

**AND NOW FOR SOMETHING SLIGHTLY DIFFERENT:
THE BRITISH COLUMBIA OPPRESSION REMEDY**
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I. INTRODUCTION

Federal and provincial corporate statutes permit a shareholder or other proper complainant to apply to court for an “oppression remedy”. Under the British Columbia *Business Corporations Act* (“BCBCA”)¹, to grant such relief the court must be satisfied there has been “oppressive” or “unfairly prejudicial” conduct. Under the federal *Canada Business Corporations Act* (“CBCA”)² and the provincial Acts modelled on it,³ an additional available trigger for such relief is conduct which “unfairly disregards” a complainant’s interests.

In what circumstances will the B.C. court actually exercise its broad discretionary power to grant this relief? The general principle is that oppression, unfairly prejudicial conduct, or conduct which unfairly disregards a complainant’s interests, as the case may be, is conduct which violates reasonable expectations or discriminates without a legitimate business purpose.

This paper explores what that means in practice, and recent developments in this area of the law, with a focus on B.C. The discussion begins with a summary of the B.C. statutory provisions. Included in this is a consideration of the limitation periods for commencing an application for oppression relief.

In the second part of this paper we give examples of the courts applying the reasonable expectations test. We also consider directors’ personal liability for oppressive and unfairly prejudicial conduct.

¹ *Business Corporations Act*, S.B.C. 2000, c.57.

² *Canada Business Corporations Act*, R.S.C. 1985, c-44.

³ The corporate legislation of most provinces, with the exception of the British Columbia, is modelled after the CBCA; thus, in this paper, unless otherwise indicated, CBCA requirements are also generally the requirements in other provinces.

The last section of the paper considers alternative shareholder remedies: the derivative action and just and equitable liquidation and dissolution. Questions remain whether and when oppression and derivative claims can co-exist, although recent case law suggests that the dominant view is that they can. This part also discusses the liquidation provision in more detail.

II. STATUTORY FRAMEWORK

The BCBCA, like the CBCA, frames its oppression remedy provisions broadly in terms of the proper complainants and the types of relief available.

Complainant

The oppression remedy set out in the BCBCA is, in theory, available to more than just shareholders. The BCBCA provides that a registered or beneficial shareholder, or “any other person who the court considers appropriate”, may apply for relief.⁴

The CBCA explicitly sets out four groups of potential complainants: (i) shareholders⁵ of a corporation or its affiliates; (ii) current and former directors and officers of the corporation or its affiliates; (iii) the Director under the CBCA; or (iv) any other person who, in the court’s discretion, is a proper person.⁶

Given the courts’ broad discretion to permit any person they consider appropriate or proper to make an oppression claim, one could be forgiven for thinking that similar types of entities took advantage of the provisions under both Acts. However, in practice that does not appear to be the case. In B.C., certainly under the BCBCA, the vast majority of oppression claims are made by entities which, while they may also wear other hats, are shareholders. Oppression claims by other types of entity, such as creditors, are much less common than in other jurisdictions, such as Ontario.

⁴ BCBCA, *supra* at s. 227(1).

⁵ In this paper, the term “shareholders” is used to include a current or former registered or beneficial holder of shares or security of a corporation, unless otherwise indicated.

⁶ CBCA, *supra* at s.238. Note that the *Business Corporations Act* (Alberta), R.S.A. 2000, c. B-9 [hereinafter “ABCA”], explicitly names creditors of the corporation as a proper complainant, if the court so exercises its discretion; see ABCA at s.239(b).

Trigger

Both the BCBCA and CBCA make relief available in response to conduct which is “oppressive” or “unfairly prejudicial” to the complaining party. The meaning of those terms will be discussed below.

However, as noted above, unlike the CBCA and other provincial statutes, the BCBCA does not provide relief for conduct which “unfairly disregards” a complainant’s interest. While, as discussed below, it is difficult to say exactly what the availability of such relief adds to relief for conduct which is oppressive or unfairly prejudicial, it must add something. Whatever that something is, it is not available under the BCBCA.

It is also important to note that, under the BCBCA at least, relief is only available where the conduct complained of affects the complaining party in the capacity which entitles them to complain. In other words, if the complaining party is a shareholder, the oppressive or unfairly prejudicial conduct complained of must affect them as a shareholder.

It is common in closely held corporations for the same person to be some or all of a shareholder, director, officer and employee. In those circumstances it is very important to distinguish and specify what conduct is being complained of and how it affects the complaining party in the capacity which gives them standing to seek relief.

A common scenario is the minority shareholder who is also an employee who falls out with the majority shareholders and is then fired. That firing may give rise to a wrongful dismissal claim. But, in and of itself, it is not oppression or unfairly prejudicial conduct, because it does not affect the party as shareholder, only as employee.

