BAD FAITH AND THE OPPRESSION REMEDY: UNEASY MARRIAGE, OR AMICABLE DIVORCE?

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Courts have disagreed on the issue of whether a demonstration of bad faith is an essential element of the plaintiff's cause of action under the corporate oppression remedy. The better argument is that bad faith is not an indispensable element of the cause of action. This conclusion receives jurisprudential support in the history of the common law preceding the enactment of the statutory oppression remedy, and in the purpose and function of the oppression remedy. It is also supported normatively, in that the plaintiff's injury and need for corrective action does not depend on the presence or absence of bad faith on the part of the defendant.

Introduction

An important question under the oppression remedy, and one to which the courts have not given consistent answers, is whether a showing of bad faith is an integral part of an oppression action. The question is important because cases may arise where bad faith does not exist or cannot be proven, but where impugned conduct appears to lead to an unfair result. For example, consider a case where a corporation finds it difficult to raise new equity capital because of heavy preferred share arrearages. The corporation has an outstanding offer from an institutional investor to make a large infusion of equity capital by way of a private placement, but only on condition that the arrearages be reduced or eliminated. The directors, acting honestly
in what they believe to be the best interests of the corporation, propose an amendment to the articles that will wipe out all arrearages not paid within three years of accrual. The amendment is approved by common shareholders and, as required by statute, by the preferred shareholders. However, the amendment would not have been adopted save for the affirmative votes of one preferred shareholder who is also the largest common shareholder. Moreover, as a result of the transaction, the market price of the preferred shares drops while that of the common shares rises. In these circumstances, a requirement to show bad faith may bar an action by a dissenting preferred shareholder to block the elimination of arrearages. And yet, one could easily take the view that the preferred shareholders have been unfairly treated, and are deserving of some remedy. Indeed, there is common law precedent for excluding the votes of an interested

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1 See, for example, Ontario Business Corporations Act (OBCA), S.O. 1982, c. 4, s. 169(1)(c)(i); Canada Business Corporations Act (CBCA), R.S.C. 1985, c. C-44, s. 176(1)(c)(i).


3 I have not overlooked the fact that dissentients in this situation will likely have an appraisal remedy available to them. See, for example, OBCA, *supra*, footnote 1, s. 184(2); CBCA, *supra*, footnote 1, s. 190(2). However, the appraisal remedy is not entirely leakproof and cases may arise where fundamental transactions having a significant impact on security values do not yield an appraisal remedy for all claimants. See, for example, OBCA, s. 184(2)(a); CBCA, s. 190(2)(a). Moreover, it is not clear that the availability of an appraisal remedy should preclude the availability of other relief in all circumstances. See J. Vorenburg, Exclusiveness of the Dissenting Stockholder's Appraisal Right (1963-64), 77 Harv. L. Rev. 1189; N.D. Lattin, Minority and Dissenting Shareholders' Rights in Fundamental Changes (1958), 23 Law & Cont. Prob. 307; Note (1979-80), 84 Dick. L. Rev. 543. Judicial and administrative authority in Canada favour the proposition that the availability of an appraisal right is not exclusive of other redress. See, *Re Brant Investments Ltd. and Keeprite Inc.* (1983), 5 D.L.R. (4th) 116, 44 O.R. (2d) 661 (Ont. H.C.); *Re Brant Investments Ltd. and Keeprite Inc.* (1987), 42 D.L.R. (4th) 15, 60 O.R. (2d) 737 (Ont. H.C.); *In The Matter of M. Loeb, Limited and In The Matter of Loebex, Limited* (1978), O.S.C. Bull. 333; *Re Palmer and Carling O'Keefe Breweries of Canada Ltd.* (1989), 56 D.L.R. (4th) 128, 67 O.R. (2d) 161 (Ont. Div. Ct.). But cf. *McConnell v. Newco Financial Corporation* (1979), 8 B.L.R. 180 (B.C.S.C.); *Jepson v. The Canadian Salt Company Ltd.* (1979), 7 B.L.R. 181 (Alta. T.D.) (both containing obiter remarks that suggest that the appraisal remedy is the shareholder's exclusive redress where available). See, generally, J.G. MacIntosh, The Shareholders' Appraisal Right in Canada: A Critical Reappraisal (1986), 24 Osg. H.L.J. 201, at p. 205.

4 The facts of *Palmer v. Carling O'Keefe Breweries of Canada Limited, and Elders IXL Limited* (1987), 37 B.L.R. 316 (Ont. S.C.), rev'd sub nom. *Re Palmer and Carling O'Keefe Breweries of Canada Ltd.* (Div. Ct.), *supra*, footnote 3, provide a good illustration of the differing views that objective observers may take of the fairness of a transaction not entirely dissimilar from that discussed in the text. The lower court was persuaded of the fairness of the transaction and held that it was fair and not oppressive. The Divisional Court reversed, holding that the transaction was unfairly prejudicial to preferred shareholders.
shareholder even where the vote is effected in strict accord with statutory requirements.\(^5\)

My aims in writing this article are three. First, to outline a reasoned framework of analysis; second, to demonstrate the existing state of doctrinal confusion; and third, to suggest that the oppression remedy ought not, on both jurisprudential and normative grounds, be read to require a showing of bad faith.

I. A Framework for Analysis

At the highest level of generality, there are two main ways of viewing the oppression remedy. One—the subjective view—is that a finding of liability requires a showing of bad faith on the part of the wrongdoer. The other—the objective view—is that an oppressive\(^6\) result will ground liability. But delving beyond this level of generality reveals that the interplay between these two theories can generate a variety of hybrid theories that merit consideration, and that achieve representation in the case law. For example, it could be the case that either a showing of bad faith or an unfair result will establish liability. Alternatively, liability could be premised on a demonstration of both bad faith and an unfair result. A convenient way of summing up the possibilities is to enumerate the various possible views of the necessary and sufficient conditions for liability.

Category 1: Bad faith is a necessary, but not sufficient condition for liability

An unfair result is the other necessary (but not sufficient) condition for liability. Together, bad faith and an unfair result are necessary and sufficient to find liability.

Category 2: Bad faith is a necessary and sufficient condition for liability

This implies that an unfair result is neither a necessary nor a sufficient condition for liability. There are two variations of this case.

Variation 1

An unfair result is evidence supporting the plaintiff's case. For example,

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\(^6\) Unless otherwise indicated, I use the word "oppressive" in its broadest sense, meaning conduct that is oppressive, unfairly prejudicial, or that unfairly disregards the interests of the petitioner.
if a share recapitalization can be shown to achieve an unfair result, this might lead to a strong inference of bad faith.

