

# THE OPPRESSION REMEDY: CLARIFYING PART II OF THE *BCE* TEST

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*Claiming oppression is easy. Only the low bar of unfairness must be overcome. It seems to arise from any unwelcome conduct in a (usually) closely held corporation. It can be appended to any corporate misconduct claim. Broad statutory language governs the remedy, making it facially applicable to a broad range of conduct. In addition, the remedy is fact-based, being granted when a party satisfies the court that the corporation or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer. In the face of these challenges, courts have struggled to maintain a clear set of applicable rules to govern when oppression has occurred. As a consequence, predicting the outcome of an oppression case is difficult.*

*This article prescribes how courts can achieve greater clarity in cases where a party has alleged oppression by developing a principled approach to determine whether the impugned conduct rises to the level of harm required by the statute. This approach has two parts. The first part identifies the elements necessary to entitle the applicant to an oppression remedy and combines them to form two overarching principles. The second part of the approach discusses the effect of the impugned conduct on a complainant to show how prejudicial conduct or conduct that disregards the complainant can become conduct that is “unfairly prejudicial” or that “unfairly disregards” the complainant.*

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*Il est facile de présenter un recours pour abus (oppression). Le seuil de l'injustice à prouver est relativement bas. Il semble résulter de toute conduite non désirée au sein (généralement) d'une société fermée. On peut le rattacher à toute allégation de faute de la part d'une société. Des dispositions législatives larges régissent la réparation, ce qui le rend à première vue applicable à une vaste gamme de conduites. De plus, la réparation repose sur les faits, étant accordée lorsqu'une partie convainc le tribunal que la société ou ses administrateurs ont agi d'une façon qui est abusive ou injustement préjudiciable pour un porteur de titres, un créancier, un administrateur ou un dirigeant, ou qui est injuste en ce qu'elle ne tient pas compte de leurs intérêts. Aux prises avec ces défis, les*

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*tribunaux ont eu du mal à maintenir un ensemble clair de règles applicables régissant les cas d'abus. Par conséquent, il est difficile de prédire l'issue d'un recours pour abus de droit.*

*Cet exposé décrit la façon dont les tribunaux peuvent être plus clairs dans les affaires où une partie allègue l'abus en élaborant une méthode raisonnée pour déterminer si la conduite reprochée atteint le degré de préjudice requis par la loi. Cette méthode comporte deux volets. En premier lieu, il faut déterminer les éléments nécessaires pour donner au demandeur droit à une réparation pour abus et les regrouper pour former deux principes fondamentaux. En deuxième lieu, il faut analyser l'effet de la conduite reprochée sur un plaignant pour démontrer la façon dont la conduite préjudiciable ou la conduite qui ne tient pas compte du plaignant peut devenir une conduite qui est injuste en lui portant préjudice ou qui est injuste en ne tenant pas compte de ses intérêts.*

## Contents

1. Introduction .....	486
2. What is the Problem? .....	489
A) The BCE Decision .....	489
B) The BCE Decision: What Is Missing? .....	494
C) Attempts to Clarify Statutory Components Prior to BCE: Indicia of Oppression .....	496
D) Case Law Post-BCE: How are the Courts Dealing with Step Two? .....	498
i) Scullion v Munro .....	498
ii) Paulsen v Wolfson Law Professional Corp .....	501
E) Why does this Problem Exist? .....	502
3. What is the Solution? .....	507
A) Introduction .....	507
B) The Two Principles .....	507
i) Principle 1: The Complainant Must Experience Harm Arising from its Relationship with the Corporation, and the Harm Must be Particular to the Complainant's Interests. ....	508
ii) Principle 2: Other Remedies Cannot be Capable of Addressing this Harm .....	512
C) How do Principles Provide Greater Clarity in Case Law? .....	513
D) Effect of Impugned Conduct .....	514
E) Decisions: The Good and the Can-be-Improved .....	517
i) A Good Decision: <i>Wood Estate v Arius3D Corp</i> .....	517
ii) A Second Good Decision: <i>R Floden Services Ltd v Solomon187</i> .....	518
iii) <i>Ryan v York Condominium Corp No 340</i> : How to Fix a Problematic Decision .....	520

F) Summary: The Proposed Solution .....	524
4. Conclusion .....	525

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## 1. Introduction

Claiming oppression is easy. Only the low bar of unfairness must be overcome. It seems to arise from any unwelcome conduct in a (usually) closely held corporation. It can be appended to any corporate misconduct claim. Broad statutory language governs the remedy, making it facially applicable to a broad range of conduct. In addition, the remedy is fact-based, being granted when a party satisfies the court that the corporation or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer.<sup>1</sup> In the face of these challenges, courts have struggled to maintain a clear set of applicable rules to govern when oppression has occurred. As a consequence, predicting the outcome of an oppression case is difficult.

This article prescribes how courts can achieve greater clarity in cases where a party has alleged oppression. By clarifying and categorizing the harm that must be suffered by a complainant to successfully allege oppression, this area of law can become more structured, more transparent and less ambiguous. Courts have expounded on the rules and limitations applicable to assess the harm suffered by a complainant, and several implicit rules and limitations can be identified in the cases, but these are more of a “grab-bag” of rules than overarching principles. Courts have not identified an overarching principle to permit judges or affected parties to determine the harm necessary to demonstrate oppression. This paper identifies patterns in the case law and categorizes them to show how courts can achieve clarity in their oppression remedy jurisprudence.

When the oppression provision was enacted under the *Canada Business Corporations Act* (“CBCA”), the broad statutory language caused confusion about its limitations. Nevertheless, as courts began to interpret the provision and make decisions on its availability and applicability, the boundaries

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<sup>1</sup> The requirements are set out in section 241(2)(c) of the *Canada Business Corporations Act*, RSC 1985, c C-44 [CBCA], and under all provincial statutes except Prince Edward Island’s. See *Business Corporations Act*, RSA 2000, c B-9, s 242(2); *Corporations Act*, RSM 1987, CCSM c C255, s 234(2); *Business Corporations Act*, SNB 1981, c B-9.1, s 166(2); *Corporations Act*, RSNL 1990, c C-36, s 371(2); *Companies Act*, RSNS 1989, c 81, Schedule III, s 5(2); *Business Corporations Act*, RSO 1990, c B.16, s 248(2) [OBCA]; *Business Corporations Act*, RSS 1978, c B-10, s 234(2); *Business Corporations Act*, RSY 2002, c 20, s 243(2); The *Business Corporations Act* of British Columbia protects only shareholders “or any other person whom the court considers to be [appropriate]” (SBC 2002, c 57, ss 227(2), 228(1)).

on the scope of the remedy slowly began to form, answering many of the questions that initially arose. As the remedy began to take shape, however, questions about how to establish a claim for oppression that would justify such a remedy remained elusive. Each lower court decision determined whether a remedy was warranted for the incident brought before it, but little was said about overarching principles and a comprehensive framework for identifying what distinguishes oppressive conduct from that which is not.

In 2008, in *BCE Inc, Re*, the Supreme Court of Canada articulated a two-step framework for the oppression remedy, a remedy for protecting reasonable expectations.<sup>2</sup> This framework for analysing cases built on the existing jurisprudence and attempted to inject a straightforward approach into an area of law known for its ambiguity and lack of clarity. First, it requires a court to determine whether a complainant's expectations are reasonable. Second, if the complainant's expectations are reasonable, the complainant will be entitled to a remedy if breach of those reasonable expectations is oppressive, unfairly prejudicial or unfairly disregarding of its interests. The first step of the *BCE* test and its application are unambiguous and straightforward, but the second step has done little to provide courts with guidance on how to approach these cases.

Step two of the *BCE* test frames this issue by requiring that the breach of reasonable expectations cause harm to the complainant in such a way as to meet one of the statutory components or standards of oppression, unfair prejudice or unfair disregard. The test does not, however, explain the type or amount of harm necessary to meet that requirement; the conditions necessary to satisfy the statutory components are not articulated. The analytical framework provided in the *BCE* decision is workable but it needed to be more comprehensive, as it has left lower courts with the task of identifying whether the impugned conduct rises to the level of harm required by the statute. A review of the case law shows that courts use the *BCE* test, and the outcomes are justifiable, but there is a lack of analytical clarity in the decisions, making it difficult to determine how judges reached these outcomes. This paper seeks to remedy this deficit in the post-*BCE* jurisprudence.

Part one of this paper examines the *BCE* decision and the inherent gap left by part two of the *BCE* test. This part of the paper will review cases post-*BCE* to show how courts have not sufficiently clarified the meaning of harm. This part will also discuss the reasons why this problem exists. In addition to the breadth of the statutory language, cases that obtain a remedy for oppression have facts that evidently demonstrate unfairness or wrongful

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<sup>2</sup> 2008 SCC 69, [2008] 3 SCR 560 [*BCE*].

behaviour that necessitates a remedy, allowing decisions to be reached with little explanation as to how the outcomes are achieved.

Part two of this paper develops a principled approach to determine whether the impugned conduct rises to the level of harm required by the statute. This approach has two parts. The first part identifies the elements necessary to entitle the applicant to an oppression remedy and combines them to form two overarching principles. In this part, I examine the last three years of oppression remedy cases in Alberta, British Columbia and Ontario, and categorize the features and patterns emerging from these decisions. I combine them to articulate two overarching principles to apply to every oppression remedy case—principles that clarify what constitutes relevant harm suffered by the complainants, extrapolated from the cases and expressly acknowledged by the courts. First, the complainant must experience harm arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. Second, other remedies cannot be capable of addressing this harm. These two principles determine whether a complainant is eligible to be considered under the second step of the *BCE* test.

The second part of the approach discusses the effect of the impugned conduct on a complainant to show how prejudicial conduct or conduct that disregards the complainant can become conduct that is “unfairly prejudicial” or that “unfairly disregards” the complainant. The legislation does not define these statutory components and the Supreme Court maintained that they cannot be “conclusively defined”, which is correct, as they are simply descriptors of inappropriate conduct.<sup>3</sup> Absent a definition, however, guidelines on how to meet these components are necessary. Although conduct will meet the standards on a case-by-case basis depending on the facts and the context of each case, rather than by ascribing legal meaning to the statutory components, one can nonetheless articulate principles to guide courts in their analysis. Specifically, identifying what effect of the conduct on the complainant is necessary to satisfy each component will clarify the courts' analysis of why certain behaviour meets the statutory standards, while other behaviour does not. In this part of the paper, I examine cases that clearly articulate the effect of the harm on the complainant.

Applying these two principles, and explaining the effect of the harm, will provide greater clarity in case law. A legal framework through which every oppression case can be analysed will provide predictability about the outcome of cases and eliminate the uncertainty that currently surrounds the oppression remedy.

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<sup>3</sup> *Ibid* at para 54.

## 2. What is the Problem?

### A) The BCE Decision

In 2008, the Supreme Court of Canada issued the *BCE* decision, their second major decision on the oppression remedy.<sup>4</sup> *BCE* arose from an offer to purchase all BCE Inc shares by the Ontario Teachers Pension Plan Board (“Teachers”). The offer was financed in part by Bell Canada, a wholly owned subsidiary of BCE, assuming a \$30 billion debt.<sup>5</sup> This leveraged buyout was opposed by the debentureholders of Bell Canada, who maintained it would reduce the value of their bonds. The debentureholders argued that the arrangement, which would proceed under section 192 of the *CBCA*, would be unfair, and was oppressive to them under the oppression provisions.<sup>6</sup> Specifically, they argued that the arrangement would reduce the value of their debentures by about 20%, while awarding a premium of about 40% on the market price of BCE shares.<sup>7</sup>

BCE was doing well financially in 2006 and market analysts perceived it to be a suitable target for a buyout.<sup>8</sup> In 2007, amid circulating rumours about the pursuit of BCE by various parties, Teachers filed a report with the United States Securities and Exchange Commission, revealing a change in their shareholdings to active holders.<sup>9</sup> These activities fueled speculation that BCE was going private, compelling a meeting of the BCE board of directors (“Board”) to discuss the best strategy going forward. The Board decided that it would be in BCE’s and its shareholders’ best interests to hold a competitive bidding process.<sup>10</sup> After BCE issued a press release, several debentureholders expressed concern to the Board about the potential leveraged buyout transaction, and the Board assured them that it intended to honour the contractual terms of the trust indentures.<sup>11</sup>

The Board received three offers from three groups. Each offer anticipated the addition of substantial new debt for which Bell Canada would be liable, and would have likely resulted in the downgrading of the debentures below investment grade.<sup>12</sup> The Board accepted an offer that was approved by a majority of 97.93% and provided for a compulsory acquisition of all of BCE’s

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<sup>4</sup> Their first decision was *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*].

<sup>5</sup> *BCE*, *supra* note 2 at para 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at para 4.

<sup>8</sup> *Ibid* at para 9.

<sup>9</sup> *Ibid* at para 12.

<sup>10</sup> *Ibid* at para 13.

<sup>11</sup> *Ibid* at para 15.

