareholder agreements, corporate articles or by-laws, compensating the aggrieved party, directing the corporation or other shareholders to purchase the aggrieved shareholder's share at fair market value and other remedies.⁴⁹ This statutory language is to be given a broad interpretation consistent with its remedial purpose.⁵⁰

Oppressive conduct which occurred before the oppression remedy came into effect and continued may be considered by the Court.⁵¹ This is so because the oppression remedy is considered part of substantive law that has been interpreted as having retrospective effect.⁵²

A "complainant", as defined in s. 245 of the OBCA and referred to above, may apply to a court for an order and where the court is satisfied that

- (a) any act or omission of the corporation or its affiliates effects a result;

⁴⁸ (1983), 43 O.R. (2d) 128 at 137 (C.A.), leave to appeal to S.C.C. refused (1983), 2 O.A.C. 158n.

⁴⁹ *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* 1995 CanLII 7419 (ON S.C.), (1995), 131 D.L.R. (4th) 399 (Ont. Ct. Gen. Div.),

⁵⁰ *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 523 (Ont. C.A.)

⁵¹ *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 529-533 (Ont. C.A.)

⁵² *Re Mason and Intercity Properties Ltd.* (1986), 32 A.C.W.S. (2d) 366 (Ont. Div. Ct.), varied on unrelated other grounds (1987), 59 O.R. (2d) 631 (C.A.).

- (b) the business or affairs of the corporation or its affiliates are or have been carried on or conducted; or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised

in a manner that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of."⁵³

The great flexibility of the oppression remedy stems from the inclusiveness of its language, which allows any type of corporate activity to be the subject of scrutiny, and which makes the remedy available to a broad class of individuals.

For example, it has been held that "the court has jurisdiction to find an action is oppressive, unfairly prejudicial, or unfairly taken in disregard of the interests of a security holder if it is wrongful, even if it is not actually unlawful."⁵⁴ In addition, conduct may be isolated or may form a pattern of conduct that is considered oppressive to shareholders.

Importantly, it has been held evidence of bad faith or actual unlawfulness is not required to establish conduct as oppressive. It is the effect of the conduct, and not the intention of the party engaging in the conduct, that is of primary importance in oppression remedy cases.⁵⁵ An important element of the use of

⁵³ OBCA s.248(1) and (2)

⁵⁴ *Maple Leaf Foods Inc. v. Schneider Corp.* (1998) 42 O.R. (3d) 177 (QL)

⁵⁵ *Brant Investments Ltd. v. KeepRite Inc.* (1991) 30 R. (3d) 289 (Ont. C.A.) (QL); *BCE Inc. v. 1976 Debentureholders et al.* 2008 SCC 69, [2008] 3 S.C.R. 560 at para. 71 referring to Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. 1, at p. 163.

the oppression remedy is to rectify self-dealing which frequently occurs, particularly in closely-held corporations.⁵⁶

As pointed out above, there is overlap between the oppression remedy under s.248 OBCA and the derivative action under s.246 OBCA. One situation in which the overlap between the oppression remedy and the derivative action can be found is where directors in closely held corporations engage in self-dealing to the detriment of the corporation and other shareholders or creditors.⁵⁷ The Court may also permit the fruits of the oppression to be traced into a corporation subsequently established by the oppressing shareholders.⁵⁸

The Court of Appeal has recently questioned whether there is a meaningful distinction between the derivation action and the oppression remedy. Even though the tests are different, and under s. 247(d) OBCA, the Court may order the legal fees or other costs reasonably incurred in connection with a derivative action, there is not much distinction in the case of closely-held corporation, i.e., one with relatively few shareholders.⁵⁹

Similar issues have been considered under the parallel provisions of the Canada Business Corporations Act. In the 2006 case of *Ford Motor Co. of Canada Ltd. v. Ontario Municipal Employees Retirement Board*,⁶⁰ the Ontario Court of Appeal