**Variation 2**

The issue of good faith is the exclusive focus of the inquiry. The question of unfair result is one considered only at the stage of determining an appropriate remedy.

**Category 3: Bad faith is a sufficient, but not necessary condition for liability**

Under this approach, an unfair result is also a sufficient, but not a necessary condition for liability. The necessary condition for liability is therefore that there be either bad faith or an unfair result.

**Category 4: Bad faith is neither a necessary nor sufficient condition for liability**

This implies that an unfair result is both necessary and sufficient to make out a case of oppression. However, there are two variations of this case.

**Variation 1**

Bad faith is evidence supporting the plaintiff's case. For example, if a share recapitalization can be shown to be in bad faith (and, not entirely equivalently, perhaps lacking a business purpose) this might lead to a strong inference of unfair result.

**Variation 2**

The issue of unfair result is the exclusive focus of the inquiry. The question of good or bad faith is irrelevant to liability and is considered (if at all) only at the stage of determining an appropriate remedy.\(^7\)

**Category 5: Indeterminate**

Because of the difficulties of accurately characterizing all of the cases, I have created a fifth category, which I shall simply label "indeterminate". A case in this category is typically a case which holds that no oppression occurred. A finding of fact that a defendant acted in good faith is listed with other factors as a reason for declining to find oppression. Thus, it

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\(^7\) The combinations that lead to liability can also be expressed in terms of whether or not an unfair result is a necessary and/or sufficient condition for liability. These categories are numbered 5-8 as follows.

**Category 5: unfair result is a necessary, but not sufficient condition for liability**

Bad faith is the other necessary (but not sufficient) condition for liability. Together, an unfair result and bad faith are necessary and sufficient to find liability. Category 5 is identical to category 1.

**Category 6: unfair result is neither a necessary nor sufficient condition for liability**

This implies that bad faith is both necessary and sufficient. However, there are two variations.
is clear that the issue of bad faith assumes some importance, but it is
difficult to ascribe to it any specific legal role.

The following matrix illustrates the comparative results under all four
categories of rule, in all possible situations.

<table>
<thead>
<tr>
<th>BAD FAITH, BUT NO UNFAIR RESULT</th>
<th>UNFAIR RESULT, BUT NO BAD FAITH</th>
<th>BOTH UNFAIR RESULT AND BAD FAITH</th>
</tr>
</thead>
<tbody>
<tr>
<td>CATEGORY 1</td>
<td>no liability: costs to defendant</td>
<td>no liability: costs to defendant</td>
</tr>
<tr>
<td></td>
<td></td>
<td>liability: costs to plaintiff</td>
</tr>
<tr>
<td>CATEGORY 2*</td>
<td>liability, but nominal damages only: costs to plaintiff</td>
<td>no liability: costs to defendant</td>
</tr>
<tr>
<td>CATEGORY 3</td>
<td>liability, but nominal damages only: costs to plaintiff</td>
<td>liability: costs to plaintiff</td>
</tr>
<tr>
<td>CATEGORY 4**</td>
<td>no liability: costs to defendant</td>
<td>liability: costs to plaintiff</td>
</tr>
<tr>
<td></td>
<td></td>
<td>liability: costs to plaintiff</td>
</tr>
</tbody>
</table>

* For convenience of exposition, the two variations are collapsed into one on the assumption that the court is unwilling to draw an inference of bad faith from the finding of an unfair result.

** For convenience of exposition, the two variations are collapsed into one on the assumption that the court is unwilling to draw an inference of unfair result from the finding of bad faith.

**Variation 1**

Unfair result is merely evidence supporting the plaintiff's case. For example, if a share recapitalization can be shown to lead to an unfair result this might lead to a strong inference of bad faith.

**Variation 2**

The issue of unfair result is simply irrelevant to the issue of liability (it might still be relevant at the remedies stage). Category 6 is identical to category 2.

**Category 7: unfair result is a sufficient, but not necessary condition for liability**

Under this approach, bad faith is also a sufficient, but not a necessary condition for liability. The necessary condition for liability is therefore that there be either an unfair result or bad faith. Category 7 is identical to category 3.

**Category 8: unfair result is a necessary and sufficient condition for liability**

This implies that bad faith is neither a necessary nor sufficient condition for liability. There are two variants to this category.

**Variation 1**

Bad faith is merely evidence supporting the plaintiff's case.

**Variation 2**

The issue of bad faith is simply irrelevant. Category 8 is identical to category 4.

Since these categories are the mirror images of the categories enumerated in the text, they will not be discussed further.
As the matrix shows, the primary cleavage is between categories 1 and 2 on the one hand, and 3 and 4 on the other. The only difference between categories 1 and 2 arises in a situation where there is bad faith, but no unfair result. In such a case, a category 1 rule yields no liability, with the result that costs are awarded to the defendant. Under category 2, there is liability, but only nominal damages because of the absence of an unfair result. The difference arises in the disposition of costs: under category 2, the plaintiff will normally be awarded costs in view of her success. However, since costs are purely discretionary, the judge could easily decide that the defendant’s success on the issue of damages or other remedy (that is, unfair result) merits an award of costs in the defendant’s favour. The non-trivial possibility of such an award of costs brings categories 1 and 2 into near (although not perfect) functional equivalence.\(^8\) This equivalence is enhanced by noting that cases in which there is bad faith but no unfair result will be relatively rare, either because the plaintiff will not be moved to sue in the absence of a prejudicial effect, because a defendant acting in bad faith is likely to achieve an unfair result, or for both reasons.\(^9\)

For precisely the same reasons, categories 3 and 4 are nearly equivalent in practice (as will be apparent from the matrix).

Thus, the issue of greatest (although not exclusive) importance is whether a finding of bad faith is a necessary part of the cause of action under the oppression remedy. This is what distinguishes categories 1 and 2 from 3 and 4.

II. A Taxonomy of Cases

A review of the cases dealing with the issue of good faith under the oppression remedy reveals a startling lack of consistency. As I point out in this section, cases can be found that support every theory of liability outlined above.

**Category I**

In one of the most widely cited definitions of “oppression”, Lord Keith in *Elder v. Elder & Watson, Limited*\(^10\) stated that “oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder”. When the leading English case of *Scottish Co-operative Wholesale Society Ltd. v. Meyer*\(^11\)

\(^8\) Of course, the judge could also order that each side bear its own costs, also bringing the rules into near, but not perfect functional equivalence.

