THE OPPRESSION REMEDY: PERSONAL OR DERIVATIVE?

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Introduction

One of the more important issues arising under the statutory oppression remedy is whether the remedy embraces actions of a derivative character, in addition to those of a purely personal character. This is an issue that the courts are only now beginning to grapple with, and as yet no clear consensus view has emerged. The better view is that actions of a derivative character may only be commenced with leave of the court under the statutory derivative action provision. Otherwise, the requirement for leave, which can easily be supported on normative grounds, would be rendered nugatory. However, statutory amendments are warranted to eliminate unsupportable differences in procedure, costs, remedies and the substantive standard of liability as between derivative and oppression actions.

Under the Canada Business Corporations Act and cognate statutes a complainant may, with leave of the court, mount a derivative action in

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1 R.S.C. 1985, c. C-44, hereinafter "CBCA".


3 See CBCA, ss. 238, 239; ABCA, ss. 231(b), 232; MBCA, ss. 231(b), 232; NCA, ss. 363(b), 364; NBBCA, ss. 163, 164; NSCA Third Schedule, s. 3; OBCA, ss. 244(b),
the name and on behalf of the corporation. A complainant may also commence an oppression action alleging oppression on the part of the company, its affiliates or its directors. What, if any, is the overlap in coverage between these two provisions? More specifically, can an action of a derivative character be commenced under the oppression remedy?

As will be seen below, the answer is not obvious. Far from spreading illumination, a careful reading of the statute discloses no ready answer. Nor do the legislative reports leading to the adoption of the oppression provision resolve the ambiguity. In the face of this, it is not surprising that the courts have given inconsistent answers to this important question.

In this article, I will suggest that the derivative action and the oppression remedy are two pieces of a puzzle that steadfastly refuse to fit together in a tractable fashion. An amendment to the statute will best succeed in salvaging order from potential chaos. In particular, I suggest that the statutory derivative action and oppression provisions ought to be combined into a single all-embracing provision. The new unified provision will ensure that all actions involving derivative wrongs are funnelled through the statutory leave procedure. Unification will also eliminate differences in matters of procedure, costs, standing, and the substantive standard of liability that currently arise as between the derivative and oppression actions.

I. The Distinction Between Personal and Derivative Actions

A derivative action is commonly said to arise where it is the corporation that is injured by the alleged wrongdoing. The “corporation” will be injured when all shareholders are affected equally, with none experiencing any special harm. By contrast, in a personal (or “direct”) action, the harm has a differential impact on shareholders, whether the difference arises amongst members of different classes of shareholders or as between members of a single class. It has also been said that in a derivative action, the

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4 CBCA, s. 239; ABCA, s. 232; MBCA, s. 232; NCA, s. 364; NBBCA, s. 164; NSCA, Third Schedule, s. 4; OBCA, s. 245; SBCA, s. 232.

5 See, supra, footnote 3, and infra, footnotes 114-124 and accompanying text.

6 I use the term “oppressive” broadly here to include conduct that is “oppressive or unfairly prejudicial to or that unfairly disregards the interests of” the complainant. See CBCA, s. 241(2); ABCA, s. 234(2); MBCA, s. 234(2); NCA, s. 366(2); NBBCA, s. 166(2); NSCA, Third Schedule, s. 5(2); OBCA, s. 247(2); SBCA, s. 234(2).

7 The oppression action has also been used to remedy the oppressive conduct of controlling shareholders. See generally, J.G. MacIntosh, Minority Shareholder Rights in Canada and England: 1860-1987 (1989), 27 Osgoode Hall L.J. 561.

injury to shareholders is only indirect; that is, it arises only because the corporation is injured, and not otherwise.9

While the precise boundary between these two types of actions is obscure, there are at least a few clear polar cases. Where, for example, the managers steal assets from the corporation or appropriate a corporate opportunity, it is the corporation that suffers. While it is true that the value of shares in the company is diminished by the conduct, this loss in value arises only indirectly, as a consequence of the injury to the company. No shareholder or particular constituency of shareholders is affected in a manner different from other shareholders.

Where, however, the directors of a corporation refuse to accept the proxies of a shareholder at an annual meeting, the action is a personal one.10 The shareholder whose proxies are refused is affected in a manner different from other shareholders.

II. The Statutory Derivative Action

In Foss v. Harbottle,11 the English courts at a very early date held that only the corporation was a proper plaintiff to sue in respect of a wrong done to it. The holding was premised on the notion that it was up to the majority of shareholders to decide whether or not the corporation should sue.12 The English courts defined very narrow exceptions in the rule in Foss.13 As a result, the shareholders’ derivative action was available only in rather exceptional circumstances.14

The rule in Foss held sway in Canada until the major statutory reforms of the 1970s and 1980s. A statutory derivative action was adopted in the Ontario legislation in 1971,15 following a recommendation by the Lawrence Committee.16 A broadly similar provision was adopted in British Columbia in 1973.17 Nor did the Dickerson Committee, in drafting the

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9 See Farnham, ibid.; Goldex Mines, ibid.
10 See, for example, Goldex Mines, ibid.
11 (1843), 2 Hare 461, 67 E.R. 189 (V.C.).
12 This rationale no longer applies under the CBCA and cognate statutes, under which the decision to sue belongs to the managers as part of their statutory mandate to manage the company. See CBCA, ss. 102(1); ABCA, ss. 97(1); MBCA, ss. 97(1); NCA, ss. 163; NBBCA, ss. 60(1), NSCA, ss. 143, 144; OBCA, ss. 115(1); SBCA, ss. 97(1).
14 Ibid.
15 See the Ontario Business Corporations Act, R.S.O. 1970, c. 53, s. 99.
new federal Act, feel any compunction in recommending the demise of the “notorious” rule in Foss, and it has since been abandoned in a majority of Canadian jurisdictions. However, the distinction between derivative and personal actions has been maintained. Under the Canada Business Corporations Act (pursuant to recommendations of the Dickerson Committee) and cognate statutes a complainant may bring an action in the name and on behalf of the corporation, but only with leave of the court. The statute specifies three conditions precedent that must be satisfied before the court will grant leave. These are (1) reasonable notice to the directors; (2) a finding that the complainant is acting in good faith; and (3) it appears to be in the interests of the corporation that the action be brought.

The Dickerson Committee articulated three main reasons for maintaining the distinction between personal and derivative actions and for requiring satisfaction of the conditions precedent for leave to sue derivatively. The first was to prevent “strike suits” designed to extort a coercive settlement from the corporation. Because a derivative action potentially imposes

18 Proposals for a New Business Corporations Law for Canada (1971) (hereinafter the “Dickerson Report”). Vol. 2 of the study contains a draft of the proposed legislation (hereinafter “Draft Act”). The draft recommendations were mostly adopted in S.C. 1974-75, c. 33, s. 232, and form the basis for the legislation in the six provinces indicated supra, footnote 2.

19 Ibid, para. 482. The Committee was of the view that the rule had worked to the unfair disadvantage of minority shareholders. With this view it is hard to disagree.


21 Complainant is defined very broadly to include more than just shareholders; see supra, footnote 3, and infra, footnotes 114-124 and accompanying text.

22 The Dickerson Report, op. cit, footnote 18, para. 482, states:

At one stroke this provision [requiring leave] circumvents most of the procedural barriers that surround the present right to bring a derivative action and, incidentally, minimizes the possible abuse of “strike suits” that might otherwise be instituted as a device to blackmail management into a costly settlement at the expense of the corporation. Although it confers extraordinarily wide discretion upon the court, subsection (2) does state the conditions that must be met before a derivative action may be commenced. By requiring good faith on the part of the complainant this provision precludes private vendettas. And by requiring the complainant to establish that the action is “ prima facie in the interest of the corporation” it blocks actions to recover small amounts, particularly actions really instituted to harass or to embarrass directors or officers who have committed an act which, although unwise, is not material.
costs on the corporation, it may be cheaper for the corporation and the defendants in the action to settle a meritless claim than to devote time and resources to challenging the action. The second was to exclude derivative claims that, while not undertaken in bad faith, are nonetheless groundless or which seek to recover trivial amounts. A third reason for requiring leave was to ensure that the corporation, or those against whom relief is sought in the action, are not exposed to a multiplicity of lawsuits. Under the leave procedure, conduct of the action is ceded to a single litigant and, because of the principle of res judicata and the fact that the true plaintiff is the corporation, the result effectively binds all shareholders and excludes further litigation. Under the Canada Business Corporations Act and cognate statutes, shareholder ratification of the alleged wrongdoing does not exclude a derivative action. Ratification is only one factor that the court may take into account in deciding whether to grant leave.

In effect, this provision abrogates the notorious rule in *Foss v. Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions.

See also para. 488.

23 *Ibid.* The costs to the corporation and defendants arise in many forms, some of which are explored infra, footnotes 161-165 and accompanying text.


26 Or group of litigants. See CBCA, s. 240; ABCA, s. 233; MBCA, s. 233; NCA, s. 365; NBBCA, s. 165; NSCA, Third Schedule, s. 4(3); OBCA, s. 246; SBCA, s. 233.

27 According to the Dickerson Report, *op. cit.*, footnote 18, para. 483:

Section 19.03 [of the Draft Act, now CBCA, s. 240] is designed to give very broad discretion to the court to supervise generally the conduct of a derivative action, providing maximum flexibility in respect of interim financing of the litigation and the control over the conduct of the action in a way that obviates a multiplicity of actions.

28 CBCA, s. 242(1) reads:

An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order ... [granting leave].

The Dickerson Report, *op. cit.*, footnote 18, para. 487, states that:

Section 19.05 [now CBCA, s. 242(1)] sets out several rules that apply both to derivative actions and "oppression" applications. Subsection (1) abrogates that aspect of the rule in *Foss v. Harbottle* that bars a shareholder from complaining of alleged misconduct on the ground that the impugned act might be authorized or ratified at a meeting of shareholders, a concept that has been described as "... the major absurdity of the *Foss v. Harbottle* rule...": Gower, *Modern Company Law*, 3rd ed., p. 586. Rather than set out a specific rule declaring how an act of the directors may be ratified, we think it better to characterize shareholder ratification or waiver as an evidentiary issue, which in effect compels the court to go behind the constitutional structure of the corporation and examine the real issues. If, for example, the alleged
In England (subject to developments in relation to the oppression remedy, to be discussed below), the rule in *Foss v. Harbottle* still rules the roost.

### III. The Statutory Oppression Remedy

The first oppression remedy was adopted in England in the Company Act, 1948, and allowed a shareholder to complain "that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) ...". The oppression remedy was included in this legislation on the recommendation of the Cohen Committee. The report of the committee indicates a concern about the inadequacy of the common law in redressing at least some instances of oppressive conduct. Two specific examples of "abuse" are given in the report; the refusal of directors to register transfers of shares resulting from the death of a shareholder, save on terms advantageous to the directors, and the taking of excessive remuneration by the directors. While it is clear that the members of the committee were primarily concerned about cases involving closely held corporations, they envisioned that similar misconduct was ratified by majority shareholders who were also the directors whose conduct is attacked, evidence of shareholder ratification would carry little or no weight. If, however, the alleged misconduct was ratified by a majority of disinterested shareholders after full disclosure of the facts, that evidence would carry much more weight indicating that the majority of disinterested shareholders condoned the act or dismissed it as a mere error of business judgment.

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29 The Company Act, 1948, s. 210. The section reads as follows:

(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) ... may make an application to the Court by petition for an order under this section.

(2) If on any such petition the Court is of the opinion

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in the future, or for the purchase of the shares of any members of the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

30 Report of the Committee on Company Law Amendment, United Kingdom, Cmnd. 6659 (1945) (hereinafter the "Cohen Report").

31 *Ibid.*, paras. 58-60. These examples were not meant to be exhaustive. The committee commented, *ibid.*, para. 60, that these are "in fact, only illustrations of a general problem".

32 For example, the report states, *ibid.*, para. 60: "We carefully examined suggestions intended to strengthen the minority shareholders of a private company in resisting oppression by the majority." (Emphasis added).
problems might occur in larger publicly held corporations. As a result, the oppression provision was made to apply to both private and public corporations, although the vast majority of reported cases have involved private corporations.

The report gives very little overt indication of how the committee viewed the relationship between the derivative and oppression actions. However, the committee apparently envisioned that the new oppression provision could be used in relation to both forms of action. The first example of abuse supplied by the committee, the illicit refusal of the directors to register a transfer of shares, would clearly give rise to a personal action at common law. The second—excessive remuneration—would normally give rise to a derivative action. In suggesting that the oppression remedy might be useful in cases of excessive remuneration, the committee commented that:

At present the only remedy open to the minority shareholder is to commence an action to restrain the company from paying the remuneration on the ground that such payment is a fraud on the minority, since the Court would not make a winding-up order in view of the alternative remedy.

An action that proceeds under the “fraud on the minority” exception to the rule in Foss v. Harbottle would usually be a derivative, and not a personal action. Thus, the committee appears to have been fully cognizant of the implication of suggesting that the oppression provision would be useful in such a case; namely, that an action to redress a derivative wrong could be commenced under the oppression remedy.

Two leading cases under this early oppression remedy appear to have implicitly adopted this point of view. In In re H.R. Harmer Ltd., the elderly founder of the firm in question purported to act for the company

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33 The committee noted, ibid., para. 58, in respect of an oppressive refusal to register share transfers that “[t]his difficulty is not in law peculiar to private companies since there is no legal impediment to a public company having in its articles a provision subjecting transfer of shares to the approval of the directors, though Stock Exchanges do not accept it where leave to deal is required”.

