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SHAREHOLDER VOTING INJUNCTIONS IN CANADA

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A shareholder's right to vote is fundamental. By exercising this right, shareholders exert control over management and approve fundamental transactions. Shareholders are entitled (and expected) to exercise their proprietary right to vote out of self-interest. Despite the fundamental nature of the right to vote, the right to vote freely is not absolute and can be pre-emptively restrained by injunction. This article provides a detailed analysis of Canadian jurisprudence regarding what it terms "voting injunctions." Part 2 reviews the fundamental nature of a shareholder's right to vote. Part 3 surveys circumstances in which voting injunctions have been sought (and occasionally granted) in Canada. Part 4 examines how Canadian courts have applied the RJR-MacDonald analysis in the context of interlocutory voting injunctions. Part 5 presents practical considerations for voting injunctions. Part 6 offers concluding thoughts.

Le droit de vote des actionnaires est fondamental. Exercer ce droit, c'est exercer un contrôle sur la direction d'une société et approuver les transactions fondamentales. Les actionnaires peuvent (et sont censés) exercer leur droit propriétal de voter selon leur intérêt personnel. Cela dit, même s'il est fondamental par nature, le droit de vote de manière libre n'est pas absolu et peut être restreint de façon préventive par une mesure injonctive. L'auteur présente une analyse détaillée de la jurisprudence canadienne concernant ce qu'il appelle une « injonction de vote ». La deuxième partie consiste en

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une analyse du caractère fondamental du droit de vote des actionnaires. Viennent ensuite, en troisième partie, un exposé des cas où une injonction de vote a été sollicitée (et parfois accordée) au Canada, puis, en quatrième partie, un examen de la manière dont les tribunaux canadiens ont appliqué l'analyse RJR-MacDonald dans le contexte d'une injonction interlocutoire de vote. Les cinquième et sixième parties consistent en un exposé des considérations pratiques en lien avec les injonctions de vote, suivi des conclusions de l'auteur.

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1. Introduction

Nearly 150 years ago, the English Court of Appeal's decision in *Pender v Lushington* established that a shareholder's right to vote is proprietary, and can be enforced through personal action and injunctive relief.[1] In reaching this conclusion, the Master of the Rolls, Lord Jessel, explained that a shareholder "has a right to say, 'Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you.'"[2]

Lord Jessel's holding about personal standing remains a core precept of Canadian corporate law.[3] However, his account presents an incomplete picture of shareholder voting rights by casting them as absolute or inviolable. While a shareholder's right to vote may be fundamental, it is not absolute.[4] The exercise of voting rights is, in rare circumstances, restrained in advance (or subsequently set aside) by courts and securities regulators.[5] In the case of injunctions seeking to prevent the exercise of voting rights, the party seeking relief—usually another shareholder—takes the position that, to paraphrase Lord Jessel, that, "your vote shall *not* be recorded, *despite* it being a right of property belonging to your interest in this company, and if you *intend* to record your vote I will institute legal proceedings against you to *prevent* you."

Perhaps because they are a "rare and unusual remedy,"[6] injunctions that constrain a shareholder's right to vote freely, (usually to prohibit the

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1 (1877), 6 Ch D 70 (Eng CA) [*Pender*].

2 *Ibid* at 81.

3 *Fiorillo v Krispy Kreme Doughnuts Inc* (2009), 98 OR (3d) 103, 60 BLR (4th) 113 at para 147 (Sup Ct) [*Fiorillo*]; *Nord Invest Ltd v Maple Leaf Foods Inc*, 2006 NLTD 171 at para 16; Jeffrey G MacIntosh, "Minority Shareholder Rights in Canada and England: 1860–1987" (1989) 27:3 Osgoode Hall LJ 561 at 600–605.

4 See Stuart Urquhart, "Shareholder's Freedom to Vote" (1992) 13:10 Company Lawyer 193 at 193–94 (noting that although it "is an accepted principle of company law that a shareholder is free to exercise his voting rights in whichever way he chooses and that he owes no duty to the company in doing so," this right is "not unimpeachable" and subject to injunctive relief); William MF Wong, "Can Shareholders Vote Irrationally" (2011) 127:4 LQR 522 at 524 ("A shareholder's proprietary right to vote is not absolute"). See also *Bluechel v Prefabricated Buildings Ltd*, [1945] 2 DLR 725 at 727–729, [1945] 2 WWR 309 (BCSC) (describing the right to vote discussed in *Pender, supra* note 1 as "qualified" rather than "absolute").

5 See e.g. *Securities Act*, RSO 1990, c S.5, s 104(1)(d) [*OSA*]; *Securities Act*, RSBC 1996, c 418, s 114(1)(j) [*BCSA*].

6 Earl Sneed, "Stockholder Votes Motivated by Adverse Interest: the Attack and the Defense" (1960) 58:7 Mich L Rev 961 at 967 (noting that "the disenfranchisement of specific shareholders by enjoining them from voting is a rare and unusual remedy").

voting of shares), have not received any detailed analysis in Canada. The lack of analysis of what this article terms "voting injunctions" is nevertheless surprising given the disenfranchising impact of such injunctions, and the fact that they have been sought (and occasionally granted) in relation to the shares of corporations both public and private, large and small. This article seeks to both fill this analytical gap and highlight practical considerations.

This article proceeds as follows. Part 2 reviews the fundamental nature of a shareholder's right to vote. Part 3 surveys the diverse circumstances in which voting injunctions have been sought in Canada. Such circumstances include disputes over breaches of voting agreements, the proper ownership of shares, misuse of confidential information, breaches of statute (especially securities legislation), oppression, improperly issued shares, and the risk of dissipation or destruction of assets. Part 4 examines how Canadian courts have approached the three-pronged *RJR-MacDonald Inc v Canada (AG)* analysis in the context of interlocutory voting injunctions.[7] Part 5 offers practical considerations for litigants where a voting injunction is sought. Part 6 provides some concluding thoughts.

2. The Fundamental Nature of the Right to Vote

A share is often characterized as "a 'bundle' of interrelated rights and liabilities."[8] The rights that inhere to a share arise both from corporate statutes and a corporation's articles of incorporation. In *McClurg v Canada*, Justice La Forest identified three "fundamental" rights that inhere to share ownership: "the right to a dividend, the right to vote, and the right to participate in the distribution of assets upon dissolution of the corporation."[9]

More recently, in *1162251 Ontario Limited v 833960 Ontario Limited (M-Plan Consulting)*, the Court of Appeal for Ontario further described the right to vote as "the most fundamental right of share ownership."[10] Although the court did not elaborate on why the right to vote is pre-eminent, the fundamental nature of the right to vote is perhaps self-evident; voting is the core method through which shareholders exert

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7 [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald* cited to SCR].

8 *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 35; *Sparling v Québec (Caisse de Dépôt et Placement du Québec)*, [1988] 2 SCR 1015 at 1025, 55 DLR (4th) 63.

9 [1990] 3 SCR 1020 at 1059, 76 DLR (4th) 217 (La Forest J, dissenting, but not on this point) [*McClurg*].

10 2017 ONCA 854 at para 51. See also Julian Velasco, "The Fundamental Rights of the Shareholder" (2006) 40 UC Davis L Rev 407; *HudBay Minerals Inc, Re*, 2009 ONSEC 15 at para 243; *Certain directors, officers and insiders of Hollinger inc et al*, 2005 ONSEC 4 at para 35.

control over the management of a corporation (by electing directors), approve fundamental transactions, and protect their interests.[11]

Canadian courts have gone so far as to suggest that a shareholder's right to vote "is analogous to the right to vote in elections and referenda to determine the composition and nature of public governments."[12] In *Echo Energy Canada Inc v Challenge Gas Holding AB*, a case in which the plaintiff sought an order restraining the counting of the defendant's shares at a shareholders meeting, the court remarked that, "[a] shareholder's right to vote is both a necessary and fundamental right in corporate democracy."[13]

As Professor Kevin McGuinness explains, "the normal view taken by the courts is that a meeting of shareholders offers a vital forum in which a company can assemble to debate and resolve their differences through the exercise of their voting powers."[14] In this context, shareholders (unlike directors) are generally not required to look after the interests of the corporation, other shareholders, or stakeholders.[15] Indeed, as the court noted in *Brio Industries Inc v Clearly Canadian Beverage Corp*, a case in which a voting injunction was sought on the basis of alleged oppression, "[s]hareholders are entitled, and indeed assumed, to act in their own self-interest."[16]

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11 *Sansone v D'Addario* (2006), 16 BLR (4th) 145, 2006 CanLII 63697 at para 38 (Ont Sup Ct) [*Sansone*]; *Aurum, LLC v Calais Resources Inc*, 2016 BCSC 1173 at para 85 [*Aurum*]; Ernest Lim, *A Case for Shareholders' Fiduciary Duties in Common Law Asia* (Cambridge: Cambridge University Press, 2019) at 14; *McClurg*, *supra* note 9 at 1057.

12 *Paulson & Co Inc v Algoma Steel Inc* (2006), 79 OR (3d) 191, 14 BLR (4th) 104 at para 40 (Sup Ct). At the same time, the Dickerson Report, the 1971 progenitor of the *Canada Business Corporations Act*, suggested that: "the analogy between democracy in a political context and the relationships between the shareholders and directors of a corporation is tortured and misleading." See Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at 3. See also PM Vasudev, "Corporate Stakeholders in Canada—An Overview and a Proposal" (2015) 45:1 Ottawa L Rev 137 at 145–146.

13 *Echo Energy Canada Inc v Challenge Gas Holding AB* (2008), 94 OR (3d) 254, 55 BLR (4th) 243 (Sup Ct) at para 88 [*Echo Energy*].