To further complicate matters however, if the firing is not an isolated event, but is part of a pattern of conduct which can be characterized as oppressive or unfairly prejudicial, then it may support such a claim.⁷

Relief

Oppression remedy provisions give the court a wide discretion to grant any interim or final order it thinks appropriate. Both the BCBCA and the CBCA also provide specific examples of orders which a court can make, including the following:

- restraining or prohibiting certain actions or conduct;
- appointing a receiver;
- regulating the company's affairs;
- directing an issue or exchange of shares;
- appointing new directors to replace, or in addition to, existing directors;
- ordering the company or any other person to purchase part or all the shares of a complainant;
- varying or setting aside a transaction or contract to which the company is a party;
- requiring the company to produce financial statements within a specified time period;
- ordering compensation for an aggrieved person;
- directing rectification of the company's registers or records;
- directing dissolution of the company;
- directing an investigation; and
- requiring the trial of any issue.⁸

⁷ *Nanef v. Con-Crete Holdings Ltd.*, [1993] O.J. No. 1756 (Ont. C.J. – Gen. Div.); *Clitheroe v. Hydro One Inc.*, [2002] O.J. No. 4383 (Ont. S.C.J.).

That such lists do not restrict the court's discretion to make any other order it considers appropriate was made clear in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, where the Ontario Court of Appeal upheld the removal of a director and officer of a public corporation under the CBCA's oppression provisions, notwithstanding that remedy is not expressly set out in that Act.⁹

It is important to remember that the court's discretion to grant relief must be exercised with a view to remedying the conduct found to be oppressive. This is explicit in the BCBCA¹⁰ and the CBCA as well.¹¹

Under both the BCBCA and the CBCA, a court cannot order a payment by the corporation to a complainant if there are reasonable grounds for believing that the company is insolvent or that the payment would make the company insolvent.¹²

The BCBCA contains the further requirement that a court can only order relief from oppression if it is satisfied that the application was brought in a "timely manner".¹³

Limitations

Over and above the "timely manner" provision referred to above, the timing of the conduct complained of is relevant, as provincial limitation periods apply.¹⁴ For example,

⁸ The BCBCA provides additional examples of relief: directing any act, directing conversion of shares, removing any director, reducing a company's capital, directing the company or any other person to repay a shareholder all or part of the amounts the shareholder paid for shares of the company, directing any party to a transaction which the court has varied or set aside to compensate another party, varying or setting aside a resolution, and appointing one or more liquidators with or without security, or granting leave for or directing derivative proceedings.

⁹ *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2006] O.J. No. 944 (C.A.).

¹⁰ BCBCA, *supra* at s. 227(3).

¹¹ CBCA, *supra* at s. 241(2).

¹² BCBCA, *supra* at s. 227(5) and CBCA, *supra* at s.241(6). Note the difference in language of the provision under the CBCA, which states that a court cannot order payment if there are reasonable grounds for believing that the corporation is or would be unable to pay its liabilities as they become due or the realizable value of the company's assets would become less than the aggregate of its liabilities.

¹³ BCBCA, *supra* at s.227(4).

¹⁴ Because there is no federal limitations legislation, the courts have pondered the constitutional issue of whether provincial limitations legislation applies to oppression actions under the CBCA. While this issue is beyond the scope of this paper, it is noted that the Alberta Court of Queen's Bench decided in *Switzer v. Greenland Properties Ltd.*, [2002] A.J. No. 177 (Q.B.), that the provincial limitations act cannot apply to an action brought under the CBCA. Most recently in *Ford Motor Co. of Canada v. Ontario Municipal*

in most provinces other than B.C., it is well-established that the limitation period for seeking an oppression remedy, being an equitable remedy, is 6 years after the discovery of a cause of action.¹⁵

In B.C. this issue has not been expressly decided. However, s. 3(5) of the B.C. *Limitations Act*¹⁶ states that “any other action not specifically provided for... may not be brought after the expiration of 6 years after the date on which the right to do so arose.” “Action” is defined as including “any proceeding in a court” and should therefore include a proceeding under the BCBCA oppression remedy provision.

Further, in *Safarik v. Ocean Fisheries Ltd.*,¹⁷ the defendants argued the plaintiff could not make a claim of oppression related to conduct which had occurred more than six years before he filed his petition. The court implicitly accepted that there was a six year limitation period, but admitted evidence of conduct occurring more than six years before the filing to provide historical background to facilitate understanding of what occurred at the material time.

One additional limitations issue under the BCBCA is how oppression claims are limited by the “timely manner” requirement referred to above. It would be interesting to see how the courts would interpret the relationship between this requirement and the 6-year limitation period which might otherwise be applicable. These issues have not been dealt with.

Employees Retirement Board, [2006] O.J. No. 27 at para 174 (C.A.), the Ontario Court of Appeal declined to make a determination of this issue.

¹⁵ The leading case is *Seidel v. Kerr*, [2003] A.J. No. 1163 (C.A.). Under similar legislation, the Manitoba Court of Appeal followed the reasoning in *Seidel* and held in *Hughes v. Bob Tallman Investments Inc.*, [2005] M.J. No. 26 (C.A.), that oppression actions constitute “actions grounded on other equitable grounds of relief” and thus, the relevant limitation period under Manitoba limitations legislation is 6 years after the discovery of the cause of action. However, such a 6-year limitation is only applicable for Alberta oppression actions where the old limitations legislation applies; see *Limitations Act*, R.S.A. 1980, c. L-15 at s.4(1)(e). Where the current Alberta *Limitations Act* applies, an oppression complainant in Alberta must seek relief within 2 years after the date when the complainant first knew or ought to have known about the claim, or 10 years after the claim arose, whichever expires first; see *Limitations Act* (Alberta), R.S.A. 2000, c. L-12 at s.3(1) and *Da Shazo v. Nations Energy Co.*, [2005] A.J. No. 856 (C.A.).