34 See, for example, In re Smith and Fawcett Ltd., [1942] Ch. 304, [1942] 1 All E.R. 542 (C.A.).

35 In such a case, all shareholders are injured equally. The injury to shareholders is only indirect.


37 See, for example, Edwards v. Halliwell, [1950] 2 All E.R. 1064 (C.A.), in which the “fraud on the minority” exception to the rule in Foss is seen as separate and distinct from a case where the plaintiff’s personal rights are interfered with. It is well to point out, however, that the fraud on the minority exception has been invoked by the courts in some cases involving personal wrongs as well. See generally S.M. Beck, An Analysis of Foss v. Harbottle, in J.S. Ziegel (ed.), 1 Studies in Canadian Company Law (1967), 545, p. 566. See, however, Cini v. Micallef (1987), 60 O.R. (2d) 584 (Ont. H.C.), holding that where there is a fraud on the minority the action is derivative in character.

in a variety of unauthorized transactions, without the approval of either the board or the other shareholders, and refused to take direction from the board. His actions were clearly detrimental to the company as a whole, and in breach of his fiduciary duty to the company. Acknowledging that the actions were harmful to the company, the Court of Appeal nonetheless rendered judgment in favour of the plaintiffs under the oppression provision.

A similar result may be found in *Scottish Co-operative Wholesale Society Ltd v. Meyer.* The parent company deliberately undertook actions that made nearly certain the demise of its subsidiary, the Scottish Co-operative Wholesale Society. The action, again clearly of a derivative character, succeeded in the House of Lords under the oppression remedy.

The report of the Jenkins Committee in 1962 confronted the issue more squarely than that of the Cohen Committee. In recommending a change in the substantive standard of liability from acts that are "oppressive" to those that are "unfairly prejudicial", the committee commented that if its suggestion were adopted "it should go some way to providing a shareholder who suffers an indirect wrong of the kind described above [a derivative wrong] with a more effective remedy than he enjoys at common law". The committee also recommended that the oppression action be

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39 *Ibid.,* at pp. 83 (W.L.R.), 704 (All E.R.), per Jenkins L.J.:

Then fifthly, ... [counsel] said that the acts complained of were not in their result oppressive, because it cannot be demonstrated that the company suffered any loss from any of them. I cannot agree. The acts complained of were, I should say for the most part, calculated to damage the company in one way or another.

40 Indications that redress for a derivative wrong may not be granted under the oppression remedy may also be found in the Court of Appeal, however. In *In re Jermyn Street Turkish Baths Ltd.,* [1971] 1 W.L.R. 1042, [1971] 3 All E.R. 184 (C.A.), the court held, at pp. 1060 (W.L.R.), 199 (All E.R.):

If a director of a company were to draw remuneration to which he was not legally entitled or in excess of the remuneration to which he was legally entitled, this might no doubt found misfeasance proceedings or proceedings for some other kind of relief, but it would not of itself amount to oppression.

But see *Re Stelvarts (Brixton) Ltd.,* [1985] B.C.L.C. 4 (Ch. D.), declining to interpret these remarks as suggesting that derivative wrongs may not proceed under the oppression remedy. See, *infra,* at footnotes 52-53 and accompanying text. Note that the *Jermyn* court, *ibid.,* at pp. 1059 (W.L.R.), 199 (All E.R.), also held that the availability of other relief either at common law or statute is irrelevant in determining the availability of the oppression remedy.


42 Report of the Company Law Committee, United Kingdom, Cmnd. 1749 (1962) (hereinafter the "Jenkins Report").

explicitly extended by statutory amendment to embrace actions of a derivative character.\textsuperscript{44}

These recommendations of the Jenkins Committee were adopted in the Companies Act 1980.\textsuperscript{45} The substantive ground for complaint was amended to include conduct that is “unfairly prejudicial” rather than conduct that is “oppressive”.\textsuperscript{46} In addition, the Act allowed the court to “authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct”.\textsuperscript{47} These amendments have been carried forward in the Companies Act 1985.\textsuperscript{48}

Unfortunately, these amendments appear not to have resolved the issue. In \textit{Re A Company},\textsuperscript{49} Hoffman J. was confronted with a situation in which assets had been plundered from a company by the majority shareholder (who subsequently sold his shares to a third party). The defendant sought to derail the petitioner’s action under the oppression remedy\textsuperscript{50} with the assertion that the suit should have been framed as a derivative, rather than an oppression action. The court rejected this claim.\textsuperscript{51}

\textsuperscript{44} Ibid., paras. 205-207, 212. The committee stated, \textit{ibid.}, para. 206:

We think, however, that for this purpose section 210 [the oppression remedy] should be further extended to give the Court an express power, if upon hearing a petition under that section it sees fit, to authorize proceedings to be brought against a third party in the name of the company by such person or persons and on such terms as the Court may direct.

By necessary implication, this suggests that the committee viewed the existing oppression action as not extending to derivative causes of action (a conclusion buttressed by the further discussion in the above noted paragraphs). Note also that the report includes, \textit{ibid.}, para. 205, in its list of instances where an oppression application “might be appropriate” the example of excessive remuneration also relied upon by the Cohen Committee. However, the case of excessive remuneration is also included, \textit{ibid.}, para. 206, in a list of “direct wrongs to the minority”.

\textsuperscript{45} 1980, c. 22 (U.K.).

\textsuperscript{46} \textit{Ibid.}, ss. 75(1).

\textsuperscript{47} \textit{Ibid.}, ss. 75(4)(c).

\textsuperscript{48} See Companies Act 1985, c. 6, ss. 459, 461(2)(c) (U.K.).


\textsuperscript{50} Although it may now be more appropriate to refer to the English provision as the “unfair prejudice” remedy, I use the term “oppression” in a generic sense to identify it with other similar statutes.


I do not think it necessary or appropriate in this judgment to attempt any comprehensive exposition of the situations which may give rise to the court's jurisdiction under s. 75. Broadly, however, I would say this. Without prejudice to the generality of the wording of the section, which may cover many other situations, a member of a company
Similarly, in *Re Stewarts (Brixton) Ltd.*,\(^{52}\) the plaintiff complained (in part) that the defendant had taken excessive remuneration and had entered into competition with the company. Vinelott J. in the Chancery Court also rejected the argument that the action must proceed derivatively.\(^{53}\)

However, in *Re Carrington Viyella PLC*,\(^{54}\) the petitioners sought to characterize a “service agreement” between the Chairman and the company as unfairly prejudicial in that it was designed to preserve the Chairman’s job in the case of a takeover. In holding that such a claim was not cognizable under the oppression provision, Vinelott J. appears to have had a change of heart in stating that:\(^{55}\)

> ...the breach, if any, would affect all shareholders equally. To succeed in a petition under section 75 [the oppression provision, now s. 459 of the Companies Act, 1985], however widely construed, the petitioners have to show conduct which is unfairly prejudicial to part of the shareholders of [the company].

The court based its holding on the introductory words of the oppression provision, which require the petitioner to show unfair prejudice to “some part of the members (including at least himself)”\(^{56}\).

If *Carrington* is a correct statement of English law, it would seem to render nugatory the clear words of the statute authorizing the court to allow civil proceedings in the name and on behalf of the company under the oppression provision. The requirement that “some part” of the members be prejudiced does not unambiguously suggest that the provision can only be used when another part of the shareholders is not injured. The holdings in *Re A Company* and *Re Stewarts* comport more with the manifest intention of the legislature to open up the oppression provision to actions of a derivative character.

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\(^{52}\) *Supra*, footnote 40.

\(^{53}\) The defendant relied on the statement of Buckley L.J. in *Re Jermyn Street Turkish Baths*, *supra*, footnote 40, that the taking of excessive remuneration might found misfeasance proceedings, but not an action under the oppression provision. Vinelott J. stated, however, *supra*, footnote 40, at p. 9, that he “did not think that Lord Justice Buckley intended to lay down any general rule that a petitioner could not seek relief if the conduct complained of would found a minority shareholder’s action or, in a winding up, misfeasance proceedings”. In so holding, the court was not deterred by the requirement (specifically noted) that the oppression affect “some part of the members (including himself)”.

\(^{54}\) (1983), 1 B.C.C. 98,951 (Ch. D.).


The confusion created by the inapposite drafting of the English oppression provision extends beyond the Chancery Court. No less sophisticated a commentator than L.C.B. Gower has changed his mind not once—but twice—on the question of the relationship between the oppression remedy and the derivative action. In discussing the issue in the fourth edition of his widely read text, Gower initially suggests that the oppression provision may be used “in all circumstances” involving an action of a derivative character. He then goes on to say:

> It should be noted, however, that it will not always be possible for a minority to use the section to surmount the *Foss v. Harbottle* rule. A petition under the section will be possible only where there is conduct prejudicial to some part of the members. Where a wrong has been done to the company the conduct is prejudicial to the company as a whole and therefore to all members. Often, it is true, some will be benefiting in another capacity and presumably where that is so it will be possible to use the section, since then the conduct of the miscreants will be unfairly prejudicial to some part of the members. But in a case such as *Pavlides v. Jensen* ([1948] Ch. 565), where the allegation is that with gross negligence the directors have sold the company’s property at a wholly inadequate price, it is difficult to see how the new section will help.

There is an imbedded inconsistency in the position adopted by Gower. Since a derivative action is precisely one in which all shareholders are

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58 Gower states, *ibid.*, p. 668, that:

> Of even greater importance is the inclusion within the scope of the section of a single prejudicial act or omission which has taken place or is proposed. This will remove the present requirement that there must be a continuing course of conduct and make the remedy available as an alternative not only to winding up but to a minority shareholder’s suit (derivative or personal) in all circumstances where the action taken or proposed is unfairly prejudicial to some part of the members.

The above passage suggests that the oppression provision embraces derivative actions even without the amendment authorizing the court to allow civil proceedings in the name and on behalf of the company. However, Gower later comments, *ibid.*, pp. 669-670:

> As already pointed out, the foregoing amendments will themselves go some way to loosen the excessively restrictive bonds of the *Foss v. Harbottle* rule since a minority shareholder will, in future, be able to petition under the section and obtain an order preventing action unfairly prejudicial to the minority. But without more, what it would not do is to permit action to be taken by a minority to obtain restoration or compensation to be made to the company in respect of a wrong done to it, for example, as a result of a breach by the directors of their duties of good faith or care and skill. Hence, following the recommendations of the Jenkins Committee the new section proposes to outflank the restrictive conditions of the *Foss v. Harbottle* rule in relation to derivative suits. This it does by providing that among the orders which the court may make on a petition under the section is one authorising “civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct.” This will enable a minority, unable to comply with all the conditions for bringing a derivative action, instead to petition initially under the section and to ask for an order authorising it to institute proceedings in the name and on behalf of the company.

affected equally, the latter limitation is an all-embracing denial of the proposition that the oppression remedy may be used in any derivative action.

The first supplement to the fourth edition appears to correct the error by suggesting that the oppression section can indeed be applied in all situations involving derivative injuries.\( ^{60} \) The second supplement, however (written by B.G. Pettet), returns to the initial position of the fourth edition.\( ^{61} \)

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\( ^{60} \) The above noted passage in the text is amended to the following:

Providing that the minority can jump the initial hurdle of establishing that the act or omission complained of is "unfairly prejudicial" to them, there seems to be no reason why they should not be authorised to sue in the name of the company whenever a wrong is done to it. The argument that a wrong to the company harms all the members and not merely "some part" of them would not seem to be open to the defendants. Even under the old section 210 it did not preclude successful petitions in \textit{Scottish Co-operative Wholesale Society v. Meyer} and \textit{Re Harmer} in both of which all members, \textit{qua} members, suffered—though admittedly the miscreants benefited in another capacity. The only doubt is whether, when the only complaint is that the negligence of the directors has harmed the company and all its members without benefiting the defendants, a petition under section 75 could succeed. Will the courts be willing to regard that as conduct "unfairly prejudicial to some part of the members"? If they decline, it will be unfortunate for that is the situation where it is particularly necessary to outflank the \textit{Foss v. Harbottle} rule since, if the defendants remain in control of the company, no other remedy seems to be available.


Thus the position, though not settled, may well be now that very often a petition under section 459 can be used instead of a derivative action. Quite how this fits in with the court's power in section 461(2)(c) to order an action to be started in the name of the company is not immediately clear, but it rather looks as though that power will become unnecessary in a lot of cases since it can only be invoked once the court is satisfied that "unfair prejudice" has been established and in a case such as \textit{Re A Company} (No. 5287/85) once the full hearing has taken place the court will usually already be in a position to give a final remedy such as account or injunction. Thus the approach of Hoffman J. in this area, if followed, may well eventually make section 461(2)(c) largely redundant and indeed it may do the same for the rule in \textit{Foss v. Harbottle}.

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There is some limit to these developments and in a situation where the alleged wrong does affect all shareholders equally then it is probable that there can be no petition. An example of this kind of situation might be where the only complaint is that the negligence of the directors has harmed the company and all its members without benefiting the defendants as in \textit{Pavlides v. Jensen}... [[1948] Ch. 565], although in this situation it might be observed that a derivative action is not available either.