<sup>12</sup> *Ibid* at para 17.

outstanding shares at \$42.75 per common share.<sup>13</sup> When this arrangement was announced, the credit ratings of the debentures were downgraded from investment grade to below investment grade, which caused the debentures to decrease in value by 20% and potentially obliged debentureholders to sell their debentures at a loss.<sup>14</sup>

The debentureholders commenced legal action. They sought relief under the *CBCA* section 241 oppression remedy and they opposed court approval of the arrangement, maintaining that the adverse economic impact it had on them meant that the arrangement was not “fair and reasonable”.<sup>15</sup> They also brought motions for declaratory relief under the terms of their trust indentures, although that issue was not before the Supreme Court.<sup>16</sup>

At trial, the oppression claim was dismissed. The trial judge found that the debt guarantee assumed by Bell Canada had a valid business purpose, that the transaction did not breach the reasonable expectations of the debentureholders, that the transaction was not oppressive and that the interests of the debentureholders had not been unfairly disregarded.<sup>17</sup> In addition, the trial judge found that the arrangement was fair and reasonable.<sup>18</sup> The Court of Appeal overturned, finding that the transaction was not fair and reasonable to the debentureholders under section 192.<sup>19</sup> Based on that finding, the Court of Appeal found it unnecessary to reconsider the oppression claim. The parties appealed to the Supreme Court, where BCE and Bell Canada argued that the Court of Appeal had erred in not approving the plan of arrangement.<sup>20</sup> While the debentureholders cross-appealed on oppression grounds, they argued that the Court of Appeal’s conclusion on section 192 was correct, “such that their [oppression] appeals became moot.”<sup>21</sup> The portion below will focus on the Court’s handling of the claims for oppression, where the debentureholders argued that the directors acted oppressively by approving the sale of BCE.

The Court found that there had traditionally been two approaches to the interpretation of section 241. The first approach strictly categorized types of conduct that would qualify as oppressive, which the Court found to be problematic because “the terms used [could not] be put into watertight

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<sup>13</sup> *Ibid* at paras 17, 19.

<sup>14</sup> *Ibid* at para 21.

<sup>15</sup> *Ibid* at para 22.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at para 23.

<sup>18</sup> *Ibid* at para 26.

<sup>19</sup> *Ibid* at para 27.

<sup>20</sup> *Ibid* at para 29.

<sup>21</sup> *Ibid*.

compartments or conclusively defined.”<sup>22</sup> The second approach focused on broad principles underlying section 241. The Court combined the two approaches, looking first to the principles underlying the oppression remedy by considering the parties’ reasonable expectations.<sup>23</sup> Then, if a breach of reasonable expectations were established, the Court would assess whether the impugned conduct amounts to unfair disregard, unfair prejudice or oppression.<sup>24</sup> The Court prefaced its discussion on the *CBCA*’s oppression provisions by making two observations: the oppression remedy is equitable, giving the court “broad, equitable jurisdiction to enforce not just what is legal but what is fair,”<sup>25</sup> and the oppression remedy is fact-specific.<sup>26</sup> The parties’ reasonable expectations are shaped by the context in which they arise and the relationships between the parties, meaning that “[c]onduct that may be oppressive in one situation may not be in another.”<sup>27</sup>

The Court first focused on the reasonable expectations of the parties, the “cornerstone of the oppression remedy.”<sup>28</sup> These expectations are formed when stakeholders enter into relationships with and within corporations, and they may conflict with the expectations of other individuals and groups.<sup>29</sup> The goal of the corporation—to maximize profit and share value—cannot be pursued at the cost of treating individual stakeholders unfairly, as “[f]air treatment . . . is most fundamentally what stakeholders are entitled to ‘reasonably expect.’”<sup>30</sup> Directors, who are obligated to act in the best interests of the corporation, may need to consider how their decisions affect stakeholders. The best interests of the corporation may align with the interests of stakeholders, but if they diverge, then the duty of directors is owed to the corporation, not to the stakeholders; in such instances, stakeholders must reasonably expect that directors will act in the best interests of the corporation.<sup>31</sup>

The Court considered seven factors that emerged from case law to determine whether a reasonable expectation exists.<sup>32</sup> First, parties form expectations based on general commercial practice, and a complainant is usually entitled to a remedy if a business alters its practice in a way that

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<sup>22</sup> *Ibid* at para 54.

<sup>23</sup> *Ibid* at para 56.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at para 58.

<sup>26</sup> *Ibid* at para 59.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* at para 61.

<sup>29</sup> *Ibid* at para 63.

<sup>30</sup> *Ibid* at para 64.

<sup>31</sup> *Ibid* at para 66.

<sup>32</sup> *Ibid* at para 72.

undermines the complainant's exercise of his or her legal rights.<sup>33</sup> Second, factors such as the "size, nature and structure" of the corporation influence reasonable expectations and, as a result, directors of small corporations may be granted more leeway to deviate from commercial formalities than directors of larger companies.<sup>34</sup> Third, the relationships between the complainant and other corporate actors contribute to the expectations, with non-arm's length relationships, such as between friends or family, being governed by different standards than arm's length relationships, such as between shareholders in public corporations.<sup>35</sup> Fourth, the past practice of a corporation can create reasonable expectations between shareholders "on matters relating to participation of shareholders in the corporation's profits and governance."<sup>36</sup> Over time, practices and expectations can change, and "where valid commercial reasons exist for the change and the change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice."<sup>37</sup> Fifth, the court may consider whether the complainant could have taken any preventative steps to protect itself from the harm it claims to have suffered.<sup>38</sup> Sixth, in determining reasonable expectations, the court may consider shareholder agreements and any representations made to stakeholders or the public via promotional materials.<sup>39</sup> The seventh factor outlines that any conflicting interests ought to be resolved by the directors "[acting] in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen."<sup>40</sup>

The Court then turned to the second prong of the oppression remedy. It determined that not every breach of reasonable expectations would amount to oppression, unfair disregard or unfair prejudice,<sup>41</sup> but rather that a complainant must show that the breach involved "unfair conduct and prejudicial consequences."<sup>42</sup> The Court explained the statutory components as follows:

"Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind,

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<sup>33</sup> *Ibid* at para 73.

<sup>34</sup> *Ibid* at para 74.

<sup>35</sup> *Ibid* at para 75.

<sup>36</sup> *Ibid* at para 76.

<sup>37</sup> *Ibid* at para 77.

<sup>38</sup> *Ibid* at para 78.

<sup>39</sup> *Ibid* at paras 79–80.

<sup>40</sup> *Ibid* at para 82.

<sup>41</sup> *Ibid* at para 67.

<sup>42</sup> *Ibid* at para 89.

that nevertheless has unfair consequences. Finally, “unfair disregard” of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders’ reasonable expectations.<sup>43</sup>

The Court maintained that the statutory components are adjectival and should not be regarded as “watertight compartments”, as they often “overlap and intermingle”.<sup>44</sup> Of the three standards, oppression was deemed the most serious.<sup>45</sup> The other two wrongs—unfair prejudice and unfair disregard—were later added to the *CBCA*, ensuring that section 241 would catch wrongs that were not as abusive and offensive as oppression.<sup>46</sup> Examples of unfair prejudice include:

Squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm.<sup>47</sup>

Examples of unfair disregard include “favouring a director by failing to properly prosecute claims, improperly reducing a shareholder’s dividend, or failing to deliver property belonging to the claimant.”<sup>48</sup>

Having established the requirements for the test, the Court proceeded to apply the test to the facts. The debentureholders argued that they reasonably expected the directors to act in a way that would preserve the investment grade status of their debentures or, in the alternative, that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures.<sup>49</sup> The Court found that the expectation that the directors would consider the position of the debentureholders while making their decision was both reasonable and had been met, in that the Board, “having considered its options in the difficult circumstances it faced ... made its decision, acting in what it perceived to be the best interests of the corporation.”<sup>50</sup> Specifically, BCE was facing a takeover and the Board acted reasonably in the circumstances by creating a bidding process.<sup>51</sup> Each of the three bids were leveraged, and there was nothing that BCE could have

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<sup>43</sup> *Ibid* at para 67.

<sup>44</sup> *Ibid* at para 91.

<sup>45</sup> *Ibid* at para 93.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid* at para 94.

<sup>49</sup> *Ibid* at paras 96, 101.

<sup>50</sup> *Ibid* at para 104.

<sup>51</sup> *Ibid* at para 106.

done to avert that risk.<sup>52</sup> The Court noted that the debentureholders were actually arguing not for a reasonable expectation that the Board consider their interests, but rather for an expectation that the Board preserve the market value of the debentures.<sup>53</sup>

The Court went on to apply some of the factors that contribute to a reasonable expectation. First, commercial practice did not support the expectation that the Board could have preserved the trading position of the debentures: leveraged buyouts of this type, according to the Court, are not unusual, and the debentureholders had not negotiated protections to deal with changes of control and credit ratings.<sup>54</sup> Second, the nature and size of BCE indicated to the debentureholders that these types of arrangements were not unusual.<sup>55</sup> Third, although the company maintained investment grade ratings in past practice, the changing economic conditions that precipitated the leveraged buyout changed the reasonable practices.<sup>56</sup> Finally, the directors fairly considered the conflicting interests of the stakeholders and did what was in the best interests of the corporation. The directors made a decision that was “within the range of reasonable choices that they could have made in weighing conflicting interests.”<sup>57</sup> Given these three observations, the Court found that the expectations argued before them were not reasonable, and that the debentureholders failed to establish that their expectations were not fulfilled.<sup>58</sup> The Court therefore did not have to consider the second step of the test.

## **B) The BCE Decision: What Is Missing?**

The second part of the *BCE* test aims to determine which breaches of reasonable expectations amount to oppression, unfair prejudice or unfair disregard of the complainant's interests. To that end, the test establishes two points. First, both causation and injury are necessary to meet the second step: a harmful effect on, or “prejudicial consequences”<sup>59</sup> to the claimant, caused by the breach of a reasonable expectation.<sup>60</sup> Second, not every

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at para 105.

<sup>54</sup> *Ibid* at para 108.

<sup>55</sup> *Ibid* at para 109.

<sup>56</sup> *Ibid* at para 110.

<sup>57</sup> *Ibid* at para 112.

<sup>58</sup> *Ibid* at para 114.

<sup>59</sup> *Ibid* at paras 89–90.

<sup>60</sup> This concept of harm and causation is not a new one in oppression remedy jurisprudence; it was considered in *Downtown Eatery (1993) Ltd v Ontario*, 54 OR (3d) 161, 200 DLR (4th) 289 at para 56 (CA).

breach of reasonable expectations will fulfill the requirements of one of the three statutory standards.<sup>61</sup>

This part, however, does not provide the necessary guidance on how to meet the test. Most importantly, the Court in *BCE* does not explain *how* a breach of reasonable expectations will meet the statutory standards: the type or amount of harm necessary to meet that requirement is unclear, and it does not articulate conditions that must be satisfied to meet the test. The Court attempts to justify this lack of explanation by maintaining that “a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined.”<sup>62</sup>

The Court defined the terms but did not specify the requirements as to *how* they could be fulfilled, thereby failing to delve into the substance of the second step. Instead, the Court discussed two peripheral elements of the test. First, it placed the statutory standards on a culpability spectrum—oppression being the most onerous and unfair disregard being the least.<sup>63</sup> This part is not particularly relevant because the focus of the statutory provision is on the effect of the conduct, rather than the motive of the wrongdoer. The language of the statute supports this view, as the provision provides a remedy where the act or omission “*effects a result ... that is oppressive, unfairly prejudicial to or that unfairly disregards the interests of a complainant.*”<sup>64</sup> This view has also been widely accepted in case law,<sup>65</sup>

<sup>61</sup> *BCE*, *supra* note 2 at para 89.

<sup>62</sup> *Ibid* at para 54.

<sup>63</sup> *Ibid* at para 67.

<sup>64</sup> Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Canada, 2004) at 116–18 [Koehnen] [emphasis in original].

<sup>65</sup> In *McGovern-Burke v Martineau*, 2016 ABQB 514 at para 58, 43 Alta LR (6th) 128, the court maintained, “[f]inally, it is important to note that this Court need not find bad faith or want of probity on Ms. Martineau’s part or Wine-Ohs’ part. The focus is on effect, not motive. Any remedy is not intended to punish the oppressor, only remedy the oppression.” Similarly, in *Wood Estate v Arius3D Corp*, 2014 ONSC 3322, [2014] OJ No 2620 (Sup Ct J (Commercial Court)) [*Arius3D SCJ*], *aff’d* 2016 ONSC 36 at para 80, 347 OAC 334 (Div Ct), the Court maintained, “[i]n my view the trial judge did not err in applying the second branch of the *BCE* test. First, it is clear from his reasons that he was aware that it was the ‘effect’ of the impugned conduct, not its motivation or purpose, that is central to the analysis. He specifically referred to and properly relied upon *Downtown Eatery*.” See also *Brant Investments v KeepRite Inc* (1991), 3 OR (3d) 289 at para 33, 80 DLR (4th) 161 (CA) [*Brant Investments*]; *DC Jensen Enterprises Ltd v Sand Dollar Enterprises Ltd*, 2017 BCSC 185 at paras 75–79, [2017] BCWLD 1675, citing *Walker v Betts*, 2006 BCSC 128, [2006] BCWLD 2523; *SCI Systems Inc v Gornitzki Thompson & Little Co* (1997), 147 DLR (4th) 300, 36 BLR (2d) 192 (Ont Ct J (Gen Div)); *Far East Food Products Ltd v 1104742 Ontario Ltd* (2009), 59 BLR (4th) 75, 59 BLR (4th) 75 (Ont Sup Ct J). These cases show that even if motive is mentioned in the case, the outcome is not contingent upon it. For general commentary on the issue, see Karen C Ulmer, “Business Issues: The Oppression Remedy” (1989) 53:2 Sask L

with *Wilson v Alharayeri*<sup>66</sup> being the most recent pronouncement, where the Supreme Court maintained, “the oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor.”<sup>67</sup> Second, the Court provided examples of behaviour that would meet the components.<sup>68</sup> Despite the Court’s attempts, these comments did not provide any meaningful clarity with respect to the test.

