Recent Watershed Developments in Oppression Remedies and Shareholder Activism

*Mendy Chernos, Michael D. Briggs and Brandon Kain**

I. INTRODUCTION

It is no exaggeration to say that the last decade has witnessed a sea change in Canadian shareholder litigation. Although the spectre of mass shareholder activism has its roots in the United States, it is now clear that large, complex and carefully-orchestrated shareholder lawsuits have become a permanent feature of the Canadian legal landscape. This new brand of shareholder litigation is distinguished by both its sophistication, and its aggressiveness, and is only likely to grow with the recent enactment of class proceedings legislation in Alberta,[1] and with the addition of statutory liability for secondary market misrepresentations to the Ontario *Securities Act*[2] (a reform that is soon likely to be followed in Alberta, Manitoba and British Columbia).[3]

---

* Mendy Chernos is a partner at McCarthy Tétrault LLP in Calgary; Michael D. Briggs is a partner at McCarthy Tétrault LLP in Calgary; Brandon Kain is an associate at McCarthy Tétrault LLP in Toronto.

1 The *Class Proceedings Act*, S.A. 2003, c. C-16.5 came into force on April 1, 2004.

2 See Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5, which came into force on December 31, 2005.

3 In Alberta, Bill 25, which will amend the *Securities Act*, R.S.A. 2000, c. S-4 to create civil liability for secondary market misrepresentations, received Royal Assent on May 24, 2006, and be proclaimed into force on December 31, 2006. In Manitoba, Bill 17, which will amend the *Securities Act*, C.C.S.M. c. S50 in a similar manner, received Royal Assent on June 13, 2006, and will be proclaimed into force on January 1, 2007. In British Columbia, a liability regime for secondary market misrepresentations is included in Part 10 of the *Securities Act*, S.B.C. 2004, c. 43, which passed Third Reading on May 11, 2004, but has yet to come into force. In Saskatchewan, Bill 19, which will amend the *Securities Act, 1988*, S.S. 1988-99, c. S-42.2, was introduced for second reading on November 13, 2006, but has yet to be passed. In Nova Scotia, Bill 75, which will amend the *Securities Act*, R.S.N.S. 1989, c. 418, passed third reading on November 23, 2006, has yet to come into

Shareholder claims brought under the "oppression" provisions of the various Canadian Business Corporations Acts are no exception to this trend. Indeed, they represent some of the most significant contributors to the modern face of Canadian shareholder litigation. The purpose of this paper is to examine the phenomenon of shareholder activism through the lens of recent watershed developments in oppression jurisprudence. Given the potential breadth of this undertaking, the paper is arranged topically, with a discussion that focuses upon six discrete issues which have figured prominently in recent oppression actions. These issues are: (1) the application of provincial limitation periods to federal oppression actions; (2) the relationship between oppression and derivative actions; (3) evidentiary hurdles to establishing reasonable expectations; (4) the obligations and liabilities of directors in the oppression context; (5) the business judgment rule; and (6) the scope of oppression relief.

II. THE APPLICATION OF PROVINCIAL LIMITATION PERIODS TO FEDERAL OPPRESSION ACTIONS

One of the more interesting questions in modern oppression jurisprudence is the degree to which limitation periods contained in provincial enactments may prescribe oppression claims that are instituted under s. 241 of the *Canada Business Corporations Act*.[4] It is generally accepted that provincial limitation periods are capable of barring oppression actions brought under *provincial* corporations acts (notwithstanding that there is some debate concerning the proper characterization of oppression actions as tortious, equitable or statutory for the purposes of provincial limitations statutes).[5] However, the application

---

force. In Newfoundland, Bill 51, which will amend the *Securities Act*, R.S.N.L. 1990, c. S-13, passed third reading on November 29, 2006, but has yet to receive Royal Assent.

4 R.S.C. 1985, c. C-44 [*CBCA*].

5 See: *Calmont Leasing Ltd. v. Kredl* (1993), 142 A.R. 81, [1993] A.J. No. 569 (Q.B.) at paras. 114-125 (QL), varied on other grounds (1995), 32 Alta. L.R. (3d) 345 (C.A.); *Safarik v. Ocean Fisheries Ltd.* (1993), 10 B.L.R. (2d) 246, [1993] B.C.J. No. 1816 (S.C.) at paras. 288-289 (QL), reversed on other grounds (1995), 12 B.C.L.R. (3d) 342 (C.A.), supplemental reasons at (1996), 17 B.C.L.R. (3d) 354 (C.A.); *Jaska v. Jaska* (1996), 141 D.L.R. (4th) 385 (Man. C.A.) at 391; *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 719; *Seidel v. Kerr* (2003), 330 A.R. 284, 2003 ABCA 267 at paras. 26 and 41; *Hughes v. Bob Tallman Investments Inc.* (2005), 192 Man. R. (2d) 123, 2005 MBCA 16 at paras. 28-29; *Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at para. 55; and *De Shazo v. Nations Energy Co.* (2005), 367 A.R. 267, 2005 ABCA 241 at paras. 20 and 37. See, however, *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (C.A.) at paras. 534-536 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291, and *Ford Motor Co. v. Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27 (C.A.) at paras. 169-173 (QL), leave to appeal refused, [2006] S.C.C.A. No. 77, where the Courts held that the limitation provisions in the old Ontario *Limitations Act*, R.S.O. 1990, c. L.15, did not apply

of such limitation periods to *CBCA* oppression actions is a matter of considerable uncertainty.

1. The Current Position

One of the first cases to directly address the relationship between provincial limitation periods and *CBCA* oppression claims is the decision of McMahon J. in *Switzer v. Greenland Properties Ltd.*[6] The plaintiff in that case brought an oppression claim under s. 241 of the *CBCA* to recover monies allegedly owing to her as the result of a forced redemption of her shares. Although the plaintiff had first discovered her entitlement to the redemption proceeds in 1979, she did not commence the oppression action until approximately 20 years later. Nevertheless, McMahon J. held that the plaintiff's claim was not barred under the *Limitations Act*.[7] He stated that:

> [t]he respondent argues that the provincial *Limitations Act* applies to bar Mrs. Switzer's claim which is framed as an oppression remedy under the *CBCA*. Counsel relies upon *Jaska v. Jaska*, [1997] 2 W.W.R. 86 (Man. C.A.). That case, however, involved a winding up application under the Manitoba *Corporations Act* to which the Court found that the provincial *Limitations Act* applied. *Here the action is brought pursuant to the CBCA to which the provincial Limitations Act cannot apply.*[8] [emphasis added]

Notwithstanding *Switzer*, the courts in Quebec appear to have concluded that provincial limitation periods do indeed apply to *CBCA* oppression actions. In *Gruber v. Greenberg*,[9] Gomery J. held that the prescription period contained in Art. 2922 of the *Civil Code of Quebec* applied to an oppression claim commenced under s. 241 of the *CBCA*. In so ruling, he referred to an earlier decision of the Quebec Court of Appeal that had summarily applied a provincial prescription period to a *CBCA* oppression action.[10] He also referred to various Supreme Court of Canada judgments which failed to conclusively resolve whether provincial limitation periods could apply to actions commenced under federal bankruptcy legislation. Gomery J. then stated that:

---

to oppression actions brought under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, since the limitations statute did not contain any "basket provision" capable of encompassing oppression claims.

6 (2002), 309 A.R. 386, 2002 ABQB 38 [*Switzer*].

7 R.S.A. 2000, c. L-12. Although McMahon J. did not discuss the relevant limitation period under the Act, it is likely that the plaintiff's claim would have been barred as of March 1, 2001 under s. 2(2)(b), had the Act actually been found to have applied.

8 *Switzer*, *supra* note 6, at para. 14.

9 [2003] Q.J. No. 21414 (S.C.) (QL) [*Gruber*], affirmed, [2004] J.Q. no. 6567, leave to appeal refused, [2004] S.C.C.A. No. 389.

10 *Sparling c. Javelin International Ltee* (1991), 43 Q.A.C. 16 (sub nom. *Sparling c. Doyle*), leave to appeal refused (1992), 53 Q.A.C. 169n (S.C.C.).

> [i]t may be concluded from the foregoing that there is uncertainty in the jurisprudence and in doctrinal writings as to whether or not provincial laws of prescription apply to recourses based upon federal statutes, and as to the appropriate prescriptive period, should provincial rules be held to apply . . . Nevertheless, it cannot reasonably be argued that no prescription applies to a *CBCA* recourse; a negligent litigant cannot be pardoned for unduly delaying the commencement of his recourse.[11]

Gomery J.'s judgment was later affirmed by the Quebec Court of Appeal, which held that provincial limitation periods would apply to *CBCA* actions in the absence of any other federal direction.[12]

The position in Ontario (the only other jurisdiction in which the courts have been asked to decide whether provincial limitation periods apply to *CBCA* oppression actions) is currently unclear. In *Sutherland v. Birks*,[13] the Ontario Court of Appeal rejected a limitations defence to a *CBCA* oppression action on the ground that the old Ontario *Limitations Act* did not contain any "basket provision" applicable to oppression claims. However, it did not address the question of whether such a provision could have validly barred a federal oppression claim had it actually existed. More recently, the Ontario Court of Appeal declined to even consider the issue in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*,[14] stating that it had not been raised in the court below.

2. Recent Guidance from the Supreme Court of Canada

In divining the true nature of the relationship between provincial limitation periods and *CBCA* oppression actions, it is worth noting that there has historically existed some question as to whether provincial limitation periods may validly bar causes of action created under *any* federal statute.[15] This issue has assumed a greater prominence since the Supreme Court of Canada held, in

---

11 *Gruber*, *supra* note 9 at paras. 21 and 23.

12 *Gruber c. Greenberg*, [2004] J.Q. no. 6567, leave to appeal refused, [2004] S.C.C.A. No. 389.

13 (2003), 65 O.R. (3d) 812, [2003] O.J. No. 2885 at para. 22 (QL), leave to appeal refused, [2003] S.C.C.A. No. 424.

14 (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27 (C.A.) at para. 174 (QL) [*OMERS*], leave to appeal refused, [2006] S.C.C.A. No. 77.

15 See: *Gingras v. General Motors Products of Canada Ltd.*, [1976] 1 S.C.R. 426, 1976 CarswellQue 59 at paras. 4-5 (WLeC); *Clark v. Canadian National Railway*, [1988] 2 S.C.R. 680, [1988] S.C.J. No. 90 at para. 52 (QL); *K. (H.J.) v. B (J.E.)* (1997), 44 B.C.L.R. (3d) 77, 1997 CarswellBC 2558 (C.A.) at paras. 14-16 (WLeC); and *Stoney Creek Indian Band v. British Columbia* (1999), 67 B.C.L.R. (3d) 47, 1999 BCCA 139 at paras. 14 and 31. See further Graeme Mew, *The Law of Limitations*, 2nd ed. (Toronto: Butterworths, 2004) at 31-32; and *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9 at paras. 38-41.

Tolofson v. Jensen,[16] that limitation periods were matters of substantive and not procedural law. Indeed, to the extent that a provincial limitation period is legislation with respect to substantive law, its application to a federally-created cause of action could potentially be construed as an illegitimate intrusion into the federal sphere (rather than a simple attempt to regulate the procedure applicable to the prosecution of that cause of action within the responsible province). Nevertheless, the Court's recent decision in *Castillo v. Castillo*[17] indicates that provincial legislatures may validly enact limitations provisions which claims governed by the substantive law of foreign jurisdictions, provided that the time-bar is operative solely within the enacting province itself. The Court in *Castillo* characterized the effect of *Tolofson* upon provincial limitation periods which have intra-territorial bearing upon extra-territorial causes of action as limited to the conflict of laws context. It stated that:

> *Tolofson* was a 'choice of law' case. *The Court's classification of limitation periods for 'choice of law' purposes as substantive rather than procedural did not (and did not purport to) deny the province's legislative authority over 'the administration of justice in the province'* . . . The Alberta legislature can, in relation to the administration of justice in the province, determine the time limits within which the *Alberta* courts can entertain actions, including live actions arising in a foreign jurisdiction governed by the substantive law of that foreign jurisdiction.[18] [emphasis added]

Although it remains to be seen what impact the reasoning in *Castillo* will have upon the application of provincial limitation periods to *CBCA* oppression actions, the recognition that provincial legislatures may validly enact limitation periods which prescribe extra-provincial causes of action would appear to render reliance on cases such as *Switzer* somewhat questionable.