14 Kevin P McGuinness, *Canadian Business Corporations Law*, 3rd ed (Toronto: LexisNexis, 2017), § 20.215, see also § 20.223.

15 *Koh v Ellipsiz Communications Ltd*, 2016 ONSC 7345 at para 36; Hartley R Nathan & Mihkel E Voore, *Corporate Meetings: Law and Practice* (Toronto: Thomson Reuters Canada Limited), (loose-leaf updated February 2023, release 1), §21:4; McGuinness, *supra* note 14, § 20.254.

16 See (1995), 11 BCLR (3d) 343, 1995 CanLII 2434 (SC) at para 8. See also *Brio Industries Inc v Clearly Canadian Beverage Corp*, 1995 CanLII 1514, 1995 CarswellBC 582 (SC) at para 3 [*Brio Industries*].

Out of deference to the fundamental right of a shareholder to vote, "Canadian courts have been very reluctant to interfere with the democratic, internal workings of the corporation" and there must be "a strong case to justify a court in interfering with the conduct of a shareholder meeting or other decision-making process."[17]

3. The Varied Circumstances of Voting Injunctions

Litigants have sought voting injunctions in a wide variety of circumstances. This is hardly surprising given that injunctions are highly-flexible remedies that are not restricted to any area of substantive law.[18] This Part presents a survey of Canadian case law in which voting injunctions have been sought, and identifies the following (by no means exhaustive) categories of circumstances: disputes over breaches of voting agreements, the proper ownership of shares, misuse of confidential information, breaches of statute (especially securities legislation), oppression, improperly issued shares, and the risk of dissipation or destruction of assets.

A) Breach of Voting Agreements

A straightforward circumstance in which voting rights can be subject to injunctive relief is where a written voting agreement has been, or is about to be, breached. Shareholders can limit their freedom to vote by contract, and if a shareholder agrees to vote or restrain from voting in a particular matter, this contract may be enforced by mandatory or prohibitive injunction.[19] As one Australian court observed in granting such an injunction, where shareholders have "provided that they shall exercise their votes in a certain way or shall not exercise their votes in a certain way, then the status quo is represented by the agreement of the shareholders as to what will be done in a certain circumstance."[20]

Babic v Milinkovic provides an example of a voting injunction sought in this context.[21] In *Babic,* a group of plaintiff shareholders sought a

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17 Halsbury's Laws of Canada, *Business Corporations*, "Shareholders and Corporate Management: Shareholders' Meetings: Resolutions and Majority Rule" at HBC-275 "Strong Case Required for Court Interference" (2022 Reissue).

18 *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 23 [*Google*], citing a previous release of Justice Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 1992) (loose-leaf updated to 2022, release 1), § 2:1.

19 McGuinness, *supra* note 14, § 20.255; *Ringuet v Bergeron*, [1960] SCR 672 at 684, 24 DLR (2d) 449; *Puddephatt v Leith* (1915), [1916] 1 Ch 200 (Eng); *Canada Business Corporations Act*, RSC 1985, c C-44, s 145.1 [*CBCA*].

20 *Pettaras v Pettaras*, [2004] NSWSC 1212 at para 16 (Aus).

21 (1972), 25 DLR (3d) 752, 1972 CarswellBC 333 (CA), aff'g (1971) 22 DLR (3d) 732, 1971 CarswellBC 302 (SC) [*Babic* cited to DLR].

range of injunctive relief against a corporation's board of directors and another shareholder.[22] The defendant shareholder held four votes whose casting had led one faction of shareholders to prevail over another faction in an impugned 102–98 shareholder vote. The plaintiffs alleged that the defendant shareholder had cast his votes in contravention of a voting agreement and sought an interlocutory injunction restraining the defendant shareholder "from voting at any meeting of the respondent company except in accordance with the terms of a voting agreement" that the plaintiff alleged to exist.[23] The court denied the voting injunction on the basis that there was only weak evidence that the voting agreement actually existed and in light of its view that granting the voting injunction would interfere with the *status quo* of shareholder democracy.[24]

In *Schelew v Schelew*, the plaintiff brought an action seeking the return of shares in a corporation, MFO, that he had transferred to his four sons as part of an estate freeze.[25] After the plaintiff commenced an action against three of his four sons, he became concerned that the three sons were going to use their 75% voting interest in MFO to remove him and the non-defendant son, Alan, as directors of MFO. Accordingly, the plaintiff sought an interlocutory injunction restraining the three sons from voting their shares pending the determination of the action.[26]

The plaintiff in *Schelew* argued that the removal of himself and Alan as directors was contrary to oral agreements the parties had entered into as a condition for the transfer of shares, including an agreement that the voting rights attached to the shares would not be used to remove the plaintiff and Alan as directors.[27] In seeking interlocutory relief, the plaintiff contended that that "fairness and the interest of justice favour preserving his rights until all of the issues are settled so as to allow 'the proper people who control MFO' to address those issues that could significantly impact upon the future of MFO."[28] While the court accepted that there was a serious question to be tried, it found that the lack of irreparable harm and the balance of convenience decisively weighed against the voting injunction sought.[29]

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22 *Ibid*.
23 *Ibid* at para 3.
24 *Ibid* at paras 4–7.
25 2005 NBQB 132 at paras 4–9 [*Schelew*].
26 *Ibid* at paras 42, 57.
27 *Ibid* at paras 2, 9–11.
28 *Ibid* at para 20.
29 *Ibid* at paras 34–42.

B) Disputes Over Share Ownership

Disputes over the ownership of shares are another circumstance where voting injunctions have been sought. As the British Columbia Court of Appeal recently observed, such injunctive relief is conceptually challenging and the cases in this vein tend to have "distinct" facts.[30]

In *Catalyst Group Inc v Moyse*, the plaintiff investment firm sought a voting injunction as interlocutory relief in an action in which it asserted a constructive trust over shares in Wind Mobile that were held (indirectly) by the defendant, West Face Capital.[31] The plaintiff, Catalyst, alleged that an employee of West Face had misused confidential information obtained while working for Catalyst in order to help West Face outbid Catalyst for a 35% interest in Wind Mobile.[32] The interlocutory voting injunction sought by the plaintiff was based on an allegation that West Face Capital would be able to exercise the voting rights associated with the disputed 35% interest in Wind Mobile so as to "harm [the plaintiff's] long-term interest in Wind Mobile."[33] The court denied the injunction, holding that the plaintiff had failed to demonstrate irreparable harm or that the balance of convenience favoured an injunction, and that, in any event, the failure to provide an undertaking as to damages was fatal.[34]

Where it is alleged that shares were obtained through fraud, an interlocutory voting injunction may be appropriate. In *Cameron v Blair Holdings Corp*, the court issued an injunction that restrained the voting of shares that the defendant had acquired in a transaction that the plaintiffs sought to set aside on the basis of alleged fraud.[35] Meanwhile, in *Claiborne Industries Ltd v National Bank of Canada*, a voting injunction was granted in circumstances where the defendant bank became a major secured creditor of the plaintiff corporation and eventually realized security over shares that gave it a majority stake.[36] The plaintiff corporation and minority shareholders alleged that the bank's acquisition of the shares had been effected through the use of "tainted" funds and that the bank held the shares on constructive trust.[37] In these unusual circumstances (and the absence of provisions governing derivative actions at the time the

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30 *Hirakawa v Bonner*, 2021 BCCA 304 at para 30 [*Hirakawa* BCCA].

31 2015 ONSC 4388 at para 32 [*Catalyst* Voting Injunction].

32 *Ibid* at paras 1, 21–22; *Catalyst Capital Group Inc v Moyse*, 2016 ONSC 5271 at paras 1–4, aff'd 2018 ONCA 283.

33 *Catalyst* Voting Injunction, *supra* note 31 at para 32.

34 *Ibid* at para 41.

35 1954 CarswellOnt 414, [1954] OJ No 356 at para 8 (CA).

36 [1979] OJ No 495 (H Ct J), aff'd [1980] OJ No 921 (H Ct J, Div Ct) aff'd 1981 CarswellOnt 1576 (CA).

37 *Ibid* at para 7.

action was commenced), the corporation sought and obtained a voting injunction to prevent the defendant from voting its shares at shareholder meetings out of a concern that the defendant would empanel a new board of directors that would terminate the lawsuit.[38] The court accepted that there were serious questions to be tried based upon the evidence presented and that "balance of convenience strongly favors the maintenance of the status quo" given that the minority shareholders would otherwise need to seek leave in order to commence a derivative action under a newly-enacted statutory provision and start the case *ab initio*.[39]

C) Breach of Confidence

Where a shareholder has misused confidential information, a voting injunction may be an appropriate form of relief. As the Supreme Court of Canada explains, "[i]njunctive relief, whether interim, interlocutory or permanent, is available in appropriate circumstances to restrain the apprehended or continued misuse or disclosure of confidential information."[40]

A straightforward example of a misuse of confidential information in the shareholder voting context is the use of information provided by a corporation in confidence to further a hostile take-over bid. Such were the circumstances in *Maudore Minerals Ltd v The Harbour Foundation*.[41] In *Maudore Minerals*, investors who were the largest shareholders in Maudore, holding 18.4% of its shares, arranged for a geologist to visit one of Maudore's mines. As a condition of the mine visit, the geologist was required to sign a confidentiality agreement, the terms of which established that any information received would be kept confidential and would "not be used … to obtain any commercial advantage" over Maudore, and that the geologist could only reveal the information to the investors that had arranged for his site visit.[42]

Based upon the information garnered from the geologist's visit, the investors commenced a proxy campaign to replace Maudore's board of directors. In response, Maudore commenced an application against the investors and moved for an interlocutory injunction that would restrain them from voting their shares at the impending shareholder meeting, alleging that the investors had committed both a breach of the

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38 *Ibid* at paras 5–7.