### C) Attempts to Clarify Statutory Components Prior to BCE: Indicia of Oppression

The issue of defining or meeting the statutory components is not new. Prior to *BCE*, courts had developed a non-exhaustive list of indicia to determine whether conduct was *prima facie* oppressive. These included:

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Rev 211 at 219 [Ulmer]; Jeffrey G MacIntosh, “Bad Faith and the Oppression Remedy: Uneasy Marriage or Amicable Divorce?” (1990) 69:2 Can Bar Rev 276; Mary Anne Waldron, “Corporate Theory and the Oppression Remedy” (1981) 6:2 Can Bus LJ 129 at 138–41 [Waldron]; *First Edmonton Place Ltd v 315888 Alberta Ltd* (1988), 60 Alta LR (2d) 122, [1988] CLD 1277 (QB), rev’d (1989), 71 Alta LR (2d) 61, 45 BLR 110 (CA); *Palmer v Carling O’Keefe Breweries of Canada Ltd* (1989), 67 OR (2d) 161, 56 DLR (4th) 128 (Div Ct); *Eiserman v Ara Farms Ltd* (1988), 52 DLR (4th) 498, [1988] CLD 1328 (Sask CA); *Bank of Montreal v Dome Petroleum Ltd* (1987), 54 Alta LR (2d) 289, [1987] CLD 1284 (QB); *Ruffo v IPCBC Contractors Canada Inc* (1988), 33 BCLR (2d) 74, [1989] CLD 213 (SC), aff’d (1990), 44 BCLR (2d) 293, [1990] BCWLD 1015; *Goguen v Metro Oil Co* (1989), 95 NBR (2d) 295, 42 BLR 30 (CA).

<sup>66</sup> 2017 SCC 39, [2017] 1 SCR 1069.

<sup>67</sup> *Ibid* at para 42 (the Court did go on to note that “[a] director who acts out of malice or with an eye to personal benefit is more likely to attract personal liability than one who acts in good faith” at para 43). The concept of bad faith has had an uneasy history with the oppression remedy. Despite the accepted view that motive or bad faith is irrelevant, there are some outlying cases containing comments that do not necessarily fit with the current views on bad faith. With respect to “unfair disregard” of the complainant’s interests in the test, some cases have implied the element of “unfair” adds the requirement of considering motive, for without such a consideration, a complainant would only ever have to prove that an action benefited the defendant at the cost of the complainant. See *Arius3D* SCJ, *supra* note 65 at paras 80–81. Similarly, in *Brant Investments*, *supra* note 65 at para 33, the Court noted that an additional consideration was needed, and rejected having to prove only the cost/benefit without anything more. Specifically, the Court said, “[o]f course, there may be many situations where the rights of minority shareholders have been prejudiced or their interests disregarded, without any remedy being appropriate.” See also *Ballingall v Carleton Condominium Corp No 111*, 2015 ONSC 2484 at para 102, 42 BLR (5th) 74, where the Court grappled with how disregard could become unfair. For the most part, however, cases have tended to reject the consideration of motive for the standard of unfair disregard. In *Grigoriu v Ottawa-Carleton Standard Condominium Corp No 706*, 2014 ONSC 2885, 240 ACWS (3d) 757 (Sup Ct J) [*Grigoriu*], the Court found that the complainant’s interests had been unfairly disregarded but that there had been no specific intention to harm the interests.

<sup>68</sup> *BCE*, *supra* note 2 at paras 93–94.

- (i) lack of a valid corporate purpose for the transaction;
- (ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction;
- (iii) lack of good faith on the part of the directors of the corporation;
- (iv) discrimination between shareholders with the effect of benefiting the majority shareholder to the exclusion or to the detriment of the minority shareholder;
- (v) lack of adequate and appropriate disclosure of material information to the minority shareholders; and
- (vi) a plan or design to eliminate the minority shareholder.<sup>69</sup>

These indicia can be helpful, but they are not fail-proof for two reasons. First, they share the common themes of bad faith or a culpable state of mind, so they are only helpful in considering whether there has been “oppression” and not unfair prejudice or unfair disregard. Oppression is arguably the easiest statutory component to define and identify. The definition of oppression originated in *Scottish Co-operative Wholesale Society v Meyer*<sup>70</sup> as conduct that is “burdensome, harsh and wrongful or which lacks probity or fair dealing”<sup>71</sup> and the definition has been quoted and referred to extensively since, including in *BCE*.<sup>72</sup>

Second, even if one or more of the indicia are present, it does not definitively indicate the presence of oppression. While most intentional bad behaviour will meet the requirements for oppression, this is not always the case. An example was discussed by Professor Vanduzer, in a situation where a corporation sells a corporate asset to another corporation and one of the directors has an interest in the sale but fails to disclose it.<sup>73</sup> Such conduct is a clear breach of fiduciary duty but unless the sale price exceeded the asset's

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<sup>69</sup> *Ford Motor Co of Canada Ltd v Ontario Municipal Employees Retirement Board* (2006), 79 OR (3d) 81 at para 92, 263 DLR (4th) 450 (CA); *Millar v McNally* (1991), 3 BLR (2d) 102, [1991] OJ No 1772 (Ct J (Gen Div)).

<sup>70</sup> [1958] 3 All ER 66 at 71, [1959] AC 324 (HL).

<sup>71</sup> *Blue-Red Holdings Ltd v Strata Plan VR 857* (1994), 42 RPR (2d) 49, 50 ACWS (3d) 909 (BCSC) at para 52. See also *BCE*, *supra* note 2 at para 67.

<sup>72</sup> *BCE*, *supra* note 2 at para 54.

<sup>73</sup> J Anthony Vanduzer, “*BCE v 1976 Debentureholders*: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*” (2010) 43:1 UBC L Rev 205 at 233.

value, it would not be oppressive to the shareholders.<sup>74</sup> While the indicia might flag bad intention, the oppression remedy also requires prejudicial effect.

In sum, the Court's pronouncements on the statutory components in *BCE* do not explain how harm can become unfairly disregarding of, or prejudicial to, the complainant's interests, and the indicia are only helpful for flagging oppressive conduct. There is no analysis or test that shows how to get from finding a breach of reasonable expectations to determining that the breach fits within one of the lesser statutory components. This large gap needs to be addressed.

## D) Case Law Post-BCE: How are the Courts Dealing with Step Two?

The Court in *BCE* determined that not every breach of reasonable expectations will meet the statutory standards, but it failed to determine how the standards will be met: what *type* of harm will satisfy the standards? Subsequent case law shows that the problem has not been fixed in lower court decisions.<sup>75</sup> Below, I discuss two cases that show the need for clarification in decisions and one case that attempted, albeit unsuccessfully, to clarify how to meet the second step of the *BCE* test.

### i) Scullion v Munro

In *Scullion v Munro*,<sup>76</sup> two friends, Scullion and Munro, went into business together. In 1998, they incorporated three companies: Munro and Scullion Contracting Inc ("M&S") under the *BCA*—to carry on the business of landscaping, snow removal and construction—and two numbered companies, incorporated under the *OBCA*, that owned the land used by M&S to carry out its business.<sup>77</sup> In 2014, Scullion and Munro acquired another company, John Sweeping (2014) Inc.<sup>78</sup> Scullion and Munro were equal partners throughout the time in their business together: they held an equal number of shares in each of their corporations; they were the only two directors; they divided the responsibilities and were each paid a weekly salary of \$3,000 plus benefits; and Scullion was the president and Munro

<sup>74</sup> *Ibid.*

<sup>75</sup> See e.g. *Wennekers v Gumm*, 2016 ABQB 358, [2016] AWLD 3579 [*Wennekers*]; *König v Hobza*, 2013 ONSC 1060, 31 BLR (5th) 248; *Kidner Investments Ltd v Totem Mercury Holdings Ltd*, 2017 BCSC 205, [2017] BCWLD 1670; *D'Antonio v Monaco*, 2013 ONSC 5007, 230 ACWS (3d) 1057, aff'd 2015 ONCA 274, 253 ACWS (3d) 345.

<sup>76</sup> 2016 ONSC 116, 53 BLR (5th) 320 [*Scullion*]. For additional reasons regarding costs, see *Scullion v Munro*, 2016 ONSC 1298, 264 ACWS (3d) 47.

<sup>77</sup> *Scullion*, *supra* note 76 at paras 3–4.

<sup>78</sup> *Ibid* at para 5.

was either the vice-president or secretary treasurer.<sup>79</sup> Scullion and Munro were also employees of their corporations. They did not have a written shareholder agreement.<sup>80</sup>

In August 2015, the situation changed. Munro decided to end his business relationship with Scullion and, to that end, changed the locks on the companies' premises, helped Scullion to remove his belongings from the premises, terminated Scullion's business mobile phone and access to the business computers and gave Scullion a letter from legal counsel, telling Scullion to terminate his involvement with M&S.<sup>81</sup> After those occurrences, Scullion was not involved with the business and ceased to collect his weekly salary.<sup>82</sup> Munro maintained that he took those steps after he discovered that Scullion had been paying himself improperly from the business for personal expenses.<sup>83</sup> Scullion and Thomas Scullion Holdings Inc (together, "the Applicants") sought relief pursuant to the oppression remedy provisions in both the *CBCA* and *OBCA*.<sup>84</sup> Munro and Paul Munro Holdings Inc (together, "the Respondents"), brought a cross application for relief pursuant to the oppression remedy and for an interim injunction.<sup>85</sup>

The Applicants took issue with the following actions by Munro: locking Scullion out of the business, stopping his salary, telling suppliers and customers that Scullion had been bought out of the business, and misappropriating Scullion's rights as a shareholder, director, officer and employee.<sup>86</sup> The Applicants argued that Munro acted without "colour of right" in forcing Scullion out of the business and that Munro was not entitled to relief because he did not have clean hands.<sup>87</sup> They further argued that the misappropriation allegation was unsubstantiated.<sup>88</sup>

The evidence consisted of affidavits from Scullion, Munro and the bookkeeper for the businesses.<sup>89</sup> The affiants were cross-examined.<sup>90</sup> The judge found that the effect of Munro's conduct had been unfairly prejudicial

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<sup>79</sup> *Ibid* at paras 6–8.

<sup>80</sup> *Ibid* at para 6.

<sup>81</sup> *Ibid* at para 9.

<sup>82</sup> *Ibid* at para 10.

<sup>83</sup> *Ibid* at para 11.

<sup>84</sup> *Ibid* at para 12.

<sup>85</sup> *Ibid* at para 13.

<sup>86</sup> *Ibid* at para 21.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid* at para 26.

<sup>90</sup> *Ibid*.

to the Applicants and that the Applicants were entitled to relief pursuant to the oppression remedy in the *CBCA* and the *OBCA*.<sup>91</sup>

To reach that decision, the judge considered the wording of the oppression provisions and the wide discretion to grant relief to a complainant. The judge noted that “the complainant must establish that the act complained of has a result that is ‘unfairly prejudicial to, or unfairly disregards the interest of one of the protected persons or groups’” in order to find a remedy.<sup>92</sup> The judge went on to point out that motive is an irrelevant consideration, but that “it is the unfairness as the end result that is critical to a finding of oppressive conduct.”<sup>93</sup> After considering the *Litz v Litz*<sup>94</sup> decision—a case with similar facts—to support denial of injunctive relief, the Court concluded that Munro had acted “without right of any kind—general, contractual (i.e. a shareholders’ agreement) or statutory—in ousting Scullion from the Corporations.”<sup>95</sup> The Court found the effect of Munro’s conduct to be unfairly prejudicial to the Applicants, entitling them to relief under the oppression provisions.

