

Shareholders' Remedies in Canada

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Important Note

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Introduction

When advising business clients about doing business in Canada¹ lawyers must turn their minds not only to the kinds of corporate vehicles which Canadian law permits but also the remedies permitted if disputes arise. In this paper, we highlight the range of remedies available in the common law jurisdictions of Canada to protect shareholders and others from abusive corporate action.

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

In the face of this enabling philosophy, corporate law has been described as a form of constitutional law that attempts to regulate the rights and obligations of those who participate in or who are affected by the corporation³. A central theme of this regulation is "the struggle to balance the protection of corporate stakeholders and the ability of

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

² See f.n. 1.

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

management to conduct the affairs of the company in an efficient manner without undue interference".⁴

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

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

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

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

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

Shareholder Rights

Corporate Statutes

In Canada, a company may be incorporated under either federal or provincial legislation.⁶

Although the statutes cover broadly the same categories of rights and remedies of shareholders, there are minor variations between the statutes. For the purposes of this paper, we will use the Ontario Business Corporations Act⁷ (the "OBCA")⁸ as our model. However, counsel should be sure to consult the corporate statute under which the company was incorporated for the appropriate provisions.⁹

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

Voting

The right to vote is the most fundamental right accorded to shareholders under Canadian corporate law statutes. Through voting, shareholders can control the makeup of the board of directors¹⁰, which is by statute responsible for the management of the corporation¹¹, and participate in major business decisions affecting the company¹². Further, the articles of

⁶ See f.n. 1.

⁷ D.H. Peterson, *ibid.* p. 18.1

⁸ R.S.O. 990, c.B-16. online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm.

⁹ It is beyond the scope of this paper to address the strategic and tax considerations which affect the selection of the most favourable jurisdiction in which to incorporate.

¹⁰ OBCA s.119(4)

¹¹ OBCA s.115

¹² See for example OBCA s.184(3), which requires shareholders to vote on a sale of "all or substantially all" of the assets of the corporation.

incorporation and by-laws may impose limits on corporate and intra-shareholder activities.

Meetings

A corollary of the right to vote is the right of the shareholder to attend at meetings. Corporate statutes provide for the calling of an annual meeting of shareholders not later than fifteen months following the last held annual meeting, as well as special meetings at any time.¹³

The annual meeting usually involves the election of directors, the appointment of the auditor and the presentation of the company financials, although other business may also be transacted. Business requiring shareholder approval can be transacted between annual meetings by the calling of a special meeting of shareholders. The statutes also provide for shareholders who hold not less than 5% of the voting shares of a corporation to requisition the directors to call a meeting for any purpose stated in the requisition.¹⁴

Access to Information

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

¹³ OBCA s.94(1)

¹⁴ OBCA s.105(1)

- (a) the articles and by-laws of the corporation and all amendments thereto;
- (b) copies of any unanimous shareholders agreements known to the directors;
- (c) minutes of meetings and resolutions of shareholders;
- (d) a register of directors setting out specified information; and
- (e) a securities register setting out certain specified information.¹⁵

In addition, the corporation is to prepare adequate accounting records and a record of directors' meetings and meetings of any committee thereof.¹⁶ Shareholders and creditors and their agents and legal representatives are to be provided access to the books and records maintained by the corporation during the usual business hours of the corporation and are permitted to take extracts of the records where appropriate.¹⁷

Shareholders are also entitled to be provided with notice of meetings and related information. Such notices and materials, including proxy forms and circulars, must describe the nature of the business to be conducted at the meeting "in sufficient detail to permit the shareholder to form a reasoned judgment thereon".¹⁸ For example, it was held in *Pace Savings & Credit Union Ltd. v. Cu-Connection Ltd.*¹⁹ that a notice was insufficient where a draft agreement had been provided to shareholders. The draft, it was

¹⁵ OBCA s.140(1)

¹⁶ OBCA s.140(2)

¹⁷ OBCA s.145(1), (2), 146(1)

¹⁸ See OBCA s.96(6) for notice of meetings and s.30(31) of O. Reg. 62 regarding information circulars.

