

---

7-1-1989

## Minority Shareholder Rights in Canada and England: 1860-1987

Jeffrey G. MacIntosh

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Business Organizations Law Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

---

### Citation Information

MacIntosh, Jeffrey G.. "Minority Shareholder Rights in Canada and England: 1860-1987." *Osgoode Hall Law Journal* 27.3 (1989) : 561-645.

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol27/iss3/4>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

## Minority Shareholder Rights in Canada and England: 1860-1987

### Abstract

This article reviews the changing relationship between majority and minority shareholders over approximately the past century and a quarter. In the last century and the early part of this century, company law in Canada and England was built on a foundation of majoritarianism, which was sometimes applied over-zealously by the courts to the detriment of minority shareholders. This majoritarianism has slowly yielded over time, however, to a greater concern for the position of minority shareholders. It is still not clear if controlling shareholders owe fiduciary duties at common law either to the company or to other shareholders. However, the courts have impressed controlling shareholders with what amount to fiduciary duties under the statutory oppression remedy.

### Keywords

Minority stockholders--Legal status, laws, etc.--History; Canada; England

### Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

# MINORITY SHAREHOLDER RIGHTS IN CANADA AND ENGLAND: 1860-1987<sup>©</sup>

BY JEFFREY G. MACINTOSH\*

This article reviews the changing relationship between majority and minority shareholders over approximately the past century and a quarter. In the last century and the early part of this century, company law in Canada and England was built on a foundation of majoritarianism, which was sometimes applied over-zealously by the courts to the detriment of minority shareholders. This majoritarianism has slowly yielded over time, however, to a greater concern for the position of minority shareholders. It is still not clear if controlling shareholders owe fiduciary duties at common law either to the company or to other shareholders. However, the courts have impressed controlling shareholders with what amount to fiduciary duties under the statutory oppression remedy.

I.	INTRODUCTION . . . . .	562
II.	VESTED RIGHTS . . . . .	565
III.	DISSENTERS' RIGHTS . . . . .	571
IV.	JUDICIAL OVERSIGHT: CONSENT . . . . .	579
V.	JUDICIAL PROTECTION: SHAREHOLDER RIGHTS OF A FIDUCIARY CHARACTER . . . . .	598
	A. <i>Introduction</i> . . . . .	598
	B. <i>The Currents of Majoritarianism</i> . . . . .	599
	C. <i>The Evolution of Shareholder Duties of a Fiduciary Character</i> . . . . .	605

---

<sup>©</sup> Copyright, 1989, Jeffrey G. MacIntosh.

\* Professor of Law, Faculty of Law, University of Toronto. This paper was last updated in 1987.

1.	Good Faith: Subjectivity and Objectivity . . . . .	607
2.	The Benefit of the Company as a Whole: Formal and Substantive Discrimination . . . . .	608
3.	The Anti-Discrimination Principle and the Rule of Selfish Ownership . . . . .	612
4.	A Modern Conception of Shareholders' Fiduciary Duties . . . . .	615
	a. <i>Introduction</i> . . . . .	615
	b. <i>Substantive Doctrine</i> . . . . .	616
	i. The Just and Equitable Ground for Winding-Up . . . . .	616
	ii. Shareholders' Fiduciary Duties . . . . .	618
	iii. The Statutory Oppression Remedy . . . . .	622
	c. <i>Shareholder Remedies: The Statutory Derivative Action</i> . . .	636
	d. <i>Ratification of Corporate or Directorial Wrongdoing</i> . . . . .	640
	D. <i>Summary</i> . . . . .	642
VI.	SUMMARY . . . . .	643

## I. INTRODUCTION

Since the enactment of the first general incorporation statutes in Britain and Canada around the middle of the last century, corporate law in Britain and Canada has undergone a great deal of change. From shareholder rights of a vested character, in which fundamental changes could only be effected with unanimity (if at all), a principle of majority rule became dominant. Majority rule has been transformed slowly over time, with increasing concern on the part of courts, legislators, and administrators for the protection of minority shareholders. Progress in this respect has been somewhat uneven, and has varied in doctrinally distinct areas of corporate law. However, major developments have occurred in the

last twenty years or so which strike a new balance between majority and minority shareholders.

One aim of this paper is to trace some of these developments, especially as they relate to shareholder duties of a fiduciary character. The focus is on corporate fundamental changes including reconstructions, amalgamations, arrangements, sales of all or substantially all the assets of the company, compulsory acquisitions, constitutional amendments (including alterations to the terms of outstanding securities, and reductions of capital), winding up, and, to a limited extent, takeover bids. It is in this context that the relations between shareholders in the corporation, and the extent and limits of the principle of majoritarianism are most graphically illustrated.

I will turn my attention mainly to those topics which traditionally have fallen into the "company law" domain. However, I should not be understood as suggesting that there is any clear or compelling distinction between matters of "company law" and those relegated to the realm of "securities regulation." The choice is inspired mainly to achieve a manageability of subject matter. Recognizing, however, that securities regulators are increasingly making incursions into the bailiwick of company law, I have made note of some of the important developments in the field of securities regulation where relevant.

Another aim of the paper is to highlight some of the differences between protection of shareholders in English and Canadian law. It is striking how many differences arise between Canadian and British company law — and not, as many would think, only recently as Canadian statutes have begun to adhere more closely to the American model. Important differences between Canadian and British company law can be identified from the enactment of the first general incorporation statutes. Of course, there are very great similarities as well. It is hoped the paper will shed some further light on both the similarities and differences.

To a considerable extent, I have avoided a normative analysis, adopting more the posture of cartographer than of jurist. The decision to do so arises out of a concern to achieve manageability of subject matter. Also, I have undertaken a

normative analysis of fundamental changes elsewhere.<sup>1</sup> Nonetheless, a few words indicating the nature of the problem are in order.

The rights and remedies available to minority (and in some situations, majority) shareholders can be seen as a response by courts and legislators to a number of closely related problems. Clearly, where some shareholders hold sufficient voting power to control the destiny and affairs of the corporation, there is a danger that these shareholders will redistribute corporate assets in their favour, at the expense of minority shareholders (and other corporate constituents). Corporate fundamental changes of a predominantly redistributive character consume both human and non-human resources in order to effectuate non-productive ends. These are economically (and socially) wasteful transactions. Rules governing corporate and shareholder conduct which allow for a significant level of such activity are not likely to be efficient rules. Thus, it would seem to be appropriate (and efficient) to constrain such conduct to *some* degree.

It may, however, be true in some cases that the cure is worse than the disease. For example, one rather potent response to the danger of majority shareholder opportunism is an absolute ban on corporate fundamental changes. But the harm worked by such a rule would exceed the benefits: changes in the corporate constitution, internal reorganizations and corporate combinations are an essential adaptive feature of corporate enterprise. Barring fundamental changes would result in grave economic harm.

A slightly less dramatic response to the problem is to give each minority shareholder a veto over any proposed fundamental change. Yet this creates a new problem — one of minority shareholder opportunism. Minority shareholders will be tempted to use their veto power to hold out for a greater share of the spoils of the fundamental change. Thus, majority shareholder opportunism will be severely circumscribed, but will be replaced by an equally virulent and wasteful form of behavior. Especially where individual

---

<sup>1</sup> The normative framework which I have formulated in the course of discussing the shareholder's appraisal right can be applied to any of the fundamental changes discussed below. See MacIntosh, "The Shareholder's Appraisal Right in Canada: A Critical Reappraisal" (1986) 24 Osgoode Hall L.J. 201.

shareholders each have a veto, it becomes extremely difficult to effect even the most desirable of fundamental changes.<sup>2</sup>

Other devices are available to strike a balance between the dangers of majority and minority opportunism, such that productive transactions are fostered while strategic behavior and wasteful transactions are discouraged. This article focuses on the device of external oversight of fundamental transactions by courts (and, to a lesser extent, administrators), operating either *ex ante* (by way of advance approval or injunctive relief) or *ex post* (after the fact, and in response to complaints by some shareholding constituency of unfair treatment).<sup>3</sup> To flesh out the historical development of shareholder rights, and to place judicial (and administrative) developments in context, I begin by tracing out in a summary way the history of vested and dissenters' rights in English and Canadian company law.

## II. VESTED RIGHTS

As noted, one way to ensure that no shareholder is made *worse off* as a result of a corporate fundamental change (and of avoiding majority opportunism) is to require unanimous consent to effect the change. A yet more exacting mechanism for protecting shareholders and preserving the original bargain is to deprive the corporation of the ability to engage in fundamental changes even with unanimous consent. In either case, it might be said that shareholders have "vested" rights.

English, federal, and Ontario statutes of mid-nineteenth century vintage failed to provide any specific mechanism for

---

<sup>2</sup> Aside from the problem of minority opportunism, opinions will inevitably differ about the wisdom of a proposed change. Frequently, a small minority (perhaps one person) will view a fundamentally sound proposal with disdain, and will block the change.

<sup>3</sup> Shareholder powers of approval by means of majority voting mechanisms are an important response to the problems noted in the text but a consideration of this subject is deferred to a future occasion to preserve manageability of the subject matter.

effecting many types of fundamental changes.<sup>4</sup> If a mechanism was not provided in the company's constitutional documents, then a fundamental change could not be effected even with unanimous shareholder consent.<sup>5</sup> However, the range of fundamental changes specifically authorized by the statutes expanded at a fairly rapid rate in the latter part of the last century and the first part of this century. In addition to authority to increase the company's capital, the statutes were amended to permit (*inter alia*) reductions of capital, reconstructions, arrangements, amalgamations, alterations to the constitutional documents of the company, alterations to the terms of outstanding securities, and changes in the type of business carried on by the company, in each case by approval of a supermajority of shareholders.<sup>6</sup> Even absent statutory authority, a

---

<sup>4</sup> The first English general registration statute, *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies* (U.K.), 7 & 8 Vict., c. 110 referred to only one type of fundamental change: the amendment of the constitution of the company in order to bring it into conformity with the Act. The English *Companies Act 1862* (U.K.), 25 & 26 Vict., c. 89, provided for a limited number of fundamental changes, including an increase of capital, consolidation of shares, alteration of the articles of association by special resolution, and statutory "reconstruction". See, ss 12, 50, 161.

The first federal *Letters Patent Act* in 1864, 27 & 28 Vict., c. 23, allowed only for increase of capital. See s. 5.16.

The first Ontario legislation in 1874, 37 Vic., c. 35, provided for increase, reduction, and subdivision of share capital. See ss 11-16.

The failure to provide for fundamental changes does not entail the presumption that fundamental changes were not possible. For example, the English *Act* of 1844, *supra*, failed to provide for increases of capital. "Schedule A" however made it a condition of registration that the constitution of the company indicate "whether, and under what circumstances, and on what Conditions, the Capital of the Company may be augmented, by the Conversion of Loans into Capital or otherwise, or by the Issue of new Shares or otherwise." See s. III. 33. A company may, by appropriate drafting of its constitutional documents, have entered into other types of fundamental changes as well. See *infra*, notes 7-8 and accompanying text.

<sup>5</sup> See *infra*, note 8.

<sup>6</sup> In the English legislation, the ability to reduce capital was added by 1867 (U.K.), 30 & 31 Vict., c. 131. The arrangement provisions were added by 1870 (U.K.), 33 & 34 Vict., c. 104 in favour of creditors, and extended to shareholders by 1877 (U.K.), 40 & 41 Vic., c. 26 and 1880 (U.K.), 43 & 44 Vic., c. 19. The enactment of the *Companies (Memorandum of Association) Act, 1890* (U.K.), 53 & 54 Vict., c. 62, allowed for alteration of the objects of the company for any of five listed reasons. The list was expanded to seven by the *Companies Act, 1929* (U.K.), 19 & 20 Geo. 5, c. 23, s. 5(1). It was however, not until the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 5 that (in effect) amendments of any character could be made to the objects. In 1928 compulsory acquisition provisions were enacted allowing for forcible cashout of dissenters on a takeover bid where the offer was "approved" by 90 percent of the class of shares. *Companies Act, 1928* (U.K.), 18 & 19 Geo. 5, c. 45, s.



common law reconstruction<sup>7</sup> could be effected as long as clear

---

50.

In the federal legislation, the power to reduce capital was added in 1869, 32 & 33 Vict., c. 13, ss 12, 13. From 1877, it was possible to extend the objects or powers of a federal company and to subdivide shares, 1877, 40 Vic., c. 43, ss 14, 19. This *Act* also introduced provisions allowing loan companies to amalgamate. See ss 99-103. The *Act* of 1902, 2 Ed. 7, c. 15, s. 35, allowed for the first time for the purchase of shares by one company of another company (thereby opening the door for takeovers by share acquisition). This *Act* also authorized the creation of preference stock, and the issue of unallotted stock by the directors through by-law (without further shareholder action). See ss 37, 38. The *Act* of 1904, 4 Ed. 7, c. 5 allowed for consolidation of share capital. The *Act* of 1914, 4-5 Geo. 5, c. 23, s.4 authorized *any* change to the letters patent.

In 1923, by 13-14 Geo. 5, c. 39, s. 4, arrangement provisions modelled on the English version were added. In 1924, by 14-15 Geo. 5, c. 23, s. 8, federal companies were granted "incidental and ancillary" powers allowing for a wide range of fundamental changes. This *Act* also allowed for conversion of shares from one class to another. See s. 47. The *Act* of 1930, 20-21 Geo. 5, c. 9, s. 14 extended the "incidental and ancillary powers" provisions making it clear that an extra-statutory reconstruction could be effected. The 1934 *Act*, 24-25 Geo. 5, c. 33, s. 124 added compulsory acquisition provisions modelled on the English provisions. Amalgamation provisions were not added until 1965, c. 52, s. 41.

In the Ontario legislation, the *Act* of 1878, 41 Vic., c. 5, s. 13 adopted reconstruction provisions modelled on the English legislation. Another *Act* of 1878, 41 Vic., c. 8, s. 16 authorized the creation of preference shares, although such issuance required the *unanimous* sanction of shareholders. The *Act* of 1881, 44 Vic., c. 18, s. 3 allowed for the alteration of the objects of the company or of any term of the letters patent. The *Act* of 1882, 45 Vic., c. 17, s. 9 allowed for repurchase of shares of the company (this provision was soon merged in the reduction of capital provision). The 1897 legislation, 60 Vict., c. 28, s. 24 enacted incidental and ancillary powers (drawn from Palmer's Company Precedents, as were the later amendments to these provisions and the federal incidental and ancillary powers). This *Act* also provided a general amalgamation procedure, adopted from R.S.O. 1887, c. 169, ss 76-81 which allowed for amalgamation of loan companies; 60 Vict., c. 28, s.102. The 1907 *Act*, 7 Edw. 7, c. 34, s. 17, significantly expanded the range of incidental and ancillary powers. This *Act* also provided for redemption and conversion of outstanding securities. See s. 76. The *Act* of 1912, 2-3 Geo 5, c. 31, s. 15 added a power to distribute assets *in specie* on a winding-up, thereby facilitating extra-statutory reconstructions. The 1924 legislation, 14 Geo. 5, c. 47, s. 4 made important extensions to the ability of a corporation to alter the terms of existing share capital. The 1928 *Act*, 18 Geo. 5, c. 32, s. 7 added arrangement provisions modelled on the English *Act*. The 1948 *Act*, 12 Geo. 6, c. 13, s. 2(1) added a power allowing a public company to "go private" but required the *unanimous* consent of shareholders.

<sup>7</sup> A reconstruction consisted of a sale of the assets of the company for securities of another company, followed by the voluntary dissolution of the first company and a distribution of the securities *in specie* to the shareholders. The reconstruction procedure could thus be used to effect any type of internal reorganization by the device of incorporating a second company specifically for the purpose of uniting with the first. It could also be used to effect corporate combinations. A common law reconstruction would be effected under appropriate powers in the company's constitutional documents to sell all the assets of the company for securities in another company, and to distribute the same *in specie* to members on a voluntary liquidation. See note 6.

authority was contained in the constitutional documents of the company (and in accord with the mechanism set out in these documents).<sup>8</sup> The reconstruction procedure could be used to effect almost any type of internal reorganization, change in the business carried on, or corporate combination.

At the same time that statute law adopted a more progressively facilitative design, the courts began to adopt a more liberal and facilitative interpretation of statutory fundamental change provisions and to depart from their initial posture of reluctance to sanction fundamental changes.<sup>9</sup> Thus, if there ever was an age of

---

<sup>8</sup> That a reconstruction could be effected at common law under suitable powers taken in the charter was never entirely free from doubt, although certainly this appears to have been the case under the letters patent statutes, if not the memorandum statutes. See W.R.P. Parker & G.M. Clark, *Company Law – A Concise Manual* (Toronto: Canada Law Book, 1909) [hereinafter "Parker (1909)"] at 98-99, 311-24 (concluding that a common law reconstruction may be effected under Ontario legislation); T. Mulvey, ed., *Canadian Company Law* (Montreal: J. Lovell & Son, 1913) at 262-64 (concluding that a common law reconstruction may be effected under both the Ontario and English legislation); V.E. Mitchell, *Canadian Commercial Corporations* (Montreal: Southam, 1916) [hereinafter "Mitchell (1916)"] at 85-86, 1210-14, 1374-76 (common law reconstruction may be effected by a simple majority of shareholders under any of the memorandum or letters patent legislation, unless, following *Bisgood v. Henderson's Transvaal Estate Co.* (1908), 1 Ch. 743, there exists a statutory reconstruction provision, in which case the statutory procedure is the exclusive method available for effecting a reconstruction; Mitchell also notes that reconstruction powers were "almost invariably" taken in letters patent companies); C.A. Masten & W.K. Fraser, *Masten and Fraser on Company Law*, 2d ed. (1920) [hereinafter "Masten & Fraser (1920)"] at 589-91 (common law reconstruction may be effected under Ontario legislation even without consulting shareholders if the letters patent so provide – although it is usual for a shareholders' meeting to be called – despite the existence of a statutory reconstruction procedure); C.A. Masten & W.K. Fraser, *Company Law of Canada*, 3d ed. (Toronto: Carswell, 1929) [hereinafter "Masten & Fraser (1929)"] at 117-18, 131-34, 716-17 (to similar effect, except that where there is a statutory reconstruction procedure, its protections may not be excluded); C.A. Masten & W.K. Fraser, *Company Law of Canada*, 5th ed. (Toronto: Carswell, 1962) at 728-29 (to similar effect). The most comprehensive review of both the memorandum and letters patent authorities is to be found in F.W. Wegenast, *The Law of Canadian Companies* (Toronto: Burroughs, 1931) at 273-75 (concluding that such sale may not be possible in a memorandum jurisdiction, but is likely possible under the letters patent statutes). Whatever the precise legal position, the extra-statutory reconstruction appears to have been a common method of effecting an internal reorganization or corporate combination. Where challenged, it is at least clear that the courts insisted that the appropriate powers be clearly and completely specified. See for example, *Hill v. Starr Manufacturing Company* (1914), 15 D.L.R. 146.

<sup>9</sup> Compare the early cases *Hutton v. Scarborough Cliff Hotel Company Limited B* (1865), 62 E.R. 717; and *Harrison v. Mexican Railway Company* (1875), L.R. 19 Eq. 358 narrowly interpreting the authority to increase capital, with the later holding of the Court of Appeal overruling *Hutton* in *Andrews v. Gas Meter Company*, [1897] 1 Ch. 361 (C.A.). See also *Re Welsbach Incandescent Gas Light Company Limited*, [1904] 1 Ch. 87 (C.A.) affirming the

absolute vested rights not subject to defeasance — a proposition which may be doubted — it was relatively short lived, and soon gave way to shareholder rights of an essentially defeasible character. The devices of making rights unalterable or subject to unanimous alteration were generally abandoned<sup>10</sup> in favour of other devices for the protection of shareholders (especially majoritarian voting) on the undertaking of corporate fundamental changes.

I have already suggested that prohibiting fundamental changes is not a solution to the problem of majority opportunism: the cost (in the form of sacrificing productive fundamental changes) is simply too great. A unanimity requirement creates an equally difficult problem of minority holdouts.<sup>11</sup> It is not therefore particularly surprising that each of these forms of shareholder protection was largely abandoned in the last century. It is both interesting and informative, however, that the domain in which unanimity (or near-unanimity) requirements have survived is in the case of relatively small private corporations. Although the problem of minority opportunism remains, it is undoubtedly less acute where

---

validity of a provision in the constitutional documents of a company for a variation of the rights of outstanding securities.

<sup>10</sup> The technique of requiring unanimous assent is not entirely dead, even aside from the imposition of mandatory rules and the preservation of unanimity requirements in private companies (see *infra*). See the *Companies Act* (U.K.), 1985, c. 6, s. 125(5) (formerly *Companies Act*, 1980, c. 22, s. 32(5)) (substantially codifying the common law) which requires unanimous shareholder consent to alter class rights specified in the memorandum of association, where there is no variation-of-rights clause in either the memorandum or articles.

<sup>11</sup> See generally J.M. Buchanan & G. Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962) at 63-91. In *Re Dominion of Canada Freehold Estate and Timber Co.* (1886) 455 L.T. 347 at 351, Chitty J. said:

That [securing unanimous approval] is a difficulty which the legislature itself felt when it passed the Act of 1870 [allowing for fundamental changes to be accomplished by way of an "arrangement"], allowing a majority ... to bind the minority. Then it was known that before the legislation of 1870 any particular individual could hold out against a scheme, however meritorious and however beneficial it might be, in order that he might get generally speaking some special advantage for himself, or because he was a person who did not even take a fair view of the advantages to be gained. It was for the purpose of preventing that obstruction that the legislature passed the Joint Stock Companies Act of 1870...."

the number of participants is relatively small.<sup>12</sup> Further, shareholders in a small private enterprise will have frequent or iterated interactions with one another, raising the probability of cooperative behaviour.<sup>13</sup> The relative decline in the economic importance of the small private corporation would appear to explain the disappearance of the unanimity principle as the "default"<sup>14</sup> rule in corporate law.

It is customary to think that the era of vested rights ended with the passing of unanimous decision-making procedures. However, there is another important sense in which vested rights manifest themselves, and one which is extremely important in the current regime of corporate and securities law. This is the imposition of rules of a mandatory character that may not be "contracted" out of. For example, many fundamental changes under the *Canada Business Corporations Act* (hereinafter *CBCA*) may not be undertaken without the approving votes of two-thirds of the shareholders.<sup>15</sup> Although these statutory super-majorities are subject to increase, they may not be decreased, even with the (prior) unanimous consent of all shareholders.<sup>16</sup> These are clearly examples

---

<sup>12</sup> See generally R. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984). See also D.C. Mueller, *Public Choice* (Cambridge: Cambridge University Press, 1979) at 14-16.

<sup>13</sup> See Mueller, *ibid.* at 7-11. For shareholders locked together in a corporate enterprise, the periodic recurrence of decisions to undertake profitable fundamental changes creates an iterated sequence of transactions much like a relational contract, although not necessarily satisfying the strict conditions necessary to create the "prisoner's dilemma" with which both Axelrod and Mueller are primarily concerned. See Axelrod, *ibid.* at 7-11.

Three other factors make unanimity (or near unanimity) requirements more desirable in the case of small private corporations than in the case of larger public corporations. First, the transaction costs of securing shareholder assent are lower in the former case than in the latter. Second, shareholders will not usually have a market exit option available. Third, shareholders in smaller private enterprises will often be significantly underdiversified in their investment portfolios, leading to a greater need for protection against fundamental changes altering the risk of the enterprise. See generally MacIntosh, *supra*, note 1 at 210-15.

<sup>14</sup> A default rule is that which applies absent contrary stipulation by the parties in the enterprise.

<sup>15</sup> See for example, *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended [hereinafter *CBCA*] ss 173 (amendments to the articles of incorporation), 183 (amalgamation), 188 (continuance out of jurisdiction), 189 (sale of assets).