This decision refers to *BCE* but it does not apply the *BCE* test for oppression. The Court made no findings of reasonable expectations and did not explain why the impugned conduct was unfairly prejudicial to the Applicants. It simply determined that Munro had acted without any kind of right, which resulted in unfair prejudice to the Applicants. The outcome of the decision is unsurprising. It is relatively easy to spot the breach of reasonable expectations in the case: eliminating a partner from the business, depriving him of his salary and preventing him from access to the premises and computers without any right. Having met the first part of the test, it is also plain to see how the second part could be met. Assuming there was no oppression, and the court did not discuss bad faith or vindictiveness on the part of Munro, the conduct unfairly disregarded and unfairly prejudiced the complainant because of the conduct’s lasting effects. The business relationship ended, but it did so in a public and humiliating way to the complainant. He was accused, without evidence, of misappropriating funds, and he was locked out of his business as a result. His reputation must have suffered, in addition to his financial situation and livelihood. These results would have raised the conduct from prejudice to unfair prejudice. The decision, however, lacks this analysis, thereby failing to explain how and why the statutory components were met.

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<sup>91</sup> *Ibid* at para 52.

<sup>92</sup> *Ibid* at para 50.

<sup>93</sup> *Ibid*.

<sup>94</sup> (1995), 101 Man R (2d) 40, [1995] MJ No 82 (QB).

<sup>95</sup> *Scullion*, *supra* note 76 at para 52.

## ii) Paulsen v Wolfson Law Professional Corp

This case was an appeal from the decision of Small Claims Court, awarding damages to the respondent, the law firm of Wolfson Law Professional Corporation (“Wolfson”).<sup>96</sup> The appeal was dismissed.

Duane Paulsen and his company, Purrfect Pages Inc (“Purrfect Pages”), had entered into a contract with Mr. Johnston, and supplied Johnston with materials for which Johnston refused to pay.<sup>97</sup> Purrfect Pages sued Johnston and succeeded, but when Johnston refused to pay the damages, Paulsen sought the legal assistance of Mr. Wolfson, a member of Wolfson, to enforce the judgment.<sup>98</sup> Wolfson acted on this matter, as well as on other matters, for Purrfect Pages. Paulsen did not pay Mr. Wolfson for his services. Paulsen also maintained that Purrfect Pages, and not Paulsen himself, had retained Mr. Wolfson, and that the company alone should be liable for the fees.<sup>99</sup>

In Small Claims Court, the Deputy Judge found that the invoices for legal services were addressed to both Purrfect Pages and Paulsen, and that they were jointly and severally liable for Mr. Wolfson’s legal fees; this was confirmed on appeal.<sup>100</sup> Also, since Paulsen knew of the near-insolvent state of Purrfect Pages but nonetheless agreed to pay Wolfson’s legal fees, the judge found that Purrfect Pages had lost the privilege of separate legal entity.<sup>101</sup> Accordingly, Paulsen, as an individual, was found to be a client and therefore personally liable for the legal fees.<sup>102</sup>

Given the above, Wolfson pursued the oppression remedy as a creditor against Paulsen. After determining that creditors can seek the oppression remedy against debtors, the court set out the *BCE* test and proceeded to apply it.<sup>103</sup> It found, after considering the factors, that Mr. Wolfson had a reasonable expectation that he would be paid for his legal services, as evidenced by the letters and invoices that had been exchanged.<sup>104</sup> In the second step of the test, the Court found that the failure to pay Mr. Wolfson did not meet the parties’ reasonable expectations and that the conduct was unfairly prejudicial.<sup>105</sup> At this point, the decision becomes unclear, as the Court switches from the finding of “unfairly prejudicial” to providing

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<sup>96</sup> 2015 ONSC 5714, 339 OAC 200 [*Wolfson*].

<sup>97</sup> *Ibid* at para 5.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* at para 8.

<sup>100</sup> *Ibid* at para 6.

<sup>101</sup> *Ibid* at para 13.

<sup>102</sup> *Ibid* at para 18.

<sup>103</sup> *Ibid* at para 22.

<sup>104</sup> *Ibid* at para 23.

<sup>105</sup> *Ibid*.

examples of “unfair disregard” from *BCE*.<sup>106</sup> Specifically, the Court determined that the conduct before it was similar to one example of conduct set out in *BCE* as evidencing unfair disregard: failing to deliver property belonging to the claimant.<sup>107</sup> It concluded, “Mr. Paulsen’s actions amount to unfair conduct and prejudicial consequences.”<sup>108</sup>

The decision is facially unclear because the Court initially concludes that the conduct is unfairly *prejudicial*, then it determines that the conduct is similar to an example of conduct that unfairly *disregards* the complainant, but finally concludes that the actions simply amount to “unfair conduct”.<sup>109</sup> The Court likely meant “unfair disregard”, but it is difficult to be certain. Even with the lack of clarity in setting out the statutory test, however, the decision is not substantively clear. Assuming the statutory standard being referred to was “unfair disregard”, the reason the judge found the behaviour to meet the standard is that the impugned conduct was similar to one of the examples of unfair disregard that was provided in *BCE*. This is not a sufficient reason to find that a statutory standard has been met; more explanation is required. Again, what about that conduct met the standard, or elevated the conduct from disregard to unfair disregard?

### **E) Why does this Problem Exist?**

The specific problem here is that the statutory components have never been defined. It is an issue that has recently come to light because the Court in *BCE* did not have to apply this part of the test to the facts before it. Under the first part of the test, the court determined that one expectation was not reasonable and the other expectation—that the debentureholders’ interests would be considered—was met.<sup>110</sup> Therefore, there was no breach to analyse under the second part of the test in *BCE*. The bigger problem with the remedy, as in the broad, undefined statutory language that governs the entire remedy, is not new. Indeed, it has existed since the remedy was enacted. Over the years, case law has managed to narrow the oppression remedy and develop boundaries for the statutory language for many aspects of it, but a precise framework or test for the second part of the test remains elusive.

The *Canada Business Corporations Act* of 1975 adopted the oppression remedy in response to the recommendations made by the federally

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<sup>106</sup> It appears, from a reading of the decision, that the initial finding of “unfairly prejudicial” could be an error, as the Court continues its analysis of the behaviour under the statutory standard of “unfair disregard”.

<sup>107</sup> *Wolfson*, *supra* note 96 at para 24.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *BCE*, *supra* note 2 at paras 100–03.

commissioned Dickerson Committee, which was tasked with laying out a new federal business corporations law for Canada.<sup>111</sup> The Dickerson Committee, perceiving that the common law did not provide enough protection for minority shareholders, recommended in its report that the oppression remedy, now section 241 of the *CBCA* (and similar or identical provisions in the provincial business corporation legislation), be adopted.<sup>112</sup> The remedy applies when a party satisfies the court that the corporation, its shareholders or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director or officer.<sup>113</sup> It has been described as “the broadest, most comprehensive and most open-ended shareholder remedy in the common law world.”<sup>114</sup>

In spite of the breadth of the remedy recommended (and subsequently adopted), the Committee did not provide much in the way of guidelines as to how the remedy should be used, nor did it provide a framework for identifying when oppression has occurred. It simply maintained that the remedy should be invoked more frequently in relation to closely held corporations,<sup>115</sup> that it applies both to a continuing course of oppressive conduct as well as to isolated acts, that the court should have wide discretion to determine who a proper person is to make an application and that it can apply when the conduct is wrongful, whether or not it is lawful.<sup>116</sup> The

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<sup>111</sup> *CBCA*, *supra* note 1, s 241; Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) [Dickerson Report].

<sup>112</sup> Although most of the provinces appointed advisory panels to consider the enactment of new corporate legislation in the 1970s and 1980s, the only published reports on the oppression remedy were those of Ontario (Ontario, Legislative Assembly, Select Committee on Company Law, *Interim Report of the Select Committee on Company Law* (1967) (Chair: Allan F Lawrence)), otherwise known as the “Lawrence Report”, and Alberta (University of Alberta, *Report No. 36: Proposals for a New Alberta Business Corporations Act* (Edmonton: Institute of Law Research and Reform, 1980)). The Lawrence Report, wanting to keep courts from interfering in corporate affairs, recommended that the oppression remedy not be adopted in Ontario’s business corporations legislation; the Alberta report largely adopted the recommendations in the Dickerson Report, *supra* note 111. See Waldron, *supra* note 65 at 130.

<sup>113</sup> *CBCA*, *supra* note 1, s 241(2)(c).

<sup>114</sup> Stanley M Beck, “Minority Shareholders’ Rights in the 1980s” in *Special Lectures of the Law Society of Upper Canada: Corporate Law in the 80s* (Don Mills, Ont: Richard De Boo, 1982) 311 at 312.

<sup>115</sup> Dickerson Report, *supra* note 111 at para 484.

<sup>116</sup> *Ibid* at para 485.

Committee summed up the remedy by recommending the application of a broad standard of fairness and equity.<sup>117</sup>

The Dickerson Committee's omission of details on its recommended remedies, including the oppression remedy, was deliberate. It wanted to have remedies with a wider application because it recognized that "corporation law—and particularly the duties of officers, directors and dominating shareholders of corporations—is in a very fluid state" and that the role of the corporation in society is not defined.<sup>118</sup> It envisioned an "extraordinarily permissive" business corporations act, but one that responded quickly to misconduct.<sup>119</sup> It also determined that it could not anticipate all the ways in which a corporation could be misused.<sup>120</sup> For these reasons, the Committee established broad standards of conduct and left it to the courts to determine what constituted a breach, allowing the courts to develop the law in this area.<sup>121</sup>

Many concerns arose as to how the oppression remedy would be interpreted once it was enacted.<sup>122</sup> This was not surprising, given the lack of guidance provided by the Dickerson Committee, the breadth of the language in the statute and the numerous elements that would need to be identified, defined and interpreted.<sup>123</sup> Additionally, each case turns on its own facts.<sup>124</sup> The Dickerson Committee did provide a few examples of conduct and commented on whether the oppression remedy would apply. For example, the refusal to declare dividends in an attempt to squeeze out minority shareholders would be covered by an oppression application, while excessive salaries to dominant shareholders who are also officers is

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<sup>117</sup> *Ibid* at para 484. See also Brian R Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40:3 UTLJ 775 at 777 [Cheffins, "Economic Analysis"].

<sup>118</sup> Dickerson Report, *supra* note 111 at para 477.

<sup>119</sup> *Ibid* at 474.

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid* at para 477.

<sup>122</sup> See Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 U Pa J Intl Business L 305 [Cheffins, "Canadian Experience"]; Cheffins, "Economic Analysis", *supra* note 117 at 781.

<sup>123</sup> Waldron notes with concern that as the law, including corporate law, shifts to consider what is fair in human relationships, "fairness, like beauty, is often in the eye of the beholder": see Waldron, *supra* note 65 at 151. Welling was concerned about judges' "potentially rampant discretion" in dealing with corporate affairs through the oppression remedy: see Bruce Welling, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1984) at 532–33.

<sup>124</sup> Cheffins, "Economic Analysis", *supra* note 117 at 780. See also *Ferguson v Imax Systems Corp* (1983), 43 OR (2d) 128 at 137, 150 DLR (3d) 718. This concept is still followed and judges continue to use a fact-based analysis. See e.g. *Dancey v 229281 Alberta Ltd* (1988),

borderline oppressive.<sup>125</sup> Overall, however, the Committee defaulted to the idea that general standards of fairness applied to determine the outcome of these applications.<sup>126</sup>

Despite these concerns, the remedy was enacted and, from the outset, extensively and regularly relied upon to challenge corporate conduct. In response to the many cases before them, courts commented on and developed the law, addressing many of the questions identified on enactment of the oppression provisions.<sup>127</sup> As predicted by the Dickerson Report, applicants for oppression are mostly minority shareholders,<sup>128</sup> although creditors can also invoke it,<sup>129</sup> as can trustees in bankruptcy and employees.<sup>130</sup> Equal or majority shareholders can also bring an oppression claim.<sup>131</sup> Courts do not require a finding of bad faith to establish oppressive conduct, but

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90 AR 283 at para 18, [1988] AWLD 1619, and *Matthew Investments Ltd v Assiniboine Medical Holdings Ltd*, 2008 MBQB 52, 227 Man R (2d) 9; *BCE*, *supra* note 2.

<sup>125</sup> Dickerson Report, *supra* note 111 at para 484.

<sup>126</sup> *Ibid* at paras 484–85.

<sup>127</sup> Cheffins, “Economic Analysis”, *supra* note 117 at 777.

<sup>128</sup> Stephanie Ben-Ishai and Poonam Puri, “The Canadian Oppression Remedy Judicially Considered: 1995–2001” (2004) 30:1 Queen’s LJ 79 at 102, 111 [Ben-Ishai & Puri, “Oppression Remedy”]. This study finds that 80% of oppression remedy actions are brought by shareholders, and 67% of those claims were from minority shareholders while 19% of them were brought by 50% shareholders.

<sup>129</sup> *Peoples*, *supra* note 4 at paras 47–49. The Supreme Court of Canada, in holding that directors do not owe a fiduciary duty to creditors, pointed out that creditors can use the oppression remedy, and that while creditors may not fall within the definition of “complainant” found in section 238(a) of the *CBCA*, they can qualify as a “proper person” at the court’s discretion under section 238(d).

