

**SECURITIES LITIGATION AND THE
OPPRESSION REMEDY**

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Insight Information Co.
WESTERN FORUM ON
COMMERCIAL LITIGATION

September 17-18, 2002
Hyatt Regency
Vancouver, B.C.



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This is an update of a paper entitled "Shareholder Lists, Shareholder Rights Plans and the Oppression Remedy" by Stephen J. Mulhall and Robert J. C. Deane for an Insight Conference in Calgary on Mergers and Acquisitions in Canada, April 6-7, 2000.

DEFENSIVE TACTICS: SHAREHOLDER RIGHTS PLANS, ASSET OPTIONS, BREAK-FEES AND POISON DEBT

Introduction

Shareholder rights plans, or "poison pills", have been in use in Canada for fifteen years and have become important tools for a corporation faced with an unwelcome take-over bid.¹ Whatever the particular form adopted, the common feature of the various types of poison pills is that they make it prohibitively expensive for a hostile acquirer to gain control of a corporation without the co-operation of the target corporation's management.² It is a device that encourages a would-be acquirer to talk to the target corporation's board of directors before seeking to acquire more than a certain percentage of the target corporation's stock because not doing so will result in substantial economic harm to the would-be acquirer: the rights held by the would-be acquirer will become void, and all the other shareholders will be able to buy shares of the target corporation for substantially less than the effective price to be paid by the hostile acquirer.³ The securities commissions and the courts have had to confront these plans and develop principled yet practical approaches. Although the foundations are still being laid, a substantial body of precedent has been developed.

Legitimacy of Shareholder Rights Plans

Often lost in the debate over how particular pills should be addressed by the applicable securities commission or Court, is the question of whether they are legitimate corporate tools at all. Although it appears that they are here to stay, it is useful to recall that it has been argued strongly that pills are fundamentally unlawful.⁴ It is possible that this argument may be resurrected because the battleground has shifted to the courts on a more regular basis. Unlike



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the securities commissions, which may only review shareholders' rights plans to determine whether they remain in the public interest, it is the Courts who must ultimately pass on their legality.

The argument that pills are illegal is based on the fact that, by implementing a pill, the corporation is attaching rights to shares that can only be exercised by certain persons – the existing shareholders. Necessarily, the acquirer cannot be permitted to exercise the rights.⁵ This is alleged to constitute discrimination between shareholders holding the same class of shares which, in turn, is said to be prohibited by all corporations statutes⁶ and by the decisions in *McClurg v. Canada*⁷ and *Bowater Canadian Ltd. v. R.L. Crain Inc.*⁸ The argument is that shares within a class must be equal and, as rights attach to the shares and not to shareholders, it is unlawful to draw a distinction between shareholders of the same class.⁹ If discrimination is necessary, a new class of shares should be created. That, however, would defeat the essence of the pill.

Although this argument has not yet received sustained attention by the Courts¹⁰, a bidder may be compelled to develop it further if it is not successful in having the securities commissions dislodge the pill.¹¹

National Policy 62-202, Take-Over Bids - Defensive Tactics

On August 4, 1997, National Policy 62-202 came into force. It replaced the substantially identical National Policy 38, adopted in 1986. National Policy 62-202 sets out the objectives of the securities commissions in the context of a take-over bid:

1.1 Defensive Tactics

- (1) The Canadian securities regulatory authorities recognize that take-over bids play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses. In considering the merits of a take-over bid, there is a possibility that the interests of management of the target company will differ from those of its shareholders. Management of a target company may take one or more of the following actions in response to a bid that it opposes:

1. Attempt to persuade shareholders to reject the bid.



2. Take action to maximize the return to shareholders including soliciting a bid from a third party.
 3. Take other defensive measures to defeat the bid.
- (2) The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the *bona fide* interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.
- ...
- (5) The Canadian securities regulatory authorities consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to intervene in contested bids. However, they will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.
- (6) The Canadian securities regulatory authorities appreciate that defensive tactics... may be taken by a board of directors of a target company in a genuine attempt to obtain a better bid. Tactics that are likely to deny or limit severely the ability of the shareholders to respond to a take-over bid or a competing bid may result in action by the Canadian securities regulatory authorities.

This general policy is left to be developed in the decisions of the securities commissions.

Position of the Securities Commissions on Shareholder Rights Plans

The treatment of shareholder rights plans by the various securities commissions has not been entirely consistent over the past decade. From an initially broad contextual analysis, the



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commissions lapsed into a more formal test in the mid-1990s. Recently, however, there have been indications that the initial approach has returned.

Initial Broad Analysis

Initially, the securities commissions took a broad approach to poison pills. In *Re Canadian Jorex Ltd.*¹², for example, the directors of Canadian Jorex Ltd. had instituted a pill to block the take-over bid launched by Mannville Oil & Gas Ltd. The Commission expressed the issue before it as whether the public interest required that the pill be quashed so that the Mannville bid could be considered by the shareholders of Jorex. The Commission's conclusion in the affirmative was based on three non-exhaustive factors: (1) the Mannville bid would not proceed if the pill remained; (2) the maintenance of the pill was not going to prompt any additional bidders; and (3) the maintenance of the pill would not lead to any improvements in the Mannville bid. The pill had outlived its usefulness and it was time for it to be discarded.

This broad approach was followed by the Ontario Securities Commission in *Re Lac Minerals Ltd.*¹³ In *Lac*, the pill had been adopted by shareholders long before the take-over bids at issue, which had been made by American Barrick Resources Corporation and Royal Oak Mines Inc. To answer the question of whether it was "time for the poison pill to go", the Commission recognized that it had to balance two competing principles: (1) the directors' duty to manage the corporation, and (2) the shareholders' right to consider an offer to purchase their shares. That tension was resolved by considering, as was done in *Jorex*, the consequences of allowing the pill to continue in the particular circumstances of the case. In *Lac*, because counsel for the directors indicated that the pill would be waived voluntarily if either bid attracted more than 66 2/3% of the outstanding shares, the Commission declined to cease-trade it.¹⁴

Jorex and *Lac* seemed to indicate that the securities commissions were going to scrutinize the circumstances of the particular case when determining whether the public interest required that a pill be quashed. As Vice-Chairman Geller noted at the time, the result of this analysis was that "the decision in one case to end the operation of a 'pill', immediately or after a period, can only have limited precedential value in another case, even though on the surface their facts may appear to be similar".¹⁵ In every case, the evidence, not pre-ordained tests, would govern.