¹⁶ *Limitations Act* R.S.B.C. 1996, c.266 at s.3(5).

¹⁷ *Safarik v. Ocean Fisheries Ltd.*, (1993), 10 B.L.R. (2d) 246, at 301 (B.C.S.C.). Interestingly, most recently in *Ford*, *supra* at para 171, the Ontario Court of Appeal stated that courts cannot award the oppression remedy for past oppression, because this is inconsistent with reasonable expectations.

III. CASE LAW

Given the wide discretion granted to courts by the oppression remedy provisions, it is important to turn to case law to see how the courts have actually interpreted the requirements in practice.

Reasonable Expectations

An application for an oppression remedy is resolved largely by an examination of the parties' reasonable expectations.¹⁸ Reasonable expectations have been described as the "touchstone to entitlement to compensation for oppression".¹⁹ Where those expectations have been violated, without good reason, an oppression remedy is available. Recently the Supreme Court of B.C. suggested that a modified objective test, which looks to all of the circumstances involved, is appropriate.²⁰

Whether something falls in the realm of reasonable expectations is a question of fact,²¹ and, in some cases, personal considerations can become relevant.²² All of the circumstances must be considered when determining whether a shareholder or complainant is being oppressed or unfairly prejudiced, in light of his or her reasonable expectations.

Another core concept of oppression is discrimination among shareholders without a legitimate business reason. The mere fact of discrimination will not be sufficient. There may well be a good reason for it. But if there is not, there may well be oppression.

¹⁸ *Brant Investments Ltd. v. Keep-Rite Inc.* (1987), 60 O.R. (2d) 737 (H.C.); *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.); *Diligenti v. R.W.M.D. Operations Kelowna Ltd. (No.1)* (1976), 1 B.C.L.R. 36 (S.C.). It should be noted that despite the wide availability of the oppression remedy to proper "complainants", the oppression remedy is used predominantly by shareholders to address a company's oppressive or unfairly prejudicial conduct. As such, the reasonable expectations test has been framed largely in the context of those reasonable expectations of a *shareholder*.

¹⁹ *Ford*, *supra* note 12 at para 122.

²⁰ *Walker v. Betts*, [2006] B.C.J. No. 161 at para 88 (S.C.) (QL).

²¹ *Cohen v. Jonco Holdings Ltd.*, [2005] M.J. No. 126 at para 32 (C.A.) (QL).

²² *Ibid* at para 36.

Oppression has frequently been characterized as conduct which is “burdensome, harsh or wrongful”, or lacks probity or fair dealing.²³ That requires at least some element of unfairness or wrongdoing.

However, the motive for the conduct complained of is not relevant. It is not necessary for a complainant to establish bad faith or some other improper intent. What is relevant is the effect of the conduct complained on the complainant.²⁴

What exactly the availability of relief for unfairly prejudicial conduct (and for that matter conduct which unfairly disregards the interests of a complainant) adds to oppression is not easy to determine. The one thing that is clear is that the test for unfairly prejudicial conduct is easier to meet than that for oppression, and that for conduct which unfairly disregards the interest is easier to meet than that for unfairly prejudicial conduct. Beyond that, distinctions are hard to find.

Unfairly prejudicial conduct has been held to mean conduct that limits or injures a complainant’s rights or interests in a way which is unfair or inequitable, or unjust or inequitable.²⁵ That is not much help.

The B.C. courts, like those of Ontario and Saskatchewan (but unlike those of Alberta) have focused on the addition of the concept of unfairness to that of prejudice. The B.C. courts suggest that companies may well take actions which prejudice their shareholders, but that will not give rise to relief unless the prejudice is unfair.²⁶ One example is from the *Safarik* litigation, where Donald J.A., concurring in the result, accepted that the exclusion of a shareholder from the management of a closely held family company was prejudicial, but declined to find it was unfair because he was unable to work with other family members.²⁷

²³ *Starcom International Optics v. Macdonald*, [1994] B.C.J. No. 548 (S.C.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36, at 45-6 (S.C.).

²⁴ *Starcom*, *supra*; *Diligenti*, *supra*.

²⁵ Koehnen “Oppression and Related Remedies” (Toronto, Carswell; 2004) p. 82.

²⁶ *Ibid.*

²⁷ *Safarik v. Ocean Fisheries* (1995), 12 B.C.L.R. (3d) 342 (C.A.), at paras. 120-1.

Conduct which unfairly disregards the interests of a shareholder is more difficult yet to define. It appears to mean conduct which ignores the interests of a shareholder, and not to require any tangible harm to justify a remedy.²⁸

The following types of conduct have been held to be oppressive or unfairly prejudicial:²⁹

- Directors issuing shares without regard for shareholders' pre-emptive rights, or in a way which reduces a majority shareholder to a minority or gives a majority shareholder voting control of the company.³⁰
- A company preparing false financial statements.³¹
- A company refusing to hold an annual general meeting, or postponing it to avoid having to face its shareholders.³²
- A shareholder refusing to postpone a company's annual general meeting, where he knew the only other shareholder was mistaken about the meeting's time and intended at the meeting to remove him as a director and pass a resolution to sell the company's assets.³³
- Majority shareholders appointing their nominees as directors, without holding an election.³⁴
- A majority shareholder proposing to remove minority shareholder nominees as directors.³⁵

²⁸ Koehnen, *supra* at p. 83.

