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THE OPPRESSION REMEDY IN CORPORATE LAW: THE CANADIAN EXPERIENCE

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1. INTRODUCTION

In recent years U.S. legislators, courts, and academic commentators have expended a good deal of energy attempting to define the proper scope of statutory provisions that authorize minority shareholders in corporations to apply for dissolution or other remedial relief on the basis of fraud, oppression or other improper conduct. Similarly, most Canadian jurisdictions have recently enacted provisions that authorize the courts to grant remedial relief for oppressive and unfairly prejudicial conduct.

Canadian courts and academics, and even some foreign commentators, have considered the Canadian oppression provisions, which have been referred to as "beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world." U.S. courts and commentators have, however, almost entirely neglected Canadian oppression law. This is unfortunate. Canadian oppression

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3. Even the most comprehensive work in the area, F. O'NEAL & R. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS (2nd ed.), which discusses the English law in some detail, devotes only a few footnotes to the Canadian law.
law provides useful insights into the issues which are confronting, and will continue to confront, U.S. courts, legislators, and academics. In order to shed light on these issues, this article will outline the Canadian experience with the oppression remedy. It will be seen that the broadly drafted Canadian oppression remedy has had an important impact on the law relating to minority shareholders and has been a valuable addition to Canadian corporation law. This article will also identify issues which should cause concern for U.S. law-makers in relation to the introduction of an open-ended oppression remedy.

2. HISTORY OF THE OPPRESSION REMEDY IN CANADA

Canada, like the United States, is a federal system. Unlike in the United States, however, the Canadian federal government, as well as the ten provinces, has the power to incorporate. All eleven jurisdictions have taken advantage of their constitutional authority and have enacted general incorporation statutes. In the late 1960s and early 1970s the federal government and a number of provinces established task forces to examine the law relating to corporations. The results were dramatic. In 1970 the province of Ontario passed a new general incorporation statute. Three years later British Columbia enacted a new British Columbia Companies Act (hereinafter B.C.C.A.). In 1975, the federal Parliament passed the Canadian Business Corporations Act (hereinafter C.B.C.A.). Through the remainder of the 1970s and in the early 1980s Alberta, Saskatchewan, Manitoba and New Brunswick enacted legislation modeled closely on the C.B.C.A. Also, in 1982 Ontario replaced its 1970 statute with one closely resembling the C.B.C.A. The other four provinces made either less ambitious or no changes to their general incorporation laws in this period.


Those responsible for developing recommendations and specific legislative provisions borrowed heavily from legislation and reform proposals in other jurisdictions. The two most influential jurisdictions were the United States and, to a lesser extent, England. For example, the U.S. concepts of articles of incorporation and by-laws were introduced into the C.B.C.A. and the statutes modeled after it.

Remedies for minority shareholders was another area where a significant amount of borrowing from other jurisdictions occurred. Those responsible for recommending corporate law reform and other commentators widely recognized that the position of minority shareholders was an unsatisfactory one under Canadian corporate law. A large part of the problem was that the protection for minority shareholders under the common law was inadequate. The Canadian judiciary, expressly following their English counterparts, were reluctant to interfere in internal corporate affairs, and the Canadian common law relating to corporations reflected this. The general rule was, and continues to be, that directors owed fiduciary duties to the corporation and not to shareholders directly. Similarly, majority shareholders generally owed no duties directly to other shareholders. Thus, under Canadian common law, majority shareholders were prima facie entitled to act in their own self-interest, even to the extent of being entitled to use their votes in support of absolving themselves of breaches of fiduciary duty committed as directors. Further, the general rule was that individual shareholders were
not entitled to bring an action on behalf of the corporation or other shareholders.

There were exceptions to these principles. For example, case law from England indicated that majority shareholders were under some form of duty to cast their votes in the best interests of the company. Also, an individual shareholder was entitled to bring an action on behalf of the corporation in certain limited circumstances, such as when there had been fraud on the minority. Similarly, an action could be brought by a shareholder in his or her individual capacity if the alleged conduct constituted a breach of the applicant's personal rights as opposed to a wrong to the corporation. Nevertheless, the equitable protection afforded by the courts was at best erratic and uncertain and at worst completely ineffective.¹⁰

The legislative protection provided to minority shareholders was also sparse. There were no statutory provisions requiring the company to buy out minority shareholders who objected to fundamental changes. Also, the operation of legislative provisions dealing with the alteration of class rights was confusing and provided little protection for dissenting class shareholders.¹¹

The lack of viable judicial or statutory remedies meant that frequently the only course of action open to a dissatisfied minority shareholder under Canadian corporate law was to apply to have the corporation wound-up under statutory provisions that authorized a court to dissolve a corporation on the application of a minority shareholder. As in England and the United States, such applications were generally made in order to resolve the underlying dispute or to help the applicant withdraw his or her investment rather than with the ultimate intention of having the corporation wound-up. A winding-up application was far


from a perfect remedy, however. There was no statutory authorization for alternative remedies and most judges accepted that the courts did not have the jurisdiction to grant such remedies. Further, though Canadian company legislation most often set out a variety of grounds for dissolution, including an open-ended clause which allowed dissolution on the grounds that it was just and equitable that the corporation be wound-up, Canadian courts, like their English and U.S. counterparts, operated under the assumption that winding-up was a drastic remedy to be granted sparingly. For example, in cases brought under the just and equitable ground, a court would only grant the application if the facts matched those in classes of cases borrowed from English case law. These classes were largely oriented toward smaller companies without publicly traded shares, and even in relation to these companies the prospects of obtaining a dissolution order were not good. 12

In order to improve the position of the minority shareholder, those responsible for recommending company law reforms proposed major statutory revisions. These proposals were in large measure accepted by those Canadian jurisdictions enacting new general incorporation legislation. The U.S. influence on this process is very evident. For example, appraisal rights were introduced in relation to corporate amalgamations, sales of all or substantially all of the corporate undertaking and some other fundamental changes. 13 Also, a statutory derivative action was created which authorized a court to grant leave to an individual shareholder to bring an action on behalf of the corporation if certain prerequisites were fulfilled. 14 Further, those responsible for the draft-


14. The prerequisites essentially are 1) the applicant must have asked the board to bring the action, 2) the action appears to be in the interests of the corporation, and
borrowing from North Carolina legislation, introduced provisions which required that any alteration of rights related to a particular share class be approved by the members of that class. Those dissenting were given the right to be bought out at fair value. Such provisions also exist in the B.C.C.A. and the statutes modeled after the C.B.C.A. 5

Canadian corporate law reformers looked to England, however, for guidance with respect to the oppression remedy. The oppression remedy first appeared in Canada when it was introduced into the B.C.C.A. in 1960. The provision was borrowed directly from § 210 of the 1948 English Companies Act. The English provision had many important faults, and the B.C. provision suffered from the same weaknesses. For example, because these provisions were intended primarily to provide alternative remedies to winding-up, as opposed to introducing new conduct which could give rise to judicial intervention, it was necessary for a successful applicant to prove grounds justifying a winding-up order as well as oppressive conduct. Ironically, it was sometimes easier to prove the grounds for winding-up than it was to show oppressive conduct within the terms of the provision. This was because the oppressive conduct had to affect the applicant in his or her capacity as a shareholder and had to constitute a course of conduct which continued to exist at the time of the application. 6

Throughout the 1960s and early 1970s, no other Canadian jurisdiction had an oppression remedy and the remedy did not fare well.
when it was first scrutinized by those appointed to consider corporate law reform. Ontario's Lawrence Committee recommended that an oppression remedy not be adopted because the concept was a complete dereliction of the established principle of judicial non-interference in the management of corporations. The Committee said further that the underlying philosophy of the remedy had an air of defeatism about it, as adoption of the remedy was recognition that the legislature could offer no more to aid minority shareholders than abandoning the problems to the judiciary to deal with on an ad hoc basis.17