III. THE RELATIONSHIP BETWEEN OPPRESSION AND DERIVATIVE ACTIONS

1. The Validity of Collateral Oppression and Derivative Actions

The precise nature of the relationship between oppression and derivative actions has long been a source of consternation for the Canadian judiciary. In light of the venerable distinction (most famously drawn in *Foss v. Harbottle*[19]) between corporations and their shareholders, certain courts have held that de-

16 (sub nom. *Lucas (Litigation Guardian of) v. Gagnon*), [1994] 3 S.C.R. 1022 [*Tolofson*].
17 [2005] 3 S.C.R. 870, 2005 SCC 83 [*Castillo*].
18 *Ibid.* at paras. 5-6.
19 (1843), 67 E.R. 189.

rivative and oppression actions seek to advance different (i.e., corporate vs. personal) interests, and that derivative claims may therefore not be pursued under the rubric of the oppression remedy unless the complainant is also able to establish that he or she suffered the alleged harm *qua* stakeholder.[20] However, other courts have held that oppression actions may proceed on facts which could also give rise to derivative claims without specifically limiting this principle to circumstances where the complainant suffered the injury *qua* stakeholder.[21] Certain courts have even allowed oppression and derivative actions based upon the same facts to proceed simultaneously.[22]

---

20 See: *Rogers v. Bank of Montreal* (1985), 64 B.C.L.R. 63, [1985] B.C.J. No. 1120 (S.C.) at paras. 84 and 116 (QL), affirmed,(1986), 9 B.C.L.R. (2d) 190 (C.A.), leave to appeal refused, [1987] 1 S.C.R. xiii; *Re Goldstream Resources Ltd.* (1986), 2 B.C.L.R. (2d) 244, [1986] B.C.J. No. 3201 (S.C.) at para. 6 (QL); *Pappas v. Acan Windows Inc.* (1991), 90 Nfld. & P.E.I.R. 126, 1991 Carswell Nfld 20 (S.C.) at paras. 104-110 (WLeC); *Furry Creek Timber Corp. v. Laad Ventures Ltd.* (1992), 75 B.C.L.R. (2d) 246, 1992 CarswellBC 389 (S.C.) at para. 16 (WLeC); *Pak Mail Centers of America Inc. v. Flash Pack Ltd.*, [1993] O.J. No. 2367 (Gen. Div.) at para. 4 (QL); *Starcom Optics Corp. v. MacDonald*, [1994] B.C.J. No. 548 (S.C.) at para. 30 (QL), additional reasons at [1994] B.C.J. No. 842 (S.C.); *Hoet v. Vogel*, [1995] B.C.J. No. 621 (S.C.) at paras. 17-21 (QL); *Liu v. Sung* (1997), 37 B.C.L.R. (3d) 158, [1997] B.C.J. No. 1516 (C.A.) at para. 15 (QL); *Drove v. Mansvelt* (1999), 131 B.C.A.C. 16, 1999 BCCA 540 at para. 9; *Thomson v. Quality Mechanical Service Inc.* (2001), 56 O.R. (3d) 234, [2001] O.J. No. 3987 (S.C.J.) at paras. 28-30 (QL); *530432 Ontario Ltd. v. Viner*, [2002] O.J. No. 56 (S.C.J.) at para. 10 (QL); *Samos Investments Inc. v. Pattison* (2002), 5 B.C.L.R. (4th) 389, 2002 BCSC 1360 at para. 18 (QL); *NPV Management Ltd. v. Anthony* (2003), 36 B.L.R. (3d) 204 (Nfld. C.A.), 2003 NLCA 41 at para. 35; and *Pasnak v. Chura* (2004), 27 B.C.L.R. (4th) 50, 2004 BCCA 221 at para. 5 (QL). See also *Hercules Management Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.) at 608.

21 See: *Bellman v. Western Approaches Ltd.* (1981), 33 B.C.L.R. 45, 1981 CarswellBC 350 (C.A.) at para. 18 (WLeC); *Ontario Securities Commission v. McLaughlin* (1988), 11 O.S.C.B. 442 (H.C.J.); *Jabalee v. Abalmark*, [1996] O.J. No. 2609 (C.A.) at para. 4 (QL); *Acapulco Holdings Ltd. v. Jegen* (1997), 193 A.R. 287, [1997] A.J. No. 174 (C.A.) at paras. 18-24 (QL); *Agbi v. Durward* (1998), 231 A.R. 80, 1998 ABQB 751 at paras. 10-13; *Clarke v. Rossburger* (1999), 254 A.R. 30, 1999 ABQB 821 at para. 79, affirmed (2001), 293 A.R. 223 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 570; *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (C.A.) at para. 526 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291; *IGM Resources Corp. v. 979708 Alberta Ltd.* (2004), 364 A.R. 167, 2004 ABQB 925 at paras. 28-29; and *OMERS*, *supra* note 14, at paras. 110-111.

22 See: *Appotive v. Computrex Centres Ltd.* (1981), 16 B.L.R. 133, 1981 CarswellBC 486 (S.C.) at para. 17 (WLeC); *Acapulco Holdings Ltd. v. Jegen* (1997), 193 A.R. 287, [1997] A.J. No. 174 (C.A.); *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 58 B.C.L.R. (3d) 105, [1998] B.C.J. No. 2674 (C.A.) at para. 12 (QL), leave to appeal refused, [1999] S.C.C.A. No. 24; *Winfield v. Daniel* (2004), 352 A.R. 82, 2004 ABQB 40 at paras. 42-45; and *L & B Electric Ltd. v. Oickle* (2006), 242 N.S.R. (2d) 356, 2006 NSCA 41 at para. 65.

2. *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC*

Notwithstanding the foregoing body of jurisprudence, there had not, prior to the recent decision in *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC*,[23] been any consideration of whether a derivative or oppression action may be commenced subsequent to the issuance of a decision in a prior derivative or oppression action that was predicated upon the same facts as the latter. The decision in *Calpine II* (the written reasons for which have yet to be released) would thus appear to be the first time in Canadian legal history that a court has addressed the application of the doctrines of *res judicata*, abuse of process and collateral attack to multiple oppression and derivative actions.

The facts giving rise to *Calpine II* may be summarized as follows. The original oppression proceeding was brought by Harbert Distressed Investment Master Fund Ltd. ("Harbert"), and subsequently Wilmington Trust Company ("WTC") joined as co-applicant. Harbert had acquired bonds of the respondent Calpine Canada Energy Finance II ULC ("Finance II"). WTC was the trustee for all Finance II bondholders. Finance II was a wholly owned subsidiary of Calpine Canada Resources Company ("CCRC"). CCRC in turn, through a chain of other subsidiaries, owned the Saltend Power Generating Facility (the "Saltend Facility") in the United Kingdom.

When the intention to sell the Saltend Facility was announced, Harbert (and later WTC) maintained an oppression proceeding in the Supreme Court of Nova Scotia against Finance II, CCRC and Calpine Corporation (as well as against certain other Calpine entities who were subsequently deleted from the proceedings). This oppression proceeding was founded on Harbert's and other bondholders' standing as creditors of Finance II via their ownership of Finance II bonds. Harbert and WTC sought as relief for the benefit of all Finance II bondholders (among other claims) the net proceeds from the sale of the Saltend Facility equal to the face value of all of their bondholdings. The oppression claims proceeded to a hearing, following which the Court issued Reasons for Decision on August 2, 2005,[24] pursuant to which the primary relief sought was denied to all bondholders except those who had acquired their bonds prior to September 1, 2004 and continued to hold those bonds at the date of the decision. These "Eligible Bondholders" were held to be entitled to an order requiring Calpine to retain in the control of CCRC sufficient net proceeds from the sale of the Saltend Facility to cover the face value of their Eligible Bondholdings.[25]

---

23 (15 December 2005), Halifax No. 256279 (N.S.S.C.) [*Calpine II*].

24 *Harbert Distressed Investment Master Fund Ltd.* v. *Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211.

25 This effectively excluded Harbert's claims as it did not qualify as an Eligible Bondholder. The Court also expressly excluded any bondholdings held by any Calpine party. The Court also directed CCRC generally to preserve and protect its assets.

On October 11, 2005, Harbert and WTC filed a second application in the Supreme Court of Nova Scotia seeking leave to commence a derivative proceeding as against CCRC on behalf of, and in the name of, Finance II. The facts as alleged in the second application were essentially the same as those that had been at issue in the prior oppression proceeding. Further, the relief sought in the proposed derivative proceeding was substantially similar to that sought in the oppression proceeding.

In response, CCRC and Finance II brought a preliminary cross-application to dismiss, or alternatively stay, the derivative proceeding as "false, scandalous, frivolous or vexatious" and as an "abuse of the process of the court." The basis for the cross-application was Rules 14.25(1)(b) and (d) of the Nova Scotia *Civil Procedure Rules*, and included allegations that the derivative proceeding was prohibited under the doctrines of cause of action estoppel, issue estoppel, abuse of process and collateral attack. The application was heard on November 22 and 23, 2005, and the Court issued a brief letter (with written reasons to follow) dismissing the derivative proceeding on December 15, 2005. As the written reasons for judgment have yet to be released, discussion of the basis for the decision is premature. Having said that, in light of *Calpine II*, parties contemplating parallel oppression and derivative actions would be well-advised to initiate such proceedings simultaneously, rather than waiting to commence one of the actions until after such time as the other action has already been subject to hearing and adjudication.

IV. EVIDENTIARY HURDLES TO ESTABLISHING REASONABLE EXPECTATIONS

1. The Role of Reasonable Expectations in Oppression Jurisprudence

Canadian oppression legislation outside of British Columbia[26] is generally uniform in allowing an action where the complainant can demonstrate that the defendants have acted in a manner which: (a) is oppressive, (b) is unfairly

26 Section 227(2) of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 only allows an action where a complainant (which status is restricted to shareholders and other "appropriate persons") can demonstrate that the conduct was "oppressive" or "unfairly prejudicial" to the interests being advanced, not where it also "unfairly disregarded" those interests. The narrower nature of this right (in the form of its predecessor, s. 221 of the *Companies* Act, S.B.C. 1973, c. 18) was contrasted with the wider oppression provisions contained in the federal and other provincial business corporations acts in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 1988 CarswellAlta 103 (Q.B.) at para. 23 (WLeC), stayed on other grounds (1987), 71 Alta. L.R. (2d) 61 (C.A.).

prejudicial to, or (c) unfairly disregards the interests of an enumerated party.[27] Satisfaction of any of these criteria will entitle the complainant to a remedy, and there are different tests applicable to each.[28] Nevertheless, following the watershed decision of the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd.*,[29] the Canadian courts have consistently employed the concept of the complainant's "reasonable expectations" as an organizing principle with respect to the shareholder interests which are protected by all three criteria.[30] The role of reasonable expectations in the oppression context was described by Kerans J.A. in *Westfair Foods Ltd. v. Watt*, where he stated that:

> [o]ne deserving case is where the person to whom the profit will go has nourished that hope. The company and the shareholders entered voluntarily, not by duty or chance, into a relationship. Our guides are the rules in other contexts, such as contract law, equity, and partnership law, where the courts have also considered just rules to govern voluntary relationships. In very general terms, one clear principle that emerges is that we regulate voluntary relationships by regard to the expectations raised in the mind of a party, by the word or deed of the other, and which the first party ordinarily would realize it was encouraging by its words and deeds. This is what we call reasonable expectations, or expectations deserving of protection. Regard for them is a constant theme, albeit variously expressed, running through the cases on this section or its like elsewhere.[31]

---

27 See: s. 241(2) of the *CBCA*; s. 242(2) of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9; s. 234(2) of the Manitoba *Corporations Act*, C.C.S.M. c. 225; s. 166(2) of the New Brunswick *Business Corporations Act*, S.N.B. 1981, c. B-9.1; s. 371(1) of the Newfoundland *Corporations Act*, R.S.N.L. 1990, c. C-36; s. 5(2) of the Third Schedule to the Nova Scotia *Companies Act*, R.S.N.S. 1989, c. 81; s. 248(2) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B. 16; s. 234(2) of the Saskatchewan *Business Corporations Act*, R.S.S. 1978, c. B-10; and s. 243(2) of the Yukon *Business Corporations Act*, R.S.Y. 2002, c. 20.