As in the fourth edition, the stated "limit" swallows up the principle that the oppression provision may be used for derivative actions.
But in this supplement, Gower attempts a rationalization of the cases in the following fashion:\textsuperscript{62}

However, it is suggested that this limitation [that only "some part of the members be injured"] is not operative in the situation where although the wrong is done to the company the miscreants nevertheless benefit in some other capacity. This situation arose in \textit{Scottish Co-operative Wholesale Society v. Meyer} \ldots [[1959] A.C. 324] and \textit{Re Harmer} \ldots [[1959] 1 W.L.R. 62] and did not preclude a petition under the old section 210. Often the wrongdoers will be shareholders who also benefit from the wrong they have done and thus a petition by the other shareholders should be available.

The substance of this rationalization appears to be that an action that is derivative in character may not be commenced under the oppression remedy, unless what is ostensibly a derivative wrong in fact results in a sufficiently disparate impact on shareholding constituencies that the injury assumes a personal flavour. Whatever merits this theory might have as a \textit{normative} description of how the derivative and oppression actions \textit{ought} to relate to one another,\textsuperscript{63} it seems manifestly to contradict the intention of the English legislature in giving the court jurisdiction to allow civil proceedings under the oppression remedy in the name and on behalf of the company. Moreover, if the action is indeed essentially personal in substance, the provision authorizing the court to allow civil proceedings in the name of the company would be wholly unnecessary; the action could simply be commenced as a personal action. Indeed, if the action is personal in nature, then it \textit{ought not} to be commenced in the name of the company, since a personal, and not a corporate remedy will be appropriate.

It may simply be better to recognize that the legislation as currently drafted (as least, if the \textit{Carrington} interpretation of the statute is sound), presents the court with a legal impossibility. The court cannot allow an action to proceed in the name and on behalf of the company (that is, in a situation where all shareholders are affected equally) if to do so would violate the requirement that only \textit{some part} of the members be affected. But that is precisely what the statute authorizes the court to do. A statutory amendment to resolve the ambiguity is clearly indicated.

In Canada, the oppression provision was first adopted in the British Columbia legislation in 1960. That provision was adopted \textit{verbatim} from the English legislation of 1948.\textsuperscript{64} The British Columbia provision was substantially revised in 1973 to incorporate many of the recommendations of the Jenkins Committee, greatly broadening the scope of the legislation.\textsuperscript{65}

\textsuperscript{62} Ibid., p. 123.

\textsuperscript{63} These merits are discussed, \textit{infra}, Part V.

\textsuperscript{64} See Companies Act, R.S.B.C. 1960, c. 67, s. 185.

\textsuperscript{65} See Companies Act (1973), S.B.C. 1973, c. 18, s. 221, now Company Act, R.S.B.C. 1979, c. 59, s. 224.
On the recommendation of the Dickerson Committee, a similarly broadly drafted oppression remedy was included in the Canada Business Corporations Act in 1975. The federal model has since been adopted in six provinces.

Unfortunately, the unsettled state of English law on the relationship between the derivative and oppression actions is replicated in the Canadian context. The Canada Business Corporations Act oppression provision reads (in part):

241. (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, 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.

The section thus focuses on the conduct of the corporation and its directors. The provision embraces all forms of personal actions. Where a wrong is done by the corporation, the action will be personal in nature; a derivative action is one in which there is harm to the corporation. However, a close reading of the statutory provision suggests that it was

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67 See ABCA, s. 234; MBCA, s. 234; NBBCA, s. 166; NCA, s. 366; OBCA, s. 247; SBCA, s. 234. See also NSCA, Third Schedule, s. 5.

68 The meaning of “the corporation” is somewhat ambiguous, since the corporation embodies all those constituencies—shareholders, creditors, directors, officers, etc.—that together constitute the economic entity that is the corporation. See, for example, M.C. Jensen and W.H. Meckling, Theory of the firm: Managerial behavior, agency costs, and ownership structure (1976), 3 J. Fin. Econ. 305. In the context of the oppression remedy, it seems natural to assume that “the corporation” acts when any of its duly authorized agents—directors and officers—acts in the name of the corporation. However, the courts have usually identified “the corporation” with shareholders. See, for example, Bonisteel v. Collis Leather Co. (1919), 45 O.L.R. 195 (Ont. S.C.); Greenhalgh v. Arderne Cinemas, [1950] 2 All E.R. 1120 (C.A.) (in which the phrase “the company as a whole” is interpreted as meaning the body of shareholders). There is strong evidence that the Dickerson Committee, op. cit., footnote 18, envisioned the term “the corporation” as embracing the conduct of controlling shareholders. After suggesting that the new ratification provision of the Draft Act (cl. 19.05, now embodied in CBCA, s. 242) would allow the courts to disregard ratifying votes cast by interested shareholders, the Report states, ibid., para. 487:

Implicit in this policy is the premise that dominant shareholders, who are in a position to control management, owe a fiduciary duty to minority shareholders comparable to the duty that directors and officers owe the corporation. This policy constitutes a major divergence from the English common law, but it is clearly a corollary of the U.K. Companies Act, s. 210 and of the Draft Act, s. 19.04 [the oppression provision]. (Emphasis added).
intended to embrace at least some actions of a derivative character as well. At the time when the oppression provision was drafted, directors' duties, save in very particular circumstances, were owed only to the corporation, and not to shareholders either collectively or individually. Thus, breaches of directors' duties would normally be derivative wrongs. In making such wrongs actionable under the oppression provision, the draftsmen appear to have contemplated that these derivative wrongs be cognizable under the oppression provision.

Further, the provision creates a liability where an affiliate of the corporation acts oppressively. The term “affiliate” includes parent and subsidiary companies where there is de jure control exercised by the parent over the subsidiary. Wrongs committed by a parent corporation (or by a subsidiary in respect of its parent) are likely to result in harm to the subsidiary (or the parent) as a whole, and thus should constitute derivative, rather than personal wrongs. In addition, the ratification provision of

See also, ibid., at para. 477 (the oppression provision relates “to ‘oppressive or unfairly prejudicial’ conduct of management or dominant shareholders”). A fiduciary duty owed by majority or controlling shareholders to minority shareholders would create a personal cause of action. One might well ask how the oppression provision places a fiduciary duty on shareholders generally, since it refers only to the acts of “the corporation”, “affiliates”, and “the directors”. An affiliate that is a parent corporation will be a shareholder. However, the English oppression provision cited refers only to the “conduct of the affairs of the corporation”. See Companies Act, 1948, c. 38, s. 210. If a fiduciary duty is indeed a “corollary” of both statutes, then the Dickerson Committee must have envisioned that the term “the corporation” would draw shareholders into its net. The courts have in fact subsequently interpreted the oppression remedy as drawing in shareholder conduct. See generally, MacIntosh, loc. cit., footnote 7.

It seems reasonably clear that this liability would not have existed at common law at the time when the oppression provision was drafted.


Actions by a parent corporation, for example, in diverting corporate opportunities or in arranging inter-corporate transfers on terms favourable to the parent would harm the subsidiary corporation as a whole.
the Draft Act\textsuperscript{74} (adopted in the Canada Business Corporations Act\textsuperscript{75}) states that:

An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order under section 214, 240 \textit{(powers of court in connection with a derivative action)} or 241 \textit{(oppression remedy)}.

The ratification provision thus concerns itself with breaches of duty owed to the corporation. If the oppression provision is entirely personal in nature, then it would be wholly unnecessary to make reference to it in the ratification provision, since shareholder ratification cannot affect a personal cause of action.\textsuperscript{76} The reference to the oppression remedy in the ratification provision therefore also suggests that derivative wrongs are actionable under the oppression remedy.\textsuperscript{77}

Further support for this view is found in the sampling of orders that the court may make under the oppression provision.\textsuperscript{78} The court may, for example, make an order "varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract".\textsuperscript{79}

At first blush, the oppression provision thus appears to embrace personal wrongs and at least some types of derivative wrongs, although the picture is far from clear. Unfortunately, while the report of the drafters of the legislation sheds some additional light, it is not sufficient to resolve all

\textsuperscript{74} Dickerson Report, op. cit., footnote 18, clause 19.05.

\textsuperscript{75} CBCA, ss. 242(1). \textit{(Emphasis added). Comparable provisions may be found in ABCA, ss. 235(1); MBCA, ss. 235(1); NBBCA, ss. 167(1); NCA, ss. 367(1); OBCA, ss. 248(1); SBCA, ss. 235(1). See also, NSCA, Third Schedule, ss. 7(1).}

\textsuperscript{76} See, for example, \textit{Provident International Corporation v. International Leasing Corporation} (1969), 89 W.N. (Pt. 1) (N.S.W.) 370, at p. 375.

\textsuperscript{77} \textit{Supra}, footnote 75. Note also that court approval is necessary for the settlement or discontinuance of both derivative and oppression actions. See CBCA, ss. 242(2); ABCA, ss. 235(2); MBCA, ss. 235(2); NBBCA, ss. 167(2); NCA, ss. 367(2); OBCA, ss. 248(2); SBCA, ss. 235(2). See also NSCA, Third Schedule, ss. 7(2). The chief purpose of this provision is to protect against collusive settlements of representative actions by plaintiffs and their lawyers. This implicitly suggests that an oppression action may be brought in representative form. However, a personal action may be brought in representative form without being a derivative action in the name and on behalf of the corporation. Thus, this provision does not unambiguously suggest that the oppression action may be derivative as well as personal.

\textsuperscript{78} See, CBCA, ss. 241(3); ABCA, ss. 234(3); MBCA, ss. 234(3); NBBCA, ss. 166(3); NCA, ss. 366(3); OBCA, ss. 247(3); SBCA, ss. 234(3).

\textsuperscript{79} CBCA, ss. 242(3)(h). \textit{(Emphasis added); ABCA, ss. 243(3)(j); MBCA, ss. 234(3)(h); NBBCA, ss. 166(3)(h); NCA, ss. 366(3)(h); OBCA, ss. 247(3)(h); SBCA, ss. 243(3)(h). See also, NSCA, Third Schedule, ss. 5(3)(h). See \textit{Sparling v. Javelin International Ltd.}, \textit{supra}, footnote 72, discussed, \textit{infra}, at footnote 100 and accompanying text.
ambiguities. In recommending adoption of an oppression remedy as an antidote to the perceived inadequacy of the common law of fiduciary duties, the Dickerson Committee commented on the relationship to the derivative action as follows:

Section 19.02 [now s. 239 of the Canada Business Corporations Act, allowing the court to grant leave to commence a derivative action] in broadly permissive terms—but always subject to court supervision—legitimates the shareholder’s derivative action that is brought in the name of the corporation to enforce a right of the corporation, e.g., where the directors divert to themselves the profits from a transaction that they had a duty to effect in the name and on behalf of the corporation. The object of s. 19.02 is to remedy a wrong done to the corporation, therefore it applies to all corporations irrespective of size or distribution of shares. Section 19.04 [now s. 241 of the Canada Business Corporations Act, the oppression remedy], on the other hand, will be invoked most frequently—but not always—in respect of a corporation the shares of which are held by only a relatively small number of persons, a so-called “close corporation”, since its usual object is to remedy any wrong done to minority shareholders. Examples of such cases are commonplace. The most frequent cases are mentioned in the Jenkins Report (para. 205): e.g., where dominant shareholders appoint themselves to paid offices of the corporation, absorbing any profits that might otherwise be available for dividends; the issue of shares to dominant shareholders on advantageous terms; or the repeated passing of dividends on shares held by a minority group. Generally, the purpose of these tactics is to squeeze out minority shareholders. Another illustration is the liquidation “freeze-out” that succeeded in Fallis and Deacon v. United Fuel Investments Ltd. [1963] SCR 397. Scrutiny of these examples shows that there is no clear dividing line between the cases.

Diversion of corporate profits is clearly a wrong to a corporation that normally would be remedied by a derivative action under s. 19.02. A refusal to declare dividends in order to squeeze out minority shareholders would call for an application under s. 19.04. But the payment of excessive salaries to dominant shareholders who appoint themselves officers is a borderline case: it may constitute a wrong to the corporation and, at the same time, may have as its specific goal the squeezing out of minority shareholders (at a low price reflecting the small dividends paid) whose investment is no longer required. In such a case the aggrieved person may select the remedy that will best resolve his problem. . . . In sum, we think that the courts should have very broad discretion, applying general standards of fairness, to decide these cases on their merits.

This passage suggests that the oppression remedy was intended to have a fundamentally personal character. The object of the provision allowing for leave to commence a derivative action “is to remedy a wrong done to the corporation”, while the “usual object” of the oppression provision “is to remedy any wrong to minority shareholders”. Some “borderline” derivative cases like excessive remuneration can be litigated under the oppression remedy. However, the committee appears to have envisioned that this would be so only where the ostensibly derivative wrong could more properly be characterized as personal in nature. This interpretation

81 Including a wrong done by controlling shareholders to the minority shareholders. See, supra, footnote 68.
is strengthened by noting that the oppression remedy was intended to be used primarily—although not exclusively—in the case of private companies. In the private company context, the distinction between derivative and personal actions loses a good deal of its bite, and wrongs to the corporation frequently reflect an underlying dispute between corporate constituents.

If this description of the oppression remedy (which parallels Gower’s rationalization of the English cases) is correct, then the oppression remedy embraces two types of actions: those that are purely personal, and those which might be brought as either derivative or personal actions, but which are pursued in personal form under the oppression remedy.