¹⁹ [2000] O.J. No. 3830 (Ont. S.C.)

held, could change substantially throughout the course of negotiation, and could not form the basis on which a reasoned judgment could be formed as to the impact of the transaction. In *Giannotti et al. v. Wellington Enterprises Ltd.*,²⁰ the Ontario Superior Court held that the transfer of a principal asset of a corporation was invalid when the notice of the meeting failed to specify in detail the full nature of the transaction and the proposed agreement of purchase and sale.

Articles of Incorporation and By-Laws

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

Shareholder Agreements

Shareholders' agreements may take many forms, from a simple agreement to vote shares in a particular way through to unanimous shareholders' agreements, which restricts the powers of the directors of the corporation and transfers those rights and responsibilities to the shareholders. Such agreements may embellish or supplement rights provided under corporate law statute. For example, shareholders' agreements could include provisions

²⁰ *Giannotti v. Wellington Enterprises Ltd.* [1997] O.J. No. 574 (Ont. Gen. Div.)

such as buyout mechanisms, pre-emptive rights, drag-along and tag-along provisions on sale of shares. They may also set out definitions of who can be a shareholder and provide for restrictions on transfer of shares.

In closely-held corporations, shareholder agreements often include provisions describing or limiting the scope of some shareholders' management functions; plans for succession and undertaking of new corporate opportunities. Abuse of these provisions by shareholders active in the management of the corporation form the genesis of assertion of shareholders' rights by the minority or other aggrieved shareholders. How the assertion of rights by minority or aggrieved shareholders is limited by a mandatory arbitration clause is an important consideration which will be considered later in this paper.

Securities Laws

Securities Acts in each province enact an entire regime regulating public companies and their actions in relation to the Canadian securities market.²¹ These statutes contain a set of complex rules and regulations overseen by provincial regulatory bodies. These include rules on voting and access to information, much like the corporate statutes described above, as well as rules regarding disclosure of information to shareholders. It is beyond the scope of this paper to discuss these statutes in detail.

²¹ See reference to Securities Acts online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90s05_e.htm for the *Ontario Securities Act* and for the other provinces at www.canlii.org. Securities legislation is enforced and administered in Ontario by the Ontario Securities Commission. Information about the OSC is available online at <http://www.osc.gov.on.ca/>. Securities commissions also exist in the other provinces. Links to websites of other securities commissions are found at www.osc.gov.on.ca/RelatedLinks/rl_links_index.jsp. The securities and investment dealer/broker industry is also administered by several self-regulating organizations, including the Investment Dealers Association of Canada, Market Regulation Services Inc. and the stock exchanges in Toronto, Montreal and Vancouver. Links to the sites of these organization are also found at the above page on the OSC site..

Shareholders' Remedies

If the rights given to shareholders are to be effective and worthwhile, it is clear that corresponding remedies must be available to the shareholder to cure their breach. In the following sections of the paper, we examine some of the remedies made available to shareholders and their application.

Court Ordered Meetings

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

In particular, section 106(1) of the OBCA states that the court may "order a meeting to be called, held and conducted in such manner as the court directs" where it is "impracticable" to call a meeting of shareholders or to conduct a meeting in the manner provided for under the articles and by-laws of the corporation or under statute or "for any other reason the court thinks fit".²² The remedy is available on application by a director or shareholder entitled to vote at a meeting. The classic statement of what is meant by

²² OBCA s.106(1)

"impracticable" in the context of section 106(1) comes from the judgment of the English Court of Appeal in *Re El Sombrero Ltd.*²³:

It is to be observed that the section opens with the words "If for any reason," and therefore it follows that the section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next words are "...it is impracticable to call a meeting of a company..." The question then arises, what is the scope of the word "impracticable"? It is conceded that the word "impracticable" is not synonymous with the word "impossible"; and it appears to me that the question necessarily raised by the introduction of that word "impracticable" is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held.

"Impracticability" must be interpreted broadly in order "to govern the affairs of practical men engaged in business."²⁴ In addition, the courts have held that "the right of the shareholders to democratically determine the future course of the company is paramount consideration, even when there is ongoing litigation" between the parties.²⁵ The fact that the application is opposed should not preclude the calling of the shareholders' meeting.

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

²³ [1958] 1 Ch. 900 (U.K. C.A.)