39 *Ibid* at para 9.

40 *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 at para 78, 167 DLR (4th) 577.

41 2012 ONSC 4255 [*Maudore Minerals*].

42 *Ibid* at para 25.

confidentiality agreement and an equitable breach of confidence when they solicited proxies.[43] The court refused to issue a voting injunction on the basis that Maudore could not demonstrate a strong *prima facie* case that confidential information was actually misused. The court found that the investors' use of the confidential information as a "motivational catalyst" was irrelevant and that Maudore "could not actually identify confidential information in the dissent proxy circular" disseminated by the investors.[44] The court also concluded that the balance of convenience favoured allowing leaving the parties "to win or lose the proxy fight on the merits."[45]

D) Breach of Statute

Breaches of statute are another circumstance in which voting injunctions have been sought. Voting injunctions of this kind most commonly arise where securities legislation is alleged to have been breached. Legislative provisions, such as section 105 of the Ontario *Securities Act*, permit an interested person to bring an application to court for interim or final relief, including an order "prohibiting any person or company from exercising any or all of the voting rights attaching to any securities."[46] Additionally, in some other provinces, securities commissions themselves can issue orders that operate in effect akin to a voting injunction.[47]

Orders restraining the exercise of voting rights under such provisions have been sought where it was alleged that certain shareholders failed to properly disclose that they were "acting jointly or in concert" in the context

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43 *Ibid* at paras 2–3.

44 *Ibid* at para 91.

45 *Ibid* at paras 89–98.

46 *OSA*, *supra* note 5, s 105(1)(d). See also *BCSA*, *supra* note 5, s 115(1)(d); *Securities Act*, RSA 2000, c S-4, s 180(1)(d). In some provinces securities commissions can themselves apply to court for voting injunctions where securities legislation has been breached: *OSA*, *supra* note 5, ss 104, 128(3)(6); *Ontario Securities Commission v Von Anhalt*, 2008 CanLII 47021 at para 2, 2008 CarswellOnt 5461 (Sup Ct); *BCSA*, *supra* note 5, s 157.

47 *BCSA, supra* note 5, s 114(j); *Securities Act*, CQLR c V-1.1, s 262.1(5); *Growthworks Canadian Fund Ltd et al*, 2011 ONSEC 17 at paras 66–68.

of a take-over bid,[48] a shareholder acquired shares in contravention of early warning requirements,[49] and a proxy solicitation was improper.[50]

Despite the "broad latitude" afforded by provisions such as section 105 of the *OSA* to grant remedies, "the judicial and regulatory posture on this point has traditionally been one of restraint."[51] In some instances, courts have refused to enjoin the voting of shares in the context of violations of securities legislation and instead issued orders adjourning meetings and requiring corrective disclosure.

For instance, in *Genesis Land Development Corp v Smoothwater Capital Corp*, the court found that the respondent shareholders had failed to properly disclose their common intention to gain control of the applicant corporation's board.[52] However, the court held that a voting injunction was an inappropriate remedy given the "fundamental" nature of the right to vote, and that when fashioning an appropriate remedy where there has been non-compliance with securities regulation, "the surgery should be done with a scalpel, and not a battle axe."[53] Rather than impose "a temporary disenfranchisement of shareholders," the court in *Genesis* favoured a "less drastic" remedy that would "ensure that shareholders would be in the same position with respect to information as they would have been had proper and full disclosure been made, and that they be allowed sufficient time to adjust their decisions on proxies if necessary."[54] The court postponed the shareholders meeting by one month in order to allow for corrective disclosure to be made.[55]

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48 See e.g. *OSA, supra* note 5, s 90; *Genesis Land Development Corp v Smoothwater Capital Corp*, 2013 ABQB 509 at para 2 [*Genesis*]; *Cybersurf Corp v Mercury Partners & Co*, 2003 ABQB 954 at para 9; *Forbes & Manhattan Inc v URSA Major Minerals*, 2011 ONSC 3911 at paras 5, 14–17 [*Forbes & Manhattan*]; *Allied Cellular Systems Ltd v Bullock* (1990), 49 BLR 306, 1990 CarswellBC 364 at para 5 (BCSC) [*Allied Cellular*]; *Kingsway Financial Services Inc v Kobex Capital Corp*, 2015 BCSC 2155 at paras 12, 14.

49 *Continental Precious Minerals Inc v Singh*, 2012 ONSC 7122 at paras 5–13 [*Continental*].

50 *Echo Energy*, *supra* note 13 at paras 38, 89; *Allied Cellular*, *supra* note 48 at para 8.

51 Anita Anand & Andrew Mihalik, "Coordination and Monitoring in Changes of Control: The Controversial Role of 'Wolf Packs' in Capital Markets" (2017) 54:2 Osgoode Hall LJ 377 at 395.

52 *Genesis*, *supra* note 48 at para 2.

53 *Ibid* at para 69.

54 *Ibid* at para 70.

55 *Ibid* at para 71. Other courts have employed a similar approach. See *Echo Energy*, *supra* note 13 at paras 87–88; *Continental*, *supra* note 49 at paras 7–13. See also *Scion Capital, LLC v Gold Fields Ltd* (2006), 15 BLR (4th) 331, 2006 CanLII 3286 at paras 50–53 (Ont Sup Ct).

In addition to alleged violations of securities legislation, voting injunctions may be sought where corporate statutes have been, or are about to be, breached. For instance, a shareholder might be prevented from voting shares that were issued without being fully-paid up[56] or a subsidiary corporation might be prevented from voting shares of its parent corporation.[57] Although a voting injunction can theoretically be sought by way of statutory compliance orders under corporate statutes, courts are disinclined to grant such relief given that it is "drastic and essentially punitive in nature," aligning with the approach taken when securities legislation has been breached.[58]

E) Oppression

Under the statutory oppression remedy provided for in the *Canada Business Corporations Act*, a court "may make any interim or final order it thinks fit," including the issuance of an interlocutory injunction.[59] Under this broad remedial provision and its provincial equivalents, voting injunctions have been sought in a number of oppression cases,[60] as have orders setting aside the issuance of shares ahead of an impending

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[56] See e.g. *CBCA*, *supra* note 19, s 25(3); *FSD Pharma Inc v Bokhari et al*, 2022 ONSC 1469 at paras 2, 12.

[57] *Schiowitz et al v IOS Ltd et al*, [1971] 3 OR 684, 21 DLR (3d) 420 (H Ct J), aff'd [1972] 3 OR 262, 28 DLR (3d) 40 (CA). For the *CBCA* equivalent of this provision, see *CBCA*, *supra* note 19, s 33.

[58] *Polar Star Mining Corporation v Willock*, 96 OR (3d) 688 at paras 2, 63, 57 BLR (4th) 71 (Sup Ct) [*Polar Star Mining*] (The court concluded that the relief sought was not available, and that in any event, the relief sought (which included a prohibition on voting), was inappropriate because it was "drastic and essentially punitive in nature"); *Kasumu v Musah*, 2018 ABQB 242 at paras 9–10, 64 (Although the court granted a compliance order, finding that the respondents had breached the Alberta *Business Corporations Act*, RSA 2000, c B-9, a voting injunction was not issued. Instead, mirroring *Genesis, supra* note 48, the court favoured a corrective disclosure of information over disenfranchising shareholders, ordering that a special shareholders meeting be held "after the provision of the information as directed [emphasis in original]"; *CBCA*, *supra* note 19, s 247.

[59] See *CBCA*, *supra* note 19, s 241(3); *Wong v 10658987 Canada Inc et al*, 2020 ONSC 2469 at para 40.

[60] See e.g. *Brio Industries, supra* note 16 at paras 3, 20; *Shipka v Trevoy*, 2012 ABQB 416 at paras 14–15 [*Shipka*]; *Raging River Capital LP v Taseko Mines Ltd*, 2016 BCSC 2302 at para 2 [*Raging River*]; *Sparling v Northwest Digital Ltd*, 1991 CarswellBC 594 at para 4, 1991 CanLII 748 (CA) [*Sparling*]; *Bellman v Western Approaches Limited* (1981), 130 DLR (3d) 193, 17 BLR 117 at para 8 (BCCA); *Xie v Lai*, 2020 BCSC 295 at para 21; *Allarco Broadcasting Limited v Duke* (1981), 34 BCLR 7, 1981 CanLII 723 at para 12 (SC).

shareholder meeting,[61] and enjoining the transferring of shares on an interlocutory basis.[62]

Voting injunctions are rarely granted in oppression cases. One notable exception is *Nord Resources Corp v Nord Pacific Ltd*.[63] In *Nord Resources*, the applicants sought to enjoin the respondent directors from exercising voting rights relating to 5,200,000 shares they had issued to themselves, officers, and related parties. The applicant, a 25.8% shareholder, alleged that the issuance of these impugned shares was an oppressive entrenchment tactic and had occurred during a period in which the directors refused to convene a shareholder meeting to hold a vote by disinterested parties on the issuance of the impugned shares. The court granted an interlocutory injunction restraining the respondent directors from exercising voting rights of the 5,200,000 impugned shares until disinterested shareholders were able to vote on their issuance at a shareholder meeting.[64] Somewhat curiously, the court emphasized the injunction would benefit the defendant directors by protecting them "before harm is done, from accusations that they may have acted without sufficient care in issuing the disputed shares."[65]

There are a number of reasons that may explain the reluctance of Canadian courts to grant voting injunctions in oppression cases. For one thing, "[t]he normal workings of democracy in a corporation cannot be characterized as oppression" and a voting injunction will not be warranted simply because a shareholder faces the prospect of being outvoted.[66] Second, relief under the oppression remedy (including interim relief) must be carefully calibrated and "go no further than necessary to correct the injustice or unfairness between the parties."[67] Third, courts are attuned to the potential misuse of the oppression remedy as a tactical weapon, since sweeping relief can "allow the minority to take control of the corporation from the majority" and thereby "interfer[e] with the operations of a corporation."[68]

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61 *Harrington Global Opportunities Fund Ltd v Eco Oro Minerals Corp*, 2017 BCSC 664.