²⁹ Stephen Antle, "Shareholder Oppression – What is, What isn't" (September 30, 2003), Borden Ladner Gervais LLP.

³⁰ *Otawara Co. v. Masuda*, [1992] B.C.J. No. 427 (S.C.); *Starcom International Optics Corp.*, *supra*; *Re Peterson and Kanata Investments Ltd.* (1975), 60 D.L.R. (3d) 527 (B.C.S.C.).

³¹ *Re Nat. Bldg. Maintenance Ltd.* [1971] 1 W.W.R. 8, affirmed [1972] 5 W.W.R. 410 (*sub nom*, *Nat. Bldg. Maintenance Ltd. v. Dove*) (B.C.C.A.).

³² *Mahood v. High Country Holdings Inc.*, [2000] B.C.J. No. 2433; *Jackman & Jackets Enterprises Ltd.* (1977), 4 B.C.L.R. 358 (S.C.); *Burdeny v. K & D Gourmet Baked Foods & Investments Inc.*, [1999] B.C.J. No. 953; *Starcom International Optics Corp. v. Macdonald*, *supra*.

³³ *Bradley v. Bradley*, [2001] B.C.J. No. 1177.

³⁴ *Starcom International Optics Corp. v. Macdonald*, *supra*.

³⁵ *Cathay Development Inc. v. 328243 B.C. Ltd.*, [1995] B.C.J. No. 829 (S.C.).

- Excluding a shareholder from corporate management, where the shareholder had a reasonable expectation of continued involvement, even where that removal was permitted by the company's articles.³⁶
- A company paying secret management fees to some shareholders.³⁷
- A majority shareholder taking a substantial salary without approval of the directors or shareholders, or consent of the minority shareholder.³⁸
- A company making, or shareholders or directors authorizing, payments to, or contracts with, entities related to those shareholders or directors.³⁹
- A company loaning money to a company related to the majority shareholder, but not to one related to the minority shareholder.⁴⁰
- A company not charging interest on a loan to members of the majority shareholder's family.⁴¹
- A shareholder or director diverting corporate business opportunities to entities related to them.⁴²
- A shareholder using corporate cash and other assets for non-corporate purposes.⁴³

³⁶ *Saarnok-Vuus v. Teng*, [2003] B.C.J. No. 353 (S.C.); *Dilgenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Grizzly Ropes Ltd. v. Hymax Engineering Ltd.*, [1992] B.C.J. No. 1406 (S.C.).

³⁷ *Wilkinson v. Today's Carpets Ltd.* (October 17, 2000), Doc. Kelowna 38054 (B.C.S.C.); *Re Nat. Bldg. Maintenance Ltd.*, [1971] 1 W.W.R. 8, affirmed [1972] 5 W.W.R. 410 (*sub nom*, *Nat. Bldg. Maintenance Ltd. v. Dove*) (B.C.C.A.).

³⁸ *Chan v. GMS Datalink International Corp.*, [1996] B.C.J. No. 2015 (S.C.).

³⁹ *Re Peterson and Kanata Investments Ltd.* (1975), 60 D.L.R. (3d) 527 (B.C.S.C.); *Re Little Billy's Restaurant (1977) Ltd.*; *Faltakas v. Paskalidis* (1983), 45 B.C.L.R. 388 (S.C.); *Redekop v. Robco Const. Ltd.* (1978), 7 B.C.L.R. 268 (B.C.S.C.).

⁴⁰ *Jackman & Jackets Enterprises Ltd.* (1977), 4 B.C.L.R. 358 (S.C.); *Kenco Land Management Co. v. 375035 B.C. Ltd.*, [1996] B.C.J. No. 3096 (S.C.).

⁴¹ *Low v. Ascot Jockey Club Ltd.* (1986), 1 B.C.L.R. (2d) 123 (S.C.).

⁴² *Vukusik v. Sign-O-Lite Signs Ltd.*, [1983] B.C.W.L.D. 1064 (S.C.); *Grizzly Ropes*, *supra*.

⁴³ *Mananquil v. Phillipine Chronicle Newspaper Ltd.*, [2001] B.C.J. No. 1845 (S.C.); *Re Little Billy's Restaurant*, *supra*; *Mahood*, *supra*; *DeCotiis v. De Cotiis*, [1995] B.C.J. No. 1423 (S.C.); *Redekop v. Robco Const. Ltd.* (1978), 7 B.C.L.R. 268 (B.C.S.C.); *Drove v. Mansvelt*, [1999] B.C.J. No. 1539 leave to appeal refused, [1999] B.C.J. No. 2150 (C.A.).

- Shareholders discriminating among themselves in the distribution of proceeds of the sale of the company's business.⁴⁴
- A majority shareholder stripping the company of cash and then electing to sell his shares under a "shotgun" provision.⁴⁵
- Minority shareholders threatening to quit the company and take its largest customer with them if not given corporate control.⁴⁶

The following types of conduct have been held not to be oppressive or unfairly prejudicial:

- A company not postponing a validly requisitioned annual general meeting to permit the requisitioning shareholder more time to contact beneficial shareholders in preparation for the meeting.⁴⁷
- A company excluding a minority shareholder from management, where permitted by the company's articles and where his personal relationship with the majority shareholder and president had deteriorated so they could not work together.⁴⁸
- A president terminating a minority shareholder as employee and removing him as director, where permitted by employment agreements.⁴⁹
- A company ceasing to pay dividends to one shareholder and effectively blocking the redemption of his shares, where permitted by its articles.⁵⁰
- A company's preferential treatment of its majority shareholder, who was also its main customer.⁵¹

⁴⁴ *Re Romana Inn Ltd.*; *Manaras v. Apostal* (1982), 48 B.C.L.R. 65 (S.C.); *Pasnak v. Chura*, [1999] B.C.J. No. 2851; *Yen v. Yu*, [2000] B.C.J. No. 227 (S.C.).