Towards a Formalized Analysis

The Ontario Securities Commission arguably formalized its approach in *Re MDC Corporation and Regal Greetings & Gifts Inc.*¹⁶, which was ironically released concomitantly with *Lac*. The Commission set forth two questions that would determine where the public interest lay in the case before it:

1. If the shareholder rights plan is permitted to remain in effect for a reasonable further period, is there, on the evidence, a reasonable possibility that a better offer will come along during the period so that, whether or not this results in an increase in the existing bid, the shareholders of the target corporation will be advantaged?
2. If the shareholder rights plan is not terminated prior to the end of the current period for acceptance of the bid, is it likely that the bidder will not extend the period for acceptance for such “reasonable further period”, and thus deprive the shareholders of the opportunity to decide whether they wish to accept the bid?

The Commission concluded that there was a reasonable possibility that a better bid would be attracted if the pill remained in effect for a reasonable period and that the bidder would likely extend its bid if it was likely that the pill would eventually be terminated. For these reasons, and because none of the shareholders of Regal had registered any opposition to the pill, the Commission declined to interfere.

We see in *Regal* the tentative development of a more regimented analysis, with the Commission setting forth a formal two-stage test. Yet, at the same time, the Commission also thought it important that the Regal shareholders appeared to support the pill- a contextual factor not mentioned in the formal test. The Commission, it could be argued, was moving in two directions at once.

Subsequent cases indicated, however, that the formalized approach had taken hold. In *Re CW Shareholdings Inc. and WIC Western International Communications Ltd.*¹⁷, for example, a joint panel of the Ontario, Alberta and British Columbia Securities Commissions considered a pill implemented by WIC. CW Shareholdings (a subsidiary of CanWest Global Communications Corp.) had made a bid for WIC's Class A and B shares. WIC's directors were opposed to CW Shareholdings' offer. Not only did they consider it inadequate, they were concerned about the coat-tail provisions of the Class B shares, which allowed holders of those shares to exchange them for Class A voting shares in the event of a change in control of WIC. WIC responded to



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CW Shareholdings' bid by implementing a pill, which at that time did not yet have the approval of the shareholders.

In an apparent departure from *Jorex, Lac* and, to a lesser extent, *Regal*, the Ontario Securities Commission held that a target corporation may only implement a pill in the face of a bid and without shareholder approval where, "at the very least", the bid is "coercive" or displays "some other very substantial unfairness or impropriety". No such circumstances could be shown there and the pill was cease-traded one week after the hearing.¹⁸

CW Shareholdings seemed to be a formidable barrier to a target corporation seeking to respond to a take-over bid. Unless the bid was "coercive", "unfair" or "improper", it seemed that the poison pill weapon was unavailable. This narrow approach was followed by the Ontario and Quebec Securities Commissions in *Re Ivanhoe III Inc. and Cambridge Shopping Centres Limited*.¹⁹

Returning to First Principles

Ultimately, the artificially formal approach to identifying the "public interest" taken in cases such as *Regal*, *CW Shareholdings* and *Ivanhoe* fell by the wayside. In *Re Samson Canada Ltd. and Highridge Exploration Ltd.*²⁰, for example, the Alberta Securities Commission generally applied the *Regal* test but felt constrained to note that:

[s]hareholder approval of the Plan is powerful, but not necessarily conclusive, evidence of how the shareholders want their collective interests to be protected in a take-over bid situation. Because all take-over bid situations are fact-specific, the Commission must consider all of the particular circumstances of each case, including shareholder approval or lack thereof, in determining whether either party has met their burden under the *Regal* test. Here, the 45 day period appeared to be reasonable under all the circumstances and not merely because it was approved by the shareholders.

The Commission continued to hold that "[w]hether an offer is coercive is only one factor to be considered in assessing a shareholder rights plan". To the extent that *Ivanhoe* and *CW Shareholdings* diverged from that view, the Commission concluded that each of those cases should be "interpreted as consistent with the fundamental application of the *Regal* test in the manner we have described".



This trend towards a less structured analysis was continued by the British Columbia Securities Commission in *Re BGC Acquisition Inc. and Argentina Gold Corp.*²¹ In BGC, Argentina Gold had instituted a pill without shareholder approval and after BGC's bid had been made. Preferring to weigh the factors arising from the circumstances of the case, the Commission moved sharply away from *CW Shareholdings*, specifically holding that "we did not place much weight" on the fact that the pill was implemented without shareholder approval in the midst of the bid. Importantly, if *CW Shareholdings* still governed, that would have been dispositive unless Argentina Gold were able to demonstrate that the bid was coercive or unfair. Instead, the Commission recognized in *BGC* that the task of balancing the two objectives identified in *Jorex* "is highly dependent on the specific facts".

In the result, the Commission cease-traded Argentina Gold's pill, but did so on the basis of a broad review of the circumstances, with the public interest and National Policy 62-202 at the forefront, rather than by relying on the outcome of a formal test.²²

Shortly thereafter, the British Columbia Securities Commission, in a joint hearing with the Alberta and Ontario Securities Commissions, squarely recognized the divergent trends in the jurisprudence and firmly adopted the broadly contextual, fact-specific approach signalled in *Jorex* and endorsed in *BGC*. In *Royal Host Real Estate Investment Trust (Re)*²³, the Commission thoroughly canvassed the approaches that various securities commissions had developed over the past decade and concluded that:

[a]fter reviewing these decisions and the fact patterns upon which they were based, we have come to the conclusion that it is fruitless to search for the "holy grail" of a specific test, or series of tests, that can be applied in all circumstances. Take over bids are fact specific; the relevant factors, and the relative importance to be attached to each, will vary from case to case. As a result, a test that focuses on certain factors to the exclusion of others will almost certainly be inappropriate in some of the cases to which we attempt to apply it.