<sup>16</sup> *Ibid.*, s. 6(3).

of "vested" rights.<sup>17</sup> Even a quick perusal of our corporate and securities law enactments reveals that much of corporate and securities law is mandatory in character. Although some of these provisions are designed to protect third parties who deal with the corporation,<sup>18</sup> much of this regulation is concerned with the relations *between* capital contributors to the corporation or between capital contributors and the corporate managers.<sup>19</sup> As I have discussed the differences between mandatory and non-mandatory rules elsewhere, I will not repeat that discussion here.<sup>20</sup>

### III. DISSENTERS' RIGHTS

The term "dissenters' rights" is not wholly self-defining. Necessarily the term connotes rights attaching to something less than a shareholding majority. Indeed, one could easily define "dissenters' rights" as those rights attaching to *any* constituency less than a majority of shareholders. So defined, the dissentient minority might be a class of shareholders, a fluid body of shareholders within or extending across classes, or an individual shareholder.

As it is used here, the term "dissenters' rights" embraces all of those except the former (class rights). In the interests of analytical clarity, shareholder rights of a fiduciary or quasi-fiduciary

---

<sup>17</sup> See also *CBCA* ss. 241(3)(c), 241(4), providing that as a remedial technique under the oppression remedy, the court may order an amendment of the articles of incorporation or by-laws, which are then unalterable save with a further court order. Compare *Ontario Business Corporations Act, 1982*, S.O. 1982, c. 4 [hereinafter *OBCA*], ss. 247(3)(c), 247(4); *Companies Act* (U.K.), 1985, c. 6, s. 461(3) (formerly *Companies Act* (U.K.) 1980, c. 22, s. 75(3)). See also *Companies Act* (U.K.), 1985, c. 6, s. 5(6).

<sup>18</sup> Such as the provisions respecting corporate capacity and agency. See *CBCA*, ss 15-18.

<sup>19</sup> For example *CBCA*, ss 102 (directors shall manage the business and affairs of the corporation), 122 (duty of care and skill and duty of fiduciary care), 149 (mandatory proxy solicitation), 190 (appraisal right). This list could be made very much longer.

<sup>20</sup> On the distinction between mandatory regulation, as opposed to permissive provisions allowing for contracting out, see generally MacIntosh, *supra*, note 1 at 274-83.

character are excluded.<sup>21</sup> Dissenter's rights are of two principal varieties. The first aims at augmenting the internal voice<sup>22</sup> of minority shareholders on the undertaking of fundamental changes (over and above their participation in majoritarian voting); the second supplies an exit option<sup>23</sup> impressed with an element of internal voice (as it is commenced by private action).

In the United States, dissenters' rights were widely resorted to as a remedial technique from the latter part of the nineteenth century onwards.<sup>24</sup> A very different picture emerges in England and Canada. In Canada, dissenters' rights were not important until the 1970s; in England, dissenters' rights still play a relatively minor role.

In England, dissenters' rights were provided in the 1862 reconstruction provision, which allowed a dissenter on the undertaking of a reconstruction to require the liquidator to either refrain from carrying the reconstruction into effect, or cause the company to buy the dissenter's shares.<sup>25</sup> This provision, which has survived to this day,<sup>26</sup> is almost unique in English law in supplying dissenters with an "appraisal right" not conditioned on a court determination of entitlement. The only other example of such a provision can be found in the 1985 *Act* (and formerly, the 1929 and 1948 *Acts*) which allows a shareholder, where a takeover bidder has been successful in acquiring 90 percent of the issued shares of the company, to require the bidder to purchase the interest of that shareholder, on the same terms offered other shareholders, or on

---

<sup>21</sup> By "quasi-fiduciary" I refer principally to the statutory oppression remedy, which imposes norms which could easily be denominated "fiduciary" in character, and are in substance functionally indistinguishable. See for example *CBCA* s. 241; *OBCA* s. 247, and see *infra*, at Part V.

<sup>22</sup> The term "voice" is borrowed from Hirschman. See A.O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge, Mass.: Harvard University Press, 1970). The modifier "internal" has been added to distinguish shareholder participation in decision making from external oversight by a neutral third party. The latter I will refer to as "external" voice.

<sup>23</sup> The term "exit" is also borrowed from Hirschman, and simply refers to the shareholder's ability to sell his or her shares and exit the corporation. *Ibid.*

<sup>24</sup> See Manning, "The Shareholder's Appraisal Remedy: An Essay for Frank Coker" (1972) 72 *Yale L.J.* 223.

<sup>25</sup> *Companies Act, 1862* (U.K.), 25 & 26 *Vict.*, c. 89, s. 161.

<sup>26</sup> *Companies Act* (U.K.), 1985, c. 6, s. 582.

"such other terms as may be agreed or as the court on the application of either the [bidder] or the shareholder thinks fit to order."<sup>27</sup>

Other dissenters' rights offering an exit option have been conditioned on court approval, sometimes combining the furnishing of an exit option with external oversight mechanisms. For example, in a number of cases, a court, in approving or disapproving the transaction in question, has been given the power to strike an arrangement for the purchase (or in some cases other special treatment) of the interests of dissenting shareholders. This technique has been employed for alterations to the memorandum amending the company's objects,<sup>28</sup> and reconstructions by way of statutory arrangement.<sup>29</sup> Similarly, the recast oppression remedy in the 1980 *Act*<sup>30</sup> (now carried forward in the 1985 *Act*<sup>31</sup>) expressly allows for the purchase of the dissenters' interests.

It is more usual in English law to find examples of the first variety of dissenters' rights (that is, supplying voice) – conditioned, as in those cases involving an exit option, on court approval. In 1929, a provision was introduced allowing shareholders holding 15 percent of the capital of the company or any class thereof to apply to a court to annul an alteration of the terms of outstanding

---

<sup>27</sup> *Companies Act* (U.K.), 1985, c. 6, s. 429(4), formerly *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 209(2). The provision was enacted pursuant to a recommendation of the Cohen Committee. See *Report of the Committee on Company Law Amendment*, Cmnd. 6659 (1945). See also *Companies Act* (U.K.), 1985, c. 6, s. 461(2)(d) (formerly *Companies Act* (U.K.), 1980, c. 22, s. 75(4)(d)) (oppression) which allows the court to order the purchase by the company or other members of the complainant's shares.

<sup>28</sup> *Companies (Consolidation) Act, 1908* (U.K.), 8 Edw. 7, c. 69, s. 9(5), continued by *Companies Act, 1929* (U.K.), 19 & 20 Geo. 5, c. 23, s. 5; *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 5(4); *Companies Act* (U.K.), 1985, c. 6, ss 5(4), (5).

<sup>29</sup> *Companies Act, 1929* (U.K.), 19 & 20 Geo. 5, c. 23, s. 154 (allowing the court in sanctioning the scheme of arrangement to allow for "provision to be made for any persons, who ... dissent from the compromise or arrangement") continued by *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 208(1)(e); *Companies Act* (U.K.), 1985, c. 6, s. 427(3)(e).

<sup>30</sup> *Companies Act* (U.K.), 1980, c. 22, s. 75(4)(d).

<sup>31</sup> *Companies Act* (U.K.), 1985, c. 6, s. 461(2)(d).

securities effected by a variation-of-rights clause.<sup>32</sup> However, this provision arguably does not truly provide for "dissenters' rights," since the substantive ground for relief is a demonstration by the plaintiff that the alteration would "unfairly prejudice the shareholders of the class represented by the applicant."<sup>33</sup> The protection afforded is therefore arguably a *class* right, although invoked by a dissenting subset of the class.

Similar provisions were introduced in the 1948 *Act* which, on an alteration of the objects or memorandum of the company, allow shareholders holding 15 percent of the capital of the company or a class thereof to apply to have the alteration cancelled.<sup>34</sup> Although no substantive ground for relief is spelled out, these provisions also supply a limited sort of "dissenters' right," as the right is not crystallized, but contingent on a court's determination of an entitlement to relief. Similarly, the compulsory acquisition provisions, first enacted in 1929, allow for a dissenter to apply to a court, which may order that the compulsory acquisition not proceed.<sup>35</sup>

---

<sup>32</sup> *Companies Act, 1929* (U.K.), 19 & 20 Geo. 5, c. 23, s. 61. This provision was continued in the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 72, and the *Companies Act* (U.K.), 1985, c. 6, s. 127.

<sup>33</sup> *Ibid.* (emphasis added).

<sup>34</sup> *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, ss 5, 23. These provisions have been continued in the *Companies Act* (U.K.), 1985, c. 6, ss 4-6, 17.

<sup>35</sup> *Companies Act, 1929* (U.K.), 19 & 20 Geo. 5, c. 23, s. 155. This provision allowed an acquiror in a share acquisition, where the offer had been "approved by the holders of not less than nine-tenths in value of the shares affected," to force any dissenters to sell their shares also, on the same terms as contained in the offer to other shareholders. A dissenting shareholder was empowered, however, to apply to a court which might "order otherwise." The compulsory acquisition section was enacted following a recommendation of the Greene Committee, which feared the exploitation of a hold-up power by a small minority, where the acquiror sought 100 percent ownership. *Report of the Greene Committee on Company Law Amendment*, Cmd. 2657 (1926), para. 84. The limited dissenter's right was added as a counterbalance to avoid unfairness to squeezed-out minorities. The provision was carried forward, with modifications, by the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 209. Section 209(2) allowed a dissenting shareholder to insist that an acquiror of 90 percent of the shares purchase his shares, either on the same terms, or on "such other terms as may be agreed or as the court on the application of either the transferee company or the shareholder thinks fit to order." These provisions are carried forward in the *Companies Act* (U.K.), 1985, c. 6, ss 428-29.



The 1980 English *Act* combines the exit and voice techniques in introducing a provision<sup>36</sup> (carried forward in the 1985 *Act*<sup>37</sup>) allowing 5 percent in nominal value of the shareholders of the company (or class thereof) to apply to a court for an order cancelling or confirming a going-private transaction in which case the court may if it thinks fit strike an arrangement for the purchase of the interests of the dissenters.

The efficacy of these dissenters' rights can easily be questioned. For example, where in connection with a reconstruction a dissenter required the company to purchase his shares, the courts at an early date held that the shareholder was not entitled to examine the directors of the company<sup>38</sup> or the books<sup>39</sup> to obtain information relating to the value of the shares. As Gower suggests, he is "very much in the position of having to make bricks without straw, his only straw being his nuisance value, which will depend upon the total number of dissentients."<sup>40</sup>

Nor have the provisions according some percentage of shareholders the opportunity to apply to a court for cancellation of the transaction proved effective to protect dissenters, because of the difficulty of marshalling the required percentage of dissenting shareholders — a good example of the collective action problem attending the exercise of internal voice.<sup>41</sup> Probably the only dissenter's right of any real potency amongst the English provisions canvassed here is the contingent right to ask for a court-ordered purchase of the interests of the applicant under the oppression remedy.

---

<sup>36</sup> *Companies Act* (U.K.), 1980, c. 22, s. 11. In the case of an "old public company," the application must be made within twenty-eight days of the resolution adopting the going-private transaction, failing which the transaction becomes final and conclusive. *Ibid.*, ss 8, 11.

<sup>37</sup> *Companies Act* (U.K.), 1985, c. 6, s. 54.

<sup>38</sup> *Re British Building Stone Company* (1908), [1908] 2 Ch. 450.

<sup>39</sup> *Re Glamorganshire Banking Co.* (1884), 28 Ch.D. 620.

<sup>40</sup> Gower, *Modern Company Law*, 4th ed. (London: Stevens & Sons, 1979) and Supp. 1981 at 692.

<sup>41</sup> See *infra*, notes 107-11 and accompanying text.

Dissenters have not, until recently, been accorded extensive rights under the Canadian legislation. The federal compulsory acquisition provisions<sup>42</sup> and the 1965 amalgamation provisions<sup>43</sup> adopted the English technique of allowing dissenters to apply to a court for an annulment of the transaction. The arrangement provisions required that notice be given to every shareholder of the time and place when the application for court confirmation would be made, if a dissenting vote was cast by any shareholder.<sup>44</sup>

In Ontario, there are also few examples of statutory appraisal rights prior to 1953.<sup>45</sup> In that year, a statutory provision was enacted allowing a dissenting shareholder, for certain fundamental changes, to insist that the company buy his or her shares at an appraised value.<sup>46</sup> The provision, however, applied only to private corporations, and only for a limited number of structural changes.<sup>47</sup>

---

<sup>42</sup> The compulsory acquisition provisions were first enacted by the *Companies Act, 1934*, 24-25 Geo. 5, c. 33, s. 124. Modelled closely on the U.K. legislation, the section provided that a dissenting shareholder might apply to a court for an "order otherwise."

<sup>43</sup> The *Canada Corporation Act*, 13-14 Eliz. 2, c. 52, s. 128(A) enacted the first amalgamation legislation, which allowed shareholders holding 10 percent or more of the shares of any class to apply to a court "for an order annulling the amalgamation agreement."

<sup>44</sup> 1930, 20-21 Geo. 5, c. 33, s. 124.

<sup>45</sup> The Ontario legislation from 1874 to 1953 contained a number of dissenters' rights provisions. The *Joint Stock Companies' Winding-up Act*, 41 Vic., c. 5, s. 13 enacted a reconstruction provision modelled on the English legislation providing that a dissenter might require the liquidator to either abstain from carrying the transaction into effect, or purchase the interest of the dissentients; this dissent right was deleted in the *Ontario Act, 1925*, 15 Geo. 5, c. 53, s. 5, with court approval and class voting rights substituted. The arrangement provisions were modified by the *Ontario Act, 1931*, 21 Geo. 5, c. 46, s. 8 to require that all shareholders be given notice by the company of the time and place for court confirmation of the scheme if there were dissenting votes cast at any of the approving shareholders' meetings.

<sup>46</sup> The *Corporations Act, 1953*, S.O. 1953, c. 19, s. 99.

<sup>47</sup> *Ibid.* The enumerated fundamental changes were: a sale of all or substantially all the company's assets; conversion into a public company; amalgamation. The right had to be claimed by written notice within 2 days of the adoption of the resolution. Compare the *Business Corporations Act, 1970*, S.O. 1970, c. 25, s. 100, which applied, as did the earlier legislation, only to private corporations, but which altered the triggering transactions to include: a sale of all or substantially all of the undertaking of the company; the deletion of restrictions on transfer of any class of shares; amalgamation.

It was not until the Report of the Dickerson Committee,<sup>48</sup> and the enactment of the *CBCA* in 1975 embodying the recommendations of the Committee, that the position changed substantially. It was quite clearly the intention of the Dickerson Committee to make the statutory appraisal right the new centrepiece of the fundamental change provisions.<sup>49</sup> The appraisal right, available for a wide variety of fundamental changes<sup>50</sup> and in respect of both public and private companies,<sup>51</sup> was seen by the Committee as a method to remedy a perceived imbalance between the rights of minority and majority shareholders<sup>52</sup> while allowing a majority to "effect almost any fundamental change with impunity."<sup>53</sup> The appraisal provision was also to serve the goal of making the *Act* "self-enforcing" by means of private appraisal proceeding rather than administrative oversight or penal sanction.<sup>54</sup> In short, the appraisal right was designed to

---

<sup>48</sup> *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) (Chair: R.W.V. Dickerson) [hereinafter "Dickerson Report"].

<sup>49</sup> The adoption of the appraisal rights was described by the Committee as "a basic change in policy" and the "keystone" of the new provisions regarding fundamental changes. See paras 347, 348. See generally MacIntosh, *supra*, note 1.

<sup>50</sup> The Committee recommended that the right be available in respect of: an amendment of the articles restricting the transfer of shares; amalgamation (except short-form amalgamation); continuance under the laws of another jurisdiction; a sale, lease or exchange of all or substantially all of the corporation's property; amendment of the rights, privileges, restrictions or conditions attaching to a class of shares which would, directly or indirectly, derogate from the rights of that class of shareholders. See para. 373, and see *Draft Bill*, cl. 14.17. The *CBCA* as enacted followed (with some drafting changes) this recommendation. See *CBCA*, s. 190.

<sup>51</sup> See *Draft Bill*, cl. 14.17(1), 1.02(1)(h); *CBCA*, ss 190, 2(1).

<sup>52</sup> The Committee noted that the courts were loathe to intervene on behalf of minority shareholders unless a showing of fraud or bad faith had been made out. Surveying the then current position, the Committee concluded that "the present state of the common law is at best unsatisfactory, at worst downright unjust" in failing to protect minority shareholders against unfairness on fundamental changes. See para. 346, and see generally paras 344-46. The Committee opined that the enactment of the appraisal right would reverse this "general policy of the common law" and have the effect of withdrawing minority shareholders from the "mercy of the majority." See para. 347.

<sup>53</sup> See para. 347. In the Committee's view, the result was "a resolution of the problem that protects minority shareholders from discrimination and at the same time preserves flexibility within the enterprise, permitting it to adapt to changing business conditions."

<sup>54</sup> See paras 476, 479.

effect a fundamental realignment of majority and minority rights on the undertaking of a fundamental change, emphasizing exit over both internal voice and external oversight.

The Report of the Committee has been enormously influential, forming the basis of the 1975 federal legislation and the 1982 Ontario legislation<sup>55</sup> and that of four other provinces.<sup>56</sup> Allowing a shareholder to insist that the company buy his shares supplies an exit option which may be important where the market exit option, for some reason (for example, as in the case of private companies) proves deficient. *Prima facie*, it would appear to be an effective way of encouraging the undertaking of productive fundamental changes while meeting the minority's concern of preventing majority opportunism. Unfortunately, the statutory appraisal right has proved far less effective than might have been anticipated in supplementing the market exit option. As I have undertaken an extensive analysis of the appraisal right elsewhere,<sup>57</sup> I will not deal with its shortcomings at length here. Suffice it to say that numerous defects, including the costs of exercise, cumbersome procedures, difficulties in establishing appropriate valuation procedures, the expense of valuation, and other problems have rendered the appraisal right a less effective method of shareholder protection than that envisaged by the Dickerson Committee.<sup>58</sup>

Thus, both in England and Canada, dissenters' rights have not been very successful either in providing minority shareholders with added voice on fundamental changes or in furnishing an additional exit option.

---

<sup>55</sup> *Business Corporations Act*, 1982, S.O. 1982, c. 4.

<sup>56</sup> The *CBCA* provisions have been adopted in the same or substantially similar form not only in Ontario, but in Alberta, Manitoba, Saskatchewan, and New Brunswick. *Alberta Business Corporations Act* [hereinafter *ABCA*] S.A. 1981, c. B-15; *Manitoba Corporations Act* [hereinafter *MCA*], S.M. 1976, c. 40; *New Brunswick Business Corporations Act* [hereinafter *NBBCA*], S.N.B. 1981, c. B-9.1; *Saskatchewan Business Corporations Act* [hereinafter *SBCA*], R.S.S. 1978, c. B-10.

<sup>57</sup> An extensive analysis is undertaken in MacIntosh, *supra*, note 1.

<sup>58</sup> *Ibid.*

## IV. JUDICIAL OVERSIGHT: CONSENT

One device for policing fundamental changes by means of external oversight is to insist that a court routinely approve the fundamental change. The advantage of such an approval requirement is obvious: the court is a neutral third party with no particular interest in the outcome, and arguably well-placed to weigh the interests of all security holders and objectively decide if the transaction is fair to all concerned.<sup>59</sup> It is probably for this reason that a requirement for judicial approval has long been the favoured technique in English law for the protection of shareholders on the undertaking of fundamental changes. However, an examination of the history of judicial approvals reveals some potential pitfalls which stem primarily from the institutional limitations of courts.

One of the first instances where the courts were called upon to give their imprimatur to a proposed fundamental change was in the case of a reduction of capital – although the device of court approval was intended chiefly to protect creditors rather than shareholders.<sup>60</sup> As in most other instances where court approval is required in the English legislation, no guidance was (nor is, in the current provisions) given to the court as to the substantive standard to be applied in approving the reduction, aside from ensuring that requisite procedures designed to protect *creditors* have been complied with.<sup>61</sup> From at least the latter part of the nineteenth century, the courts permitted a reduction even if not in strict accordance with the rights of classes of shareholders.<sup>62</sup> However, the courts erected two types of protective measures for shareholders.

---

<sup>59</sup> This advantage is shared, of course, by disinterested administrators.

<sup>60</sup> See *supra*, note 29. Similar provisions dealing with increase of capital (and other alterations to share capital, such as subdivision and consolidation) did not require court approval.

<sup>61</sup> The *Companies Act (U.K.)*, 1985, c. 6, s. 137(1) allows the court to "make an order confirming the reduction on such terms and conditions as it thinks fit," providing that every creditor entitled to object to the reduction has consented or the debt has been discharged or secured.

<sup>62</sup> See, for example, *British and American Trustee Corporation v. Couper*, [1894] A.C. 399 (H.L.), *Carruth v. Imperial Chemical Industries, Limited*, [1937] A.C. 707 (H.L.). But compare *Re Denver Hotel Company*, [1893] 1 Ch. 495.

First, the courts would not generally confirm a reduction altering class rights unless it was effected in harmony with any variation-of-rights clause in the constitution, unless effected *via* an arrangement.<sup>63</sup> Second, the courts enunciated an apparent objective standard of review of the merits of the reduction by requiring that no reduction should be confirmed unless "fair," "equitable," or "reasonable" as between the classes of shareholders.<sup>64</sup>

These protections, however, have turned out to be a good deal less effective than might be imagined. Given the narrow compass ascribed to the meaning of a "variation" of class rights by the courts,<sup>65</sup> the first protection left much room for an indirect alteration of rights.<sup>66</sup> Two additional factors have limited the protection of shareholders by the courts on a reduction of capital. First, the rights protected have extended only to the rights of shareholders on a winding-up.<sup>67</sup> Second, the principle of "fairness" has been frequently stated but seldom applied. As Gower notes:

There is no reported case this century in which shareholders have been treated in accordance with their class rights and in which the required formalities have been complied with, where the courts have refused confirmation. This cannot be explained on the ground that all reduction schemes have been scrupulously fair.<sup>68</sup>

Gower also notes that there are only two reported cases in this century in which the courts have refused to confirm a reduction

---

<sup>63</sup> See, for example, *Scottish Insurance Corporation v. Wilsons & Clyde Coal Co.*, [1949] A.C. 462 (H.L.); *Prudential Assurance v. Chatterley-Whitfield Collieries*, [1949] A.C. 512, [1949] 1 All E.R. 1094 (H.L.); *Re Old Silkstone Collieries*, [1954] Ch. 169 (C.A.); *Re Holders Investment Trust Ltd.*, [1971] 1 W.L.R. 583. Compare *Re Mackenzie & Company Limited*, [1916] 2 Ch. 450, where the reduction, sanctioned by the Court and effected *pari passu* with respect to ordinary and preferred shareholders, had the effect of reducing the dividend preference of the preferreds.

<sup>64</sup> See, for example, *Poole v. National Bank of China*, [1907] A.C. 229.

<sup>65</sup> See *Re John Smith's Tadcaster Brewery Co.* [1953] Ch. 308; *White v. Bristol Aeroplane Co.*, [1953] Ch. 65; *Greenhalgh v. Ardenne Cinemas Ltd.*, *infra*, note 192.

<sup>66</sup> See, for example, *Re Saltdean Estate Company*, [1968] 1 W.L.R. 1844.

<sup>67</sup> *Griffith v. Paget (No. 1)* (1877), 5 Ch. D. 894; *Griffith v. Paget (No. 2)* (1877), 6 Ch. D. 511.

<sup>68</sup> Gower, *supra*, note 40 at 709-10. See generally 708-11. Gower gives as an example of unfairness which has occurred, the fact that "some schemes have been used to repay capital on irredeemable preference shares standing well above par."

on the ground of unfairness. In both, the refusal was because the shareholders had not been treated in strict accordance with their class rights.<sup>69</sup>

As in other contexts, the apparent objective fairness test has, in practice, largely been applied subjectively. The courts have tended to follow the dictum of Lindley L.J. in *Re English, Scottish and Australian Chartered Bank*<sup>70</sup> that "[i]f the creditors [or shareholders] are acting on sufficient information, and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be."<sup>71</sup>

The reason for this judicial deference to majorities is clear: courts do not consider themselves to be in a better position than shareholders to judge the wisdom of a proposed scheme — a judgment which is, in the main, correct. Unfortunately, however, the majoritarianism principle assumes a homogeneity of shareholder interests which may not reflect reality. The outcome of the vote may be determined by the votes of a shareholder or shareholders whose interests diverge in some material respect from the interests of other shareholders of the company, or of the particular class. This may occur in a variety of circumstances. One such circumstance is where there are significant cross-holdings of securities. Where a shareholder holds securities (other than those of the voting class) which may be indirectly affected by alterations to the voting class, that shareholder may be tempted to vote in a manner which enhances the value of the other class at the expense of the voting class. Another instance of a divergence of interest arises where a fundamental change affecting all shareholders in a

---

<sup>69</sup> *Ibid.* at 709. One of these cases, *Re Holders Investment Trust Ltd*, is discussed *infra*. See notes 77-78 and accompanying text.