The views of the Lawrence Committee were in the minority. When the new B.C.C.A. was enacted in 1973, the oppression remedy was substantially revised. The revisions were made in accordance with a number of recommendations made by England's Jenkins Committee in 1962. The requirement that grounds for winding-up exist for there to be a successful application was removed. The type of conduct for which relief could be granted was widened to include unfair prejudice. It was also specified that a single act could give rise to a successful application, and that unfairly prejudicial conduct did not have to exist at the time of the application for the application to succeed. Finally, the types of relief which could be granted were expanded. Ten specific types of orders which could be made were specified and it was provided that the court had the authority to make any other order it deemed proper. Some examples of the orders which can be granted under the B.C. provision include cancelling or varying any transaction or resolution, regulating the company's affairs in the future, appointing a receiver, requiring a buyout of any shareholder's shares, and winding-up the company.18

The authors of the federal proposals also recommended the introduction of an oppression remedy. The result was what is now § 241 of the C.B.C.A. Section 241 contains the revisions which were incorporated into its counterpart in the B.C.C.A., but the C.B.C.A. oppression remedy is broader in a number of respects. The class of potential applicants is wider. Both acts permit applications by persons the court deems proper. Under the B.C. act, however, only present shareholders are expressly authorized to apply. Under the C.B.C.A. past shareholders, other security holders, former and present directors and officers of the

17. LAWRENCE REPORT, supra note 5, at 60.
company and the administrative official with responsibility for the Act, referred to as the director, are expressly authorized to apply. Further, there is a third class of conduct which can give rise to relief: conduct which unfairly disregards the interests of the applicant. Moreover, conduct of an affiliated corporation can also give rise to a remedy. Also, while the B.C.C.A. stipulates that the impugned conduct must affect the applicant in the capacity of member (shareholder), the C.B.C.A. provides that the impugned conduct can affect the applicant in the capacity of security holder, creditor, director, or officer. Finally, the list of remedies which are specifically authorized is somewhat broader under the C.B.C.A. All of the provinces which have adopted statutes based on the C.B.C.A. have enacted an oppression remedy which closely resembles § 241. This includes Ontario, which did not have an oppression remedy in its 1970 legislation because it adhered to the recommendations of the Lawrence Report.

3. Judicial Interpretation of the Oppression Remedy

The new oppression provisions were clearly an invitation to the courts to abandon their past conservatism and to intervene in intra-corporate affairs. The courts, however, have been given relatively little guidance as to how to apply the remedy. Their traditional source of guidance, English case law, was unavailable because England did not modernize its oppression remedy in accordance with the recommendations of the Jenkins Committee until 1980. Those responsible for recommending corporate law reform did not provide precise guidelines as

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19. Dickerson Report, supra note 5, at 158-63; Beck, supra note 2, at 312-14; Kaufman, supra note 10, at 79-81; Ravinsky, supra note 16, at 61-64; and Iacobucci, supra note 18, at 204-10.
21. Dickerson Report, supra note 5, at 162; Welling, supra note 4, at 526-33; Iacobucci, supra note 18, at 208.
to how the oppression remedy was to operate. The most comprehensive statement on the matter was made by the Dickerson Committee, which formulated the proposals for reforming the federal corporation legislation. The Dickerson Report cited examples of freeze-out techniques as instances where the courts might intervene, suggested that the remedy would be invoked more frequently in relation to closely held corporations than other corporations, and indicated that a broad standard of fairness should be invoked in applying the remedy. 23 Canadian academic commentators have added little to these observations. It is widely agreed by academic writers that the oppression remedy cuts across traditional corporate law doctrines and should be interpreted in accordance with broad standards of fairness and ethical business behavior. 24 However, attempts to develop a more rigorous theoretical framework, such as the reasonable expectations analysis which has gained much attention in the United States, have been rare. 25

Despite the lack of specific guidance, Canadian judges have gener-

23. DICKERSON REPORT, supra note 5, at 162-63. The following passage from Elder v. Elder and Watson Ltd., [1952] Sess. Cas. 49, 55 (H.L.) was quoted with approval:

[T]he essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

The ALBERTA REPORT discussed the issue in some depth but relied heavily on the DICKERSON REPORT and existing case law. See ALBERTA REPORT, supra note 5, at 136-43.


25. WELLING, supra note 4, at 532-37, has advanced a shareholders' expectation analysis based on the English case of Ebrahimim v. Westbourne Galleries, [1973] App. Cas. 360 (H.L.). The possibility of invoking an expectation analysis has also been discussed by Kaufman, supra note 10, at 82-83. Beck, supra note 2, at 319-20, argues that the oppression remedy should be interpreted in a manner consistent with the duties imposed on the majority in United States cases like Jones v. H.F. Ahmanson, 460 P.2d 464 (1969).

ally accepted that the oppression remedy has broadened judicial authority to intervene in intra-corporate affairs and have indicated that they will use this increased authority in appropriate cases. It has certainly been recognized that the oppression remedy has limits. It has been stated that the remedy does not open the door to every disgruntled shareholder. 26 It has also been said that the remedy does not alter the basic principle of majority rule and cannot be used by the minority to abuse the majority. 27 There have even been isolated suggestions that the law in fact has not been changed to any significant extent by the remedy. 28 The dominant viewpoint of Canadian judges, however, is that the oppression remedy should be interpreted broadly. 29 Most judges accept that their role with respect to the oppression remedy is to judge upon the fairness of the actions of management and the majority of shareholders in order to protect the minority from unfair treatment. 30

3.1. Procedural Issues

The oppression remedy in Canada, especially as set out in the C.B.C.A. and the statutes modeled after it, is an open-ended remedy with few procedural obstacles. Consistent with this, Canadian courts have generally been unreceptive to arguments which would impose procedural limitations on the availability of the remedy. For example, it has been held that an applicant shareholder does not have to have a minority interest in order to suffer oppressive or unfairly prejudicial conduct within the terms of the statutory provision. 31 Further, the fact


that an applicant’s shares were a gift will generally not affect a court’s
determination of whether there has been oppressive or unfairly prejudi-
cial conduct.\textsuperscript{32} Also, the absence of clean hands will not preclude a
finding of oppressive or unfairly prejudicial conduct.\textsuperscript{33}

The most striking example of judicial resistance to procedural bar-
riers is the B.C. case of \textit{Diligenti v. RWMD Operations}.
\textsuperscript{34} As men-
tioned, under the B.C. oppression provision the oppressive or unfairly
prejudicial conduct must impact on the applicant in the capacity of
shareholder.\textsuperscript{35} In closely held corporations a minority shareholder’s pri-
mary complaint will often be removal from the board or dismissal from
employment, as opposed to conduct affecting his or her rights as a
shareholder.\textsuperscript{36} On their face, such complaints cannot give rise to relief
under the B.C.C.A. oppression remedy because of the capacity require-
ment.\textsuperscript{37} \textit{Diligenti} held, however, that in certain situations there are eq-
uitable rights, expectations, and obligations between shareholders
which exist independent of the company structure and the relevant leg-
islation. Further, these rights, expectations, and obligations belong to

\begin{footnotes}
\footnote{638 (Ont. H.C. 1986). In \textit{Re Gandalman}, Judge Callon specifically refused to follow Vedova v. Garden House Inn Ltd., 29 B.L.R. 236 (Ont. H.C. 1985), where it was held that a 50% shareholder could not apply under the oppression provision because the remedy was only applicable to minority shareholders.}

\footnote{32. Mason v. Intericity Properties, 37 B.L.R. 6, 25 (Ont. C.A. 1987); Miller v. F. Mendel Holdings Ltd., [1984] 2 W.W.R. 683 (Sask. Q.B. 1984). This is also the law in the United States under oppression/liquidation provisions. \textit{See, e.g.}, Gunzberg v. Art-Lloyd Metal Products Corp., 492 N.Y.S.2d 83 (1985). Indeed, as was pointed out in Meiselman v. Meiselman, 307 S.E.2d 551 (1983), a shareholder who obtains his shares by way of gift is often in a worse position because he does not have the opportu-
nity to bargain. \textit{See Meiselman}, at 558-59.}

\footnote{33. Journet v. Superchef, 29 B.L.R. 206, 224-25 (Que. S.C. 1984); Miller v. F. Mendel Holdings Ltd., [1984] 2 W.W.R. 683, 695-96 (Sask. Q.B.). In contrast, a find-
ing of an absence of clean hands could preclude an application for winding-up by a
minority shareholder. \textit{See Huberman}, \textit{supra} note 12, at 316-17.}