²⁴ *B. Love Ltd. v. Bulk Steel & Salvage Ltd.* (No. 2) (1982), 40 O.R. (2d) 1 (H.C.J.) (QL)

²⁵ *FTS Worldwide Corp. v. Unique Broadband Systems Inc.* [2001] O.J. No. 5126 (Ont. Sup. Ct.) (QL)

incorporation and by-laws of the corporation or by the statute "be varied or dispensed with" at a meeting ordered pursuant to section 106.²⁶

Derivative Action

The powerful but infrequently-used remedy of "derivative action" permits a shareholder or other "complainant" to advance an action on behalf of the corporation when the corporation refuses to bring the action itself. The action is available to rectify wrongs done to the corporation itself rather than to the individual shareholder. The intent of the remedy is to circumvent the problem of management not taking action to rectify a wrong where they may have been involved in or responsible for the wrong sustained by the corporation.

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

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
- (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates;
- (c) any other person who, in the discretion of the court, is a proper person to make an application.

A person with standing may seek leave to do one of two things: to "bring an action in the name and on behalf of a corporation or any of its subsidiaries", or to "intervene in an

²⁶ OBCA s.106(2)

action to which any such body corporate is a party" in order to prosecute, defend or discontinue the action on behalf of the body corporate.²⁷

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

- (a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;
- (b) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his or her intention to seek leave to commence a derivative action;
- (c) the complainant is acting in good faith; and
- (d) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.²⁸

With respect to the notice provision, it was held by the British Columbia Supreme Court in *Re Daon Development Corp.*²⁹ that the condition could not be waived, in part because the "condition can be easily performed without undue expense of effort".

In *Re Loeb and Provigo Inc.*,³⁰ Steele J. of the Supreme Court of Ontario discussed the onus of proof for leave to begin an action, stating that "There is an onus on an applicant to bring before the court more than mere suspicion to warrant the granting of leave." The requirement has been interpreted broadly, and it has been decided that the notice is not

²⁷ OBCA s.246(1)

²⁸ See OBCA s.246(2) and Peterson, supra note 2 at 17.35

²⁹ (1984) 54 B.C.L.R. 235 (S.C.) (QL)

³⁰ (1978), 88 D.L.R. (3d) 139 (Ont. H. C.)

required to contain every cause of action that is eventually brought in the derivative action. The notice should, however, contain enough information to permit the directors to determine the nature and extent of the complaint and it must be delivered to the appropriate parties.³¹

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

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

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

³¹ D.H. Peterson, *supra* note 4 at 17.37

manager of the corporation, the Court must assess the impact on the continued operation of the corporation's business.

The final pre-condition to obtaining leave to commence a derivative action is that it "appear" to be in the interests of the corporation" that the action move forward. This differs from other provisions of the OBCA which require the courts to be "satisfied" that certain conduct has been carried out. This pre-condition affords the Court a mechanism to provide relief to a deserving complainant where access to all the relevant information was not possible at the time of bringing the motion for leave to bring the action.

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

Where a complainant is successful in persuading the Court that leave to commence a derivative action should be given, the Court may make "any order it thinks fit," including, but are not limited to:³²

- an order authorizing the complainant or any other person to control the conduct of the action;
- an order giving directions for the conduct of the action;
- an order requiring that any amount adjudged payable by the defendant in the action shall be paid, in whole or in part, directly to former and

³² OBCA, s.247

present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and

- an order requiring the corporation or its subsidiary to pay reasonable legal fees and any other costs reasonably incurred by the complainant in connection with the action.³³

The Oppression Remedy

The oppression remedy³⁴ is widely acknowledged as being one of the most powerful weapons in the arsenal of the shareholder. The remedy was introduced largely in response to the difficulties encountered by minority shareholders in a corporate environment that runs by majority rules.

Nearly 80 years ago, the Ontario Court of Appeal enunciated the dilemma of minority shareholders in these words in *Re Jury Gold Mine Development Co.*:³⁵

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

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

³³ See OBCA s.247

³⁴ See OBCA s.248

³⁵ [1928] 4 D.L.R. 735 (Ont. C.A.)