Having disclaimed the rigid approach that had sometimes been taken in the past, the Commission set forth a non-exhaustive list of factors to be considered when determining whether it is "time for the pill to go":

1. whether shareholder approval of the rights plan was obtained;



2. when the plan was adopted;
3. whether there is broad shareholder support for the continued operation of the plan;
4. the size and complexity of the target corporation;
5. the other defensive tactics, if any, implemented by the target corporation;
6. the number of potential, viable offerors;
7. the steps taken by the target corporation to find an alternative bid or transaction that would be better for the shareholders;
8. the likelihood that, if given further time, the target corporation will be able to find a better bid or transaction;
9. the nature of the bid, including whether it is coercive or unfair to the shareholders of the target corporation;
10. the length of time since the bid was announced or made; and
11. the likelihood that the bid will not be extended if the rights plan is not terminated.

The Alberta and Ontario Securities Commissions adopted the B.C. Commission's reasons.

The B.C. Commission recently reapplied the broad contextual approach in the case of *Everest Investors 15, LLC et al and Del Cano Properties Trust*.²⁴ The background of this case can be shortly stated. On September 17, 2001, in anticipation of a takeover bid by Everest, Del Cano asked a special committee of its trustees to review the anticipated bid and search for alternative transactions. On September 26, 2001, Del Cano's trustees adopted a shareholder rights plan. The rights plan provided that the rights would separate and trade apart from the shares on the tenth day after the announcement of a bid that was not a permitted bid. The Everest bid was not a permitted bid, however Del Cano's trustees extended the separation date several times during October and November. On November 16, 2001, Del Cano announced a definitive agreement to sell its assets to Alliance Communities, LLC. Del Cano also announced a further extension of the separation date under its rights plan to November 23, 2001. On November 16, 2001 Everest applied, under section 161(1) of the *Securities Act*, R.S.B.C. 1996, c. 418, for an order cease trading Del Cano's rights plan.



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The Commission issued its decision that day. It decided that if Everest extended its bid to no earlier than November 29, 2001, the Commission would issue an order cease trading the Del Cano shareholder rights plan unless Del Cano issued a news release by noon, Pacific Standard Time, on November 23, 2001, confirming that it waived the plan for the Everest bid.

In written reasons released a few months later, the Commission cited *Royal Host* as guiding its judgment, and reproduced the list of eleven non-exhaustive factors set out above. The Commission then applied those factors to the facts present in *Everest*, emphasizing the following:

1. Del Cano did not obtain shareholder approval of its rights plan.
2. The Commission did not know whether the shareholders supported the continued operation of the rights plan. They had before them affidavits in support of the continued operation of the rights plan from the holders of only 16 out of 4,237.6 shares.
3. Del Cano had known of Everest's impending bid for more than 8 months.
4. The Everest bid was announced on October 9th and would be extended to November 29th if the Commission ceased trade of the rights plan. Thus by the time the bid expired it would have been open for acceptance for 52 days, far longer than the minimum 35 days required by the Securities Rules, B.C. Reg. 196/97.
5. There was now an alternative on the table - the "definitive agreement" for the sale of Del Cano's assets to Alliance.

Royal Host and *Everest* return the take-over bid jurisprudence to its roots in *Jorex*. Although a broadly contextual approach may be less predictable for corporations and their advisors, it arguably better reflects the general jurisdiction of the securities commissions to regulate the take-over bid process in the public interest.

Asset Options and Break Fees

As an alternative to implementing a shareholder rights plan, a target corporation may decide to issue defensive asset options or to negotiate break-fees with friendly corporations. The legitimacy and efficacy of these tools were at issue in *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*²⁵



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CW Shareholdings and Shaw Communications Inc. became engaged in a battle for ownership of WIC Western International Communications Ltd. after WIC's shareholders' rights plan, implemented in response to CW Shareholdings' bid, had been cease traded in the joint hearing of the Ontario, Alberta, and British Columbia Securities Commissions described above.

Shaw announced an offer to purchase all of the WIC Class B shares for a price comprised of cash and Shaw stock (the "Shaw Offer"). In exchange for agreeing to make the Shaw Offer, however, Shaw had negotiated with WIC a Pre-Acquisition Agreement pursuant to which it was entitled to a "break fee" of \$30 million if its bid was rejected, and an option to purchase WIC's radio assets. CW, claiming that it was prejudiced as a Class B shareholder by the manner in which WIC's board of directors responded to the CW bid and negotiated the Shaw Offer, applied to the Court for an oppression remedy.

In his reasons dismissing the application, Blair J. held that break fees may be appropriate responses to a hostile take-over bid where:

1. they are necessary in order to induce a competing bidder to enter the auction;
2. the competing bid is a better value for shareholders; and
3. the break fee represents "a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator".

The appropriateness of break fees, not in response to an extant take-over bid, but as a condition of a welcome takeover transaction by way of a plan of arrangement, was considered in two recent cases before the Supreme Court of British Columbia. In *Re Pacifica Papers Inc.*,²⁶ Lowry J. considered an argument that a break fee of \$20 million was unduly large because it dampened any interest there may have been in bettering a proposed share exchange transaction whereby Norske Skog Canada Limited ("Norske") was to acquire Pacifica Papers Inc. ("Pacifica"). The transaction was to be effected by way of a plan of arrangement pursuant to s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA"). Pacifica had to petition for approval of the plan of arrangement in order to complete the transaction. The application before Lowry J. was opposed by two of Pacifica's shareholders. The shareholders were aligned in contending that Pacifica shareholders were not going to receive what their shares were worth because the process of negotiating the sale of Pacifica's



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equity was so flawed that it was impossible to obtain a fair value. The shareholders' complaints centred on the exclusivity with which Norske was able to negotiate with Pacifica, made worse, from their perspective, by Pacifica's acceptance of the \$20 million break fee.