<sup>130</sup> See James Farley, Roger J Chouinard & Nicholas Daube, “Expectations of Fairness: The State of the Oppression Remedy in Canada Today” (2007) 33:1 Adv Q 261 at 267, 273; Ben-Ishai & Puri, “Oppression Remedy”, *supra* note 128 at 102–03; Neil B Gross, “Figaro, Ferrari and Unfair Prejudice—Can Creditors Actually Use the Oppression Remedy? Canadian Opera Company v Euro-American Motor Cars” (1991) 13:1 Adv Q 115; Ulmer, *supra* note 65 at 225–26; Brian R Cheffins, “The Oppression Remedy in Corporate Law: Recent Developments” (1990) 48:3 Advocate 361 at 362 [Cheffins, “Recent Developments”]; Jeffrey S Leon and Sarah Armstrong, “The Relevance of the Oppression Remedy as a Control on Corporate Governance in Canada” (2003) 27:4 Adv Q 402 at 426–29. It has been found that employees typically use the oppression remedy when they allege they have been wrongfully dismissed and when they are unable to recover a claim against the corporation: see Mohamed F Khimji and Jon Viner, “Oppression—Reducing Canadian Corporate Law to a Muddy Default” (2016) 47:1 Ottawa L Rev 123 at 172.

<sup>131</sup> This has been an issue because a finding of oppression will usually require an inequality of bargaining power, which is not present with equal or majority shareholders: see Michael Rice, “The Availability of the Oppression Remedy to Majority Shareholders in Ontario” (1989) 16:1 Can Bus LJ 58 at 59. But cases involving equal or majority shareholders include *Vedova v Garden House Inn Ltd* (1985), 29 BLR 236, [1985] OJ No 408 (H Ct J); *Re Gandalman Investments Inc v Fogle* (1985), 52 OR (2d) 614, 22 DLR (4th) 638 (H Ct J);

the presence of bad faith may help demonstrate oppression. Applicants of any kind do not formally need clean hands with regard to the matter at issue to bring an action for oppression, but the courts have still considered the applicants' behaviour.<sup>132</sup> The remedy is available for both public and private companies, though private companies use it more frequently,<sup>133</sup> and a slightly more flexible standard may be applied to directors of private companies when they are defending a claim for oppression.<sup>134</sup>

In settling these issues, the courts defined the parameters of the oppression remedy and started building the foundation for an effectual cause of action. The cases established the identity of potential claimants; they made it clear that the effect of the conduct and not the motive of the defendant is relevant to establishing the claim; and they considered the difference between using oppression in public and private companies. But the answers to these questions were all peripheral to the main question: what does one have to establish to build a claim for oppression?

In answering these questions, courts have substantiated the broad nature of the statutory language, holding that the oppression provisions apply to a wide spectrum of applicants, conduct and situations. But the statutory components are not defined, nor are there requirements that must be met. As Koehnen put it, the words used do not provide guidance in determining

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*Gillespie v Overs*, [1987] CLD 1217, [1987] OJ No 747 (H Ct J); *Hui v Yamato Steak House Inc*, [1988] CLD 215, [1988] OJ No 9 (H Ct J). See also Ulmer, *supra* note 65 at 225.

<sup>132</sup> For the most part, the courts do not rely on whether an applicant has clean hands. The statutory language does not mention clean hands, though this is not necessarily predictive of how courts will react, since the statutory predecessor to the oppression remedy—the winding up provisions, used by displeased shareholders—also did not mention the applicant's conduct, but the courts usually required an applicant to come to court with clean hands: see Cheffins, "Recent Developments", *supra* note 130 at 364–65. For this general proposition, see also Matthew Berkahn, "The Oppression Remedy and the 'Group' Approach to Shareholder Remedies in New Zealand" (1997) 10:1 *Corporate & Business LJ* 1; Koehnen, *supra* note 64 at 42–43; Cheffins, "Canadian Experience", *supra* note 122 at 315–16; BH Bresner, "A Litigation Perspective on 'The Oppression Remedy'" (1986) 7:3 *Adv Q* 266 at 274–75. But see *Lindzon v International Sterling Holdings Ltd*, [1989] BCWLD 2453, 45 BLR 57 (SC); *Cairney v Golden Key Holdings Ltd (No 2)*, 40 BLR 289, [1988] BCWLD 987 (SC), where the Court did place some weight on the applicants' conduct.

<sup>133</sup> *BCE*, *supra* note 2 at para 74; Cheffins, "Recent Developments", *supra* note 130 at 362; Brian R Cheffins & JM Dine, "Shareholder Remedies: Lessons from Canada" (1992) 13:5 *Company Lawyer* 89 at 90–91; Brian R Cheffins & Bernard S Black, "Outside Director Liability Across Countries" (2006) 84:6 *Tex L Rev* 1385 at 1444–47.

<sup>134</sup> "Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company": *BCE*, *supra* note 2 at para 74.

when the court should intervene.<sup>135</sup> As with other equitable remedies, the availability of oppression depends on the facts; what will constitute oppression in one instance will not necessarily be oppressive in another.<sup>136</sup>

Even though the remedy has been clarified in some areas, the same clarification has eluded judges and scholars when it comes to determining exactly how the statutory standards are met. The breadth of the language cannot be blamed for this dilemma, as other parts of the remedy containing equally broad language have been delineated. The problem is likely, as the *BCE* court maintained, that the terms “cannot be put into watertight compartments or conclusively defined.”<sup>137</sup> Indeed, how could one define “disregard” or “prejudice” narrowly enough to provide legal meaning? If these terms cannot be defined, it is nonetheless incumbent on us to articulate a framework or enumerate elements that must be met in this part of the test, for without such guidance, decisions appear random and haphazard. A party said to have engaged in oppressive conduct can legitimately be left wondering how the test was met. Given the deficiency in the current case law and statute, courts do not have the tools to write reasons that explain their decisions to parties on a principled basis. This can be rectified by recognizing what courts are doing and identifying the patterns that have emerged, as well as specifying the effect of the conduct on the complainant, to clarify the application of the remedy on a case-by-case basis. This makes the entire remedy clearer, more accessible and more predictable.

### 3. What is the Solution?

#### A) Introduction

The solution to this problem requires the development of a structured approach to determine whether the impugned conduct rises to the level of harm required by the statute. This approach has two parts. First, it identifies the elements necessary to be entitled to an oppression remedy. Second, it articulates the effect of the impugned conduct on a complainant in each successful oppression remedy case.

#### B) The Two Principles

I have examined the last three years of oppression remedy cases in Alberta, British Columbia and Ontario, and categorized the features and patterns

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<sup>135</sup> See *BCE*, *supra* note 2 at para 54, citing Koehnen, *supra* note 64 at 84: “[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct ... The difficulty with adjectives is they provide no assistance in formulating principles that should underline court intervention”.

<sup>136</sup> *BCE*, *supra* note 2 at para 59.

<sup>137</sup> *Ibid* at para 54.

emerging from these decisions. I have combined them to articulate two overarching principles that can be applied to every oppression remedy case. These principles contain elements every complainant must meet to be eligible for a successful oppression claim, and they articulate the type of harm necessary to meet the statutory standards. These principles have both been extrapolated from the cases and expressly acknowledged by the courts, but they have not been expressed in their entirety in the form of a checklist; in such a format, the requirements for oppression can become more accessible. Currently, courts apply what is akin to a “grab bag” of rules, where they lay out the facts, then determine which rules apply. This “grab bag” of rules approach does not necessarily instigate incorrect results, but it does make decisions appear chaotic and haphazard.

The principles are as follows. First, the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant’s interests. Second, other remedies cannot be capable of addressing the harm. These two principles determine whether a complainant is eligible to be considered under the second step of the *BCE* test.

**i) Principle 1: The Complainant Must Experience Harm Arising from its Relationship with the Corporation, and the Harm Must be Particular to the Complainant’s Interests.**

There must be some harm to meet part two of the *BCE* test; “[b]ald allegations with no particulars of any wrong done to the interest of the plaintiffs themselves or otherwise are not sufficient.”<sup>138</sup> Harm is not the end of the analysis, however, as harm resulting from the defendant’s actions, in and of itself, does not entitle the complainant to a remedy. First, that

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<sup>138</sup> 790668 *Ontario Inc v D’Andrea Management Inc*, 2016 ONSC 4657 at para 191, 269 ACWS (3d) 277. See also *Locke v Quast*, 2016 ONSC 1873 at para 71, 54 BLR (5th) 263. In *Zhao v Zhao*, 2016 ONSC 2469 at para 224, 267 ACWS (3d) 206, the judge noted, “there is no evidence of any damage caused to any of the respondents as a result of Pingbo’s actions, apart from some modest expenses associated with Pingbo’s actions in freezing the bank account of 219. In particular, while some of Pingbo’s actions have probably caused Pingyuan some embarrassment, the Business does not appear to have suffered and has, in fact, prospered under his sole management.” In *Bimman v Neiman*, 2015 ONSC 2313 at paras 158–59, 41 BLR (5th) 95, rev’d on other grounds 2017 ONCA 264, 277 ACWS (3d) 308, the harm done was that the rules were changed “at Bimman’s expense.” In *Shefsky v California Gold Mining Inc*, 2016 ABCA 103 at para 37, 616 AR 290, the Court maintained, “[a]n expectation based on a loss of an opportunity, without proof that such opportunity was more than merely speculative, is insufficient to ground an oppression claim because causation and compensable injury have not been established”.

harm must have been inflicted unfairly.<sup>139</sup> Second, the complainant must experience the harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests.

First, the harm addressed by the oppression remedy must be harm suffered by the complainant in the enumerated capacities, as a security holder, creditor, director or officer. In other words, the harm must involve the complainant in its corporate role; the harm cannot be personal to the complainant, nor can it be harm that affects the complainant in a role other than in its corporate role.<sup>140</sup> For example, when a shareholder is removed from her position as director or officer, that in itself would not trigger the oppression remedy if the complaint is being brought *qua* shareholder.<sup>141</sup> Similarly, if members behave badly to each other but the complainant's rights as a member are unaffected, the courts will not allow the use of the oppression remedy.<sup>142</sup>

Second, the harm addressed by the oppression remedy must be direct, personal and distinct to that shareholder or a small group of shareholders; it cannot be harm that affects every shareholder in the same way.<sup>143</sup> In other

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<sup>139</sup> *R Floden Services Ltd v Solomon*, 2015 ABQB 450, 24 Alta LR (6th) 76 [*Floden Services*]. The unfairness aspect will be discussed below.

<sup>140</sup> In *Jaguar Financial Corp v Alternative Earth Resources Inc*, 2016 BCCA 193 at para 188, 86 BCLR (5th) 317 [*Jaguar Financial*], the Court ruled that the harm was to Jaguar as a potential bidder, not as a shareholder. In *Geddes v Silvestri Holdings Inc*, 2014 ABQB 416 at para 123, [2014] AWLD 3982, a relationship breakdown between a minority and a majority shareholder did not thwart the minority shareholder's expectations as to the benefits she would continue to receive from the business in her role as a member.

<sup>141</sup> *Diligenti v RWMD Operations Kelowna Ltd* (1976), 1 BCLR 36 at 43, [1976] BCJ No 38 (SC), citing *Re British Columbia Aircraft Propeller & Engine Co Ltd* (1968), 66 DLR (2d) 628, 63 WWR 80 (BCSC). However, if the shareholder has expectations that he or she will participate in the business, that could trigger the oppression remedy: see *Khela v Phoenix Homes Ltd*, 2013 BCSC 2079 at paras 111–12, 20 BLR (5th) 107 [*Khela*], aff'd 2015 BCCA 202, 77 BCLR (5th) 257. Similarly, when the shareholder suffered as an engineer because of forgeries on documents, the Court found that the harm was personal to the engineer, and not belonging to the shareholder: see *1043325 Ontario Ltd v CSA Building Sciences Western Ltd*, 2016 BCCA 258 at paras 57–58, 88 BCLR (5th) 278 [*CSA Building Sciences*].

<sup>142</sup> In *Hui v Hoa*, 2015 BCCA 128 at para 52, 74 BCLR (5th) 251 [*Hui*], the Court found that the son had behaved “reprehensibly” toward his mother, but that it did not translate to corporate oppression because the mother was not entitled to the income stream as a shareholder after transferring her control over the company to her son.