The Ontario Court of Appeal reiterated the state of the law in the recent and oft-referred to case of *Waxman et al. v. Waxman et al.*³⁶ in which Morris Waxman succeeded in recovering nearly \$50 million following his dismissal and exclusion from a family business by his brother, Chester Waxman and others. It was the culmination of a 10-year legal battle, which may see another round as leave to appeal to the Supreme Court of Canada is pending at the time of this paper. The decision applied the principles espoused 20 years earlier by the same Court in *Ferguson v. IMAX Systems Corp.*³⁷, a case decided under the *Canada Business Corporations Act*.

In essence, the oppression remedy amounts to this: the Court has a broad remedial authority where it finds conduct that qualifies as oppressive. It may make any order it thinks fit to rectify the matters complained of. This explicitly includes setting aside a transaction or contract to which the corporation is a party or amending unanimous shareholder agreements, corporate articles or by-laws. This statutory language is to be given a broad interpretation consistent with its remedial purpose.³⁸

Oppressive conduct which occurred before the oppression remedy came into effect and continued may be considered by the Court.³⁹ This is so because the oppression remedy is

³⁶ [2002] O.J. No. 2528, (2002) 25 B.L.R. (3d) 1 (Ont. S.C. Sanderson J.) aff'd with minor variations [2004] O.J. No. 1765, (2004) 44 B.L.R. (3d) 165 (Ont. C.A.)

³⁷ (1983), 43 O.R. (2d) 128 at 137 (C.A.), leave to appeal to S.C.C. refused (1983), 2 O.A.C. 158n.

³⁸ *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 523 (Ont. C.A.)

³⁹ *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 529-533 (Ont. C.A.)

considered part of substantive law has been interpreted as having retrospective effect.⁴⁰

In Ontario, no specific limitation period applies to an oppression claim.⁴¹

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

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

in a manner that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of."⁴²

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

For example, it has been held that "the court has jurisdiction to find an action is oppressive, unfairly prejudicial, or unfairly taken in disregard of the interests of a security holder if it is wrongful, even if it is not actually unlawful."⁴³ In addition, conduct may be isolated or may form a pattern of conduct that is considered oppressive to shareholders.

⁴⁰ *Re Mason and Intercity Properties Ltd.* (1986), 32 A.C.W.S. (2d) 366 (Ont. Div. Ct.), varied on unrelated other grounds (1987), 59 O.R. (2d) 631 (C.A.).

⁴¹ *Waxman v. Waxman* [2002] O.J. No. 2528 at para. 534-535 (Ont. C.A.)

⁴² OBCA s.248(1) and (2)

⁴³ *Maple Leaf Foods Inc. v. Schneider Corp.* (1998) 42 O.R. (3d) 177 (QL)

Importantly, it has been held that no bad faith is required in order to establish conduct as oppressive. It is the effect of the conduct, and not the intention of the party engaging in the conduct, that is of primary importance in oppression remedy cases.⁴⁴

Legitimate Expectations

In *Brant Investments Ltd. v. KeepRite Inc.*,⁴⁵ the Ontario Court of Appeal held that the oppression remedy protects only the legitimate expectations of shareholders. Those expectations must be "reasonable under the circumstances and reasonableness is to be ascertained on an objective basis." In the same case, the Court expressed the concept in the following language:

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

The legitimate expectations of a shareholder may be affected by the provisions contained in the articles of incorporation and by-laws of the corporation or the provisions of any agreements between shareholders. They may also be affected by the size and nature of the corporation and general commercial practice. On making a finding of oppression, a court may make "an order to rectify the matter complained of".⁴⁶ Section 248(3) sets out a number of specific orders that may be made by the court, including, for example:

- (a) an order restraining the conduct complained of;

⁴⁴ *Brant Investments Ltd. v. KeepRite Inc.* (1991) 30.R. (3d) 289 (Ont. C.A.) (QL)

⁴⁵ *Brant Investments Ltd. v. KeepRite Inc.*, *supra.*, f.n. 39

⁴⁶ OBCA s. 248(2)