⁴⁵ *Ludlow v. McMillan* (1995), 6 B.C.L.R. (3d) 163 (S.C.).

⁴⁶ *MacMillan v. Progressive Mill Supplies Ltd.* (1986), 6 B.C.L.R. (2d) 129 (C.A.).

⁴⁷ *Nalcap Holdings Inc. v. Equity Preservation Corp.*, [1989] B.C.J. No. 1842 (S.C.).

⁴⁸ *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342, reversing in part 10 B.L.R. (2d) 246 (C.A.).

⁴⁹ *Grant v. A.W. Sessions Ltd.*, [1998] B.C.J. No. 1970 (S.C.).

⁵⁰ *Saunders v. Tidewater Development Corp.*, [1998] B.C.J. No. 1871 (S.C.).

- Shareholders making decisions to improve the company's financial performance, which also made it more difficult for a minority shareholder to sell his shares.⁵²
- Shareholders not accepting a minority shareholder's business views.⁵³
- One director not signing monthly shareholder loan cheques to any shareholders.⁵⁴
- A company not issuing to a minority shareholder shares for which he could not pay.⁵⁵
- Shareholders of a closely held company passing a special resolution allowing the directors to redeem shares issued to the majority shareholder's family without consideration.⁵⁶
- Directors arranging a private placement diluting the majority shareholders and resulting in the undervaluing of their shares, where issuing shares was in the discretion of the directors.⁵⁷
- Shareholders suspending share dividend payments to finance repairs to the company's premises and management salaries.⁵⁸
- Shareholders not re-electing a representative of a corporate competitor as a director and terminating payments to that competitor, while paying management fees to themselves.⁵⁹
- The directors of a company deciding not to begin a doubtful lawsuit against a contractor.⁶⁰

⁵¹ *Sentinel Estates Ltd. v. Inland Fibre Specialists Ltd.*, [1987] B.C.J. No. 1073

⁵² *Tkatch v. Dr. Heide Dr. Tkatch Dr. Climenhaga Dr. Fietz Inc.* (1996), 29 B.L.R. (2d) 266 (B.C.S.C.) [In Chambers]; affirmed: [1998] B.C.J. No. 2613 (C.A.).

⁵³ *Bosman v. Doric Hldg. Ltd.* (1978), 6 B.C.L.R. 189 (S.C.).

⁵⁴ *Bianco v. Apple Valley Trailer Park Ltd.*, [1985] B.C.W.L.D. 633 (S.C.).

⁵⁵ *McMurchie v. Locke*, [1990] B.C.J. No. 664 (C.A.).

⁵⁶ *Re Giroday Sawmills Ltd.; De La Giroday v. Giroday Sawmills Ltd.* (1983), 49 B.C.L.R. 378 (S.C.).

⁵⁷ *Re Goldstream Resources Ltd.; Dicore Resources Ltd. v. Goldstream Resources Ltd.*, *supra*.

⁵⁸ *Lafaille v. Amorous Oyster Restaurant Ltd.*, [1991] B.C.J. No. 1091 (S.C.).

⁵⁹ *Chiu v. Aero Heat Exchanger Inc.*, [1990] B.C.J. No. 1217 (S.C.).

⁶⁰ *H.J. Rai Ltd. v. Reed Point Marina Ltd.*, [1981] B.C.J. No. 786 (S.C.).

- Shareholders deadlock.⁶¹
- Directors being in a conflict of interest.⁶²

Dismissing a shareholder as an employee is generally held to be a breach of his employment contract rather than oppression or unfairly prejudicial conduct, so long as, as discussed above, the dismissal is not part of a pattern of exclusion of the shareholder from management where he has a reasonable expectation of continued involvement.⁶³

Generally speaking, courts tend to hold parties and companies to agreements which govern their relationships.⁶⁴ For example, shareholder agreements,⁶⁵ trust indentures⁶⁶, and even generally accepted accounting principles and auditing standards⁶⁷, have been used to determine the reasonable expectations of the parties involved. In some instances, breaches of such agreements may be viewed as a breaches of contract rather than oppression; however, this will depend upon reasonable expectations of the complainant.

In the public company context, where it is difficult to adduce cogent evidence of shareholders' reasonable expectations, it may be instructive to look to the company's public statements and the shared expectations about the way the company should be run.⁶⁸

In a closely held corporation, it is even more important to consider reasonable expectations, since shareholders do not have the "self-help remedy"⁶⁹ of selling their investments in the public market. Intuitively, closely held corporations are likely to be more conducive to the formation of mutual understandings and personal expectations

⁶¹ *Cariboo Western Lumber Ltd. v. Mochizuki*, [2001] B.C.J. No. 1556 (S.C.)