\(^9\) This is not to say that such cases will never occur. *Mala fides* on the part of one or more participants in a close corporation, for example, can lead to a loss of confidence as between corporate “partners”. This may in turn lead to the apprehension of future harms and the search for a solution under the oppression provision.


went before the House of Lords, Lord Keith reiterated this definition of oppression. The requirement to show a lack of probity has been repeated in many of the English cases. Subsequent cases have frequently equated a “lack of probity” with an absence of good faith.

A careful reading of these cases, however, emphasizes the importance of a finding of unfair result in determining liability. Although I have therefore nominally classified these holdings under category 1, I have already indicated that whether they are regarded as falling under category 1 or category 2 is not of the highest importance.

Below, I will argue that despite the ostensible importance attached to a finding of bad faith, the English courts have, in substance, applied a test which focuses on the question of unfair result. Thus, it is possible to interpret these holdings as consistent with a category 4 theory of liability. Further, all of the cases I have cited above precede the 1980 amendments to the English oppression provision, and these amendments appear to alter the requirements that are necessary and sufficient to establish liability. I therefore withhold further discussion of these cases until later.

Category 2

The clearest statement of the view that bad faith is both a necessary and sufficient condition to ground liability comes from a number of recent Canadian cases. In *Re Brant Investments Ltd. and Keeprite Inc.*, Anderson J. stated:

> It has been submitted that the granting of the oppression remedy does not require a finding that there has been a want of probity in those responsible for the impugned conduct; that oppression in the result is sufficient. As to that, I have a measure of skepticism. When one examines the facts in the decisions to which I have been referred, in which a remedy was granted, there is always a finding of conduct clearly inconsistent with good faith and honesty.

The court held that a showing of bad faith was a necessary condition to establishing liability under the oppression provision.
The holding in the Brant case was both warmly endorsed and elaborated upon in Re Pizza Pizza Limited.\textsuperscript{17} In embracing the Brant holding, Sutherland J. commented:\textsuperscript{18}

To me it is not at all surprising, given the long tradition in which courts of equity in proper cases would restrain the exercise of common law rights, and given the equitable precursors of the statutory oppression remedies of today, that the courts have looked to the \textit{bona fides} of conduct complained of before they have moved to exercise their formidable discretionary powers under provisions like s.247 [the oppression remedy in the OBCA].

This quotation graphically reveals the pull of the common law on the interpretation of the statutory oppression remedy.

\textit{Category 3:}

\textit{Nystad v. Harcrest Apartments Limited}\textsuperscript{19} is illustrative of category 3. After enumerating examples of conduct found to be "oppressive" under the oppression remedy, McEachern C.J.S.C. said:\textsuperscript{20}

The above examples are by no means exhaustive and, as pointed out by Lord Keith in \textit{Scottish Co-op. [Scottish Co-operative Wholesale Society Ltd. v. Meyer]} "oppression . . . may take various forms", implying that the concept is fairly open-ended. At a minimum, however, it seems there must be an element of lack of probity (adherence to the highest principles and ideals) or fair dealing to a shareholder in the matter of his proprietary rights as a shareholder: per Lord Keith in \textit{Scottish Co-op.}

"Good faith" according to Black's Law Dictionary, 5th ed. (1979), has no technical meaning but is a term used "to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation", or "An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together

\textsuperscript{17} Unreported, Ont. H.C., August 14, 1987. See also, \textit{Palmer v. Carling O'Keefe Breweries of Canada Limited and Elders IXL Limited}, supra, footnote 4, apparently requiring a showing of bad faith, but rev'd on this point by \textit{Re Palmer and Carling O'Keefe Breweries of Canada Ltd}, supra, footnote 3.

\textsuperscript{18} \textit{Re Pizza Pizza Limited}, \textit{ibid.}, at pp. 71-76. See also, \textit{Bank of Montreal v. Dome Petroleum Limited and Amoco Canada Company Limited} (1987), 54 Alta. L.R. (2d) 289 (Alta. Q.B.). In that case Forsyth J. held, \textit{ibid.}, at p. 299, that it was unnecessary for the purposes of the application at hand "to determine that a finding of mala fides or lack of probity is a condition precedent to awarding relief under s. 234 [now s. 241] of the C.B.C.A.". However, he indicated, \textit{ibid.}, at pp. 299-300, that he was "very sympathetic" to the holding of Anderson J. in the \textit{Keeprite} case requiring a showing of bad faith. He also indicated, \textit{ibid.}, at p. 300:

If the finding of mala fides or the lack of probity is not a condition precedent to granting leave under s. 234, C.B.C.A., it would seem to me to take overwhelming evidence of oppression, again using the term in the broad sense, which clearly does not exist in this case, to grant the relief sought.

See also, \textit{H.J. Rai Ltd. v. Reed Point Marina Ltd.} unreported, May 26, 1981 (B.C.S.C.), in which the \textit{bona fides} of the directors in making an issuance of shares appears to have been a key factor in finding that there was no oppression.


\textsuperscript{20} \textit{Ibid.}, at pp. 45-46.
with absence of all information, notice, or benefit or belief of facts which render a transaction unconscientious”. This definition leaves little room for a lack of probity or fair dealing and it therefore appears that there may be no “oppression” remedy open to the injured minority shareholder when the directors have acted in good faith.

However, the statutory oppression remedies in Canada typically contain three substantive grounds: that which is oppressive, that which is unfairly prejudicial, and that which unfairly disregards the interests of the complainant. According to McEachern C.J.S.C., the “unfairly prejudicial” ground sets a lower substantive hurdle than that which is “oppressive”. Under the former, McEachern C.J.S.C. decided that no showing of bad faith need be made. Whereas the focus with regard to “oppression” is on the character of the conduct complained of, it is apparent... that the focus with regard to the “just and equitable” provision (in our Act “unfairly prejudicial”) is on the effect of the injured shareholder of the impugned conduct.

The effect of the holding is as follows. To come under the “oppression” limb of the oppression remedy, it is both necessary and sufficient for the complainant to establish bad faith on the part of the defendant. To come under the “unfairly prejudicial” limb, it is both necessary and sufficient to establish an unfair result. Putting these together, success under the oppression remedy (that is, having regard to the whole of the provision) requires either a showing of bad faith or unfair result. Similarly, it is sufficient if either of these can be demonstrated. The case is thus representative of the category 3 genre.

21 See, for example, OBCA, supra, footnote 1, s. 247(3); CBCA, supra, footnote 1, s. 241(3). Cf., B.C. Company Act (BCCA), R.S.B.C. 1979, c. 59, s. 224, which contains the “oppressive” and “unfairly prejudicial” grounds. The Nystad case was decided under the B.C. legislation.