Lowry J. held that Pacifica's acceptance of a period of exclusivity in a pre-acquisition agreement with Norske was a feature of the negotiations upon which Norske insisted and was customary in transactions of this kind.²⁷ Further, while it may have been better for Pacifica to be able to inject competitive bidding for its equity into the process, that was a luxury it did not have. As for the break fee itself, Lowry J. held that the evidence did not establish that the break fee was so high that it precluded offers for the equity of Pacifica. Indeed, the advice given by Pacifica's financial advisors was that \$20 million was 4.5% of Pacifica's equity value, thus the break fee was within the normal and accepted range of 3-5% of equity value.²⁸ In the end, Lowry J. rejected all allegations of flawed process, including the allegation that the break fee was inappropriately high.

In *Re Sepp's Gourmet Foods Ltd.*²⁹ Burnyeat J. determined that a \$500,000 break fee negotiated by an acquisition group intending to take Sepp's Gourmet Foods private was not inappropriate, even though the break fee represented 5.3% of Sepp's \$9.37 million market capitalization based on the \$.71 per share acquisition price.

Similarly, asset options are not unknown in the context of take-over bids. They may be appropriate if they strike a "reasonable commercial balance" as described above. Factors to be considered when deciding whether this is so, according to Blair J. in *CW Shareholdings*, include the following:

1. whether the process by which the directors of the target corporation exercised their obligation to maximize shareholder value complied with their duties as target-directors;
2. whether the overall commercial balance and proportion between the auction inhibiting and auction stimulating effect of such an agreement in the circumstances has been struck, i.e., whether the agreement is likely to preclude further bidding, in the sense of harming or significantly dampening the auction process, and thus deprive the shareholders of potential additional value;
3. whether the price for the optioned asset is within the range of reasonable value attributed to that asset, or whether it represents such a discount that it would result in a



disproportionate erosion in the value of the corporation making it uneconomical for others to bid; and

4. whether the competing bid induced by the asset option agreement provides enough additional value to the shareholders to justify its granting.

In *CW Shareholdings*, Blair J. concluded that break fees and asset options are not *per se* illegal and they do not become illegal merely because they occur together. Whether the tactics are appropriate or inappropriate depends entirely on the circumstances. When assessing whether the directors acted appropriately in the circumstances, their decisions are not to be judged in hindsight. Rather, they must be assessed in light of the facts known at the time. The business judgment rule is capable of applying in take-over bid/oppression situations just as well as it applies to other situations. The result in *CW Shareholdings* was that neither the break fee nor the radio asset option could be successfully impugned.

Poison Debt

Another tool available to be used by target corporations is “poison debt”, which is simply “the issuance by a target company of debt securities containing provisions designed to discourage a hostile takeover”.³⁰ Provisions unpalatable to bidders may include the extraordinarily high amount of the total debt issued, a very short maturity date, an increased interest rate, and terms in the trust indenture severely restricting the activities of the target corporation or specifying that a change of control constitutes an event of default. More immediately, upon a specified event such as a change in the control of the issuer, the debt instruments may allow the holders to redeem the debt at a premium redemption price or convert it into equity securities. The former may burden the bidder with an unmanageable debt load; the latter will dilute its holdings.³¹

To prevent the bidder from simply acquiring the debt securities and converting them, the right of conversion may be limited, *i.e.*, to provide that no holder is permitted to convert its debt if the result would be that it held more than a specified percentage of the equity securities. To provide the directors with flexibility in dealing with competing bids, the terms of the debt securities may provide that any or all of the restrictive provisions may be waived in certain circumstances.³²

The advantage of poison debt is that it is not as vulnerable to the often variable supervision of the securities commissions. The only restrictions on its issuance and the terms that may be



attached are the provisions of the applicable corporation statute and the common law obligations of directors and officers to act in the best interests of the corporation. As the securities commissions come to terms with poison pills, corporations and their advisors will increasingly turn to poison debt as an alternative take-over defence tool.³³

Practical Lessons: Deflecting a Take-Over Bid

Given the recent state of the cases, there is no downside to inserting a pill in the face of a hostile take-over bid, although the Commissions will strive to prevent it from interfering with a validly subsisting auction.³⁴ That said, corporations and their advisors must remain flexible. To deflect a hostile take-over bid or to attract a white knight, they should also consider implementing asset options, break fees and poison debt, alone or in combination with a shareholder rights plan.

ARRANGEMENTS: SOLICITATION OF PROXIES

Various kinds of corporate reorganizations, including share exchange transactions, going private transactions and amalgamations, can be effected through plans of arrangement. These plans often amount to a welcome or "friendly" take-over of a corporation. This paper does not address the general law governing arrangements and what is required to effect them, i.e. court approval etc. Considered below is a discrete issue in arrangements law that has been recently addressed by the B.C. Supreme Court and Court of Appeal: the propriety of soliciting proxies or "support agreements" for an arrangement prior to the mailing of a proxy circular.

Solicitation of proxies

One of the main issues dealt with by Lowry J. in *Re Pacifica* was the appropriateness of Pacifica soliciting proxies or support agreements for the proposed share transaction prior to the mailing of a proxy circular.³⁵ The statutory provision at issue was s. 150(1) of the CBCA. Counsel for Pacifica forcefully argued that s. 150(1) permitted such proxy solicitation, providing that a circular is at some time sent with a notice of meeting.³⁶

Lowry J. did not agree with the interpretation of section 150(1) argued by Pacifica. He held that the Pacifica interpretation was at odds with what must be the obvious purpose of the section – shareholder protection. In short, Lowry J. held that shareholders must be provided the



statutorily prescribed information about a transaction upon which they are to vote, and a notice of a meeting to be convened for that purpose, before their proxies are solicited. Notably, Pacifica adduced evidence that it was common practice to solicit shareholder support, and enter into support agreements prior to the mailing of a proxy circular. This evidence did not sway Lowry J. on the issue of the contravention of s. 150(1) of the CBCA. However, although he did not state this expressly, it is likely that this common practice influenced his decision that the contravention of section 150(1) was not fatal to the approval of the arrangement.