<sup>70</sup> [1893] 3 Ch. 385 (C.A.).

<sup>71</sup> *Ibid.* at 409. In *Carruth v. Imperial Chemical Industries Limited*, [1937] A.C. 707 at 769 (H.L.), Lord Maugham described the *Re English* rule as the principle of ordinary application in cases involving reductions of capital.

formally identical manner stands to substantively affect some (often majority) shareholders more favourably than other shareholders.<sup>72</sup>

Generally, the English courts have not been acutely sensitive to these conflicts of interest.<sup>73</sup> There are, however, a few important exceptions in cases involving reductions of capital. In *Carruth v. Imperial Chemical Industries Limited*,<sup>74</sup> there were, *inter alia*, common and deferred classes of shareholders. A scheme of reduction was proposed which would have the effect of reducing the paid-up capital of the deferred shareholders by one-half.<sup>75</sup> The deferred shareholders voted as a class on the resolution to put the scheme into effect and approved it by a substantial majority. However, a majority of the deferred shareholders were also common shareholders potentially adverse in interest to the deferred shareholders. Maugham L.J. commented that the *Re English* principle that the majority should prevail could not be "of great value as a guide when it is proved that the majority of the class have voted in the way they did because of their interests as shareholders in another class."<sup>76</sup> The court, nevertheless, held that the scheme was fair and approved it.

In *Re Holders Investment Trust Ltd.*,<sup>77</sup> Megarry J. was confronted with similar facts. There was clear evidence that the owner of 90 percent of the preferred shares and of 52 percent of the common shares had voted his preferreds in favour of a proposed reduction scheme because of the favourable effect it was likely to have on the value of the *common* shares. Megarry J. held that:

---

<sup>72</sup> See for example *Re Cablecasting*, February, 1978 O.S.C.B. 37 (going private transaction). See also *Ferguson v. Imax Corporation*, *infra*, notes 227-28 and accompanying text.

<sup>73</sup> See generally Gower, *supra*, note 40 at ch. 27.

<sup>74</sup> [1937] A.C. 707 (H.L.).

<sup>75</sup> The reduction was part of a plan to simplify the company's capital structure by converting the deferreds into commons at a conversion ratio of four deferreds to one common, which reflected the relative market values of the securities. However, the paid-up capital of the deferreds was one half of the commons, and the reduction was proposed in order to render the ratio of paid-up capital of the deferreds to commons equal to the conversion ratio.

<sup>76</sup> *Ibid.* at 769. Neither of the other two judges commented on this point.

<sup>77</sup> [1971] 1 W.L.R. 583.



... three relevant propositions emerge. First, a reduction of capital which is not in accordance with the class rights is nevertheless regular if it is effectually sanctioned in accordance with the regulations of the company. Second, there is an effectual sanction to the modification of class rights if those holding a sufficient majority of the shares of that class vote in favour of the modification in the bona fide belief that they are acting in the interests of the general body of members of that class. Third, the burden of proof depends on whether or not there is any such sanction. If there is, the court will confirm the reduction unless the opposition proves that it is unfair; if there is not, the court will confirm the reduction only if it proved to be fair.<sup>78</sup>

The *Carruth* and  *HOLDERS* cases do not (at least as yet) represent the dominant philosophy in English law on conflicts of interest. In most reduction cases, the "fairness" hurdle as a substantive test appears to have had little existence independent of the observance of a circumscribed set of class winding-up rights.<sup>79</sup> The *Carruth* and *Holders* cases are, however, representative of a movement which is very slowly gathering force towards a more effective application of an objective fairness test.

Since 1870,<sup>80</sup> another instance where English courts have been called upon to approve a fundamental change — and again without clear guidance as to the substantive standard — is in the case of a statutory arrangement.<sup>81</sup> The standard which the English courts have applied<sup>82</sup> is aptly summarized by Maugham J. in *Re Dorman Long & Company*.<sup>83</sup> Maugham J. held that the duties of the court, when called upon to approve an arrangement, are two-fold. First, to see that "resolutions are passed by the statutory majority in value and number ... at a meeting or meetings duly

---

<sup>78</sup> *Ibid.* at 586. See also *Re Williams & Sons Ltd*, [1969] 1 W.L.R. 146.

<sup>79</sup> See generally Gower, *supra*, note 40 at 27.

<sup>80</sup> See the *Joint Stock Companies Arrangement Act, 1870* (U.K.), 1870, 33 & 34 Vict., c. 104.

<sup>81</sup> The *Companies Act* (U.K.), 1985, c. 6, s. 425 (formerly the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 206) simply allows the scheme of arrangement to go forward "if sanctioned by the court," provided the requisite class approvals are secured.

<sup>82</sup> The test can be traced back to *Re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213 at 247; see also *Re English, Scottish and Australian Chartered Bank*, *supra*, note 70 at 408.

<sup>83</sup> [1934] Ch. 635.

convened and held;<sup>84</sup> second, "in the nature of a discretionary power" to see "whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."<sup>85</sup> Again, the standard consists of a procedural test coupled with an ostensibly objective fairness test.

In practice, however, the second part of the test has been applied in a largely subjective manner which parallels the experience in cases involving reductions of capital. If adequate disclosure has been made to shareholders, and all requisite super-majorities secured, then the English courts have tended to regard this as a virtual certification of the fairness of the scheme.<sup>86</sup> As in other contexts, the courts have generally not been sensitive to conflicts of interest. But, there are some notable exceptions. In *Sovereign Life Assurance Company v. Dodd*,<sup>87</sup> a life insurance company proposed a scheme of arrangement<sup>88</sup> which required the approval of policy holders. All policy holders, including those holding matured and unmatured policies, voted on the resolution as a single class, and the resolution passed by the required majority. The court found that the vote was ineffective, given that policy holders holding matured policies (of which the plaintiff was one) had a sufficiently different interest in the outcome as to require a separate vote as a "class". In giving judgment for the plaintiff, Bowen L.J. commented:

It seems plain that we must give such a meaning to the term "class" as will prevent the section being worked so as to result in confiscation and injustice, and that it must be confined to persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.<sup>89</sup>

---

<sup>84</sup> *Ibid.* at 655.

<sup>85</sup> *Ibid.* at 657.

<sup>86</sup> As Gower puts it, the English courts have tended to "take refuge in the facile but fatal rule" of Lord Lindley in the *Re English* case (*supra*, note 70 and accompanying text). Gower, *supra*, note 40 at 712.

<sup>87</sup> [1892] 2 Q.B. 573 (C.A.).

<sup>88</sup> Under the *Joint Stock Companies Arrangement Act, 1870* (U.K.), 33 & 34 Vict., c. 104.

<sup>89</sup> *Supra*, note 87 at 583. Noting that the provision bound all dissentients, Bowen, L.J. commented that the provision "exercises the most formidable compulsion upon dissentient, or would be dissentient creditors..." and must be "construed with care" so as not to make "a mere

Of similar effect is the much more recent case of *Re Hellenic & General Trust Limited*.<sup>90</sup>

The holdings of the *Sovereign* and *Re Hellenic* cases express a broader principle: that a true certification of fairness must be rendered by a majority of the *disinterested* shareholders who stand to gain no special benefits as a result of the transaction.<sup>91</sup> These cases stand on a similar footing to the *Re Holders* case which, in the face of cross-holdings of shares giving rise to shareholder conflicts of interest, shifted the burden of proof in demonstrating the fairness of the reduction to the company. As in the case of reductions, however, the *Sovereign* and *Re Hellenic* holdings represent only a germinating trend rather than a dominating influence.<sup>92</sup> In general, the English courts have tended to prefer procedural devices for the protection of minority shareholders, and have shied away from engaging in a truly effective objective review of the business purpose or fairness of the transaction. This has been true even where the courts have purported to engage in objective review of the transaction.

---

jest of the interests of the minority." See also the judgment of Lord Esher, M.R., at 580. An arrangement case decided a year earlier, *Re Alabama, New Orleans, Texas and Pacific Junction Ry. Co*, *supra*, note 82 at 239, 240, 244, also expressed misgivings about the value of a class vote in a case where there appeared to be significant cross-holdings of securities, but stopped short of holding the vote vitiated by the existence of the cross-holdings. See also the Canadian cases *Re National Grocers Company*, [1938] O.R. 142 at 148; *Re Dairy Corporation of Canada*, [1934] O.R. 436.

<sup>90</sup> [1975] 3 All E.R. 382, [1976] 1 W.L.R. 123. See also *Re United Provident Assurance Company*, [1910] 2 Ch. 477 (another arrangement case whose holding is substantially identical to the *Dodd* and *Re Hellenic* cases); *Re NFU Development Trust Ltd*, [1973] 1 All E.R. 135 (Ch.D.) (an arrangement under s. 206 of the *Companies Act, 1948* (U.K.), involving a farmer's cooperative, in which the court declined to accept the reasons put forward for the arrangement and found that it was unreasonable and confiscatory).

<sup>91</sup> Additionally, *Re Hellenic* appears implicitly to define "fairness" in a broad fashion to include more than simply fairness as to price, and possibly extending to a consideration of the *expectations* of particular minority shareholders. See *supra*, note 90.

<sup>92</sup> Compare the Australian cases *Re Jax Marine Pty. Ltd*, [1967] 1 N.S.W.R. 145 at 148 (all the unsecured creditors of the company were allowed to vote together, even though they included the company's sole beneficial shareholder); *Re Landmark Corporation*, [1968] 1 N.S.W.R. 759 (seven subsidiaries of the company were allowed to vote as unsecured creditors; the scheme of arrangement, however, was not approved by the Court in view of an overwhelming vote of the external creditors against the arrangement).

Yet another context in which deference to majoritarianism has dominated in the English courts has been in compulsory acquisitions. Where, on a takeover bid, a purchaser acquires 90 percent or more of the shares subject to the bid, he may force the reluctant minority out of the company on the same terms offered to the other shareholders.<sup>93</sup> A dissenter may apply to a court, which has the power to "order otherwise" so that the compulsory acquisition not proceed.

The signal case in determining when the court will "order otherwise" is *Re Hoare & Co. Ltd.*,<sup>94</sup> in which Maugham J. held that:

prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned.<sup>95</sup>

In *Re Sussex Brick Co.*,<sup>96</sup> Vaisey J. went so far as to say that the court would not "order otherwise" unless the applicant demonstrated the terms of the offer to be "obviously unfair, patently unfair, unfair to the meanest intelligence."<sup>97</sup>

Further, the English courts have ruled that the dissenter has no right of discovery against the company to test the fairness of the terms offered,<sup>98</sup> and a failure to make full disclosure to shareholders is not a ground for relief.<sup>99</sup> Thus, ordinarily, the burden of proof on the dissenting shareholder is an all but insuperable one.

As in the case of reductions of capital and arrangements, however, the courts have not failed entirely to take conflicts of

---

<sup>93</sup> *Companies Act* (U.K.), 1985, c. 6, ss 428-29. The provision was first introduced in the *Companies Act, 1929* (U.K.), 18 & 19 Geo. 5, c. 45, s. 50. It was continued in the *Companies Act, 1929* (U.K.), 19 & 20 Geo. 5, c. 23, s. 155 and the *Companies Act, 1948* (U.K.), 1948, 11 & 12 Geo. 6, c. 38, s. 209.

<sup>94</sup> (1933) 150 L.T. 374.

<sup>95</sup> *Ibid.* at 375.

<sup>96</sup> [1961] Ch. 289.

<sup>97</sup> *Ibid.* at 292.

<sup>98</sup> *Re Press Caps Ltd.*, [1948] 2 All E.R. 638, aff'd without comment on this point by [1949] Ch. 344 (C.A.).

<sup>99</sup> *Re Everite Locknuts Ltd.*, [1945] 1 Ch. 220.

interest into account. In *Re Bugle Press*,<sup>100</sup> there were three shareholders in a private company; two shareholders each held 45 percent of the shares, and the third (the plaintiff) held 10 percent. The two were anxious to get the third out of the company. Having attempted unsuccessfully to purchase the plaintiff's shares, they incorporated a second company which then made a tender offer to all shareholders of the company and which the two accepted. When the third declined to sell, the two purported to enlist the aid of the compulsory acquisition provision as the offer had been accepted by 90 percent of the company's shareholders. On an application by the plaintiff to "order otherwise," Buckley J. in the lower court held that where the acquiror was not truly independent, the onus of proof normally carried by the plaintiff was cast upon the company to show that the offer was "fair." On the facts, he found that the onus had not been discharged, and therefore, made an order in favour of the plaintiff.

In the Court of Appeal, Evershed M.R. proceeded upon a slightly different ground. His Lordship held that it was always up to the plaintiff to establish that the court should order otherwise. But where the minority shareholder shows that the offeror and the 90 percent acceptors are the same, "then it seems to me he has, *prima facie*, shown that the court ought otherwise to order," since this amounts to an eviction or expropriation by the company.<sup>101</sup> The company must then show "that there was some good reason in the interests of the company" for the expropriation — for example, a minority seeking to destroy the company.<sup>102</sup> In practical terms, this amounts to the casting of a tactical burden of proof on the company. The court, however, failed to make it clear exactly what is expected of the company in discharging the burden of proof, or what degree of conflict of interest will be sufficient to invoke the

---

<sup>100</sup> [1960] 1 All E.R. 768, aff'd [1961] 1 Ch. 270 (C.A.).

<sup>101</sup> *Ibid.* at 287.

<sup>102</sup> *Ibid.*

burden shifting rule.<sup>103</sup> What is clear is that the case falls short of enunciating a true "majority of the minority" test, for the statutory requirement to secure 90 percent approval may still be satisfied by counting the "votes" of interested shareholders.<sup>104</sup>

Generally, compulsory acquisitions present a far stronger case for deference to majoritarianism than fundamental changes which are initiated from *within* the corporation by non-arm's length parties.<sup>105</sup> Acceptance by 90 percent of the offeree shareholders is a strong indication of the fairness of the acquiror's offer. Thus, the deference to majoritarianism must be seen in a different light than in the case of a non-arm's length transaction initiated by insiders.

Where the compulsory acquisition provisions are enlisted by those not at arm's length with the corporation, there is a clear danger that the transaction will be engineered opportunistically by majority or controlling shareholders to effect a redistribution of wealth away from minority shareholders. The burden-shifting accomplished by *Re Bugle* is clearly a response to this danger. Whether it is necessary to go further and impose a requirement that the transaction be approved by a majority of the minority of shareholders is a controversial matter which I explore in greater detail elsewhere.<sup>106</sup>

---

<sup>103</sup> Per Lord Evershed, M.R., "it seems plain to me that what the section is directed to is a case where...the offeror is independent of the shareholders in the transferor [target] company, or at least independent of that part or fraction of them from which the 90 percent is to be derived." *Ibid.* at 28. Whether something less than *de jure* or *de facto* control would constitute independence is not clear.

<sup>104</sup> The provision of the *Companies Act, 1948* (U.K.), 1948, 11 & 12 Geo. 6, c. 38, s. 209, which the majority shareholders wished to take advantage of, excluded from the requisite 90 percent any shares "held at the date of the offer by, or by a nominee for, the transferee [acquiror] company or its subsidiary." The provision is continued by the *Companies Act* (U.K.), 1985, c. 6, s. 428. This is the beginning of a true "majority of the minority" test. See MacIntosh, "Shareholder Voting in Canada" (forthcoming). The Courts in the *Re Bugle* case appear to have proceeded on the assumption that, because a corporation is in law a separate legal entity from its shareholders, it is not a "nominee" of its incorporators. This conceptualistic approach forced the court to find another device in order to give relief to the minority shareholders.

<sup>105</sup> On the potential difficulties caused by the asymmetrical possession of information by insiders and outside public shareholders, see MacIntosh, *supra*, note 1.

<sup>106</sup> See MacIntosh, "Shareholder Voting in Canada" (forthcoming).

Another context in which the English courts have been called upon to pass judgment on fundamental changes is in the context of applications by dissenters to annul a variation of the memorandum of the company<sup>107</sup> or the terms of outstanding securities.<sup>108</sup> For an application to annul an amendment to the terms of outstanding securities to succeed, the legislation states that the court must be satisfied that the proposed amendment "would unfairly prejudice the shareholders of the class represented by the applicant."<sup>109</sup> There are only two cases decided under this section, and in both the application was dismissed on the ground of failure to amass the requisite 15 percent of dissenting shareholders.<sup>110</sup> For alterations to the memorandum, there is no substantive standard indicated in the provision,<sup>111</sup> and there are no reported cases. The absence of cases arising under these sections may indicate the inadequacy of these provisions as a shareholder protection, due to the difficulties of securing collective shareholder action.

Surveying these cases where the English courts have been called upon to approve a fundamental change, a reasonably clear pattern emerges. The courts have exercised their powers of approval in ways which ensure that the requisite procedures set out in the governing legislation are closely observed. This has often (though not always) included ensuring reasonably full disclosure to shareholders of the effects of a proposed fundamental change. The courts have, in some contexts (as in the case of reductions and arrangements), also enunciated what at first sight appear to be criteria which allow the court to engage in an objective review of

---

<sup>107</sup> *Companies Act* (U.K.), 1985, c. 6, ss 4-6, 17. The provisions were first introduced in the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, ss 5, 23.

<sup>108</sup> *Companies Act* (U.K.), 1985, c. 6, s. 127 (formerly *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 72).

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

<sup>110</sup> *Re Suburban Stores Ltd*, [1943] Ch. 156 (C.A.); *Re Sound City Films Ltd*, [1947] Ch. 169.

<sup>111</sup> The court may "make an order confirming the alteration either wholly or in part and on such terms and conditions as it thinks fit," and is also empowered to make an arrangement for the purchase of the interests of dissentient members. *Companies Act* (U.K.), 1985, c. 6, ss 5(4), 5(5), 17 (formerly *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, ss 5(4), 23).

the merits and fairness of the scheme under consideration. However, these tests have in the greater number of cases been applied subjectively by asking only whether or not the requisite majority or majorities have, with adequate information, approved the scheme. If so, court approval is almost always forthcoming. Conflicts of interest, which might cast some doubt upon the wisdom of relying on majority sanction, have only occasionally been instrumental in prompting judicial disapproval.

There is, however, a body of cases spanning the different types of fundamental changes which make serious efforts to protect minority shareholders from the opportunistic behavior of shareholding majorities in positions of a conflict of interest. Where a conflict has arisen, some English courts (as, for example, in *Re Holders* and *Re Bugle*) have reversed the burden of proof, such that those seeking to uphold the scheme carry a burden (of uncertain dimensions, and possibly extending beyond a duty to show a "fair price") of showing that the scheme is fair or to demonstrate *some* business purpose. In a very few cases (for example, *Sovereign Life Assurance* and *Re Hellenic*), a "majority of the minority" test has been adopted so that those shareholders in a conflict position are excluded from being counted in the requisite class vote.

Federal and Ontario legislation, in contrast to the English, historically relied on the device of administrative approval for the protection of shareholders.<sup>112</sup> Nevertheless, the English arrangement provisions were copied in the federal and Ontario legislation (as well as in the Canadian "memorandum" jurisdictions), including the requirement for court approval. In the federal and Ontario legislation, this was in addition to the requirement for administrative approval.<sup>113</sup> The arrangement provisions were a popular resort of companies undergoing many types of reorganizations at least through the first half of this century.

---

<sup>112</sup> For example, many of the mechanisms indicated in note 6, *supra*, for effecting fundamental changes were conditional upon securing supplementary letters patent issued at the discretion of officials overseeing the administration of the incorporating legislation.

<sup>113</sup> The federal arrangement provisions date from 1923, enacted by 13-14 Geo. V, c. 39. The Ontario provisions date from 1928, enacted by 18 Geo. V, c. 32, s. 7.



The Canadian courts purported to follow the English courts' substantive standard for court approval of arrangements.<sup>114</sup> However, a number of Canadian decisions emanating from the 1930s to the 1950s provide a startling contrast to the English cases as well as a striking departure from the deference to majority approval characteristic of this era. A number of these cases refuse to sanction schemes of arrangement even in the face of overwhelming shareholder approval, usually with the declared purpose of protecting preferred shareholders. In *Re Second Standard Royalties*,<sup>115</sup> a scheme of arrangement was proposed to eliminate a sinking fund feature attached to the company's preferred shares, and to allow for redemption, purportedly as a response to an anticipated decrease in revenues. The redemption feature failed to provide for proportionate treatment of all shareholders in all circumstances. In spite of approval of the arrangement by 93 percent of the preferred shareholders and 95 percent of common shareholders voting on the arrangement, the court refused to sanction the scheme, holding that "the proposed arrangement is so drastic in its destruction of the sinking fund and places such absolute power in the hands of those who control the company to redeem whose stock they please, as to make it a violation of the rights of the minority."<sup>116</sup>

In another case decided under the federal legislation, *In Re Canadian Cottons Ltd*,<sup>117</sup> a scheme was proposed under which voting but non-cumulative preferred shares (which, as a class, controlled the company by virtue of carrying a majority of votes) would exchange their voting privilege in return for a higher, and cumulative

---

<sup>114</sup> See for example, *Re Audax Gas & Oil Ltd* (1985), 42 Alta L.R. 353 (Q.B.); *Re Canadian Cottons Ltd*, [1952] Que. S.C. 726; *Re Brazilian Traction Light and Power Company*, [1947] O.R. 791; *Re Langley's Ltd*, [1938] O.R. 123; *Re Provincial Apartments Ltd*, [1936] 3 W.W.R. 327 (Sask. K.B.); *Re Canada Bread Company*, [1935] O.W.N. 429 (H.C.); *Re Western Grocers Ltd*, [1936] 2 D.L.R. 762 (Man. K.B.); *Re Dairy Corp. of Canada* (1934), O.R. 436; *Re Second Standard Royalties Ltd* (1930), 66 O.L.R. 288.

<sup>115</sup> (1930), 66 O.L.R. 288.

<sup>116</sup> *Ibid.* at 303.

<sup>117</sup> [1952] Que. S.C. 276.

dividend, with an increased redemption price.<sup>118</sup> The justification advanced for the scheme by the company was a desire to achieve flexibility in raising new capital. The claim was made that the existing capital structure, with two voting constituencies, made it difficult or impossible to secure the necessary class approvals to raise new equity capital.<sup>119</sup> It is not clear from the decision what majority of preferred shareholders approved the arrangement; however, out of 165,000 preferred shares in total, shareholders holding only 1,375 shares (less than 1 percent) either registered an objection to the scheme or voted against it. The common shareholders approved the scheme unanimously. Further, a number of institutional preferred shareholders made representations favouring the scheme. Nonetheless, the court refused to sanction the arrangement. Mr. Justice Collins noted that since the directors of the company held 44 percent of the voting commons, stripping the preferreds of their vote would result in transferring undisputed control of the company to the directors.<sup>120</sup> Rejecting the "flexibility" rationale, the court could find no "necessity"<sup>121</sup> for stripping the preferreds of their vote. Characterizing the scheme as an "unjust deprivation of ... voting rights,"<sup>122</sup> Mr. Justice Collins found that the transfer of control formed the "ulterior motive" for the scheme.<sup>123</sup>

---

<sup>118</sup> The dividend would have increased from 6 percent to 7 percent, and the redemption price by five dollars. In addition to losing the right to vote, the preferreds would have had a right to elect only one director, as compared to three directors before the arrangement.

<sup>119</sup> There may indeed be good reasons for preferring one voting constituency to two. See Easterbrook & Fischel, "Voting in Corporate Law" (1983) 26 J. L. & Econ. 395.

<sup>120</sup> The president of the company, from whom the scheme originated, held 31 percent of the common shares.

<sup>121</sup> Compare *Re Western Grocers Ltd*, *supra*, note 114 at 771, declining to approve a scheme of arrangement on the ground that there was a "total absence of any necessity" for the addition of a redemption feature to the preferred shares.