<sup>143</sup> *LaRosa v Brown*, 2016 ONSC 407 at paras 22–26, 263 ACWS (3d) 89 [*LaRosa*]. Here, the Court found that the conduct of the defendants, the alleged misappropriation of funds, was alleged to cause damages to the corporation, not to the shareholder, and that the personal interests of the shareholder were not engaged by the allegations. See also *829194 Ontario Inc v Garibotti*, 2013 ONSC 5857, 19 BLR (5th) 118.

words, as required by the legislation, it must be harm *to the interests of the complainant*. The limitation here is that it cannot be harm that affects the shareholder indirectly, such as that which would occur if the corporation were harmed, causing share prices to drop. Put differently, and following the rule in *Foss v Harbottle*,<sup>144</sup> harm to the corporation (and indirectly to the shareholders as a collective) is not harm to the complainant shareholder; harm to the corporation should be addressed by the derivative action, which is brought in the name of or on behalf of a corporation and requires the leave of the court.<sup>145</sup> The oppression remedy is intended to address harms done to the interests of stakeholders affected by the oppressive acts.<sup>146</sup> This rule has caused some difficulty because the two remedies are not mutually exclusive, and there has been inconsistent treatment in the case law when the remedies overlap.<sup>147</sup>

The Court of Appeal of Ontario recently examined the distinction between the oppression remedy and the derivative action in *Rea v Wildeboer*, where the Court upheld the trial judge's determination that a claim alleging misappropriation of the company's funds properly belonged to the company to pursue by way of derivative action.<sup>148</sup> The Court confirmed that for the oppression remedy, "the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.* the collectivity of shareholders as a whole."<sup>149</sup> Similarly, in *Jaguar Financial*, Justice Savage wrote,

In my view the authorities require a shareholder to show it suffered harm that is "direct and special", "peculiar", or "separate and distinct" from the harm suffered generally by all of the shareholders. In other words, a shareholder need not be the only shareholder oppressed in order to claim oppression, nor suffer a different harm than the corporation does, but it must show peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly.<sup>150</sup>

Courts are adept at distinguishing between conduct that is clearly direct and personal to the shareholder and conduct that is clearly done to the corporation, and they apply the proper cause of action.<sup>151</sup> But problems may arise if the harm triggers both a derivative action and an oppression remedy. In certain circumstances, in closely held corporations, the actions

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<sup>144</sup> (1843), 67 ER 189, [1843] EngR 478.

<sup>145</sup> The purpose of the leave requirement is to prevent frivolous and vexatious actions, or actions not in the corporation's best interests to litigate: see *BCE*, *supra* note 2 at para 43.

<sup>146</sup> *Ibid* at para 45.

<sup>147</sup> *Rea v Wildeboer*, 2015 ONCA 373 at para 28, 384 DLR (4th) 747 [*Rea*].

<sup>148</sup> *Ibid* at para 47.

<sup>149</sup> *Ibid* at para 33.

<sup>150</sup> *Jaguar Financial*, *supra* note 140 at para 179.

<sup>151</sup> The test for determining oppression under condominium legislation is the same one that is used for the provincial business corporations acts. In *Grigoriu*, *supra* note 67 at

of directors might constitute both harm to the company and to the minority shareholders. If, for example, a majority shareholder treats the company as his own personal piggy bank, pays management excessive fees, or engages in self-dealing through nominee directors, that is both a wrong to the corporation and oppressive of the minority.<sup>152</sup> In these cases, if the harm also breaches a shareholder's reasonable expectations, courts have determined that the "size, nature and structure of the corporation" will influence whether a wrong done to the corporation can also be a wrong to the shareholder.<sup>153</sup>

Additionally, the consequences of proceeding by way of derivative action are pertinent. In certain circumstances, allowing a derivative action to proceed when a corporation has been harmed is not productive, and in those cases, courts have allowed complainants to pursue an oppression remedy: for example, if the corporation only has two shareholders, and the majority shareholder, who is also the controlling mind, removes money from the company, then a remedy consisting of repaying the money into the corporation is not going to be beneficial to the minority shareholder.<sup>154</sup>

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para 36, the judge found that the effect of the condominium declaration imposed a restriction on the applicant that had not been imposed on any other resident, rendering it oppressive to the applicants. In *Raging River Capital LP v Taseko Mines Limited*, 2016 BCSC 2302 at paras 52–53, [2017] BCWLD 432, the judge found that the harm alleged by the complainant was no different than the harm suffered by all the shareholders of the corporation, thereby finding no basis for the oppression remedy. See too *Barrett v Strata Plan LMS 3265*, 2016 BCSC 1477, [2016] BCWLD 6114, rev'd 2017 BCCA 414. See also *Todd Family Holdings Inc v Gardiner*, 2015 ONSC 4432, 47 BLR (5th) 46 [*Todd Family Holdings*], rev'd on other grounds 2017 ONCA 326, 64 BLR (5th) 1; *Khela*, *supra* note 141 at para 56.

<sup>152</sup> See *CSA Building Sciences*, *supra* note 141 at paras 69–71.

<sup>153</sup> *BCE*, *supra* note 2 at para 76. In *CSA Building Sciences*, *supra* note 141 at para 74 [emphasis in original], quoting *Jaguar Financial*, *supra* note 140 at paras 184–85, the Court noted, "[f]urthermore, there are scenarios where *BCE*'s examples, such as paying directors' fees higher than industry norms, could result in a shareholder experiencing distinct harm and therefore reconcile *BCE* with the other authorities. The size, nature and structure of a corporation is a key element in the analysis. Thus, in a closely-held corporation, the payment of a director's fee may be in breach of an expectation that all monies would be paid out of the corporation to the shareholders in proportion to the shares held (*BCE*, para 76). This would be a distinct harm as paying a director's fee would not only affect the company but separately and distinctly harm the other shareholder who alone would not receive a fee".

<sup>154</sup> See *CSA Building Sciences*, *supra* note 141 at para 80, where the Court determined that allowing a derivative action to proceed—whereby the excessive management fees would be recovered by the corporation that is controlled by the defendant—would be "wholly counterproductive." In *Brockhedge Investment Group (1) Inc v Campus Court Developments Ltd*, 2013 ONSC 1578, 13 BLR (5th) 327, an oppression remedy by three minority shareholders was allowed to proceed where the defendants, the directing minds and owners of 50% of the shares, were using the corporation as their own personal piggy bank.

## ii) Principle 2: Other Remedies Cannot be Capable of Addressing this Harm

The second principle requires a consideration of whether another cause of action can remedy the harm, other than an oppression remedy. If the complainant could have brought a claim for breach of contract, tort or wrongful dismissal, the courts will not grant the oppression remedy.<sup>155</sup> For example, if creditors attempt to use the oppression remedy for ordinary debt collection, or employees for wrongful dismissal, the court will not find oppression if the claims involve nothing further.

This principle, however, is not without exception. The oppression remedy is frequently relied on as a cause of action because of its breadth: the statutory language can essentially encompass any type of behaviour. Case law shows that although courts do not allow parties to use the remedy if another cause of action is applicable, they will sometimes take advantage of the broad language to assist a complainant who is without recourse. If another cause of action is applicable to the facts, but is unavailable, courts have used the oppression remedy. Below are several examples.

In *Hayat v Raja*, the Court found that the defendants had fraudulently excluded the applicant from ownership and control of the company by having him resign as director and surrender his shares.<sup>156</sup> In finding for the complainant, the Court noted that the contractual remedy of rescission would be impossible to pursue in this case because the shares had already been sold, so it utilized the remedies available under the oppression remedy.<sup>157</sup> Another example can be found in *2081451 Ontario Ltd v 2221306 Ontario Inc*, where the defendants went to great lengths to transfer their business and assets from one corporation to another, without consideration.<sup>158</sup> The Court found the purpose of the transactions was to defraud their creditors.<sup>159</sup> In finding for the applicant, the Court found the transactions to be fraudulent conveyances and awarded damages under the oppression provisions.<sup>160</sup> The

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<sup>155</sup> *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, 2008 ONCA 183, [2008] OJ No 958; *Todd Family Holdings*, *supra* note 151; *Dinis v Nobrega*, 2016 ONSC 6156, 272 ACWS (3d) 756. See also the statement by Justice D Brown (as he then was) in *Brookfield Financial Real Estate Group Ltd v Azorim Canada (Adelaide Street) Inc*, 2012 ONSC 3818 at para 52, 111 OR (3d) 580 (Sup Ct J (Commercial List)) where he said, “it is not appropriate to resort to the statutory oppression remedy where a simple breach of contract has occurred.” With regard to employment, see e.g. *Benin v DrawSplash Inc*, 2014 ONSC 2659, 240 ACWS (3d) 865.

<sup>156</sup> 2016 ONSC 6805 at para 131, 273 ACWS (3d) 305.

<sup>157</sup> *Ibid* at paras 131–32.

<sup>158</sup> 2016 ONSC 6270 at para 23, 272 ACWS (3d) 102.

<sup>159</sup> *Ibid* at para 25.

<sup>160</sup> *Ibid* at para 27.

Court did not mention the *Fraudulent Conveyances Act*,<sup>161</sup> even though it was clearly applicable, presumably because the Act does not provide for an award of damages.<sup>162</sup> Similarly, in *Wolfson*, a debt collection case, the Court used the oppression remedy to hold the sole shareholder and director personally liable for legal fees of the corporation because the principal knew of the poor financial state of the corporation when the law firm was retained, a fact the law firm could have no way of knowing.<sup>163</sup> In a similar case, where two employees were hired and put to work at a time when the sole director and officer knew he could not pay their wages because the corporation was insolvent, the Court allowed the oppression remedy to be used against his estate.<sup>164</sup>

### C) How do Principles Provide Greater Clarity in Case Law?

The principles above are those used by courts to determine whether a complainant is entitled to an oppression remedy once the complainant's expectations are found to be reasonable and shown to have been breached by the impugned conduct. In determining whether a remedy is warranted, courts will run through these principles, but they will not necessarily expressly articulate the requirements that must be met. They may focus on elements of the principles that are in issue,<sup>165</sup> but the aspects not in issue will not be discussed. As a result, an incomplete picture arises in the case law, as the required elements that must be met before the remedy becomes available are not discussed.

Providing greater clarity in the decisions would not require a significant change. Now, courts operate without an express list of elements; they do

<sup>161</sup> RSO 1990, c F-29.

<sup>162</sup> See *Perry, Farley & Onyschuk v Outerbridge Management Ltd* (2001), 54 OR (3d) 131, [2001] OJ No 1698 (CA); *Taylor v Cummings* (1897), 27 SCR 589, 1897 CarswellNS 86; *Taylor v McKinnon* (1896), 29 NSR 162, 1896 CarswellNS 77 (SC); 336239 *Alberta Ltd v Mella*, 2016 ABQB 190, [2016] AWLD 1658; *Nadi Inc v Yahyavi*, 2016 ONSC 4386, 39 CBR (6th) 133.

<sup>163</sup> *Wolfson*, *supra* note 96.

<sup>164</sup> *El Ashiri v Pembroke Residence Ltd*, 2015 ONSC 1172, 250 ACWS (3d) 414. Justice Boswell maintained, “[t]his is not a case where the plaintiffs were hired, had a long history with the defendants and where the defendants ran into financial [difficulty], leaving the plaintiffs as creditors. Mr. Dewji hired the plaintiffs and put them to work in responsible positions in his hotels and never, from the ‘get go’ paid them what they were due. He must have known when he hired them that he was not in a position, financially, to pay them what they were due. They provided their labour and services in good faith and in return were treated callously and as though they were his personal servants” (para 21).

<sup>165</sup> See e.g. *1186708 Ontario Inc v Gerstein*, 2016 ONSC 1331, 64 BLR (5th) 318, where the claims for losses were found to belong to the corporations; *LaRosa*, *supra* note 143, where the alleged harm would have been suffered by the corporation; *Rea*, *supra* note 147 at para 34, where the conduct was not found to harm the interests of the complainant.

consider the elements as they determine which cases are entitled to a remedy, but they do not do so expressly. Articulating the principles to indicate how they are met in individual cases would clarify the legal analysis. Similarly, showing how judges arrive at their decisions results in justifiable outcomes. This in turn leads to a stronger air of legitimacy in the entire area of law. Additionally, sharper analyses in the decisions will decrease the volume of these claims, as potential claimants will have a clear guideline as to the requirements that must be met before qualifying for an oppression remedy. Not all cases contain oppression, but they do go to court and they are tried, using valuable judicial resources in the process. Conversely, claimants with valid claims may be more willing to go to court when they can better assess the merits of their claim.

This type of clarification has already occurred in the first part of the oppression remedy test. Prior to *BCE*, courts had been using the doctrine of reasonable expectations in oppression remedy cases, and they were identifying the factors that were relevant to their decisions. However, the *BCE* Court combined these factors and applied them to the case before it in an articulate and comprehensible analysis, providing a clear and detailed map for lower courts to navigate this part of the test in an oppression remedy analysis.<sup>166</sup> A study of the case law over the last three years shows that most courts are clear and methodical in their analysis of reasonable expectations because they lay out all the factors and discuss their applicability. As a result, the legal analysis in this part of the test has become clear, justifiable and predictable.<sup>167</sup> This paper proposes a similar clarification for the second part of the *BCE* test.

## D) Effect of Impugned Conduct

The second aspect of clarifying oppression remedy jurisprudence requires articulating the effect of the impugned conduct on the complainant. Such clarity could show how simple prejudicial conduct or conduct that disregards the complainant can become conduct that is “unfairly prejudicial” or that “unfairly disregards” the complainant. The Court in *BCE* was right to say these terms cannot be “conclusively defined”, as they are simply descriptors

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<sup>166</sup> The factors are commercial practice; the nature of the corporation; relationships; past practice; preventative steps; representations and agreements; and fair resolution of conflicting interests. See *BCE*, *supra* note 2 at paras 73–88.