62 *Société de gestion Infomédic inc c Almaviva Santé*, 2021 QCCA 733.

63 2003 NBQB 253 [*Nord Resources*].

64 *Ibid* at paras 4, 19.

65 *Ibid* at para 17.

66 *G & E Vending Ltd v 700748 Alberta Ltd*, 2002 ABQB 888 at para 46; *GM Resources Corp v 979708 Alberta Ltd*, 2004 ABQB 925 at para 31.

67 *Wilson v Alharayeri*, 2017 SCC 39 at para 27. See also *Echo Energy*, *supra* note 13 at paras 96–102; *Polar Star Mining*, *supra* note 58 at paras 2, 63.

68 *IGM Resources Corp v 979708 Alberta Ltd*, 2004 ABQB 925 at para 31; *Lakhani et al v Gilla Enterprises Inc et al*, 2019 ONSC 1727 at para 39 [*Lakhani*].

F) Improperly Issued Shares

Where shares have been improperly issued, shareholders have a personal right of action to seek a declaration that the issuance of shares is void "and for an injunction to restrain the voting of such shares if they are about to be used at a general meeting."[69] This is consistent with the view that injunctive relief is often the only appropriate relief for *ultra vires* corporate acts because "it is difficult to imagine an award of damages in respect of an *ultra vires* act."[70]

For instance, in *Bernard et al v Valentini et al*, the respondent—a minority shareholder and the sole director of the corporation—used his power as a director to issue sufficient shares to make himself the majority shareholder.[71] This share issuance derailed efforts by the plaintiff shareholders, who had concerns about financial impropriety allegedly committed by the defendant (the sole director of the corporation), to add further directors to the corporation.[72] In response, the plaintiff shareholders sought and obtained an interlocutory voting injunction concerning the newly-issued shares pending a trial on the matter, with the court finding that "[t]here is no real contest that in this case the shares appear to have been issued for the sole purpose of maintaining control of the company."[73]

An interlocutory voting injunction arising from allegedly improper directorial conduct was also granted in *Langset v Langtec Capital Corp*.[74] In *Langset*, the majority of the corporation's board of directors allegedly sought to "wrest control of" the corporation and three related companies from the plaintiff (a director and major shareholder) in advance of the corporation's annual shareholder meeting.[75] Ahead of this meeting, the majority of the board approved the issuance of shares to one of the directors in exchange for shares in a related company. The plaintiff moved for, and obtained, an interlocutory injunction that included a prohibition on voting the recently issued shares.

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69 Stanley M Beck, "The Shareholders' Derivative Action" (1974) 52:2 Can Bar Rev 159 at 172.

70 Sharpe, *supra* note 18, § 5:5.

71 (1978), 18 OR (2d) 656, 83 DLR (3d) 440 (H Ct J) [*Bernard*].

72 *Ibid* at 441–42.

73 *Ibid* at para 442. See also *Smith v Hanson Tire Company Ltd*, [1927] 3 DLR 786, [1927] 2 WWR 529 at paras 4–7 (SKCA).

74 1996 CanLII 1188, 1996 CarswellBC 1408 (SC) [*Langset* cited to CanLII].

75 *Ibid* at paras 7, 53, 57.

Finally, in *St John v HPY Industries Ltd*, a voting injunction was granted in relation to shares issued at gross undervalue.[76] In this case, there was a battle for control of the corporation and the plaintiff shareholder sought an injunction to prevent the voting of approximately 20% of the corporation's shares at an impending meeting on the basis that the shares had been issued at gross undervalue.[77] The court granted the injunction, holding that it was "probabl[e]" that the "company received little or no value for the issue of the escrow shares" and observing that the "majority of the present directors intend to seek the cancellation of the escrow shares."[78]

G) Preservation of Assets

Canadian courts have granted voting injunctions to prevent defendants from dissipating assets, frustrating judgments, and otherwise prejudicing creditors. Such relief has been sought through a mixture of statutory preservation orders, *Mareva* injunctions, and permanent injunctions. These disparate cases lack a clear unifying theme and tend to have unusual facts.[79]

In the context of family law proceedings, injunctive relief has been sought to prevent a party's spouse from exercising voting rights in closely held corporations pending the final division of property.[80] In *Richardson v Richardson*, the plaintiff, a 25% shareholder, sought a voting injunction against her husband, a 75% shareholder, after he requisitioned a shareholder meeting in order to change the corporation's banking authorizations in a manner that she alleged would "cut off her income and benefits, or in order to deliberately damage the business."[81] The court accepted that an interlocutory preservation order restraining the voting of shares was available under the *Family Relations Act*,[82] but refused to grant

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76 1990 CanLII 1423, [1990] BCJ No 2206 (SC) [*St John*].

77 *Ibid.* See also *Colonial Assurance Co v Smith* (1913), 23 Man R 243 at 266–267, 12 DLR 113 (QB) (certain shares were issued without being paid for and an injunction was granted enjoining the voting of these shares until proper payment was made).

78 *St John*, *supra* note 76 at para 6.

79 For two interesting foreign cases involving voting injunctions sought in the insolvency context to prevent "irrational" voting that would have deleterious consequences, see *Walker v Standard Chartered Bank*, [1992] 1 WLR 561 (Ch D), and *Sunlink International Holdings Ltd v Wong Shu Wing*, [2010] 5 HKLRD 653. See also Wong, *supra* note 4; KD Tuffnell, "Restrictions on Shareholders' Voting Rights" (1993) 15:5 Company Lawyer 90.

80 See e.g. *Dolan v Dolan*, 1998 ABQB 569 at para 6; *Manousakis v Manousakis* (1979), 10 BCLR P-21, 1979 CarswellBC 40 at para 11 (SC) [*Manousakis*].

81 (1994), 91 BCLR (2d) 252, 1994 CarswellBC 203 at para 27 (SC) [*Richardson*].

82 *Family Relations Act*, RSBC 1979, c 121.

a voting injunction after considering the factors relevant to interlocutory injunctive relief. Among other reasons, the court noted both that the plaintiff could later seek relief under the *Company Act*,[83] and that, "[u]ntil the actual division of assets occurs, however, the courts should, in my view, exercise caution in interfering with internal corporate decisions which do not clearly fall within the scope of [the *Family Relations Act*], that is, which do not result in a disposition, or virtual disposition of an asset, or its probable destruction or loss."[84]

A prohibition on exercising the voting rights attached to shares may be an appropriate term of a *Mareva* injunction where shares are alleged to have been fraudulently conveyed. In *Suncorp Realty Inc v PLN Investments, Inc*, the plaintiff judgment creditor sought to set aside a transfer of shares that were alleged to have been fraudulently conveyed so as to frustrate the execution of a judgement.[85] In the context of an action for relief under the *Fraudulent Conveyances Act*,[86] the plaintiff sought an interlocutory injunction enjoining the defendant transferee (a corporation entirely controlled by the transferor) from voting the disputed shares as well as from transferring, or otherwise dealing with them.[87] The court granted the injunction on these terms, characterizing it as a *Mareva* injunction.[88]

Courts have also granted permanent voting injunctions to protect the interests of judgment creditors. In *Sinclair v Ridout and Moran*, the plaintiff brought an action against two defendants, alleging that they had misappropriated a business opportunity from the plaintiff and carried on that opportunity through a corporation whose voting shares were split between the two defendants on a 49–51% basis.[89] The court dismissed the plaintiff's claim against the majority shareholder defendant, but granted judgment against the minority shareholder defendant. The latter was ordered to disgorge his profits and to transfer his 49% shareholding to the plaintiff. In what appears to have been a prophylactic measure to prevent the defendants from frustrating this judgement (e.g., by draining the corporation's assets), the court issued an injunction that: (i) restrained the minority shareholder from "disposing of or dealing" with his 49% shareholding, and (ii) restrained the majority shareholder "from voting

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83 *Company Act*, RSBC 1979, c 59.

84 *Richardson, supra* note 81 at para 52.

85 (1985), 36 Man R (2d) 280, 23 DLR (4th) 83 (QB) [*Suncorp Realty*].

86 *Fraudulent Conveyances Act*, CCSM, c F160, s 3.

87 *Suncorp Realty, supra* note 85 at paras 7, 10.

88 *Ibid* at paras 1, 10, 48, 52 (the injunction was ultimately dissolved over service issues, however).