<sup>122</sup> *Supra*, note 117 at 283.

<sup>123</sup> In a passage which will not shock the contemporary intellect, but which is quite extraordinary given the strongly majoritarian temper of the times, the court said that, on an arrangement:

the sanction of the Court is to ensure that the whole Scheme is fully aired in public and that the rights of all shareholders, minority as well as majority, will be fully considered, even the rights of those who are not vocal in their approval or disapproval. The owner of the shares in a company has proportionately exactly the

The holdings in *Second Standard* and *Canadian Cottons* represent more than merely a vigorous application of the objective fairness test enunciated in *Re Dorman Long*. Although one might question the certificatory force of shareholder approval owing to management control of the proxy machinery and "rationale shareholder apathy,"<sup>124</sup> these cases, in their almost cavalier disregard of overwhelming shareholder approvals, evince an extraordinary and excessive degree of paternalism. In *Canadian Cottons*, for example, the court very simply appears to have thought it imprudent and unwise for the preferred shareholders to have agreed to trade away the right to vote. In the words of Mr. Justice Collins:

It does seem to the Court, in view of the many sad experiences of the years of the Thirties, that it has been demonstrated on many occasions that the voting rights of preferred shareholders are not only important but vital in many cases for the security of their investment in a company and their dividends.<sup>125</sup>

The paternalistic stance of these cases is echoed in a number of other Canadian arrangement cases from the same period.<sup>126</sup>

same rights as the owner of a large number.... The court appreciates that a small shareholder cannot afford to contest any such scheme in Court, no matter how sound may be his objections to it because of the large costs involved, whether his contestation be won or lost.

*Ibid.* at 291. Compare the comments of Cory J.A. in *Sparling v. Royal Trustco* (1984), 1 O.A.C. 279, 6 D.L.R. (4th) 682 (C.A.).

<sup>124</sup> On the incentive problems facing shareholders, see generally Easterbrook & Fischel, *supra*, note 119; Clark, "Vote Buying and Corporate Law" (1979) 29 Case W. Res. L. Rev. 776; Manne, "Some Theoretical Aspects of Share Voting" (1964) 64 Colum. L. Rev. 1427.

<sup>125</sup> *Supra*, note 117 at 285. See also 286.

<sup>126</sup> In *Re Provincial Apartments*, [1936] 3 W.W.R. 327 (Sask. K.B.), preferred shares with accumulated arrears of dividends were to be replaced by a combination of bonds and common shares. Although there was no *a priori* reason to believe such an arrangement to be unfair to the preferreds, the court held the scheme to be a "confiscation of some of the property of the preferred class, as making the preferred class victims that the holders of common shares may 'feast on their rights.'" *Ibid.* at 332 (quoting from *In Re Alabama, New Orleans, Texas & Pacific Ry. Co.*, [1891] 1 Ch. 213 (C.A.)). Similarly, in *Re Dairy Corp. of Canada*, [1934] O.R. 436, the arrangement called for the conversion of preferreds into commons, making a compensatory adjustment for the loss of preference in determining the number of shares to be exchanged. The Court found the scheme not fair or reasonable, because it would "debase and degrade the preference stock and reduce it to the rank of common stock.... Before any scheme such as this could receive judicial sanction, it must be made very plainly to appear that there was practical unanimity." *Ibid.* at 441. As long as the conversion ratio is fair to the preferreds (that is to say, confers adequate compensation for loss of the

However, another body of Canadian arrangement cases eschew excessive paternalism in favour of a more restrained sensitivity to balancing majority and minority shareholder rights in face of shareholder conflicts of interest. These cases refuse to confirm arrangements in view of conflicts of interest arising from cross-holdings of different classes of shares. In *Re National Grocers*,<sup>127</sup> a proposed scheme of arrangement which aimed at replacing preferred shares carrying accumulated arrears of dividends with common stock was approved by over 90 percent of the preferreds and 87 percent of the commons voting on the arrangement. However, 180,000 of 296,000 issued common shares were held by shareholders who also held 25,000 of the 29,000 issued preferred shares. Following the judgment of Lord Maugham in the *Carruth* case,<sup>128</sup> the court declined to attribute any weight to the majority approvals due to the significant cross-holdings, and ultimately found the scheme to be unfair to the common shareholders because of the dilution of their interest.<sup>129</sup>

More recently, the Ontario courts have held that the arrangement provisions may be used to effect consolidation

---

preference), it is difficult to see why the abandonment of a preference should be *per se* unfair. A better reason for refusing to sanction the scheme lay in the fact that a subsidiary corporation held a significant block of shares in the parent company undergoing the arrangement. See *infra*, note 129.

<sup>127</sup> *Supra*, note 114.

<sup>128</sup> See *supra*, note 74 and accompanying text.

<sup>129</sup> The Court also found that insufficient information had reached shareholders, and that an improper form of proxy had been used. See also *Re St. Lawrence Corp. and Mayr* [1948] 2 D.L.R. 107 (Que. S.C.), in which there were significant cross-holdings. The court held that given the large common shareholdings and relatively trivial preferred shareholdings of some shareholders, "the legal majority [of preferreds] was not voted in the interests of the class of preferred shareholders" and found that the scheme was in the sole interest of common shareholders and hence unfair. See also *Re Dairy Corp. of Canada, supra*, note 126 at 441. On a proposed arrangement concerning a parent company, shares of the parent which were voted by a subsidiary, in the words of the Court, "controlled the situation." The Court held that "[m]anifestly this is against the policy of the Act which requires the vote of three-fourths of the individual shares held by the classes affected." More recently, see *Re Canadian Hidrogas Resources Ltd* (1979), 8 B.L.R. 104 (B.C.S.C.). But compare *Re Brazilian Traction Light and Power Company*, [1947] O.R. 791 at 800.

freezeouts.<sup>130</sup> However, holdings under the arrangement provisions have continued to be a source of potentially leading-edge developments in the law of corporations. In *Re Ripley International*,<sup>131</sup> the court put the burden of proof on the applicant company to show to the court's satisfaction that the proposed arrangement was fair and reasonable. Of perhaps even greater significance, the court held that before the freezeout would be approved as fair and reasonable, the cashed-out shareholders would have to receive their pro-rata portion of the anticipated synergy of the going-private transaction.<sup>132</sup> The Newfoundland Supreme Court in *Re Standard Manufacturing Company and Baird*,<sup>133</sup> adopted the principle in the *Sovereign* case by holding that where a proposed arrangement "will affect the rights of shareholders in different ways"<sup>134</sup> the differently affected shares must vote as a "class"<sup>135</sup> to approve the arrangement.<sup>136</sup>

As under the English legislation, Canadian courts have been called upon to give an advance approval to compulsory acquisitions. A compulsory acquisition provision was adopted in the federal legislation in 1934,<sup>137</sup> but not until 1982 in Ontario.<sup>138</sup> The early federal legislation (and other Canadian legislation following the

---

<sup>130</sup> *Re P.L. Robertson Manufacturing Co.* (1974), 7 O.R. (2d) 98 (H.C.); *Re Ripley International Ltd* (1977), 1 B.L.R. 269 (Ont. H.C.).

<sup>131</sup> *Ibid.*

<sup>132</sup> Whether or not minority shareholders *ought* to be so entitled is a highly controversial issue. See generally Easterbrook & Fischel, "Corporate Control Transactions" (1982) 91 Yale L.J. 698; MacIntosh, *supra*, note 1.

<sup>133</sup> (1984), 5 D.L.R. (4th) 697 (N.S.T.C.D.).

<sup>134</sup> *Ibid.* at 700.

<sup>135</sup> The Court also invoked the rule in *Allen's* case. See *infra*, Part V (C).

<sup>136</sup> However, failure to make full disclosure to shareholders of the terms of the arrangement may not vitiate shareholder approval if the terms of the arrangement are fair and reasonable: see *Re Tip Top Cannery Ltd*, [1973] 1 O.R. (2d) 626 (H.C.).

<sup>137</sup> *Companies Act, 1934*, 24-25 Geo. 5, c. 33, s. 124.

<sup>138</sup> *Business Corporations Act, 1982*, S.O. 1982, c. 4, s. 187.

English model)<sup>139</sup> allowed a court, on the application of a dissenting shareholder, to "order otherwise" and prevent the compulsory acquisition from proceeding. The Canadian courts, as with the arrangement provisions, generally interpreted these provisions very strictly in favour of minority shareholders – more strictly than in England or other Commonwealth jurisdictions.<sup>140</sup> Thus, for example, in *Re John Labatt and Lucky Lager Breweries Ltd*,<sup>141</sup> the court went out of its way to find a minor technical error in the company's notice sent to shareholders – posing no threat of prejudicing the dissenting shareholders – to derail the application for compulsory acquisition. Other Canadian courts have taken a similar approach,<sup>142</sup> pointing to the provision's expropriatory nature and the "radical departure from the common law rights of shareholders."<sup>143</sup>

I have already suggested that the case for judicial oversight of compulsory acquisitions undertaken by initially arm's length bidders is not nearly as compelling as in transactions initiated by non-arm's length insiders.<sup>144</sup> The rigid and technically oriented attitude of Canadian courts when faced with requests to approve

---

<sup>139</sup> See McNamara, "Note on Compulsory Acquisition of Shares" (1971) 10 U.W.O.L. Rev. 141 at 146; Flisfeder, "Compulsory Acquisition of the Interest of a Dissenting Minority Shareholder" (1973) 11 Alta L. Rev. 87 at 91.

<sup>140</sup> See Flisfeder, *ibid.* at 96; McNamara, *ibid.*; Chertkow, "Compulsory Acquisition of Shares Under Section 199 of the Canada Business Corporations Act and *Re Whitehorse Copper Mines Ltd: An Offer You Can Refuse*" (1982-83) 7 Can. Bus. L.J. 154.

<sup>141</sup> (1959), 29 W.W.R. 323 (B.C.S.C.).

<sup>142</sup> See for example *Rathie v. Montreal Trust Co*, [1953] 2 S.C.R. 204, [1953] 4 D.L.R. 289; *Re Waterous and Koehring-Waterous Ltd*, [1954] 4 D.L.R. 839 (Ont. C.A.); *Re Canadian Business*, [1964] C.S. 600 (Que. S.C.); *Royal Trust Co v. Campeau Corp* (No. 1) (1980), 31 O.R. (2d) 130, 118 D.L.R. (3d) 271, 11 B.L.R. 288 (Ont.C.A.). But compare the relatively liberal approach in *Re Dad's Cookie Co* (1969), 7 D.L.R. (3d) 243. See also the English cases of *Re Western Manufacturing (Reading) Ltd*, [1956] 1 Ch. 437; *Blue Metal Industries Ltd v. Dilley*, [1969] 3 All E.R. 437 (P.C.).

<sup>143</sup> *Re Shopper's City Ltd and M. Loeb Ltd*, [1969] 1 O.R. 449 at 451 (H.C.). The current federal and Ontario provisions allow for the dissenter to apply to a court to fix an appraised value of his shares, but have removed the power of the court to order that the compulsory acquisition not proceed. *CBCA* s. 206; *OBCA* s. 187. Recent developments are reviewed in Chertkow, *supra*, note 140.

<sup>144</sup> See *supra*, notes 105-06 and accompanying text.

schemes of compulsory acquisition arises more from a visceral reaction to an event of expropriation than from a reasoned analysis of the potential for harm.

The arrangement and compulsory acquisition cases illustrate an important difference between the English and Canadian law of corporations. Canadian drafters, administrators, and courts have seemed willing to invade the corporate domain to a greater extent than in England to protect minority shareholders. These interventions have occasionally smacked of an overbearing paternalism, in cases where an overwhelming majority of *both* interested *and* disinterested (fully informed) shareholders have stamped the transaction with their seal of approval.

The English and Canadian cases also illustrate some of the pitfalls of judicial approval of fundamental changes. For good reason, a court may feel reluctant to review corporate decisions which involve an element of business judgment. This reluctance may lead (as it has on occasion in the English courts) to an excessive judicial deference to decisions taken by shareholding majorities, with the consequence of overlooking shareholder conflicts of interest which lend a redistributive character to the expression of majoritarian will. In quite the opposite fashion, judicial intervention in Canada has occasionally been characterized by an excessively interventionist spirit.

If *ex ante* judicial approval is desirable, then it is best to confine the role of the courts rather narrowly. The courts are capable of ensuring that all requisite procedures have been complied with, including obtaining all shareholder approvals required to proceed with the transaction. The courts can also ensure that all relevant information has been given to shareholders. In addition, the courts might also play a role in policing for conflicts of interest. They can exclude shareholders who stand to gain special benefits from the transaction or whose interests are not aligned with other shareholders, from participating in shareholder votes or from being counted for the purposes of constituting requisite statutory majorities.<sup>145</sup> Outside of these roles, the courts should not tread

---

<sup>145</sup> The case is not entirely open and shut. For further discussion of the "majority of the minority" principle (and of some of its drawbacks) see MacIntosh, "Shareholder Voting in Canada" (forthcoming).

hastily. As the cases amply illustrate, broadly constructed objective fairness standards are liable either to be interpreted so liberally as to constitute no test at all, or to lead the courts into matters of business judgment in which they have no expertise.

As has been the case in the federal and Ontario legislation (with a very few exceptions), avoiding *ex ante* requirements for judicial approval is the superior course except where the fundamental change cannot be consummated without the supervision of a court.<sup>146</sup> Such requirements inevitably delay the undertaking of a fundamental change, and this delay may prove fatal to many productive fundamental changes. Moreover, the judicial procedure is a costly one, consuming both private and public resources. These costs are amplified by the invitation which such requirements create for constituencies of shareholders to use the approval process to redefine the transaction in their favour.

## V. JUDICIAL PROTECTION: SHAREHOLDER RIGHTS OF A FIDUCIARY CHARACTER

### A. Introduction

Another technique for the protection of shareholders on fundamental changes (and otherwise) is the formulation of fiduciary standards of conduct (or duties of a fiduciary character, as supplied by the oppression remedy). These rules may be of either a "liability" or a "property" character giving rise respectively to a claim for damages or a power to prevent or unwind the transaction.<sup>147</sup> These standards may be applied to the conduct of directors, officers, and shareholders. They may be invoked either by shareholders or by others (for example, administrative officials) empowered to act on their behalf. Indeed, as the *Canadian Tire*<sup>148</sup> holding makes clear, fiduciary standards of conduct may be applied by securities regulators

---

<sup>146</sup> See for example the current federal arrangement provision. *CBCA* s. 192.

<sup>147</sup> See Calabresi & Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 *Harv. L. Rev.* 1089.

<sup>148</sup> See *infra*, note 220 and accompanying text.



acting under the broad discretionary powers given them under provincial securities legislation.<sup>149</sup>

Since I have chosen to focus on the relations between majority and minority shareholders, the purview of this section is restricted to rules relating to the conduct of *shareholders*.

The substance of rules of a fiduciary character, in the past, has been, as with court approval of fundamental changes, flavoured by a marked and in many cases unreasoned deference to the expressed will of a majority of shareholders. This has been true even where majority shareholder approval has been given in spite of a conflict of interest or where the majority has, in effect, ratified its own misconduct. One result of this deference to the principle of majoritarianism is that a good deal of opportunistic behavior disadvantaging minority shareholders has been ignored.

However, as in other contexts, this deference to majoritarianism has been eroded over time. It has yielded to a greater sensitivity to shareholder conflicts of interest and a greater willingness to rely on shareholder expectations in interpreting the scope of the financial contract. There has been (at least until very recently) a less visible departure between the substance and effect of the doctrines as applied by Canadian and English courts than with *ex ante* judicial oversight.

## B. *The Currents of Majoritarianism*

The wellspring of the principle of majoritarianism in company law is undoubtedly the 1843 decision in *Foss v. Harbottle*.<sup>150</sup> In that case it was held that for any wrong done to the company, the decision to undertake an action was a matter reserved for a majority of shareholders. Thus, an individual shareholder could not sue for

---

<sup>149</sup> Despite avowals to the contrary, it seems clear that the Ontario Securities Commission applied fiduciary standards of conduct in reaching its decision in *Canadian Tire*. See *infra*, note 220 and accompanying text.

<sup>150</sup> (1843), 2 Hare 461, 67 E.R. 189. See also *Mozley v. Alston* (1847), 1 Ph. 790. This rule is said to have derived from partnership principles. See for example, Mackinnon, "The Protection of Dissenting Shareholders," in Ziegel, ed., *Studies in Canadian Company Law*, vol. 1 at 507; Beck, "An Analysis of *Foss v. Harbottle*," in Ziegel, *ibid.* at 545 [hereinafter "Analysis"].

a wrong done *to the corporation* if a majority of shareholders *had* ratified the wrong, or simply *could* ratify the wrong (whether or not such ratification had actually occurred). The holding suggests that the will of the majority of shareholders is absolute within the sphere in which shareholders are competent to act.<sup>151</sup>

The decision is not only a rule about the decision-making structure of the corporation and the relative positions of majority and minority; it is also a statement of the jurisdictional limits of judicial intervention in corporate affairs. Thus, according to Lord Davey in *Burland v. Earle*, "it is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so."<sup>152</sup>

The rule can be justified on a number of grounds: the prevention of a multiplicity of shareholder actions; the avoidance of futile litigation (where an individual shareholder suit is derailed by subsequent shareholder ratification); or the impropriety of judicial interference in business or investment judgments and which properly are within the province of shareholders to decide.<sup>153</sup> However, this ostensibly procedural rule is clearly not without substantive effect: it creates a significant danger (particularly where the directors are majority or controlling shareholders) of the diversion of corporate resources by majority shareholders without minority shareholder redress. The obvious dangers of the rule in *Foss v. Harbottle* generated exceptions to the rule. One of these exceptions was more or less mechanical in its application: an individual shareholder could sue on matters requiring the assent of some special majority of shareholders.<sup>154</sup> A second exception allowed a shareholder to sue to restrain an act *ultra vires* the corporation.<sup>155</sup> Two other exceptions were anything but mechanical: a shareholder could sue

---

<sup>151</sup> Absent "fraudulent" or "oppressive" conduct. See *infra*.

<sup>152</sup> [1902] A.C. 83 at 93 (P.C.). The cases cited for this proposition are *Foss* and *Mozley*, *supra*, note 150.

<sup>153</sup> See generally Beck, "Analysis," *supra*, note 150.

<sup>154</sup> See for example, *Baillie v. Oriental Telephone Co*, [1915] 1 Ch. 503 (C.A.).

<sup>155</sup> See for example *Simpson v. Westminster Palace Hotel Co* (1860), 8 H.L.C. 712.

for a "fraud on the minority" of shareholders (where the wrongdoers were in control) or for those harms which were a wrong to the shareholder *personally*, rather than *derivatively*.<sup>156</sup> The exceptions to the rule are tied together by a common thread; a simple majority of shareholders could not ratify the wrong. The exceptions are, in a sense, the obverse of matters essentially relating to the internal management of the company. If, for example, a corporate act constituted a fraud on the minority, it could not be said to constitute merely a matter of internal management to be resolved according to the will of a majority of shareholders.

As noted by a number of commentators,<sup>157</sup> the substance of what constituted a "fraud on the minority" was limited essentially to appropriation of corporate assets<sup>158</sup> or the grossest sort of overreaching by majority shareholders.<sup>159</sup> As the famous case of *Northwest Transportation Co. v. Beatty*<sup>160</sup> made clear, a mere conflict

---

<sup>156</sup> On the exceptions to the rule in *Foss v. Harbottle*, see *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (C.A.); *Daniels v. Daniels*, [1978] Ch. 406 at 408. It may be that there is a further exception to the rule in *Foss v. Harbottle*; the so-called "justice of the case" exception. The existence of this exception has never been definitively affirmed, however. See for example *Prudential Assurance Co v. Newman Industries Ltd* (No. 2), [1982] 1 All E.R. 354 (C.A.); *Eastmanco (Kilner House) Ltd v. London Greater Council*, [1982] 1 All E.R. 437 (Ch.D.); *Schiowitz v. M.O.S. Ltd* (1971), 23 D.L.R. (3d) 102 (N.B.C.A.). See generally, Gower, *supra*, note 40 at 644-56, and Beck, "Analysis," *supra*, note 150 at 560-96.

<sup>157</sup> See Beck, "Analysis," *supra*, note 150; Beck, "The Shareholders' Derivative Action" (1974) 52 Can. Bar Rev. 159; Wedderburn, "Shareholders' Rights and the Rule in *Foss v. Harbottle*" [1957] Cambridge L.J. 194.

<sup>158</sup> See for example *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. App. 350.

<sup>159</sup> See for example *Cook v. Deeks*, [1916] 1 A.C. 554 (P.C.).

<sup>160</sup> (1887), 12 App. Cas. 589 (P.C.). A director of the company sold to it a steamship. The director later voted his substantial shareholdings in the company in favour of the acquisition; had these votes not been counted, the shareholder's resolution to approve the acquisition would have failed. The Privy Council, in allowing the ratification to stand, was unmoved by the clear conflict of interest, holding (at 601) that the acquisition was a "pure question of policy...upon which the voice of the majority ought to prevail." The Court was evidently persuaded that the price of the steamer was fair and reasonable, and that the company needed a steamer and could not obtain another equally suitable for its operations. Despite the conflict, the Court left the burden of proof with the plaintiff to show that there had been a fraud on the minority. The Privy Council also expressly rejected the test of approval of the transaction by a majority of disinterested shareholders propounded in an earlier hearing by the Supreme Court of Canada, holding (at 600) that "great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically

of interest was insufficient, by itself, to call the fraud principle into action. What was required was a truly egregious interference with clearly defined minority shareholder rights. The courts adopted the posture that shareholders owed no duties of a fiduciary character — either to the company, or to fellow shareholders.<sup>161</sup>

At least part of the reason for the reluctance to impose fetters on the exercise of majority power appears to have been the nineteenth century conception of the nature of the property interest represented by holding shares in a company. Shares are a species of property. And, as was said by Jessel, M.R. in *Pender v. Lushington*:

where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise.<sup>162</sup>

Therefore, a shareholder might vote as he or she please, though the person is "actuated in giving his vote by interests entirely adverse to the interests of the company as a whole."<sup>163</sup>

For Lord Jessel, the vote which accompanies the share is an inseparable incident of the property entitlement; thus, there must be as few fetters on its exercise as possible. This conclusion is far from inevitable; indeed, it is fundamentally tautological. The unspoken (and unsupported) premise is that once the characterization of "property" has been established, the right must be as nearly absolute as is possible. Reasoning from first principles, it is just as easy to imagine that the voting right accompanying share ownership is impressed with duties of a fiduciary character owed to fellow shareholders or to the company. Lord Jessel's essentially question-begging definition of the nature of the property interest associated with share ownership no doubt had an intuitive appeal to nineteenth

---

nullified, if they also stood in some fiduciary relation to the company." But compare *Cook v. Hinds* (1918), 42 O.L.R. 273, 44 D.L.R. 586.

<sup>161</sup> See for example *Phillips v. Manufacturer's Securities Ltd* (1917), 116 L.T. 209 at 296 (C.A.).

<sup>162</sup> (1877), 6 Ch.D. 70 at 75 (C.A.).

<sup>163</sup> *Ibid.* Compare *Northwest Transportation Co v. Beatty*, *supra*, note 160; and *Burland v. Earle*, *supra*, note 152 at 94.

century jurists more used to dealing with "property" rights as *a priori* constructs than as mere instrumentalities.<sup>164</sup>

The relatively unencumbered spirit of majoritarianism which had gained ascendancy by the turn of the century, invaded all the cracks and recesses of company law, including jurisprudence dealing with corporate fundamental changes.<sup>165</sup> So far as the minority shareholder was concerned, a sort of corporate *caveat emptor* was the rule of the day.

Few passages illustrate the position of the minority shareholder quite so graphically as this quotation from a 1928 judgment of Middleton J.A. in a minority shareholder's winding-up application:<sup>166</sup>

[The plaintiff] is a minority shareholder and must endure the unpleasantness incident to that situation. If he choose to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transactions *ultra vires*, the majority must govern, and there should be no appeal to the Courts for redress.<sup>167</sup>

---

<sup>164</sup> Lord Jessel's characterization also reflects a general tendency in the nineteenth century to make rights as absolute as possible. See Oliver Wendell Holmes, *The Common Law* (Cambridge, Mass: The Belknap Press, 1964).