My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words “just and equitable” and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter
Category 4
There are at least four Canadian holdings that clearly embrace a category 4 theory of the oppression remedy. Two of these are lower court holdings, one is a Divisional Court holding, while one is a Court of Appeal ruling.

In *Low and Anderson v. Ascot Jockey Club Limited*,24 Southin J. said:

> Is the test to be applied objective or subjective—in other words, does it matter whether the acts which were complained of were done deliberately with a view to harming the petitioners or depriving them of their rights or were simply done with a lack of appreciation of the rights of the petitioners? . . .

As to . . . [this] question, I see no reason why the motive or intent of those doing things complained of should be inquired into. What is at issue is the effect of the conduct or acts complained of. Nothing is to be gained by importing notions of malice into this branch of the law. The best way to put my opinion is to say that malice or an intent on the part of the respondents to do harm is not a necessary ingredient of the petitioner’s case at least in circumstances such as those now before me. I do not doubt that there might be cases in which the purpose of the acts complained of would be relevant to determining whether it was oppressive: for instance, if the directors decided not to pay any dividends, an issue might be whether their motive or purpose was to force the minority to sell.

This holding is easily interpreted as embracing category 4, variation 1 (that is, the presence of bad faith is not central, but may be evidence going to the question of unfair result). Another lower court holding reaching a similar result is *Sparling v. Javelin International Ltd.*25

The Saskatchewan Court of Appeal has also embraced this view of the oppression remedy. In overturning the finding of the lower court that...

se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The “just and equitable” provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; consideration, that is, of a personal character arising between one individual and another, which may make it unjust, or unequitable, to insist on legal rights, or to exercise them in a particular way.

What is puzzling about the case is why McEachern C.J.S.C. equates the “just and equitable” ground for winding-up with the “unfairly prejudicial” ground under the B.C. oppression remedy; although see, *Re Peterson and Kanata Investments Ltd. (1975)*, 60 D.L.R. (3d) 527 (B.C.S.C.). As I have noted, however, McEachern C.J.S.C. is not alone in holding that the “unfairly prejudicial” ground sets a lower substantive hurdle than the “oppression” ground. See, *supra*, footnote 22, and accompanying text. Nor is he alone in transporting the reasoning of the *Ebrahimi* case into the context of the oppression remedy. See, MacIntosh, *loc. cit.*, footnote 2, at p. 622-636.


*It is not necessary that oppression and unfair treatment be caused by the deliberate act of the corporation or its directors, nor is it necessary for the unfairness to have...*
no case had been made out under the oppression remedy, Sherstobitoff J.A. held in *Eiserman v. Ara Farms Ltd.*\(^{26}\) that:

The evidence which was disregarded [by the trial judge] was a course of conduct by the majority shareholders which reduced the voice of the appellant in the operation of the farm to a point which he found to be intolerable. And it must be noted that under s. 234, [the oppression provision] the conduct need not be deliberate—it is sufficient if the conduct has the effect of being unfairly prejudicial.

More recently, the Ontario Divisional Court has held in *Re Palmer and Carling O'Keefe Breweries of Canada Ltd.*\(^{27}\) that oppression does not require a showing of bad faith. Two other lower court rulings, one in the Ontario High Court,\(^{28}\) and the other in the British Columbia Supreme Court,\(^{29}\) also appear to adopt a category 4 point of view.

its source in the management of the corporation at all. What is important is the result, not the intent. Thus an applicant does not have to establish bad faith on the part of the corporation's directors or management in order to convince the Court to make an order.


\(^{27}\) *Supra,* footnote 3, at pp. 139 (D.L.R.), 172 (O.R.), reversing the trial judgment (supra, footnote 4). Southey J. for the court found that the directors were not guilty of bad faith, but held that bad faith was not required under the oppression remedy.

\(^{28}\) *Mazzotta v. Twin Gold Mines* (1987), 37 B.L.R. 218 (Ont. H.C.). At issue in *Mazzotta* was an issuance of shares to a company owned by the controlling shareholder, Smerchanski. Before the share issuance, Smerchanski owned or controlled about 39% of the outstanding shares. After the issuance, he owned or controlled about 49%, just shy of *de jure* control. The effect of the issuance was to make Smerchanski's control position effectively unassailable. The issuance was made shortly before an annual meeting at which a proxy battle mounted by the applicants was a distinct possibility. Moreover, the applicants had expressed a desire to purchase more shares, but were not given the opportunity to do so. However, the court found, at p. 226:

...there can be drawn no inference of fraud or improper dealing. I recognize the power of the directors to issue shares for the benefit of the corporation if done honestly and in good faith. I recognize that the issue of the shares herein was in payment of a long standing debt and for the expense necessary for the company to continue. I accept that the issue of shares to Eldorado at the price was reasonable for this purpose.

Nonetheless, the court found that the share issuance was unfairly prejudicial. According to Van Camp J., at p. 227:

The situation here is not so much the question of price that was paid which the applicants have not shown to be unreasonable but rather the question of the respective percentage of shareholdings by each of the shareholders.

In other words, the share issuance affected an unfair result, and that alone was sufficient to move the court to grant a remedy under the oppression provision.

Admittedly, the role of bad faith remains somewhat clouded in the *Mazzotta* case. It is not clear if a showing of bad faith would also be sufficient to ground oppression liability (i.e. category 3, as in *Nystad v. Harcrest Apartments Limited*, supra, footnote 19); if bad faith is merely evidence tending to prove an unfair result (i.e. category 4, variation 1); or, if the issue of *bona fides* is simply irrelevant (i.e. category 4, variation 2). Since there is no indication in the case that bad faith would be sufficient to ground liability, this case appears to fit most comfortably in category 4.

\(^{29}\) *Re B.C. Electric Co. Ltd.* (1964), 47 D.L.R. (2d) 754, at pp. 770-771 (B.C.S.C.) (on facts, however, suggesting that the directors were not acting in good faith).
Before 1980 in England, it was necessary to demonstrate “oppressive”
conduct in the affairs of the company in order to secure a remedy under
the Companies Act.\(^{30}\) In 1980, the legislation was amended so that a
petitioner need only demonstrate that the impugned conduct is “unfairly
prejudicial”.\(^{31}\) At least three cases decided under the new standard have
held that establishing unfairly prejudicial conduct does not require a showing
of bad faith. In *Re Bovey Hotel Ventures Ltd.*\(^{32}\) Slade J. held:

> The test of unfairness must, I think, be an objective, not a subjective one. In other
words it is not necessary for the petitioner to show that the persons who have
had de facto control of the company have acted as they did in the conscious knowledge
that this was unfair to the petitioner or that they were acting in bad faith; the test,
I think, is whether a reasonable bystander observing the consequences of their conduct,
would regard it as having unfairly prejudiced the petitioner’s interests.