89 [1955] OR 167, [1955] 4 DLR 468 (H Ct J).

his shares in [the corporation] so as to affect the plaintiff's rights under this judgment."[90]

Ontario (AG) v Ballard Estate presents a unique factual matrix where a voting injunction was sought in the context of an allegation that the executors of an estate committed a breach of fiduciary duty to a residual beneficiary (a charitable foundation) by selling shares in a corporation for below fair market value.[91] The Public Trustee and the Attorney General of Ontario brought an action on behalf of charitable interests who might benefit under the estate, seeking to set aside the sale of the shares. In the face of an impending special meeting of shareholders to vote on an amalgamation that would have resulted in the cancellation of the shares, the plaintiffs sought and obtained interlocutory injunctive relief that included prohibitions on the convening of the special meeting and the voting of the impugned shares in furtherance of the amalgamation.[92]

4. Voting Injunctions & the RJR-MacDonald Test

Voting injunctions are frequently sought as interlocutory relief. Akin to injunctive relief sought by shareholders against corporations, injunctions sought against other shareholders "raise difficult problems because they usually must be dealt with very quickly on an interlocutory application."[93] This Part examines how Courts have applied the test for interlocutory injunctions from *RJR-MacDonald* in the voting injunction context.[94] As set out in *RJR-MacDonald*, the three well-known criteria for an interlocutory injunction are the existence of a serious question to be tried, irreparable harm if relief is not granted, and the balance of convenience favouring the moving party.[95]

In *Dominion Jubilee Corp, Re,* the Supreme Court of Newfoundland Trial Division stressed that voting injunctions must be carefully assessed by courts due to the fundamental nature of voting rights and the harm that can result from allowing disputed shares to be voted.[96] The court explained that voting injunctions "should only be issued upon strict adherence to the well-established rules relating to injunctive relief" because "[w]here

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90 *Ibid* at para 77. See also *Gilbert v Barron* (1958), 13 DLR (2d) 262 at 267–68, 1958 CanLII 387 (Sup Ct, H Ct J).

91 1994 CarswellOnt 669 at para 16, 1994 CanLII 7305 (Gen Div) [*Ballard Estate*].

92 *Ibid* at para 93.

93 Sharpe, *supra* note 18, § 5:5.

94 *RJR-MacDonald, supra* note 7.

95 *Ibid* at 334. See also *Google*, *supra* note 18 at para 25.

96 1978 CarswellNfld 91, 21 Nfld & PEIR 334 (SC(TD)) [*Dominion*].

there are warring factions within a company the question of irreparable damage and of the balance of convenience is a two-edged sword."[97]

A) A Serious Question to be Tried … or A Strong Prima Facie Case?

Although the serious issue to be tried criterion is rarely dispositive due to its low threshold,[98] it can nevertheless prove decisive in voting injunction cases. For example, in *Langset*, the court refused to grant a voting injunction against one of the defendants, finding that there was no serious question to be tried because the defendant was unequivocally entitled to take, hold, and vote the disputed shares pursuant to the terms of a loan agreement that the plaintiff had defaulted upon.[99] In *Babic*, the court refused to grant a voting injunction to prevent the defendant shareholder from breaching an alleged voting agreement, citing "far from satisfactory" evidence about the existence and terms of the alleged agreement.[100] Meanwhile, in *Richardson*, the court concluded that there was no serious issue to be tried on the basis that "it cannot lightly be assumed" that the defendant shareholder would "deliberately destroy a business in which he, as well as the plaintiff, has a substantial interest" by exercising rights associated with the impugned shares.[101]

While a plaintiff seeking an interlocutory voting injunction is typically required to demonstrate that there is merely a serious question to be tried,[102] there are a number of circumstances in which the higher standard of a strong *prima facie* case may apply.

First, as explained in *RJR-MacDonald*, if an interlocutory voting injunction will effectively determine an underlying dispute, the plaintiff can be required to demonstrate a strong *prima facie* case rather than simply that there be a serious issue to be tried.[103] As Justice Sharpe explains, where the "result of refusing an injunction will be to permit the corporate restructuring to occur without any chance of injunctive relief later," this calls "for the most careful sifting of the merits even though the matter arises

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97 *Ibid* at para 21.

98 *RJR-MacDonald*, *supra* note 7 at 337.

99 *Langset*, *supra* note 74 at para 38.

100 *Babic*, *supra* note 21 at 753.

101 *Richardson*, *supra* note 81 at para 54. See also *Hirshhorn v Miller,* [1938] OJ No 166 (SC, H Ct J) at paras 13, 17 (the court refused to grant a voting injunction because the plaintiff "[did] not state the grounds of [his] belief" underlying the allegation that the defendants had allegedly colluded to defraud him) [*Hirshhorn*].

102 *Catalyst* Voting Injunction, *supra* note 31 at para 42; *Schelew*, *supra* note 25 at para 35; *Langset*, *supra* note 74 at para 37.

103 *RJR-MacDonald*, *supra* note 7 at 338–39.

at the interlocutory stage."[104] Conversely, in the context of shareholder votes such as the approval of fundamental transactions, "[t]he effect of granting the injunction will almost always … end any real prospect of the reorganization occurring."[105] *Maudore Minerals* provides an examples of the strong *prima facie* standard being applied in a voting injunction case. In *Maudore Minerals*, the court required a strong *prima facie* case to be demonstrated because the voting injunction would, in practical terms, be dispositive of the underlying application, which centred upon a contested election of directors that was to occur imminently.[106] Applying this higher standard, the court in *Maudore Minerals* found that a strong *prima facie* case had not been established.[107]

Second, if a voting injunction is sought alongside mandatory injunctive relief, the strong *prima facie* standard may[108] also apply to the voting injunction. In *Shipka v Trevoy*, the court described the voting injunction that was sought as "highly intrusive" because it would adversely affect the defendant shareholders, in addition to protecting the plaintiff's interests pending a trial of the action.[109] As the court explained, the voting injunction would "prevent them from voting at all, to protect their own interests as shareholders."[110] The court concluded that, due to the severe impact of the voting injunction and the related mandatory injunctive relief that was sought (which included setting aside the plaintiff's termination as President and CEO of the corporation), a strong *prima facie* case was required for the voting injunction.[111]

Third, where a voting injunction is sought as interim relief pursuant to the oppression remedy, a strong *prima facie* case may be required.[112] Fourth

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104 Sharpe, *supra* note 18, § 5:5.

105 *Ibid*.

106 *Maudore Minerals*, *supra* note 41 at paras 76, 82–91.

107 *Ibid* at para 92.

108 In *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 15 [*CBC*], the Supreme Court of Canada established that the strong *prima facie* case must be demonstrated in order for a mandatory interlocutory injunction to be issued. While a mandatory interlocutory voting injunction (e.g., one requiring a defendant to comply with a voting agreement) would no doubt be subject to this higher standard, *Shipka, supra* note 60, a case that admittedly pre-dates *CBC*, appears to suggest that if other mandatory relief is sought, it may be appropriate to assess a prohibitive interlocutory voting injunction under the more rigorous strong *prima facie* standard.

109 *Shipka*, *supra* note 60 at para 22.

110 *Ibid*.

111 *Ibid* at paras 22–25.

112 The jurisprudence regarding the appropriate standard where interim relief is under the oppression remedy is mixed. For a discussion of this, see Allan Coleman, David S Morritt & Sonia Bjorkquist, *The Oppression Remedy* (Toronto: Thomson Reuters Canada Limited), (loose-leaf updated 2022, release 2), § 8:20. See also *Nord Resources*, *supra* note

and finally, a strong *prima facie* case would need to be demonstrated—alongside a genuine risk of asset dissipation or destruction—where the voting injunction sought is tantamount to a *Mareva* injunction.[113]

B) Irreparable Harm

Irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[114] The concept of irreparable harm is difficult to define with precision, and courts have cautioned against a narrow approach to irreparable harm.[115]

In voting injunction cases, plaintiffs frequently struggle to both demonstrate that harm will occur and that compensation for the alleged harm will be impossible to remedy through an award of damages. Several reasons may account for this.

First, as the courts in *Catalyst* Voting Injunction and *Richardson* observed, the economic interests of competing shareholders will generally be aligned (i.e., in maximizing the value of their shares and voting on measures that will promote the success of a business).[116] Second, plaintiffs are often unable to provide evidence beyond mere speculation that they will suffer harm if the defendant is allowed to exercise their voting rights.[117] Third, a claim of irreparable harm will fail where the defendant has sufficient assets to compensate the plaintiff for a quantifiable loss.[118]

Parties seeking voting injunctions appear to have greater success in arguing that harm is irreparable because it cannot be quantified.[119] For example, in *Maudore Minerals*, the court accepted that irreparable harm would result where a corporation's board of directors were elected in a "tainted election."[120] The importance of conducting director elections

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63 at para 11 (applying the serious issue to be tried standard). See also *Halsey v Genoil*, 2017 ONSC 4817 at para 14.

113 *Hirakawa v Bonner*, 2021 BCSC 2387 at paras 49–70 [*Hirakawa* BCSC]; *Manousakis*, *supra* note 80 at para 10.

114 *RJR-MacDonald*, *supra* note 7 at 341.

115 Sharpe, *supra* note 18, § 2:7.30.

116 See *Catalyst* Voting Injunction, *supra* note 31 at paras 32–38; *Richardson*, *supra* note 81 at para 54. See also *TELUS Corporation v CDS Clearing and Depository Services Inc*, 2012 BCSC 1350 at para 104.

117 See e.g. *Shipka*, *supra* note 60 at para 37; *Catalyst* Voting Injunction, *supra* note 31 at para 35; *Schelew*, *supra* note 25 at paras 36–40.

118 *Richardson*, *supra* note 81 at para 55; *Hirshhorn*, *supra* note 101 at para 16.