<sup>165</sup> See for example *Ritchie v. Vermillion Mining Co* (1902), 4 O.L.R. 589 at 594, 596 (C.A.); *Dominion Cotton Mills v. Amyot*, [1912] A.C. 546 (P.C.); *Garvie v. Axmith*, [1962] O.R. 65 (H.C.). But see also *Brown v. Can-Erin Mines Ltd* (1960), 25 D.L.R. (2d) 250 (Ont. H.C.) (finding a fraud on the minority sufficient to upset certain payments made to a company wholly owned by the majority shareholders of the company in question); *Elliott v. Orr Gold Mines Limited* (1920), 17 O.W.N. 447 (sale of mining claims found to constitute a fraud on the minority). See also *Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited (No. 1)*, [1947] O.R. 928 (C.A.); *Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited (No. 2)*, [1947] O.R. 994 (C.A.), discussed *infra*, note 216.

<sup>166</sup> *Re Jury Gold Mine Dev. Co*, [1928] 4 D.L.R. 735 (Ont. C.A.). The Court made it clear, however, that an action by a minority shareholder would lie for misappropriation of assets. See also *United Fuel Investments Ltd* [1962] O.R. 162 (C.A.), *aff'd* (sub nom. *Fallis v. United Fuel Investments Ltd*) (1963), 40 D.L.R. (2d) 1 (S.C.C.), in which the Ontario Court of Appeal suggested (at 180) that:

[t]he shareholders are in effect a domestic tribunal upon which has been conferred the power to decide questions as to the administration of the affairs of the company, and the Court will not substitute its opinion for the decision of such a tribunal unless very strong grounds are shown for doing so.

<sup>167</sup> Occasionally, the courts enunciated a "good faith" limit to majority shareholder action: however, the boundaries of the principle were so severely circumscribed as to render it little different in application from the "fraud on the minority" principle. See, for example, the

Of course, the principle in *Foss* did not extend to actions which were *personal* in nature rather than merely derivative.<sup>168</sup> The question of what constitutes a personal as opposed to a corporate or derivative cause of action is a difficult and vexing question, and one to which the courts have not always given consistent answers.<sup>169</sup> However, of particular importance to the question of fundamental changes is the judicial determination that shareholder voting rights are personal in nature. As was said by Jessel M.R. in the *Pender* case, in which the chairman of a shareholders' meeting had refused to record the plaintiff's votes:<sup>170</sup>

This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded – an individual right in respect of which he has a right to sue. That has

---

judgment of Moss J.A. in the *Ritchie* case, *supra*, note 165; *Castello v. London General Omnibus Co.* (1912), 107 L.T. 575 at 580 (C.A.); *Fallis v. United Fuel Investments Ltd*, *supra*, note 166. The limits of the good faith principle are explored further below. See *infra*, Part V (C). It would appear that the principle in *Foss* covers actions which are merely *negligent*; these may be ratified by shareholders and so (under the rule) the company is the proper plaintiff. *Pavrides v. Jensen*, [1956] Ch. 565. But see also *Heyting v. Dupont* [1964] 1 W.L.R. 843 (C.A.); *Daniels v. Daniels* [1970] Ch. 406.

<sup>168</sup> See generally Beck, "Analysis," *supra*, note 150; Beck, "The Shareholders' Derivative Action," *supra*, note 157; Wedderburn, "Shareholders' Rights and the Rule in *Foss v. Harbottle*," *supra*, note 157. As Beck points out in "Analysis," the term "fraud on the minority" has been used to describe situations in which a shareholder or shareholders have a personal right to sue, as well as where the fraud gives rise to a purely derivative action. See "Analysis" at 566. Nevertheless, shareholders' "personal" rights constitute a separate and distinct exception to the rule in *Foss v. Harbottle*.

<sup>169</sup> In *Farnham v. Fingold*, [1972] 3 O.R. 688 at 690, rev'd [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.) Morand J. defined a derivative action in the following way:

It is the corporation which is the aggrieved party, and the plaintiff devives his status from the fact of injury to the corporation, the failure of the corporation to protect itself and the fact that the plaintiff is a shareholder. In bringing the action, the plaintiff enforces not his rights but the rights of the corporation, and gains thereby solely by virtue of the manner in which the benefits to a corporation flow to an individual shareholder.

See also *Goldex Mines Ltd v. Revill* (1975), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (C.A.). Compare *Jones v. H.F. Ahmanson & Co* (1969), 460 P.2d 464 (cited by the Court of Appeal in *Goldex*).

<sup>170</sup> *Pender v. Lushington*, *supra*, note 162 at 80-81. See also *MacDougall v. Gardiner*, [1875] 1 Ch.D. 13.

nothing to do with the question like that raised in *Foss v. Harbottle* and that line of cases.<sup>171</sup>

Another particularly important species of personal right, explored in the following section, is the right to complain about discriminatory alterations to the corporation's constitutional documents. In the cases dealing with such alterations a principle emerged which, although seldom applied with any effect in the latter part of the nineteenth or early twentieth centuries, operated as a foil to cases like *Pender* which held that a shareholder might vote from whatever promptings or motives might inspire him or her. This principle is the seed from which would later germinate an evolving conception of shareholder duties of a fiduciary character.

### C. *The Evolution of Shareholder Duties of a Fiduciary Character*

The first tentative steps towards a generalized fiduciary duty of shareholders can be seen in those cases which impressed upon shareholders a duty to exercise their voting powers in good faith. This duty of good faith, enunciated around the turn of the century, was essentially toothless for the first fifty years of its existence: nonetheless, it provided a toehold for later important developments.

The grandfather of all these cases is *Allen v. Gold Reefs of West Africa Ltd.*<sup>172</sup> Zuccani, a shareholder, held large quantities of both partly and fully paid shares. The articles allowed the directors

---

<sup>171</sup> Other rights which have been characterized as personal in nature include the right to "timely and informative notice of company meetings...the right to have a properly executed proxy accepted and the right to inspect certain of the corporations's records." Beck, "The Shareholders' Derivative Action," *supra*, note 157 at 169-70. It is clear that at common law breach of proxy legislation is also a personal right (see *Goldex Mines Ltd v. Revill* (1975), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (C.A.)), as is the right of shareholders to be heard at a shareholders' meeting (see *Wall v. London and Northern Assets Corp.*, [1898] 2 Ch. 469 (C.A.)), and (at least in England) the right to sue in respect of violations of the company's constitutional documents. See generally Beck, "The Shareholders' Derivative Action," *supra*, note 157 at 169-79; Beck, "Analysis," *supra*, note 150 at 581-89. Some of these rights have now been accorded express statutory recognition. See for example, *CBCA* s. 154 (allowing a shareholder to secure a restraining order to prevent a breach of the proxy provisions of the statute), s. 247 (allowing a shareholder to secure an order requiring compliance with the *Act*, articles of incorporation, by-laws, or any unanimous shareholder agreement).

<sup>172</sup> [1900] 1 Ch. 656 (C.A.).

to make calls on the partly paid shares. They also furnished the company with a lien for unpaid calls, extending to the partly paid, but not the fully paid shares. When Zuccani died, he left a large sum owing in respect of unpaid calls on his partly paid shares. When it appeared that the assets of the estate were insufficient to pay all claimants, the shareholders passed a special resolution amending the articles so that the fully paid shares, in addition to the partly paid shares, were subject to the lien. As Zuccani was the only holder of fully paid shares, there can be little doubt that the action of the company was aimed at the shares held by Zuccani's estate; indeed, counsel for the company admitted as much.<sup>173</sup> Zuccani's estate argued that the alteration was oppressive, in bad faith and amounted to a retroactive alteration of the company's articles.

In a holding which echoes decisions canvassed earlier as to the defeasible nature of shareholders' rights,<sup>174</sup> Lindley M.R. noted that the statute appeared to allow for any type of variation of the articles, and held that "[t]he power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association."<sup>175</sup> The "contractual" rights of shareholders bestowed by the articles were said to be "limited as to their duration by the duration of the articles which confer them."<sup>176</sup> Nevertheless, Lindley M.R. also held that:

Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide for the benefit of the company as a whole*, and it must not be exceeded.<sup>177</sup>

---

<sup>173</sup> *Ibid.* at 667.

<sup>174</sup> Compare *Shuttleworth v. Cox Brothers and Company (Maidenhead)*, [1927] 2 K.B. 9 at 18 (C.A.); and *Peter's American Delicacy Company v. Heath* (1938-39), 61 C.L.R. 457 at 481 (Aust. H.C.).

<sup>175</sup> *Supra*, note 172 at 671.

<sup>176</sup> *Ibid.* at 673.

<sup>177</sup> *Ibid.* at 671 (emphasis added).



The Court of Appeal was, however, not persuaded that the modification had been undertaken in bad faith; the amendment was allowed to stand.

This outcome by itself might be enough to persuade an observer of average perception that the good-faith principle did not, at its inception, have very sharp teeth. This apprehension is sharpened by reference to subsequent cases where shareholders attempted to rally the principle in their favour. This subsequent history is analyzed in respect of the perspective used in determining when shareholders are acting in good faith; the substantive content of the concept of acting in the interests of the company as a whole; and attempts to harmonize the principle with other holdings canvassed earlier expressing a strongly majoritarian sentiment. The section is concluded by reference to recent developments leading to a modern conception of shareholder duties of a fiduciary or quasi-fiduciary character.

### 1. Good Faith: Subjectivity and Objectivity

The *Allen* court did not definitively resolve the issue of whether the good faith principle was to be applied *objectively*, from the perspective of the reviewing court, or *subjectively*, from the perspective of the shareholders themselves. As against earlier decisions which appeared to regard the *Allen* test as an objective one,<sup>178</sup> the English Court of Appeal in *Shuttleworth v. Cox Brothers*<sup>179</sup> established beyond peradventure that the *Allen* test was to be primarily a *subjective* one.<sup>180</sup> In the words of Bankes L.J.:

---

<sup>178</sup> See *Brown v. British Abrasive Wheel Company*, [1919] 1 Ch. 290 (Ch.D.); *Dafen Tinplate Co v. Llanelly Steel Co*, [1920] 2 Ch. 124. A Court of Appeal case decided after *Brown*, but before *Dafen*, is unclear on whether the test is objective or subjective. See *Sidebottom v. Kershaw, Leese and Company*, [1920] 1 Ch. 154 (C.A.).

<sup>179</sup> [1927] 2 K.B. 9 (C.A.).

<sup>180</sup> In *Cox*, the articles as originally framed granted life tenure to all directors, subject to limited exceptions. The company wished to add an additional exception to allow it to get rid of a director suspected of defalcation (or at least negligent conduct). The Court of Appeal upheld the validity of the amendment on the *Allen* test.

the test is whether the alteration of the articles was *in the opinion of the shareholders* for the benefit of the company. By what criterion is the Court to ascertain the opinion of the shareholders upon this question? The alteration may be so oppressive as to cast suspicion on the honesty of the persons responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company. In such cases...the alteration of the company's articles shall not stand ....<sup>181</sup>

Thus, although objective evidence is to be consulted to determine those cases falling beyond the peripheries of good faith, only those egregious cases constituting the most flagrant abuse of minority rights could be struck down.

The actual result in the *Shuttleworth* case is fully as illuminating as that in *Allen*: despite a *finding of fact* by the jury that the amendment lacked good faith, the Court of Appeal upheld the alteration in question, finding that there was no evidence upon which the jury could have reached its verdict.

The insistence on utterly compelling objective evidence thus rendered the good faith test substantially impotent. Such compelling evidence contradicting self-serving assertions of motive will rarely, indeed almost never be available.<sup>182</sup>

## 2. The Benefit of the Company as a Whole: Formal and Substantive Discrimination

The *Allen* court had suggested not only that shareholders must act in good faith, but that they must act *for the benefit of the company as a whole*. In *Greenhalgh v. Arderne Cinemas (No.2)*,<sup>183</sup> Evershed M.R. said:

---

<sup>181</sup> *Supra*, note 179 at 18 (emphasis added). See also the judgment of Scrutton L.J. at 23, proceeding on nearly identical grounds, and *Greenhalgh v. Arderne Cinemas, Ltd (No. 2)*, [1951] 1 Ch. 286 at 291 (C.A.) (per Evershed, M.R.). In Canada, see *Re Leigh*, [1951] 3 D.L.R. 561 (B.C.S.C.). But compare the Australian case *Peter's American Delicacy Company v. Heath* (1938-39), 61 C.L.R. 457 (H.C. Aust.) in which Latham C.J. said that "this is not an absolute rule, but it is the *prima facie* general rule." *Ibid.* at 481 (citations omitted).

<sup>182</sup> One case in which such evidence was fortuitously available is *Re Holders Investment Trust Ltd*: see *supra*, note 77 and accompanying text.

<sup>183</sup> *Supra*, note 181.

the phrase "the company as a whole," does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body, that is to say the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is in the honest opinion of those who voted in its favour, for that person's benefit.<sup>184</sup>

In the view of Lord Evershed, this is the functional equivalent of a principle of non-discrimination:

I think that the matter can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived.<sup>185</sup>

However, a scrutiny of the cases reveals that it cannot be a simple act of discrimination which is captured by the *Allen* principle. The outcome of *Allen* itself illustrates this point. The effect of the alteration of the articles was perfectly discriminatory: the amendment was aimed at, and only affected a single shareholder. Similarly, in *Sidebottom v. Kershaw*<sup>186</sup> the English Court of Appeal gave its imprimatur to forcible evictions of shareholders from the company: what could be more inherently discriminatory? Indeed, the amendment permitted by the Court of Appeal in the *Greenhalgh* case, converting a right of first refusal<sup>187</sup> exercisable by individual shareholders into a right subject to withdrawal by a majority of shareholders, operated solely to the advantage of the majority shareholder and to the disadvantage of the minority. The amendment cannot be conceived of as anything but discriminatory.<sup>188</sup>

---

<sup>184</sup> *Ibid.* at 291.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Supra*, note 178.

<sup>187</sup> The right is referred to in the case as a "pre-emptive" right; however, in Canada, the type of right considered is more usually denominated a right of first refusal.

<sup>188</sup> Thus, as was said by Latham C.J. in *Peter's American Delicacy*, *supra*, note 181, "[t]he fact that an alteration prejudices or diminishes some of the rights of shareholders is not in itself a ground for attacking the validity of the alteration." *Ibid.* at 480 (citing *Allen's* case, *Sidebottom v. Kershaw*, *supra*, note 178, and *Shuttleworth v. Cox Brothers*, *supra*, note 179). See also *infra*, notes 197-205 and accompanying text.

The difficulty, and the source of confusion, lies in the meaning of "discriminatory." The meaning given the word by the Court of Appeal is a truncated meaning: discriminatory treatment embraces essentially *formally* unequal treatment, but not formally equal treatment even though the latter may result in a widely disparate economic impact upon constituencies of shareholders.

The above noted cases illustrate at once the interconnection between the principle of formal equality and a finding of good or bad faith, and the identification of "discrimination" with formally unequal treatment. In *Allen*, the court was persuaded that the amendment to the articles was undertaken in *good faith* precisely because of the *formal equality* of treatment — despite the fact that the amendment was aimed at and affected only a single shareholder. In the words of Lord Lindley M.R. "[t]he altered articles applied to all holders of fully paid shares, and made no distinction between them. The directors cannot be charged with bad faith."<sup>189</sup>

Similarly, in *Sidebottom v. Kershaw*,<sup>190</sup> the Court of Appeal endorsed an expropriatory amendment to the articles of association although it was clearly aimed at a particular shareholder and had a differential impact upon that shareholder and other shareholders in the company.<sup>191</sup> As in *Allen*, the amendment treated all shareholders formally alike.

Similar principles are at work in the *Greenhalgh* case. All shareholders were again treated in a formally equal manner. The amendment passed muster under the *Allen* principle, even though as a practical and as a business matter, a shareholding majority destroyed a right of first refusal in a manner which almost certainly

---

<sup>189</sup> [1900] 1 Ch. 656 (C.A.) at 675. Compare the judgment of Romer L.J. at 683. But see also the judgment of Vaughan Williams L.J., finding bad faith.

<sup>190</sup> *Supra*, note 178. Two other cases striking down expropriatory amendments, *Brown v. British Abrasive Wheel Co*, and *Dafen Tinplate Co v. Llanelly Steel Co*, both *supra*, note 178, must now be regarded as of doubtful authority.

<sup>191</sup> The identification of bad faith with discriminatory *motive*, and discriminatory motive with formally disparate treatment seems clear. Lord Sterndale M.R. found that the resolution amending the articles to allow for the eviction of any shareholder competing with the company was made in good faith because it was made without *malicious* motive and against the problem of competition generally. Although the amendment was clearly a response to the activities of a particular shareholder, the finding of an absence of malice was anchored to the fact that the amendment applied in a formally equal manner to all shareholders.

did violence to the expectations upon which the minority shareholder had subscribed his capital.<sup>192</sup>

Indeed, the two passages cited above from the judgment of Lord Evershed illustrate the inseparability of motive and effect in the cases. The first passage suggests that what is relevant to a determination of whether shareholders acted "for the benefit of the company as a whole" is a question of the motives of voting shareholders; that is, did they act in good faith (for the benefit of the company as a whole) or in bad faith (for the purpose of favouring some shareholding constituency over another)?<sup>193</sup> The second passage suggests that it is simply a question of the consequences of the shareholder resolution which matter.<sup>194</sup> Motive and consequence, however, are undeniably very different things.

---

<sup>192</sup> See also *Greenhalgh v. Mallard*, [1943] 2 All E.R. 234 (C.A.); *Greenhalgh v. Arderne Cinemas (No. 1)*, [1946] 1 All E.R. 512 (C.A.). The entire woeful saga, in which the plaintiff came off decidedly second best, is reviewed at greater length in Gower, *supra*, note 40 at 624-27. See also *Re MacKenzie & Co*, [1916] 2 Ch. 450 where a reduction of capital was effected rateably in respect of both common and preferred shares – formally equal treatment – with the result that the preferential dividend of the preferreds was effectively halved. The scheme of reduction was sanctioned by the Court.

The perception that it was only formal discrimination which attracted judicial disapproval is strengthened by reference to those cases in which the *Allen* principle was given some effect. In *British America Nickel Corporation v. M.J. O'Brien, Ltd*, [1927] A.C. 369 (P.C.) and *North-West Electric Co v. Walsh* (1898), 29 S.C.R. 33, formally *unequal* treatment resulted in holdings that the transaction fell afoul of the *Allen* principle.

The Ontario Court of Appeal has recently given expression to the idea that formally identical treatment of majority and minority shareholders is adequate treatment: see *Wotherspoon v. Canadian Pacific Ltd* (1982), 129 D.L.R. (3d) 1 (Ont. C.A.), *aff'd* on other grounds in an unreported judgment of the Supreme Court of Canada. The Court commented that:

Majority rule still applies to shareholders' meetings and controlling shareholders can still sell assets of the company to their own subsidiaries, provided that full and fair disclosure is made to all shareholders of what is being done, and all shareholders are treated alike.

*Ibid.* at 40. This case is out of keeping with the more recent trend, however. See *infra*, Part V (C)(4).

<sup>193</sup> *Supra*, note 184 and accompanying text. See also *Shuttleworth v. Cox Brothers, supra*, note 179 at 23 where Scrutton L.J. held that an alteration to the articles would be impugned if those who acted did so "with a view to the interest of some of the shareholders and against the interest of others."

<sup>194</sup> *Supra*, note 185 and accompanying text. Compare *Peter's American Delicacy Company v. Heath, supra*, note 174 at 504, in which Dixon J. suggested that the alteration "must not be such as to sacrifice the interests of the minority to those of the majority without any reasonable prospect of advantage to the company as a whole."

The courts "resolved" the dilemma by searching for formal equality of treatment. Once found, a finding that the shareholders acted in good faith was sure to follow, even where the facts manifestly appeared to dictate a contrary finding.<sup>195</sup>

To summarize, the courts suggested that what was important to finding a violation of the *Allen* principle was the presence of some discriminatory motive. However, the question of what constituted such a motive was largely to be determined from the perspective of the shareholders themselves. Further, formally equal treatment almost guaranteed a finding of good faith and lack of discriminatory motive. Conversely, formally unequal treatment might give rise to an inference of bad faith.<sup>196</sup>

Despite these crippling limitations, the *Allen* case and its progeny laid the groundwork for the later development of a principle of fiduciary duty relating to the conduct of shareholders.

### 3. The Anti-Discrimination Principle and the Rule of Selfish Ownership

A difficulty arises in reconciling the *Allen* principle with Jessel M.R.'s statement in the *Pender* case that a shareholder may vote his shares from whatever motive, though he be "actuated in giving his vote by interests entirely adverse to the interests of the company as a whole."<sup>197</sup> *Prima facie*, the two are inconsistent: one frees shareholders to act in accordance with their own particular interests, unaffected by any concern for other shareholders. The other constrains them from engaging in discriminatory acts. Can the two be reconciled?

Having enunciated the anti-discrimination principle in the *Greenhalgh* case, Lord Evershed M.R. was content to observe:

---

<sup>195</sup> Contrast the statement of Evershed M.R. in *Greenhalgh v. Ardenne Cinemas, Ltd*, *supra*, note 181 at 291, that "bona fide for the benefit of the company as a whole means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole." The reputed primacy of motive over consequences is belied by the results of the cases.

<sup>196</sup> See *supra*, note 192.

<sup>197</sup> See *supra*, note 162 and accompanying text.

It is therefore not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from their own prospects and consider whether what is thought to be for the benefit of the company as a going concern [and] it is no ground for impeaching the resolution that [the shareholders] are considering their own position as individuals.<sup>198</sup>

This suggests that neither principle is absolute. Shareholders need not dissociate themselves *altogether* from their own prospects, and may *consider* their own interests. But they may not discriminate, at least in the limited sense of undertaking transactions with a formally discriminatory effect.

However, no reconciliation can be entirely satisfactory. It is probably better to resist the temptation (all too frequently indulged in by legal scholars) to impose a unity and consistency on the cases which does not in fact exist. It is more accurate to simply observe that these two somewhat inconsistent ideas persisted uneasily side by side, with the anti-discrimination principle (as we shall see) slowly gaining ground as against the principle of selfish ownership.

Indeed, as a conceptual matter, it is not always clear that the admonition that shareholders must act *bona fide* in the interests of the company *as a whole* is entirely cognizable in all circumstances. In any corporation with multiple classes of shareholders, conflicts between classes of shareholders are virtually inevitable. These conflicts arise from the ordering of interests and priorities in the corporation and the differential impact which substantial changes in the company's business may have upon differing classes of security holders. It is therefore difficult, if not impossible, to isolate (as Lord Evershed would have it) a "hypothetical member" of the corporation and ask if the change is for that person's benefit; no hypothetical member could possibly be the embodiment at once of all the conflicting interests at play.

Few Commonwealth cases have recognized this inherent conflict of interest between classes of shareholders so clearly as the holding of the Australian High Court in the 1939 case of *Peter's*

---

<sup>198</sup> *Supra*, note 181 at 291.

*American Delicacy v. Heath*,<sup>199</sup> and no judgment more clearly than that of Dixon J. who recognized that:<sup>200</sup>

... the very subject matter involves a conflict of interests and advantages. To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, in net meaningless, and at all events starts an impossible inquiry.<sup>201</sup>

What then is the content of the *Allen* principle? With characteristic perception, Dixon J. suggested:<sup>202</sup>

... the chief reason for denying an unlimited effect to widely expressed powers such as that of altering a company's articles is the fear or knowledge that an apparently regular exercise of the power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power. It is to exclude the purpose of securing such ulterior special and particular advantages that Lord Lindley used the phrase "bona fide for the benefit of the company as a whole."<sup>203</sup>

The holding recognizes the essential distinction between purely redistributive recapitalizations and those which generate real economic gain.<sup>204</sup> The judgment of Dixon J. also recognizes that, even for large public corporations, the exercise of apparently unrestricted powers might be conditioned by legitimate shareholder expectations, a principle whose full import is only now in the process of full elaboration.<sup>205</sup>

<sup>199</sup> *Supra*, note 174. Two other cases recognizing the shortcomings of the "benefit of the company as a whole" test are *Mills v. Mills* (1938), 60 C.L.R. 150 (Aust. H.C.), and *Howard Smith v. Ampol Petroleum Ltd.*, [1974] A.C. 821, [1974] 1 All E.R. 1126 (H.L.) [hereinafter cited to A.C.].