⁵⁶ *Budd v. Gentra Inc.*, 1998 CanLII 5811 (ON C.A.); *Huronario Property Development Corporation v. Pinewood Business Interiors Inc.*, 2010 ONSC 260 (CanLII) at para. 117

⁵⁷ *Malata Group (HK) Limited v. Jung*, 2008 ONCA 111 (CanLII) at para. 31-32

⁵⁸ *Jabalee v. Abalmark Inc.* [1996] O.J. No. 2609 (Ont. C.A.), the Court allowed a post-oppression company to be added as a party because the company arguably “aided and abetted” the alleged oppression. See also *Gautier v. Telerate Canada Inc.*, 2000 CarswellOnt 4019 and *Tessaro v. DH Collins & Associates Ltd.*, 2009 CanLII 5125 at para. 10.

⁵⁹ *Ibid.*, paras. 34-35

⁶⁰ 2006 CanLII 15 (ON C.A.), (2006), 79 O.R. (3d) 81 (C.A.) paras. 111-112

also considered the distinction between the derivative action and the oppression remedy and came to the conclusion that there was considerable overlap between the two remedies.

Reasonable Expectations

In *Brant Investments Ltd. v. KeepRite Inc.*,⁶¹ the Ontario Court of Appeal held that the oppression remedy protects only the legitimate expectations of shareholders. Those expectations must be "reasonable under the circumstances and reasonableness is to be ascertained on an objective basis." In the same case, the Court expressed the concept in the following language:

Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations that are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact with shareholders.

A significant development in the law of reasonable or legitimate expectations of shareholders is set out in the recent decision of the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*.⁶² In the case, Canada's highest court expounded on the two related inquiries which must be undertaken to determine the reasonable expectations of aggrieved shareholders in a claim for oppression:

- (1) Does the evidence support the reasonable expectation asserted by the claimant? and
- (2) 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?⁶³

⁶¹ *Brant Investments Ltd. v. KeepRite Inc.*, *supra*. See also *Greenlight Capital Inc. v. Stronach*, 2006 CanLII 36620 (ON S.C.), paras. 19-28

⁶² *BCE Inc. v. 1976 Debentureholders et al.* 2008 SCC 69, [2008] 3 S.C.R. 560

⁶³ *Ibid.*, para. 68 and see *Tanenbaum v. Tanjo Investments Ltd.*, 2009 CanLII 48526 (ON SC) para. 46

The Supreme Court of Canada established the following test for proof of the aggrieved claimant's reasonable expectations:⁶⁴

- the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.
- The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play.
- Factors to assist 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.

Commercial Practice In determining these issues, commercial practice is significant in forming the reasonable expectations of the litigations. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy.⁶⁵

Nature of the corporation The size, nature and structure of the corporation are relevant factors in assessing reasonable expectations. Courts may accord more

⁶⁴ Ibid at paras. 70-71

⁶⁵ Ibid., para. 73 and see also, I.Ellyn, QC and M.E. Gordon, *Winning Business Appeals and the Concept of Commercial Reasonableness*, <http://www.hg.org/article.asp?id=4813>.

latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.⁶⁶

Personal Relationships Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. When dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such.⁶⁷

Past Practice Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance. For instance, in where the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held, an authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.⁶⁸

It is important to note however that practices and expectations can change over time. Where valid commercial reasons exist for the change and the change does

⁶⁶ Ibid., para. 74, referring to G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 N.Z. Univ. L. Rev. 134, at pp. 138 and 145-46 and First Edmonton Place Ltd. v. 315888 Alberta Ltd. 1988 CanLII 168 (AB Q.B.), (1988), 40 B.L.R. 28, varied 1989 CanLII 222 (AB C.A.), (1989), 45 B.L.R. 110;

⁶⁷ Ibid, para. 75, referring to Re Ferguson and Imax Systems Corp. (1983) 150 D.L.R.(3d)718 (Ont CA)