119 See e.g. *Hirakawa* BCSC, *supra* note 113 at para 77.

120 *Maudore Minerals*, *supra* note 41 at para 93.

with "scrupulous fairness and without any advantage being conferred or denied to any candidate or any slate of candidates" has been echoed in other voting injunction cases.[121] In *Nord Resources*, the court accepted that because "[c]orporate law emphasizes the importance of the decisions of formal meetings of shareholders," allowing the defendants to vote shares issued as part of an allegedly oppressive entrenchment effort "irreparably harms the timely accountability of the board of directors to the shareholders."[122] On the other hand, the fact that a director who is facing removal by shareholders will become "stressed" and "could lose his business reputation" does not amount to an irreparable harm in the voting injunction context.[123]

Irreparable harm can also be established where the disputed shares will cease to exist unless a voting injunction is granted. In *Ballard Estate,* the plaintiffs sought to enjoin the defendants from effecting an amalgamation that would result in the subject shares being cancelled.[124] In granting the injunction, the court remarked that the "most telling factor" of irreparable harm was the fact that the shares would cease to exist, explaining, "[w]here an amalgamation of two companies takes place it cannot be undone at a later time. If a court, after a trial, found in favour of the plaintiffs, it could not dissolve the amalgamated company or restore the separate corporate existence."[125] The court also added that damages may well have been an inadequate remedy due to the "uniqueness" of the underlying business to which the shares related (the Toronto Maple Leafs hockey franchise) and the inability to determine a price for the shares through a public sale prior to the amalgamation transaction.[126]

Although there does not appear to be any jurisprudence directly on point, the possibility of a plaintiff obtaining subsequent relief under the oppression remedy may theoretically undermine a claim that alleged harm would be irreparable because it is not quantifiable.[127] The oppression

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[121] *Brio Industries*, *supra* note 16 at paras 13–15; *Gupta v East Asia Minerals Corporation*, 2018 BCSC 214 at para 61.

[122] *Nord Resources*, *supra* note 63 at paras 13–14.

[123] *Schelew*, *supra* note 25 at para 40. See also *Shipka*, *supra* note 60 at paras 34–36 (removal of president and CEO). *Cf Langset*, *supra* note 74 at paras 45–46, 56 where the court appears to have accepted at face value that the irreparable harm alleged by the plaintiff (the potential loss of his life savings and the inability to change careers at age 55 in the face of a loss of credibility) was sufficient.

[124] *Ballard Estate*, *supra* note 91 at paras 75–77.

[125] *Ibid.* See also *Alexander v Westeel-Rosco Ltd* (1978), 22 OR (2d) 211, 93 DLR (3d) 116 at 127 (SC, H Ct J).

[126] *Ballard Estate*, *supra* note 91 at para 81.

[127] There appears to be some support for this proposition in *Richardson*, *supra* note 81 at para 57.

remedy is "a flexible, equitable remedy"[128] and a plaintiff might be able to subsequently rectify harm alleged to result from the denial of a voting injunction that that is not easily quantifiable (e.g., the loss of control of a corporation's board).

C) Balance of Convenience

The balance of convenience analysis for voting injunctions is strongly influenced by the fundamental nature of the right to vote and the judicial preference for maintaining and deferring to the *status quo* of unrestricted corporate democracy.

This judicial tenor is readily apparent in the voting injunction jurisprudence. As the court in *Schelew* explained, "[voting] rights are fundamental to a shareholder and should not be interfered with lightly."[129] In *Sansone v D'Addario*, the court explained that orders preventing the exercise of voting rights interfere with a "shareholder's fundamental statutory right to vote his shares through which he exercises control over the internal management."[130] The British Columbia Court of Appeal suggested in *Babic* that, especially in the context of public companies, the *status quo* that an injunction will generally disturb is one in which shareholders are allowed, "right or wrong, at a properly constituted meeting to elect the directors of their choice," and that "[i]f, following the trial, a different result should be found to exist, it can be corrected."[131]

A voting injunction that would prevent a majority shareholder or a group holding a majority from voting imposes a significant inconvenience. In *Schelew*, where the plaintiff sought to enjoin the voting of 75% of a corporation's shares pending a trial, the court's analysis of the balance of convenience was perfunctory, focusing solely on the inconvenience the defendants would suffer from being deprived of their "entitle[ment] to vote on the matters affecting" the corporation.[132] Similarly, in *Richardson*, the court held that preventing the defendant (a 75% shareholder) from exercising his voting right would alter, rather than preserve, the *status quo*. This is because the defendant had "the right to vote the majority shares to control the financial operations" and "[t]o deny the defendant the right to continue to influence the operations of [the corporation] by [voting his] shares, would be to alter the *status quo* in a more fundamental way."[133]

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128 *Unique Broadband Systems, Inc (Re)*, 2014 ONCA 538 at para 107.

129 *Schelew*, *supra* note 25 at para 31.

130 *Sansone*, *supra* note 11 at para 38. See also *Aurum*, *supra* note 11 at para 85.

131 *Babic*, *supra* note 21 at 753. *Cf Hirakawa* BCSC, *supra* note 113 at para 79.

132 *Schelew*, *supra* note 25 at para 41.

133 *Richardson*, *supra* note 81 at paras 30, 56 [added emphasis].

The inability of a minority shareholder to vote can also amount to a significant inconvenience.[134] As Justice Sharpe notes, in the context of fast-paced shareholder litigation, "[a]n interlocutory injunction in favour of one faction puts that group in an extremely powerful bargaining position."[135] In *Catalyst* Voting Injunction, the plaintiff sought a voting injunction against a 35% shareholder who was the largest shareholder of the corporation, designated two members on the corporation's ten-person board, and played "an important role" in the corporation's "governance, strategic and capital funding direction."[136] In finding that the balance of convenience decisively favoured the defendant, the court observed that a voting injunction would curtail the defendant's ability to vote on "issues that affect a significant investment" and would allow other shareholders to "have the ability to control the future" of the corporation.[137] Indeed, the court went so far as to suggest that the defendant would suffer an irreparable harm if it were to be disenfranchised through an injunction.[138]

A related inconvenience that weighs against the granting of a voting injunction is whether such relief would interfere with the internal governance of a corporation by conferring *de facto* control of the corporation to the plaintiff or make it difficult for the corporation to conduct business.[139] In *Shipka*, the court found that the balance of convenience did not favour granting an injunction restraining certain directors/shareholders from removing the applicant as President and CEO of the corporation. The court in *Shipka* concluded that granting the injunction would "be likely to negatively affect" the corporation because "there would be clear difficulties in running a company where the chief executive officer has lost the confidence of the majority of the board of directors, and where the board is restricted in its ability to hold the officer to account."[140] The court expressed a similar concern in *Brio Industries*, denying injunctive relief that included a voting injunction because "an injunction would likely have serious adverse effects on the company, especially given the highly competitive market in which it operates."[141] In *Schelew,* the court endorsed deference to the corporate democratic process, remarking that "[t]his is not an appropriate case for the court to interfere with the internal governance of a corporation. In my opinion, the principles of corporate democracy trump. The applicant will have his

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134 McGuinness, *supra* note 14, § 20.223.

135 Sharpe, *supra* note 18, § 5:5.

136 *Catalyst* Voting Injunction, *supra* note 31 at para 40.

137 *Ibid.*

138 *Ibid.*

139 *Canada Snow Mountain Investments Co Ltd v Miller Springs Ltd*, 2015 BCSC 1117 at para 117.

140 *Shipka*, *supra* note 60 at para 41.

141 *Brio Industries*, *supra* note 16 at para 20.

day in court on the main action, and if he is successful, he will be entitled to certain remedies."[142]

Even where it would disrupt the *status quo,* the balance of convenience may favour a voting injunction where there is a history of impropriety by the respondents. For example, in *Bernard*, the court found that the balance of convenience favoured granting a voting injunction because there was evidence that the defendant director/shareholder was engaging in financial impropriety and had improperly issued shares to himself, leading the court to conclude that "it is in the best interests of all parties to see that the corporation survives, operates, carries its proposed schemes through to fruition in order that the shareholders may benefit from its operation."[143] Similarly, in *Foster v Oakes*, the court continued an interim voting injunction until trial on the basis that, without such relief, "persons having substantial beneficial interests in the company would, pending the determination of important questions relating to the company, be exposed to the risk of having these interests dealt with or interfered with by the votes or other acts of those who had absolutely no beneficial interest in these shares."[144]

The (in)convenience that a voting injunction imposes upon non-party shareholders or the corporation itself is also a valid consideration.[145] Although, this appears to have garnered little attention in voting injunction jurisprudence, at least two considerations readily spring to mind.

First, a voting injunction could make it impossible for shareholders to satisfy the quorum requirement at a shareholder meeting, thereby "frustrating the ability of the meeting to transact business."[146] This inconvenience would arguably be borne by both shareholders and the corporation itself. While a director or shareholder could apply for a court-ordered meeting dispensing with the quorum requirement in such a scenario,[147] requiring resort to such a procedure is a further inconvenience, especially if there is a fast-moving situation in play, such as a proxy battle.[148]

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142 *Schelew*, *supra* note 25 at para 56.

143 *Bernard*, *supra* note 71 at 443.

144 *Foster v Oakes*, [1916] OJ No 562 at para 2, 10 OWN 210 (H Ct J).

145 *Maudore Minerals*, *supra* note 41 at para 79.

146 *Wells v Melnyk* (2008), 92 OR (3d) 121 at para 36, 46 BLR (4th) 112 (Sup Ct) [*Wells*].

147 *Ibid*; *CBCA*, *supra* note 19, s 144; *Business Corporations Act*, RSO 1990, c B16, s 106 [*OBCA*].

148 *Athabasca Holdings Ltd v ENA Datasystems Inc et al* (1980), 30 OR (2d) 527, 116 DLR (3d) 318 at para 18 (H Ct J).