<sup>167</sup> See e.g. *Rothwell v Kemik Inc*, 2017 ABQB 310, [2017] AWLD 2291; *Collins Barrow Vancouver v Collins Barrow National Cooperative Inc*, 2015 BCSC 510, [2015] BCWLD 3286; *Hui*, *supra* note 142; *Floden Services*, *supra* note 139; *Goetz Investments Inc v Partners in Motion Pictures Inc*, 2015 BCSC 547, [2015] BCWLD 3743. There are, of course, still decisions that reach a conclusion without properly going through the test—or without going through the test at all—but these now tend to be the exceptions.

of inappropriate conduct.<sup>168</sup> As such, conduct will meet the statutory tests on a case-by-case basis, depending on the facts and the context, and not by ascribing legal meaning to the statutory tests. Uncertainty, however, does not require an absence of clarity. Courts need to be specific in their analyses, so as to clarify, in each decision, which conduct caused which harm, and why that harm qualifies the complainant for an oppression remedy. Specifically, articulating the legal significance of the effect of the conduct on the complainant will be the single most important factor in providing a clear analysis on a case-by-case basis, and would help ascertain why certain behaviour meets the statutory tests while other behaviour does not. Some cases already do this, but not nearly enough to provide an overarching clarity to oppression remedy jurisprudence.<sup>169</sup> In this part of the paper, I examine cases that clearly articulate the effect of the harm on the complainant.

The oppression remedy is not available unless harm has been done to the complainant, meaning that each successful oppression remedy case addresses harm that in some way meets one or more of the statutory tests. But in cases where the complainant has successfully obtained a remedy, several items are typically left unaddressed. Sometimes courts simply list a number of acts and call each of them, or a combination of them, oppressive, without anything more.<sup>170</sup> Some courts have not distinguished between the components and have found that one impugned act meets all the statutory

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<sup>168</sup> *BCE*, *supra* note 2 at para 54.

<sup>169</sup> In *Aurum, LLC v Calais Resources Inc*, 2016 BCSC 1173 at para 76, [2017] BCWL 3040 [*Aurum*], the Court found that the ongoing conduct, particularly the failure to comply with the statute and the company's articles, and the attempt to dilute the complainant's shareholdings *in order to* interfere with the complainant's exercise of its legal rights as majority shareholder were unfairly prejudicial and possibly oppressive. The effect of the acts makes the Court's finding understandable and justifiable. There are several other cases where the courts were specific as to how the particular acts constituted oppression: see e.g. *Grigoriu*, *supra* note 67, where the Court found that an amended declaration that had the effect of prohibiting the applicants from selling their parking and storage unit with their residential unit constituted oppression. In *Blankenship v Jenks-Cochrane Properties Ltd*, 2016 ABQB 461 at paras 163–67, [2016] AWL 3855, the judge found that there had been unfair disregard because of the refusal to recognize the existence of preference shares, as well as the fact that the share transfers had been taken without compensation and in defiance of the terms under which the share transfer was authorized. There had been unfair prejudice because the company was in arrears of property taxes and had ignored clean up orders. Further, there was oppression because the complainant had been pressured into accepting a mortgage for less than the full amount of debt owed by her company. In *Nowosad v Boutillier*, 2015 ABQB 763 at para 90, [2016] AWL 606, the Court found that failing to provide financial information, against the backdrop of the lack of communication and a number of events that reduced the value of the company, had been unfairly prejudicial.

<sup>170</sup> In *Randhawa v Gateway Building Management Ltd*, 2013 BCSC 1662 at para 125, 236 ACWS (3d) 623, the Court found many wrongful actions and found each act to be oppressive. These included failing to keep the corporate records of the company, failure to

components,<sup>171</sup> or have used the components interchangeably, without much explanation.<sup>172</sup> Some courts simply find unfairness then determine the test has been met,<sup>173</sup> and others use “oppressive conduct” as a catch-all phrase and fail to specify which component has been met by the impugned conduct.<sup>174</sup> Additionally, when the conduct consists of many aspects or stretches over long periods of time, it can be difficult to determine where the oppression lies and the cases are not always clear as to how each action contributes to the overall finding. As the Court in *Aurum, LLC v Calais Resources Inc* maintained, “[w]hile a single incident may not, by itself, constitute oppressive or unfairly prejudicial conduct, the combination of acts must be examined in their totality to determine if the shareholders’ rights have been so affected.”<sup>175</sup>

Unfairness, disregard and prejudice are limitless concepts, capable of being met by conduct ranging from the innocuous to the extreme. It is for these reasons that the concepts cannot be defined, but it is for these same reasons that a clear explanation is necessary each time one of these standards is met. Courts need to specify in each case how the effect of the conduct is elevated to unfair prejudice or disregard to justify a remedy.

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allow the complainant to access the records at the company, failure to call an AGM and to allow the complainant to exercise his rights as a shareholder, breaches of fiduciary duty by the director, failure to provide financial statements, making payments to another company, attempting to convert unsecured debt to shareholdings, not accounting for funds received or dispersed under a mortgage, and refusal to acknowledge the complainant’s entitlement in the company’s shares. There were additional alleged acts that would have each been oppressive if true.

<sup>171</sup> See e.g. *Wennekers*, *supra* note 75 at para 223.

<sup>172</sup> In *Uraizee v Pacific Art Stone Inc*, 2014 BCSC 236, [2014] BCWLD 1951, the Court simply found that the affairs of the company had been conducted in an oppressive manner, in a way that was unfairly prejudicial to the complainant as a shareholder. These included freezing the complainant out of the management of the company and failing to provide him with financial information or notice of the directors’ and shareholders’ meeting. It did not specify whether each action or the combination of them was oppressive: paras 41–42.

<sup>173</sup> See e.g. *Paquette v Zaio Corp*, 2016 ABQB 529, 43 Alta LR (6th) 356, where the decision was not clear about whether manifest unfairness and prejudice equal “oppression”, or whether they meet the statutory standard of unfair prejudice in the oppression remedy.

<sup>174</sup> See e.g. *1007374 Alberta Ltd v Ruggieri*, 2014 ABQB 641 at paras 118–20, 9 Alta LR (6th) 395; *Lam v Chen*, 2017 ONSC 3926, 281 ACWS (3d) 536.

<sup>175</sup> *Aurum*, *supra* note 169 at para 76. Similarly, in *Floden Services*, *supra* note 139 at para 36, the Court maintained, “Courts should consider not only isolated actions but patterns of conduct to determine whether conduct was unfair under s. 242”.

## E) Decisions: The Good and the Can-be-Improved

### i) A Good Decision: *Wood Estate v Arius3D Corp*<sup>176</sup>

In this case, the late Mr. Wood indirectly lent Arius3D Corp \$750,000 for an acquisition agreement it had negotiated with Masterfile Corporation.<sup>177</sup> Wood lent the funds to another company, A3DL Limited, which then lent them to Arius3D. In return, Wood received a promissory note from A3DL, in which it was indicated that Wood would be repaid the loan the day after the Irish Companies (the companies that were listed in the schedule attached to the promissory note) received the funds.<sup>178</sup> The “Irish deals” closed, and Arius3D received over \$990,000, but it did not use the funds to repay Wood’s loan.<sup>179</sup> Wood attempted to obtain the money but Arius3D did not pay, so he commenced an oppression action, seeking damages of \$950,000.<sup>180</sup> Wood died but his estate continued the action.

The judge found that Wood had a reasonable expectation that his \$750,000 loan would be repaid by Arius3D upon receipt of any funds from the Irish Companies until his loan had been repaid in full.<sup>181</sup> Arius3D breached that reasonable expectation because it received the funds from the Irish Companies but it did not apply any of it toward the Wood loan, nor did it tell him it had received the money until the money had been spent.<sup>182</sup> The judge had to determine whether Arius3D’s failure to apply any of the funds from the Irish Companies to the Wood’s loan was oppressive, unfairly prejudicial or unfairly disregarding of Wood’s interest.

Several pieces of evidence were relevant to this analysis: Arius3D was insolvent; its directors were trying to keep the company operating as a going-concern; Wood was pressuring Arius3D for the repayment of his loan; and Wood was leading a proxy fight against the board.<sup>183</sup> Given the financial state of the company, the Court found that Arius3D had failed to pay several of its creditors, with the result that, “at the material time Arius3D was disregarding the interests of many of its creditors, including Wood.”<sup>184</sup>

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<sup>176</sup> *Arius3D SCJ*, *supra* note 65. Another excellent decision is *Binman v Neiman*, 2015 ONSC 2313, 41 BLR (5th) 95, rev’d in part on other grounds 2017 ONCA 264, 277 ACWS (3d) 308.

<sup>177</sup> *Arius3D SCJ*, *supra* note 65 at para 1.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid* at para 2.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid* at para 123.

<sup>182</sup> *Ibid* at para 124.

<sup>183</sup> *Ibid* at para 129.

<sup>184</sup> *Ibid* at para 130.

The Court concluded that Arius3D's decision to use some of the Irish funds to pay its operating expenses and its employees' salary arrears did disregard Wood's interest, but not unfairly.<sup>185</sup> The Court also found, however, that Arius3D's directors used some of the Irish funds to repay themselves for the loans they had extended to the company. That, combined with their role in inducing Wood to loan the money to Arius3D, and their role in directing Arius3D to breach its undertaking to Wood so they could prefer their own self interest, amounted to conduct that unfairly disregarded the interests of Wood.<sup>186</sup>

This is a good decision because the Court discusses exactly how the breach of reasonable expectations became elevated to unfair disregard of the complainant's interests. It discussed the effect of the conduct on the complainant, and it discussed how the effect went from disregard to unfair disregard, which is required for part two of the *BCE* test. The conduct—failing to repay Wood while paying other expenditure—was a disregard of Wood's interests, but disregard alone does not meet the second stage of the *BCE* test. What *does* meet the test is the disregard being “unfair”. In this case, the unfairness arose from the directors having induced Wood to make the loan, deciding to repay their own loans before his, and directing their company to breach its undertaking to him.

## ii) A Second Good Decision: *R Floden Services Ltd v Solomon*<sup>187</sup>

Rick Solomon, an inventor in the firefighting industry, learned of a gel that could be used to fight forest fires. He began to develop injection systems that would mix the gel with water and deliver the mixture from a fire fighting aircraft.<sup>188</sup> The gel and injection systems could also be used in oil and gas wells. Solomon needed capital to fund his project. To that end, he approached Floden, a director, officer, and shareholder of R Floden Services Ltd (“Floden Services”) in 2012, a company in the oil patch trucking services.<sup>189</sup>

Solomon and Floden Services entered into an agreement, although it was not set out in a formal document.<sup>190</sup> They agreed that Floden Services would provide capital in return for a share position in a new corporation, of which Solomon would be a shareholder and would provide expertise, equipment and his contacts.<sup>191</sup> Solomon would also develop the intellectual property.

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<sup>185</sup> *Ibid* at para 131.

<sup>186</sup> *Ibid* at para 132.

<sup>187</sup> *Floden Services*, *supra* note 139.

<sup>188</sup> *Ibid* at para 1.

<sup>189</sup> *Ibid* at para 2.

<sup>190</sup> *Ibid* at para 3.

<sup>191</sup> *Ibid*.

They incorporated a company (Firefox Inc) in 2012, with four shareholders, including Solomon and Floden Services. Floden Services invested over \$1.2 million in the business. By October 2014, the relationship between Floden Services and Solomon had broken down.<sup>192</sup> Floden Services brought an oppression remedy claim against Solomon, alleging he had engaged in self-dealing by diverting funds, assets and opportunities from Firefox Inc.<sup>193</sup> Solomon cross-applied, also claiming oppression. The Court found for Floden Services and dismissed the cross-application.

In reaching its conclusion on oppression, the Court noted that, after establishing a breach of reasonable expectations, a complainant must establish “that its interests were limited unfairly ... [as] harm alone is not sufficient.”<sup>194</sup> After going through the factors for reasonable expectations, the judge determined that it was reasonable for Floden Services to expect that Solomon, as a director of Firefox, would act in the best interests of Firefox and that he would follow through on the projects he brought to Firefox.<sup>195</sup> The judge went on to analyse the claims made against Solomon. He categorized them and determined how the actions in each category harmed Firefox.

In one category, the judge found that Solomon had failed to do business. Although a profitable business cannot be guaranteed, Solomon had not produced any significant results, and had demonstrated a lack of effort to obtain results.<sup>196</sup> This “indifference” was found to be an unfair disregard of the interests of Firefox and Floden Services. Additionally, failing to produce results and to apply work effort prejudiced the interests of Floden Services as a shareholder in Firefox.<sup>197</sup> These actions did not merely disregard and prejudice Floden Services; they unfairly did so because Solomon had made representations, extracted over \$1.2 million, then failed to work hard to maintain the confidence of the investors.<sup>198</sup>

In another category, the judge found numerous counts of improper spending by Solomon. Overall, Solomon was found to have abusively and unfairly spent money in a way that did not benefit Firefox, and unfairly disregarded the interests of Floden Services. The transactions prejudiced the two companies because Firefox’s money had been wasted, and they unfairly

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<sup>192</sup> *Ibid* at para 6.