⁶² *Bruneau v. Irwin Industries (1978) Ltd.*, [2002] B.C.J. No. 1095 (S.C. Master).

⁶³ *Woloshuk v. Woloshuk*, [1998] B.C.J. No. 2377 (C.A.); *McMurchie v. Locke*, *supra*; *Ruffo v. IPCBC Contractors Canada Inc.* (1988), 33 B.C.L.R. (2d) 74, affirmed 44 B.C.L.R. (2d) 293 (C.A.); *Burdeny v. K. & D Gourmet Baked Foods & Investments Inc.*, *supra*.

⁶⁴ *Linamar Corp. v. Westcast Industries Inc.*, [2004] O.J. No. 2449 at paras 27 and 32 (Ont. S.C.J.) (QL).

⁶⁵ *Ibid.*

⁶⁶ *Casurina Limited Partnership v. Rio Algom Ltd.*, [2004] O.J. No. 177 (O.N.C.A.).

⁶⁷ *Levy-Russell Ltd. v. Shieldings Inc.*, [2004] O.J. No. 4291 (Ont. S.C.J.)

⁶⁸ *Ford*, *supra* at para 66.

⁶⁹ Dennis H. Peterson, *Shareholder Remedies* (Markham, Ont: LexisNexis Butterworths, 1989+) at s.18.145.

between the parties involved. For instance, the B.C. Supreme Court recently held that two shareholders had a reasonable expectation of continued employment by the company in question. The court found that the shareholder and employee interests of the two complaining shareholders were “extricably bound together”, and that they became shareholders of the company based on the “implied term” and reasonable expectation that they would remain employees so as to contribute to the company’s growth.⁷⁰

Viewed in this light, the “reasonableness” threshold appears to only work in favor of complainants. However, reasonableness has also been used by the courts to help find that oppression or unfair prejudice had not taken place. For instance, when investing in a small, closely held, rural company, a shareholder’s reasonable expectations must include a reasonable assessment of the risk involved. The materialization of such risk does not make the oppression remedy available to such an investor.⁷¹

Finally, shareholders with dual roles in a company cannot expect the company to take care of all their interests over those of others.⁷² Although how a shareholder or complainant came to be in those roles is important, the court has a general jurisdiction to consider the relationship between the parties more broadly, including recognizing that expectations may change over time.⁷³ Something may be oppressive in one case, or at a certain time, but not in another, depending on the relationship at issue.⁷⁴

Directors’ Obligations and Liability in the Oppression Context

Traditionally, relief from oppression was sought against the corporation itself. As long as the directors were acting within their statutory powers, they were unlikely to be held

⁷⁰ *Elliott v. Opticom Technologies Inc.*, [2005] B.C.J. No. 782 (S.C.). Note, however, that the expectation of an active role in management is not necessarily reasonable, even in a family-run, closely-held corporation; see *Safarik, supra*. Termination of employment is often considered as a breach of an employment contract rather than oppression.

⁷¹ *Lee v. To*, [1998] S.J. No. 347 (Sask. C.A.).

⁷² For example, a shareholder’s reasonable expectation does not include that the company will repay shareholder loans in priority to other creditors. See *Levy, supra* note 25 and *Stabile v Milani*, [2004] O.J. No. 2804 (O.N.C.A.).

⁷³ *Chiaromonte v. World Wide Importing Ltd.* (1996), 28 O.R. (3d) 641 (Gen. Div.) at p.655; *Main v. Delcan Group Inc.*, [1999] O.J. No. 1961 (Sup. Ct.).

⁷⁴ *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (C.A.) at p. 137.

responsible for decisions made on behalf of the company. Courts tended to defer to directors' judgment in managing a company's business or affairs.⁷⁵ Even if, in retrospect, directors made the wrong decision they were entitled to rely on the "business judgment rule" if they acted prudently. As the Alberta Court of Queen's Bench stated, "Allegations of mismanagement are exactly the type of situation that calls for director immunity."⁷⁶ Special circumstances had to exist to make directors personally liable.⁷⁷

However, it has become increasingly clear that in some circumstances directors and others can be held personally liable for the oppressive or unfairly prejudicial acts of the corporation. If a director's actions or conduct are "not properly attributable to the corporation"⁷⁸ they should not be permitted to hide behind its protection. The same logic applies where directors gain a personal benefit from causing the corporation to act oppressively or in an unfairly prejudicial manner.

The leading case of *Budd v. Gentra* sets out the factors to consider when determining whether a director or officer should be held personally liable for oppression:⁷⁹

- (1) the nature of the oppression;
- (2) any benefit which flowed to the director or officer;
- (3) whether the directors or officers furthered their control of the corporation through the oppressive conduct
- (4) the effects of other possible orders on other shareholders; and
- (5) whether the corporation is a closely-held corporation such that the director or officer is more likely to have a personal interest in the corporation's oppressive conduct.

This broadly-framed test has since been applied by many courts.⁸⁰

⁷⁵ See David S. Morritt *et al.*, *The Oppression Remedy* (Aurora, Ont: Canada Law Book, 2004+) at s. 4-20.1.

⁷⁶ *First Mortgage Fund (V) Inc. (Receiver and Manager of) v. Boychuk*, [2001] A.J. No. 1071 at para 31 (A.Q.B.) (QL).

⁷⁷ *Hovsepian v. Westfair Foods Ltd.*, [2001] A.J. No. 1074, 2001 A.Q.B. 700.