On this note, Lowry J. first considered whether the contravention of s. 150(1) rendered the shareholders' vote invalid. He decided that it did not, as the support agreements were illegal and unenforceable. Thus it was open to all shareholders to give or withhold their proxies regardless of whether they signed a support agreement.³⁷ Lowry J. then considered whether the contravention of s. 150(1) rendered the arrangement "unfair" in any event because the solicitation that was carried out did not comply with the CBCA. He noted that there is authority stating that in order to obtain approval of an arrangement all statutory requirements must be strictly complied with. He then noted instances where arrangements have been approved even though they did not comply with some provision of the statute under which approval was sought.³⁸

Lowry J. held that a breach of the CBCA in the course of negotiating and completing an arrangement is not fatal to its being approved. Rather, it is necessary to consider the breach in the context of the transaction as a whole in determining whether the arrangement is fair and reasonable. In deciding that the arrangement proposed in *Re Pacifica* was fair and reasonable, Lowry J. emphasized that no contravention of the CBCA was intended. There was also no evidence that the shareholders who signed support agreements were in any way misled. On the contrary, those who entered into such agreements were either large financial institutions or nominee corporations of persons closely linked to members of Pacifica's board. In other words, they were clearly knowledgeable participants in the market. They were also aware of the valuation controversy stirred up by the shareholders opposing the arrangement. A final factor Lowry J. found particularly significant was that the shareholders who opposed the arrangement did not raise the illegality of the support agreements at the interim application ordering the shareholders meeting to be held.³⁹



The Court of Appeal dismissed the appeal from the order of Lowry J., approving the plan of arrangement. Finch C.J.B.C., for the Court, was not convinced that Lowry J. erred in his fundamental conclusion that the arrangement was fair and reasonable. The Chief Justice indicated that he was in general agreement with Lowry J.'s reasons for judgment, but he expressed two reservations *in obiter*. The first was with respect to the conclusion that Pacifica was in breach of s. 150(1) of the CBCA by soliciting proxies prior to the mailing of a proxy circular. He noted that Lowry J.'s interpretation appeared to import into s. 150(1) a restriction on proxy solicitation not supported by the language of the statute. In addition, he was critical of Lowry J.'s statement that the support agreements were unenforceable because they were illegally obtained. The Chief Justice disagreed, commenting that such proxies are always revocable.

Unfortunately, the decisions in *Re Pacifica* did not clearly settle the law on the solicitation of proxies by management and the enforceability of support agreements. Neither did amendments to s.150, in force as of November 24, 2001. Sections 150(1.1) and (1.2) provide exceptions to the proxy circular requirements of s. 150(1) for proxies solicited other than by or on behalf of management. The exceptions apply if the total number of shareholders whose proxies are solicited is fifteen or fewer (s.150(1.1)) or if the solicitation is conveyed by public broadcast, speech or publication (s. 150(1.2)). In the case of proxies solicited by management, all that is clear is that if proxies are solicited in advance, the corporation should ensure that such solicitation does not undermine the corporation's ability to demonstrate that the arrangement is "fair and reasonable". In accordance with Lowry J.'s reasons, this may be accomplished, in part, by restricting such solicitation to a small group of sophisticated shareholders or "insiders".⁴⁰ Of course, determining who is "sophisticated" and who is an "insider" is itself a challenge.

USE OF OPPRESSION REMEDIES

Introduction

Each Canadian corporations statute contains an oppression remedy. While they share a common goal – the protection of shareholders' interests *qua* shareholders – and generally take the same approach, there are some differences. Because the maker of a take-over bid is usually an existing shareholder, the oppression remedy often figures prominently in a hard-fought take-over battle.⁴¹



Applicable Provisions, Examples and Remedies

Section 200 of the B.C. *Company Act* provides that any shareholder may apply for an oppression remedy if the corporation's affairs, or the actions of the directors, are being conducted in a manner that is oppressive to that person or if the corporation has done or is about to do an act that is unfairly prejudicial to the shareholder. If either criterion is met, the Court has jurisdiction to make an interim or final order "with a view to bringing to an end or to remedying the matters complained of".⁴² Notably, under Section 227 of Bill 47 (the proposed new British Columbia *Business Corporations Act*), the criteria set out above remain as the basis of the remedy. However, there are more specific remedies laid out in the proposed Act.⁴³

Section 248 of the *OBCA* and s. 241 of the *CBCA* are organized in much the same way, except that each also provides that shareholders (and others, such as creditors) may also apply for an oppression remedy in respect of a corporate decision that "unfairly disregards the interests" of any shareholders or creditors, as the case may be.⁴⁴

Apart from the allegedly improper implementation of a shareholders' rights plan, common triggers of oppression claims include the following:

1. failure to maintain proper accounting records;
2. secret payment of management fees without authorization;
3. preparation of false financial statements;
4. failure to hold an annual general meeting;
5. failure to provide financial statements to minority shareholders;
6. irregularity in the financial dealings of the corporation such as borrowing for the purpose of lending to a related corporation owned by a majority shareholder;
7. unreasonable refusal to register transfers of minority shareholdings in order to force a sale of those shareholdings at a lower price;
8. amendments to the articles to change or arbitrarily set the value of shares;
9. failure of directors to act openly, honestly and in good faith;



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10. removal of a shareholder from management where the relationship between the parties in a closely held corporation is based upon everyone continuing in management.

The Court has wide jurisdiction to make any order necessary to bring the oppressive or unfair circumstances to an end. This jurisdiction extends to the amendment of a unanimous shareholders' agreement, the winding-up of the corporation, an order that the shares of the oppressed shareholder be purchased by the majority and perhaps, in extraordinary circumstances, even the judicial sale of the corporation or its assets.⁴⁵

The Court also has the jurisdiction to grant interlocutory relief against continuing oppressive actions and *quia timet* relief where an oppressive act is threatened by the corporation.⁴⁶ The OBCA specifically provides that a final oppression remedy may be granted where the oppressive act is merely prospective.