\footnote{34. 1 B.C.L.R. 36 (B.C.S.C. 1976).}

\footnote{35. Most U.S. dissolution/oppression provisions do not expressly deal with the
suggests that the failure to deal with the matter may not be a significant barrier to
relief, but in some states, such as New Jersey, South Carolina and Minnesota, it is
specified that the requisite conduct can impact on the applicant in a variety of capaci-
10.14; Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554 (1979).}

3.06; Kaufman, \textit{supra} note 10, at 76-77; Waldron, \textit{supra} note 16, at 142-43;
Hannigan, \textit{supra} note 22, at 69; Meiselman v. Meiselman, 307 S.E.2d 551, 557-58
The Minnesota oppression provision specifically provides that oppression, or unfair-
ly prejudicial conduct, can apply in the capacity of employee if the corporation involved
has less than 35 shareholders. \textit{See Olson}, \textit{supra} note 1, at 641-42.}

note 2, at 421-22; Kaufman, \textit{supra} note 10, at 76-77; Hannigan, \textit{supra} note 22, at 69.}
\end{footnotes}
participants as shareholders, so if these rights, expectations, and obligations are breached, there can be relief granted under § 224. In *Diligenti*, the court granted relief to a shareholder who had been removed as a director, relieved of managerial duties, and deprived of the remuneration flowing from such duties. 38

Some have expressed concern that the oppression remedy is in fact too open-ended and that it may allow applications in situations which are inappropriate. 39 This might suggest that more statutory limitations should have been placed on access to the oppression remedy. On balance, however, leaving the remedy open-ended and allowing the courts to deal with procedural issues on a case by case basis has proved to be a sound approach. One reason is that even when Canadian courts have held that a particular circumstance should not be an absolute bar to an oppression application, that circumstance can still be relevant to the success of the application or the proper remedy. Thus, even though clean hands is not an absolute bar to an application, the conduct of the applicant is relevant in ascertaining whether there has been oppressive or unfairly prejudicial conduct and in determining the proper remedy. 40 Also, the fact that the applicant’s shares were a gift can be relevant to an oppression application in special circumstances. 41

38. Justice Fulton, in developing his analysis, relied heavily on Ebrahimi v. Westbourne Galleries, [1973] A.C. 360 (H.L.), where the notion that there were rights, expectations and obligations which survived the company structure was first recognized in Commonwealth law. *Diligenti* will be discussed further infra. The manner in which the *Ebrahimi* reasoning was adapted by Justice Fulton is discussed in Slutsky, *Corporate Law - Minority Rights - Oppression Remedy - Diligenti* v. RWMD Operations Kelowna Ltd. el. al., 11 U.B.C. L. REV. 326 (1977). *Diligenti* has been discussed or noted by many authors, including a number outside Canada. See, e.g., Prentice, *supra* note 2, at 422-23; Farrar, *supra* note 2, at 381; O’Neal & Thompson, *supra* note 3, at para. 3.06; Hannigan, *supra* note 22, at 70.

39. Welling, *supra* note 4, at 532-33. One case that tends to support this analysis is R. v. Sands Motor Hotel Ltd., [1985] 1 W.W.R. 59 (Sask. C.A.), where it was held that Revenue Canada, the federal taxing authority, could apply in its capacity as creditor. It was held further that Revenue Canada had in fact been unfairly prejudiced. 40. See Mason v. Intercity Properties, 37 B.L.R. 6, 11, 24-25, 29-30 (Ont. C.A. 1987); Eiserman v. Ara Farms Ltd., 44 Sask. R. 61 (Sask. Q.B. 1985). The conduct of the applicant is clearly relevant under the United States reasonable expectations analysis. The applicant must show that the frustration of his expectations was not his fault. Hillman, *supra* note 25, at 80-81; Capel, *Corporation Law - Meiselman v. Meiselman: 'Reasonable' Expectations Determine Minority Shareholders' Rights*, 62 N.C.L. REV. 999, 1018-19 (1984). Beyond this, the doctrine of clean hands under United States dissolution/oppression provisions is unclear. The conduct of the applicant has been treated as irrelevant in some cases, and has been crucial in denying relief in others. See, e.g., Topper v. Park Sheraton Pharmacy Inc., 433 N.Y.S.2d 359 (1980); Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 400 A.2d 554 (1979); Meiselman v. Meiselman, 307 S.E.2d 551 (1983) (Martin, J., dissenting); Gimpel v. Bolestein, 125 Misc.2d 45, 477 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1984); Davidian, *supra* note 1, at 62-70.

41. See *Re* Giroday Sawmills Ltd., 49 B.C.L.R. 378 (B.C.S.C. 1983). In this
Another advantage of the open-ended approach is that limitations on access to the oppression remedy would increase the likelihood that the judiciary would impose inappropriate barriers around the remedy. It is commonly accepted that this is what occurred in relation to the original English oppression remedy. The same might have occurred in Canada. Even with the open-ended nature of the oppression remedy, the tendency to impose unnecessary limitations on the remedy has appeared in some cases. For example, even though it is specifically set out that former shareholders, directors, and officers can apply and that past conduct can constitute oppressive or unfairly prejudicial conduct for the purposes of an application, one case held that an application will be dismissed unless oppression or unfairness exist at the time of the application. Further, there have been suggestions that the presence of a contractual buyout procedure may be a bar to relief.

The notion that statutory limitations on the availability of relief under the oppression remedy can lead to problematic judicial interpretations is illustrated by the different treatment of widely held corporations under the oppression remedies in Minnesota and in Canadian jurisdictions. It is widely accepted that judicial intervention on behalf of minority shareholders is more appropriate in closely held corporations than it is in other corporations. In widely held corporations, for example, the impact of the traditional lack of remedies for a minority shareholder is often less acute because it is more likely that there is a market for the shares. Further, in widely held corporations, the shareholder expectations and understandings relating to employment, management and other matters which are so often the components of shareholder dissatisfaction are unlikely to arise. Finally, judicial intervention in case, a father established a corporation in order to distribute his estate. He subsequently reallocated the rights of the future beneficiaries. Justice Taylor held that if such steps had been taken in a normal commercial corporation, it would have constituted a breach under § 224 of the B.C.C.A. The special circumstances of the case entitled the father to act as he did.


44. Eiserman v. Ara Farms Ltd., 44 Sask. R. 61 (Sask. Q.B. 1985); Bernard v. Montgomery, 36 B.L.R. 257 (Sask. Q.B. 1987). In the most careful consideration of this argument, the court held that the existence of a contractual buy-out procedure does not preclude reliance on the oppression remedy. See Re Bury, 12 D.L.R.4th 451 (Ont. H.C. 1985).
widely held corporations may be more objectionable because corporate operations may be too complex for effective judicial intervention.\textsuperscript{45} From all this, it might be thought that the oppression remedy should be limited to closely held corporations. Oppressive or unfairly prejudicial conduct, however, can occur in corporations which do not fall within the traditional definitions of closely held corporations. Further, defining a closely held corporation is a notoriously difficult process.\textsuperscript{46} Consequently, it is better not to restrict the application of the oppression remedy and let the courts consider the significance of the characteristics of the corporation involved on a case by case basis.\textsuperscript{47}

The Minnesota experience bears this out. Minnesota has an oppression provision which is the broadest in the United States and which is similar in scope to that in the C.B.C.A. and the statutes modeled after it.\textsuperscript{48} However, consistent with the intention of the drafters that the provision provide relief primarily to shareholders in closely held corporations, a number of aspects of the provision only apply to such corporations, defined as corporations with no more than thirty-five shareholders. For example, it is specified that a court is authorized to order the buyout of a shareholder in an action involving a closely held corporation. This provision proved to be of great significance in \textit{Sundberg v. Lampert Lumber Co.}\textsuperscript{49} In that case, the corporation had over one hundred shareholders. Seventy percent of the shares, however, were held by members of one family, and it was acknowledged that the corporation had some of the features of a common law closely held corporation. The trial court held that the applicants had been unfairly prejudiced


\textsuperscript{47} The problems relating to judicial interpretation of statutory provisions which are restricted to particular types of corporations are discussed in Karjala, \textit{A Second Look at Special Close Corporation Legislation}, 58 TEX. L. REV. 1207, 1259-60 (1980).