The somewhat ambiguous legacy left by the Dickerson Committee is aptly summed up in the Proposals for a New Business Corporations Law for Alberta, which reviewed (and recommended substantial adoption of) the Canada Business Corporations Act. The authors of the Proposals state that:

... we find some difficulty in the relationship between the derivative and personal actions in the CBCA: a given set of facts may appear to give rise to both or it may be doubtful which it gives rise to. The drafters of the CBCA (Proposals, p. 162) thought that in the area of overlap the aggrieved person would have an election, and it seems likely that they are right in that opinion, but a cautious lawyer is likely to feel impelled to bring two actions so as to be sure that he has brought the right one. . . .

If we were starting with a clean slate, we think that we would recommend that the proposed ABCA set out one procedure to be followed whenever the claim is, in essence, that those in control of a company are abusing their power and treating the minority unfairly.

The Canadian cases also reflect the uncertainty created by the drafting of the Canada Business Corporations Act and its progeny. The cases fall loosely into four categories: cases preceding the adoption of the oppression remedy and holding that the statutory derivative action procedure is the
exclusive method of commencing a derivative action; cases post-dating the adoption of the oppression remedy and specifically holding that an action of a derivative character may not be commenced under the oppression provision; cases post-dating the oppression remedy and holding that actions for wrongs of a derivative character may be commenced under the oppression provision; and those not explicitly discussing the relationship between derivative and oppression actions but allowing actions of a derivative character to proceed under the oppression remedy.

Falling in the first category is the Ontario Court of Appeal decision in Farnham v. Fingold.\textsuperscript{88} In delivering the unanimous opinion of the court Jessup J.A. held that:\textsuperscript{89}

\ldots the very broad language of s. 99(1) [allowing the court to grant leave to commence a derivative action] embraces all causes of action under any statute or in law or in equity, that a shareholder may sue for on behalf of a corporation. All forms of derivative actions purporting to be brought on behalf of and for the benefit of the corporation come within it, and therefore s-s. (2) applies to all such actions.

Jessup J.A.'s broad language would seem to exclude the possibility of a derivative wrong proceeding under the oppression remedy. However, the judgment in fact says nothing about the issue at all. While the court makes clear that the leave provision is the exclusive method for commencing a derivative action, the statutory oppression provision had not then been adopted in the legislation under consideration by the court.\textsuperscript{90} The issue at hand was whether or not the applicant could commence a derivative action under an exception to the rule in Foss without seeking leave of the court. Without the statutory oppression remedy before it, the court could not have contemplated the relationship between the derivative action and the oppression provision. Moreover, even if one adopts the view that the court's pronouncement was intended to embrace all forms of present and future actions, it is clear that a court cannot act in a manner that overrides future legislation. Whatever the position was at the time when Farnham was decided, the legislature (barring unconstitutionality) might speak in a manner which alters the result. On this view the issue reduces to one of interpretation; in furnishing shareholders with a statutory oppression remedy, did the legislature in fact reverse the result in Farnham in respect of some or all actions of a derivative character?\textsuperscript{91}

\begin{footnotes}
\item[88] Supra, footnote 8. See also, Goldex Mines Ltd. v. Revill, supra, footnote 8.
\item[89] Ibid., at pp. 159 (D.L.R.), 135 (O.R.).
\item[90] The Business Corporations Act, R.S.O. 1970, c. 53, s. 99.
\item[91] Other cases dealing with the relationship between derivative and personal actions and preceding the adoption of a statutory oppression remedy fail to cast light on the question at hand, for the same reason. See, for example, Goldex Mines Ltd. v. Revill, supra, footnote 8. In Rogers v. Bank of Montreal, supra, footnote 20, post-dating the adoption of both the leave procedure and the oppression remedy, the court held that for wrongs done to the corporation, the corporation was the proper plaintiff, and the rule in Foss prevented the plaintiffs from suing personally. However, the plaintiffs did not claim under the oppression
\end{footnotes}
Cases in the second category directly confront that question. At least three lower courts have held that leave must be obtained to commence any derivative action, and that such an action may not be commenced under the statutory oppression remedy. In *Re Goldstream Resources Ltd.*92 Spence J. of the British Columbia Supreme Court held that in a derivative action:

... any injury caused to a shareholder is indirect. It may decrease the market value of his shares by putting too little into the company's treasury in return for the new placement. But the real injury, if any, is done to the company itself. If the company is injured, and if the directors refused to take action on behalf of the company, then a derivative action may be sought by leave pursuant to s. 225 of the Company Act. That has not been done. Since the enactment of s. 225 and its predecessor, there is no means in British Columbia of commencing any derivative action other than under the provisions of the section. It entirely replaces any previous common law derivative action.

Unlike *Farnham*, the court expressly considered the relationship between the derivative action and the oppression remedy. Another British Columbia lower court judge reached a similar result,93 as did Carter L.J.S.C.O. in *Skorchid v. Edgewater Marine Limited.*94 In *Skorchid*, however, the court relied on the holding of the Ontario Court of Appeal in *Goldex Mines Ltd. v. Revill.*95 Like the holding in *Farnham*, the *Goldex* decision preceded the enactment of the statutory oppression remedy in Ontario. Thus, it is difficult to know how *Goldex* supports the result in *Skorchid*.

A decision of the Ontario Divisional Court also supports the view that all derivative actions must be commenced with leave. In *Re Goldhar*

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93 In *Beckwith v. Natural Nectar Products Canada Ltd.*, unreported, June 14, 1985 (B.C.S.C.) (per Cowan L.J.S.C.), the plaintiff and defendant were the sole shareholders and directors of a company incorporated to sell the products of a California corporation. The plaintiff, *ibid.*, at p. 3, alleged that the defendant "was instrumental in having the California company terminate its relationship with the respondent company and transfer the representation to himself". The court held that if the allegation was true, then the defendant would be in breach of his fiduciary duty to the corporation; that is, the alleged wrong was one of a derivative character. Although the application was brought under the British Columbia oppression provision, the court, *ibid.* (apparently on its own initiative), granted leave to commence the action derivatively under the leave procedure in the British Columbia statute, holding that such an action was "more appropriate" in the circumstances.


95 *Supra*, footnote 8.
and Quebec Manitou Mines Ltd.  

Reid J. for the court held that the restraining order provision of the former Ontario legislation does not embrace derivative causes of action, for which leave was held to be necessary. In the course of his judgment, Reid J. said that the argument that a derivative cause of action could be commenced under the restraining order provision:

... amounts to saying that the Legislature intended to provide not only complementary but concurrent vehicles for the assertion of shareholders' derivative claims; one by action under s. 99 [allowing for leave to commence a derivative action], the other by motion under s. 261 [the restraining order provision].

It has already been observed that s. 261 does not, on its face, appear to have any relevance to derivative claims. But even if this were not as plain as it is, one would experience difficulty in accepting that the Legislature intended to provide explicitly for derivative rights to be asserted in an action maintainable only with leave and in the same breath provide impliedly for the same to be done on a motion without leave. I see nothing that requires, or even justifies, the acceptance of legislative inconsistency on this scale, and I reject the argument.

It is not difficult to see that the same sort of "legislative inconsistency" would accompany any attempt to utilize the oppression action to remedy derivative wrongs. In my view (elaborated further below), Reid J.'s argument is a compelling one.

However, for every holding that the oppression remedy may not be enlisted in a derivative cause, there is an opposite holding. In Sparling v. Javelin International Ltd., decided in the Quebec Superior Court, Rothman J. held that:

The intent of Parliament in enacting section 234 [the oppression remedy of the CBCA, now s. 241] was to include in its ambit all shareholders' recourses, on the condition that a finding of oppression or unfairness first opens the door to the exercise of the Court's jurisdiction. Nothing in the wording of section 234 suggests that the recourses foreseen in section 232 may not be included in a section 234 application. Indeed, some of the orders suggested by section 234(3) encompass derivative recourses; in particular subsection (h) foresees an order compensating the corporation and

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97 Business Corporations Act, R.S.O. 1970, c. 53, s. 261. The provision now appears in Business Corporations Act, 1982, S.O. 1982, c. 4, s. 252. Cf, CBCA, s. 247; ABCA, s. 240; MBCA, s. 240; NBBCA, s. 172; NCA, s. 373; SBCA, s. 240.
98 Supra, footnote 96, at pp. 617-618 (D.L.R.), 745-746 (O.R.). The court also accepted the argument, ibid., at pp. 615 (D.L.R.), 743 (O.R.), that the restraining order provision should be "confined to the rectification of simple 'mechanical' omissions of a type that lend themselves to summary disposition", owing to the summary procedures characteristic of compliance and restraining order proceedings. The oppression remedy, by contrast, allows the court to refer complex matters to trial, obviating this problem. Nonetheless, at least one British Columbia lower court judge appears to have suggested that complex factual matters ought not to be tried under the oppression provision. See Bosman v. Doric Holdings Ltd., Redekop and Wall (1978), 6 B.C.L.R. 189, at p. 192 (B.C.S.C.).
99 See, infra, Part V.
subsection (j) foresees an order compensating an aggrieved person; the corporation itself may be the aggrieved person.

To decide that any right belonging to the corporation may only be exercised by way of derivative action would be to deny the fundamental nature of the reform which enactment of section 234 represents. Such an interpretation would also require a multiplicity of proceedings in a case such as this. There is a decided advantage to a simplified procedure whereby all demands to enforce the rights of minority shareholders can be dealt with in one application.

The derivative action will continue to apply in cases where the applicant does not choose to scale the barrier that section 234(2) represents, but in our view it may be combined with other recourses if the applicant is able to overcome that obstacle.

As against the two lower court British Columbia rulings that derivative wrongs are not actionable under the oppression remedy, at least one British Columbia lower court has also suggested that derivative and personal matters may be heard together under the oppression remedy, in order to simplify proceedings and avoid duplicative litigation.

The judgment of Henry J. of the Ontario Supreme Court in Ontario Securities Commission v. McLaughlin also seems to suggest that derivative wrongs may be litigated under the oppression remedy. In his words:

"There is, however, nothing in the scheme of Part XVII of the new Act [the OBCA, 1982] that in my opinion makes sec. 245 [authorizing the court to grant leave to commence a derivative action] an exclusive remedy merely because the plaintiffs as minority shareholders rely on conduct of the defendants that in the first instance caused harm to the company. I have no doubt that they could have invoked sec. 245 and could have applied for leave to do so. But plaintiffs have not chosen that course. Instead they rely on sec. 247(2) which embraces conduct of the corporation, its controlling mind or its directors, that is oppressive or unfairly prejudicial to them as minority shareholders. The language of sec. 247(2) is quite capable of embracing conduct that is also prejudicial to the corporation and so may overlap sec. 245. In the case at bar, the plaintiffs could, with leave, proceed on behalf of and in the name of the corporation to enforce its rights in respect of the alleged misfeasance of defendants. They choose however to take advantage of sec. 247 in respect of the defendants' alleged misfeasance within the ambit of sec. 247(2) which itself, on a liberal and common sense interpretation can also embrace..."

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The court stated, at p. 544:

Mr. Fawcus, with his customary clarity, argued that the three members have been given rights under s. 222 of the Companies Act of 1973 to commence a derivative action if they feel that a secret profit has been made. In my view, the new rights created by s. 222 [of the Companies Act of 1973, allowing shareholders to commence a derivative action] are in addition to whatever other rights or remedies the three members have either by statute or at common law. The opening words of s. 222(2) which I paraphrase "... the Court may, with a view to bringing to an end or to remedying the matters complained of, make such order as it considers appropriate..." suggest to me that where, as here, the company is not large or affluent and the financial stakes are not that high, that I should make an order, hopefully to reduce rather than increase the possibility of future litigation.


103 Ibid., at pp. 450-451.
derivative claims. In this respect, Part XVII being a new scheme of protection for claimants, I do not consider *Farnham v. Fingold* [(1973), 33 D.L.R. (3d) 156] binding because that decision was delivered under the former Act which did not have the full scheme now found in Part XVII; for the same reason I do not consider the reasoning of the Divisional Court in *Goldhar* [(1975), 61 D.L.R. (3d) 612] applicable. Under the new Part XVII there is no inconsistency in a derivative action under sec. 245 requiring leave and sec. 247 not being so limited; leave is required under sec. 245 to protect the corporation from frivolous and unwarranted interference by disaffected claimants who seek to inject the corporation into litigation as a party plaintiff for which the corporation may initially have to provide the financing. The proceeding now created by sec. 247 on the other hand is quite different; it creates a new personal cause of action to which the corporation need not be a party. A careful reading of the statement of claim reflects a claim for payment direct to plaintiffs and not to Mascan.

The holding in *McLaughlin* is not free from ambiguity. A cursory reading suggests that the court envisioned that all derivative matters would be actionable under the oppression remedy. However, the court refers to the oppression action as “personal” in nature. Further, as Henry J., points out, the statement of claim did not claim relief for the corporation, but only for the individual plaintiffs. Thus, the *McLaughlin* court appears to have adopted a view of the oppression action that corresponds to that of the Dickerson Committee. That is, the oppression action may be resorted to in cases where the alleged facts would give rise to either a personal or a derivative action, but where the plaintiff has elected to proceed by way of a personal action.

In sum, amongst those cases that expressly consider the relationship between the derivative action and the oppression remedy, no consensus view has emerged in the courts.