<sup>200</sup> *Heath*, *ibid.* at 512.

<sup>201</sup> See also the judgment of Latham C.J., *ibid.* at 481.

<sup>202</sup> *Heath*, *ibid.* at 511-12.

<sup>203</sup> See also the judgment of Rich J. at 495. To similar effect is the judgment of Lord Wilberforce in *Howard Smith*, *supra*, note 199 at 835.

<sup>204</sup> The recapitalization may also generate real economic gains but be structured in a manner which is unnecessary to the realization of those gains, to the disadvantage of a class (or classes) of shareholders. For a fuller discussion of what constitutes acceptable and unacceptable discrimination, see Easterbrook & Fischel, "Corporate Control Transactions," *supra*, note 132; MacIntosh, *supra*, note 1.

<sup>205</sup> See *infra*, Part V (C) (4).



However sensible the reading given Lord Lindley's principle (enunciated in the *Greenhalgh* case, *supra*) by the High Court of Australia, it would be at least two decades before this interpretation of the anti-discrimination principle would truly begin to take hold. It is to these later developments that I now turn.

#### 4. A Modern Conception of Shareholders' Fiduciary Duties

##### a. *Introduction*

Developments in the last three and a half decades (but particularly in the last decade) in England and Canada have led to a fundamental recasting of those corporate law principles discussed above. More particularly, the rule of almost untrammelled majoritarianism has given way to a new concern to protect minority shareholders against the unchecked exercise of majority power. A further development has been the gradual erosion of a strict constructionist bias in the courts, replaced by a willingness to define the shareholders' bargain in terms of expectations and implicit understandings. The courts have also redefined the discrimination principle to include conduct which is *substantively* and not merely formally discriminatory. In all these developments (and not merely the last), it is possible to discern both a revitalization and redefinition of the anti-discrimination principle in the *Allen* case.

These changes can be seen in a number of different doctrinal contexts. This section will focus on substantive changes to the "just and equitable" ground for winding-up, shareholders' fiduciary duties, the statutory oppression remedy and derivative action, and principles relating to shareholder ratification of corporate action. I will attempt to show how some or all of the substantive changes referred to above are reflected in each of these doctrinal contexts.

It is worth noting that although the English and Canadian courts have, in the main, sedulously avoided a characterization of evolving shareholder duties as "fiduciary" in nature, there can be little doubt that they are fiduciary in character and substance. The unwillingness to so characterize these duties and limitations on majority action is a persistent curiosity which will likely soon become an historical anachronism.

b. *Substantive Doctrine*

i. The Just and Equitable Ground for Winding-Up

A watershed case in the demise of untrammelled majoritarianism is clearly *Ebrahimi v. Westbourne Galleries Ltd.*,<sup>206</sup> in which the House of Lords signalled that strict judicial deference to majoritarianism is yielding to a more flexible approach of as yet uncertain contours.

The company in question was a private corporation with three shareholder-directors — two of them, a father and son, holding a majority of shares. All profits were distributed as directors' remuneration. The father and son removed the plaintiff as a director, an act described by Lord Wilberforce as one "effective in law." Despite the technical legality of the conduct, the petition for a winding-up on the "just and equitable" principle<sup>207</sup> was granted. The reason, as put by Lord Wilberforce, was that:

... a limited company is more than a mere judicial entity, with a personality in law of its own: ... there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure .... The 'just and equitable' provision does not ... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.<sup>208</sup>

His Lordship was not prepared to exhaustively define those situations in which these equitable considerations would arise. However, drawing on earlier jurisprudence,<sup>209</sup> he suggested that

---

<sup>206</sup> [1973] A.C. 360, [1972] 2 All E.R. 492 (H.L.) [hereinafter cited to A.C.].

<sup>207</sup> The action was under the winding-up provision of the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 222(f).

<sup>208</sup> *Supra*, note 206 at 379.

<sup>209</sup> The *Ebrahimi* case was not the first to use the "partnership analogy". In *Re Yenidje Tobacco Company*, [1916] 2 Ch. 426 (C.A.), Lord Cozens-Hardy M.R. referred to the company in question as "in substance ... a partnership in the form or the guise of a private company" and applied partnership principles from *Lindley on Partnerships* in determining that

those companies which might be distinguished as "incorporated partnerships" (in which equitable considerations would arise) would likely involve a personal relationship based on mutual confidence, an expectation on the part of all concerned in continued participation in the management of the corporation, and/or restrictions on the transferability of shares.<sup>210</sup> On the facts, Lord Wilberforce found

---

a winding-up was justified on the "just and equitable" ground. *Ibid.* at 432. See also 434 (per Lord Warrington). See also *Re Davis and Collett, Limited*, [1935] 1 Ch. 693 (Ch.D.), following *Yenidje*. The progress of the partnership analogy was arrested by the strict interpretation of the just and equitable ground in *Re Cuthbert Cooper and Sons, Limited*, [1937] 1 Ch. 392 (Ch.D.), a case disapproved of by the House of Lords in *Ebrahimi*. See also *Scottish Co-operative Wholesale Society Ltd v. Meyer*, [1959] A.C. 324 at 361 (H.L.) (per Lord Keith); *Re Lundie Brothers Ltd*, [1965] 1 W.L.R. 1051 (Ch.D.) (applying the partnership analogy but determining on the facts that no case was made out for a just and equitable winding-up). The holding in *Ebrahimi*, however, has both re-energized and extended the partnership analogy by more explicitly directing the court's attention to shareholder expectations. See, for example *Re Zinotty Properties Ltd*, [1984] 3 All E.R. 754 (Ch.D.) (violation of shareholder expectations justifies winding-up); *Re A Company*, [1983] 2 All E.R. 854 (Ch.D.). The partnership analogy was also applied in Canada prior to *Ebrahimi*. See, for example *Re R.C. Young Insurance Ltd*, [1955] 3 D.L.R. 571 (Ont. C.A.). Since *Ebrahimi*, see, for example *Re Welport Investments Ltd* (1985), 31 B.L.R. 232 (Ont. H.C.); *Kapeluck v. Pro Industries Ltd* (1983), 25 Sask. R. 58 (Q.B.); *Re Cravo Equipment Ltd and Cramaro* (17 December 1982), (Ont. H.C.).

In suggesting that technically legal conduct could constitute oppression, Lord Wilberforce also drew upon earlier jurisprudence under the oppression provision. See *Re Harner Ltd*, [1959] 1 W.L.R. 62 at 77 (C.A.) (per Jenkins L.J.); *Meyer v. Scottish Co-operative Wholesale Society*, [1954] S.C. 381 at 391 (per Lord Cooper), aff'd (*sub. nom. Scottish Co-operative Wholesale Society v. Meyer*) [1957] S.C. 110, [1957] S.L.T. 250 (1st Div.); aff'd [1959] A.C. 324 (H.L.).

<sup>210</sup> In Lord Wilberforce's words:

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that the company is a small one, or a private company is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles. The superposition of equitable considerations requires something more, which typically may include one, or probably more ... of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

*Ibid.* at 379. For a comment on the case, see Trebilcock, "A New Concern for the Minority Shareholder: *Ebrahimi v. Westbourne Galleries Ltd*" (1973) 19 McGill L.J. 106.

that equitable considerations arose and granted the petition for a winding-up.

The case is a landmark in its willingness to go beyond the formal elements of the shareholder's "contract" — the constitutional documents and the statute — and explicitly reference the expectations and understandings of the participants in determining their legal entitlements. In so doing, it clearly sets limits on the exercise of majority power. Although the judgment of Lord Wilberforce is carefully crafted to apply only to what are in substance incorporated partnerships, in the context of applications to wind-up on the "just and equitable" ground, it has become abundantly clear that the reverberations of the *Ebrahimi* decision extend not only to a variety of other doctrinal contexts but to virtually all types of corporate fundamental changes.<sup>211</sup>

## ii. Shareholders' Fiduciary Duties

Lord Wilberforce's appeal to broad equitable principles has been invoked in at least one case in a manner which suggests that it may be the basis for a generalized fiduciary duty owed by a majority or controlling shareholder to other shareholders. In *Clemens v. Clemens*,<sup>212</sup> an aunt held 55 percent of the voting shares of a private company, and her niece held the other 45 percent. A long history of disagreement between the parties ultimately culminated in an attempt by the aunt to destroy the niece's power to block special resolutions by an issuance of shares to fellow directors and to a trust for employees. Shareholders' resolutions were passed such that sufficient shares were issued to dilute the niece's holdings to just below what she required to block a special resolution.<sup>213</sup> Finding that the resolutions were framed to deprive the niece of her power of "negative control," Foster J. enlisted the *Ebrahimi* principle and held that the aunt's ability to vote her

---

<sup>211</sup> See *infra*, Parts (V) (C) (4) (b) (ii) and (iii).

<sup>212</sup> [1976] 2 All E.R. 268 (Ch.D.).

<sup>213</sup> The niece required 25 percent to block special resolutions. Her holdings were diluted to fractionally below that figure.

majority shares was subject to "equitable considerations," and that, on the facts, a court of equity would not allow her to exercise her votes to approve the share issuance.<sup>214</sup>

Aside from the restraint imposed on the exercise of majority power, the case is significant in that the shareholder resolutions did not "discriminate" (in the sense used by Lord Evershed, *supra*) between the aunt and niece (the only holders of shares before the share issuance); shares were not issued to either party. All existing shareholders were treated in a formally identical manner, although the clear result of the resolutions was to pass an unconstrained power of control to the aunt. In the view of Foster J., the formal equality was not sufficient to rescue the resolutions.<sup>215</sup> Thus, the case also shows the breakdown of the identification of formal inequality and unfairness, or (equivalently) the recasting of the anti-discrimination principle to embrace substantively unequal treatment.

The Ontario Court of Appeal has also suggested that the exercise of shareholder rights may be constrained by "equitable" considerations of a fiduciary character. In the context of allegations of improper actions of directors to maintain themselves in control,

---

<sup>214</sup> Foster J. reviewed the authorities beginning with the *Allen* case, dealing with alterations to articles of association and holding that shareholders must act *bona fide* in the best interests of the company as a whole, as well as those cases striking down shareholder action as a "fraud on the minority" or as constituting "oppressive" conduct. He preferred to base his judgment, however, on Lord Wilberforce's "equitable considerations," saying:

[t]he difficulty is in finding a principle, and obviously expressions such as "bona fide for the benefit of the company as a whole," "fraud on the minority," and "oppressive" do not assist in formulating such a principle. I have come to the conclusion that it would be unwise to produce a principle since the circumstances of each case are infinitely varied.

*Supra*, note 212 at 282.

<sup>215</sup> Foster J. quoted from the judgment of Lord Cooper in a case decided under the "oppression" section of the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 210, in which Lord Cooper said:

The [oppression remedy] is not concerned with the results to the oppressor but with the results to those who complain of the oppression. When the section inquires whether the affairs of the company are being conducted in a manner oppressive to some part of the members including the complainor, that question can still be answered in the affirmative even if, *qua* member of the company, the oppressor has suffered the same or even greater prejudice.

(See *Meyer v. Scottish Textile and Manufacturing Co, Scottish Co-operative Wholesale Society Ltd, supra*, note 209). *Ibid.* at 281. See also *infra* at note 269 and accompanying text.

and the passing of misleading proxy information to shareholders, the court said in *Goldex Mines Ltd v. Revill*:

the principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important – that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice, and when the test of fairness is not met, the equitable jurisdiction of the Court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused. The category of cases in which fiduciary duties and obligations arise is not a closed one.<sup>216</sup>

---

<sup>216</sup> (1975), 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 at 680 (C.A.). It is interesting that two much earlier Ontario Court of Appeal cases espousing similar principles have been largely forgotten. In *Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited (No. 1)*, [1947] O.R. 928 (C.A.) and *Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited (No. 2)*, [1947] O.R. 994 (C.A.), Bear owned a majority of shares in Yellowknife, which in turn owned a majority of shares in Burwash, which owned a majority of shares in Giant Yellowknife. The subsidiary companies were evidently created in order to attract public capital to invest in the development of certain promising mining claims, at a time when Bear's own finances were in a desperately poor position, while allowing Bear to retain control of the pyramided enterprise. The boards of directors of all these companies were substantially identical. The complaints of the minority shareholder of Yellowknife all related to attempts by Bear to shift back to itself the economic benefit of the operations of the subsidiaries to the disadvantage of the minority shareholders of those companies. In the first action, two derivative claims were pursued on behalf of Yellowknife. One related to the sale by Yellowknife to Bear of almost half its holdings in Giant Yellowknife, at a time when the Giant claims held out promise of success, and at a price which was only a small fraction of the subsequent value of the Giant shares. In striking down the sale, Robertson C.J.O. remarked:

the principles of law to be applied are broad principles of equity applicable where a *fiduciary relationship* is to be deemed to be established and "which impress such a character upon the relationship subsisting between two persons when one of them is in a position to exercise a controlling influence over the mind or actions of the other."

*Gray (No. 1)*, [1947] O.R. 928 at 947 (emphasis added). The internal quotation is from C.A. Maston & W.K. Fraser, *Company Law of Canada*, 4th ed. (Toronto: Carswell, 1941) at 501. Robertson C.J.O. thus felt that it was unnecessary to resort to the *Menier* fraud/bad faith principle, "for there is much more to be found in the relation of these two companies to support the attack of the appellant upon the transaction." *Ibid.* at 942. Similarly, Laidlaw J.A. commented that "there is no doubt in my mind that at the time of the alleged transaction between Yellowknife and Bear on 20th July 1943, Bear was in a *fiduciary relationship to Yellowknife*." *Ibid.* at 965 (emphasis added). It is clear that the substantial overlap of the boards of directors was a pivotal factor in arriving at the decision – as well as the fact that the common directors of the two companies each held substantial holdings in Bear but only a single share in Yellowknife (if not also the fact that the two board decisions were taken within a half hour of each other, hardly allowing for independent reflection in respect of each company's interest). It is unclear, however, how far this principle of a "fiduciary" relationship was meant to extend. The passage cited by Robertson C.J.O. from Maston & Fraser deals with the fiduciary duty of a *promoter* to his company, and a third judge, Hogg J.A., clearly limited the application of the fiduciary principle to that existing between promoter and

Although the case appears to enunciate a potentially broad standard of fiduciary care placed on shareholders, its scope is undefined. In the subsequent case of *Wotherspoon v. Canadian Pacific Ltd.*,<sup>217</sup> the Court of Appeal, without definitively ruling on the existence of a fiduciary duty owed by shareholders, suggested that any duty would be owed only to the company and not to other shareholders.<sup>218</sup> A number of recent lower court decisions have also held that shareholders owe no fiduciary duty to other shareholders.<sup>219</sup>

---

company. *Ibid.* at 993-94. The fourth judge, Roach J.A., based his decision on principles dealing with the conflict of interest of the common directors (compare the judgment of Laidlaw J.A., which also deals with the conflicts of interest and directorial "misconduct" and lack of good faith). *Ibid.* at 965-69. And while the comments of Robertson C.J.O. and Laidlaw J.A. do suggest a principle of broad application, subsequent cases (at least until very recently) failed to pick up the suggestion of a *fiduciary* obligation extending from a parent to a subsidiary corporation, or, more generally, from majority shareholders to the corporation or to fellow shareholders. The second action, which resulted in the setting aside of an option granted to Bear to purchase all of the unissued shares of Yellowknife, is not any clearer with respect to the scope of the fiduciary duty. Per Robertson C.J.O., the imposition by Bear of a board of directors on Yellowknife substantially identical to Bear's "imposed upon Bear the obligation to take no unfair advantage of its position." *Gray No. 2*, [1947] O.R. 994 at 1003-1004 (C.A.). However, the judgment of Laidlaw J.A. focuses on the "bad faith" of the common directors. *Ibid.* at 1005. See also *Re R.J. Jowsey Mining Co.* (1969), 6 D.L.R. (3d) 97 at 104-05, per Laskin J.A. (Ont. C.A.) ("...the taking of control of a public company itself lays a burden of fair dealing on the person or group who secures it, beyond any duty that devolves upon them as directors in the day to day operations of the company"); *Farnham v. Fingold*, [1972] 3 O.R. 688, 29 D.L.R. (3d) 279 (H.C.) (holding that the majority shareholder had a duty to disclose the terms of a buyout offer to minority shareholders), *rev'd* on facts by [1973] 2 O.R. 132 (C.A.); *Alexander v. Westeel-Rosco* (1978), 22 O.R. (2d) 211, 93 D.L.R. (3d) 116 (H.C.) (majority shareholders may owe a duty to minority shareholders); *Re Loeb and Provigo Inc.* (1978), 20 O.R. (2d) 497 (H.C.) (controlling or majority shareholders may owe a fiduciary duty to the company). See also *Beamish v. Solnick* (1980), 10 B.L.R. 224 (Ont. H.C.).

<sup>217</sup> (1982), 129 D.L.R. (3d) 1 (Ont. C.A.), *aff'd* on other grounds by the Supreme Court of Canada in an unreported judgment.

<sup>218</sup> *Ibid.* at 44. The facts of the case are summarized in Kathryn Chalmers, "The Supreme Court of Canada Decision: Minority Shareholders of Ontario and Quebec Railway vs. Canadian Pacific Limited" (1987) 1 *Corp. Gov. Rev.* 2.

<sup>219</sup> See *Brant Investments v. Keeprite Inc* (1987), 60 O.R. (2d) 737 (Ont. S.C.) (supplementary reasons at 61 O.R. (2d) 469) [hereinafter cited to 60 O.R. (2d)]; *Exco Corporation v. Nova Scotia Savings & Loan Company* (1987), 79 N.S.R. (2d) 29; *Bell and Stewart v. Source Data Control Ltd* (12 February 1986), (Ont. H.C.J.) [unreported], summarized in 39 A.C.W.S. (2d) 62, *aff'd* (1988), 66 O.R. (2d) 78 (C.A.); *Roberts v. Pelling* (1981), 16 B.L.R. 150 (B.C.S.C.), also reported *sub nom. Pelling v. Pelling* (1981), 130 D.L.R. (3d) 761. See also *QMG Holdings Inc. v. Kerr Addison Mines Limited* (20 December 1982), (Ont. S.C.) [unreported].

Nevertheless, the existence of a duty flowing from controlling shareholders to other shareholders was simply assumed by the Ontario Securities Commission in *Re Canadian Tire*.<sup>220</sup> The Commission indicated that facts tending to show that a controlling shareholder has breached a fiduciary duty will assist it in determining whether to grant a cease trade order.<sup>221</sup>

The jurisprudence can hardly therefore be described as settled. Apparent judicial movement in the direction of imposing duties of a fiduciary character on majority or controlling shareholders has been stalled by recent appellate and lower court rulings. But, even more recently, the securities regulators of at least one province have given new inspiration to evolving shareholder fiduciary duties. While the best guess might well be that judicial movement towards the imposition of such duties will resume — at least in the case of closely held companies — the common law does not presently offer great certainty or clarity to those wishing to hold shareholders accountable to standards of fiduciary conduct.

### iii. The Statutory Oppression Remedy

Progress towards the imposition of shareholder fiduciary duties has probably been most keenly felt under the statutory

---

<sup>220</sup> *Re Canadian Tire* (1987), O.S.C. Bull. 857, 35 B.L.R. 56 (Sec. Comm.), aff'd 37 D.L.R. (4th) 94, 59 O.R. (2d) 79 (*sub. nom. Re C.T.C. Dealer Holdings Ltd and Ontario Securities Commission*) (H.C.J.), leave to appeal denied, 35 B.L.R. 117 (C.A.) [hereinafter cited to 35 B.L.R. 56]. See also *Re Bramalea and Trizec* (1984), 25 B.L.R. 305; *Re McLaughlin and S.B. McLaughlin Associates Ltd* (1981), 14 B.L.R. 46 (Ont. Sec. Comm.), aff'd 128 D.L.R. (3d) 256 (Ont. Div. Ct.), leave to appeal denied 2 O.S.C. Bull. 408C (Ont. C.A.).

<sup>221</sup> *Re Canadian Tire*, *ibid.* at 110. The Commission stated that:

Our decision to impose a cease-trading order does not depend on a finding of breach of fiduciary duty. However, an allegation of breach of fiduciary duty, and evidence which clearly concerns the conduct of those who are fiduciaries, can be important in supporting facts which otherwise would support a s. 132 [cease trade] order. That is the case here. The Billeses are in a fiduciary position in at least two categories — as directors of *Tire* and as *Tire's* controlling shareholders.



oppression remedy.<sup>222</sup> It is under the oppression remedy that the impact of the *Ebrahimi* case has been most pronounced.<sup>223</sup>

The federal and Ontario oppression provisions are widely drafted and extend to any conduct "that is *oppressive* or *unfairly prejudicial* to or that *unfairly disregards* the interests of any security holder, creditor, director or officer ...."<sup>224</sup> The parameters of the court's power to intervene are thus defined very broadly and without

<sup>222</sup> The oppression remedy was initially enacted in the English *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, s. 210, in response to a recommendation by the *Report of the Committee on Company Law Amendment*, Cmd. 6659, para. 60 (1945) [hereinafter the "Cohen Report"]. The Cohen Committee envisioned the oppression remedy as filling a role primarily in relation to private companies, and then only in situations where a winding-up order would be justified but would be an inadequate or inappropriate remedy for the minority. *Ibid.* paras 60, 152. The provision in the 1948 *Act* was accordingly limited to situations where a case for winding-up had been made out, although it applied to both public and private companies. See also the *Report of the Company Law Committee*, Cmnd. 1749, paras 200-12 (1960) [hereinafter the "Jenkins Report"]. In the *Companies Act* (U.K.), 1980, c. 22, s. 75 (now *Companies Act* (U.K.), 1985, c. 6, ss 459-61), the oppression remedy was freed of the requirement to make out a case for winding-up and extended to conduct "unfairly prejudicial" to shareholders. See generally Gower, *supra*, note 40 at 668-69. The oppression remedy was first adopted in Canada in British Columbia. See *Companies Act*, S.B.C. 1960, c. 8, s. 15. The provision was, however, a simple copy of the English legislation. Following a recommendation of the Dickerson Committee (see the Dickerson Report, *supra*, note 48 at para. 485), a remodelled oppression provision was included in the federal legislation in 1975, and later, in the Ontario legislation of 1982. See *CBCA* s. 241; *OBCA* s. 247. The Saskatchewan, Alberta, Manitoba, and New Brunswick provisions are also modeled on the federal legislation. See *SBCA* s. 234, *ABCA* s. 234, *MCA* s. 234, *NBBCA* s. 166. The B.C. legislation was also reformed in 1973 roughly along the lines suggested by the Dickerson Committee. See *Companies Act 1973* (B.C.), c. 18 (now *Company Act*, R.S.B.C. 1979, c. 59, s. 224). See generally Waldron, "Corporate Theory and the Oppression Remedy" (1982) 6 *Can. Bus. L.J.* 129.

<sup>223</sup> The impact of the *Ebrahimi* case has probably been greater in the context of the oppression remedy than in the context of a just and equitable winding-up in which the case arose (and to which Lord Wilberforce took pains to confine the holding). Application of the "partnership analogy" was anticipated in the latter context by cases over half a century earlier. See *supra*, note 209 and accompanying text.