⁶⁸ Ibid. para. 76

not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice.⁶⁹

Preventative Steps Finally, in determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered.⁷⁰

The legitimate expectations of a shareholder may be affected by the provisions contained in the articles of incorporation and by-laws of the corporation or the provisions of any agreements between shareholders. They may also be affected by the size and nature of the corporation and general commercial practice. On making a finding of oppression, a court may make "an order to rectify the matter complained of".⁷¹

It is worth noting that while the complaining shareholder has the burden to show that oppression exists, evidence of fraud or bad faith is not a requirement in order to make out the claim. The conduct must only be shown to be burdensome, harsh and wrongful.⁷²

Section 248(3) sets out a number of specific orders that may be made by the court, including, for example:

⁶⁹ Ibid. para. 77, referring to *Alberta Treasury Branches v. SevenWay Capital Corp.* 1999 ABQB 859 (CanLII), 1999 ABQB 859 (CanLII), (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd 2000 ABCA 194 (CanLII), 2000 ABCA 194 (CanLII), (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

⁷⁰ Ibid. para. 78

⁷¹ OBCA s. 248(2)

⁷² *Brant Investments Ltd. v. KeepRite Inc.* (1991) 30 R. (3d) 289, 1991 CanLII 2705 (ON C.A.), *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* 1998 CanLII 5847 (ON C.A.), (1998) 40 O.R. (3d) 563 (Ont. C.A.); *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.*, 2008 CanLII 48125 (ON S.C.) at para. 27

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order amending the articles or by-laws of the corporation or the provisions of a unanimous shareholders' agreement;
- (d) an order appointing directors in place of or in addition to the directors then in office;
- (e) an order directing the company or any other person to purchase securities of a security holder;
- (f) an order winding up the corporation; and
- (g) an order requiring the trial of any issue.⁷³

In addition, the Court may order the corporation or its affiliates to "pay to the complainant interim costs, including reasonable legal fees and disbursements".⁷⁴ In order to obtain such an order, the applicant must establish that there is a case of sufficient merit to warrant pursuit and that the applicant is genuinely in financial circumstances which, but for an order, would preclude the claim from being pursued.⁷⁵

However, where a complainant, a minority shareholder, is unable to persuade the Court that he does not have the resources to pursue the action or fails to disclose his financial circumstances, the Court will refuse to make an order for interim disbursements.⁷⁶

The management by the Court of shareholder expectations is an important aspect of the oppression remedy. Even at the interim stage of the proceedings, the Court's objective is to maintain a semblance of the status quo even if

⁷³ OBCA s.248(3). Not all available remedies are listed here. The entire section may be viewed online at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm#BK269

⁷⁴ OBCA s.249(4)

⁷⁵ *Alles v. Maurice* (1992) 9 C.P.C.(3d) 42 (Ont. Gen. Div.) (QL)

⁷⁶ *Molinaro v. U-Buy Discount Foods Limited* [2000] O.J. No. 4642 (Ont. Superior Court of Justice)

allegations of oppression have not been fully proved. In *Alizadeh et al. v. Akhavan et al.*⁷⁷, a judge of the Ontario Superior Court restored historic payments of management fees to an equal shareholder pending trial without drawing any conclusions about the merit of the oppression allegations.

Use of the Oppression Remedy by Non-Shareholders

As set out above, the definition of "complainant" under the derivative action and oppression remedy is extremely broad, including current and former shareholders, current or former directors and officers, and "any other person who, in the discretion of the court, is a proper person" to bring the application.⁷⁸

In *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*,⁷⁹ an Alberta case examining the scope of an identical oppression remedy provision in the Alberta statute, the Court identified two circumstances under which a creditor could be considered a "proper person" to bring an application:

- (a) where the directors or management of the corporation have used the corporation as a vehicle for committing fraud upon the applicant; and
- (b) where the directors or management of the corporation have breached the underlying expectations of the applicant arising from the circumstances in which the applicant's relationship with the company arose.