As noted earlier, there is yet a fourth category of cases; those that, without comment, allow actions of a derivative character to proceed under the oppression remedy. These actions have involved a wide range of subject matters, including the payment of excessive remuneration and excessive management fees, making unauthorized corporate loans and other transactions to the detriment of the company, charging unauthorized

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104 *Supra*, footnotes 80-83 and accompanying text. Such a reading would also be consistent with Gower's rationalization of the English cases (even though Gower's rationalization may not be a suitable view of those cases, given the English statutory context); see *supra*, footnotes 57-63 and accompanying text.


expenses to the company,\textsuperscript{108} effecting an authorized licence of a trade mark,\textsuperscript{109} appropriation of a corporate opportunity,\textsuperscript{110} an interested director's transaction,\textsuperscript{111} the unauthorized payment of dividends,\textsuperscript{112} and the charging of an unauthorized franchise fee to the company.\textsuperscript{113}

Thus, the balance of authority appears to favour the proposition that all types of derivative actions are permitted under the oppression remedy. However, what stands out in compiling a tally sheet of the cases is the wide divergence of judicial opinion. This is not surprising given the essentially schizophrenic character of the statutes, which fail to offer the courts much guidance. Indeed, the relationship between the statutory oppression and derivative action provisions is inherently ambiguous and, as I argue further below, in need of legislative reform. Before completing the case for reform, however, it is useful to return for a moment to the reasons why the election between an oppression or a derivative proceeding is an important one.

\textbf{IV. The Election Between the Derivative Action and the Oppression Remedy}

Whether an action must be prosecuted derivatively or under the oppression remedy may have important consequences in terms of standing, procedures, costs rules, the substantive standard of liability, and the range of remedial options available to the court.

In relation to standing, the Canada Business Corporations Act and cognate statutes both allow a “complainant” to bring a derivative action in the name and on behalf of the corporation.\textsuperscript{114} “Complainant” is defined broadly to include “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”.\textsuperscript{115} The term “security” is also broadly defined and includes debt securities.\textsuperscript{116} The term complainant includes as well directors

\begin{footnotes}
\item[109] Ibid.
\item[111] Redekop v. Robco Construction Ltd., supra, footnote 107.
\item[114] Supra, footnote 3. By contrast, in the BCCA, only a “member” (shareholder) or director may commence a derivative action. See BCCA, s. 225. Moreover, where an application is made by a member, that person must have been a member of the company at the time of the event giving rise to the cause of action: BCCA, s. 225(3)(d).
\item[115] Supra, footnote 3.
\item[116] CBCA, ss. 2(1) defines “security” as follows: “security” means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate
\end{footnotes}
and officers\textsuperscript{117} and "any other person who, in the discretion of a court, is a proper person to make an application under this Part".\textsuperscript{118}

A "complainant" may also commence an oppression action.\textsuperscript{119} Superficially, it would therefore appear that the same class of persons has standing to commence either type of action. This superficial similarity is misleading, however. At common law, only shareholders have standing to commence a derivative action in the name of the corporation.\textsuperscript{120} Although it is possible to read the leave provision as working a substantive change in the law by broadening the class of persons with standing to sue in the name of the corporation, the courts have not thus far availed themselves of the opportunity.\textsuperscript{121} This appears to comport with the intention of the drafters of the legislation who envisioned that the derivative action would be resorted to mainly (or perhaps even exclusively) by shareholders.\textsuperscript{122} Thus, at least given the present state of the law, the derivative action may be open only to shareholders.\textsuperscript{123}

evidencing such a share or debt obligation”. Comparable definitions may be found in ABCA, ss. 1(1)(u); MBCA, ss. 1(1); NBBCA, ss. 1(1); NCA, ss. 2(1)(bb); OBCA, ss. 1(1)38; SBCA, ss. 2(1)(bb).

\textsuperscript{117} And former directors and officers. See CBCA, ss. 238(b); ABCA, ss. 231(b)(ii); MBCA, ss. 231(b); NBBCA, ss. 163(b)(ii); NCA, ss. 363(b)(ii); OBCA, ss. 244(b)(ii); SBCA, ss. 231(b)(ii). See also NSCA, Third Schedule, ss. 7(5)(b)(ii).

\textsuperscript{118} CBCA, ss. 238(d); ABCA, ss. 231(b)(iii); MBCA, ss. 231(d); NBBCA, ss. 163(3); NCA, ss. 363(b)(iv); OBCA, ss. 244(b)(iii); SBCA, ss. 231(b)(iii). See also NSCA, Third Schedule, ss. 7(5)(b)(iv).

\textsuperscript{119} CBCA, ss. 241(1); ABCA, ss. 234(1); MBCA, ss. 234(1); NBBCA, ss. 166(1); NCA, ss. 366(1); OBCA, ss. 247(1); SBCA, ss. 234(1). See also NSCA, Third Schedule, ss. 5(1).


\textsuperscript{121} See, for example, \textit{Re Daon Development Corporation} (1984), 54 B.C.L.R. 235 (B.C.S.C.) (declining to accord a creditor standing to complain about an alleged unauthorized payment of dividends under the “proper person” clause of the British Columbia legislation). \textit{Cf., R. v. The Sands Motor Hotel, supra}, footnote 112 (allowing Her Majesty standing as a creditor owed unpaid taxes to complain about an unauthorized payment of dividends under the oppression remedy).

\textsuperscript{122} In discussing the derivative action, the Dickerson Committee, \textit{op. cit.}, footnote 18, repeatedly refers to the action as the \textit{shareholder's} derivative action. See, for example, paras. 481, 482, 484 and 489. Although the leave provision allows a "complainant" to commence an action, it also allows a complainant to \textit{intervene} in a derivative action. Therefore, one might guess that the Dickerson Committee envisioned that the courts might permit creditors and others standing to \textit{intervene} in a derivative action, rather than commence such action.

\textsuperscript{123} In \textit{Daon Development Corporation, supra}, footnote 121, the court did not exclude the possibility that persons other than shareholders might be accorded standing to commence a derivative action. However, in holding that the complainant must have a “direct financial interest” in how the company is run, but excluding creditors from this class, the court, \textit{ibid.}, at p. 243, appears to have virtually foreclosed the possibility that claimants other than shareholders might be accorded standing.
By contrast, the oppression provision provides that a complainant may commence an action in regard to conduct that is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer". The breadth of the substantive cause of action makes it clear that standing is broadened to include persons other than shareholders.

Procedures differ in respect of the two types of proceedings. An oppression application may be commenced by a summary form of procedure, while a derivative suit must proceed as an action, with full pleadings and discoveries. Moreover, where an action is commenced derivatively, the conditions precedent for leave must be satisfied, which include "reasonable notice" to the directors of the corporation. The oppression provision is thus comparatively well suited to the granting of a speedy remedy where necessary, including an order for ex parte relief. Under the derivative action provision, it is questionable whether a court could grant any relief at all (whether ex parte or otherwise) before leave to commence an action has been granted.

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124 CBCA, ss. 241(2); ABCA, ss. 234(2); MBCA, ss. 234(2); NCA, ss. 366(2); OBCA, ss. 247(2); SBCA, ss. 234(2). (Emphasis added). See also NSCA, Third Schedule, ss. 5(2). These subsections define the class of persons in favour of whom the substantive cause of action runs. Note that this class of persons does not correspond to those who are given standing as "complainants". For example, although a former shareholder has standing to apply for an order under the oppression provision, the charging section appears to offer a remedy only where there is oppressive conduct towards "any security holder". Similarly, "complainant" is defined to include holders of debt obligations, but the oppression remedy touches in addition conduct that is oppressive to "creditors" (which might include, for example, trade creditors who are not holders of debt obligations). This latter anomaly is explicable as an attempt to prevent creditors with mere contractual claims (more properly adjudicated under the law of contracts) from having automatic resort to the oppression remedy. The former is not so easily explained and ought, in my view, to be corrected. Note that New Brunswick's legislation extends the oppression action to "shareholders" rather than security holders. See NBBCA, ss. 166(2) ("shareholder, creditor, director or officer").

125 The oppression provisions allow a complainant to "apply to a [or "the"] court for an order under this section". CBCA, ss. 241(1); ABCA, ss. 234(1); MBCA, ss. 234(1); NBBCA, ss. 166(1); NCA, ss. 366(1); OBCA, ss. 247(1); SBCA, ss. 234(1). See also NSCA, Third Schedule, ss. 5(1). Thus, the lis proceeds as an "application" and pleadings and discoveries are unnecessary. See, for example, Ontario Rules of Civil Procedure, O. Reg. 560/84, Rules 38, 39. Where the lis is commenced derivatively, it will proceed as an action, which will be accompanied by the full range of civil procedures, including pleadings, discoveries, etc. See also Ontario Rules of Civil Procedure, supra, Rules 25-33. The rules of procedure in the other provinces are broadly similar.

126 CBCA, ss. 239(2)(a); ABCA, ss. 232(2)(a); MBCA, ss. 232(2)(a); NBBCA, ss. 164(2)(a); NCA, ss. 364(2)(a); SBCA, ss. 232(2)(a). See also NSCA, Third Schedule, ss. 4(2)(a). Cf., OBCA, ss. 245(2) (requiring fourteen days' notice to the directors). The notice requirement and the other conditions precedent for leave have proved to be more than paper tigers to a number of applicants requesting leave. See, generally, M.A. Maloney, Whither the Statutory Derivative Action? (1986), 64 Can. Bar Rev. 309, at pp. 317-330; Dennis H. Peterson, Shareholder Remedies in Canada (1989), paras. 17.35—17.46.
been given. The simplified procedure for an oppression application may also allow the plaintiff to secure appropriate relief at lower cost, although this advantage may be dissipated if the court orders trial of some or all of the issues in the complaint.

In the CBCA, ss. 239(1) authorizes the court to grant "leave to bring an action". Subsection 239(2) states that "no action may be brought and no intervention in any action may be made under subsection (1)" unless the conditions precedent to leave have been satisfied. Thus, there is no "action" unless and until the court has given leave under section 239. Section 240, which sets out the powers of the court in relation to derivative actions, states that "[i]n connection with an action brought or intervened in under section 239, the court may at any time make any order it thinks fit...". The words "at any time" must be read in conjunction with the words "in connection with an action", which would appear to empower the court to act only after leave has been given; only then is there an action. There is at least one holding suggesting that no authority to grant ex parte interim relief will be implied. See Re Goldhar and Quebec Manitou Mines Ltd., supra, footnote 96.

Provisions comparable to the CBCA may be found in MBCA, ss. 232-33; NBBCA, ss. 164-65; NCA, ss. 364-65; SBCA, ss. 232-33. See also NSCA, Third Schedule, ss. 4(2)-(3). By contrast, the OBCA specifically authorizes the court to grant interim ex parte relief before the notice requirement has been satisfied. See OBCA, s. 245(3). The position in Alberta is unclear. The relevant provisions are near copies of the federal legislation, but with one wrinkle. The court is specifically empowered to grant leave to commence a derivative action where the plaintiff has initially made an application under the oppression provision. See ABCA, ss. 234(3)(q). This suggests that the court might exercise its authority under the oppression provision to grant interim relief (ex parte or otherwise) prior to granting leave to commence a derivative action. Authority suggests, however, that this would have to be conditioned on a finding of oppression. See Low v. Ascot Jockey Club Limited (1986), 1 B.C.L.R. (2d) 123 (B.C.S.C.); Westmore and Enchant Resources Ltd v. Old MacDonald’s Farms Ltd., supra, footnote 107. This creates a logical conundrum. If derivative matters are not cognizable under the oppression provision, and ss. 234(3)(q) was intended only as a procedural convenience to allow a court to grant leave when an application has mistakenly been brought under the oppression provision, then there can be no finding of oppression prior to granting leave. This would rule out the possibility of pre-leave relief (unless the words of s. 233 are read broadly to encompass such relief). Thus, the position may well be the same as under the CBCA.

See CBCA, ss. 241(3)(n); ABCA, ss. 234(3)(p); MBCA, ss. 234(3)(n); NBBCA, ss. 166(3)(n); NCA, ss. 366(3)(n); OBCA, ss. 247(3)(n); SBCA, ss. 234(3)(n). See also NSCA, Third Schedule, ss. 5(3)(n) (allowing the court to require the trial of any issue). According to Re Peterson and Kanata Investments Ltd., supra, footnote 101 and Westmore and Enchant Resources Ltd. v. Old MacDonald's Farms Ltd., supra, footnote 107, the court should settle as many things as possible on the original application. However, particularly where complex matters of fact arise, the court may choose to order a trial of some or all of the issues in the application. This may have the effect of producing greater delay and increased costs for the plaintiff. See, for example, Re Heyl and Lac Minerals Ltd., supra, footnote 70 (lengthy judgment deciding only that there was prima facie merit to the plaintiff's oppression claims and referring them to trial, with pleadings, discoveries, and other procedures characteristic of a normal action). Nonetheless, to the extent that any of the issues in question can be settled on the original application, the legal costs of the action will be correspondingly reduced. See, for example, Miller v. F. Mendel Holdings Ltd., supra, footnote 110 (settling the question of liability and referring only the matter of cashout price to trial).
The relevant costs rules may also partly differ as between the derivative and oppression actions. In respect of both, no security for costs need be given, and an award of interim costs may be made. However, while it is clear that the court may award an indemnity for costs in a derivative action, it is at least doubtful that such an indemnity could be ordered in an oppression application.