Identifying an Oppression Claim

A. Identifying the Interests at Stake

It is not disputed that the oppression remedy protects the interests of the shareholder *qua* shareholder, not as the maker of a take-over bid, nor as a contracting party, officer, director, or employee of the corporation.⁴⁷ While the principle is easy to state, the difficulty lies in determining precisely where the interests of the shareholder lie. Confusion may arise because oppression is often accompanied by other wrongs, such as a breaches of the duties owed by the directors to the corporation, wrongful interception of corporate opportunities, and breaches of shareholder agreements.⁴⁸ It may be necessary to sever the contractual claims from those claims properly raising the oppression remedy.⁴⁹

In *Irwin et al. v. GST Telecommunications et al.*⁵⁰, for example, the oppression claim arose out of the transfer of GST Telecommunications' shares in a Mexican telecommunications project to Global Light Telecommunications. GST alleged that the plaintiffs, who were directors of GST, effected the transfer for no consideration and only after purchasing Global shares themselves. A California action by GST against several of its directors had been stayed in February, 1999 after the California court ruled that California was not the most convenient forum for the action. The GST directors then brought oppression claims under the *CBCA* against GST and the



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individual members of its litigation committee, arising from GST's decision to commence the action against them in California.

All the defendants applied successfully to strike the oppression claims on the basis that the plaintiffs did not have standing to seek an oppression remedy. Dillon J. noted that there was no pleading that the plaintiffs were shareholders and, furthermore, they were neither directors nor officers by the time the California action was commenced. More fundamentally, Dillon J. held that the California action did not affect the plaintiffs *as shareholders or directors*, affirming that the oppression remedy does not operate to vindicate a plaintiff's personal interests. Here, the plaintiffs could point to no discrimination or unfair dealing, any breach of a legal or equitable right, or any appropriation of corporate property. The statement of claim was therefore struck out wherever it advanced a claim in oppression.

Where the basis of the oppression claim is the corporation's alleged breach of contract, particular care must be taken to identify the precise shareholders' or directors' interest, if any, that is engaged by the breach. In several recent cases, courts have affirmed that the oppression remedy is not designed to enforce contracts between two people who just happen to be shareholders.⁵¹ The oppression remedy must be tied to the core interests at stake, not merely the identities of the parties. Similarly, although the bidder in a take-over battle may have standing to apply for an oppression remedy, the Court must be satisfied that the bidder is seeking the remedy in its capacity as a shareholder, not a bidder.⁵² The line is obviously difficult to draw.

It must also be remembered that, although actions taken in bad faith are more likely to be oppressive or unfairly prejudicial, bad faith is not in itself a requirement of a successful claim of oppression. The remedy focuses on the effect of the action, not its purpose.⁵³

B. Protecting Reasonable Expectations

Like the law of contract underlying the notion of the corporation itself, an application for an oppression remedy is resolved by an examination of the parties' reasonable expectations.⁵⁴ The courts will strive to vindicate shareholders' reasonable expectations, particularly if the corporation is a closely-held one, such as a family corporation.⁵⁵



The expectations protected by the oppression remedy are not “those that a shareholder has as his own individual ‘wish list’”. Rather, the alleged expectations must “have been (or ought to be considered as) part of the compact of shareholders”.⁵⁶ The Court is not restricted by the simple legal rights of the parties but instead has a general jurisdiction to consider their relationship more broadly, which includes recognizing that expectations may change over time.⁵⁷ Something may be oppressive in one case or at a certain time but not in another, depending on the relationship at issue.⁵⁸

Common forms of purported “expectations” include the expectation that the applicant will be permitted to play an active role in the management of the corporation, that the corporation will be wound up when the applicant ceases to participate in management, and that each shareholder will have an equal role in major corporate decisions. These expectations are often directly contrary to the formal rules of corporate governance, such as the rule that the board of directors is responsible for the management of the corporation and that the majority will rule.⁵⁹

All of the circumstances must be considered when determining whether the applicant is being oppressed or dealt with unfairly in light of reasonable expectations. The following are some factors that are usually used to determine the parties’ reasonable expectations, particularly where a closely-held corporation is involved⁶⁰:

1. the history and nature of the corporation, including the terms of the constating documents;
2. the types of interests affected;
3. general commercial practice;
4. the nature of the relationship between the applicant and the other shareholders;
5. the extent to which the impugned acts or conduct were foreseeable;
6. the size, structure and nature of the corporation;
7. the relationship between the expectation and the shareholders’ decision to invest;
8. whether the other shareholders are unmistakably aware of the applicant’s expectations; and
9. any shareholders agreements, formal or informal, universal or otherwise.⁶¹



Seeking Relief From Individual Directors

Traditionally, relief from oppression was sought as against the corporation itself. The independent legal stature of the corporation was protected and, as long as the directors were acting within the boundaries of their statutory powers, they were unlikely to be held to satisfy an oppression remedy. Recently, the orthodox view has been questioned and it has become clear that, in some circumstances, directors and others may be personally liable for the oppressive or unfairly prejudicial acts of the corporation.

In *Budd v. Gentra Inc.*⁶², for example, the plaintiff was a former shareholder of Gentra Inc. (formerly Royal Trustco). He claimed that Gentra had been mismanaged, that shareholders had received incomplete and inaccurate financial disclosure, and that the sale of Gentra's assets to the Royal Bank served the interests of the controlling shareholders to the detriment of all other shareholders. Budd brought an oppression claim under the CBCA and sought relief from the directors personally. The directors were successful in applying to strike the claim as against them.⁶³

On the appeal brought by Budd, Doherty J.A. set out a test to determine whether an application for an oppression remedy reveals a reasonable cause of action against directors or officers personally:

1. First, the court should determine whether the petitioner has pleaded that specific directors or officers committed specific acts that could provide the basis for finding that the corporation acted oppressively.
2. Second, the court must determine whether, in all the circumstances, it is appropriate to rectify the corporation's oppression by making an order against the directors or officers personally. The mere fact that the act has been attributed to the corporation does not absolve the director or officer of responsibility.

The factors to consider when determining whether a director or officer should be held personally liable in an oppression claim include:

1. the nature of the oppression at issue;
2. the benefit if any 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.

The order striking out the claim against the defendant directors was affirmed in *Budd* because the plaintiff failed to allege that any individual director participated in the conduct complained of.

This broadly-framed test of directors' liability has since been applied by several courts.⁶⁴ 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.⁶⁵



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¹ The first poison pill appears to have been introduced by Inco in 1988: S. Wishart, "Are Poison Pills Illegal?" (1998), 30 *Can.Bar.Rev.* 105 at 105. The Canadian shareholder rights plan has evolved into a unique form: see S. Romano, "Poison Pills: Where Do We Go From Here?" (1995), 18 O.S.C.B. 5424.