\textsuperscript{49} Sundberg v. Lampert Lumber Co., 390 N.W. 2d 352 (Minn. App. 1986). The author thanks Professor Dennis Kajala of Arizona State University for bringing this case to his attention.
and that their shares should be bought out by the corporation. On appeal the trial court was reversed — even though the Minnesota provision expressly authorized a court to grant any relief deemed just and reasonable in the circumstances. The specific reference to buyouts for closely held corporations in the statute was held to preclude ordering a buyout for other types of corporation, such as the one in the case before the court. Thus, because of the type of corporation involved, the applicants were not entitled to a remedy, apparently regardless of the conduct involved.

Similar problems have not arisen in relation to closely held corporations under the Canadian provisions, where there is no express reference to the type of corporation to which the remedy is applicable. There have been successful applications in cases involving widely held corporations. This does not mean, however, that all corporations have been treated identically under the oppression remedy. As mentioned, the Dickerson Report recognized that the oppression remedy was not specifically limited to closely held corporations, but stated that the remedy would be most useful in relation to such corporations. The case law has followed this pattern. The success rate in cases where corporations do not have the characteristics of closely held corporations appears to be lower than it is in cases involving corporations which appear to be closely held.60 Further, most oppression applications have involved corporations without publicly traded shares. Finally, judicial pronouncements on the topic suggest that the oppression remedy has a wider application to closely held corporations.61 Consequently, the oppression remedy in Canada has provided more substantial protection to shareholders in corporations where such protection is most needed without


imposing any rigid limitations on the availability of the remedy in other corporations. Thus, as with other procedural issues, the approach of leaving the line drawing to the courts as opposed to imposing statutory barriers has proved to be well advised.\(^2\)

3.2. Oppressive and Unfairly Prejudicial Conduct

Another important issue which Canadian legislators left in the hands of the courts was determining what constitutes oppression, unfair prejudice, or conduct which unfairly disregards the interests of the applicant.\(^3\) The courts have taken a narrow view of what constitutes oppression. Generally, as has occurred in some U.S. cases dealing with applications for dissolution or other relief on the basis of oppressive conduct, Canadian courts have followed the jurisprudence developed under the original English provision. Thus, oppression has been characterized as conduct which is burdensome, harsh and wrongful, or which lacks of probity and fair dealing.\(^4\)

While the Canadian judiciary has taken a narrow view of oppression, this has not been the case with unfairly prejudicial conduct.\(^5\) It

\(^{52}\) But see F. Buckley & M. Connelly, Corporations — Cases, Texts and Materials 611-12, 677-78 (1984) (suggesting that the oppression remedy should only apply to closely held corporations).

\(^{53}\) On the other hand, in applications involving closely held corporations, the Minnesota provision directs courts to consider reasonable expectations and the duties owed by majority shareholders under U.S. case law in determining whether to grant relief and what relief is appropriate. See Olson, supra note 1, at 646-58. An approach similar to that of Minnesota is recommended in Phillips, supra note 1. Other U.S. authors have argued that the specific conduct constituting oppression should be set out in the relevant statute. See Davidian, supra note 1, at 57-62; Shapiro, Involuntary Dissolution of Close Corporations for Mistreatment of Minority Shareholders, 60 Wash. U. L.Q. 1119, 1147, 1151-52 (1982).


\(^{55}\) Little consideration has been given to what constitutes conduct which unfairly disregards the interests of the applicant. It has been recognized that this stands as an independent basis for relief and may have a broader scope than unfairly prejudicial conduct. In no case, however, has a specific finding of such conduct been found. See Mason v. Intercity Properties, 37 B.L.R. 6, 10 (Ont. C.A. 1987); Bernard v. Montgomery, 36 B.L.R. 257, 261 (Sask. Q.B. 1987); Miller v. F. Mendel Holdings Ltd.,
has been held that unfair prejudice to the applicant connotes a wider scope of conduct than oppression. 56 Unlike oppression, the existence of unfairly prejudicial conduct is determined by the effect on the shareholder, as opposed to the motives or the nature of the conduct of the majority. 57 An applicant, however, will not be unfairly prejudiced simply because he or she is adversely affected by the operations of the corporation. 58 Instead, the conduct must be detrimental or damaging to the applicant's rights in a manner which is unjust or inequitable. 59

Canadian courts, however, have not attempted to develop a precise definition or a comprehensive theoretical framework for unfairly prejudicial conduct. No attempt has been made, for example, to determine whether relief should be granted on the basis of frustrated reasonable expectations, as is occurring with increasing frequency under U.S. oppression/dissolution provisions. 60 In the United States, the judiciary has been criticized for failing to develop a more rigorous approach to such provisions. 61 In Canada, however, the lack of a precise definition has

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60. There have been suggestions that Canadian courts are in fact using the oppression remedy to protect the thwarted expectations of shareholders. See, e.g., Wellin, supra note 4, at 533-37; Anisman, supra note 10, at 482-83. However, the courts have not expressly recognized that this is what is occurring.


61. Davidian, supra note 1, at 57-62; Chittur, supra note 45, at 139-43, 170-71;
not generated a significant degree of controversy. This may be because the oppression provision is still new enough that the courts and academic commentators are prepared to accept a case by case approach. Further, the use of a theoretical framework would not necessarily be a panacea. The limited U.S. experience with the reasonable expectations analysis indicates that it may not be amenable to all situations which can arise under a dissolution/oppression provision and that it does not guarantee a broad interpretation of such provisions. At any rate, the absence of a precise definition or theoretical framework has not prevented the courts from utilizing the oppression remedy to intervene in a wide variety of circumstances. The most important classes of cases where the remedy has been utilized are worth consideration.

It is difficult to classify the cases which have arisen under the oppression remedy in a perfectly satisfactory fashion. Any division will be arbitrary to a certain extent, as the factual circumstances in each of the cases have been different. Also, some cases fit comfortably into two or more classes. Further, the courts themselves have generally refrained from classifying the cases. Despite these qualifications, clearly the most common type of oppression application alleges that the controllers of the corporation have diverted corporate profits to their own use, or have used corporate money or assets for their personal advantage. When such conduct is proved the courts have invariably granted the application and provided relief. This is not startling. The conduct involved in the cases likely constituted breaches of fiduciary duty and, even before

Shapiro, supra note 53, at 1132-43, 1147, 1151-52.

In McCauley v. McCauley & Son Inc., 724 P.2d 232 (1986), however, Justice Garcia defended the lack of a rigidly defined standard for oppression, arguing that this gave the courts freedom to determine whether the acts involved frustrated reasonable expectations or otherwise merited relief. Id. at 236.


This should not be surprising, as those who control corporations often use a variety of techniques to freeze-out or otherwise mistreat minority shareholders. See O'NEAL & THOMPSON, supra note 3, at ch. 3.


https://scholarship.law.upenn.edu/jil/vol10/iss3/1
the statutory reforms, may well have been grounds for a successful personal action or winding-up application. 65

A significant number of oppression applications allege that the corporate affairs and proceedings have not been conducted in accordance with relevant legislation or the corporate constitution. Not surprisingly, when the procedures utilized are found proper, the application has been dismissed. 66 Unlike with cases involving misuse of corporate assets, however, mere proof of non-compliance with legislation or the corporate constitution has generally not been sufficient to support a successful application. Instead, something more than irregular corporate procedure is required, such as a plan by the controllers of the corporation to operate the corporation without regard for other shareholders. 67 Similarly, the fact that proper corporate procedures are followed will not prevent a successful oppression application. 68

This is illustrated by cases involving removal of a director, officer, or employee of the corporation. Unlike improper use of corporate assets, such conduct was generally unassailable before the enactment of the oppression remedy, as removal from the board of directors and from managerial and employment positions is clearly permitted under Canadian corporation legislation. 69 Nevertheless, a significant number of successful applications have been made under the oppression remedy in situations where the applicant was excluded from employment, participation in management, and remuneration.

Exclusion from the day-to-day operation of the corporation, as such, will not automatically entitle an applicant to relief under the oppression remedy. The courts have not lost sight of the fact that removal of directors and officers by the corporation is permitted under general

65. See Hadden, supra note 4, at 262, 264-65; Waldron, supra note 16, at 138-42; Schaef, supra note 24, at 519-20. See also sources cited supra note 10.