Based on these principles, the oppression remedy has been available to a trade creditor where the corporation had taken actions to conceal its insolvency,⁸⁰ and to a wrongfully dismissed employee against former directors where a corporate

⁷⁷ *Alizadeh v. Akhavan* [2004] O.J. No. 2147 (Jarvis J.) (Ont. Superior Court)

⁷⁸ OBCA s.245

⁷⁹ [1988] A.J. No. 511 (Alta. Q.B.) (QL)

⁸⁰ *C.C. Petroleum v. Allen et al.* [2002] O.J. No. 2203 (S.C.J.) (QL)

reorganization resulted in the corporation which paid the employee's salary ceasing to exist.⁸¹

It has also been used faced by a creditor of a corporation against the corporation and the sole shareholder and director of the corporation where, through inadvertence, the corporation failed to renew an irrevocable letter of credit in favour of the creditor. The corporation then sold its assets and used the proceeds of the sale to eliminate its debt to the bank. In doing so, it eliminated the liability of its sole shareholder who had personally guaranteed the corporation's debt to the bank. The Court held that the corporation's inadvertent failure to renew the letter of credit and subsequent sale of its assets was conduct which came within the terms of s. 248 of the OBCA.⁸² These are examples. There are many other interesting uses of the remedy.

Limitation Period Applicable to Oppression Remedy

In Ontario, the limitation period applicable to all claims unless specifically exempted by the *Limitations Act* is two years from the date the cause of action arose, subject to discoverability.⁸³ The two-year limitation period applies to oppression remedy claims under the OBCA.⁸⁴ The situation is not so clear under the *Canada Business Corporations Act*.⁸⁵

⁸¹ *Downtown Eatery (1993) Ltd. v. Ontario* [2001] O.J. No. 1879 (C.A.) (QL)

⁸² *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* 1998 CanLII 5847 (ONCA), (1998) 40 OR(3d) 563

⁸³ Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, section 4. Under s. 16(1)(a), there is no limitation period for “a proceeding for a declaration if no consequential relief is sought”. Typically, a claim for oppression or derivative seeks consequential relief so the section may not be applicable. A claim for a declaration that property is held on constructive trust may not be subject to the limitation period. The specific facts of each case must be carefully examined.

⁸⁴ *Reinhart v. VIXS Systems Inc.*, 2011 ONSC 5349 (CanLII) para. 2. See also: *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469 and *Paragon Development Corp. v. Sonka Properties Inc.* 2009 CanLII 13627 (ON SC).

⁸⁵ The first version of this paper expressed the view that there were no limitation periods applicable to oppression claims. This view was judicially expressed by the Ontario Court of Appeal in *Waxman v. Waxman*, 2004 CanLII 39040 (ON C.A.) para. 534-535 in reference to oppression under the *Canada Business Corporations Act*. However, it is now considered well-settled that the Ontario Limitations Act

In the 2006 decision in *Ford Motor Company of Canada, Ltd. v. Ontario Municipal Employees Retirement Board*,⁸⁶ the Ontario Court of Appeal, expressed doubt, without reaching a definitive conclusion, as to whether an action for oppression under the CBCA was subject to the six-year limitation period under the Ontario Limitations Act which was in effect until January 1, 2004.⁸⁷ The former statute contained a reference to “an action on the case”, a concept eliminated by the new Limitations Act.⁸⁸

Again, while no Ontario Court has definitively determined the matter, it may be that the two-year limitation period applies under an OBCA oppression claim but not to a CBCA oppression claim. The distinction is that a limitation period created by a provincial statute may not apply to a cause of action created by a federal statute.⁸⁹

Oppression and Arbitration

In *Deluce Holdings Inc. v. Air Canada*⁹⁰, the court was asked to examine in what circumstances oppressive conduct could operate to postpone arbitration proceedings, which were mandatory under the terms of a shareholders' agreement. In that case, a shareholders' agreement provided for arbitration for disputes as to value of the shares held by each of the parties in Air Ontario, a

applies to oppression claims under the OBCA. The circumstances may be different in other provinces. See f.n. 3 at p. 3 for the practice in British Columbia and *Jaska v. Jaska* 1996 CanLII 2926 (MB C.A.), (1996), 141 D.L.R. (4th) 385 (Man. C.A.) for the practice in Manitoba.