⁷⁸ *Budd v. Gentra*, [1998] O.J. No. 3109 at para 31 (O.C.A.) (QL) [hereinafter, "*Budd*"].

⁷⁹ *Budd*, *supra* note 36.

The Court may also make a provisional order that, if the proposed oppression remedy against the individual directors fails, leave will be granted to the applicant to commence a derivative action against them in the name of the corporation.⁸¹

In the recent case of *Waiser v. Deahy Medical Assessment Inc.*, the Ontario Superior Court of Justice appears to have accepted a director's argument that he could not be found personally liable for oppression unless

- (1) he was the controlling mind of the company;
- (2) the complainant could not have protected himself against the oppressive conduct;
and
- (3) he received a personal benefit from the oppressive conduct.

In that case, the director was absolved from personal liability to a creditor of the company, because he did not gain any personal benefit from his oppressive conduct.⁸²

As mentioned, the oppression remedy is an equitable remedy that focuses on the effects of conduct, not the motive for it.⁸³ Imposing the burden of rectifying oppressive corporate conduct on an individual director does not rectify the effect of the conduct, unless the conduct is attributable to the director as opposed to the corporation. Personal benefit is thus a strong indication that a director acted beyond the scope of his or her

⁸⁰ See, for example, *Irwin et al. v. GST Telecommunications et al.*, [1999] B.C.J. No. 2221; *Hovsepian*, *supra* note 35; *Leon Van Neck and Son Ltd. v. McGorman* (1998), 83 A.C.W.S. (3d) 938 (Ont. Gen. Div.), where the claims against the individual directors were struck out. Such claims have been allowed in several cases including *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.); *Private E Management Co. v. Vianet Technologies Inc.* (2000), 48 O.R. (3d) 294 (S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.), var'd 110 O.A.C. 160 (Div. Ct.); *Olympic Wholesale Co. v. 1084715 Ontario Ltd.* (1998), 78 A.C.W.S. (3d) 502 (Ont. Gen. Div.); *Stierman v. Genserve Ltd.* (1998), 77 A.C.W.S. (3d) 727 (Ont. Gen. Div.); *McAteer v. Devoncroft Developments Ltd.*, [2002] 5 W.W.R. 388, (2001) ABQB 917.

⁸¹ *Osborne v. Bucci* (1998) 82 A.C.W.S. (3d) 687 (Ont. Gen. Div.); *Mathews v. Muroff* (1998), 79 A.C.W.S. (3d) 932 (Ont. Gen. Div.).

⁸² *Waiser v. Deahy Medical Assessment Inc.*, [2006] O.J. No. 224 (S.C.J.).

⁸³ *Ford*, *supra* at para 171.

responsibilities, and breached his or her fiduciary obligations to the corporation.⁸⁴ Where such a breach affected a particular complainant or group of complainants, it should be open to them to seek a remedy directly from the directors.

III. ALTERNATIVE SHAREHOLDER REMEDIES – DERIVATIVE ACTION AND JUST AND EQUITABLE DISSOLUTION

Two other avenues of relief are available under the CBCA and the BCBCA: the derivative action and just and equitable dissolution.

Derivative Actions

Under both the CBCA and BCBCA, where a wrong has been done to the company itself, the court can grant leave to bring a derivative action on the company's behalf. Under the BCBCA such an application can be made by a shareholder, a director or any other person the court considers appropriate. Under the CBCA it can be made by a shareholder, a present or former director or officer, the director under the CBCA or any other person who the court considers to be a proper person.

To obtain leave, the shareholder must show that (i) they have given notice of the application to the directors or the company; (ii) they are acting in good faith; and (iii) it appears to be in the best interests of the company to prosecute or defend the legal proceedings.⁸⁵

Under the BCBCA there is an additional requirement: the shareholder must show that they have made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceedings.⁸⁶

⁸⁴ *Morritt, supra* at s.4-2. Morritt suggested that when performing his or her responsibilities, a director should be mindful of his or her statutory and common law directors' duties, in order to avoid personal liability. The basic directors' duties under both statute and common law are: (i) to act honestly and in good faith with a view to the best interests of the company, and (ii) to exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances; see BCBCA, *supra* note 3 at s.142.

⁸⁵ CBCA, *supra* s. 239(1)(c) and BCBCA, *supra* at s.233.

⁸⁶ BCBCA, *supra*, s. 233 (1)(a).

It is settled under the BCBCA that the applicable limitation period to apply for leave to bring a derivative action is 6 years.⁸⁷

In essence, the derivative action is not a “shareholder” remedy, because it is an action brought or defended on behalf of the company, not a shareholder. By seeking to leave to bring a derivative action, the applicant is really acting as a representative of the company, not on their own behalf. However, like the oppression remedy, many derivative actions are brought to address shareholders’ concerns. The difference may simply be that a wrong has been done to the company as a whole (i.e., all of shareholders), rather than to one shareholder or a group of shareholders. As a result, the derivative action is often referred to as a shareholder remedy.