67. Journet v. Superchef, 29 B.L.R. 206 (Que. S.C. 1984); Redekop v. Robco Constr. Ltd., 89 D.L.R.3d 507 (B.C.S.C. 1978); Re Romana Inn, 48 B.C.L.R. 65 (B.C.S.C. 1983); Jackman v. Jackets Enters., 4 B.C.L.R. 358 (B.C.S.C. 1977). In Jackman, there was some suggestion that the failure to comply with proper corporate procedures might give rise to some relief absent the other improper conduct.

68. This was expressly recognized in MacMillan v. Progressive Mill Supplies Ltd., 6 B.C.L.R.2d 135 (B.C.C.A. 1986).

69. See Beck, supra note 10, at 556-57. The only remedy that a minority shareholder could realistically have utilized was an application for winding-up on the theory that the corporation was in fact an incorporated partnership. There were cases in which winding-up was ordered because of exclusion from corporate affairs if it was understood that the applicant was to be an active rather than silent partner. See Hamburger, supra note 12, at 309-10.
Also, the courts, not surprisingly, have concluded that the applicant has no complaint if the applicant left his or her position voluntarily. Further, it appears that removal will not be unfairly prejudicial if those operating the company have justifiably lost faith in the applicant. It also appears that if the parties have expressly dealt with the possibility of termination in a shareholders' agreement, the likelihood that removal from employment with the corporation will constitute unfairly prejudicial conduct will be reduced. Beyond this, dismissal of the applicant without sufficient notice under the common law of employment contracts does not necessarily amount to unfair prejudice.

Clearly, then, something more than mere removal from a particular post with the corporation or a reduction in the applicant's role with the corporation is required for an application under the oppression remedy to succeed. If the removal of the applicant or the reduction in the applicant's role is part of a plan ultimately to force the applicant to leave the corporation, the prospects of a successful application will increase significantly. This will also be the case if the removal is part of a plan by those controlling the corporation to operate the corporation without regard for any of the other shareholders. Finally, an application is more likely to succeed if the relationship between the participants was such that the applicant was vested with some form of equitable right to participate in the management of the corporation.

There have been a number of cases where an oppression applica-

76. Mason v. Intercity Properties, 37 B.L.R. 6, 8-10, 25-26 (Ont. C.A. 1987); Re Little Billy's Restaurant, 45 B.C.L.R. 388 (B.C.S.C. 1983); Miller v. F. Mendel Holdings Ltd., [1984] 2 W.W.R. 683 (Sask. Q.B.); Redekop v. Robco Constr. Ltd., 89 D.L.R.3d 507 (B.C.S.C. 1978); Re Romana Inn Ltd., 48 B.C.L.R. 65 (B.C.S.C. 1983). In Mason, Little Billy's, Re Romana Inn, and Reeder v. Jones (B.C.S.C. 1978) (unreported), the applicant was not formally excluded from a particular post, but his involvement in the corporation was significantly reduced and his access to the income of the corporation was virtually cut-off.
tion was brought on the basis of conduct which was permissible under the relevant legislation and the corporate constitution, but which allegedly constituted a breach of underlying understandings and equitable rights. These cases have most often involved exclusion from corporate affairs, but they merit some independent consideration. The first case of this type was *Diligenti.*

As mentioned, this case was innovative in terms of introducing the concept of equitable rights and obligations of shareholders in order to overcome the capacity problem in the B.C. oppression provision. The case left some unanswered questions, however. For example, could such equitable rights and obligations arise in corporations other than those of the type in *Diligenti?* In *Diligenti,* the participants had been in partnership before incorporation and the relationship between the participants was personal as well as commercial. In a subsequent case where the conduct involved was clearly permissible under the relevant legislation, but relief was granted on the basis of breach of the equitable rights of the applicant, the court stressed that the corporation was of the same type as that in *Diligenti.* Other cases have not been as restrictive, however. The Ontario Court of Appeal has expressly stated that equitable obligations and considerations are relevant in cases involving closely held corporations, thus embracing a wider class of corporations than those of the type in *Diligenti.* Further, there have been statements in cases involving corporations which do not fall within the *Diligenti* facts that equitable rights can form the basis of a successful oppression application. Finally, a finding that a corporation is not of the type in *Diligenti* will not preclude a successful application under the oppression remedy. Consequently, while it is more likely that equitable rights meriting protection under the oppression remedy will be found in corporations with the same characteristics as those in *Diligenti,* such equitable rights and obligations can clearly arise in other corporations.


80.  *Re* Ferguson and Imax Systems Corp., 43 O.R.2d 128 (Ont. C.A. 1983). While many definitions of a closely held corporation include an overlap between ownership and management, a pre-existing partnership or a personal relationship is not generally a prerequisite for a corporation to be considered closely held.


83.  For example, in *Re* Goldstream Resources Ltd., 2 B.C.L.R.2d 244 (B.C.S.C. 1986), Justice Spencer stated that the widely held nature of the corporation and purely commercial relationship between the participants precluded the existence of any equita-
Another issue brought up by Diligenti is whether any form of understanding or agreement between the parties is necessary for equitable rights and obligations to exist outside the framework of the relevant legislation and corporate constitution. In Diligenti there was an agreement or understanding about the expectations of the participants. Subsequent cases indicate, however, that no such finding is necessary for relief on the basis of equitable rights under the oppression remedy. Indeed, relief has been granted in cases where the conduct was in accordance with the express agreement of the parties. It should be noted, also, that mere breach of an agreement between shareholders will not found a successful application. In one case, the application was denied in part because the agreement between shareholders was private and thus did not involve corporate affairs. This line of reasoning suggests share transfers between shareholders cannot constitute oppressive conduct. The reasoning, however, has not been used in subsequent cases.

Cases involving misuse of corporate assets, the irregular conduct of corporate affairs, and exclusion from involvement with the corporation have been common under U.S. dissolution/oppression provisions.
OPPRESSION REMEDY: CANADIAN LAW

Less common, however, have been complaints based on alteration of rights attached to shares or unequal treatment as between shareholders. This is probably because cases involving such conduct are brought on the basis of breach of duties owed to minority shareholders. Such cases, however, have formed the basis of a significant number of applications under the oppression remedy in Canada. This class of cases can be divided into three groups. One is where the controllers of the corporation are seeking, by way of corporate reorganization, to place themselves in a position where they can buy out certain minority shareholders who want to retain their shares. The second is where share issuances alter the proportional shareholdings in the corporation. The third is where certain shareholders are given the opportu-


90. For examples in which such conduct was the basis of the application, see Sundberg v. Lampert Lumber Co., 390 N.W.2d 352 (1986); Browning v. C & C Plywood Corp., 434 P.2d 330 (1967).

91. See, e.g., Ski Roundtop Inc. v. Hall, 658 P.2d 1071 (1983) (allegations that defendant obtained control through the issuance of shares on unequal terms formed basis of breach of duty to the minority, while the defendant's conduct once control was obtained formed basis of dissolution/oppression application). Duties owed to minority shareholders will be examined in greater detail infra.

92. Alexander v. Westeel-Rosco Ltd., 93 D.L.R.3d 116 (Ont. H.C. 1978); Ruskin v. Canada All-News Radio Ltd., 7 B.L.R. 142 (Ont. H.C. 1979); Burdon v. Zeller's Ltd., 16 B.L.R. 59 (Que. S.C. 1981). Note that these cases involved preliminary injunctions and thus did not constitute a full hearing of the issues. In these cases a merger of corporation "A" with corporation "B," which was owned solely by the majority of "A" shareholders, was used to oust the minority of "A" shareholders. Such a pattern is most likely to emerge in Canada when the "A" majority cannot utilize the statutory take-over procedure which exists in most Canadian jurisdictions. Under this procedure when a take-over bid is accepted by 90% or more of the shareholders, the remaining shareholders can be required to sell their shares at fair value. See, e.g., C.B.C.A., supra note 6, at § 206. See generally Schaef, supra note 24, at 514-16; Beck, supra note 2, at 321-25; Hadden, supra note 4, at 595-615; Waldron, supra note 16, at 146-48; Halperin, Statutory Elimination of Minority Shareholders in Canada in Sarna 1, supra note 16, at 1; Kroft, Further Reflections on 'Going Private' - Towards a Rational Scheme of Regulating Minority Squeeze-Out Transactions, 13 OTTAWA L. REV. 356 (1981). The complex United States law relating to mergers and squeeze-outs is discussed in O'Neal & Thompson, supra note 3, at paras. 5.04-5.05.