28 See generally: *Abraham v. Inter Wide Investments Ltd.* (sub nom. *Re Abraham and Inter Wide Investments Ltd.*) (1981), 51 O.R. (2d) 460, 1981 CarswellOnt 1643 (H.C.J.) at para. 28 (WLeC); and *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 1988 CarswellAlta 103 (Q.B.) at para. 27 (WLeC), stayed on other grounds (1987), 71 Alta. L.R. (2d) 61 (C.A.).

29 [1973] A.C. 360 (H.L.) at 379.

30 See: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36, 1976 CarswellBC 3 (S.C.) at para. 52 (WLeC), additional reasons at (1977), 4 B.C.L.R. 134 (S.C.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142 (Gen. Div.) at para. 129 (WLeC), affirmed (1991), 3 B.L.R. (2d) 113 (Div. Ct.); *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, 1995 CarswellOnt 1207 (C.A.) at para. 28 (WLeC); *LeBlanc v. Corporation Eighty-Six Ltd.* (1997), 192 N.B.R. (2d) 321, [1997] N.B.J. No. 375 (C.A.) at para. 19 (QL); *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 411; and *Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at paras. 25-31.

31 (1991), 79 Alta. L.R. (2d) 363, 1991 CarswellAlta 63 (C.A.) at para. 26 (WLeC) [*Westfair*], leave to appeal refused, [1991] 3 S.C.R. viiin.

The principles which govern the ascertainment of reasonable expectations have been summarized in the following terms:

> [i]n determining what expectations deserve protection, this Court favours an approach that considers the relationship between the parties over a restrictive view of their "legal" rights. The complainant's reasonable expectations must be viewed and measured against the backdrop of the entire relationship . . . *In assessing reasonableness, the courts are mandated to consider, amongst other things, the history of their relationship, the nature and structure of the company, previous general company practice, and the nature of the rights affected without necessarily considering the intention of the party whose acts are being impugned. The corporate law itself may be the foundation of underlying expectations.* An expectation that a corporation was created for the purpose of carrying on business with a view to profit is not unreasonable since it is the usual basis upon which the shareholders invest. That the goal might not be achieved is recognized, but management is presumed to be working to that end. It is also reasonable to expect that directors and officers fulfill their duties under s. 117 of the ABCA . . .[32] [emphasis added]

As indicated by the foregoing passage, there are two broad sources of reasonable expectations: (a) legal obligations; and (b) the factual matrix which defines the relationship between the parties.[33] Where an oppression action is based upon allegations that a defendant has violated a specific legal obligation, it is unlikely that the complainant will face any significant evidentiary obstacles in establishing the existence of a reasonable expectation that the defendant would comply with the obligation in question.[34] However, where an oppression action is based upon allegations that the defendant has violated reasonable expectations which arise simply by virtue of the relationship between the defendant and the complainant (rather than by way of any identifiable legal obligation), the complainant may face numerous hurdles in demonstrating that

---

32 *Clarke v. Rossburger* (2001), 293 A.R. 223, 2001 ABCA 225 at para. 54, leave to appeal refused, [2001] S.C.C.A. No. 570. See also *Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at para. 35; and *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91 at paras. 16-20, application to stay appeal dismissed, 2006 MBCA 114.

33 Although reasonable expectations may thus issue from a source other than legal obligation, they must still be tied to some legal entitlement in so far as they must belong to one of the enumerated parties (security holder, creditor, director or officer) in s. 241(2) of the *CBCA*: see *Joncas v. Spruce Falls Power & Paper Co.* (2001), 15 B.L.R. (3d) 1, [2001] O.J. No. 1505 (C.A.) at para. 9 (QL).

34 See, e.g.: *Lyall v. 147250 Canada Ltd.* (1993), 84 B.C.L.R. (2d) 234, [1993] B.C.J. No. 874 (C.A.) at para. 48 (QL); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.) at 308-309, varied on other grounds (1998), 110 O.A.C. 160 (Div. Ct.); *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200, [1999] O.J. No. 1961 (S.C.J.) at para. 50 (QL); *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 412; and *Agrium Inc. v. Hamilton* (2005), 44 Alta. L.R. (4th) 177, 2005 ABQB 54 at paras. 34 and 37.

such reasonable expectations are actually valid. The difficulties which can be encountered in establishing "fact-based" reasonable expectations include: (a) the degree to which expectations can be proven and disproven through inference; (b) the tension between objective and subjective expectations; and (c) the varied and often contradicting sources of reasonable expectations.

2. Inferring Reasonable Expectations

One question that has arisen in connection with fact-based expectations is the degree to which such expectations may be proven and disproven through inferential as opposed to simply empirical means. In *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, one of the earliest decisions to consider this issue, Farley J. suggested that reasonable expectations can be established by inference. He held that:

> [i]n my view, one cannot regard expectations as a static matter. Expectations may well evolve from the situation of the shareholder going into the corporation (by way of setting up the corporation or by way of gift—or by way of purchasing previously issued shares). Certainly these original expectations may strongly influence the evolutionary process. *As well, in a closely held corporation, it will be much easier to consider the "factual" expectations of the shareholders; in a widely held corporation, these expectations will have to be assumed or proxied if they are to be discerned at all.* I would think that the expectations that count are those that are reasonable and which are in existence as the directors make their decisions from time to time.[35] [emphasis added]

However Farley J. later qualified this statement in *AMCU Credit Union Inc. v. Olympia & York Developments Ltd.*[36] There, in dismissing an oppression action brought by certain noteholders on the grounds that the plaintiffs had not tendered any evidence of their reasonable expectations other than the introduction of an expert who testified as to the general profile of the commercial paper buyers, he stated that:

> [w]hile it is true that I indicated in *obiter* in *Ballard* . . . that shareholder expectations in a widely held corporation might have to be assumed or proxied if they are to be discerned at all, it is important not to take this comment out of context. *A representative shareholder(s) applicant(s) in a multi-applicant oppression case*

35 (1991), 3 B.L.R. (2d) 123, 1991 CarswellOnt 142 (Gen. Div.) at para. 135 (WLeC) [*Ballard*], affirmed (1991), 3 B.L.R. (2d) 113 (Div. Ct.).

36 (1992), 7 B.L.R. (2d) 103, 1992 CarswellOnt 145 (Gen. Div.) (WLeC) [*AMCU*].

> *or more especially in a derivative action situation would still have to give evidence.*[37] [emphasis added]

Notwithstanding *AMCU*, the proposition that oppression complainants must *always* tender direct evidence in establishing reasonable expectation should now be reconsidered given the recent decision in *OMERS*. The Court in *OMERS* ruled that there exists:

> . . . no support for the proposition that there must be evidence, in the form of testimony, from the shareholders as to their expectations. *The existence of reasonable expectations is a question of fact and like any question of fact can be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence* . . . Where the minority shares in a public company are widely held it may be difficult to adduce cogent direct evidence of the reasonable expectations of the shareholders. In such cases, it is open to the trial judge to infer reasonable expectations from the company's public statements and the shared expectations about the way in which a company should be run.[38] [emphasis added]

In light of *OMERS*, the better view would currently appear to be that reasonable expectations may be established through both inference and direct evidence.[39] However, although the ability to establish reasonable expectations through purely inferential means may be of assistance to a complainant in appropriate cases, it can also place the complainant in the unenviable position of having to assert the legitimacy of their expectations in the face of broad, implicit assumptions about the manner in which public companies operate.[40] This often causes the reasonable expectations analysis to more closely resemble an exercise in contractual interpretation, rather than an adjudication of the proper weight attributable to direct evidence of the expectations in question.[41]

---

37 *Ibid.* at para. 3. Although *AMCU* indicates that expert evidence may be of limited relevance in establishing reasonable expectations, expert evidence may be of significant importance in determining whether reasonable expectations have actually been violated in an oppressive or unfair manner: see *Envirodrive Inc. v. 836442 Alberta Ltd.* (2005), 7 B.L.R. (4th) 61, 2005 ABQB 446 at paras. 130-147; and *OMERS, supra* note 14 at paras. 41-54.

38 *OMERS, supra* note 14 at paras. 65-66.

39 Direct testimony may still assume a greater prominence in oppression actions where there is disputed evidence before the court: see *Seymour Resources Ltd. v. Hofer* (2004), 49 B.L.R. (3d) 104, 2004 ABQB 303 at para. 15.

40 See *OMERS, supra* note 14 at para. 100.

41 See, i.e., *OMERS, supra* note 14 at paras. 71-75, where the Court found that a reasonable expectation could be established through the interpretation that a "reasonable reader" might give to financial statement notes which did not expressly evidence the expectation in question. See also *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211 at para. 186.

3. Objective and Subjective Expectations

The difficulties inherent in responding to reasonable expectations which are established through purely inferential means highlights the tension between the subjective and objective dimensions of what actually constitute reasonable expectations. This tension has increasingly caused the courts to adopt what might be described as a "modified objective test" for reasonable expectations. As recently stated in *Walker v. Betts*:

> [i]n determining a shareholder's reasonable expectations, the court must apply a modified objective test. *This test requires objectively identifiable expectations that a shareholder in the applicant's position reasonably would expect to have.*[42] [emphasis added]

Because the quasi-objective nature of the foregoing test requires that reasonable shareholder expectations form part of the fundamental shareholder compact, merely individual hopes and desires held by a complainant will not qualify as reasonable expectations.[43] Additionally, the oppression remedy was not intended to protect against conduct which violates a complainant's *personal* expectations. As a result, what must be established are the reasonable expectations of the complainant *qua* shareholder, creditor, director or officer.[44] The

---

42 (2006), 15 B.L.R. (4th) 114, 2006 BCSC 128 at para. 88 [*Walker*]. Other courts appear to have suggested that the test for establishing a complainant's reasonable expectations is *purely* objective: see *Pente Investment Management Ltd. v. Schneider Corp.* (sub. nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) (1998), 42 O.R. (3d) 177, 1998 CarswellOnt 4035 (C.A.) at para. 68 (WLeC); and *Re Canadian Airlines Corp.* (2001), 265 A.R. 201, 2001 ABQB 442 at para. 142, leave to appeal refused (2000), 266 A.R. 131 (C.A. in Chambers), affirmed (2000), 277 A.R. 179 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 60. However, these cases did not expressly reject the modified objective standard, and a purely objective test fails to recognize that the expectations generally identified by the courts are expectations which a reasonable person would possess *in the position of the complainant*: see *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211 at paras. 186-188.

43 See: *Ballard*, *supra* note 35 at para. 129; *Gazit (1997) Inc. v. Centrefund Realty Corp.* (2000), 8 B.L.R. (3d) 81, [2000] O.J. No. 3070 (S.C.J.) at para. 85 (QL); *Vlasbom v. NetPCS Networks Inc.* (2003), 31 B.L.R. (3d) 255, [2003] O.J. No. 535 (S.C.J.) at para. 234 (QL); *Krynen v. Bugg* (2003), 64 O.R. (3d) 393, [2003] O.J. No. 1209 (S.C.J.) at para. 97 (QL); *Stabile v. Milani* (2004), 46 B.L.R. (3d) 294, [2004] O.J. No. 2804 (C.A.) at para. 46 (QL), leave to appeal refused, [2004] S.C.C.A. No. 472; *Envirodrive Inc. v. 836442 Alberta Ltd.* (2005), 7 B.L.R. (4th) 61, 2005 ABQB 446 at para. 74; and *OMERS*, *supra* note 14 at para. 66.

44 See: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, 1995 CarswellOnt 1207 (C.A.) at paras. 25-26 (WLeC); *Walker*, *supra* note 42 at para. 81; and *Bassett-Smith v. Protech Consultants (1989) Ltd.* (2006), 54 B.C.L.R. (4th) 161, 2004 BCSC 803 at para. 23. The courts may, however, still assess reasonable expectations in light of familial and personal relationships which exist between the relevant parties: see *Naneff v. Con-Crete*

allegedly reasonable expectations of the complainant must therefore be measured against those of the defendant,[45] and against those held by other interested third parties (such as creditors or majority shareholders[46]). Such a balancing of interests inevitably dulls the importance attributable to the complainant's own legitimate expectations. Further, this can result in significant credibility battles[47] given that evidence tendered by other shareholders which contradicts the complainant's own evidence may prove fatal to his or her attempt to establish the reasonable expectation in question.[48]

4. Contradictory Sources of Reasonable Expectations

An additional difficulty that complainants face in seeking to establish reasonable expectations is the bewildering array of (often contradictory) sources which can be relevant to this assessment. In addition to *viva voce* evidence, the courts have expressed a willingness to take into account such varied indicia of reasonable expectations as: shareholders agreements;[49] trust indentures and

---

Holdings Ltd. (1995), 23 O.R. (3d) 481, 1995 CarswellOnt 1207 (C.A.) at para. 31 (eC); *Wood v. Wood*, 2004 ABQB 775 at paras. 32-44; *Proulx v. 2006550 Ontario Inc.* (2005), 15 B.L.R. (4th) 72, [2005] O.J. No. 5150 (S.C.J.) at paras. 46 and 57 (QL); and *Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at para. 36.