This passage was adopted and applied by Nourse J. in *Re R.A. Noble
& Sons (Clothing) Ltd.*\(^{33}\) More recently, in *Re A Company (No. 005134
of 1986), ex parte Harries*,\(^{34}\) Peter Gibson J. clearly adopted a category
4, variation 1 view of the English oppression remedy.\(^{35}\)

### Category 5

It will be recalled that in this category are all those cases which raise
the issue of bad faith, but cannot otherwise be accurately characterized.
I have simply footnoted some of these cases.\(^{36}\)

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\(^{30}\) Companies Act (U.K.), 1948, 11 & 12 Geo. 6, c. 38, s. 210.

\(^{31}\) Companies Act 1980, c. 22, s. 75. Currently, see Companies Act, 1985, c. 6, s. 459.

\(^{32}\) Unreported, Ch. D., July 31, 1981.


\(^{35}\) Peter Gibson J. said, *ibid.*, at pp. 389-390:

> I was taken to a number of authorities on the approach of the court, but there
is no dispute between counsel for Mr. Harries (Mr. Davis) and counsel for the respondents
(Mr. Crow), on the following propositions: (1) The test of unfair prejudice is objective.
(2) It is not necessary for the petitioner to show bad faith. (3) It is not necessary
for the petitioner to show a conscious intention to prejudice the petitioner. (4) The
test is one of unfairness, not unlawfulness. Counsel for the respondents, however,
submitted that because the test is objective it was irrelevant that the respondent may
have acted for an improper purpose or with an improper motive. I do not doubt
that if the objective bystander observes unfairly prejudicial conduct by a respondent
the fact that the respondent had a proper purpose and a proper motive will not
prevent that conduct from falling within the section. But if the objective bystander
observes that the conduct of the respondent was for an improper purpose or with
an improper motive, that may well be a relevant consideration in determining whether
the conduct is unfairly prejudicial. I should also record that counsel for the respondents
did not suggest, in my view rightly, that the conceded invalidity and ineffectiveness
of the allotment meant that the allotment could not amount to unfairly prejudicial
conduct.

\(^{36}\) *Cumberland Holdings Ltd. v. Washington H. Soul Pattison & Co. Ltd.* (1977), 2
A.C.L.R. 307, at p. 318, 13 A.L.R. 561, at pp. 573-574 (P.C.) (failure to establish lack
of probity on the part of the directors is a factor in finding no oppression); *Sparling v.
III. Analysis

In this section, I will argue that those cases adopting a category 3 or category 4 approach are both jurisprudentially and normatively sounder than those cases adopting a different point of view.

A. Why the Bad Faith Theory Fails

There are three vital jurisprudential underpinnings to the argument that the oppression provision requires a showing of bad faith (categories 1 and 2). One is the English oppression cases preceding the 1980 amendment to the English Companies Act. The second is the ruling of the Ontario Court of Appeal in Ferguson v. Imax Systems Corp. Ltd.\textsuperscript{37} The third is the common law of fiduciary duties. I will deal with each of these in turn.

The quickest way to dispose of the pre-amendment English cases is to note that they deal only with that which is “oppressive” and not with the broader Canadian statutory standards of conduct that is “unfairly prejudicial” or that “unfairly disregards the interests of” the petitioner. Numerous cases have held that these latter two standards set a lower threshold of liability than that which is oppressive.\textsuperscript{38} Perhaps more to the point, three post-amendment English cases have specifically held that the lower threshold rests on a requirement to show an unfair result, rather than bad faith.\textsuperscript{39}


\textsuperscript{38} Supra, footnotes 19-23, and accompanying text.

\textsuperscript{39} Supra, footnotes 30-35, and accompanying text.
But more than this, I will argue that the main focus of even the pre-amendment cases was an unfair result, rather than bad faith. Although Lord Keith’s statement in *Elder v. Elder & Watson, Limited* that “oppression involves, I think, at least an element of lack of probity or fair dealing” has often been repeated, a closer reading of the English cases indicates that the question of unfair result assumes central importance. *Re H.R. Harmer Ltd.*, a decision of the Court of Appeal, is illustrative. Jenkins L.J. quoted with apparent approval Lord Keith’s statement in *Elder*. However, in the same judgment, he stated: “It seems to me the result rather than the motive is the material thing.” This suggests that “lack of probity” includes conduct that is objectively, and not merely subjectively wrongful. Willmer L.J. was even more forthcoming on this point. He stated:

For myself, I doubt very much whether it makes very much difference whether the father did or did not know that he was exceeding his powers, because, in the view which I take, oppressive conduct would not cease to be oppressive merely if it were unconscious, although, of course, it may be said—if I may be forgiven for once more borrowing a phrase used in connexion with a matrimonial case—that which is done consciously strikes with a sharper edge. It seems to me that the question whether the conduct complained of was conscious or unconscious is more material on the question of what relief ought to be accorded. If, as the learned judge thought, the father persisted in his conduct well knowing it to be wrong, there can, of course, be less assurance of the discontinuance of such conduct in the future, and therefore, possibly all the more need for a stringent order to protect the interests of the shareholders.

Willmer L.J.’s statement clearly expresses a category 4 view of the oppression remedy.

Further indications that the oppression remedy has been objectively applied can be found in the Court of Appeal in *Re Jermyn Street Turkish Baths Ltd.* After citing with approval Lord Keith’s definition of oppression, Buckley L.J. said:

In other words, the petitioner has to go beyond making out a case for winding-up on the *Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426 principle, and establish some element of lack of probity or fair dealing to him in his capacity as a shareholder in the company.

Plowman J. appears to take a more strictly subjective view of Lord Keith’s statement, a view also apparently endorsed in *Re Westbourne Galleries Ltd.*, supra, footnote 12, at pp. 1387 (W.L.R.), 381-382 (All E.R.).