93. Re Sabex Internationale, 6 B.L.R. 65 (Que. S.C. 1979); H.J. Rai Ltd. v. Reed Point Marina (B.C.S.C. 1981) (unreported); Re Peterson and Kanata Inv. Ltd., 60 D.L.R.3d 527 (B.C.S.C. 1975); Re Goldstream Resources Ltd., 2 B.C.L.R.2d 244
nity to have their shares bought out, and other shareholders are not, or are offered a lower price.\textsuperscript{94}

In all three situations, successful applications have been made under the oppression remedy.\textsuperscript{95} This does not mean, however, that because of the introduction of the oppression remedy that all shareholders are entitled to remain shareholders, that all shareholders have the right to retain their proportional shareholdings, or that all shareholders must have the opportunity to leave the corporation on equal terms.\textsuperscript{96} Further, though it is difficult to generalize, the cases indicate that the courts will not interfere with unequal treatment of shareholders if a persuasive business reason can be given for the unequal treatment.\textsuperscript{97} A persuasive business reason, however, will not likely be sufficient to preclude a successful application if there was an underlying understanding between the participants that there would be equality of treatment, or if the impact on the applicant is particularly harsh.\textsuperscript{98}

In summary, despite the lack of specific guidance from legislators, the courts have done a good job of determining what conduct will found a successful application under the oppression remedy. Applications

(B.G.S.C. 1986). Under the C.B.C.A. and the statutes modeled after it, a corporation is authorized to require shares be issued on a pro rata basis. See, e.g., C.B.C.A., supra note 6, at § 28. Under the B.C.C.A., non-reporting corporations, that is corporations without publicly traded shares, are required to issue new shares on a pro rata basis. See B.C.C.A., supra note 6, at § 41. On the United States position regarding share issuances, see O'NEAL & THOMPSON, supra note 3, at para. 3.20.


have been successful in a fairly wide range of circumstances, and the courts have shown little inclination to limit the oppression remedy to the classes of cases where successful applications have already been made. Conversely, however, the courts have imposed sensible limits on the type of conduct which will give rise to a successful application. Thus, breaches of relevant legislation, removal from a position with the corporation, and unequal treatment as between shareholders will not be sufficient, without more, to found a successful application.

3.3. Remedies

As mentioned, when a successful oppression application has been brought, it is expressly provided that the court has the discretion to grant a wide variety of orders. Past history suggested that the courts would be reluctant to innovate with respect to remedies. Before statutory reform, as with many U.S. dissolution/oppression provisions, there was no specific authorization for courts to grant alternative remedies on winding-up applications. Canadian judges, unlike their U.S. counterparts, most often held that there consequently was no jurisdiction to grant alternative remedies on winding-up applications.99 Now that Canadian judges have been given explicit statutory authorization to grant a wide variety of remedies, however, there has been no hesitation to use these powers.

The order which is most often sought and which is most commonly granted in a successful application is a buyout of the applicant's shares by the corporation or other shareholders. Still, the courts have not always granted such an order when requested. Most often, a buyout is not ordered when the judge is of the view that management of the company is competent and other remedies will be sufficient to remedy the detrimental conduct.100

In relation to successful applications where a buyout is ordered, determination of the price of the shares is often a more contentious issue than the determination of whether a buyout is the appropriate remedy.101 There is no statutory direction as to how shares are to be


101. Quite frequently in the reported cases, the court has left the determination of the value of the shares to the parties or has stipulated that the matter should be dealt with at a later date. See Nystad v. Harcrest Apartments, 3 B.C.L.R.2d 40 (B.C.S.C.
valued. The courts, however, have generally held that the applicant is entitled to the fair value of the shares, which is the standard used under the appraisal remedy. In the oppression remedy cases where the courts have had to determine fair value, market price has been irrelevant, as the shares in all of the cases were not being traded on any stock exchange. The courts have instead determined fair value by first fixing the value of the business and then by attaching a price to the applicant's share of the business. Courts have generally valued the business by determining what a prudent investor, knowledgeable of the business, under no compulsion to buy, would be willing to pay a vendor, under no compulsion to sell, for the business as a going concern.

In terms of attaching a value to the applicant's share of the business, the primary issue has been whether the applicant is entitled to a pro rata share of the value of the business based on the percentage of shares held, or whether a minority discount should be applied. As in the United States, the Canadian case law on this issue is mixed. The trend of authority, however, is that no minority discount should be applied. The courts apply a minority discount only if the applicant's conduct was of such a grave character that the applicant deserved to be excluded from the corporation.


104. In Re Romana Inn Ltd., 48 B.C.L.R. 65 (B.C.S.C. 1983), the liquidation value of the corporation was the focus because the corporation had ceased to do business.


106. On the U.S. law, see O'NEAL & THOMPSON, supra note 3, at para. 7.21 n.25.

107. The leading case on these issues is Mason v. Intercity Properties, 37 B.L.R.
This approach to the minority discount issue is sensible.\textsuperscript{108} When minority interests in corporations, closely held or otherwise, are sold between parties at arms length there will usually be a minority discount. Therefore, it makes a certain degree of sense to apply a minority discount when a shareholder engages in conduct justifying expulsion — the shareholder can be said to be notionally electing to leave the corporation in much the same way as when a shareholder relies on appraisal rights. Where, however, the shareholder is leaving the corporation by virtue of unfairly prejudicial conduct, it is less appropriate to treat the applicant as electing to sell his or her shares. Instead, the shareholder will have been forced out of the corporation, and requiring those responsible for the unfairly prejudicial conduct to pay more than the shares would fetch on the market seems appropriate compensation.

While a buyout of the applicant is the most common remedy granted, other remedies have been granted in a significant number of oppression cases. Remedies other than buyout are divisible into two basic types.\textsuperscript{109} The first is remedies which assist the applicant but do not alter the basic structure of the corporation or the relationship between the participants. For example, in some cases, there have been orders setting aside or preventing the corporation from acting on resolutions of the shareholders or the directors.\textsuperscript{110} In others, the court has set aside transactions involving the corporation and those controlling it.\textsuperscript{111} Also, there have been orders requiring compliance with provisions in the relevant corporation statute and requiring that the applicant be provided with certain information concerning the corporation.\textsuperscript{112} In one

\textsuperscript{108} The following analysis is based on Krishna, \textit{Determining the 'Fair Value' of Corporate Shares}, 13 C.B.L.J. 132, 165-76 (1987-1988). See also MacIntosh, supra note 13, at 201, 283-91.

\textsuperscript{109} Cf. \textit{Welling}, supra note 4, at 529-32.


case, it was even ordered that the controlling shareholder of the corporation give a personal guarantee on a loan taken by the corporation.\textsuperscript{113}

To the second class of order other than a buyout of the applicant belong those which realign the power structure within the corporation or change the ground rules under which the corporation operates. For example, in one case the court ordered that the applicants were entitled to buy out the majority shareholder.\textsuperscript{114} In another case, the powers of the board of directors were suspended and a receiver was appointed to operate the affairs of the corporation.\textsuperscript{115} In subsequent proceedings involving the same corporation, the court appointed a new board of directors.\textsuperscript{116} Dissolution has even been granted on an oppression application in one case, but the courts appear to be reluctant to make such an order.\textsuperscript{117}