The historical view was that oppression claims and derivative actions were mutually exclusive and could not be brought together. That view was based partly on the requirement to seek leave to bring derivative actions, and the courts’ hesitance to permit applicants to circumvent the need to seek leave by claiming relief under the oppression remedy provision instead. However, as the oppression remedy has become increasingly broad and liberal, courts have become more inclined to permit an oppression claim to be brought with a derivative claim.⁸⁸

Most recently, the Ontario Court of Appeal commented that “the nature of relief a court can grant must be anchored in the remedy sought, rather than distinguish[ing] between personal and derivative causes of action. It would be a serious mistake to attempt to confine the broad discretion granted to court by the oppression remedy within a formal constraint of causes of action...”⁸⁹ Thus, despite case law not providing a definitive resolution to the issue, it is evident that the more broadly and liberally courts construe the

⁸⁷ *Park v. Sunrich Processors Ltd.*, [1999] B.C.J. No. 807 (S.C.).

⁸⁸ For example, see *Pasnak v. Chura*, *supra* which took the view that there is only one line of cases which governed, i.e., that which recognizes that the two remedies are not mutually exclusive. See also, *Acapulco Holdings Ltd. V. Jegen*, [1997] A.J. No. 174, *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, [1998] B.C.J. No. 2674 (B.C.C.A.) and *Drove v. Mansvelt*, *supra*.

⁸⁹ *Ford*, *supra* at paras 110-111.

oppression remedy, the less inclined they will be to find that oppression remedy and the derivative action are mutually exclusive avenues of relief.

Despite increasing acceptance, however, some courts have attempted to delineate the parameters for the co-existence of derivative and oppressive claims. In one case, the B.C. Court of Appeal stated that an applicant must show “special harm” to maintain a personal action for oppression, or else seek leave to bring a derivative action.⁹⁰ More recently, the B.C. Supreme Court commented that to bring an oppression claim an applicant must establish that there has been harm to his interests as a shareholder, as distinct from his interests as a director, officer or employee, and further, as distinct from other shareholders’ interests.⁹¹ It will be interesting to see whether such specifications will result in the narrowing of the oppression remedy as we have known it.

Just and Equitable Liquidation and Dissolution

It is important to note that there is another alternative to the oppression remedy. Both the CBCA and BCBCA provide that where a court finds it just and equitable to do so, it can order the liquidation and dissolution of a company (formerly its “winding up”).⁹² The interesting element of these provisions is that, having reached that conclusion, it is also open to the court to order any relief listed under the Acts’ oppression remedy provisions.⁹³

Under the CBCA the just and equitable liquidation provision is only available to a shareholder. Under the BCBCA, in addition to a shareholder, any of the company, a director, a creditor or any other person the court considers appropriate, may apply. There is no need to seek leave. There is no need to show oppressive or unfairly prejudicial conduct. An applicant need only satisfy the court that it would be just and equitable for the court to make the order.

⁹⁰ *Pasnak, supra* .

⁹¹ *Walker, supra* at paras 81-82.

⁹² CBCA, at s.214(1)(b)(ii) and BCBCA, *supra* at s.324(1)(b).

⁹³ CBCA, *supra* at s. 214(2) and BCBCA, *supra* at s.324.

The essential factor in persuading the court to grant such an order is that the relationship between the company's shareholders has deteriorated to such an extent that they have no trust or confidence in each other's ability to manage the company's affairs. The courts are particularly likely to order a liquidation where it appears that the basis of the company was mutual confidence among the shareholders, where the shareholders agreed all were to participate in management and where a shareholder agreement restricts shareholders' ability to liquidate their investments.

In the case of family companies, the B.C. courts have held it is appropriate to take a more liberal approach to liquidation. The courts have found it would be just and equitable to liquidate a family company where one family member, after working in the business for many years, was excluded from management, even though he was never a director and there was no wrongdoing by the other family members.⁹⁴

While a liquidation order is a drastic remedy, and the courts are therefore reluctant to grant it, the test of showing that it is just and equitable that the company be liquidated may be easier to meet than that required for the court to find oppression. This may enable a shareholder to avail themselves of the oppression remedies through the "back door" of the liquidation provisions of the BCBCA.

One interesting development is the suggestion that the reasonable expectations standard is also applicable in determining whether it is just and equitable for the court to order a remedy provided for by the liquidation provision.⁹⁵ Adopting a reasonable expectation standard for the liquidation provision makes it an even broader remedy than the oppression remedy. An applicant will not have to show that the company's conduct was oppressive or unfairly prejudicial. They will only have to show that their reasonable expectations have not been met and that it is just and equitable for the court to rectify the situation by liquidating the company. They will then be able to apply for any relief set

⁹⁴ *Safarik v. Ocean Fisheries Ltd., supra.*

⁹⁵ *Walker, supra* note 18.

out in the oppression provisions. As set out above, that relief includes any order the court thinks appropriate to remedy the conduct complained of.

IV. CONCLUSION

The oppression remedy has been made widely available under both federal and provincial legislation to protect shareholders' and other complainants' interests in a company. The provisions are broad, flexible, and grant wide discretion to the Courts to fashion appropriate relief.

Compared to the other common shareholder remedy of the derivative action, the oppression remedy also eliminates the threshold requirements of seeking leave, showing that to take action is in the best interests of the company, and first requesting the directors of the company to act.

However, the just and equitable liquidation provision is even more liberal than the oppression remedy. If there is a widening of its availability, one can see the potential for increased judicial interference in the affairs of a company. It will be interesting to see whether the just and equitable liquidation provision will eventually replace the oppression remedy as the most liberal remedy of them all.