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40 Supra, footnote 10, and accompanying text.
41 Supra, footnote 12, and accompanying text.
42 Supra, footnote 12.
43 Ibid., at pp. 84 (W.L.R.), 704 (All E.R.).
44 Ibid., at pp. 91-92 (W.L.R.), 710 (All E.R.). Although see, *Re Lundie Brothers Ltd.*, supra, footnote 12, at pp. 1057-1058 (W.L.R.), 699 (All E.R.), where Plowman J. held:

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45 Supra, footnote 12.
46 Ibid., at pp. 1060 (W.L.R.), 199 (All E.R.). (Emphasis added). Admittedly this passage is not entirely without ambiguity, since the word “overbearing” might conceivably
We do not say that this is necessarily a comprehensive definition of the meaning of the word "oppressive" in section 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for the present purpose. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

As a general matter, those who are guilty of *mala fides* are rarely forthcoming about their state of mind, nor will there usually be a documentary trail memorializing a wrongful intent. Thus, bad faith must be inferred from objective evidence. The more objectively unfair the conduct appears, the more likely it is that bad faith will be inferred. A finding of bad faith is thus likely to be little more than a statement that the conduct in question is sufficiently egregious to warrant a remedy. Those cases under the English oppression remedy in which liability resulted are clearly cases of such egregious conduct. For example, in *Re H.R. Harmer Ltd.*, the irascible founder of the company purported to arrogate to himself powers of management without the sanction, and indeed contrary to the wishes of the board of directors and the other shareholders. In *Scottish Co-operative Wholesale Society v. Meyer* the majority shareholder ran the company into the ground with a view to destroying the business (and, in essence, appropriating the value of the company to itself). Other cases that do not find liability are cases that do not evince objectively unfair conduct of an equally compelling nature or are cases in which an appropriate remedy was granted on other grounds.

One might easily question if the *Elder* case itself stands for the proposition that bad faith is required to succeed under the oppression remedy. As widely cited as Lord Keith’s definition of oppression has become, it

be interpreted as importing the notion of *mala fides*. However, the word “overbearing” is used in relation to an “act or attitude”, suggesting that an overbearing act may occur without there being an overbearing attitude, i.e. bad faith.

47 Supra, footnote 12.

48 Supra, footnote 11.

49 See, for example, *Elder v. Elder & Watson*, supra, footnote 10 (disagreement about matters of business policy at the root of the difference between the parties); *Re Jermyn Street Turkish Baths Ltd.*, supra, footnote 12 (acts of majority shareholder towards minority found to be reasonable and defensible on an objective basis); *In re Five Minute Car Wash Service Limited*, supra, footnote 12 (disagreement over matters of business policy). Although the *Elder* and *Jermyn* cases contain some conduct which might today be found to be deserving of a remedy under the oppression provision, it does seem clear that these cases present less compelling facts than those cases in which liability was found. Further, the failure to grant a remedy can easily be attributed to judicial reluctance to give the oppression remedy an overbroad coverage, rather than to the presence or absence of bad faith.

50 See, for example, *Re Lundie Brothers Ltd.*, supra, footnote 12 (winding-up on the just and equitable ground); *Re Westbourne Galleries Ltd.*, supra, footnote 12 (in which the plaintiff appealed the denial of an order on the just and equitable ground for winding-up, ultimately successfully; see *Ebrahimiv. Westbourne Galleries*, supra, footnote 23).
must share equal billing with another oft-cited definition propounded by Lord Cooper:  

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

This appears to be an objective test. No mention is made of the absence of good faith. Rather, an external reference point—the standards of fair dealing—serves as the pivotal concept. A failure to deal fairly may, but need not be inspired or accompanied by *mala fides*.

It may be true that the cases I have dealt with actually involved some degree of *mala fides*. Indeed, it may be true, as suggested 52 in *Re Brant Investments Ltd. and Keeprite Inc.* 53 and *Re Pizza Pizza Limited*, 54 that most successful oppression actions have involved some element of bad faith (whether or not bad faith was found as a fact by the court). 55

This is, however, both jurisprudentially and normatively irrelevant. As regards the former, I have already shown that the focus of the leading English oppression cases has been on unfair conduct. The fact that bad faith may have been present in these cases cannot by itself elevate bad faith into an indispensable element of a successful oppression action. As regards the normative question of what the law *ought* to be when we encounter a case of good faith but unfair result, it can surely be of little consequence that past cases have generally involved bad faith. To require bad faith simply because it is normally present in cases involving an unfair result would be to employ a very strange (and strained) logic.

Thus, in my view, undue weight has been attached to Lord Keith’s definition of oppression in the *Elder* case. An examination of the pre-amendment English cases reveals that the focal point of the analysis is the element of unfair result. A finding of bad faith is a derivative, and not a constituent element. “Lack of probity” appears to have been given by some courts a more subjective interpretation than was originally intended.

The second jurisprudential underpinning to the argument that the oppression provision requires a showing of bad faith is the ruling of the Ontario Court of Appeal in *Ferguson v. Imax Systems Corp. Ltd.* 56 The decision looms large because it was relied upon both by Anderson J. in

51 See, Elder v. Elder & Watson, supra, footnote 10, at p. 55.
52 Supra, footnotes 16-18, and accompanying text.
53 Supra, footnote 3.
54 Supra, footnote 17.
55 It cannot be said, however, that all successful oppression cases have involved an element of bad faith. One case finding good faith but oppressive conduct is *Re Palmer and Carling O’Keefe Breweries of Canada Ltd.* (Div. Ct.), supra, footnote 3.
56 Supra, footnote 37.
Re Brant Investments Ltd. and Keeprite Inc.,\textsuperscript{57} and Sutherland J. in \textit{Re Pizza Pizza Limited}\textsuperscript{58} as the foundation for the argument that the oppression remedy requires a showing of bad faith.\textsuperscript{59} The passage these cases rely upon is the following:\textsuperscript{60}

The policy of the law to ensure just and equitable treatment of minorities can be traced back to early cases. In \textit{Allen v. Gold Reefs of West Africa, Ltd.}, [1900] 1 Ch. 656, at p. 671, Lindley M.R. speaking of the powers of a corporation to amend its articles, said:

\ldots it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also \textit{bona fide} for the benefit of the company as a whole, and it must not be exceeded.

In \textit{Goldex Mines Ltd. v. Revill et al.} (1974), 7 O.R. (2d) 216 at p. 224, 54 D.L.R. (3d) 672 at p. 680, Arnup J.A. for this court, after considering the earlier cases, said:

The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important—that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice and when the test of fairness is not met, the equitable jurisdiction of the court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused.

But s. 234 must not be regarded as being simply a codification of the common law. Today one looks to the section when considering the interest of the minority shareholders and the section should be interpreted broadly to carry out its purpose; see the \textit{Interpretation Act}, R.S.C. 1970, c. I-23, s. 11. Accordingly, when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such. \textit{In addition, the court must consider the \textit{bona fides} of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholders}. Counsel has referred us to a number of decisions. They establish primarily that each case turns on its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another.