4. RELATIONSHIP OF THE OPPRESSION REMEDY WITH OTHER REMEDIES

4.1. Canada

Given the absence of procedural barriers, the wide scope of conduct which is covered, and the broad range of remedies which are available under the oppression remedy, it should not be surprising that this remedy has become the most important under Canadian corporation legislation. Other statutory remedies, on the other hand, have either declined in importance or have not achieved the importance that had been initially expected. For example, applications for winding-up by minority shareholders are much less frequent than in jurisdictions where there is no oppression remedy.\textsuperscript{118} Also, appraisal rights and the

\begin{itemize}
\item Inversiones Montforte S.A. v. Javelin Int'l Ltd., 17 B.L.R. 230 (Que. S.C. 1982). A receiver was also appointed in Journet v. Superchef, 29 B.L.R. 206 (Que. S.C. 1984), to operate the affairs of the corporation until the applicant's shares could be bought at a fair price. On the U.S. law relating to the appointment of a custodian on the application of a minority shareholder, see O'NEAL & THOMPSON, \textit{supra} note 3, at para. 10.10.
\item For example, in the Ontario Reports between 1974 and 1982 there were seven reported winding-up applications. From 1982, the year the oppression remedy was introduced, to 1988 there were no reported winding-up applications. There were, however, four applications under the oppression remedy. The statutory provisions authorizing dissolution are: B.C.C.A., \textit{supra} note 6, at §§ 295-96; C.B.C.A., \textit{supra} note 6, at § 214; M.B.C.A., \textit{supra} note 6, at § 207; S.B.C.A., \textit{supra} note 6, at § 207; N.B.C.A., \textit{supra} note 6, at § 141; O.B.C.A. 1982, \textit{supra} note 6, at § 206, A.B.C.A., \textit{supra} note 6, at § 207.
\end{itemize}
statutory derivative action have been utilized less than had been anticipated when they were introduced.\textsuperscript{119}

In part, the lack of reliance on these remedies is due to their inherent shortcomings. This is certainly the case with appraisal rights. Short time limits and a compulsory procedure which is so complex that it can only be relied upon with legal advice have the effect of precluding many shareholders from using those rights.\textsuperscript{120}

To a significant extent, however, it is the presence of the oppression remedy which has caused other remedies to recede into subsidiary status. For example, in relation to winding-up, the oppression remedy covers most of the conduct which provides grounds for a winding-up order, and the courts are much more sympathetic to applications under the oppression remedy than they have been towards winding-up applications.\textsuperscript{121} Further, if the applicant's primary objective is in fact to get the corporation dissolved, such an order can be made under an oppression application. Also, a successful application under the winding-up provision will not ensure that a winding-up order is in fact granted, as it is expressly provided that the courts have the power to make the same orders under a winding-up application that can be made in an oppression remedy application.\textsuperscript{122} Consequently, it is not surprising that dissolution applications have been abandoned for the most part in favor of applications under the oppression remedy.\textsuperscript{123}

Similarly, the advantages of the oppression remedy have considerably lessened the importance of the statutory derivative action. The statutory derivative action has revamped what was an extremely troublesome area of the law, and the courts have interpreted the relevant

\textsuperscript{119} HADDEN, \textit{supra} note 4, at 265; MacIntosh, \textit{supra} note 13, at 297-98.

\textsuperscript{120} See HADDEN, \textit{supra} note 4, at 255-60; WELLING, \textit{supra} note 4, at 545-55; MacIntosh, \textit{supra} note 13, at 249-65.

\textsuperscript{121} In a number of cases, judges have favorably contrasted the oppression remedy with the winding-up remedy. \textit{See}, e.g., Rafuse v. Bishop, 59 A.P.R. 70 (N.S.S.C. 1979); Nieforth v. Nieforth, MacKenzie Ltd., 163 A.P.R. 10 (N.S.S.C. 1985); Mason v. Intercity Properties, 37 B.L.R. 6 (Ont. C.A. 1987); \textit{Re} Abraham and Inter Wide Invs. Ltd., 20 D.L.R.4th 267 (Ont. H.C. 1986).

\textsuperscript{122} The ability of the court to make the same orders is set out expressly in the C.B.C.A. and the statutes modeled after it. Under the B.C.C.A., the position is not so clear, but it has been held that such orders can in fact be made in a winding-up application. Oakley v. McDougall, 14 B.C.L.R.2d 128 (B.C.C.A. 1987).

\textsuperscript{123} In fact, in two cases where a successful oppression application was made, winding-up applications based upon the same facts had been previously made under the unreformed legislation and were dismissed or abandoned. \textit{Re} Abraham and Inter Wide Invs. Ltd., 20 D.L.R.4th 267 (Ont. H.C. 1986); Miller v. F. Mendel Holdings Ltd., [1984] 2 W.W.R. 683 (Sask. Q.B.). There still are some successful applications for dissolution in jurisdictions with the oppression remedy. \textit{See}, e.g., 91436 Canada, Inc. v. Evalayne Sales Corp., 54 C.B.R. 87 (Que. S.C. 1985); Mammone v. Doralin Invs. Ltd., 54 C.B.R. 171 (Ont. H.C. 1985).
statutory provisions broadly. Nevertheless, there are a number of good reasons why minority shareholders have relied on the oppression remedy rather than the statutory derivative action. Facts giving rise to wrongs to the corporation, such as breaches of fiduciary duties owed by directors, can often be the subject matter of an oppression application as well as a statutory derivative action. An applicant seeking to bring a derivative action must satisfy a number of statutory prerequisites and must obtain the leave of the court before proceeding. No such prerequisites exist with the oppression remedy and leave is not required to bring an application. Finally, the remedies available are much broader under the oppression remedy.

The broad sweep of the oppression remedy means that the relationship between it and other statutory remedies can be a cause for concern. In relation to winding-up applications, the oppression remedy has not been a problem, as the relevant legislative provisions have been drafted with the intention of largely integrating the two remedies. The relationship between appraisal rights and the oppression remedy also has been relatively trouble-free. The fact that appraisal rights can be exercised in situations when the oppression remedy might be available is undisputed. A potentially more contentious problem is whether the oppression remedy should be available when appraisal rights can be utilized or have been exercised. In the United States it has been suggested in some cases that the existence of appraisal rights precludes reliance on other remedies. There has been no indication, however, from Canadian courts that the possibility of relying on appraisal rights will bar an application under the oppression remedy. Indeed, though


126. See supra note 14.

127. See Beck, supra note 2, at 318; Waldron, supra note 16, at 142; Ravinsky, supra note 16, at 53.

128. DICKERSON REPORT, supra note 5, at 150-51, 162. See also supra note 122.

129. On the U.S. law, see, for example, O'NEAL & THOMPSON, supra note 3, at para. 5.32.
there is some conflict on the point, it appears that even after requesting that the corporation purchase his or her shares under the appraisal rights provision, a shareholder can apply under the oppression remedy. This is the case even though it is provided by statute that a shareholder who utilizes appraisal rights loses his rights as a shareholder.\textsuperscript{130}

The interrelationship between the oppression remedy and the statutory derivative action is more of a problem. There have been isolated suggestions in the case law that certain allegations constitute wrongs to the corporation and thus are not the proper subject matter of an oppression application.\textsuperscript{131} Similarly, there is some academic support for the view that boundaries should be drawn around the oppression remedy by requiring certain matters be dealt with by way of a derivative action rather than the oppression remedy.\textsuperscript{132}

It would be unfortunate if these suggestions were taken up by the Canadian judiciary. Before the statutory reforms of the 1970s, Canadian courts had to struggle with the complicated question of whether a particular action constituted a wrong to the corporation or a wrong to a shareholder in his or her individual capacity.\textsuperscript{133} If the requirement of using a derivative action is used to impose limits on the oppression remedy, the courts will have to engage in similar linedrawing. The courts have shown that they can limit the oppression remedy without the use of such devices. Consequently, using the derivative action to limit the oppression remedy would likely add unnecessary complexity to the law and might impose crippling procedural barriers around the oppression remedy.\textsuperscript{134} Fortunately, most Canadian judges have not troubled themselves with the potential complications arising from the relationship between the derivative action and the oppression remedy. Further, among those who have, there is a significant degree of support for the view that the availability of a derivative action should not affect

\textsuperscript{130} Dicta in McConnell v. Newco Fin. Corp., 8 B.L.R. 180 (B.C.S.C. 1979), indicated that an oppression application could not be brought if appraisal rights had been validly exercised. However, it was held in Re Brant Invs. Ltd., 44 O.R.2d 201 (Ont. H.C. 1983), and Brant Invs. Ltd. v. Keeprite Inc., 37 B.L.R. 65 (Ont. H.C. 1987), that an application could be brought. The provision involved in all three cases was § 190(11) of the C.B.C.A.. There are analogous provisions under the statutes modeled after the C.B.C.A., though the position differs somewhat under the A.B.C.A. See A.B.C.A., supra note 6, at § 184 (14)-(16).