Second, non-party shareholders could suffer an inconvenience if an advantageous transaction were to fall through due to the granting of an injunction. This argument was raised in *Ballard Estate*, but the court dismissed it on the basis that minority shareholders had already rejected two previous similarly priced offers to purchase their shares and the court found it "difficult to see" that the amalgamation would ultimately be called off simply because the interlocutory injunction was granted.[149]

Where a shareholder has engaged in misconduct but gained little benefit over the plaintiff, the balance of convenience may nevertheless favour refusing a voting injunction. In *Maudore Minerals*, the court held that, even assuming there had been a breach of confidence by the respondent shareholders, the balance of convenience weighed against granting a voting injunction. In reaching this conclusion, the court found that the alleged breach of confidence "seems not to have genuinely perturbed" the plaintiffs, that the respondents had "achieved little from their alleged breach of confidence," and that it "seems draconian to disenfranchise [the respondents] from the exercise of their normal electoral rights."[150] The court also expressed agreement in passing with the premise advanced by the respondents that the "discomfort or inconvenience" alleged by the plaintiffs was simply "a cover for a tactical device in the proxy fight."[151]

Although the issue does not appear to have attracted direct judicial consideration, the duration of a voting injunction may be a relevant consideration in the balance of convenience analysis.[152]

D) Modifications to the Tripartite RJR-MacDonald test

Where an interlocutory voting injunction is sought, modifications may apply to the *RJR-MacDonald* test. For instance, where there is only an apprehended breach of legal obligations, the requirements of *quia timet* injunctive relief—which refine the requirement for proof of irreparable harm to account for the fact that a plaintiff has yet to suffer harm—may apply.[153] Although interim injunctive relief granted under the oppression remedy generally follows the *RJR-MacDonald* test,[154] courts have recognized that in some rare cases, "[t]he dictates of fairness may

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149 *Ballard Estate*, *supra* note 91 at paras 84–87.

150 *Maudore Minerals*, *supra* note 41 at paras 96–97.

151 *Ibid* at para 97.

152 For support for this premise from outside the voting injunction context see e.g. *Molson Canada 2005 v Miller Brewing Company*, 2013 ONSC 2758 at para 148; *West Telemarketing Canada, ULC v Titley and Eason*, 2005 BCSC 1585 at para 75.

153 See e.g. *Hirakawa* BCSC, *supra* note 113 at paras 71–72; *Maudore Minerals*, *supra* note 41 at paras 77, 105–107, 118–119.

154 See e.g. *Nord Resources*, *supra* note 63 at paras 5–7.

be so overwhelming that it may be appropriate to forego compliance with any one or all of the balance of convenience, irreparable harm or an undertaking as to damages."[155] Finally, if an interlocutory voting injunction is sought under a statutory provision such as section 105 of the *OSA*, the lower threshold for statutory injunctions may apply.[156]

5. Practical Considerations

There are a number of important practical considerations where a voting injunction is sought. This Part identifies and discusses four such considerations: (1) ensuring the proper parties are named and notified, (2) the risk of adverse costs consequences, (3) the near-certain requirement to provide an undertaking as to damages, and (4) the importance of drafting orders carefully.

A) Proper Parties and Notice

Careful consideration should be given to the appropriate parties when seeking a voting injunction. As a voting injunction seeks to restrain the proprietary right of a shareholder, in principle, the corporation need not be a party to a proceeding in which an injunction is sought. Indeed, in many cases the corporation is not a party to the proceedings.[157] However, in at least one case, a voting injunction was set aside on the basis that a shareholder's "right to vote his shares is one which can and should be determined in proceedings involving the company."[158] While the correctness of such an approach is questionable,[159] to head off any such concerns, a plaintiff might consider serving notice of the injunction sought on the corporation itself, even if it is not named as a party.

Where there are competing alleged beneficial owners of shares, the failure to implead or give notice to the competing beneficial owner could lead to the setting aside of the injunction. In one recent case, an alleged beneficial owner of shares was successful in obtaining a voting injunction,

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155 *Lakhani*, *supra* note 68 at para 37; *Connelly v Connelly-McKinley Ltd*, 2010 ABQB 515 at paras 13–15.

156 See e.g. *Her Majesty the Queen in Right of Ontario v Adamson Barbecue Limited*, 2020 ONSC 7679 at paras 16–21. It bears noting that applications brought under section 105 are often heard promptly on the merits, obviating the need for interlocutory relief.

157 See e.g. *Catalyst* Voting Injunction, *supra* note 31; *Schelew*, *supra* note 25; *Shipka*, *supra* note 60.

158 *Karlsen v Karlsen* (April 30 1991), Vancouver Registry No D076721 (BCSC), cited in *Richardson*, *supra* note 81.

159 The result in *Karlesen* appears to have been strongly influenced by the fact that the underlying proceeding was a family law matter. What is more, the decision ignores the fact that right to vote is a proprietary right of a shareholder.

but did not notify another party claiming an interest to the shares with respect to which the voting injunction was being sought.[160] This lack of notice was among the grounds upon which the British Columbia Court of Appeal granted leave to appeal the decision granting a voting injunction.[161]

On the topic of notice more broadly, careful consideration should be given to whether the circumstances of a case make it appropriate to seek a voting injunction *ex parte* rather than on notice to a defendant. Given the added complexities of *ex parte* injunctions—especially the duty of candour, the likelihood of facing a challenge on a set-aside motion or extension motion, and the risk that a court might perceive an *ex parte* injunction motion as a tactical attempt to catch a defendant by surprise ahead of an impending shareholder meeting—it will only make sense to seek voting injunction on an *ex parte* basis in truly exceptional circumstances.

B) The Risk of Adverse Cost Consequences

The cost consequences of unsuccessfully seeking a voting injunction can be significant. This risk is acute where a voting injunction is sought on short notice, appears to be "tactical" in nature, involves allegations of serious misconduct[162] (which is a recurring feature in the circumstances examined in Part 3), and requires a respondent to extensively review evidence on an expedited basis.

Forbes & Manhattan v URSA Major Minerals offers a cautionary tale. In *Forbes & Manhattan*, the applicants commenced, and proceeded to abandon at the eleventh hour, an application under section 105 of the *OSA* for a voting injunction concerning an upcoming shareholder meeting.[163] The applicants informed the respondents of their intention to commence the proceeding a mere six days before the meeting, and only issued the application three days before the meeting.[164] In awarding substantial indemnity costs, the court emphasized several factors. First, the applicants made unfounded allegations that the respondents had engaged in wrongdoing by contravening the quasi-criminal *OSA* provisions regarding acting "jointly or in concert."[165] Second, the applicants sought "extraordinary injunctive relief" in the form of a voting injunction—with the court rejecting the applicants' argument that they sought "merely

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160 *Hirakawa* BCCA, *supra* note 30.

161 *Ibid* at para 29. It goes without saying that a plaintiff should also ensure that any persons sought to be enjoined from voting are properly impleaded as parties. Failure to do so can be fatal to a voting injunction: *Dominion*, *supra* note 96 at paras 24–28.

162 See Sharpe, *supra* note 18, § 2:42.

163 *Forbes & Manhattan*, *supra* note 48 at paras 6, 16.

164 *Ibid* at para 2.

165 *Ibid* at para 16.

statutory relief."[166] Third, the court concluded that the applicants—who had brought two other applications in the preceding eight months—brought the application at a "tactical" point in time as "another tactical skirmish," thereby imposing a "tight, intense timetable."[167]

In assessing the quantum of costs, the court in *Forbes & Manhattan* rejected the applicants' argument that the respondents' costs were excessive given that only "a single legal issue was involved—whether the respondents acted jointly or in concert within the meaning of section 91 of the [*OSA*]."[168] Instead, the court held that even though the application concerned a discrete legal issue, "[u]rgent motions operating under a compressed timetable by their nature result in higher costs than litigation conducted at a more leisurely pace," especially because "a responding party needs to ensure that it has not overlooked some legal or factual matter in its response."[169]

Where a voting injunction is sought pending a trial, an unsuccessful moving party may be required to pay the respondents' costs forthwith.[170] This is true even if the legal issues and evidence on the injunction overlap with those that will be relevant at trial. In *Catalyst*, the court held that the defendant, West Face, was entitled to costs for "conduct[ing] a thorough review of the evidence to address the merits of the action … even if some unidentified portion of those costs related to evidentiary review that might also have been required if a trial takes place."[171] In assessing the quantum of costs, the court observed that the voting injunction had "high stakes" for West Face such that it had "no choice but to vigorously oppose" the injunction.[172] Although the court found that the legal issues relating to the voting injunction were not complex, it accepted that in order to assess whether there was a serious issue to be tried relating to the alleged misuse of confidential information, West Face was required to conduct an extensive review of the evidentiary record.[173]

C) An Undertaking as to Damages is Invariably Required

In addition to satisfying the *RJR-MacDonald* test, a party seeking an interlocutory injunction must give an undertaking to compensate the

166 *Ibid* at para 15.

167 *Ibid* at paras 6–7, 19–20.

168 *Ibid* at para 25.

169 *Ibid*. See also *Brio Industries*, *supra* note 16 at paras 4–14.

170 *Catalyst Capital Group Inc v Moyse*, 2015 ONSC 5248 at para 19 [*Catalyst* Costs]. *Cf Schelew*, *supra* note 25 at para 58.

171 *Catalyst* Costs, *supra* note 170 at para 17.

172 *Ibid* at paras 32, 37.