45 *Clarke v. Rossburger* (2001), 293 A.R. 223, 2001 ABCA 225 at para. 14, leave to appeal refused, [2001] S.C.C.A. No. 570.

46 See: *Alberta (Treasury Branches) v. SevenWay Capital Corp.* (2000), 261 A.R. 278, 2000 ABCA 194 at para. 35; and *Fiber Communications Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 192, [2005] O.J. No. 3899 (S.C.J.) at paras. 31-32 (QL), leave to appeal granted (2005), 198 O.A.C. 27 (C.A. in Chambers). This balancing may be of particular importance where the relevant corporation is insolvent: see *Re Canadian Airlines Corp.* (2001), 265 A.R. 201, 2001 ABQB 442 at para. 143, leave to appeal refused (2000), 266 A.R. 131 (C.A. in Chambers), affirmed (2000), 277 A.R. 179 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 60.

47 See, e.g., *Seymour Resources Ltd. v. Hofer* (2004), 49 B.L.R. (3d) 104, 2004 ABQB 303 at paras. 15-16.

48 See: *Gordon Glaves Holding Ltd. v. Care Corp. of Canada Ltd.* (2000), 186 D.L.R. (4th) 577 (Ont. C.A.) at 583, leave to appeal refused, [2000] S.C.C.A. No. 411; and *Vlasbom v. NetPCS Networks Inc.* (2003), 31 B.L.R. (3d) 255, [2003] O.J. No. 535 (S.C.J.) at para. 236 (QL).

49 See: *218125 Investments Ltd. v. Patel* (1995), 33 Alta. L.R. (3d) 245, [1995] A.J. No. 1222 (Q.B.) at para. 38 (QL); *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200, [1999] O.J. No. 1961 (S.C.J.) at para. 51 (QL); and *Elliott v. Opticom Technologies Inc.* (2005), 41 B.C.L.R. (4th) 97, 2005 BCSC 529 at para. 67. These cases indicate that courts will have regard to not only the literal effect, but also the spirit, intent and implied meaning, of shareholder agreements in determining reasonable expectations. Additionally, in *Gordon Glaves Holding Ltd. v. Care Corp. of Canada Ltd.* (2000), 186 D.L.R. (4th) 577 (Ont. C.A.) at 583, leave to appeal refused, [2000] S.C.C.A. No. 411, the Court actually considered *draft* shareholder agreements in assessing the complainant's reasonable expectations. However, reasonable expectations may be difficult to demonstrate simply on account of contractual provisions which contemplate a given end (at least where there is

share acquisition agreements;[50] the professional qualifications of the complainant and the defendants;[51] collateral representations by a corporation to its shareholders;[52] the terms of shares or debentures agreed to by the complainant;[53] the will of a corporation's founding shareholder and director;[54] and public pronouncements made by the relevant corporation through prospectuses, management information circulars, financial statements and press releases.[55] Although oral evidence of reasonable expectations which contradicts written documents may sometimes limit the expectations to be adduced from the latter,[56] and although the courts will give less weight to written documents which (unlike shareholders agreements) do not have any binding effect,[57] expectations advanced by a complainant may be dismissed where they have already been addressed or limited by a contract or other public document.[58] This was recently

---

no additional evidence that the shareholder in question actually expected that such an end would result): see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 1988 CarswellAlta 103 (Q.B.) at para. 58 (WLeC), stayed on other grounds (1987), 71 Alta. L.R. (2d) 61 (C.A.).

50 See: *Envirodrive Inc. v. 836442 Alberta Ltd.* (2005), 7 B.L.R. (4th) 61, 2005 ABQB 446 at paras. 74-75; and *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211 at para. 130-144.

51 *Three Point Oils Ltd. v. Glencrest Energy Ltd.* (1997), 200 A.R. 189, [1997] A.J. No. 451 (C.A.) at para. 20 (QL).

52 *Westfair, supra* note 31 at paras. 51-54. Such representations, however, cannot have been excluded from the consideration of the shareholders via an entire agreement clause in a governing agreement: *Envirodrive Inc. v. 836442 Alberta Ltd.* (2005), 7 B.L.R. (4th) 61, 2005 ABQB 446 at paras. 74-75 and 88.

53 See: *Alberta (Treasury Branches) v. SevenWay Capital Corp.* (2000), 261 A.R. 278, 2000 ABCA 194 at para. 34; and *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211.

54 *Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at paras. 41 and 50.

55 See: *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1998), 38 O.R. (3d) 749, 1998 CaraswellOnt 691 (C.A.) at para. 11 (WLeC); *Pente Investment Management Ltd. v. Schneider Corp.* (sub. nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) (1998), 42 O.R. (3d) 177, 1998 CarswellOnt 4035 (C.A.) at para. 67 (WLeC); *Shaw v. BCE Inc.* (2004), 49 B.L.R. (3d) 1, [2004] O.J. No. 3109 (C.A.) at para. 6 (QL), leave to appeal refused, [2004] S.C.C.A. No. 419; *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211; *OMERS, supra* note 14, at paras. 66 and 71-75; and *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288, [2006] O.J. No. 944 (C.A.) at para. 58 (QL).

56 *Three Point Oils Ltd. v. Glencrest Energy Ltd.* (1997), 200 A.R. 189, [1997] A.J. No. 451 (C.A.) at para. 21 (QL).

57 See: *Three Point Oils Ltd. v. Glencrest Energy Ltd.* (1997), 200 A.R. 189, [1997] A.J. No. 451 (C.A.) at para. 20 (QL); and *Gordon Glaves Holding Ltd. v. Care Corp. of Canada Ltd.* (2000), 186 D.L.R. (4th) 577 (Ont. C.A.) at 584, leave to appeal refused, [2000] S.C.C.A. No. 411.

58 See: *Krynen v. Bugg* (2003), 64 O.R. (3d) 393, [2003] O.J. No. 1209 (S.C.J.) at para. 74 (QL); *Casurina Limited Partnership v. Rio Algom Ltd.* (2004), 40 B.L.R. (3d) 112, [2004] O.J. No. 177 (C.A.) at paras. 26 and 31 (QL), leave to appeal refused, [2004] S.C.C.A.

noted by Slatter J. in *Envirodrive Inc. v. 836442 Alberta Ltd.*, where he stated that:

> *. . . expectations cannot override other rules of law, such as the parol evidence rule, the statutory rules of corporate governance, the legal effect of . . . 'whole agreement' clauses, and the basic rule about the enforceability of contractual covenants.* Representations excluded by [a] whole agreement [clause] cannot be repackaged as oppression. A shareholder cannot sign a contract with the corporation, and then argue that the mere enforcement of the terms of the contract is oppressive because of his or her personal expectations. No one can have 'reasonable' expectations that are inconsistent with the terms of a contract they have signed.[59] [emphasis added]

In light of the foregoing, it is clear that an oppression complainant will bear a significant evidentiary onus in establishing that his or her actual expectations about the operation of the subject corporation were "reasonable" within the meaning of Canadian oppression jurisprudence.

V. UPDATE ON THE OBLIGATIONS AND LIABILITIES OF DIRECTORS IN THE OPPRESSION CONTEXT

1. The Personal Liability of Directors for Oppression

The precise nature of the obligations owed to parties under the oppression provisions of the various business corporations acts should be a matter of particular concern to the directors of corporations which are subject to such legislation. As a general proposition, the courts have recognized that "[w]hen a corporation acts, it must act through the persons who are fixed with the power to act as the corporation, principally, its officers, directors and senior management."[60] Directors should therefore only be personally liable for the acts of a corporation where "it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own."[61] Nevertheless, in *Budd v. Gentra*,[62]

No. 105; and *Shaw v. BCE Inc.* (2004), 49 B.L.R. (3d) 1, [2004] O.J. No. 3109 (C.A.) at para. 6 (QL), leave to appeal refused, [2004] S.C.C.A. No. 419.

59 (2005), 7 B.L.R. (4th) 61, 2005 ABQB 446 at paras. 74-75 [*Envirodrive*].

60 *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27, [1998] O.J. No. 3109 (C.A.) at para. 25 (QL).

61 *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (sub nom. *ScotiaMcLeod Inc. v. Peoples Jewellers Limited*) (1995), 129 D.L.R. (4th) 711 (Ont. C.A.) at 720, leave to appeal refused, [1996] S.C.C.A. No. 40; *Blacklaws v. Morrow* (2000), 261 A.R. 28, 2000 ABCA 175, leave to appeal refused, [2000] S.C.C.A. No. 442. It should be noted that these two grounds of personal liability are disjunctive, and that directors may therefore be liable for

the Ontario Court of Appeal ruled that, where a plaintiff brings an action against a director which alleges oppression:

> [t]he plaintiff is not alleging that he was wronged by a director or officer acting in his or her personal capacity, but is asserting that the corporation, through the actions of the directors or officers, has acted oppressively and that in the circumstances it is *appropriate* (i.e. fit) to rectify that oppression by an order against the directors or officers personally.[63] [emphasis added]

As such, it is now established that, provided a complainant can demonstrate oppressive conduct by a director or officer *qua* director or officer:

> [the] director or officer may be *personally* liable for a monetary order under [the relevant oppression provisions] if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties.[64]

Nevertheless, as noted in *Budd*, a personal order against a director will still only be appropriate in circumstances such as where:

> . . . it is alleged that the directors or officers personally benefited from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.[65]

---

tortious actions undertaken even while acting in the best interests of the corporation: *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101, 1999 CarswellOnt 29 (C.A.) at para. 39 (WLeC), leave to appeal refused, [1999] S.C.C.A. No. 124.

62 (1998), 43 B.L.R. (2d) 27, [1998] O.J. No. 3109 (QL) [*Budd*].

63 *Ibid.* at para. 35.

64 *Ibid.* at paras. 43 and 46 (QL). Such a director may also be precluded from obtaining an indemnity for the costs, charges and expenses which he or she incurs in defending the action: see *Naneff v. Con-Crete Holdings Ltd.* (1993), 11 B.L.R. (2d) 218, 1993 CarswellOnt 157 (Gen. Div.) at paras. 170-172 (eC), varied on other grounds (1993), 19 O.R. (3d) 691 (Div. Ct.), varied on other grounds (1993), 23 O.R. (3d) 481 (C.A.); *Waxman v. Waxman* (2003), 30 C.P.C. (5th) 121, [2003] O.J. No. 87 (S.C.J.) at paras. 90-93 (QL); *Envirodrive, supra* note 59 at paras. 89-90; *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288, [2006] O.J. No. 944 (C.A.) at para. 96-107 (QL); and *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91 at para. 157, application to stay appeal dismissed, 2006 MBCA 114.

65 *Ibid.* at para. 52. In light of the requirement that personal liability against the directors be "appropriate" it is unlikely that directors will be found personally liable in an oppression action where the only allegation is that the directors mismanaged the corporation or were

2. Conduct Capable of Amounting to Oppression by Directors

The apparent lack of a strict requirement that directors have acted tortiously or exhibited an identity of interest separate from that of the corporation results in a greater potential for personal liability in the oppression context. This potential is further amplified by the wide array of conduct (and classes of plaintiffs) which may visit oppression claims upon a director. Given that the duties of directors in the oppression context include obligations which parallel their corporate duties at large, directors may be found to have acted oppressively where they breach tortious or contractual duties, the statutory duty (i.e., loyalty and care) owed to the corporation under s. 122(1) of the *CBCA*, or specialized variations on these duties such as those which may arise in the context of take-over bids.[66] Nevertheless, directors may also be found to have acted in an

---

aware (or ought to have been aware) that the corporation was itself acting in a manner that was oppressive, and not that the directors acted outside the scope of their duties or for personal gain: see *Hovsepian v. Westfair Foods Ltd.* (2001), 296 A.R. 283, 2001 ABQB 700 at para. 78; *Wenzel Downhole Tools Ltd. v. NGL Drilling Tools Inc.* (2002), 29 B.L.R. (3d) 202, 2002 ABQB 636 at para. 11; *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.) at 314, varied on other grounds (1998), 110 O.A.C. 160 (Div. Ct.); *Sidaplex Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563, 1998 CarswellOnt 2819 (C.A.) at paras. 3-4 (WLeC); and *First Mortgage Fund (V) Inc. (Receiver and Manager of) v. Boychuk* (2001), 291 A.R. 371, 2001 ABQB 712 at para. 31, varied on other grounds (2002), 312 A.R. 1 (C.A.). Additionally, the Alberta Court of Appeal has recently noted that "[a]n oppression remedy is not generally available where the only directors and officers are the two equal shareholders of a closely-held corporation and neither has legal or *de facto* control": *Mace v. Dirk* (2006), 59 Alta. L.R. (4th) 38, 2006 ABCA 106 at para. 29.