⁸⁶ 2006 CanLII 15 (ON C.A.)

⁸⁷ *Ibid.*, para. 169-170, Ont. C.A.

⁸⁸ Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, section 4.

⁸⁹ *Ford Motor Company of Canada, Ltd. v. Ontario Municipal Employees Retirement Board*, 2006 CanLII 15 (ON C.A.), para. 174. In British Columbia, the provincial limitation period of six years is likely applicable: see see S. Antle, S. Warnett and J. T. Li, *And Now for Something Slightly Different: The British Columbia Oppression Remedy*, posted March 2, 2007, pag 3, f.n. 7 above.

⁹⁰ (1992) 98 D.L.R. (4th) 509 (Ont. Gen. Div.) (QL)

regional carrier for Air Canada. The valuation provision was triggered by the termination of Deluce from his employment as CEO, which was effected by Air Canada (the majority shareholder) in an effort to obtain 100% control of Air Ontario and to reorganize its corporate operations.

Senior Regional Justice Blair (as he then was) of the Ontario Superior Court held that the actions of Air Canada in removing Deluce could be found to be "oppressive" and that Deluce's holding corporation (the minority shareholder) had a reasonable expectation that Mr. Deluce would only be terminated where such a move was in the best interests of Air Ontario.

In terminating Deluce, the representatives of Air Canada on Air Ontario's board of directors had been fulfilling an Air Canada agenda and had paid little attention to the best interests of Air Ontario itself. Under the circumstances, the court held that the entire underpinning of the arbitration structure had been destroyed, taking the subject of the dispute out of the purview of the matters to be dealt with under the agreement. The arbitration was therefore stayed and the oppression remedy action proceeded.

Investigations

The effective exercise of shareholder remedies will frequently depend on possessing the relevant information. An important statutory aid to shareholders in this respect is the court-ordered investigation of the corporation's affairs where the shareholder can satisfy the court that there are circumstances that warrant the court order. In particular, section 161(2) of the OBCA provides that an investigation may be ordered by the court where it appears to the court that:

- (a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person;
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is

- oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of a security holder;
- (c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or
 - (d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly.

An application for an investigation may be brought by a shareholder without notice to the corporation.⁹¹ To balance the needs of the shareholders with the ability of management of the corporation to effectively conduct the business, the hearing of an application under section 161(2) is closed to the public⁹² and is subject to a publication ban.⁹³

It is worth noting that unlike many other provisions of the OBCA, which require the court to be “satisfied”, the court may make the order granting the investigation where it “appears” that the impugned conduct fits into the listed categories. This may result in a lower burden of proof being placed on the shareholder and could be an appropriate remedy where an aggrieved shareholder does not have access to the information required to meet a higher burden.

The investigation provisions provide that the court may make any order it thinks fit and proceeds to enumerate twelve specific orders that may be made by the court.⁹⁴ The most important of these is obviously the order to investigate.⁹⁵ The other listed orders are ancillary to this general order, generally focusing on the

⁹¹ OBCA s.161(1)

⁹² OBCA s.161(5)

⁹³ OBCA s.161(6)

⁹⁴ OBCA s.162(1)

⁹⁵ OBCA s.162(1)(a).

appointment of the investigator and the powers of the inspector once appointed.

For example, the investigator may, if so ordered:

- enter any premises in which the court is satisfied there might be relevant information, and examine any thing and make copies of any document or record found on the premises;
- compel any person to produce documents or records; and
- conduct a hearing, administer oaths and examine any person on oath.