In \textit{Pizza Pizza} and \textit{Brant}, these remarks were interpreted as a requirement that bad faith be present to found an oppression action. But this reading is far from inevitable. In my view, the court's comments can just as easily be interpreted as assigning a merely evidentiary role to the question of \textit{bona fides} (that is, category 4, variation 1). The fact that the issue of \textit{bona fides} must be "considered" is hardly dispositive of what role this factor is to assume. Assigning a purely evidentiary role to the

\textsuperscript{57} \textit{Supra}, footnote 3.

\textsuperscript{58} \textit{Supra}, footnote 17.

\textsuperscript{59} \textit{Bank of Montreal v. Dome Petroleum Limited and Amoco Canada Company Limited}, \textit{supra}, footnote 18, adopting (in \textit{obiter}) the view that the oppression remedy requires a showing of bad faith, in turn relies upon the \textit{Keeprite} case. Thus, the oracle at the source of this jurisprudential current is clearly the \textit{Imax} case.

\textsuperscript{60} \textit{Supra}, footnote 37, at pp. 726-727 (D.L.R.), 137 (O.R.). (Emphasis added).
issue of *bona fides* involves a *consideration* of the question of *bona fides* as much as a requirement that bad faith be present. Moreover, Brookes J.A. suggested that the question of *bona fides* is relevant "to determine whether the act of the corporation or directors *effects a result* which is oppressive or unfairly prejudicial to the minority shareholders".\(^6\) This appears to assign a central role to the question of unfair result, rather than bad faith. This conclusion is further buttressed by noting that the quotation from the *Goldex* case referred to in the passage above makes the "test of fairness" the controlling element.

The third factor leading some courts to conclude that the oppression remedy requires evidence of bad faith is the pre-oppression remedy history of the common law.\(^6\) Reliance on the common law for this purpose, however, is seriously misplaced. First, it is absolutely clear that at common law proof of a breach of fiduciary duty is not uniquely conditioned on a demonstration of bad faith. Under the "proper purpose" doctrine, for example, directors might be found to have breached their fiduciary duties to the company despite a finding of fact that they were acting honestly, in good faith, and with a view to the best interests of the company.\(^6\)

More generally, a common thread runs through cases dealing with fiduciary duties; directors (and other fiduciaries) violate these duties when they place themselves in a position where their self-interest conflicts with that of the principal (the "conflict rule"). This rule is aptly summarized by Lord Cranworth L.C. in this passage from *Aberdeen Railway Co. v. Blaikie*:\(^6\)

A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

The conflict rule has been applied, *inter alia*, in leading cases dealing with interested directors' transactions,\(^6\) corporate opportunities,\(^6\) and the

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\(^6\) Ibid. (Emphasis added).

\(^6\) See, for example, *Re Pizza Pizza Limited*, supra, footnote 17, and accompanying text.

\(^6\) See, for example, *Howard Smith Ltd. v. Ampol Petroleum Ltd.*, [1974] A.C. 821, [1974] 1 All E.R. 1126 (P.C.); *Hogg v. Cramphorn Ltd.*, [1967] Ch. 254, [1966] 3 All E.R. 420 (Ch. D.); *Bonisteel v. Collis Leather Co. Ltd. (1919)*, 45 O.L.R. 195 (Ont. H.C.). In theory, the proper purpose doctrine attaches to the exercise of any of the powers of the directors. Most of the cases on point are, however, concerned with an issuance of shares made with the intention of enhancing an existing position of control, or defeating an existing or threatened control position.


\(^6\) Ibid.

duty not to compete with the principal. The principle of fiduciary obligation has also sometimes been said to be that no fiduciary may make profits, other than agreed upon remuneration, in connection with the prosecution of her duties (the "profit rule"). Whether these two rules are independent formulations of liability or simple mirror images of one another, it is clear that neither rests on a demonstration of bad faith.

It is therefore abundantly clear that a showing of bad faith is not a sine qua non to a common law action for breach of fiduciary duty. The common law courts did indeed require that corporate fiduciaries act in good faith and in the best interests of the company. However, the source of the confusion lies in mistaking that which is merely a sufficient condition for liability as a necessary condition. A plaintiff might succeed by demonstrating either an absence of good faith, or an improper purpose, or a violation of the conflict or profit rules. Cast in the terminology I have adopted for this article, the mistake is to assume that the common law falls within category 2, while in fact it falls within category 3.

Thus, if the oppression action is to be regarded as drawing its inspiration from the common law of fiduciary duties, this suggests that bad faith is at most a sufficient cause for finding a violation of the oppression provision.

Finally, it has been repeatedly held that the oppression remedy is not in fact to be regarded as simply a codification of the common law. Thus, even if it were true that malafides were an essential part of a common law action, this requirement could not simply be transplanted into the oppression remedy.

B. Why the Unfair Result Theory Succeeds

If the jurisprudential foundation of the "bad faith" school is exceedingly

69 Allen v. Gold Reefs of West Africa, Ltd., supra, footnote 2, and the passage cited in the text at footnote 60, for example, require that the power to alter the corporate articles be exercised "bona fide in the best interests of the company as a whole". A similar requirement has been imported into cases dealing with director's remuneration; see, e.g., Re W. & M. Roith Ltd., [1967] 1 W.L.R. 432, [1967] 1 All E.R. 427 (Ch. D.); Re Lee, Behrens & Co., Ltd., [1932] 2 Ch. 46 (Ch. D.). See, generally, L.C.B. Gower, Gower's Principles of Modern Company Law (4th ed., 1979), pp. 576-580; MacIntosh, loc. cit., footnote 2.
70 Professor Gower, ibid., p. 576, notes that directors will also be held to have violated their fiduciary duties despite acting in good faith if they are guilty of an impermissible delegation of powers.
weak, the foundation upon which the "unfair result" school rests is correspondingly strong. In this section I will argue that statutory interpretation points strongly to the absence of a bad faith requirement. I will also suggest that a bad faith requirement would be inconsistent with the general drift of corporate law towards protection of the reasonable expectations of shareholders.