66 See: *Calmont Leasing Ltd. v. Kredl* (1995), 165 A.R. 343, [1995] A.J. No. 475 (C.A.) at paras. 22-24 (QL); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.) at 308, varied on other grounds (1998), 110 O.A.C. 160 (Div. Ct.); *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755, 1998 CarswellOnt 1891 (Gen. Div.) at paras. 6 and 39-43 (WLeC); *Pente Investment Management Ltd. v. Schneider Corp.* (sub. nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) (1998), 42 O.R. (3d) 177, 1998 CarswellOnt 4035 (C.A.) at paras. 4, 33-39 and 61-71 (WLeC); *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 412; *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (C.A.) at para. 563 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291; and *Jordan Inc. v. Jordan Engineering Inc.* (2004), 48 B.L.R. (3d) 115, [2004] O.J. No. 3260 (S.C.J.) at paras. 27-39 (QL). Indeed, it has been suggested that a breach of *any* legal duty imposed upon a director will be sufficient to constitute oppression: see Markus Koehnen, *Oppression and Related Remedies* (Toronto: Carswell, 2004) at 200. For a discussion of the general nature of the duties owed a corporation by its directors, see *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 361, 2004 SCC 68.

oppressive manner even where they have not actually breached any independent legal duty.[67] As stated by Farley J. in *Ballard*:

> [i]t is . . . clear that s.134 *OBCA* is separate and distinct from s. 247 *OBCA*. That is, *a director may, after a proper analysis, act in good faith in what he considers to be the best interests of the corporation; if he does so he will not run afoul of s.134. However, the result of such action may be such that it oppresses or unfairly deals with the interests of a shareholder*; in which case s.247 comes into play.[68] [emphasis added]

In light of this principle, the obligations of directors in the oppression context include a discrete yet amorphous obligation to refrain from engaging in conduct that results in oppression to a shareholder, creditor, director or officer. Unfortunately, "[n]o case has laid down a comprehensive definition of oppression,"[69] and the numerous decisions that have addressed the nature of oppressive conduct have articulated tests which are necessarily vague. A typical formulation of the general test for oppression can be found in *Seidel v. Kerr*, where the Alberta Court of Appeal noted that:

> [t]he *CBCA* and *ABCA* set up three criteria. Satisfaction of any one criterion gives rise to a cause of action under the section: is the conduct oppressive; is the conduct unfairly prejudicial; does the conduct unfairly disregard the interests of any security holder, creditor, director or officer?[70]

Although all three criteria are unified in varying degrees by the "reasonable expectations" concept, the courts have developed different tests in relation to each.[71] Conduct that is "oppressive" has been defined as conduct that is "burdensome, harsh and wrongful,"[72] and therefore as conduct which may "incorporate an 'abuse of power situation' whereby the majority is able to perpetrate abuses because of the imbalance of power."[73] Whereas this criterion is unlikely

---

67 *Pente Investment Management Ltd. v. Schneider Corp.* (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) (1998), 42 O.R. (3d) 177, 1998 CarswellOnt 4035 (C.A.) at para. 66 (WLeC).

68 *Ballard, supra* note 35 at para. 119.

69 *OMERS, supra* note 14 at para. 91.

70 (2003), 330 A.R. 284, 2003 ABCA 267 at para. 33.

71 See: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36, 1976 CarswellBC 3 (S.C.) at para. 35 (WLeC); *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, 1991 CarswellOnt 133 (C.A.) at para. 33 (WLeC); and *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 414. For a recent and extremely thorough review of the various principles applicable to the three criteria, see *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91 at paras. 8-15, application to stay appeal dismissed, 2006 MBCA 114.

72 *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.) at 342.

73 *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 415.

to be satisfied in the absence of bad faith,[74] the latter two criteria do not focus upon the motivation behind the director's conduct.[75] Rather, conduct that is "unfairly prejudicial" merely "denote[s] that there is an imbalance between the interested parties of a corporation and that there is an inequality of treatment with no justifiable reason."[76] Similarly, conduct which "unfairly disregards" a party's interests is conduct which "unjustly and without cause . . . pay[s] no attention to, ignore[s] or treat[s] as no importance the interests of security holders, creditors, directors or officers of a corporation."[77]

Ultimately, and notwithstanding the foregoing "tests," the practical result of the jurisprudence which has considered the nature of oppressive conduct is that such conduct is necessarily fact-specific. As recently stated in *OMERS*:

> [c]ourts rather than attempting to find an exhaustive all-purpose definition of oppression have tended to look for badges or indicia of oppressive conduct. A helpful catalogue is found in the reasons of Austin J. in *Arthur v. Signum Communications Ltd.*, [1991] O.J. No. 86 (Gen. Div.) at para. 132 (affirmed [1993] O.J. No. 1928 (Div. Ct.)) considering the provisions of the *OBCA*:
>
> > Amongst the indicia of conduct which runs afoul of s. 247 are the following:
> >
> > (i) lack of a valid corporate purpose for the transaction;
> > (ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction;

---

74 *Brant Investments Ltd. v. Keeprite Inc.* (1991), 3 O.R. (3d) 289, 1991 CarswellOnt 133 (C.A.) at para. 33 (WLeC); *Mikulak v. Rubin* (2001), 289 A.R. 190, 2001 ABQB 594 at para. 8. Certain courts have also suggested that the "oppression" criterion requires an actual breach of legal rights (*Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at para. 23), and that the test for whether conduct is "oppressive" focuses upon the *character* of the conduct (*Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1, [2002] O.J. No. 2528 (S.C.J.) at para. 1664 (QL), varied on other grounds, (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (C.A.) at para. 563 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291).

75 *Wind Ridge Farms Ltd. v. Quadra Group Investments Ltd.* (1999), 180 Sask. R. 231, 1999 CarswellSask 592 (C.A.) at paras. 35-38 (WLeC); *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91 at para. 15, application to stay appeal dismissed, 2006 MBCA 114.

76 *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at para. 417. Certain courts have also indicated that the test for whether conduct is "unfairly prejudicial" focuses primarily upon the *effect* of the conduct: see *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1, [2002] O.J. No. 2528 (S.C.J.) at para. 1427 (QL), varied on other grounds, (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (C.A.) at para. 563 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291.

77 *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 1988 CarswellAlta 103 (Q.B.) at para. 33 (WLeC), stayed on other grounds (1987), 71 Alta. L.R. (2d) 61 (C.A.). Some courts have indicated that the test for whether conduct "unfairly disregards" the relevant interests focuses upon the *process* by which the conduct occurred: see *Cohen v. Jonco Holdings Ltd.* (2005), 192 Man. R. (2d) 252, 2005 MBCA 48 at para. 24.

(iii) lack of good faith on the part of the directors of the corporation;
(iv) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder;
(v) lack of adequate and appropriate disclosure of material information to the minority shareholders; and
(vi) a plan or design to eliminate the minority shareholder.[78]

3. *Envirodrive Inc. v. 836442 Alberta Ltd.*

The duties owed to shareholders by directors in the oppression context were recently subjected to an extensive examination by Slatter J. in *Envirodrive*. The facts in *Envirodrive* are somewhat complex, involving (in addition to various misrepresentation claims) an oppression action brought by the minority shareholders of Envirodrive Inc. ("Envirodrive") against its majority shareholder and managing director ("McPeak"). While some of the oppression allegations were based upon alleged misrepresentations made by McPeak (which allegations were ultimately dismissed given that the shareholders' reliance upon them was precluded by an entire agreement clause in their share subscription agreement), the other oppression allegations revolved around McPeak's alleged failures as a director. The most important of these allegations may be classified into four broad groups:

---

78 *OMERS*, *supra* note 14 at para. 92. These "badges" of oppressive conduct primarily concern the situation where the party whose interests have been violated is a shareholder. However, in addition to shareholders, directors may be liable under s. 241 of the *CBCA* for acting in a manner which oppresses the interests of creditors, officers or other directors. The ability of a creditor to initiate an oppression action against a director was recently stressed in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 361, 2004 SCC 68 at paras. 48-53, and courts have found directors personally liable to creditors in previous oppression actions (see: *Prime Computer of Canada Ltd. v. Jeffrey* (1991), 6 O.R. (3d) 733, 1991 CarswellOnt 1067 (Gen. Div.) at paras. 8-9 (WLeC); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Gen. Div.) at 314, varied on other grounds (1998), 110 O.A.C. 160 (Div. Ct.); *Sidaplex Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563, 1998 CarswellOnt 2819 (C.A.) at paras. 3-4 (WLeC); and *C-L & Associates Inc. v. Airside Equipment Sales Inc.* (2003), 174 Man. R. (2d) 150, 2003 MBQB 104 at para. 26). With respect to personal liability for actions which are oppressive of other officers or directors, the courts have recognized that an oppression action may be founded upon a claim for wrongful dismissal (*Instant Magic Holdings Ltd. v. Buchfink*, 2005 ABCA 371 at para. 5), and have found directors personally liable for wrongful dismissal actions in certain instances (see *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161, 2001 CarswellOnt 1680 (C.A.) at para. 56 (WLeC), leave to appeal refused, [2001] S.C.C.A. No. 397) although the Ontario Court of Appeal recently dismissed an attempt to hold a director personally liable in an oppression action which alleged wrongful dismissal (see *Stoody v. Kennedy* (2005), 2 B.L.R. (4th) 262, [2005] O.J. No. 1049 at paras. 35-37 (QL), leave to appeal refused, [2005] S.C.C.A. No. 267).

(1) McPeak ran Envirodrive with excessive secrecy, in that he failed to call shareholder meetings, distribute financial statements, report to shareholders on a timely basis, call directors' meetings on a regular basis, and properly document Envirodrive's transactions;

(2) McPeak operated and managed Envirodrive in an inadequate manner, in that he failed to retain key employees, implement minimal business management tools and service the domestic oilfield industry, made unkept promises to suppliers and employees of Envirodrive, and directed the affairs of Envirodrive in a manner which resulted in a loss of consumer confidence and ultimately destroyed its reputation;

(3) McPeak petitioned Envirodrive into bankruptcy to obtain payment of a promissory note which Envirodrive had tendered to another company which McPeak controlled; and

(4) McPeak engaged in numerous non-arm's length transactions between Envirodrive and himself, his family, and various companies and estates which he controlled, none of which were approved by a formal resolution of Envirodrive's board, and most of which were not evidenced by any written contract.

With respect to the first allegation, Slatter J. found that although the failure to distribute financial statements will not always amount to oppression, their non-distribution "unfairly disregarded" the interests of the Envirodrive minority shareholders given that Envirodrive had actually produced such statements, and given that the statements disclosed otherwise secret non-arm's length transactions involving it and McPeak.[79] On a more general level, Slatter J. also found that the secrecy with which McPeak ran the corporation, "as if it were a private corporation,"[80] was "condescending, disdainful, arrogant and oppressive."[81] Regarding the second allegation, Slatter J. held that simple mismanage-

---

79 *Envirodrive, supra* note 59 at para. 85. For another recent decision which held that the failure to provide financial statements was unfairly prejudicial to, and unfairly disregarded, shareholder interests, see *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91 at paras. 56-58, application to stay appeal dismissed, 2006 MBCA 114.

80 *Ibid.* at para. 82.