<sup>224</sup> *CBCA* s. 241(2) (emphasis added). The Ontario legislation includes threatened conduct as well. *OBCA* s. 247(2) (see *Low v. Ascot Jockey Club Limited* (1986), 1 B.C.L.R. (2d) 123 at 129, holding that the B.C. legislation (which makes no reference to threatened conduct) can also be used to restrain future conduct; *Heslop v. Heslop*, (15 December 1985), (B.C.S.C.) [unreported]; *Re Peterson and Kanata Investments Ltd* (1976), 60 D.L.R. (3d) 527 (B.C.S.C.) (similar to *Low*)).

clear limits.<sup>225</sup> Although the courts have often drawn inspiration from the common law of fiduciary duties in interpreting the scope of the oppression remedy, it is now clear that the remedy broadens the substantive grounds for shareholder complaint.<sup>226</sup> In *Re Ferguson and Imax Systems Corp.*<sup>227</sup> Brooke J.A. held that the oppression remedy "must not be regarded as being simply a codification of the common law. Today one looks to the section when considering the interests of minority shareholders and the section should be interpreted broadly to carry out its purpose ...."<sup>228</sup>

The meaning of "oppression" under the statute is broader than its comparable meaning at common law. In a much cited definition of "oppression" under the English statute, Lord Cooper stated that:

the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.<sup>229</sup>

---

<sup>225</sup> Despite the broadening of the English provision, the federal (and cognate) legislation continues to be more expansively drafted both on the substantive grounds for relief and the class of persons who can claim relief. See *supra*, note 222; and *infra*, notes 226-35 and accompanying text.

<sup>226</sup> See *Re Mason and Intercity Properties Limited* (1985), (Ont. Div. Ct.) [unreported], summarized in 34 A.C.W.S. (2d) 366, where the Divisional court expressly disapproved the view of Smith J. at trial that the *OBCA* oppression remedy creates no new obligations, but merely "opens the door to new remedies" (judgment reversed on other grounds: 59 O.R. (2d) 631, (1987), 38 D.L.R. (4th) 681, 67 B.L.R. 6 (O.C.A.)).

<sup>227</sup> (1983), 43 O.R. (2d) 128, 43 D.L.R. (3d) 718 (C.A.), leave to appeal to S.C.C. denied 2 O.A.C. 158, 52 N.R. 317.

<sup>228</sup> *Ibid.* at 43 D.L.R. (3d) 727. See also *Re Abraham and Inter Wide Investments Ltd* (1985), 51 O.R. (2d) 460 at 468 (H.C.); *Scottish Co-operative Wholesale Society Ltd v. Meyer*, [1958] 2 All E.R. 66 at 88.

<sup>229</sup> *Elder v. Elder & Watson, Limited*, [1952] S.C. 49 at 55 (Sc. Ct. Sess.). Lord Cooper's definition of oppression emphasizes the conditioning of corporate powers on shareholder expectations. In a similar vein, Lord Keith suggested that "...oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder." *Ibid.* at 66. See also the oft-cited definition of oppression in the first oppression case to go before the House of Lords, *Scottish Co-operative Wholesale Society Ltd v. Meyer*, [1959] A.C. 324 at 342, as conduct which is "burdensome, harsh and wrongful" (per Viscount Simmonds). Whatever the precise peripheries of statutory oppression, it cannot be doubted that these formulations suggest a much broader meaning of "oppression" than at common law.

Other recent Canadian and English cases have indicated that what is "unfairly prejudicial to" or which "unfairly disregards the interests of" shareholders extends beyond conduct which can be characterized as oppressive, and includes conduct which is simply *unfair*.<sup>230</sup>

Aside from enhancing shareholder rights, the provision substantially augments the available relief in defence of those rights. The oppression provision in the *CBCA* and cognate statutes allows for virtually any type of relief, including a restraining order, an order for the purchase of the claimant's shares, the setting aside of any transaction, appointment of new directors, an order compensating an aggrieved person, an order amending articles or by-laws of the corporation, or any other interim or final relief the court "thinks fit."<sup>231</sup> Thus, the remedial tools at the court's disposal are far wider than under the common law of fiduciary duties.<sup>232</sup>

Not only is the range of corporate action for which the provision may be invoked potentially unlimited, but the class of persons who may claim relief under the provision is considerably broader than at common law. Those who may sue include current and *former* security holders of the corporation, current and former

---

<sup>230</sup> *O'Connor v. Winchester Oil & Gas Inc.* (1986), 69 B.C.L.R. 330 at 336 (B.C.S.C.); *Re Abraham and Inter Wide Investments Ltd* (1985), 51 O.R. (2d) 460 at 468 (H.C.); *Carrington Viyella Overseas (Holdings) Ltd v. Taran*, (24 February 1983) (Que. S.C.) [unreported]; *Re Ferguson and Imax Systems Corp*, *supra*, note 227 (see discussion *infra* at notes 256-62 and accompanying text); *Journet and Mouzakiotis v. Superchef Food Inds. Ltd* (1984), 29 B.L.R. 206 (Que. S.C.) ("It is no longer a question only of oppression: now the Court is asked to judge upon the fairness of actions of management." *Ibid.* at 223); *Miller v. F. Mendel Holdings Ltd* (1984), 26 B.L.R. 85 at 99 (Sask. Q.B.); *Re Mason and Intercity Properties Limited*, *supra*, note 226; *Re A Company (No. 004475 of 1982)*, [1983] 2 W.L.R. 381 (Ch.D.); *Diligenti v. RWMD Operations Kelowna Ltd (No. 1)* (1976), 1 B.C.L.R. 36 (S.C.).

<sup>231</sup> Compare *CBCA* s. 241(3) and *OBCA* s. 247(3). See also *Sparling v. Royal Trustco Ltd* (1984), 45 O.R. (2d) 484, 6 D.L.R. (4th) 682 at 689, 694 (Ont. C.A.), *aff'd* [1986] 2 R.C.S. 537 (S.C.C.) (holding in relation to similarly drawn powers in *CBCA* s. 205(3) (formerly s. 198(3)) that "the court may take any action it deems fit to rectify the wrong committed"); *Re A Company*, [1986] 2 All E.R. 253 (Ch.D.), also reported *sub nom. Re A Company (No. 005287 of 1985)*, [1986] 1 W.L.R. 281 (Ch.D.) (holding that the English oppression provision, cast in terms similar to the *CBCA* and cognate statutes, gives the court the "widest possible discretion" to grant a remedy).

<sup>232</sup> Although at common law the courts had available the full range of legal and equitable remedies, these remedies did not include many types of relief available under the statutory provisions.

directors and officers, officials charged with overseeing the administration of the *Act*,<sup>233</sup> and "any other person who, in the discretion of the court, is a proper person ...."<sup>234</sup> The complainant may seek a remedy for conduct which results in harm to "the interests of any security holder, creditor, director or officer."<sup>235</sup>

In the context of fundamental changes, the provision has already been used, *inter alia*, as a basis for issuing an interim<sup>236</sup> and a permanent injunction<sup>237</sup> to prevent the consummation of a freeze-out amalgamation,<sup>238</sup> discriminatory amendments to the articles of incorporation,<sup>239</sup> appropriation of a premium for sale of control,<sup>240</sup> execution of a franchise agreement,<sup>241</sup> expropriation of a

---

<sup>233</sup> See *Sparling v. Royal Trustco*, *supra*, note 231.

<sup>234</sup> See *CBCA* s. 238; and see *R. v. The Sands Motor Hotel Limited* (1984), 84 D.T.C. 6464 (Sask. Q.B.) (crown given standing under the oppression provision as creditor to complain about payments in violation of statutory duties resulting in an inability to pay taxes owing); but see *Westmore and Enchant Resources Ltd v. Old MacDonald's Fann Ltd* (1986), 70 B.C.L.R. 332 (B.C.S.C.) (a simple creditor who is not also a shareholder may not sue under the oppression provision of the B.C. statute); *Goldbelt Mines Inc. (N.P.L.) v. New Beginnings Resources Inc.* (1984), 28 B.L.R. 130 (B.C.C.A.) (a shareholder may not claim oppression on behalf of another class of security holders, and must be a member of the oppressed or unfairly prejudiced class to sue under the oppression provision). Compare *Western Finance Company v. Tasker Enterprises Ltd*, [1980] 1 W.W.R. 323 (Man. C.A.) (a creditor has no standing at common law to complain about a director's breach of fiduciary duty owed to the company).

<sup>235</sup> *CBCA* s. 241(2).

<sup>236</sup> *Alexander v. Westeel-Rosco* (1978), 22 O.R. (2d) 211, 93 D.L.R. (3d) 116 (H.C.).

<sup>237</sup> *Burdon v. Zeller's Ltd* (1981), 16 B.L.R. 59 (Que. S.C.).

<sup>238</sup> In each case, an acquiror failed to achieve the 90 percent tender of disinterested shareholders required to effect a statutory compulsory acquisition, and attempted to effect a freezeout by means of a statutory amalgamation. See also *Carlton Realty Co. v. Maple Leaf Mills Ltd* (1978), 93 D.L.R. (3d) 106 at 113 (H.C.); but compare *Triad Oil Holdings Ltd v. Provincial Secretary for Manitoba* (1967), 59 W.W.R. 1 (Man. C.A.) (permitting a freezeout amalgamation under the Manitoba amalgamation provision).

<sup>239</sup> *Re Ferguson and Imax Systems Corp*, *supra*, note 227. See *infra* at notes 256-62 and accompanying text. See also *Re Giroday Sawmills Ltd* (1983), 49 B.C.L.R. 378 (S.C.).

<sup>240</sup> *Re Peterson and Kanata Investments Ltd* (1976), 60 D.L.R. (3d) 527 (B.C.S.C.). See also *Dusik v. Newton* (1983), 50 B.C.L.R. 321 (S.C.), *aff'd* (1985), 62 B.C.L.R. 1 (C.A.) (comparable result at common law).

<sup>241</sup> *Re Little Billy's Restaurant (1977) Ltd* (1983), 21 B.L.R. 246 (B.C.S.C.); *Diligent v. RWMD Operations Kelowna Ltd (No. 1)*, *supra*, note 230.

shareholding interest,<sup>242</sup> and an issuance of shares threatening to dilute the interests of minority shareholders.<sup>243</sup> There can be little doubt that it will be extended to many other types of fundamental changes as well.

For the purposes at hand, one of the more important questions under the oppression provision is the extent to which it touches the conduct of shareholders, rather than merely directors or "the corporation." The oppression provisions of the *CBCA* and cognate statutes allow a complainant to sue where "any act or omission of *the corporation* or *any of its affiliates*,"<sup>244</sup> "the business or affairs of *the corporation* or any of its *affiliates*,"<sup>245</sup> or "the *powers of the directors* of the corporation or any of its *affiliates*"<sup>246</sup> have been exercised in a manner which is oppressive or unfairly prejudicial or which unfairly disregards the interests of the complainant.<sup>247</sup> *Prima facie*, this would not seem to extend to the conduct of shareholders.

This first impression is, however, incorrect.<sup>248</sup> In the typical case, shareholders will act by means of a shareholders' resolution. Once a resolution has been adopted, any act taken to further the resolution is an act of the company and subject to the jurisdiction

---

<sup>242</sup> *Mason v. M.O.W. Holdings Ltd* (1983), 23 Man. R. (2d) 260 (Q.B.).

<sup>243</sup> *Re Sabex International Ltee* (1979), 6 B.L.R. 65 (Que. S.C.). See also *Re a Company*, [1985] B.C.L.R. 80 (Ch.D.). But see *H.J. Raj Limited v. Reed Point Marina Ltd*, (26 May 1981), (B.C.S.C.) [unreported]; *Brant Investments v. Keeprite Inc*, *supra*, note 219; *Mutual Life Insurance Company of New York v. Rank Organisation Limited*, (21 December 1981), (Ch.D.) [unreported] (summarized in *London Financial Times* (12 January 1982) at 14).

<sup>244</sup> *Ibid.*, s. 241(2)(a) (emphasis added).

<sup>245</sup> *Ibid.*, s. 241(2)(b) (emphasis added).

<sup>246</sup> *Ibid.*, s. 241(2)(c) (emphasis added).

<sup>247</sup> In the text following, the term "oppressive" is used as a shorthand to cover all the substantive grounds for relief under the oppression provision.

<sup>248</sup> It seems clear that the draftsmen of the *CBCA* fully intended to create a fiduciary duty of majority shareholders flowing to other shareholders. See the Dickerson Report, *supra*, note 48; and *infra*, note 301 and accompanying text.

of the court under the oppression provision.<sup>249</sup> The difficult case will therefore arise where a shareholder acts by means other than a shareholder resolution. Under the *CBCA* and cognate statutes, the oppression remedy extends not only to conduct of the corporation, but to conduct of "any of its affiliates" as well. "Affiliate" is defined to include parent companies holding a majority of the shares of the subsidiary.<sup>250</sup> Thus, the conduct of majority shareholders who are corporations seems to fall directly within the purview of these statutes, even where the shareholder does not act by shareholder resolution.

In respect of majority shareholders that are not corporations, or merely *controlling* shareholders (whether corporations or otherwise), the courts have not hesitated to characterize shareholder conduct as conduct of the company and hence falling within the oppression provision. In *Scottish Co-operative Wholesale Society Ltd v. Meyer*,<sup>251</sup> a parent company established a subsidiary for the manufacture of its needs of rayon in partnership with the petitioners, who were minority shareholders in the subsidiary. Once the parent secured an alternative source of supply, it withdrew its custom from the subsidiary and refused to supply raw material at reasonable prices, while also refusing to buy the shares of the petitioners, who then sought relief under the oppression remedy. The statutory oppression remedy in question extended only to situations where "the affairs of the company" had been conducted in a manner oppressive to shareholders.<sup>252</sup> Nevertheless, Viscount Simonds held that:

it is not possible to separate the transactions of the society [the majority shareholder] from those of the company. Every step taken by the latter was determined by the former ... it appears to me incontrovertible that *the society* behaved to the minority shareholders of the company in a manner which can justly be described as "oppressive". They had the majority power and they exercised their

---

<sup>249</sup> The issue in such cases is thus not simply whether the court can find that there has been oppressive conduct within the meaning of the statute, but against whom relief can be ordered. See *infra*, notes 263-66 and accompanying text.

<sup>250</sup> *CBCA* ss 2(1), 2(2), 2(3), 2(5); compare *OBCA* ss 1(1)2, 1(2), 1(4), 1(5). It is not clear why the statutes are drafted so as to exclude parent companies exercising *de facto* rather than merely *de jure* control.

<sup>251</sup> [1959] A.C. 324, [1958] 3 All E.R. 66 (H.L.) [hereinafter cited to A.C.].

<sup>252</sup> *Companies Act, 1948* (U.K.), 12 Geo. 6, c. 13, s. 210.

authority in a manner "burdensome, harsh and wrongful" – I take the dictionary meaning of the word.<sup>253</sup>

The House of Lords found that there was oppression within the meaning of the statute and ordered that the society purchase the shares of the petitioner. Similarly, in two other leading English oppression cases,<sup>254</sup> the Court of Appeal had little difficulty in characterizing the acts of the majority shareholder as those of the company.<sup>255</sup>

---

<sup>253</sup> *Supra*, note 251 at 342 (emphasis added). Viscount Simonds also adopted Lord President Cooper's statement in the court below that:

whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with the subsidiary.

*Ibid.* at 343. See also 346-47 (per Lord Morton); 362-63 (per Lord Keith, also citing the above passage from the judgment of Lord President Cooper with approval); 366-67 (per Lord Denning). In each judgment (but especially that of Lord Denning), the fact that three of five of the directors of the subsidiary were three of twelve directors of the parent was important in establishing that the conduct of the society could also be characterized as conduct of the subsidiary company. See also *Re Stewarts (Brixton) Ltd.*, (27 November 1981), (Ch.D.) [unreported] (summarized in *London Financial Times* (11 December 1981) at 11) (applying *Meyer* where a 50 percent shareholder set up a business competing with the company).

<sup>254</sup> *Re H.R. Harmer Ltd.*, [1959] 1 W.L.R. 62 (C.A.); *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All E.R. 184 (C.A.).

<sup>255</sup> Both *Harmer*, *ibid.*, and *Jermyn*, *ibid.*, illustrate that the action, inaction, or threats of shareholders (and not merely shareholder resolutions) may constitute oppressive conduct of the affairs of the company. In *Harmer*, the aging and irascible founder of the company, who also controlled a majority of the votes of the shares (without holding a majority share of the equity), undertook a number of actions without board or shareholder authorization, to the detriment of the company, and also refused to abide by resolutions of the board of directors. Jenkins L.J. held that "no ... complication arises in the present case" in finding that the affairs of the company had been conducted in an oppressive manner. *Ibid.* at 79. Jenkins L.J. also adopted Lord President Cooper's suggestion in *Elder v. Elder & Watson, Limited*, [1952] S.C. 49 at 55 that oppression is "usually exerted by a person with predominating voting power which was employed for his own advantage to the detriment of the hapless minority." *Ibid.* at 77. In *Jermyn*, Buckley L.J. went even further in holding that:

In our judgment, oppression occurs when shareholders having a dominant power in a company, either (1) exercise that power to procure something that is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs....

A recent Chancery Division holding simply found that the conduct of the majority shareholder was unfair and prejudicial and thus fell within the statutory provision, without discussing how this constituted conduct of the affairs of the company. See *Re London School of Electronics Ltd.*, [1985] 3 W.L.R. 474 (Ch.D.). See also *Re Five Minute Car Wash Service Ltd.*, [1966] 1

The more recent holding of the Ontario Court of Appeal in *Re Ferguson and Imax Systems Corp*<sup>256</sup> appears to reach a similar result. The capital structure of the company included voting common shares and non-voting but participating preferred shares. Ferguson, the moving force behind the corporation, owned a substantial but non-controlling block of common shares in the corporation. His ex-wife owned an equivalent block of the preferred shares. Ferguson was anxious to get his ex-wife out of the corporation. To this end, he persuaded the other holders of voting common shares (some of whom were also directors) not to issue dividends, hoping that the ex-wife would sell her shares. This proved unsuccessful, and the other shareholders began to clamour for payment of dividends. In order to allow for the payment of dividends, while limiting the wife's participation and ensuring her ultimate departure from the company, it was decided that all the preferred shares would be converted into a new class of non-voting securities with a fixed dividend, which would be redeemed within four years.<sup>257</sup> The capital of the corporation had been allotted such that each husband and wife family unit holding shares in the corporation, and all individual shareholders other than Mrs. Ferguson held equal portions of common and preferred shares. Thus, the burden of the conversion fell squarely on Mrs. Ferguson, despite the fact that all *preferred* shareholders were treated in a formally equivalent manner.

Building on the "good faith" principle of *Allen v. Gold Reefs of West Africa*<sup>258</sup> and the decision of the Court of Appeal in *Goldex Mines*,<sup>259</sup> the court held that these actions were oppressive to Mrs. Ferguson and enjoined the conversion from proceeding. Brooke J.A.

---

All E.R. 242 at 247 (Ch.D.). These holdings (which are as applicable in the Canadian context as in the English) indicate that a wide variety of majority or controlling shareholder activity falls within the ambit of the conduct of the "affairs of the company."

<sup>256</sup> *Supra*, note 227.

<sup>257</sup> No doubt the delay was precisely to avoid the allegation of oppression which was ultimately successful.

<sup>258</sup> See *supra*, notes 172-205 and accompanying text.

<sup>259</sup> *Supra*, note 216.



did not make fine distinctions between the acts of the individuals involved *qua* shareholders and those of *the company*, holding that:

[h]ere we have a small close corporation that was promoted and is still controlled by the same small related group of individuals...the attempt to force [Mrs. Ferguson] to sell her shares through non-payment of dividends was *not simply the act of Mr. Ferguson, but was also the act of the others in the group including the present directors, in concert with him. Having regard to the intention of that group to deny the appellant any participation in the growth of the company* I think the resolution authorizing the change in the capital of the company is the culminating event in a lengthy course of oppressive and unfairly prejudicial conduct to the appellant. In my opinion the company has not acted *bona fides* in exercising its powers to amend.<sup>260</sup>

The conduct and intentions of the controlling group of shareholders<sup>261</sup> was therefore instrumental in finding that there had been oppression in the conduct of the *company*, a holding mirroring the English cases.<sup>262</sup>

The conclusion that the reach of the oppression remedy extends to shareholder conduct is strengthened by the range of remedies available to the court. As long as the court can find that there has been conduct that is oppressive,<sup>263</sup> whether or not shareholder conduct forms the basis of that finding, the court can

<sup>260</sup> 150 D.L.R. (3d) 718 at 727-28 (emphasis added).

<sup>261</sup> It seems reasonably clear that Brooke J.A. was considering the activities not only of those who were directors of the company, but of those in the control group who were not directors as well.

<sup>262</sup> See also *Olympia & York Enterprises Limited v. Hiram Walker Resources Ltd*, 37 D.L.R. (4th) 194 at 213-14 (holding that "[the oppression provision] is to provide a way of dealing primarily, though not exclusively, with domestic unfairness – one shareholder against another...," and finding on the facts that the provision did not apply because "[n]either applicant is really complaining in its shareholder capacity of oppression by other shareholders.") But see *Johnston, Dragon Investments Ltd, Sales and McKay v. West Fraser Co* (1982), 37 B.C.L.R. 360 (C.A.) (holding that certain assurances given to the President of the company by the majority shareholders were at most private arrangements between the parties and not acts of the company).

<sup>263</sup> A finding of oppressive conduct (in the broad sense) is a condition precedent to the granting of a remedy. See, for example *CBCA*, s. 241(3), *OBCA* s. 247(3), and see *Re Bird Precision Bellows Ltd*, [1985] 3 All E.R. 523 at 531, 536 (C.A.); *Re Ferguson and Imax Systems Corp*, *supra*, note 227. But compare *Eiserman v. Ara Farms Ltd and Eiserman* (1985), 44 Sask. R. 61 at 70 (Q.B.) (apparently suggesting otherwise), *rev'd* on other grounds in an unreported Court of Appeal judgment (7 June 1988).

make an order against a shareholder.<sup>264</sup> The most usual form of remedy granted against a majority or controlling shareholder is an order to purchase the shares of the complainant,<sup>265</sup> although other remedies may be ordered.<sup>266</sup>

*Imax* is illustrative of other substantive changes in the law relating to shareholder conduct wrought by the oppression remedy. The judgment is reflective of the equitable principles discussed by Lord Wilberforce in the *Ebrahimi* case. Brooke J.A. observed that "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such."<sup>267</sup> A growing number of other Canadian and English oppression cases arising in the context of closely held companies have echoed this sentiment.<sup>268</sup>

---

<sup>264</sup> See, for example *CBCA* s. 241(3); *OBCA* s. 247(3) (both allowing the court to "make any interim or final order it thinks fit").

<sup>265</sup> See, for example *CBCA* s. 241(3)(f), (g); *Miller v. F. Mendel Holdings Ltd* (1984), 26 B.L.R. 85 (Sask. Q.B.); *O'Neil v. Dunsmuir Holdings (New Westminster) Ltd*, (20 February 1980), (B.C.S.C.) [unreported]; *Re Van-Tel T.V. Ltd* (1974), 44 D.L.R. (3d) 146 (B.C.S.C.); *Re National Building Maintenance Ltd*, [1971] 1 W.W.R. 8 (B.C.S.C.), aff'd (*sub nom. National Building Maintenance Ltd v. Dove*) [1972] 5 W.W.R. 410 (B.C.C.A.); *Scottish Co-operative Wholesale Society Ltd v. Meyer*, *supra*, note 209. At least one court has also held that it has jurisdiction to order a former controlling shareholder to buy the shares of the petitioning shareholder; see *Re A Company*, [1986] 2 All E.R. 253 (Ch.D.), also reported *sub nom. Re a Company (No. 005287 of 1985)*, [1986] 1 W.L.R. 281 (Ch.D.). Another has pierced the corporate veil in ordering the controlling shareholders of the majority shareholder of the company (as well as the majority shareholder itself) to buy the complainant's shares; *Westmore and Enchant Resources Ltd v. Old MacDonald's Farms Ltd*, *supra*, note 234.

<sup>266</sup> See for example *Re Peterson and Kanata Investments Ltd*, *supra*, note 240 (ordering the majority shareholder, who masterminded the conduct complained of, to sell his shares to the corporation); *Jackman v. Jackets Enterprises Ltd* (1974), 4 B.C.L.R. 358 (S.C.) (ordering the majority shareholder (*inter alia*) to guarantee a loan made by the company to another company controlled by the majority shareholder). The broad framing of the statute allows the court the freedom to order other remedies. See *supra*, notes 231-32 and accompanying text.

<sup>267</sup> *Supra*, note 227 at 150 D.L.R. (3d) 727.