² J.G. MacIntosh, "The Poison Pill: A Noxious Nostrum for Canadian Shareholders" (1989), 15 C.B.L.J. 276 at 276.

³ M.M. Brown and P.S. Bird, "Hostile Takeovers" (2001), Volume 118, i1 *Banking Law Journal* 18 at 21.

⁴ In addition to Wishart, *ibid.*, the debate has been engaged in by P. Dey and R. Yalden, "Keeping the Playing Field Level: Poison Pills and Directors' Fiduciary Duties in Canadian Take-Over Law" (1990), 17 *Can.Bus.L.J.* 252; J.G. MacIntosh, "Poison Pills in Canada: A Response to Dey and Yalden" (1991), 17 *Can.Bus.L.J.* 323; and R. Yalden "Controlling the Use and Abuse of Poison Pills in Canada: 347883 *Alberta Ltd. v. Producers Pipelines Inc.*" (1992), 37 *McGill L.J.* 887. For an American discussion of the point, see M. Van Meter, "Share and Share Unalike: Judicial Response to Poison Pill Discrimination Among Shareholders of the Same Class" (1987), 33 *Wayne L.Rev.* 1067.

⁵ Wishart, *supra* note 1 at 110.

⁶ *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 24.

⁷ [1990] 3 S.C.R. 1020.

⁸ (1987), 62 O.R. (2d) 752 (C.A.).

⁹ The law is clear that for "division of power" type corporations, such as those incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, as amended (the "CBCA") and similar statutes, share rights dependant on the identity of the shareholder are unlawful and unenforceable. For CBCA style corporations, the only lawful way to create different share rights among shares is to create separate classes of shares. Within any one class, all shares must have the same share rights. It is arguable that the analysis in *McClurg* and *Bowater* should not apply to companies incorporated under the contractarian model of corporate legislation (i.e. the B.C. *Company Act*, R.S.B.C. 1996, c. 62) because the articles of a contractarian style company constitute an agreement amongst all shareholders of the company *inter se* and the company itself, and the contractarian company legislation permits non-equality amongst shares *if the memorandum or articles so provide*. Therefore, by agreement via the articles, the shareholders may agree to permit disparate treatment of shares, even by reference to the identity of the shareholder. This issue has not been thoroughly addressed in any case, but there is some jurisprudence considering the equality of shares issue in the context of contractarian-model legislation that suggests that share rights can validly be made specific to named shareholders and not merely to a class of shares, see: *Burrows v. Esquimalt Saanich Taxi Ltd.* (1991), B.C.J. No. 2774 (B.C.S.C.); *Muljo v. Sunwest Projects Ltd.* (1991), 60 B.C.L.R. (2d) 343 (C.A.); and *Jacobsen v. United Canso Oil & Gas Ltd.* (1980), 40 N.S.R. (2d) 692 (S.C.T.D.).

¹⁰ The Saskatchewan Court of Appeal did not have to confront it in *347883 Alberta Ltd. v. Producers Pipelines Inc.*, [1991] 4 W.W.R. 577 (C.A.), nor did the Alberta Court of Queen's Bench in *Remington Energy Ltd. v. Joss Energy Ltd.*, [1993] A.J. No. 1301 (Q.B.).

¹¹ See J.A. Geller, "Shareholder Rights Plans: The Pill Must Go, But When?" (1994), 17 O.S.C.B. 5759.

¹² (1992), 15 O.S.C.B. 257.

¹³ (1994), 17 O.S.C.B. 4963. See also *Re Tarxien Corp.* (1996), 19 O.S.C.B. 6913 where a broad approach was arguably also taken.

¹⁴ However, the Commission did order that, if the conditions of either bid were met, the poison pill would be cease-traded. The Commission thereby gave force to the statement by Lac's counsel that the poison pill would be waived in that situation.

¹⁵ Geller, "Shareholder Rights Plans", *supra* note 11.

¹⁶ (1994), 17 O.S.C.B. 4971.

¹⁷ (1998), 21 O.S.C.B. 2899.

¹⁸ Note that Shaw Communications Inc. supported CW Shareholdings' application to have the pill cease-traded, then launched a competing take-over bid when the application was successful.

¹⁹ (1999), 22 O.S.C.B. 1327.

²⁰ (1999), 8 A.S.C.S. 1791.

²¹ [1999] 6 B.C.S.C. Wkly. Sum. 23.

²² One must, however, treat the reasons of the Commission in this case with some scepticism. The primary argument made by BGC was that Argentina Gold had had plenty of time to find a competing bidder and none had appeared or was likely to appear. The Commission cease-traded the pill one day after the hearing (January 27, 1999) but did not issue its reasons until June 21, 1999. In the meantime, another bidder had in fact appeared and bettered BGC's offer.