173 *Ibid* at paras 17, 34, 45.

responding party for any damage suffered, should their claim fail on the merits.[174]

While courts have discretion to dispense with this requirement,[175] where litigation is between sophisticated commercial parties—as almost all of the voting injunction cases discussed in Part 3 are—"[a]n undertaking in damages is almost invariably required in commercial cases."[176] *Catalyst* Voting Injunction is illustrative of the necessity of an undertaking: the court held that the failure to provide an undertaking was fatal.[177] It appears that the plaintiff's reluctance to provide an undertaking may have stemmed from the scale of potential liability it would have, given the significant value of the shares that the defendant held.[178]

At the same time, it bears noting that calculating the damages suffered in relation to a voting injunction can be difficult. In an Australian decision denying a voting injunction, the Supreme Court of Queensland remarked that "there is a marked difference between restraining a disposition of the shares and restraining the exercise of voting rights attaching to them. In the latter instance the damages resulting from the restraint are likely to be virtually incalculable, so that the undertaking is in that event unlikely to be of great value as a form of protection."[179]

D) Orders Should be Carefully Drafted

As with all injunction orders, orders restraining voting rights should be carefully drafted.[180] The Ontario decision of *Sansone* provides a clear illustration of this principle.[181] In *Sansone*, contempt proceedings were

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174 *Vieweger Construction Co Ltd v Rush & Tompkins Construction Ltd*, [1965] SCR 195, 48 DLR (2d) 509 at 207.

175 See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 40.03.

176 Sharpe, *supra* note 18, § 2:13.20; *Catalyst* Voting Injunction, *supra* note 31 at paras 10–11, 27.

177 *Catalyst* Voting Injunction, *supra* note 31 at paras 8–30. Conversely, in *Maudore Minerals*, the applicant gave an undertaking as to damages, *supra* note 41 at para 73.

178 *Catalyst* Voting Injunction, *supra* note 31 at paras 12–25. See also *Re: Mid-Bowline Group Corp*, *Re*, 2016 ONSC 669 at para 1 (suggesting an implied value the disputed shares of approximately $500 million).

179 *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd*, [1984] 2 Qd R 1 at 8. See also *Cornwall Resource Corporation NL, Re v Waraluck Ltd, Westpearl Pty Ltd & Secured Financial Services Pty Ltd*, (1997) 23 ACSR 571 at 575 (in a case granting a voting injunction, the court remarked that: "[t]he usual undertaking was given as to damages, but plainly there might be some difficulty in the assessment of any damages to be awarded in the event that the applicant is ultimately unsuccessful").

180 See *Shehu v Iqbal*, 2017 ABCA 438 at para 7; *Irving Shipbuilding Inc v Schmidt*, 2014 ONSC 1474 at para 62; *McKenzie c Ball*, 2019 QCCS 741 at para 82.

181 *Sansone*, *supra* note 11.

commenced in relation to a consent order the parties had entered into concerning voting rights. In its reasons, the court agreed that "a Court Order restraining voting rights must clearly and explicitly set out the restriction, since such a restraint will have the effect of interfering with the shareholder's fundamental statutory right to vote his shares through which he exercises control over the internal management."[182] The court in *Sansone* accepted in the circumstances that a prohibition on defendant's entitlement to "transfer" or "deal" with their shares was "sufficient to dispel what might be the usual or normal presumption."[183] However, the court nevertheless stressed that a restriction on voting rights must generally be explicit.[184]

At the same time, overly broad language is to be discouraged. Where the terms of a draft order are unnecessarily broad, the court may endeavour to "try to fashion a more restrictive form of injunction that would allow the Defendants to continue to exercise their voting rights in some way."[185] To this end, as in *Nord Resources*, detailed submissions from counsel on the precise wording of a voting injunction order may be appropriate.[186]

It is also prudent to include a "comeback clause" in an order granting a voting injunction. Such clauses allow a party (or in some cases an interested party) to seek an expeditious variation of an order in circumstances including the following: (1) the order affects a person who, for a valid reason, was not at the hearing at which the order was granted, (2) an unforeseen factor subsequently arises or is discovered, and (3) where "there is an appreciation that certain relevant material facts and arguments have not been appropriately made to the judge, especially if the hearing, of necessity, had to be immediately dealt with on short notice."[187]

In *Sansone*, the court expressly identified the second circumstance as one in which a comeback clause in a voting injunction order might well be exercised.[188] As the court explained, "[t]here may be circumstances

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182 *Ibid* at paras 38–41. See also *Fiorillo*, *supra* note 3 at para 148 (noting that "[w]hile a unanimous shareholder agreement may restrict the rights of shareholders, a provision taking away the right to vote would in my view have to be expressly stated").

183 *Sansone*, *supra* note 11 at para 41.

184 *Ibid* at paras 41–42.

185 *Shipka*, *supra* note 60 at para 22. See also *Manousakis*, *supra* note 80 at para 11 (prohibiting the respondent from voting his shares to affect a sale or disposal of the assets of the company, but containing a carve-out for assets sold in the company's ordinary course of business).

186 *Nord Resources*, *supra* note 63 at para 21.

187 See *Millard v North George Capital Management Ltd* (1999), 1 BLR (3d) 106, 1999 CanLII 14931 (ONSC) at para 6.

188 *Sansone*, *supra* note 11 at para 35.

in which the absence of such an important block from voting at the shareholders' meeting may operate adversely to the interests of the Company. In such circumstances, any of the parties appearing on this motion may apply for further relief."[189]

6. Concluding Thoughts

As set out above, voting injunctions are sought in a broad array of circumstances. The appropriateness of a voting injunction in a given case requires a nuanced analysis which balances, amongst other considerations, the fundamental nature of the right to vote, the *status quo* of shareholder democracy, and the spectre of irreparable harm to a plaintiff. While the voting injunction cases examined above may exhibit less unity and consistency than in other some areas of the law, there are some common themes that can be extracted from the jurisprudence.

First, Canadian courts approach the potential disenfranchisement of shareholders, even temporarily, with great caution. In applying the *RJR-MacDonald* test: (1) courts may require a strong *prima facie* case, rather than simply a serious question to be tried, (2) courts closely scrutinize claims of irreparable harm, especially where the alleged harm is purely financial in nature, and (3) the impact of a voting injunction on the *status quo* of shareholder democracy tends to weigh heavily in the balance of convenience analysis. Even where the traditional *RJR-MacDonald* test is not applied, as in the case of relief sought under section 105 of the *OSA*, courts have endorsed remedies that are "less drastic" than the "disenfranchisement of shareholders," such as adjourning an impending shareholder meeting to allow for corrective disclosure required under securities legislation to be made.[190]

Second, courts are attuned to the "draconian" effect of voting injunctions[191] and the potential for them to be tactically misused.[192] As the was observed in *Hirshhorn v Miller*, a case decided over a century ago, "it would be monstrous if a plaintiff who is not a shareholder of a company … could on the eve of a general meeting of the shareholders of a company prevent a shareholder from voting his shares by simply stating that he believes that such shareholder acquired his shares in some fraudulent manner."[193]

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189 *Ibid* at paras 44–45. See also *Hirakawa v Bonner*, 2022 BCCA 250 at para 6.

190 *Genesis*, *supra* note 48 at para 70.

191 *Maudore Minerals*, *supra* note 41 at para 96; *Echo Energy*, *supra* note 13 at paras 100–101; *Genesis*, *supra* note 48 at para 69; *Continental*, *supra* note 49 at para 13.

192 See e.g. *Forbes & Manhattan*, *supra* note 48 at paras 20–22; *Brio Industries*, *supra* note 16 at para 1; *Maudore Minerals*, *supra* note 41 para 97.

193 *Hirshhorn*, *supra* note 101 at para 17.

Third, voting injunctions are not the sole means of preventing disputed shares from being exercised at a shareholder meeting. Several other avenues involve commencing proceedings *after* a shareholder vote has occurred, at which point a voting injunction will be moot.[194] Such alternate avenues of relief include: (1) bringing an application to review the election of a director, a frequently disputed form of shareholder vote,[195] (2) commencing proceedings for relief pursuant to the oppression remedy,[196] and (3) bringing an application under securities legislation that allows relief to be granted prohibiting the counting of votes that have already been cast.[197] It has also been suggested that although Canadian corporate statutes lack a mechanism that "expressly allows a court to review decisions made or resolutions adopted at other disputed meetings of a corporation other than with regard to the election of directors … it seems probable that a court would be prepared to assume such a power."[198] This posited power would provide for the review of a shareholder vote other than relating to the election of a director. These after-the-fact remedies may be of use where a plaintiff cannot satisfy the irreparable harm or balance of convenience factors of the *RJR-MacDonald* test.

Fourth and finally, the equitable basis of voting injunctions must not be forgotten. The granting of injunctive relief is fundamentally a discretionary and equitable exercise, and the *RJR-MacDonald* test is not a "strict test" that is mechanically applied.[199]

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194 See *Raging River*, *supra* note 60 at para 2; *Sparling*, *supra* note 60 at para 24. Conversely, a voting injunction will not be granted if it is sought prematurely, for instance if there is no possibility of a shareholder meeting prior to the trial of an action on the merits: *Schiowitz et al v IOS Ltd et al* (1970), 4 NBR (2d) 30 at 42, 23 DLR (3d) 102 (CA).

195 See *CBCA*, *supra* note 19, s 145; *OBCA*, *supra* note 147, s 107; *Blair v Consolidated Enfield Corp*, [1995] 4 SCR 5 at 31, 25 OR (3d) 480; *Kluwak v Pasternak*, 2006 CanLII 41292 at para 35, 26 BLR (4th) 215 (Ont Sup Ct J); *Wells*, *supra* note 146 at para 40. However, not all corporate statutes contain such a provision: *Hastman v St Elias Mines Ltd*, 2013 BCSC 1069 at para 127.

196 *Echo Energy*, *supra* note 13 at paras 91–102.

197 *Ibid* at paras 58–59, 65, 88–89. See also *OBCA*, *supra* note 147, s 107; *BCSA*, *supra* note 5, s 115(1)(d).

198 McGuinness, *supra* note 14, § 20.214.

199 See Sharpe, *supra* note 18, § 2:17; *CBC*, *supra* note 108 at para 27.