Perhaps a more important distinction between the derivative and oppression actions is the differing substantive standard of liability. The derivative action creates no substantive standard of liability, but rather draws upon the law of fiduciary duties. By contrast, the oppression action

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129 CBCA, ss. 242(3); ABCA, ss. 235(3); MBCA, ss. 235(3); NCA, ss. 368(1); OBCA, ss. 248(3); SBCA, ss. 235(3). See also NSCA, Third Schedule, ss. 7(3). The New Brunswick legislation, by comparison, provides that "[a] complainant shall give such security for costs in any application made or action brought or intervened in under this Part as may be ordered by the Court". See NBBCA, ss. 167(3).

130 CBCA, ss. 242(4); ABCA, ss. 235(4); MBCA, ss. 235(4); NBBCA, ss. 167(4); NCA, ss. 368(2); OBCA, ss. 248(4); SBCA, ss. 235(4). See also NSCA, Third Schedule, ss. 7(4).

131 CBCA, ss. 240(d); ABCA, ss. 233(d); MBCA, ss. 233(d); NBBCA, ss. 165(d); NCA, ss. 365(d); OBCA, ss. 246(d); SBCA, ss. 233(d). See also NSCA, Third Schedule, ss. 4(3)(d). See Turner v. Malilhot (1985), 50 O.R. (2d) 561, 28 B.L.R. 222 (Ont. H.C.) (awarding an indemnity under the OBCA provision). The rule of ordinary application is still, however, the rule that costs follow the event.

132 The statutory provisions referred to, ibid., footnote 131, apply only to derivative actions and not to oppression applications. There is no comparable wording in the oppression provisions. The broad wording of the oppression remedy, however, which states that "the court may make any interim or final order it thinks fit", may well be wide enough to encompass an order for indemnity. Further, the English courts have held that an indemnity may be awarded under the equitable jurisdiction of the court. See Wallerstein v. Moir (No. 2), [1975] Q.B. 373, [1975] 1 All E.R. 849 (C.A.); Smith v. Croft, [1986] 1 W.L.R. 580, [1986] 2 All E.R. 551 (Ch. D.); Watts v. Midland Bank plc., [1986] B.C.L.C. 15 (Ch. D.). Thus, the best guess is that it is also possible to award an indemnity in connection with an oppression action, although see, infra, at footnote 185 and accompanying text (arguing that an order for indemnity should be rare, if available at all in a personal action under the oppression provision).

133 In the usual case, a derivative action will allege breach of a fiduciary duty owed to the corporation by directors, officers, and (occasionally) shareholders. Although a derivative action also may be brought in the name and on behalf of the corporation against outsiders, alleging such matters as a breach of contract or a tortious wrong, it is rarely so used. See T.M. Jones, An Empirical Examination of the Incidence of Shareholder Derivative and Class Action Lawsuits, 1971-1978 (1980), 60 Bost. U.L. Rev. 306.

The substantive standard to which managers as fiduciaries must comply is expressed in CBCA, ss. 122(1)(a); ABCA, ss. 117(1)(a); BCCA, ss. 142(1)(a); MBCA, ss. 117(1)(a); NBBCA, ss. 79(1)(a); NCA, ss. 199(1)(a); OBCA, ss. 134(1)(a); SBCA, ss. 117(1)(a). Whether or not common law fiduciary duties (like the proper purpose doctrine) survive the enactment of a statutory fiduciary duty provision is not clear. There is some indication that such duties may have been supplanted by the single statutory test of liability. See, for example, Teck Corporation Ltd. v. Millar (1972), 33 D.L.R. (3d) 288, [1973] 2 W.W.R. 385 (B.C.S.C.); Re Olympia and York Enterprises Ltd. and Hiram Walker Resources Ltd. (1986), 37 D.L.R. (4th) 193, 59 O.R. (2d) 254 (Ont. Div. Ct.); Olson v. Phoenix Industrial
creates liability where there has been conduct "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of" the plaintiff. The courts have drawn upon the jurisprudence relating to fiduciary duties in interpreting the scope of the oppression remedy, but it is clear that the oppression remedy creates a standard of fair conduct that captures a wider range of conduct than the common law of fiduciary duties. Further, in relation to a derivative action the plaintiff may sue in the name of the corporation or a subsidiary, while under the oppression remedy he may complain about the conduct of the corporation or any of its affiliates. "Affiliate" is defined more broadly than is "subsidiary".

Another important distinction is the range of remedial options available to the court. Under the oppression remedy the court may grant "any interim or final order it thinks fit". The section contains a number of illustrative orders that make it perfectly clear that the remedial freedom of the court is virtually unbounded. For example, the court is empowered to amend


CBCA, ss. 239(1); ABCA, ss. 232(1)(a); MBCA, ss. 232(1); NNBCA, ss. 164(1); NCA, ss. 364(1); OBCA, ss. 245(1); SBCA, ss. 232(1). See, also, NSCA, Third Schedule, ss. 4(1).

CBCA, ss. 241(2); ABCA, ss. 234(2); MBCA, ss. 234(2); NNBCA, ss. 166(2); NCA, ss. 366(2); OBCA, ss. 247(2); SBCA, ss. 234(2). See, also, NSCA, Third Schedule, ss. 5(2).

One corporation is the subsidiary of the other if that other controls securities to which are attached more than fifty per cent of the votes that may be cast to elect directors, and the votes controlled are sufficient to elect a majority of the directors. See, CBCA, ss. 2(3), 2(5); ABCA, ss. 2(2), 2(4) (extended definition of "subsidiary"); MBCA, ss. 1(3), 1(5); OBCA, ss. 1(2) (extended definition of "subsidiary"); 1(5); SBCA, ss. 2(3), 2(5). A corporation may be an "affiliate" of another if one is the subsidiary of the other, or both are subsidiaries of the same body corporate or controlled by the same person. See CBCA, ss. 2(2); ABCA, ss. 2(1); MBCA, ss. 1(2); NNBCA, ss. 1(2); NCA, s. 10; OBCA, ss. 1(4); SBCA, ss. 2(2). The legislation of New Brunswick and Newfoundland defines "control" more broadly to include cases of de facto and not merely de jure control. Thus, parent corporations that control with fewer than 50% of the votes also fall within the purview of the oppression provision (this may also be the case under the CBCA and cognate statutes: see supra, footnote 72). See NNBCA, ss. 1(3), 1(5); NCA, ss. 11, 12(b).

CBCA, ss. 241(3); ABCA, ss. 234(3); MBCA, ss. 234(3); NNBCA, ss. 166(3); NCA, ss. 366(3); OBCA, ss. 247(3); SBCA, ss. 234(3). See also NSCA, Third Schedule, ss. 5(3).

Ibid.
the articles or by-laws or create or amend a unanimous shareholders' agreement,\textsuperscript{141} direct an issue or exchange of securities,\textsuperscript{142} appoint new directors,\textsuperscript{143} liquidate and dissolve the corporation,\textsuperscript{144} or direct a statutory investigation.\textsuperscript{145} These remedial options greatly exceed those legal and equitable remedies available to a court under the common law of fiduciary duties.

In connection with a derivative action, the empowering section states that “the court may at any time make any order it thinks fit”.\textsuperscript{146} The omission of the words “interim or final” suggests that the apparently broad words of the section have a more limited meaning than in connection with an oppression application. Further, the illustrative powers that follow are far more limited in scope than those enumerated in the oppression provision. Two of the four illustrations relate to the conduct of the action,\textsuperscript{147} one relates to the disposition of costs,\textsuperscript{148} and the last allows an award to be made directly to former and present security holders.\textsuperscript{149} The difference cannot have been accidental, suggesting that, when read \textit{ejusdem generis} with the specific enumerations, the apparently broad powers of the court are much more restricted in a derivative action than in connection with an oppression proceeding. The courts have indeed been far less adventurous in granting remedies in connection with derivative actions, and have

\begin{itemize}
  \item \textsuperscript{141} CBCA, ss. 241(3)(c); ABCA, ss. 234(3)(c), (d) (omitting authority to create or amend a unanimous shareholders' agreement); MBCA, ss. 234(3)(c); NBBCA, ss. 166(3)(c); NCA, ss. 366(3)(c); OBCA, ss. 247(3)(c); SBCA, ss. 234(3)(c). See also NSCA, Third Schedule, ss. 5(3)(c) (omitting authority to create or amend a unanimous shareholders' agreement).
  \item \textsuperscript{142} CBCA, ss. 241(3)(d), 2(5); ABCA, ss. 234(3)(e); MBCA, ss. 234(3)(d); NBBCA, ss. 166(3)(d); NCA, ss. 366(3)(d); OBCA, ss. 247(3)(d); SBCA, ss. 234(3)(d). See also NSCA, Third Schedule, ss. 5(3)(d).
  \item \textsuperscript{143} CBCA, ss. 241(3)(e); ABCA, ss. 234(3)(f); MBCA, ss. 234(3)(e); NBBCA, ss. 166(3)(e) (slightly different from CBCA model); NCA, ss. 366(3)(e); OBCA, ss. 247(3)(e); SBCA, ss. 234(3)(e). See also NSCA, Third Schedule, ss. 5(3)(e).
  \item \textsuperscript{144} CBCA, ss. 241(3)(l); ABCA, ss. 234(3)(n); MBCA, ss. 234(3)(l); NBBCA, ss. 166(3)(l); NCA, ss. 366(3)(l); OBCA, ss. 247(3)(l); SBCA, ss. 234(3)(l). See also NSCA, Third Schedule, ss. 5(3)(m).
  \item \textsuperscript{145} CBCA, ss. 241(3)(m); ABCA, ss. 234(3)(o); MBCA, ss. 234(3)(m); NBBCA, ss. 166(3)(m); NCA, ss. 366(3)(m); OBCA, ss. 247(3)(m); SBCA, ss. 234(3)(m). See also NSCA, Third Schedule, ss. 5(3)(m).
  \item \textsuperscript{146} CBCA, s. 240; ABCA, s. 233; MBCA, s. 233; NBBCA, s. 165; NCA, s. 365; OBCA, s. 246; SBCA, s. 233. See also NSCA, Third Schedule, ss. 4(3).
  \item \textsuperscript{147} CBCA, ss. 240(a),(b); ABCA, ss. 233(a),(b); MBCA, ss. 233(a),(b); NBBCA, ss. 165(a),(b); NCA, ss. 365(a),(b); OBCA, ss. 246(a),(b); SBCA, ss. 233(a),(b). See also NSCA, Third Schedule, ss. 4(3)(a),(b).
  \item \textsuperscript{148} CBCA, ss. 240(d); ABCA, ss. 233(d); MBCA, ss. 233(d); NBBCA, ss. 165(d); NCA, ss. 365(d); OBCA, ss. 246(d); SBCA, ss. 233(d). See also NSCA, Third Schedule, ss. 4(3)(d).
  \item \textsuperscript{149} CBCA, ss. 240(c); ABCA, ss. 233(c); MBCA, ss. 233(c); NBBCA, ss. 165(c); NCA, ss. 365(c); OBCA, ss. 246(c); SBCA, ss. 233(c). See also NSCA, Third Schedule, ss. 4(3)(c).
\end{itemize}
in the main confined themselves to the range of remedies traditionally available in a common law derivative action.\footnote{150}

In sum, whether a plaintiff must proceed derivatively or may make an application under the oppression remedy may have important consequences for the plaintiff in a number of respects.

V. Analysis

In this section, I will argue that there are good reasons for insisting that where a wrong is done to the corporation, the plaintiff must sue derivatively. There are also good reasons for requiring that the derivative plaintiff obtain leave and satisfy conditions precedent similar to those found in the Canada Business Corporations Act and cognate statutes. As a consequence, the oppression remedy ought not to be interpreted to embrace derivative wrongs. However, it would be better still to redraft the statutes to unify the derivative action and oppression provisions. This would have the effect of eliminating anomalous differences between the two forms of proceeding, while channeling all derivative (but not personal) causes through a leave procedure.

The first two sections that follow consider two related but analytically distinct questions. First, what are the reasons for insisting that an action be undertaken in derivative form where the corporation is harmed? Second, what are the reasons for insisting that a court grant leave for undertaking a derivative action?

A. The Distinction Between Personal and Derivative Actions

Suppose that the corporation has been wronged by the appropriation of corporate assets by management\footnote{151} of the corporation. No particular corporate constituency suffers any special harm. Plaintiff X, however, wishes to undertake a personal action solely for her own benefit to recover from the wrongdoers damages equal to the diminution in the value of her shareholding as a result of the wrongful appropriation. She argues that, although the injury is indirect, it is nonetheless a very real injury and there is no reason she ought not to be able to recover in respect of that injury. Should the personal action be allowed to proceed? The answer, in most cases, is in the negative. The primary reasons (which are closely related) are two: avoiding a multiplicity of suits, and achieving remedial efficacy at reasonable cost. In respect of the first, allowing each claimant to commence a personal action would expose the corporation to a large number of essentially duplicative lawsuits, each based on the same cause of action but seeking separately calculated damages. Forcing the plaintiff to sue in the name of the corporation creates an effective joinder of all potential actions, avoiding the costs associated with multiple lawsuits. It

\footnote{150} See generally, Peterson, \textit{op. cit.}, footnote 126, paras. 17.47—17.53.

\footnote{151} I use the term "management" broadly to include both directors and officers.
also simplifies the calculation of damages and ensures an appropriate measure of recovery for all affected by the wrong.