81 *Ibid.* For another decision which recently found that a director's failure to hold meetings and generally run the corporation with the level of openness required under corporate legislation amounted to oppression, see *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91 at paras. 59-66, application to stay appeal dismissed, 2006 MBCA 114. However, for a recent case in which the court found that mere irregularities in calling a shareholders meeting did *not* amount to oppression, see *Munrealty Inc. v. Ideal Construction Co.* (2005), 11 B.L.R. (4th) 148, [2005] O.J. No. 3751 (S.C.J.) at para. 43 (QL).

ment did not constitute oppression within the meaning of s. 242(2) of the Alberta *Business Corporations Act*,[82] stating that:

> [w]hile McPeak's management style was far from ideal, it is not necessary to make findings on whether these complaints are factually well founded, because *there is a big difference between mismanagement and oppression. The Minority Shareholders cannot turn a "reasonable expectation" that the corporation would be "well managed" into oppressive conduct. Just because a corporation fails, or runs out of money, or cannot compete in the marketplace does not per se amount to oppression.* The fact that employees, contractors or suppliers of the company may have grievances against Envirodrive Inc. or McPeak is not oppressive of the minority. Such matters have an equal (or greater) effect on the majority as on the minority. There are many reasons why the Envirodrive was not a successful product, but they are not evidence of oppression.[83] [emphasis added]

Slatter J. also dismissed the third allegation, holding that:

> *[i]n my view it is not generally oppressive for a shareholder, that is also a bona fide creditor, to attempt to realize on its security and seek repayment of the debts owed to it in accordance with their terms.* There cannot be any general rule that a majority shareholder cannot enforce recovery of shareholder loans, because that would turn the majority shareholder into the unwilling banker of the minority. As I have previously noted, the oppression remedies are not designed to replace other rules of law, such as the laws between debtors and creditors. Prima facie, the majority shareholder who is a creditor is entitled to enforce its debts. Of course, if the majority creates an artificial default, that might be oppressive, but here Envirodrive Inc. had clearly run out of money. It is true that the effect of the enforcement of the secured debt might mean that [McPeak's company] eventually obtains ownership of the Envirodrive patents, which are its only remaining assets of any value. That however is simply the nature of secured debt.[84] [emphasis added]

Nevertheless, Slatter J. allowed several of the claims that populated the fourth allegation. He found that McPeak had "unfairly disregarded" the interests of the minority shareholders by engaging in numerous non-arm's length transactions without justification and in contravention of his fiduciary duties to Envirodrive. This included the secret grant of a licence over all of Envirodrive's patents to a company that he controlled but which was unsupported by any independent valuation and not approved by either the Envirodrive shareholders or its board of directors.[85] In the result, Slatter J. required McPeak to personally

---

82 R.S.A. 2000, c. B-9 [*ABCA*].

83 *Envirodrive*, *supra* note 59 at para. 87.

84 *Ibid.* at para. 99.

85 *Ibid.* at paras. 120-124 and 148-156. Similar transactions by a director were recently found to constitute oppression in *Cholakis v. Cholakis* (2006), 203 Man. R. (2d) 1, 2006 MBQB 91, application to stay appeal dismissed, 2006 MBCA 114.

refund any assets and opportunities that he had diverted from Envirodrive, and removed him from the Envirodrive board of directors, although stopped short of ordering punitive damages against him.[86]

The decision in *Envirodrive* illustrates the wide variety of conduct which may result in personal oppression claims against directors, as balanced against a judicial reluctance to overly scrutinize or penalize directors who are not committing independently actionable conduct or otherwise acting in personal self-interest.

VI. THE CANADIAN BUSINESS JUDGMENT RULE COMES OF AGE

Notwithstanding the possibility of personal liability for directors in oppression actions, several recent appellate decisions have breathed new life into the most powerful defence available to such litigants: the business judgment rule. However, while courts outside Ontario have certainly recognized the possibility of relying upon the business judgment defence in oppression litigation,[87] there has yet to be a significant non-Ontario appellate decision which examines the nature of the business judgment rule in the specific context of the oppression remedy.[88] In considering the application of the business judgment rule to oppression claims, this paper shall therefore focus principally upon recent watershed business judgment rule developments in selected Ontario cases.

1. Formative Decisions

The modern "Canadian" approach to the operation of the business judgment rule in the oppression context may be traced to *Brant Investments Ltd. v. KeepRite Inc.*, where McKinlay J.A. stated that:

---

86 *Ibid.* at para. 168.

87 See, e.g.: *Mathers v. Mathers* (1992), 113 N.S.R. (2d) 284, 1992 CarswellNS 29 (S.C.) at para. 76 (WLeC), reversed on other grounds (1993), 123 N.S.R. (2d) 14 (C.A.); *Bernhardt v. Main Outboard Centre Ltd.* (1994), 96 Man. R. (2d) 194, [1994] M.J. No. 521 (Q.B.) at para. 4 (QL); *Act Enterprises Ltd. v. Ciger Construction Ltd.* (2001), 93 B.C.L.R. (3d) 176, 2001 BCSC 1677 at paras. 38-39; *Hovsepian v. Westfair Foods Ltd.* (2003), 341 A.R. 1, 2003 ABQB 641 at para. 157; *Envirodrive*, *supra* note 59, at para. 152; *Famaf Holdings Ltd. v. Rosede Ventures Ltd.*, 2006 ABQB 199 at para. 93; and *Bolivar Gold Corp. v. Scion Capital* (sub nom. *Re Bolivar Gold Corp.*) (2006), 16 B.L.R. (4th) 10, 2006 YKCA 1 at para. 27.

88 For a non-Ontario appellate judgment which summarily considered the business judgment rule in the context of an oppression action, see *Westfair*, *supra* note 31 at paras. 50 and 80.

> [t]here can be no doubt that on an application under s. 234 [now s. 241 of the *CBCA*], the trial Judge is required to consider the nature of the impugned acts and the method in which they were carried out. *That does not mean that the trial Judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction.* Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required. That does not mean that he is not well equipped to make an objective assessment of the very factors which s. 234 requires him to assess.[89] [emphasis added]

These comments were later expanded upon by Blair J. in *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*[90] In considering the oppression liability of directors for decisions made in the context of a take-over bid, and rejecting the American "enhanced scrutiny" test (which would require that directors seeking to rely upon the business judgment rule first demonstrate the "entire fairness" of the impugned transaction, and thus shift to them the initial burden of proof),[91] Blair J. noted that:

> [i]n assessing whether or not directors have met their fiduciary and statutory obligations, as outlined earlier in these Reasons, Canadian courts have generally approached the subject on the basis of what has become known as the "business judgment rule". This rule is an extension of the fundamental principle that the business and affairs of a corporation are managed by or under the direction of its board of directors. *It operates to shield from court intervention business decisions which have been made honestly, prudently, in good faith and on reasonable grounds. In such cases, the board's decisions will not be subject to microscopic examination and the Court will be reluctant to interfere and to usurp the board of director's function in managing the corporation* . . . The directors' actions are not to be judged against the perfect vision of hindsight, and should be measured against the facts as they existed at the time the impugned decision was made. In addition, the court should be reluctant to substitute its own opinion for that of the directors where the business decision was made in reasonable and informed reliance on the advice of financial and legal advisors appropriately retained and consulted in the circumstances.[92] [emphasis added]

---

89 (1991), 3 O.R. (3d) 289, 1991 CarswellOnt 133 (C.A.) at para. 75 (WLeC) [*Brant*].

90 (1998), 39 O.R. (3d) 755, 1998 CarswellOnt 1891 (Gen. Div.) (WLeC) [*CW Shareholdings*].

91 *Ibid.* at paras. 61-64.

92 *Ibid.* at paras. 57 and 60.

Subsequent to *CW Shareholdings*, the Ontario Court of Appeal again had occasion to revisit the business judgment rule in the context of a take-over bid oppression action against a board of directors in *Pente Investment Management Ltd. v. Schneider Corp.*[93] The Court summarized the business judgment rule as follows:

> [t]he law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. *Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination.* As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. . . This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction . . .[94] [emphasis added]

Unlike *CW Shareholders*, the Court in *Pente* appeared to contemplate the possibility that the "enhanced scrutiny" test could be appropriate in certain circumstances. The Court stated that the party upon whom the burden of proving the fairness of a transaction approved by a board of directors rests is context-specific.[95] However, the Court nevertheless indicated that the rationale for shifting the burden of proof onto the directors is unlikely to exist where:

> . . . a board of directors has acted on the advice of a committee composed of persons having no conflict of interest, and that committee has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances.[96]

2. Recent Cases of Interest

Although *Brant*, *CW Shareholders* and *Pente* remain among the leading Canadian decisions on the business judgment rule,[97] five recent appellate cases

---

93 (sub. nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) (1998), 42 O.R. (3d) 177, 1998 CarswellOnt 4035 (C.A.) (WLeC) [*Pente*].

94 *Ibid.* at para. 36. This passage was cited with approval in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68 at para. 65.

95 *Ibid.* at para. 38.

96 *Ibid.*

97 See further: *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198, [1999] O.J. No. 4235 (S.C.J.) at paras. 51 and 54 (QL); *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200, [1999] O.J. No. 1961 (S.C.J.) at paras. 32-36 (eC); *Rio Tinto Canadian Investments Ltd. v. Labrador Iron Ore Royalty Income Fund (Trustee of)*, [2001] O.J. No. 2440 (S.C.J.) at

have cast new light upon the circumstances which foreground its operation: *Peoples*;[98] *Stelco Inc, Re.*;[99] *Kerr v. Danier Leather Inc.*;[100] *UPM-Kymmene Corp. v. UPM Kymmene Miramichi Inc.*,[101] and *OMERS*. Three of these judgments (*Peoples*, *Stelco* and *Danier*), while decided outside of the oppression context, affirm the importance of the business judgment rule. However, two of these judgments (*UPM* and *OMERS*), both of which were decided within the oppression context, caution against its excessive application.

(a) *People's Department Stores Ltd. (1992) Inc., Re*

In *Peoples*, the trustee in bankruptcy of Peoples Department Stores Inc. ('Peoples") brought an action against the directors and majority shareholders of Wise Stores Inc. ("Wise"), the parent corporation of Peoples. It was alleged, *inter alia*, that the directors had breached their duty of care to the creditors of Peoples (as codified in s. 122(1)(b) of the *CBCA*) by implementing a joint inventory procurement policy for Peoples and Wise which resulted in the bankruptcy of both companies. The Supreme Court of Canada dismissed the allegations relating to the breach of the directors' duty, finding that the decision to implement the joint inventory procurement policy was protected by the business judgment rule.[102] In the course of its analysis, the Court stated that:

> Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuc-

---

para. 16 (QL), affirmed (2001), 41 E.T.R. (2d) 283 (C.A.); *Krynen v. Bugg* (2003), 64 O.R. (3d) 393, [2003] O.J. No. 1209 (S.C.J.) at para. 74 (QL); *Corporacion Americana de Equipamientos Urbanos S.L. v. Olifas Marketing Group Inc.* (2003), 66 O.R. (3d) 352, [2003] O.J. No. 3368 (S.C.J.) at paras. 12-15 (QL); *Stabile v. Milani* (2004), 46 B.L.R. (3d) 294, [2004] O.J. No. 2804 (C.A.) at para. 50 (QL), leave to appeal refused, [2004] S.C.C.A. No. 472; *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28, [2004] O.J. No. 4291 (S.C.J.) at paras. 78-79 and 165-168 (QL); *Paulson & Co. v. Algoma Steel Inc.* (2006), 79 O.R. (3d) 191, [2006] O.J. No. 36 (S.C.J.) at para. 43 (QL); *Deep v. M.D. Management* (2006), 13 B.L.R. (4th) 193, [2006] O.J. No. 221 (Div. Ct.) at para. 8 (QL); and *McEwan v. Goldcorp. Inc.*, [2006] O.J. No. 4265 at para. 44 (QL), affirmed, [2006] O.J. No. 4437 (Div. Ct.).

98 [2004] 3 S.C.R. 461, 2004 SCC 68 [*Peoples*].

99 (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.) (QL) [*Stelco*],

100 (2005), 77 O.R. (3d) 321, [2005] O.J. No. 5388 (C.A.) (QL) [*Danier*], leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 56.

101 (2002), 214 D.L.R. (4th) 496 (S.C.J.) [*UPM*], affirmed (2004), 42 B.L.R. (3d) 34 (C.A.).

102 *Peoples*, *supra* note 98 at paras. 68-71.

> cessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule," adopting the American name for the rule . . . *In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff. . . Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded.* Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.[103] [emphasis added]

(b) *Re Stelco Inc.*

The wide berth accorded to the business judgment rule in *Peoples* is reflected in the more recent decision of the Ontario Court of Appeal in *Stelco*. The case arose after the directors of Stelco Inc. ("Stelco") unanimously appointed to the Stelco board two persons associated with corporations that had obtained a significant shareholding in Stelco while it was involved in a restructuring under the *Companies Creditors Arrangement Act*.[104] The employees of Stelco objected to the appointments on the ground that new directors would attempt to maximize shareholder value in Stelco at the expense of other bids favourable to its employees. Farley J. accepted this objection, and ordered that the new directors be removed from the Stelco board (relying on the court's inherent jurisdiction and the discretion conferred upon the court under the *CCAA*). In reversing Farley J.'s decision, the Court of Appeal, per Blair J.A., held that the lower court had neither the inherent jurisdiction nor the statutory discretion to order the removal of directors from a corporation in *CCAA* proceedings.[105] However, Blair J.A. also found that Farley J.'s decision ignored the legitimate business judgment of the Stelco board, and rejected Farley J.'s reasoning that the business judgment rule was inapplicable to decisions con-

---

103 *Ibid.* at paras. 64 and 66-67.

104 R.S.C. 1985, c. C-36 [*CCAA*].

105 For recent decisions involving the removal of a director in the context of an oppression action, see, in addition to *Envirodrive*, *supra* note 59: *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288, [2006] O.J. No. 944 (C.A.); and *Walker v. Betts* (2006), 20 B.L.R. (4th) 152, 2006 BCSC 1096.

cerning the composition of corporate boards, as opposed to their simple management. As stated by Blair J.A.:

> [i]t is well-established that judges supervising restructuring proceedings—and courts in general—will be very hesitant to second-guess the business decisions of directors and management . . . Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind . . . *The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring* . . . Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:
>
> > With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the *CBCA*. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.
>
> *I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) —which describes the directors' overall responsibilities—and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy).* The "affairs" of the corporation are defined in s. 1 of the *CBCA* as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". *Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach.* Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.[106] [emphasis added]

---

106 *Stelco, supra* note 99 at paras. 65 and 68-70.

(c) *Kerr v. Danier Leather Inc.*

The liberal approach taken to the interpretation of the business judgment rule in *Peoples* and *Stelco* was echoed in *Danier*. This case involved a class action for misrepresentation under s. 130(1) of the Ontario *Securities Act*[107] and was commenced against Danier Leather Inc. ("Danier") after it issued a prospectus containing a financial forecast based upon facts which changed to the knowledge of the Danier officers prior to the end of the prospectus distribution period (notwithstanding that the forecast later proved to be substantially accurate). The trial judge had allowed the action on the ground that directors and officers were under a continuing duty to disclose material facts which would alter the nature of a prospectus forecast in such a manner that one of the three implied representations of fact allegedly embedded in such forecasts (that they represent the forecaster's best judgment, were made with reasonable care and skill, and were generally believed by the forecaster) became untrue prior to the end of the prospectus distribution period. In allowing the appeal, the Court of Appeal held that the trial judge had erred in finding that the *Securities Act* created a continuing duty to update material *facts* (rather than a simple duty to update material *changes*) prior to the end of the prospectus distribution period, and in further finding that the forecast contained an implied representation that it was objectively reasonable. However, the Court also found that, assuming an implied representation concerning the objective reasonableness of the forecast was contained within the prospectus, the trial judge erred in holding that the forecast was objectively unreasonable at the end of the distribution period. In short, the reasonableness of the forecast at that time could not be impugned when assessed in light of the business judgment rule (notwithstanding that the *Securities Act* did not explicitly identify the business judgment rule as a defence to prospectus misrepresentation actions).[108] In considering the application of the business judgment rule to the facts before it, the Court noted that the trial judge had failed to give effect to expert evidence which supported the reasonableness of the forecast at the end of the distribution period.[109] Essentially, it held that he had adopted an unduly retrospective approach to the assessment of Danier management's decision that the forecast remained reasonable until the end of the distribution period.[110] As stated by the Court:

> [e]ssentially, the trial judge focused on only one view of whether the Forecast could be considered to be reasonably achievable [at the end of the distribution period] – his own – instead of asking whether [the Danier officers'] honest belief in the Forecast's achievability was within a range of reasonable alternative opin-

107 R.S.O. 1990, c. S.5 [*Securities Act*].
108 *Danier, supra* note 100 at paras. 154-157.
109 *Ibid.* at paras. 168-170.
110 *Ibid.* at para. 165.

> ions open to business people in their position, knowing what they knew and facing the circumstances they faced.[111]

(d) *UPM-Kymmene Corp. v. UPM Kymmene Miramichi Inc.*

Although *Peoples*, *Stelco* and *Danier* clearly herald a larger role for the business judgment rule in modern Canadian shareholder litigation, the rule still has its limits, as evidenced by *UPM*. The trial court in *UPM* was required to consider whether a board of directors had acted oppressively by entering into an employment contract with its own chairman upon the advice of a directors' compensation committee which did not seriously discuss or examine the agreement. Lax J. ultimately found that the business judgment rule did not insulate the board's conduct from the operation of the oppression remedy. She held that:

> [t]he business judgment rule protects Boards and directors from those that might second-guess their decisions. The court looks to see that the directors made a reasonable decision, not a perfect decision . . . This approach recognizes the autonomy and integrity of a corporation and the expertise of its directors. They are in the advantageous position of investigating and considering first-hand the circumstances that come before it and are in a far better position than a court to understand the affairs of the corporation and to guide its operation. *However, directors are only protected to the extent that their actions actually evidence their business judgment. The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. . . Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination . . . The business judgment rule cannot apply where the Board of Directors acts on the advice of a director's committee that makes an uninformed recommendation* . . . Although it was not unreasonable for the Board to assume the Committee had done a careful job, this did not relieve the directors of their *independent obligation* to make an informed decision on a reasonable basis. In order to act in the best interests of the shareholders . . . director was required to understand the terms and meaning of the Agreement and to consider it carefully against the circumstances of [the corporation] at the time . . . This did not happen.[112] [emphasis added]

The Ontario Court of Appeal subsequently affirmed Lax J.'s judgment, and dismissed the suggestion that she had attempted to second-guess the board's

---

111 *Ibid.* at para. 154.

112 *UPM*, *supra* note 101 at 536-537.

decision, noting that "the process by which the Board members came to their decision was seriously flawed."[113]

(e) *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*

The restricted ambit of the business judgment rule advocated in *UPM* was recently relied upon in *OMERS*. This case involved an appeal from a declaratory action initiated by Ford Motor Company of Canada, Limited ("Ford Canada") to fix the value of its minority shares on the date of its going-private transaction in 1995. During the declaratory action, certain of Ford Canada's minority shareholders brought a counterclaim against Ford Canada and its parent company, Ford Motor Company ("Ford U.S."), alleging oppression throughout the period between 1985-1995. The basis of the oppression claim was highly complex, although it revolved around a tax-driven "transfer pricing system" set up between Ford Canada and Ford U.S. whereby the two entities engaged in the reciprocal purchase of motor vehicle equipment. The transfer pricing system caused Ford Canada to suffer significant and long-term losses. This occurred because it allocated to Ford Canada an unfair portion of the costs and losses experienced by the Ford Canada and Ford U.S. vehicle divisions, and because it required Ford Canada to bear the risk of a decline in the Canadian currency (which was in a period of largely continual regression from the late 1970s until the mid 1990s). The *gravamen* of the plaintiff shareholder's oppression action was that the transfer pricing system was unfairly imposed upon, or accepted by, Ford Canada, and caused Ford Canada to suffer numerous avoidable losses. In rejecting Ford Canada's appeal from the trial court's finding of oppression liability (and in allowing the shareholders' appeal from the trial court's dismissal of the oppression claim against Ford U.S.), the Court held that the decision of the Ford Canada board to enter into and continue with the transfer pricing system was not protected under the business judgment rule. The Court acknowledged that:

> [d]espite the breadth of the oppression remedy, the broad notion of oppression must somehow be reconciled with the business judgment rule and the reasonable expectations of the minority shareholders.[114]

---

113 *UPM-Kymmene Corp. v. UPM Kymmene Miramichi Inc.* (2004), 42 B.L.R. (3d) 34, [2004] O.J. No. 636 (C.A.) at paras. 5-7 (QL). The decision in *UPM* may be usefully contrasted with *In re The Walt Disney Company Derivative Litigation*, 906 A.2d 27 (Del. 2006), wherein the court affirmed a decision which held that a board of directors had not breached their fiduciary duties or duty of care by approving, after only a conclusory examination, a highly lucrative compensation package for a departing executive whose performance during his brief tenure had been unsatisfactory.

114 *OMERS*, *supra* note 14 at para. 94.

Nevertheless, it ultimately held that:

> *[t]he significant impediment to Ford Canada's reliance on the business judgment rule lies in the evidence accepted by the trial judge that the Ford Canada board brought little judgment to bear on the transfer pricing system.* The evidence shows that Ford Canada's board had little understanding of the transfer pricing system and its impact on the profitability of Ford Canada's operations. *There was little discussion of the system at the board level and Ford Canada did not conduct any independent review of the system.* The evidence suggests that Ford Canada simply accepted the system that was put in place by Ford U.S., the majority shareholder. There was no evidence that Ford Canada tried to negotiate an agreement that was more consistent with arm's-length principles and failed; the attempt was never made . . . On this record, it was open to the trial judge to find that the board did not act on reasonable grounds and therefore was disentitled to the deference ordinarily accorded by the operation of the business judgment rule. *As Lax J. said in UPM . . . 'directors are only protected to the extent that their actions actually evidence their business judgment.'*[115] [emphasis added]

The result of *UPM* and *OMERS* is that directors seeking to rely upon the business judgment rule in the oppression context will bear a heavy onus where there is no evidence to support the contention that they actually turned their minds towards the decision under review. Although *Peoples*, *Stelco* and *Danier* have fortified the business judgment defence, directors must not lose sight of the fact that an initial exercise of business judgment is a threshold requirement to the availability of the business judgment rule itself. Provided, however, directors can demonstrate that they have engaged in at least some meaningful[116] consideration of the impugned decision, the business judgment rule can prove a powerful defence to oppression liability.

---

115 *Ibid.* at paras. 55-56 and 59.

116 One recent court has stressed that there is an *objective* element to the consideration required by business judgment rule, stating that "there must be more to the business judgment rule than the subjective determination by a board of directors", and that the application of the rule requires that "directors as a group bring to bear the considerations expected of reasonably prudent directors, operating in the same circumstances": *Itak International Corp. v. CPI Plastics Group Ltd.* (2006), 20 B.L.R. (4th) 67, [2006] O.J. No. 2637 (S.C.J.) at paras. 40 and 43 (QL).

VII. THE SCOPE OF OPPRESSION RELIEF

1. The Breadth of the Oppression Remedy

As recently noted by the Supreme Court of Canada in *Peoples*:

> [t]he oppression remedy of s. 241(2)(c) of the *CBCA* and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction . . . One commentator describes the oppression remedy as 'the broadest, most comprehensive and most open-ended shareholder remedy in the common law world' . . .[117]

The historical breadth of the oppression remedy is reflected in the wide array of remedies available to successful oppression complainants. These remedies are partially set out in s. 241(3) of the *CBCA*, which provides that:

> In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing:
>
> (a) an order restraining the conduct complained of;
> (b) an order appointing a receiver or receiver-manager;
> (c) an order to regulate a corporation's affairs by amending the articles or bylaws or creating or amending a unanimous shareholder agreement;
> (d) an order directing an issue or exchange of securities;
> (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
> (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
> (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the monies that the security holder paid for securities;
> (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
> (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
> (j) an order compensating an aggrieved person;

---

117 *Peoples*, *supra* note 98 at para. 48. See also *Loewen, Ondaatje, McCutcheon & Co. c. Sparling* (sub nom. *Kelvin Energy Ltd. v. Lee*), [1992] 3 S.C.R. 235, [1992] S.C.J. No. 88 at para. 40 (QL).

(k) an order directing rectification of the registers or other records of a corporation under section 243;
(l) an order liquidating and dissolving the corporation;
(m) an order directing an investigation under Part XIX to be made; and
(n) an order requiring the trial of any issue.