\textsuperscript{132} BUCKLEY & CONNELLY, supra note 52, at 524, 677-78.

\textsuperscript{133} See, e.g., Beck, supra note 10, at 581-89.

\textsuperscript{134} On this line of reasoning, see generally HADDEN, supra note 4, at 264-65; ALBERTA REPORT, supra note 5, at 142-43; Waldron, supra note 16, at 150-52.
the disposal of an oppression application. 138

4.2. United States

The Canadian experience suggests that if U.S. legislators and courts expand the scope and operation of statutory dissolution/oppression provisions, the interrelationship between various shareholders' remedies will become a source of concern. Indeed, the problem may be worse in the United States, as minority shareholders have historically had greater access to remedies than has been the case in Canada. For example, in contrast to Canada, in the United States the derivative action has been an important and effective shareholders' remedy for a significant period of time. The more established status of the derivative action may well make the task of reconciling the derivative action with a broader form of oppression remedy more difficult than in Canada. In Canada, judges simply have to consider the relationship between two statutory provisions which are in the same statute and which were introduced at the same time. In the United States, on the other hand, the judiciary would be faced with considering the relationship between federal and state rules of procedure, statutory provisions in the state incorporation code and a substantial body of common law surrounding these provisions. 138

It may be that these potential difficulties with the derivative action are overstated. Derivative actions and applications under dissolution/oppression provisions have been brought simultaneously in a number of U.S. cases without any difficulty. 137 Nevertheless, Sax v. World Wide Press Inc. 138 indicates that the relationship between the derivative action and dissolution/oppression provisions may indeed become more troublesome in the future. In Sax, an application brought under the Montana dissolution/oppression provision was dismissed on the basis

137. See, e.g., Meiselman v. Meiselman, 307 S.E.2d 551 (1983); Gimpel v. Bolestein, 477 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1984). Because of the possibility of overlap, HAYNSWORTH, supra note 99, at 295 n.259, recommends alleging multiple causes of action. See also Masinter v. WEBCO Company, 262 S.E.2d 433 (W. Va. 1980). In that case, the court held that an action could be brought by an individual shareholder on the basis of oppressive conduct even though the relevant statutory dissolution provision did not refer to such conduct. It was also held that an application based on an allegation of oppression would most often be individual rather than derivative in nature.
138. 809 F.2d 610 (9th Cir. 1987).
that the facts alleged, even if proved, constituted wrongs to the corporation rather than breaches of personal rights of the applicant. The court said that an application could only be made under the Montana dissolution/oppression provision if the personal rights of the applicant were affected. The court expressly stated that a beneficial effect of requiring applications under the dissolution/oppression provision to involve conduct affecting the personal rights of the shareholder would be that applications under the provision would be reduced. If this line of reasoning gains judicial support in the future, attempts to expand the operation of American dissolution/oppression provisions will be significantly hindered, unless the relevant statutory provisions are drafted to take into account the relationship with derivative actions.

Another potentially troublesome area is shareholders' duties. In Canada, integration of common law duties owed by shareholders to other shareholders with the oppression remedy is not a problem because, as mentioned, the general rule is that shareholders do not owe duties directly to other shareholders.\[139\] Indeed, a strong case can be made that such duties should not be introduced into Canadian law because conduct which would be encompassed by such duties is already dealt with by the oppression remedy.\[140\] In the United States, however, it is accepted in most jurisdictions that shareholders owe duties directly to other shareholders, at least in closely held corporations.\[141\] Consequently, if the operation of statutory dissolution/oppression provisions is expanded in the future, care will have to be taken to ensure that

\[139\] On the basic position that shareholders do not owe duties directly to other shareholders, see Brant Invs. Ltd. v. Keeprite Inc., 37 B.L.R. 65, 100-01 (Ont. H.C. 1987); Re Little Billy's Restaurant, 45 B.C.L.R. 388, 392-93 (B.C.S.C. 1983). Duties may be owed directly to shareholders in special circumstances such as some share transactions. Dusik v. Newton, 62 B.C.L.R. 1 (B.C.C.A. 1985).

\[140\] See WELLING supra note 4, at 593-608. But see M. ELLIS, FIDUCIARY DUTIES IN CANADA 18-6 - 18-7 (1988).

\[141\] The nature and scope of these duties is widely discussed. See, e.g., Olson, supra note 1, at 648-55; Leacock, Close Corporations and Private Companies Under American and English Law: Protecting Minorities, 14 LAW. AM. 557 (1983).
these provisions are integrated properly with the common law duties existing between shareholders.

The necessity of careful integration is demonstrated by Sundberg. In that case, the applicants argued that the conduct of the controllers of the corporation gave rise to a buyout right not only under Minnesota's oppression remedy, but under the common law duties owed by controlling shareholders to minority shareholders. The court held, however, that the applicant could not rely on the common law of corporations because the circumstances in which aggrieved shareholders could have their shares bought out was codified under the Minnesota oppression remedy. As mentioned, the right to be bought out is restricted under the Minnesota provision to corporations with thirty-five shareholders and the corporation involved did not meet this numerical limit, even though it had some of the characteristics present under the common law definition of closely held corporation. Consequently, because of the drafting of the Minnesota oppression provision the applicants were denied a remedy that they might otherwise have had under the common law relating to duties owed to shareholders. This case demonstrates that in the United States care will have to be taken in the future to ensure that the integration of duties owed to shareholders and dissolution/oppression provisions advances, rather than frustrates, the underlying purpose of both areas of the law: the protection of minority shareholders.

5. CONCLUSION

Canada's experience with a broadly drafted oppression remedy, on the whole, has been a good one. Protection of minority shareholders was a significant problem before the statutory reforms of the 1970s and early 1980s. While a variety of provisions were introduced to aid minority shareholders, the oppression remedy has emerged as the most important. Successful applications have been made in a wide variety of situations, and courts have granted a fairly broad range of remedies. This has been beneficial not only for litigants, but also for minority shareholders who have relied on negotiation rather than the courts. The threat of the remedy is a valuable bargaining chip which makes it easier for the minority to obtain a satisfactory settlement.

The success of the oppression remedy in Canada can be attributed in large part to its open-ended nature. The oppression remedy was drafted with the intention of eliminating procedural obstacles, and the courts have generally resisted attempts to impose categorical bars on

142. See supra note 49 and accompanying text.

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access to the remedy. This has allowed the oppression remedy to operate in a wide variety of circumstances. Nevertheless, the courts have not allowed applicants to use the oppression remedy to run roughshod over the normal operations of corporations. The courts, instead, have imposed sensible limits on the remedy on a case by case basis. The failure to develop a theoretical framework to govern when applications will be successful is perhaps regrettable, but, as of yet, has not seriously interfered with the satisfactory operation of the oppression remedy.

In the United States, as in Canada, concerns have been expressed about the protection of minority shareholders. The Canadian experience would seem to provide a strong endorsement for the adoption of a broad oppression remedy as a solution to these problems. Any such endorsement, however, would have to be carefully qualified. In Canada, the oppression remedy was introduced as part of substantial corporate law reform affecting all areas of corporation law. It was probably evident to judges that existing corporate law principles were to be subjected to critical re-examination. Consequently, Canadian judges generally have had few difficulties accepting that the oppression remedy has altered their role in supervising corporate affairs. In the United States, however, a new, broadly drafted oppression remedy would most likely be introduced as an isolated statutory provision. Judges and lawyers would thus have to struggle to integrate the new open-ended oppression remedy with existing corporate law concepts and principles. The difficulties which have arisen in cases involving the derivative action and shareholders' duties indicate that the problems of integration should not be understated. If these problems can be overcome, however, the Canadian experience indicates that the introduction of an open-ended oppression remedy would be a beneficial step forward in U.S. corporate law.

143. The literature is substantial. A good survey is provided in O'Neal & Thompson, supra note 3, at ch. 10. See also supra note 1.