- 23 [1999] 47 B.C.S.C. Wkly. Sum. 43.
 24 2002 B.C.S.C. Weekly Report, February 8, 2002 COR No. 02\012.
 25 (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div.)
 26 (2001) 92 B.C.L.R. (3d) 158, [2001] B.C. J. No. 1484, 2001 BCSC 1069.
 27 *Ibid* at para. 115.
 28 *CW Shareholdings, supra*, note 25 at para. 86.
 29 (2002), 21 B.L.R. (3d) 291, [2002] B.C. J. No. 33, 2002 BCSC 51 (reversed on other grounds).
 30 R.G. Clemens, "Poison Debt: The New Takeover Defense" (1987), 42 *Bus. Lwyr.* 747 at 747.
 31 Clemens, *ibid.* at pp. 749-53.
 32 Clemens, *ibid.* at pp. 752-53.
 33 Poison debt is long-established in the United States. See Clemens, *supra*; *McMahan & Company et al. v. Warehouse Entertainment Inc. et al.*, 859 F.Supp. 743 (S.D.N.Y. 1994); *Revlon Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986); *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986); *Gearhart Industries v. Smith International*, 741 F.2d 707 (5th Cir. 1984); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (1985); *Turner Broadcasting System v. CBS*, 627 F.Supp. 901 (N.D.Ga. 1985).
 34 Although they have not been entirely accurate predictors of whether the auction has been exhausted: *BGC, supra* note 21.
 35 See J. Doris, "Court Considers Rules Relating to Solicitation of Proxies by Management of a Corporation" (2001) Volume V, No. 2 *Corporate Litigation* at 291 for an excellent discussion of both the Supreme Court and Court of Appeal decisions in *Re Pacifica*.
 36 *Pacifica, supra* note 26 at para. 90.
 37 *Ibid.* at para. 98.
 38 *Ibid.* at para. 102
 39 *Ibid.* at para. 107.
 40 Doris, *supra* note 35 at p. 295.
 41 See for example *CW Shareholdings, supra* note 25. Note also that a fund manager may apply for a remedy, instead of the individual shareholders: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 40 B.L.R. (2d) 244 (Gen.Div.), *aff'd* 113 O.A.C. 253 (C.A.).
 42 B.C. *Company Act*, s. 200(2).
 43 For instance: (d) directing an issue or conversion or exchange of shares; (e) appointing directors in place of or in addition to all or any of the directors then in office; (f) removing any director; (j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction; and (k) varying or setting aside a resolution.
 44 *Ontario Business Corporation Act*, R.S.O. 1990, c. B.16, s. 248(2); *CBCA, supra* note 6, s. 241. It has been held that the burden of proof concerning unfair prejudice or "disregard of interests" is less rigorous than that applicable to a general claim of oppression: *Such v. R.W.-L.B. Holdings Ltd.* (1993), 11 B.L.R. (2d) 122 (Alta.Q.B.); *Mason v. Intercity Properties Ltd.* (1987), 38 D.L.R. (4th) 681 (Ont.C.A.); *Sahota v. Basra*, [1999] O.J. No. 186 (Gen.Div.).
 45 *Nanef v. Con-Crete Holding Ltd.*, (1993), 11 B.L.R. (2d) 218 (Gen.Div.), *aff'd* (1994), 19 O.R. (3d) 691 (Div.Ct.), *rev'd* (1995), 23 O.R. (3d) 481 (C.A.); *Safarik v. Ocean Fisheries Ltd. et al.* (1995), 12 B.C.L.R. (3d) 342 (C.A.); *add'l reasons* (1996), 17 B.C.L.R. (3d) 354 (C.A.); *Burdeny v. K&D Gourmet Baked Foods and Investments Inc.*, [1999] B.C.J. No. 953 (S.C.); *Mahoney v. Taylor*, [1996] B.C.W.L.D. 1958 (S.C.); M. Koehnen, "The Oppression Remedy: Reasonable Expectations: *Nanef v. Con-Crete Holding Ltd.*" (1994), 73 *Can.Bar.Rev.* 274.
 46 *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, [1998] B.C.W.L.D. 274 (S.C.).
 47 Because the oppression remedy protects the interests of the individual shareholder, it is not suited to a class action, where only a representative of the class would be considered: *Ker v. Auto Marine Electric Ltd.* (1990), 43 C.P.C. (2d) 278 (B.C.S.C.).
 48 Many of these claims may found a derivative action. There is an indication that an application to bring a derivative action may be combined with an application for an oppression remedy: *Drove v. Mansvelt*, unreported (28 September 1999), Vancouver Registry No. CA026137 (B.C.C.A.); *Algonquin Mercantile Corp. v. Cockwell* (1997), 43 B.L.R. (2d) 50 (Ont.Gen.Div.).
 49 *Kightley v. Beneteau* (1999), 88 A.C.W.S. (3d) 528 (Sup.Ct.).
 50 [1999] B.C.J. No. 2221, (6 October 1999), Vancouver Registry No. C990488 (B.C.S.C.).



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- ⁵¹ *Benedetti v. North Park Electronics (1980) Ltd.*, [1997] O.J. No. 5244 (Div.Ct.); *Smith v. Red Green Productions III Inc. et al.*, [1999] O.J. No. 1704 (Ont.Sup.Ct.); *Thermadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen.Div.); rev'd in part 107 O.A.C. 188 (C.A.).
- ⁵² *CW Shareholdings*, *supra* note 25.
- ⁵³ *Safarik*, *supra* note 45; *Ludlow v. McMillan* (1995), 6 B.C.L.R. (3d) 163 (S.C.); *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.).
- ⁵⁴ *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.).
- ⁵⁵ It has however been suggested that the British Columbia Court of Appeal has at times "retreated from basing its oppression and unfairly prejudicial conduct analysis on the shareholder's reasonable expectations": S. Antle "Oppression, Just and Equitable Winding Up and the Family Company: *Safarik v. Ocean Fisheries Ltd.*" (1997), 76 *Can.Bar.Rev.* 589 at 597.
- ⁵⁶ *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont.Gen.Div.) at p. 123; aff'd (1991), 3 B.L.R. (2d) 113 (Ont.Div.Ct.).
- ⁵⁷ *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.).
- ⁵⁸ *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128 (C.A.) at p. 137.
- ⁵⁹ See generally J.A. Campion et al. "The Oppression Remedy: Reasonable Expectations of Shareholders" (1995), *Spec. Lec. L.S.U.C.* 229 at 234.
- ⁶⁰ See in particular *Westfair Foods Ltd. v. Watt et al.* (1990), 73 Alta.L.R. (2d) 326 (Q.B.).
- ⁶¹ An application for an oppression remedy if a valid shareholders' agreement requires arbitration instead: *Kints v. Kints* (1998), 81 A.C.W.S. (3d) 757 (Ont.Gen.Div.).
- ⁶² (1998), 43 B.L.R. (2d) 27 (Ont.C.A.).
- ⁶³ (1996), 12 O.T.C. 117, [1996] O.J. No. 3515, Farley J.
- ⁶⁴ See, for example, *Irwin et al. v. GST Telecommunications et al.*, *supra* note 50; *Hovsepian v. Westfair Foods Ltd.*, [2001] A.J. No. 1074 (Q.L.) (Q.B.); *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.*, *supra* note 53; *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. Devencroft Developments Ltd.*, [2002] 5 W.W.R. 388, (2001) ABQB 917.
- ⁶⁵ *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.).