To see this, consider first the case of a private corporation with two shareholders each owning fifty per cent of the corporation, and no other parties with any claim on the corporate assets. Should one steal assets worth $100 from the corporation, the only party injured by the conduct is the innocent shareholder. The court could achieve an appropriate measure of compensation for the innocent shareholder in either of two ways. It could award a personal recovery of $50, or a corporate recovery of $100. Since the plaintiff owns only fifty per cent of the corporation, any personal recovery in excess of $50 would result in overcompensation. A corporate recovery of $100 achieves precisely the same result, since fifty per cent of the benefit of the award accrues to the plaintiff. Thus, it would appear to make little difference whether an action by the innocent shareholder is framed personally or derivatively. In most cases, however, there will be other claimants, and it will be better if the action proceeds derivatively. Suppose that the corporation has two creditors, each of whom is owed $25 by the corporation. A personal recovery of $50 (based on the shareholder’s indirect fifty per cent “ownership” of the corporate assets) would overcompensate the shareholder, since her shares were worth only $25 before the defalcation (fifty per cent of the net value of the corporate assets, after deduction of all liabilities). The extra $25 would come out of the pockets of the company’s creditors. Indeed (assuming no value outside of that attributable to the assets), the creditors would lose the entire $50 owed to them, since there would be no assets left in the corporation with which to pay the outstanding liabilities. After all is said and done, each shareholder will have received, in effect, a liquidating distribution of $50, trumping the prior interest of the creditors. The court could award the plaintiff shareholder $25 in damages—the actual measure of her indirect loss—but it makes more sense to ensure a coincident recovery by the creditors by forcing the shareholder to sue derivatively. This makes subsequent litigation by the creditors unnecessary, conserving judicial and private resources. Even if the interests of the creditors can be joined in the shareholder’s action, doing so creates difficulty and expense that can easily be avoided by requiring the action to proceed derivatively and awarding $100 in damages to the corporation. Further, some potential claimants suffering loss will invariably fail to sue. Awarding personal

152 By the same token, any recovery less than $50 would undercompensate the plaintiff.

153 See, for example, Westmore and Enchant Resources Ltd. v. Old MacDonald’s Farms Ltd., supra, footnote 107.

154 This may be due to the fact that some claimants will be unaware of the corporate wrong and associated personal actions, unwilling to assume the burden of expenditures and risk associated with a lawsuit, or perhaps simply because the size of the prospective recovery is small compared to the prospective expense (as in the case of shareholders holding small and transient interests).
recoveries equal to the indirect loss suffered by each plaintiff will then almost certainly lead to underdeterrence\textsuperscript{155} of wrongs to the corporation, since the aggregate recovery of plaintiffs will routinely fall short of the benefit received by the wrongdoer.\textsuperscript{156}

In the example used above, the losses suffered by all claimants (here, the plaintiff shareholder and the two creditors) are easy to calculate. But this will not always be the case. Where, for example, the defalcation does not jeopardize the solvency of the corporation, but simply reduces the probability that the debt holders will be paid, computing the loss suffered by the creditors will involve determining the effect of the reduction in the probability of payoff on the value of the debt claims, a difficult, time-consuming and expensive exercise.\textsuperscript{157}

Moreover, there may be many other potential claimants who suffer harm as a result of a wrong done to the corporation, especially in cases involving public corporations. Where injury is done to the corporation, all those with an economic interest in the corporation, and not merely shareholders and creditors, suffer an indirect harm. Fixed claimants like trade creditors and employees, and contingent claimants like consumers holding unexpired warranties and tort plaintiffs with unadjudicated (or simply unpaid) claims suffer a loss as well, to the extent that the probability of payoff diminishes. As the number of claimants\textsuperscript{158} multiplies, the difficulties

\textsuperscript{155} In general, the derivative action serves two functions: compensation of those harmed by a wrong done to the corporation, and the deterrence of future harms. See, generally, The American Law Institute, Principles of Corporate Governance, Tentative Draft No. 8 (April 15, 1988), p. 11.

\textsuperscript{156} A court might attempt to avoid the problem of underdeterrence by calculating the total damage to the corporation and awarding this global amount to the pool of plaintiffs joined in the action. But this would create fresh problems. Without taking into account the relative priorities of each class of plaintiff, there would be no guarantee that individual recoveries would even closely approximate the harms suffered. Even if there were a single class of shareholders, and no fixed or contingent claimants of any kind, the division of the award between plaintiffs to the exclusion of those not joined in the action would result in both systematic overcompensation of the plaintiffs and systematic failure to compensate non-plaintiff constituents, violating the compensation rationale for the derivative action.

\textsuperscript{157} In a private corporation, there will be no ready market for any of the corporation’s claims to serve as a benchmark for loss in value. There will likely be a public market for at least some of the corporation’s outstanding claims where the company is a public one (that is, the corporation’s shares and bonds will typically trade over public securities exchanges). In such cases, statistical techniques might be used to isolate changes in the prices of marketable securities attributable to the corporate harm. However, such techniques require great expertise and would involve the participation of financial economists in the determination of damages, generating substantial costs. Moreover, even where there is such a market, a drop in price in response to an event of defalcation or other harm to the corporation may not fully reflect the loss in value of the claims, if the market holds some expectation that legal action will result in redressing the losses.

\textsuperscript{158} Assuming that all those who suffer indirect loss have standing to file suit, a proposition that at present seems doubtful. See, supra, footnotes 114-123 and accompanying text, and infra, Part VI.
of calculating the loss of each correspondingly increase. The administrative difficulty and expense of ensuring that each claimant is paid increase concomitantly.

These difficulties are circumvented where the action proceeds derivatively. Where a single suit is undertaken in the name of the corporation, and a corporate recovery follows, all corporate constituents benefit indirectly\(^{159}\) in precisely the same proportions in which they were initially injured.\(^{160}\) A derivative action therefore accomplishes the same result as joinder in a personal action of all members of all classes of corporate constituents who might conceivably have been injured by the wrong. In so doing, it accomplishes more effectively than joint personal actions both the compensation and deterrence objectives of private law. At the same time, it obviates the need for difficult calculations of the indirect loss suffered by each class of claimant, and avoids the inevitable expenses associated with award distribution to multiple plaintiffs.

This logic leads to the exclusion of representative personal actions as much as non-representative actions, where a wrong is done to the corporation. For example, consider a representative action for the benefit of all shareholders to redress a wrongful appropriation of corporate assets. Assuming that damages are an appropriate remedy, an adjudication of liability would require the court to adopt either one of two remedial strategies. It could calculate the diminution in value of the equity claims resulting from the appropriation, taking into account that portion of the diminution suffered by fixed and contingent claimants. Or it could award the total corporate loss to shareholders as a class. The former strategy creates only marginally less difficult damages calculations than in the case of an individual plaintiff, explored above. The latter trumps the interests of creditors and other fixed and contingent claimants and results in a windfall gain to shareholders as a class. These difficulties are easily avoided by insisting

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\(^{159}\) The enhancement in the value of fixed claims resulting from a sizeable corporate recovery should not be underestimated. Fixed claims constitute a larger fraction of corporate capitalization, on average, than residual equity claims. See Decisive Business Ratios (Dun and Bradstreet, 1987). The division of the corporate recovery between fixed and residual claimants will depend on the solvency of the enterprise. On one polar extreme, the corporation will be so solvent, or the recovery so trivially small compared to outstanding claims, that the recovery will not affect more than nominally the probability that the fixed claims will be paid. On the other extreme, where the corporation is insolvent (either in the sense of assets failing to cover outstanding liabilities, or an inability to pay fixed claims as they become due) virtually all the corporate recovery may well redound to the benefit of the fixed claimants.

\(^{160}\) This assumes no substantial change in the financial health of the corporation from the time of the alleged wrong to the time of recovery. Any such change might well have the effect of causing the distribution of indirect payoffs as between corporate claimants to differ from the distribution of indirect harms occurring at the time of the injury. It also assumes no material changes in capital structure or the governing law of priorities as between competing claimants.
that the action be undertaken derivatively—in the name and on behalf of the corporation.

B. The Leave Requirement

In this section, I assume much the same facts as above; that is, that executives of the corporation have appropriated corporate assets. However, plaintiff X, non-suited in her attempt to commence a personal action, now wishes to seek redress by undertaking an action in the name and on behalf of the corporation. Should leave of the court be required? If so, under what conditions?

As noted above, the Dickerson Report suggests three reasons for requiring leave in the case of a derivative action: (1) the prevention of "strike" suits; (2) the prevention of meritless suits even if brought in good faith; and (3) the avoidance of a multiplicity of actions. In my view, all of these concerns justify a leave requirement. An opportunistic plaintiff may well be tempted to undertake meritless litigation in the name of the corporation solely to extort an attractive settlement. This tactic can succeed as long as the cost to the corporation and its managers of fighting a meritless claim exceeds the cost of settling. This might be so if the suit exposes the corporation and its managers to costs that cannot be recouped even if the action should fail. There are a variety of such costs. These include bad publicity that reflects on the commercial reputation of the corporation and/or its chief personnel, and the diversion of corporate attention (including valuable executive time) from more important matters. The corporation and managers will incur other costs, like lawyer's fees, which are potentially recoverable against the plaintiff should the action fail. However, an award of costs will typically fail to cover at least a portion of the defendant's actual costs, again resulting in irrecoverable expenses whatever the outcome of the suit. It is precisely the existence of these irrecoverable costs that creates the opportunity and the incentive to mount a strike suit with a view to extorting a generous settlement from the corporation. Where leave of the court is required to commence a derivative action and is conditioned on a showing that the plaintiff is acting in good faith and in the best interest of the corporation, such warrantless claims are likely to be weeded out at an early stage.

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161 Supra, footnotes 22-27 and accompanying text.
162 The managers (both directors and officers) are the usual target of shareholder derivative litigation. See Jones, loc. cit., footnote 133.
163 An award of party and party costs will typically fail to cover approximately 30-40% of the actual costs of a lawsuit. An award of solicitor and client costs (which is rarely made) will, however, supply a complete indemnity.
164 Even supposing that the irrecoverable costs are as low as 20% of the defendant's actual costs (a conservative figure; see supra, footnote 163), this will be a substantial sum of money in an expensive lawsuit. Most corporate litigation is indeed very expensive.
165 Such evidence as exists in the United States suggests that the danger of strike suits or meritless claims is a real one. See, for example, D.R. Fischel and M. Bradley,
It may also be the case that a meritless action is commenced in good faith. Particularly in a large public corporation, opinions about the propriety or wisdom of corporate action will inevitably differ, leading to some unwarranted good faith actions. A leave requirement conditioned on a showing that the action is in the best interest of the corporation will tend to eliminate such suits, again with attendant savings in costs to the corporation and its managers.

The concern about a multiplicity of actions (already touched on earlier) is also justified. Where shareholders suffer indirectly from a wrong to the corporation, more than one of their number may wish to commence an action. A leave procedure allows the court to consolidate multiple actions and give instructions for the proper conduct of the action. A judgment binds all shareholders and spares the corporation and defendants the risk of future lawsuits relating to the same subject matter.

There are also good reasons for requiring that notice be given to the board of directors. The notice requirement gives the board an opportunity to consider the merits of the proposed litigation. This might well involve referring the matter to a "special litigation committee" of disinterested directors for consideration. The directors' deliberations may well shed light on the merits of the proposed litigation, enhancing the court's ability to identify and derail unjustified suits at an early date. A


166 Supra, footnote 147.

167 United States legislation typically requires that the would-be plaintiff make a demand on the board to commence action. This requirement in U.S. Law is therefore usually referred to as a "demand" requirement.

168 Referring proposed litigation to a litigation committee consisting of outside or disinterested directors has become commonplace in the United States, and has engendered equal measures of controversy and litigation. In respect to the latter, see, for example, Gall v. Exxon Corp., 418 F. Supp. 508 (S.D.N.Y., 1976); Auerbach v. Bennett, 47 N.Y. 2d 619, 393 N.E. 2d 994, 419 N.Y.S. 2d 920 (N.Y.C.A., 1979); Zapata Corp. v. Maldonada, 430 A. 2d 779 (Del. Ch., 1981). The special litigation committee assumes a central role in the American Law Institute's proposals, op. cit., footnote 155, especially paras. 7.08, 7.09, 7.12, 7.15. Special litigation committees have not yet been used with frequency in Canada, although there may be reason to suspect that they will be resorted to with greater frequency in the future. See generally Maloney, loc. cit., footnote 126, at pp. 330-340.
requirement that the board receive notice also gives the corporation the opportunity to negotiate a settlement with the would-be plaintiff, encouraging intra-corporate settlement of disputes.\footnote{169} Or, the board may simply decide to take steps to rectify the matter complained of. In either case, expensive litigation is avoided and scarce judicial resources are conserved.\footnote{170}

The case in favour of requiring leave is somewhat weaker with respect to private corporations. Because there are fewer claimants, the danger of a multiplicity of actions is correspondingly reduced. The notice requirement also serves a less important function. The dispute is likely to arise out of the deteriorating relationship of the principal shareholders (or of the majority and minority shareholders) and all parties are likely to be amply forewarned of pending litigation. Frequently the \textit{lis} will be the culmination of a long and increasingly acrimonious history of disagreement, and opportunities for intracorporate settlement will have been exhausted. Nor will there always be disinterested directors available to assess dispassionately the merits of the proposed litigation.