In addition to these enumerated remedies, the opening language of s. 241(3) enables a court to make "any interim or final order it thinks fit," thereby preserving a broad equitable jurisdiction to create individualized remedies appropriate to specific oppression actions.[118] The extensive scope of the court's jurisdiction to grant oppression relief is illustrated by the recent Ontario Court of Appeal decision in *Waxman v. Waxman*.[119] In that decision, the Court affirmed the trial judge's decision to award an oppression complainant equitable remedies in the nature of a constructive trust,[120] punitive damages,[121] and even a remedy against an entity which was not actually a party to the relevant oppressive transaction.[122]

2. Principles Governing the Award of Relief

Notwithstanding the historically broad nature of the relief available in oppression actions, the court's discretion to fashion remedial orders is not unlimited. This was noted by Farley J. in *Ballard*, where he stated that:

> [t]he court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party.[123]

The Ontario Court of Appeal also recently rejected the existence of a plenary power to grant oppression relief, holding, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, that:

---

118 See *Waxman v. Waxman* (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (C.A.) at paras. 523 and 571 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291; and *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288, [2006] O.J. No. 944 (C.A.) at para. 51 (QL).

119 (2004), 44 B.L.R. (3d) 165, [2004] O.J. No. 1765 (QL), leave to appeal refused, [2004] S.C.C.A. No. 291.

120 *Ibid.* at paras. 571-584.

121 *Ibid.* at paras. 585-586.

122 *Ibid.* at paras. 537-539.

123 *Ballard, supra* note 35 at para. 140.

> . . . the statutory discretion under s. 241 of the *CBCA*, like any other statutory discretion, must be exercised judicially and in a manner consistent with the intention of the legislature and the scheme and object of the statute under which the discretion is conferred. The court's discretion under s. 241 must also be exercised in conformity with the legal principles that govern corporate law issues . . . [I]n fashioning a remedy under statutory oppression remedies, judicial interference with the affairs of the affected corporation should be undertaken only to the extent necessary to rectify the oppression in question.[124]

In light of these decisions, the jurisdiction to grant oppression relief, while clearly extraordinary, must still be exercised within a network of certain basic rules. As summarized by the Newfoundland Court of Appeal in *Pelley v. Pelley*, these rules would appear to include the following:

> (a) The result of the exercise of the discretion contained in subsection [241(3) of the *CBCA*] must be the rectification of the oppressive conduct. If it has some other result the remedy would be one which is not authorized by law.
> (b) Any rectification of a matter complained of can only be made with respect to the person's interest as a shareholder, creditor, director or officer.
> (c) Persons who are shareholders, officers and directors of companies may have other personal interests which are intimately connected to a transaction. However, it is only their interests as shareholder, officer or director as such which are protected by section [241 of the *CBCA*]. The provisions of that section cannot be used to protect or to advance directly or indirectly their other personal interests.
> (d) The law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals.
> (e) They must be expectations which could be said to have been, or ought to have been, considered as part of the compact of the shareholders.
> (f) The determination of reasonable expectations will also, in my view, have an important bearing upon the decision as to what is a just remedy in a particular case.
> (g) The remedy must not be unjust to the others involved.[125]

---

124 (2006), 79 O.R. (3d) 288, [2006] O.J. No. 944 at paras. 54-55 (QL).

125 (2003), Nfld & P.E.I.R. 1, 2003 NLCA 6 at para. 37, leave to appeal refused, [2003] S.C.C.A. No. 338. See also *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481, 1995 CarswellOnt 1207 (C.A.) at paras. 17-29 (eC); *Gleddie v. Gleddie* (2000), 260 A.R. 303, 2000 ABQB 1019 at paras. 18-19; and *McAteer v. Devoncraft Developments Ltd.* (2001), 307 A.R. 1, 2001 ABQB 917 at paras. 464-465. For an example of a recent case in which the Court held that a proposed yet unenumerated remedy (ordering the majority shareholder to transfer his shares to the minority shareholders) was likely beyond its jurisdiction, see *Envirodrive*, *supra* note 59 at para. 166. On the principles

3. Availability of Relief for Past Oppression

One of the more interesting questions regarding the scope of oppression relief is the degree to which a court can order relief for *past* oppression, i.e., oppression which occurred prior to the time when the complainant actually became a "security holder, creditor, director or officer" of the relevant corporation pursuant to s. 241(2) of the *CBCA*.[126] There have been several cases in which the courts have indicated that a plaintiff who only becomes a shareholder after the occurrence of the oppressive activity is incapable of qualifying as an oppression complainant.[127] Nevertheless, there are also other decisions in which the courts have indicated that shareholder relief for past oppression may remain available in certain circumstances.[128]

One of the most recent cases to have addressed the availability of relief for past oppression is *OMERS*. The Court in *OMERS* was required to consider whether the minority shareholders in Ford Canada who opposed its going-private transaction were entitled to a remedy for the historical oppression visited upon the Ford Canada shares through the transfer pricing system solely by virtue of having held Ford Canada shares at the time when the going-private transaction was effected. It ultimately found that the shareholders were not entitled to relief for the past oppression, but accepted that a party who only became a shareholder subsequent to the oppressive conduct could still qualify as an oppression complainant. As stated by the Court:

---

applicable to the award of *interim* relief for oppression, see Markus Koehnen, *Oppression and Related Remedies* (Toronto: Carswell, 2004) at 335-340.

126 This issue seemingly does not arise where the shareholder complainant was *assigned* an oppression right by a previous shareholder: *Iverson v. Westfair Foods Ltd.* (1996), 183 A.R. 286, [1996] A.J. No. 397 (Q.B.) at para. 68 (QL), affirmed (1998), 223 A.R. 322 (C.A.), leave to appeal refused, [1998] S.C.C.A. No. 634. For a recent decision which discusses the availability of relief for past oppression to *creditors*, see *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.* (2006), 16 B.L.R. (4th) 227, [2006] O.J. No. 812 (S.C.J.) at paras. 74-85 (QL).

127 See: *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86, 1993 CarswellOnt 147 (Gen. Div.) at paras. 13 and 16-17 (WLeC); *Westfair Foods Ltd. v. Watt* (sub nom. *Iverson v. Westfair Foods Ltd.*) (1998), 223 A.R. 322, 1998 ABCA 337 at para. 68, leave to appeal refused, [1998] S.C.C.A. No. 634; and *LSI Logic Corp. of Canada, Inc. v. Logani* (2001), 204 D.L.R. (4th) 443 (Alta. Q.B.) at 483-484.

128 See: *Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989), 41 B.L.R. 128, 1989 CarswellOnt 119 (Div. Ct.) at para. 28 (WLeC); *347883 Alberta Ltd. v. Producers Pipelines Inc.* (1991), 92 Sask. R. 81, 1991 CarswellSask 185 (C.A.) at para. 61 (WLeC); and *Iverson v. Westfair Foods Ltd.* (1996), 183 A.R. 286, [1996] A.J. No. 397 (Q.B.) at para. 66 (QL), affirmed (1998), 223 A.R. 322 (C.A.), leave to appeal refused, [1998] S.C.C.A. No. 634. See also *Richardson Greenshields of Canada Ltd. v. Kalmacoff* (1995), 22 O.R. (3d) 577, 1995 CarswellOnt 324 (C.A.) at para. 17 (WLeC), leave to appeal refused (1995), 22 B.L.R. (2d) 164n (S.C.C.), considering the ability to initiate a *derivative* action under the *Trust and Loan Companies Act*, S.C. 1991, c. 45, for conduct occurring prior to the time when the complainant became a shareholder.

> . . . the fact that the complainant 'bought into the oppression' does not automatically preclude an action under s. 241 [of the *CBCA*] . . . But, finding that the shareholder is a proper complainant does not determine the scope of the remedy to which the complainant may be entitled.[129]

The Court then proceeded to distinguish cases (such as *UPM* and *Richardson Greenshields of Canada Ltd. v. Kalmacoff*)[130] which had granted oppression and derivative relief for past conduct to complainants that sought a remedy on behalf of the corporation or its shareholders as a whole. It noted that:

> [i]n this case, the OMERS shareholders seek the personal remedy of compensation under [s. 241(3)(j) of the *CBCA*] as "an aggrieved person," not an order "compensating the corporation" under [s. 241(3)(h)], and they must therefore show entitlement to compensation. *Compensation excludes any notion of a windfall for wrongs done to others in the past.* As the trial judge said . . . the effect of any past oppression would normally be reflected in the market price of the shares at the time the shareholder purchased them. Thus, any purchase was at a market price 'that implicitly reflected the publicly reported earnings of Ford Canada under the transfer pricing structure to that point in time.' . . . To award a shareholder for past oppression would not be compensation but a windfall . . . *Here the OMERS shareholders do not seek to recover property or enforce rights for the corporation. They seek to obtain personal compensation.*[131] [emphasis added]

The Court also indicated that awarding a complainant relief for past oppression was inconsistent with the doctrine of reasonable expectations, since "[r]easonable expectations by their nature are forward looking."[132] Nevertheless, the Court in *OMERS* did not entirely foreclose the possibility of relief for past oppression, signalling that such relief could be available "where the remedy sought will benefit the corporation as a whole."[133]

In light of *OMERS*, it is evident that the Canadian courts will not award relief for past oppression as a matter of course. Nevertheless, the extent to which such relief may be available in certain specialized circumstances (such as where

---

129 *OMERS*, *supra* note 14 at para. 105.

130 (1995), 22 O.R. (3d) 577, 1995 CarswellOnt 324 (C.A.), leave to appeal refused, [1995] S.C.C.A. No. 260.

131 *OMERS*, *supra* note 14 at paras. 113-115 and 119.

132 *Ibid.* at para. 122. For another decision in which the court held (albeit via slightly different reasoning) that a complainant could not reasonably expect to obtain relief for oppressive conduct which occurred prior to the time when he or she first became a stakeholder, see *Harbert Distressed Investment Master Fund Ltd.* v. *Calpine Canada Energy Finance II ULC* (2005), 235 N.S.R. (2d) 297, 2005 NSSC 211 at paras. 169 and 180-181.

133 *Ibid.* at para. 116 (QL). See also *Scion Capital, LLC v. Gold Fields Ltd.* (sub nom. *Re Bolivar Gold Corp.*) (2006), 16 B.L.R. (4th) 17, 2006 YKSC 17 at paras. 76-77, affirmed (2006), 16 B.L.R. (4th) 10 (Y.K.C.A.), suggesting that the courts retain the discretion to award relief for past oppression.

a complainant is seeking essentially derivative relief) continues to remain open for future judicial examination.

VIII. CONCLUSION

The recent developments discussed in this paper illustrate the increasing aggressiveness and sophistication of shareholder litigation in Canada. Shareholders are now advancing quasi-constitutional arguments in an attempt to plead their way around traditional defences such as limitation periods. They are also seeking to accelerate the gradual erosion of the *Foss v. Harbottle* doctrine by, for example, attempting to reconstitute the substance of previously adjudicated oppression claims as derivative actions. Cases such as *Envirodrive* even demonstrate shareholder reliance upon the oppression remedy as a vehicle for such mundane complaints as corporate mismanagement. When these developments are considered in tandem with the growing tendency of shareholders to "buy into" oppression actions, it is evident that shareholders are now staking their claims at the very shores of Canadian oppression jurisprudence.

Notwithstanding these developments, Canadian courts have not been entirely receptive to this new breed of shareholder litigation. Decisions such as *Peoples*, *Stelco*, and *Danier* indicate that the business judgment rule will play a more prominent role in future oppression jurisprudence, and inhibit the expansion of meritless oppression actions against directors. In fact, the growth of the business judgment rule may be regarded as but one aspect of a larger trend by Canadian courts towards adopting a relatively conservative approach to shareholder oppression actions. This trend is also manifested in the emergence of a modified objective test for reasonable expectations, and in the re-affirmed vitality of certain basic and well-established principles of Canadian law (such as *res judicata*, the rules of evidence, and the judicial aversion to windfall compensation).

Ultimately, while Canadian shareholder claims will likely continue to grow in aggressiveness (particularly given the introduction of statutory civil liability for secondary market disclosures), it is unlikely that the Canadian courts will be as tolerant of such litigation as their American brethren. Rather, their increasing reliance upon the business judgment rule and the modified objective test for reasonable expectations suggests that they will incline towards adopting a typically "Canadian compromise" between the liberal, shareholder-friendly approach often found in the American courts, and the restrictive approach exemplified in *Foss v. Harbottle*. Although it is clear that the oppression remedy will continue to operate as a catalyst for shareholder activism, it seems equally clear that the Canadian judiciary has no intention of abdicating its role as an impassionate arbiter of shareholder disputes.