- (b) an order appointing a receiver or receiver-manager;
- (c) an order amending the articles or by-laws of the corporation or the provisions of a unanimous shareholders' agreement;
- (d) an order appointing directors in place of or in addition to the directors then in office;
- (e) an order directing the company or any other person to purchase securities of a security holder;
- (f) an order winding up the corporation; and
- (g) an order requiring the trial of any issue.⁴⁷

In addition, the Court may order the corporation or its affiliates to "pay to the complainant interim costs, including reasonable legal fees and disbursements".⁴⁸ In order to obtain such an order, the applicant must establish that there is a case of sufficient merit to warrant pursuit and that the applicant is genuinely in financial circumstances which, but for an order, would preclude the claim from being pursued.⁴⁹

However, where a complainant, a minority shareholder, is unable to persuade the Court that he does not have the resources to pursue the action or fails to disclose his financial circumstances, the Court will refuse to make an order for interim disbursements.⁵⁰

⁴⁷ OBCA s.248(3). Not all available remedies are listed here. The entire section may be viewed online at http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm#BK269

⁴⁸ OBCA s.249(4)

⁴⁹ *Alles v. Maurice* (1992) 9 C.P.C.(3d) 42 (Ont. Gen. Div.) (QL)

⁵⁰ *Molinaro v. U-Buy Discount Foods Limited* [2000] O.J. No. 4642 (Ont. Superior Court of Justice)

The management by the Court of shareholder expectations is an important aspect of the oppression remedy. Even at the interim stage of the proceedings, the Court's objective is to main a semblance of the status quo ante even if allegations of oppression have not been fully proved. In *Alizadeh et al. v. Akhavan et al.*⁵¹, a judge of the Ontario Superior Court restored historic payments of management fees to an equal shareholder pending trial without drawing any conclusions about the merit of the oppression allegations.

Use of the Oppression Remedy by Non-Shareholders

As set out above, the definition of "complainant" under the derivative action and oppression remedy is extremely broad, including current and former shareholders, current or former directors and officers, and "any other person who, in the discretion of the court, is a proper person" to bring the application.⁵²

In *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*,⁵³ an Alberta case examining the scope of an identical oppression remedy provision in the Alberta statute, the Court identified two circumstances under which a creditor could be considered a "proper person" to bring an application:

- (a) where the directors or management of the corporation have used the corporation as a vehicle for committing fraud upon the applicant; and

⁵¹ *Alizadeh v. Akhavan* [2004] O.J. No. 2147 (Jarvis J.) (Ont. Superior Court)

⁵² OBCA s.245

⁵³ [1988] A.J. No. 511 (Alta. Q.B.) (QL)

- (b) where the directors or management of the corporation have breached the underlying expectations of the applicant arising from the circumstances in which the applicant's relationship with the company arose.

On the basis of these principles, the oppression remedy has been available to a trade creditor where the corporation had taken actions to conceal its insolvency,⁵⁴ and to a wrongfully dismissed employee against former directors where a corporate reorganization resulted in the corporation which paid the employee's salary ceasing to exist.⁵⁵

Oppression and Arbitration

In *Deluce Holdings Inc. v. Air Canada*⁵⁶, the court was asked to examine in what circumstances, if any, oppressive conduct could operate to postpone arbitration proceedings, which were mandatory under the terms of a shareholders' agreement. In that case, a shareholders' agreement provided for arbitration for disputes as to value of the shares held by each of the parties in Air Ontario, a regional carrier for Air Canada. The valuation provision was triggered by the termination of Deluce from his employment as CEO, which was effected by Air Canada (the majority shareholder) in an effort to obtain 100% control of Air Ontario and to reorganize its corporate operations.

⁵⁴ *C.C. Petroleum v. Allen et al.* [2002] O.J. No. 2203 (S.C.J.) (QL)

⁵⁵ *Downtown Eatery (1993) Ltd. v. Ontario* [2001] O.J. No. 1879 (C.A.) (QL)

⁵⁶ (1992) 98 D.L.R. (4th) 509 (Ont. Gen. Div.) (QL)

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

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

Investigations

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

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

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

An application for an investigation may be brought by a shareholder without notice to the corporation.⁵⁷ To balance the needs of the shareholders with the ability of management of the corporation to effectively conduct the business, the hearing of an application under section 161(2) is closed to the public⁵⁸ and is subject to a publication ban.⁵⁹