Although the investigation remedy could be of great assistance to shareholders, the courts have traditionally been reluctant to order an investigation unless a shareholder can demonstrate that the information was not available through other means.⁹⁶

Appraisal Remedy

An appraisal right is the right of a shareholder to require the company to purchase his shares at an appraised "fair value" under certain circumstances. There are three circumstances under which the appraisal remedy is triggered under the OBCA:

- (a) where shareholders are granted rights of dissent upon certain fundamental changes. These changes include amendments to articles, amalgamations, and sales of all or substantially all of the assets of the corporation;⁹⁷
- (b) compulsory acquisitions, which arise where a person making a take-over bid purchases 90% or more of the shares of a particular class;⁹⁸ and
- (c) shareholder's right to request acquisition where he holds 10% or less of the outstanding shares of a particular class.⁹⁹

⁹⁶ *Re Royal Trustco Ltd. (No.3)* (1981) 14 B.L.R. 307 (Ont. S.C.) (QL)

⁹⁷ OBCA s.185(1)

⁹⁸ OBCA s.188(1)

⁹⁹ OBCA s.189(1)

The OBCA sets out the procedural steps and timelines under which each appraisal remedy may be exercised, which are beyond the scope of this paper to discuss. In *Re Domglas Inc.*,¹⁰⁰ the Quebec Superior Court held that "fair value" is the just and equitable value of the shares. The Court identified four methods to assess value:

- market value: this method uses quotes from the stock exchange;
- net asset value: this method takes into account the current value of the company's assets and not just the book value;
- investment value: this method relates to the earning capacity of the company;
- a combination of the preceding three methods.

Winding-up

The dissolution order is "the most drastic form of shareholder relief".¹⁰¹ The OBCA, like other corporate statutes, sets out a number of circumstances under which a court may order a winding-up of the corporation.¹⁰² These include where an oppression remedy claim has been met, where unanimous shareholder agreements provide the shareholder with rights to make an application and, perhaps most importantly, where it is "just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound

¹⁰⁰ (1980) 13 B.L.R. 135 (Que. S.C.); aff'd 138 D.L.R.(3d) 521

¹⁰¹ (1980) 13 B.L.R. 135 (Que. S.C.); aff'd 138 D.L.R.(3d) 521

¹⁰² Ziegel, supra f.n. 3 at 1290

up."¹⁰³ The court may make any order it thinks fit in connection with an application for winding-up.¹⁰⁴

The courts have, in the exercise of their powers under the "just and equitable" doctrine, made it abundantly clear that each case must be determined on its own facts. There emerge from the cases four situations in which the "just and equitable" rule will be applied:¹⁰⁵

- disappearance of substratum: this involves a failure of the fundamental objectives of the corporation. The cases fall into three categories:
 - the subject matter of the company is gone,
 - the object for which it was incorporated has substantially failed, or
 - it is impossible to carry on the business of the corporation except for at a loss;¹⁰⁶
- justifiable lack of confidence in the management of the corporation;
- deadlock; and
- the partnership analogy.¹⁰⁷

Conclusion

As noted in the introduction, a fundamental point in corporate law is the struggle to balance the protection of corporate stakeholders and the ability of management to conduct the affairs of the company in an efficient manner without

¹⁰³ OBCA s.207(1)

¹⁰⁴ OBCA s.207(b)(iv)

¹⁰⁵ OBCA s.207(2)

¹⁰⁶ Peterson, supra note 4 at 20.36. See also *Giannotti v. Wellington Enterprises Ltd.* [1997] O.J. No. 574 (Ont. Gen. Div.) (QL), where the corporation was wound up because the company had no reason to exist once its assets were distributed.

¹⁰⁷ *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All E.R. 492 (H.L.)

undue interference. Shareholders and other interested or affected parties are therefore provided with certain rights and remedies under corporate law, all of which attempt to foster this balance.

Toronto, March 2012.