<sup>193</sup> *Ibid* at para 7.

<sup>194</sup> *Ibid* at para 33.

<sup>195</sup> *Ibid* at para 47.

<sup>196</sup> *Ibid* at para 61.

<sup>197</sup> *Ibid*.

<sup>198</sup> *Ibid* at para 62.

disregarded the interests of the companies because the money benefited Solomon without benefiting Firefox.<sup>199</sup>

The judge also found that Solomon had engaged in competition with Firefox. Solomon had obtained funds from Floden Services to obtain funding from a new investor, but then had taken the benefit for himself, not for Firefox.<sup>200</sup> This activity was done in bad faith and was found to be oppressive to Floden Services.

In this decision, the Court breaks down the different behaviour and discusses exactly how each category of behaviour affected the complainants' interests. As in the case above, it discussed how the effect went from simple disregard and prejudice to unfair disregard and prejudice. The conduct, in and of itself, showed an overall pattern of Solomon taking advantage of the companies for his own benefit. The companies were not merely prejudiced by these actions; they were unfairly prejudiced. They had been induced to provide money for these projects, but instead of benefiting from the venture, they were duped. As the judge noted, harm alone is insufficient for an oppression remedy; there must be unfair limitation of the complainant's interests.<sup>201</sup> In this case, the judge shows how harm can be elevated to trigger the second step of the *BCE* test by meeting one or more of the statutory components.

### **iii) *Ryan v York Condominium Corp No 340*:<sup>202</sup> How to Fix a Problematic Decision**

In this decision, Ryan, the applicant and the owner of a condominium, made a claim against York Condominium Corporation ("YCC"). He alleged YCC had failed its duty to maintain and repair the common area of the condominium building, which led to water damage in Ryan's unit.<sup>203</sup> Ryan maintained that doing so breached YCC's maintenance and repair obligations under the *Condominium Act, 1998*<sup>204</sup> and that its conduct had been oppressive to him.<sup>205</sup>

The evidence showed a longstanding problem in the condominium. The condominium corporation was established in 1977 and shortly after the units were occupied, it became apparent there was a serious defect in the construction, as there was no proper building envelope installed on the upper

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<sup>199</sup> *Ibid* at paras 63–85.

<sup>200</sup> *Ibid* at para 117.

<sup>201</sup> *Ibid* at para 33.

<sup>202</sup> 2016 ONSC 2470, 265 ACWS (3d) 511 [*Ryan*].

<sup>203</sup> *Ibid* at para 1.

<sup>204</sup> SO 1998, c 19.

<sup>205</sup> *Ryan*, *supra* note 202 at para 1. See also *Grigoriu*, *supra* note 67 at para 21.

floors.<sup>206</sup> As a result, there were consistent and widespread water penetration issues largely related to weather conditions.<sup>207</sup> Since that time, the board of directors attempted various temporary fixes, all the while contemplating a permanent solution. The permanent solutions were not instituted until 2014 for water penetration, and 2015 for mould remediation.<sup>208</sup>

In 1980, Ryan purchased one of the units afflicted with water penetration problems. In 2010, water penetrated Ryan's unit after a storm and damaged the plaster and the floor. The board was advised and within a month, a contractor was sent in, but only part of the damage was repaired. The board was again advised as to the remaining damage, by letter then by phone. The board maintained it was in the process of hiring a contractor to finish the repairs. In November 2010, the board approved a major repair project, but it needed four million dollars that it did not have.<sup>209</sup> In December 2010, the board obtained an engineering report about the work required to repair the building.

In March 2011, Bird, Ryan's sister, advised the board about the dampness and mould in Ryan's unit. Bird contacted the board again in April 2011 about water damage in the den and living room. The maintenance staff confirmed the problem. At that time, Ryan, who had been living elsewhere due to health issues and proximity to the treatment centre, decided not to return to the unit because he believed it to be uninhabitable.<sup>210</sup> Ryan continued to pay all the expenses, the special assessment and taxes for his unit throughout the period he lived elsewhere.<sup>211</sup>

Between 2011 and 2014, Bird contacted the board to report water damage and mould in Ryan's unit at least a dozen times, with phone calls, letters and photographs. The board responded and sent construction contractors to make temporary repairs that were ultimately unsuccessful. Eventually, in November 2014, major repairs fixed the water penetration problem. However, the mould remained until October 2015, when a firm undertook mould remediation.

In court, Ryan requested damages for out-of-pocket loss as well as damages for mental distress, anxiety and psychological and emotional damages.<sup>212</sup> The judge found YYC had acted unreasonably and had breached its duty to repair under the *Condominium Act, 1998*, pursuant to which

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<sup>206</sup> Ryan, *supra* note 202 at para 10.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid* at paras 56, 62.

<sup>209</sup> *Ibid* at para 18.

<sup>210</sup> *Ibid* at para 21.

<sup>211</sup> *Ibid* at para 22.

<sup>212</sup> *Ibid* at para 65.

YYC had a duty to maintain the common elements and repair them after damage.<sup>213</sup> Given that YYC had known of the water penetration problems for over thirty years and that it had failed to institute a permanent solution, its conduct had been unreasonable.<sup>214</sup> Additionally, even if the entire history was overlooked and one focused only on YYC's conduct since 2010, it would show that YYC had not acted reasonably and that it had breached its duty to repair.<sup>215</sup> YYC had been advised repeatedly about the infiltration problem since 2010 but it took YYC an additional four and-a-half years to make repairs that prevented the water infiltration and another year after to address the mould issues.<sup>216</sup> The judge ordered YYC to pay the damages for the expenses Ryan had incurred, as well as his court costs. The judge did not award damages for mental distress.

With regard to the oppression claim, the Court quoted the *BCE* test and defined the three statutory elements as other condominium cases had, though the definitions would have been equally applicable in corporate cases.<sup>217</sup> The Court maintained:

Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance.<sup>218</sup>

The Court noted that, as with corporate cases, oppressive conduct involves bad faith but the other two components do not, and that the remedy protects the reasonable expectations of shareholders or unit holders—expectations “determined according to the arrangements that existed between the shareholders or unit owners of a corporation.”<sup>219</sup> The Court listed the factors that would contribute to the formation of reasonable expectations—the same factors articulated in *BCE*. However, it did not engage in an analysis of what the reasonable expectations were in this case, whether they were breached and, if so, whether they met the statutory standards.<sup>220</sup> The Court simply concluded that there was no evidence that YYC's failures constituted

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<sup>213</sup> *Ibid* at para 68.

<sup>214</sup> *Ibid* at para 73.

<sup>215</sup> *Ibid*.

<sup>216</sup> *Ibid*.

<sup>217</sup> Although the Court did not reference *BCE*, it cited *Metropolitan Toronto Condominium Corp No 1272 v Beach Development (Phase II) Corp*, 2011 ONCA 667 at para 6, 285 OAC 372, which articulates the same test as in *BCE*.

<sup>218</sup> *Ryan*, *supra* note 202 at para 78.

<sup>219</sup> *Ibid* at para 79, citing *Walia Properties Ltd v York Condominium Corp No 478*, [2007] OJ No 3032, 60 RPR (4th) 203 (Sup Ct J), rev'd 2008 ONCA 461, 67 RPR (4th) 161; *Naneff v Con-Crete Holdings Ltd* (1995), 23 OR (3d) 481, 85 OAC 29 (CA).

oppressive conduct under any of the statutory standards, and that while the conduct was ineffective, it was not abusive or oppressive.<sup>221</sup>

If the two principles proposed in this essay had been used, this case could have reached better, clearer results. The first principle has one element that may have been applicable in this case: that the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. In this case, "corporate role" would be substituted with the role of "unit holder", but the first two aspects of the principle are not in issue; the harm Ryan experienced was clearly in his role as unit holder and arose from his relationships with YYC. There may have been a question on the third element as to whether the harm was particular to Ryan's interests, but that too seems straightforward. The decision focused on Ryan's unit, but it was not only Ryan's unit that was affected. Reference was made to the fact that Ryan's unit was only one of the units plagued by the water penetration problems,<sup>222</sup> and later in the decision, the judge made note of the water problems in Bird's unit as well.<sup>223</sup> Inherent in the oppression remedy is the requirement that the harm affect that complainant as an individual, rather than all the shareholders or unitholders. Here, the harm was affecting only a small group of unitholders—not all of them.

The second principle requires that other remedies cannot be capable of addressing this harm. The judge granted Ryan the damages to which he was entitled under the *Condominium Act*, and as Ryan could be fully compensated pursuant to the statutory provisions, it was unnecessary to consider the oppression remedy in this case. That is perhaps the reason the judge chose not to engage in any analysis of the oppression remedy, but if that is true, the oppression remedy should never have been considered. Unfortunately, it was, and the result was wholly unsatisfactory.

If one did engage in an oppression remedy analysis here, the following points are relevant. YYC's conduct was clearly not abusive. It responded to the complaints and it attempted, several times, to fix the problem. That takes the conduct out of the realm of oppression. The attempts, however, were only for temporary fixes. They were also unsuccessful. Additionally, these problems continued to occur over a course of years and decades, depending on how far back the analysis stretches. The effect on the complainant is the focus of the oppression remedy and in this case, Ryan's unit was uninhabitable; as the judge noted, Ryan's quiet enjoyment of his unit had been disrupted.<sup>224</sup> Ryan

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<sup>220</sup> *Ryan*, *supra* note 202 at para 80.

<sup>221</sup> *Ibid* at paras 81–82

<sup>222</sup> *Ibid* at para 11.

<sup>223</sup> *Ibid* at para 48.

was clearly prejudiced as a result of YYC's failure to remedy the problem—a problem that only affected a select number of unitholders. However, Ryan was *unfairly* prejudiced. Although he had moved out of his unit for unrelated reasons, Ryan determined he could not return in 2011, and it was not until 2014 and 2015 when YYC fixed the water and mould problems, respectively. His inability to return to his home for over four years was due to YYC's failure to remedy a significant issue; a remedy that was within YYC's duty to provide. Additionally, this was a problem that had subsisted for over thirty years, and one that had been brought to YYC's attention, specifically with regard to Ryan's unit, many times over a period of four to five years. These facts elevate the prejudice to unfair prejudice.

Had this case been analysed using the oppression remedy, it would have likely been successful. An application of the two principles would have simplified and clarified the requirements necessary to establish oppression, and a clear discussion of the effect on the complainant, and why one or more of the statutory components can be met, shows exactly how and why the complainant would be entitled to a remedy.

## **F) Summary: The Proposed Solution**

The second stage of the *BCE* test requires the courts to determine whether the harm resulting from a breach of the parties' reasonable expectations rises to the level of harm required by the statute, namely that it is oppressive, unfairly disregarding or unfairly prejudicial of the complainant. To be eligible for consideration under the second step of the oppression remedy, a complainant must meet the two principles articulated above. First, the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests. Second, other remedies cannot be capable of addressing this harm. These principles have both been extrapolated from the cases and expressly acknowledged by the courts but they have not been expressed in their entirety in any formal checklist. Applying the principles to each case will present a complete picture of the elements that must be met before a remedy becomes available, and will provide a much-needed clarification for the second part of the test.

In addition to the principles, in successful oppression remedy claims, judges must articulate the effect of the impugned conduct on the complainant to show how simple prejudicial conduct or conduct that disregards the complainant can become conduct that is "unfairly prejudicial" or that "unfairly disregards" the complainant. These terms cannot be defined, but judges can, on a case-by-case basis, articulate the

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<sup>224</sup> *Ibid* at para 85.

legal significance of the effect of the conduct on the complainant, to show why certain behaviour meets the statutory tests and other behaviour does not. Doing so will eventually provide an overarching clarity to oppression remedy jurisprudence—a clarity we do not presently have.

#### 4. Conclusion

This paper prescribes how courts can achieve greater clarity in cases where a party has alleged oppression. By clarifying and categorizing the harm that must be suffered by a complainant to successfully allege oppression, this area of law can become more structured, more transparent and less ambiguous.

There is a deficit in the post-*BCE* jurisprudence that this paper seeks to remedy. The statutory components are not defined in the legislation and in *BCE* because the Supreme Court maintained that they cannot be “conclusively defined”.<sup>225</sup> Absent definitions, guidelines as to how to meet these standards must be articulated. This paper develops a structured approach courts can use to determine whether the impugned conduct rises to the level of harm required by the statute. First, the elements that entitle a complainant to an oppression remedy must be identified, and second, the effect of the impugned conduct on a complainant in each successful oppression remedy case must be clearly discussed.

Applying these two principles and explaining the effect of the harm in each case will provide greater clarity in the case law. A legal framework through which every oppression case is analysed will provide predictability about the outcome of cases and will eliminate the uncertainty that currently surrounds the oppression remedy.

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<sup>225</sup> *BCE*, *supra* note 2 at para 54.