Subsection 122(1) of the Canadian Business Corporations Act and similar provisions of cognate statutes require that "[e]very director and officer of a corporation in exercising his powers and discharging his duties shall (a) act honestly and in good faith with a view to the best interests of the corporation...". This is a subjective test that makes bad faith the central element of a breach of fiduciary duty. By contrast, the oppression provision makes no reference at all to acting in "good faith", "honestly" or "with a view to the best interests of the corporation". Rather, it creates liability for conduct that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of" the complainant. This suggests that, while bad faith may be a key element of breach of the statutory fiduciary duty, it forms no part of the oppression action. This conclusion is fortified by reference to the Dickerson Report. In drafting the fiduciary duty provision of the Canadian Business Corporations Act, the Dickerson Committee left no doubt of its intention to eliminate the proper purpose doctrine (which required no showing of bad faith) and substitute a single test for liability with an "emphasis upon good faith". Having done so in a conscious and deliberate manner, it does not seem tenable that the Committee would forget to include a requirement to show bad faith in the oppression provision if it was its intention that such a requirement be an intrinsic and indispensable part of the cause of action. Moreover, the Committee adopted Lord Cooper's definition of oppression (focusing on the question of fairness), rather than Lord Keith's definition (requiring

72 Supra, footnote 1.

73 (Emphasis added). See, for example, CBCA, ibid., s. 241(2), which is substantially the same as that recommended in R. Dickerson, J.L. Howard and L. Getz, Proposals for a New Business Corporations Law for Canada (Information Canada, 1971) (the "Dickerson Report"), vol. 2, Draft Act, cl. 19.04.

74 Ibid.

75 Ibid., vol. 1, para. 241. See also paras. 236-240 and vol. 2, Draft Act, cl. 9.19. The proper purpose doctrine is referred to by the Dickerson Committee as the "collateral purpose" doctrine.

76 It is unfortunate that the Committee did not comment directly on this point. Nor does the report indicate the "mischief" sought to be remedied by the inclusion of this powerful new remedy. There are indications in the report, however, that the Committee viewed the common law as an inadequate protection for shareholders and likely saw the oppression remedy as a response to this inadequacy; ibid., vol. I, paras. 344-347 (re the appraisal remedy). This view of the "mischief" of the oppression provision would suggest that the drafters intended it to have a wider substantive scope than the action for breach of fiduciary duty. The latter proposition is given strong support in that the Committee viewed the oppression remedy as imposing a fiduciary duty on shareholders, even though
“lack of probity” to make out a cause for action). All of these facts point to the omission of a bad faith requirement under the oppression provision.

One of the most significant recent trends in Canadian corporate law is the recognition that legal rights may derive from the reasonable expectations of shareholders regarding their relationship to other corporate constituents. This trend can, in no small measure, be traced to the following statement of Lord Wilberforce in the signal case of Ebrahimiv. Westbourne Galleries Ltd.: 78

... a limited company is more than a mere judicial entity, with a personality in law of its own; ... there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. ... The ‘just and equitable’ provision does not ... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations. that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

The Ebrahimii expectations principle is now clearly part of Canadian law dealing with the oppression remedy. 79 Protection of the reasonable expectations of shareholders (and others) would be severely attenuated if such protection were to be subject to the proof of bad faith in the putative wrongdoer. A reasonable expectation may be disappointed no matter how well-intentioned the acts of the defendant. Those courts that would require the demonstration of bad faith are swimming against one of the most powerful currents in contemporary corporate jurisprudence.

The final arguments supporting the objective view of the oppression remedy is, in my view, simple common sense. When people have been treated unfairly, it may improve their disposition to know that mala fides was not at the root of their discomfiture. However, both the wrong and the need for a corrective remedy remain the same. Thus, an oppression remedy that focuses on unfair result rather than bad faith has a strong normative underpinning.

“this constitutes a major divergence from the English common law”; ibid., para. 487. The courts have indeed given the oppression remedy a broader meaning. See, supra, footnote 71, and accompanying text, and footnote 22, and accompanying text. See, generally, P. Anisman, Majority-Minority Relations in Canadian Corporation Law: An Overview (1986-87), 12 C.B.L.J. 473, at pp. 479, 493; MacIntosh, loc. cit., footnote 2, at pp. 622-636.

77 The Committee suggested that it would be “difficult to improve on the frequently quoted interpretation of the meaning of ... [the oppression provision] made by Lord Cooper in Elder v. Elder and Watson Ltd. ...”; ibid., vol. 1, para. 485.

78 Supra, footnote 23, at pp. 379 (A.C.), 500 (All E.R.).

79 There are now over a dozen cases that have adopted the expectations principle, although these are almost exclusively confined to the close corporation context; see, e.g., Ferguson v. Imax Systems Corp. Ltd., supra, footnote 37; see, generally, Anisman, loc. cit., footnote 76, at pp. 482-483; MacIntosh, loc. cit., footnote 2, at pp. 632-633.
Conclusion

The issue of whether or not the oppression remedy requires a showing of bad faith is one of the most important unresolved issues under the oppression remedy. It is possible to find cases lying at nearly every point of the compass. I have argued in this article that the courts ought to embrace an objective theory that places unfair result at the centre of the oppression universe. Such a theory draws the greater support from existing jurisprudence and from principles of statutory interpretation. It also makes greater sense in view of one of the underlying rationales of the oppression legislation, which was to offer shareholders relief where the compass of common law fiduciary duties was perceived as being inappropriately narrow.80

A requirement to show bad faith imposes an additional and unreasonable evidentiary burden on the plaintiff, since the motive of the defendant is a state of mind that cannot be directly observed and can only be inferred from objective evidence.

I have argued that many of those cases where a bad faith requirement appears to have been articulated have in fact inferred bad faith from an unfair result. If this is the case, then it is better to dispense with the charade of finding bad faith and simply acknowledge that an unfair result is the focus of the inquiry. Whether the courts ultimately adopt a category 3 or category 4 theory of liability is, for reasons I noted in the first section of this article, not of the greatest moment. A category 4 approach recommends itself in that this would discourage the bringing of oppression actions when there is bad faith but no unfair result. By comparison, if a category 3 theory of liability is adopted, a plaintiff may succeed in establishing liability even though no unfair result is present. The plaintiff's success would normally entitle her to an award of costs, which will act as an incentive to undertake the action. Suits of this nature may be socially wasteful in that they consume both private and public resources with no resulting benefit. At least two points may be made in rejoinder to these arguments, however. First, in cases involving bad faith but no unfair result, the plaintiff may well be justified in bringing an action in order to secure protection against the future untoward acts of those who have proved themselves to be faithless fiduciaries. Second, under a category 3 approach, the courts can discourage suits that have technical but not substantive merit (for example, in which only nominal damages would be awarded) by awarding costs to the defendant. On balance, and for the reasons just expressed, it appears to me that a category 3 approach may be the superior one. Whether a category 3 or category 4 approach is adopted, it is, at the very least, important that the issue be finally settled.