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

The investigation provisions provide that the court may make any order it thinks fit and proceed to enumerate twelve specific orders that may be made by the court.⁶⁰ The most

⁵⁷ OBCA s.161(1)

⁵⁸ OBCA s.161(5)

⁵⁹ OBCA s.161(6)

⁶⁰ OBCA s.162(1)

important of these is obviously the order to investigate.⁶¹ The other listed orders are ancillary to this general order, generally focusing on the appointment of the investigator and the powers of the inspector once appointed. For example, the investigator may, if so ordered:

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

Although the investigation remedy could be of great assistance to shareholders, the courts have traditionally been reluctant to order an investigation unless a shareholder can demonstrate that the information was not available through other means.⁶²

Appraisal Remedy

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

- (a) where shareholders are granted rights of dissent upon certain fundamental changes. These changes include amendments to articles, amalgamations, and sales of all or substantially all of the assets of the corporation;⁶³

⁶¹ OBCA s.162(1)(a). s.162(1) is online at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90b16_e.htm#BK178

⁶² *Re Royal Trustco Ltd. (No.3)* (1981) 14 B.L.R. 307 (Ont. S.C.) (QL)

⁶³ OBCA s.185(1)

- (b) compulsory acquisitions, which arise where a person making a take-over bid purchases 90% or more of the shares of a particular class;⁶⁴ and
- (c) shareholder's right to request acquisition where he holds 10% or less of the outstanding shares of a particular class.⁶⁵

The OBCA sets out the procedural steps and timelines under which each appraisal remedy may be exercised, which are beyond the scope of this paper to discuss. In *Re Domglas Inc.*,⁶⁶ the Quebec Superior Court held that "fair value" is the just and equitable value of the shares. The Court identified four methods to assess value:

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

Winding-up

The dissolution order is "the most drastic form of shareholder relief".⁶⁷ The OBCA, like other corporate statutes, sets out a number of circumstances under which a court may order a winding-up of the corporation.⁶⁸ These include where an oppression remedy

⁶⁴ OBCA s.188(1)

⁶⁵ OBCA s.189(1)

⁶⁶ (1980) 13 B.L.R. 135 (Que. S.C.); aff'd 138 D.L.R.(3d) 521

⁶⁷ (1980) 13 B.L.R. 135 (Que. S.C.); aff'd 138 D.L.R.(3d) 521

⁶⁸ Ziegel, *supra* f.n. 3 at 1290

claim has been met, where unanimous shareholder agreements provide the shareholder with rights to make an application and, perhaps most importantly, where it is "just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up."⁶⁹ The court may make any order it thinks fit in connection with an application for winding-up.⁷⁰

The courts have, in the exercise of their powers under the "just and equitable" doctrine, made it abundantly clear that each case must be determined on its own facts. There emerge from the cases four situations in which the "just and equitable" rule will be applied:⁷¹

- disappearance of substratum: this involves a failure of the fundamental objectives of the corporation. The cases fall into three categories:
 - the subject matter of the company is gone,
 - the object for which it was incorporated has substantially failed, or
 - it is impossible to carry on the business of the corporation except for at a loss;⁷²
- justifiable lack of confidence in the management of the corporation;
- deadlock; and
- the partnership analogy.⁷³

⁶⁹ OBCA s.207(1)

⁷⁰ OBCA s.207(b)(iv)

⁷¹ OBCA s.207(2)

⁷² Peterson, *supra* note 4 at 20.36. See also *Giannotti v. Wellington Enterprises Ltd.* [1997] O.J. No. 574 (Ont. Gen. Div.) (QL), where the corporation was wound up because the company had no reason to exist once its assets were distributed.

⁷³ *Ebrahimi v. Westbourne Galleries Ltd.* [1972] 2 All E.R. 492 (H.L.)

Conclusion

As noted in the introduction, a fundamental point in corporate law is the struggle to balance the protection of corporate stakeholders and the ability of management to conduct the affairs of the company in an efficient manner without undue interference. Shareholders and other interested or affected parties are therefore provided with certain rights and remedies under corporate law, all of which attempt to foster this balance.

Toronto, March, 2005.