But this is not to say that the case in favour of leave disappears entirely. As long as there are multiple corporate claimants, there is a danger of a multiplicity of actions. A danger of frivolous suits also persists. A frustrated minority may be tempted to undertake litigation purely to pressure the majority into changing its mind about matters of corporate policy. The frequency with which intracorporate imbroglios resemble hotly contested marital disputes also suggests a non-trivial possibility that suits will be undertaken with a view to harassing the complainant's intracorporate adversaries. Thus, the requirements that the complainant be acting in good faith and in the best interests of the corporation are supportable. And, while the notice requirement may be a useless formality in some cases, in others it will be the shock that galvanizes the parties to settle their dispute without resort to the courts. These factors argue in favour of a leave procedure in the case of private corporations as well as public corporations.

A discussion of private corporations would not be complete, however, without noting the frequency with which disputes in private corporations involve wrongs that are formally derivative in character but partly or wholly personal in substance. Many of the private corporation cases canvassed

\footnote{169} Cf., American Law Institute, \textit{op. cit.}, footnote 155, p. 67. The danger of extortionate settlements at this early date is minimal as long as the corporation can threaten to force the prospective claimant to seek leave to commence an action, at least as long as the leave-granting procedure works effectively to eliminate groundless suits.

\footnote{170} This is not to say that there should not be a procedure for \textit{ex parte} relief before the notice requirement has been fulfilled, as in the Ontario legislation. There will undoubtedly be cases where such a procedure is necessary to conserve corporate assets threatened by imminent misconduct. The federal legislation ought to be amended to make clear that such \textit{ex parte} relief is available.
earlier fall in this category. Indeed, sometimes the alleged wrongdoing is so closely related to a battle between corporate factions that it is difficult to determine if the action is essentially personal or derivative; the impugned conduct may share aspects of each type of action. It is therefore important, if leave is required to commence a derivative action, that there be an expeditious procedure for the combining of derivative and personal causes of action, to avoid the occurrence of multiple suits arising out of essentially the same underlying facts. Although the rules of court presently allow for the joinder of personal and derivative claims, it might be easier to allow a court hearing an oppression application directly to grant leave to sue on behalf of the corporation and to join derivative and personal causes of action. Although it is conceivable that a court hearing an oppression application already has the authority to do so, a statutory amendment would put the matter beyond doubt.

Indeed, it would probably be better if the provisions allowing for derivative leave and the commencement of an oppression application were collapsed into one. Since its enactment, the oppression provision has spawned a fiduciary code of conduct applying to the activities of the corporation, its directors, and its shareholders. With the ever-increasing elaboration of this code of conduct, two parallel streams of fiduciary standards have arisen, one under the oppression provision, and the other, operating through the derivative action, arising under the section charging the directors and

For example, in Diligent v. RWMD Operations Kelowna Ltd., supra, footnote 106, the petitioner complained not only about the charging of excessive expenses to the corporation, a derivative wrong, but also about being fired as a director, a personal wrong. Similarly, in Journet and Mouzakiotis v. Super Chef Food Industries Ltd., supra, footnote 108, allegations of excessive expenses charged to the corporation were combined with allegations that one of the corporate principals had wrongfully transferred one of the applicants' shareholdings to another party. See also Jackman v. Jackets Enterprises Ltd., supra, footnote 107; Miller v. F. Mendel Holdings Ltd., supra, footnote 110.

See, for example, Carrington Viyella Overseas (Holdings) Ltd. v. Taran, supra, footnote 54, in which the conduct of Canadian directors holding a small minority of shares frustrated the control of the U.S. majority shareholders and prevented a planned amalgamation from proceeding. The failure to consummate the amalgamation was a wrong to the corporation, which stood to benefit from the union. The wrongful frustration of the majority's control (exercised through control of the board) is more appropriately characterized as personal in nature.

A personal action need not be commenced under the oppression provision. However, as a practical matter, the common law personal action has largely now been pre-empted by the oppression remedy.

See, supra, footnotes 100-101 and accompanying text, and especially Re Peterson and Kanata Investments Ltd., supra, footnote 101, and accompanying text; Sparling v. Javelin International Ltd., supra, footnote 72 and text at footnote 100. See also Beckwith v. Natural Nectar Products Canada Ltd., supra, footnote 93, in which the British Columbia Supreme Court granted leave to commence a derivative action in connection with an oppression application, even though the applicant had apparently not requested leave.

Supra, footnotes 134-135 and accompanying text.
officers, with a duty to manage honestly and in good faith with a view to the best interests of the corporation.\textsuperscript{177} I have already highlighted some of the procedural and substantive differences between the oppression and derivative actions.\textsuperscript{178} Although a leave procedure is warranted in derivative actions, it is difficult to know why other rules of the game, particularly the substantive standard of liability, should vary depending on whether the action is personal or derivative in nature. The paradoxical results that follow are best illustrated by imagining a case in which a single set of facts—such as a violation of the proxy rules by a corporation’s directors—could be sued upon either derivatively or personally.\textsuperscript{179} The relevant procedures, costs rules, and substantive standard of liability will vary depending on whether the plaintiff decides to sue derivatively or personally, even though she might seek the same remedy (e.g., injunctive relief) in each action.

VI. Summary and Suggested Amendments

Both in England and Canada, the relationship between the derivative action and the statutory oppression remedy is unclear. The latest incarnation of the English oppression provision appears to have been designed to allow actions of a derivative character to proceed under the oppression remedy, but inapposite drafting has led the English courts into conflicting positions. The best way to resolve the dilemma is for legislative deletion of that part of the oppression provision which requires that there be unfair prejudice “to the interests of some part of the members (including at least himself)”\textsuperscript{180} This ought to make clear that any form of derivative action may proceed under the oppression provision, abrogating the rule in \textit{Foss v. Harbottle}.\textsuperscript{181} At the same time, it would be wise to amend the legislation to direct the court, in authorizing derivative proceedings, to consider those matters which are currently conditions precedent for leave in the Canadian legislation.

The Canadian oppression legislation, modelled in large part after the Canada Business Corporations Act, is also inherently ambiguous. A reading of the provision itself suggests that it was intended to embrace both personal and derivative causes of action. The drafting of the ratification section strengthens this conclusion. However, the drafters of the legislation appear

\textsuperscript{177} \textit{Supra}, footnotes 133-135, and accompanying text.

\textsuperscript{178} \textit{Supra}, Part IV.

\textsuperscript{179} See the holding in \textit{Goldex Mines Ltd v. Revill}, \textit{supra}, footnote 8, in which the Ontario Court of Appeal held that violations of the proxy rules will give rise to \textit{either} a personal \textit{or} a derivative action.

\textsuperscript{180} \textit{Companies Act}, 1985, \textit{supra}, footnote 48, s. 459.

\textsuperscript{181} Although see \textit{Rogers v. Bank of Montreal}, \textit{supra}, footnote 20, holding that despite the existence of a statutory leave procedure in British Columbia, the rule in \textit{Foss} still governs the commencement of a derivative action. \textit{Rogers} appears to be bad law, and ought not to be followed.
to have intended that the oppression action assume a fundamentally personal character, even though it might be resorted to in some instances where the underlying facts would support a derivative action as well. Further, common sense suggests that if the oppression provision embraces all forms of derivative action, the leave provision would be rendered nugatory. This would be an unfortunate result, as the leave requirement, with attendant conditions precedent, serves a number of useful functions. Although a partial solution to this dilemma is for the courts to hold that derivative matters are not cognizable under the oppression remedy, a better alternative is to combine the derivative and oppression actions in a single provision, embracing all forms of action. A unified provision could funnel all derivative actions through a leave procedure, while eliminating insupportable differences in matters of standing, procedure, remedies and substance as between derivative and oppression actions.

In the unified derivative/oppression provision, it should be clear that standing to commence a derivative action in the name and on behalf of the corporation be accorded to all those who suffer an indirect injury as a result of a wrong to the corporation. Broad standing is a partial answer to the deficient incentives of individual claimants to seek redress for wrongs to the corporation, and may result in a more efficient level of deterrence of such wrongs. The definition of "complainant" as currently drafted is satisfactorily broad to achieve this end, but for judicial reluctance to extend standing to claimants other than shareholders. This reluctance might be overcome by redrafting the definition to make clear that any person indirectly affected in a material way by a wrong to the corporation has standing to sue in the name and on behalf of the corporation.\textsuperscript{182}

Both in relation to derivative and personal wrongs, the new provision ought to allow a court to grant ex parte relief—in the case of derivative actions, whether or not the conditions precedent for leave had been satisfied.\textsuperscript{183} More generally, it is difficult to justify a difference in the procedures applicable depending on whether the suit is personal or derivative. While it might be argued that derivative actions are generally more complex than personal actions, justifying a higher level of procedural complexity, a perusal of personal oppression applications offers only mixed support for this contention. Even if derivative matters are indeed more complex, it is better in my view to offer all complainants the option of proceeding by way of action or application, allowing the court to refer any issue raised in an application to trial.\textsuperscript{184} By so doing, the plaintiff herself may choose which form of proceeding is likely to result in timely and appropriate

\textsuperscript{182} This would reverse the result in \textit{Re Daon Development Corporation}, supra, footnote 121; see the accompanying text.

\textsuperscript{183} This change has already been incorporated in the Ontario legislation. See OBCA, ss. 245(3), (4).

\textsuperscript{184} As is currently the case under the oppression remedy. See \textit{supra}, footnote 128.
relief at acceptable cost. Where matters of law rather than fact are primarily in issue, an election to proceed by way of application will lower the costs of the proceeding for all parties concerned, and will generally result in a speedier resolution of the dispute. Where complex factual matters are involved, proceeding by way of application is likely to result only in greater cost and delay, since the court is likely to refer any complex matter to trial. This gives the plaintiff a strong incentive to proceed by way of an action where the procedures applicable to an action are more appropriate. The result will be a better matching of procedures to disputes than is currently the case.

So far as the issue of costs is concerned, a different treatment of personal and derivative actions is justified. The normal rule that costs follow the event will generally be appropriate in personal actions. Such a rule will tend to exclude frivolous or meritless litigation. A corporate indemnity also seems unsuitable in that the litigation is undertaken for the private benefit of a sub-constituency within the corporation, rather than the corporation as a whole. Awarding a corporate indemnity would force claimants who do not stand to benefit from the action to subsidize its cost indirectly, a result of questionable propriety. By passing on part of the cost to other constituents, a corporate indemnity also raises the possibility of inducing an inefficiently great amount of litigation. Where litigation is undertaken derivatively, however, the benefit of the action is spread amongst all corporate constituents. It is therefore appropriate that all constituents indirectly bear a portion of the expenses of the action. Spreading the cost in this manner will also partly answer the problem of free riders that plagues derivative litigation. The prospective benefit of the litigation is spread widely amongst all corporate constituents, who gain whether or not they participate in the action. Without a cost sharing rule, the risk of an adverse outcome and attendant liability for costs is placed on the plaintiff, generating an incentive to allow someone else to sue. Since all potential complainants face the same incentives, one can predict that there will be an inefficiently low level of derivative litigation. Where the corporation bears the cost of derivative litigation, the cost of the action is spread amongst all claimants who might have an interest, and in direct proportion to these interests. This will assist in resolving the problem of free riders.

While this will create an added inducement to begin meritless or frivolous claims, the leave procedure, conditioned on a showing that the applicant is acting in good faith and in the best interest of the corporation, will greatly mitigate this problem.

185 Or, indeed, who may suffer as a result of litigation, if a successful action results in an award against the corporation and therefore to the disadvantage of all corporate constituents save the plaintiff(s).
Thus, a good argument exists for making indemnification the rule of usual application in the case of a derivative action. In the case of personal actions, it may be adequate to leave the matter of indemnification up to the courts, in the expectation that an indemnity will rarely, if ever, be ordered.

There is no reason why the substantive standard of liability ought to differ as between a derivative and a personal action. Similarly, there is no reason why the same broad range of remedies currently available in connection with an oppression action ought not also to be available in a derivative action. A unified action should therefore adopt a uniform standard of liability and range of remedial options.

Although the preferred form of action is derivative where there is a wrong to the corporation, there may be some actions of a derivative character in which it will be more efficacious to make an award directly to a shareholder or shareholders. Such may be the case, for example, where the wrongdoers are in control of the corporation and cannot be expected to enforce a judgment in the corporation's favour, requiring a further action by the plaintiff.\(^{186}\) The Canada Business Corporations Act and cognate statutes presently allow the court to make an award directly to the security holders of the corporation.\(^{187}\) However, it is important in such cases that the interests of all claimants be taken into account. Where all possible claimants are not represented, or where difficulties in calculating the injury of each intervene, the court should refrain from ordering personal recoveries, rather than a corporate recovery.\(^{188}\) Thus, it can be expected that a personal recovery by a claimant or claimants will be very much the exceptional case.


\(^{187}\) Supra, footnote 149.

\(^{188}\) Cf., American Law Institute, op. cit., footnote 155, which provides, in para. 7.01(d):

If a corporation is closely held, the court may in its discretion treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and direct an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors in the corporation, or (iii) interfere with the fair distribution of the recovery among all interested persons.

The danger of multiple actions is avoided if the action is formally derivative, and the award alone personal. Precisely because this forecloses claims by other claimants, however, the court must not make such an award where there is any significant danger that the injuries suffered by other claimants will go unredressed.

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