<sup>268</sup> The invocation of Lord Wilberforce's equitable principles has assumed a number of substantively equivalent forms. One formulation is that conduct which is *technically legal* may nonetheless fall afoul of the oppression provision. Another is that the courts will consult the relationship or expectations of the parties in determining their legal entitlements. Another is a straightforward appeal to principles of equity. In some cases, the court may simply invoke the "partnership analogy". The number of cases relying on such principles is growing apace. See *O'Connor v. Winchester Oil & Gas Inc*, *supra*, note 230 at 337; *Re Mason and Intercity Properties Limited*, *supra*, note 226; *Westmore and Enchant Resources Ltd v. Old MacDonald's*

*Imax* and other cases decided under the oppression provision<sup>269</sup> also indicate a change in the discriminatory treatment which will attract judicial intervention. Against earlier jurisprudence which suggested that only formally unequal treatment would be enjoined, *Meyer* and *Imax* both suggest that formally equal treatment is no longer sufficient to protect the actions of shareholding majorities. In each of these cases, all shareholders were treated formally alike. The majority's shareholding interest in the former case was imperilled to the same degree as the minority's, although of course the majority ultimately stood to gain and the minority to lose. In *Imax*, the shares of *all* preferred shareholders were to be redeemed, and not just those of the target shareholder. But since all other shareholders (or families) held equal amounts of common and preferred shares, no one was affected in the same manner as the plaintiff.

---

*Farms Ltd*, *supra*, note 234 at 344; *Carrington Viyella Overseas (Holdings) Ltd v. Taran*, *supra*, note 230; *Re Little Billy's Restaurant (1977) Ltd*, *supra*, note 241 at 253; *O'Neil v. Dunsmuir Holdings (New Westminster) Ltd*, *supra*, note 265; *Re Sabex Internationale Ltee*, *supra*, note 243; *Diligenti v. RWMD Operations Kelowna Ltd*, *supra*, note 230; *Meltzer and Meltzer v. Western Paper Box Co*, [1978] 1 W.W.R. 451 (Man. Q.B.); *Re Bird Precision Bellows Ltd*, *supra*, note 263; *Re A Company (No. 00477 of 1986)*, (21 March 1985), (Ch.D.) [unreported] (summarized in *London Financial Times* (8 April, 1986)); *Re Postgate & Denby (Agencies) Ltd*, (1 July 1986), (Ch.D.) [unreported] (summarized in *London Financial Times* (1 July 1986)) (only legitimate expectations may be taken into account). See also *Re Bury and Bell Guinlock Ltd* (1984), 48 O.R. (2d) 58 (H.C.), *aff'd* (1985), 49 O.R. (2d) 91 (Div. Ct.); *Re Giroday Sawmills Ltd*, *supra*, note 239. But see *Re Cucci's Restaurant Ltd* (1985), 29 B.L.R. 3 (Alta. Q.B.) (refusing to apply *Ebrahimi* because of the absence of an understanding that petitioner would participate in management, and suggesting that the principle is only applicable where a corporation is superimposed on a pre-existing partnership); *Bosman v. Doric Holdings Ltd* (1978), 6 B.C.L.R. 189 (S.C.) (similar to *Cucci's Restaurant*, *supra*); *Jackman v. Jackets Enterprises Ltd*, *supra*, note 266 (similar to *Cucci's Restaurant*, *supra*). Whether or not the *Ebrahimi* principle will be extended to public companies is uncertain. At least one court has refused to do so: see *Re Goldstream Resources Ltd* (1986), 2 B.C.L.R. (2d) 244 (S.C.) (equitable considerations do not arise where the company is a "purely commercial arrangement with no pre-existing or specially created relationship between the petitioners and the other shareholders." *Ibid.* at 247). But see *Re Canadian Tire*, *supra*, note 220 (application of *Ebrahimi* doctrine by Ontario Securities Commission to a public company). It is clear that Lord Wilberforce intended to limit the application of "equitable" principles to private companies. See *supra*, note 210.

<sup>269</sup> See especially the lower court judgment of Lord President Cooper in *Meyer v. Scottish Textile and Manufacturing Co*, *Scottish Co-operative Wholesale Society Ltd*, *supra*, note 209, discussed *supra*, note 215; *Re H.R. Harmer Ltd*, *supra*, note 254.

At the same time, a number of courts have explicitly recognized that formally unequal treatment, even where it results in substantively unequal treatment of shareholders, may nonetheless be justified in some situations.<sup>270</sup> Thus, to found a complaint under the oppression provision, there must be not merely prejudice, but *unfair* prejudice.<sup>271</sup>

These holdings implicitly recognize the important distinction between opportunistic events of a redistributive character (for which a remedy will be granted) and those inspired by genuine business concerns (in which case no oppression will be found). The presence or absence of formally equivalent treatment says very little about the propriety of the conduct in question.

The courts have neither resolved the issue of whether the test of unfairness under the oppression remedy is an objective one or a subjective one, nor of whether the basis for a finding of liability is an absence of good faith or simply a prejudicial *effect*. Few cases have explicitly dealt with these closely related issues. In *Re R A Noble & Sons (Clothing) Ltd.*,<sup>272</sup> Nourse J. of the English Chancery Court held that the test of unfairness was an objective one relating to the effects of the impugned conduct; that is, would a reasonable bystander regard the consequences of the conduct as unfairly prejudicing the petitioner?<sup>273</sup> By contrast, in *Brant Investments v. Keeprite Inc.*,<sup>274</sup> Anderson J. of the Ontario High Court held that the

---

<sup>270</sup> See *O'Connor v. Winchester Oil & Gas Inc.*, *supra*, note 230 (*prima facie* right of all shareholders to equal treatment displaced where costs of extending takeover bid to U.S. shareholders excessive); *Mutual Life Insurance Company of New York v. Rank Organisation Limited*, *supra*, note 243 (failure to extend share offer to North American shareholders not unfair because of costs of so doing).

<sup>271</sup> *Ibid.* See also *Brant Investments v. Keeprite Inc.*, *supra*, note 219 at 761; *Re Carrington Viyella PLC*, (3 February 1983), (Ch.D.) [unreported] (summarized in *London Financial Times* (16 Feb. 1983) at 30) (mere deprivation of shareholder rights is not necessarily unfairly prejudicial); *Re R A Noble & Sons (Clothing) Ltd.*, [1983] B.C.L.C. 273 (Ch.D.).

<sup>272</sup> *Ibid.* See also *supra*, note 215.

<sup>273</sup> *Ibid.* at 290-91.

<sup>274</sup> *Supra*, note 219.

gist of an oppression action is bad faith or a want of probity.<sup>275</sup> The view adopted in *R A Noble* appears to be the correct one. There is nothing in the statutory oppression provisions which requires a showing of bad faith. Rather, the charging provisions of the statutes focus on the consequences of the impugned conduct to the complainant.<sup>276</sup> Put at its highest, a finding of bad faith will normally be *sufficient* but not *necessary* to ground liability under the oppression provision.<sup>277</sup> Moreover, a finding of good faith will not insulate the conduct from being found to be oppressive or unfairly prejudicial if it results in consequences which are oppressive, or unfairly prejudicial, or which unfairly disregard the interests of the complainant.<sup>278</sup>

As noted, earlier jurisprudence dealing with amendments to the corporate constitution required that shareholders act in good faith, and employed a subjective test of good faith.<sup>279</sup> Conversely, and as a matter of general application, the courts insisted on a finding of bad faith before interfering with the actions of a majority

---

<sup>275</sup> *Ibid.* at 767-68. The court, nonetheless, *implicitly* accepted that the test of motive should be an objective one rather than a purely subjective one by extensively reviewing objective evidence bearing on the issue of *bona fides*. Anderson J. suggested that remarks in *Re R A Noble*, *supra*, note 271 and accompanying text suggesting that no bad faith need be shown were *obiter*. *Ibid.* See also *H.J. Raj v. Reed Point Marina*, *supra*, note 243 at 11; *Re Ferguson and Imax Systems Corp*, *supra*, note 227 at 727-28 (both cases cited by the court in *Keeprite*); *Westmore and Enchant Resources Ltd v. Old MacDonald's Farms Ltd*, *supra*, note 234 at 344.

<sup>276</sup> See, for example *CBCA* s. 241(3)(a) ("effects a result"); s. 241(3)(b) ("the business or affairs...have been carried on or conducted"); s. 241(3)(c) ("the powers of directors...are or have been exercised").

<sup>277</sup> It is submitted that the holding in *Re Ferguson and Imax Systems Corp*, *supra*, note 227 (cited by Anderson J. in *Keeprite* as support for the proposition that bad faith is required) should be interpreted in this fashion.

<sup>278</sup> See *supra*, note 275 and accompanying text. By contrast, the statutory test for breach of the fiduciary duty of officers and directors found in, for example, *CBCA* s. 122(1)(a) is an apparently subjective test having regard to motive rather than consequence. This did not, however, stop the court in *Teck Corp v. Millar* (1973), 33 D.L.R. (3d) 288, [1973] 2 W.W.R. 385 (B.C.S.C.) (decided under B.C. legislation similar in this respect to the *CBCA*) from adding an objective element to the statutory test of honesty and good faith.

<sup>279</sup> See *supra*, Part V (C) (1).

of shareholders at common law.<sup>280</sup> The focus of the oppression provision on the consequences of impugned conduct for the complainant thus works an important change from the common law.

In summary, the oppression remedy has been applied by the courts to impose duties of a fiduciary character on majority or controlling shareholders, and in a way that substantially enlarges upon comparable rights available at common law.

### c. *Shareholder Remedies: The Statutory Derivative Action*

The demise of an untempered majoritarianism can also be seen in the *CBCA* and cognate statutes in other important provisions. First among these is the statutory derivative action. As noted above, the range of wrongs for which a shareholder could sue at common law was severely restricted under the rule in *Foss v. Harbottle*.<sup>281</sup> More than this, a shareholder mounting a derivative action on behalf of the corporation risked being saddled with the costs of the action should the suit fail, with no possibility of an indemnity. This might well have inhibited the undertaking of an apparently well justified action.

Under the *CBCA* and similar statutes, a shareholder may mount a derivative action for *any* wrong done to the corporation, provided he obtains leave of the court.<sup>282</sup> The statute allows a court

<sup>280</sup> Absent bad faith, fraud, or an *ultra vires* transaction, the principle of majority rule governed. See *supra*, part V (B). See, for example *Castello v. London General Omnibus Co* (1912), 107 L.T. 575 at 580 (C.A.); *Fallis and Deacon v. United Fuel Investments Ltd* (1963), 40 D.L.R. (2d) 1 at 7 (S.C.C.).

<sup>281</sup> See *supra*, Part V (B).

<sup>282</sup> *CBCA* s. 239 reads:

239(1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the corporation or its subsidiary do not

to order that the corporation indemnify the complainant for his costs whether or not the action is ultimately successful,<sup>283</sup> and also allows for an award of interim costs.<sup>284</sup> No security for costs need be given.<sup>285</sup> The importance of these costs provisions as an encouragement to shareholder action cannot be overstated.<sup>286</sup>

The statutory derivative action also allows a broader class of persons to claim relief than under the common law. At common law, only shareholders could bring a derivative action in the name of the corporation.<sup>287</sup> Under the *CBCA* and cognate statutes, any "complainant" may commence a derivative action "in the name and on behalf of a corporation."<sup>288</sup> "Complainant" is similarly defined as

---

bring, diligently prosecute or defend or discontinue the action;  
 (b) the complainant is acting in good faith; and  
 (c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

Compare *OBCA* s. 245, which is substantially similar. The derivative action was first introduced in the Ontario legislation (pursuant to a recommendation of the Lawrence Committee) in *The Business Corporations Act*, 1970, S.O. 1970, c. 25, s. 99, preceding the federal *CBCA* provision by nearly five years. See generally Dennis H. Peterson, *Shareholder Rights and Remedies* [forthcoming] (indicating how the courts have interpreted the statutory requirements).

<sup>283</sup> *Ibid.*, s. 240(d). Admittedly, the rule of usual application is still "costs follow the event," and thus a shareholder undertaking a derivative action may still be saddled with considerable costs should the action fail. One case ordering a partial indemnity under the Ontario legislation is *Turner v. Mailhot*, 28 B.L.R. 222 (Ont. H.C.). The English courts have not awaited the development of a statutory indemnity provision, and have held that such indemnity may be ordered under the equitable jurisdiction of the court. See *infra*, note 295.

<sup>284</sup> *CBCA* s. 242(4). Compare *OBCA* s. 248(4).

<sup>285</sup> *CBCA* s. 242(3). Compare *OBCA* s. 248(3).

<sup>286</sup> See for example Bowles, "Economic Aspects of Legal Procedure," in Burrows & Veljanovski, eds, *The Economic Approach to Law* (London: Butterworths, 1981); Dewees, Prichard & Trebilcock, "An Economic Analysis of Cost and Fee Rules in Class Actions" (1981) 10 J. Legal Stud. 155; Ehrlich & Posner, "An Economic Analysis of Rulemaking" (1974) 3 J. Legal Stud. 257.

<sup>287</sup> See for example *Western Finance Company and Hannard v. Tasker Enterprises Ltd and Tasker*, *supra*, note 234.

<sup>288</sup> *CBCA* s. 239.

for the oppression provision, allowing, for example, a creditor to commence a derivative action.<sup>289</sup>

A question which is not yet fully resolved is whether a shareholder may commence an action of an essentially derivative character under the oppression remedy. The oppression provisions of the *CBCA* and cognate statutes fail to draw any distinction between those wrongs which are wrongs to the corporation and only incidentally to the shareholder, and those wrongs which are personal to the plaintiff or some particular constituency of shareholders. However, at least two courts have held that actions of a derivative character cannot be entertained under the oppression remedy.<sup>290</sup> But there are holdings to the contrary,<sup>291</sup> and a significant number of cases have allowed actions of a derivative character to proceed under the oppression provision without express discussion of the issue.<sup>292</sup> The weight of authority thus favours the proposition that actions of an essentially derivative character may be commenced under the oppression provision. Where a choice arises, matters of

---

<sup>289</sup> *CBCA* s. 238. See *supra*, note 234 and accompanying text. See also *Sparling v. Royal Trustco*, *supra*, note 231 (oppression action in which the Director of the Companies Branch commenced a class action as a complainant in favour of minority shareholders).

<sup>290</sup> *Re Goldstream Resources Ltd* (1986), 2 B.C.L.R. (2d) 244 (S.C.); *Re Carrington Viyella PLC*, (3 February 1983) (Ch.D.) [unreported] (summarized in *London Financial Times* (16 Feb. 1983) at 30). See also *Re Jermyn Street Turkish Baths Ltd*, *supra*, note 254. See also *Re Goldhar and Quebec Manitou Mines Ltd* (1977), 15 O.R. (2d) 80, 75 D.L.R. (3d) 16, 1 B.L.R. 204 (H.C.) (an order cannot be obtained under the statutory restraining order provision in respect of an action of a derivative character).

<sup>291</sup> *Re a Company*, [1986] 2 All E.R. 253 (also reported *sub nom. Re A Company (No. 005287 of 1985)*, [1986] 1 W.L.R. 281 (Ch.D.); *Re Peterson and Kanata Investments Ltd*, *supra*, note 240. See also *Re R A Noble & Sons (Clothing) Ltd*, [1983] B.C.L.C. 273 at 290 (Ch.D.) (anything which jeopardizes share values may be the subject of an oppression application); *Re Jermyn Street Turkish Baths Ltd*, *ibid.*

<sup>292</sup> See for example *Re Abraham and Inter Wide Investments Ltd* (1985), 51 O.R. (2d) 460 (H.C.); *Carrington Viyella Overseas (Holdings) Ltd v. Taran*, *supra*, note 230; *Miller v. F. Mendel Holdings Ltd*, *supra*, note 230; *Journet and Mouzakiotis v. Superchef Foods Inds. Ltd*, *supra*, note 230; *Inversiones Montforte S.A. v. Javelin International Ltd* (1982), 17 B.L.R. 230 (Que. S.C.); *Redekop v. Robco Construction Ltd* (1978), 7 B.C.L.R. 268, 89 D.L.R. (3d) 507, 5 B.L.R. 58 (B.C.S.C.); *Re Little Billy's Restaurant (1977) Ltd*, *supra*, note 241; *Re Peterson and Kanata Investments Ltd*, *supra*, note 240; *Jackman v. Jackets Enterprises Ltd*, *supra*, note 266; *Re Jones & Reeder Realty Corp, B.C. Corps. Law Guide* (CCH), ¶178,038 (1978); *Re National Building Maintenance Ltd*, *supra*, note 265; *Scottish Co-operative Wholesale Society Ltd v. Meyer*, *supra*, note 209.



procedure and costs will influence the choice between a derivative action and an application alleging oppression. Under the oppression remedy, an action may be commenced by a summary form of procedure, potentially resulting in a speedier remedy and reducing the costliness of the suit.<sup>293</sup> Where a derivative action is commenced, however, a court may order that the complainant be indemnified as to costs no matter what the outcome of the suit.<sup>294</sup> It is at least doubtful that such an order could be made in

---

<sup>293</sup> However, the result of beginning an action in this way may only be to delay the final outcome if the court orders trial of some or all of the issues in question. See for example *Re Heyl and Lac Minerals Ltd* (1985), 50 O.R. (2d) 535 (H.C.), in which (in a fairly lengthy judgment) the Court decided only that there was *prima facie* merit in the petitioner's allegations of oppression and ordered that the relevant issues proceed to trial (with the usual procedures, including pleadings, discovery *et cetera*). Thus, the initial hearing served essentially the same function as a motion by the defendant to dismiss for want of a cause of action under the rules of procedure. See however *Re Peterson and Kanata Investments Ltd*, *supra*, note 240, at 544, and *Westmore and Enchant Resources Ltd v. Old MacDonald's Farms Ltd*, *supra*, note 234 at 346 (both cases holding that the court should settle as many matters as possible in the original application). In a number of cases, the courts have resolved the issue of liability on the original application and have referred only the issue of cashout price to trial. See, for example *Miller v. F. Mendel Holdings Ltd*, *supra*, note 230. Note also that when suing derivatively the complainant will normally be required to give the directors notice and may have to wait for the elapse of a statutorily mandated period before commencing his action. Compare *OBCA* s. 245(2) (requiring 14 days notice); *CBCA* s. 239(2) (requiring "reasonable notice"). The Ontario legislation, however, allows a complainant to seek interim relief through an *ex parte* application before the notice period has elapsed, allowing for a speedy and low-cost remedy in the appropriate case (subject, of course, to later reversal or variation). *OBCA* s. 245(3). The *CBCA* has no comparable provision allowing for *ex parte* relief, and authority suggests that none will be implied. See *Re Goldhar and Quebec Manitou Mines Ltd* (1975), 9 O.R. (2d) 740, 61 D.L.R. (3d) 612 (Div. Ct). It is not clear if a court under the *CBCA* may give non-*ex parte* interim relief before the conditions precedent to commence a derivative action have been met. Section 240 provides that "In connection with an action brought or intervened in under section 239 [requesting leave], the court may *at any time* make *any order it thinks fit* ..." (emphasis added). Despite the italicized words, the introductory words may limit the court's ability to render interim relief to those situations where leave has been given to commence a derivative action.

<sup>294</sup> See *supra*, note 283 and accompanying text.

connection with an oppression application.<sup>295</sup> In other respects, the provisions dealing with costs are the same.<sup>296</sup>

Perhaps more important are the substantive distinctions already noted between the two types of actions: the oppression action offers substantively broader grounds for relief than an action alleging breach of a fiduciary duty owed to the corporation.<sup>297</sup> Further, the flexibility which a court has in fashioning appropriate relief is far wider under the oppression provision.<sup>298</sup>

#### d. *Ratification of Corporate or Directorial Wrongdoing*

The demise of an untempered majoritarianism can also be seen in another important provision in the *CBCA* and cognate statutes dealing with shareholder ratification of corporate actions. The *CBCA* provides that neither an oppression action nor application for leave to commence a derivative action shall be:

---

<sup>295</sup> There is no specific enumeration in s. 241(3) corresponding with s. 240(d) in connection with derivative actions, arguably leading to the conclusion that the legislature did not intend that a court have the power to order an indemnity in connection with an oppression application. However, s. 241(3) allows the court to "make any interim or final order it thinks fit" and the specific enumerations are not exhaustive of the court's powers. Moreover, an equitable power exists at common law to order an indemnity. See *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849, [1975] Q.B. 373 (C.A.); *Smith v. Croft*, [1986] 2 All E.R. 551 (Ch.D.). Thus, a court might very well decide that it has the power to order an indemnity in connection with an oppression action.

<sup>296</sup> See *CBCA* s. 242(3) (no security for costs); *CBCA* s. 242(4) (interim orders as to costs).

<sup>297</sup> See *supra*, Parts V (C)(4)(b)(ii), (iii).

<sup>298</sup> See *CBCA* s. 241(3) and see for example *Inversiones Montforte S.A. v. Javelin International Ltd* (1982), 17 B.L.R. 230 (Que. S.C.) (appointment of receiver); *Journet and Mouzakiotis v. Superchef Foods Inds. Ltd and Marina Oil Inc. and Kiliaris*, *supra*, note 230 (appointment of receiver, removal of defendant as director/officer of corporation, and other relief with "provisional execution" notwithstanding an appeal). One of the most important additions to the remedial arsenal of the court, and one frequently resorted to, is an order to purchase the shares of the complainant. See *supra*, note 265 (cases where majority shareholders have been ordered to purchase shares of the complainant); *Re Abraham and Inter Wide Investments Ltd* (1985), 51 O.R. (2d) 460 (H.C.); *Re Mason and Intercity Properties Limited*, *supra*, note 226. See generally D.H. Peterson, *Shareholder Rights and Remedies* [forthcoming].

stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order ....<sup>299</sup>

These provisions are the product of a recommendation by the Dickerson Committee. The Committee stated:

Rather than set out a specific rule declaring how an act of the directors may be ratified, we think it better to characterize shareholder ratification or waiver as an evidentiary issue, which in effect compels the court to go behind the constitutional structure of the corporation and examine the real issues. If, for example, the alleged misconduct was ratified by majority shareholders who were also the directors whose conduct is attacked, evidence of shareholder ratification would carry little or no weight. If, however, the alleged misconduct was ratified by a majority of disinterested shareholders after full disclosure of the facts, that evidence would carry much more weight indicating that the majority of disinterested shareholders condoned the act or dismissed it as a mere error of business judgment.<sup>300</sup>

The Committee observed that this "evidentiary" approach would "compel the court to adjudge the issue on its merits. Implicit in this policy is the premise that dominant shareholders, who are in a position to control management, owe a fiduciary duty to minority shareholders comparable to the duty that directors and officers owe to the corporation."<sup>301</sup>

At least one case decided under a statute with a ratification provision similar to the *CBCA* has followed this approach and disregarded a shareholder approval of a fundamental transaction where the approval may have been secured only by the votes of interested shareholders.<sup>302</sup> A parallel move appears to be afoot at common law: one court has disregarded a majority shareholder

---

<sup>299</sup> *CBCA*, s. 242. The *OBCA* provision is identical save that "affiliate" is substituted for "subsidiary" and defined more broadly than the latter.

<sup>300</sup> Dickerson Report, *supra*, note 48 at para. 487. The *CBCA* and *OBCA* provisions noted above are substantially copies of the *Draft Act*, cl. 19.05.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Re Northwest Forest Products Ltd*, [1975] 4 W.W.R. 724 (B.C.S.C.). See also *Journet and Mouzakiotis v. Superchef Food Inds. Ltd*, *supra*, note 230 (ratification of essentially fraudulent conduct is ineffective; decided under the *CBCA*). Compare *Re National Building Maintenance Ltd*, [1971] 1 W.W.R. 8 (B.C.S.C.), *aff'd (sub nom. National Building Maintenance Ltd v. Dove)* [1972] 5 W.W.R. 410 (B.C.C.A.) (decided under the B.C. oppression remedy).

approval in a case involving the application of common law principles of fiduciary duty to an interested director's transaction.<sup>303</sup> Clearly, these statutory and common law developments mark a major reversal of the policy embodied in cases like *Foss v. Harbottle* and *Northwest Transportation v. Beatty*.

#### D. Summary

The revitalization and recasting of the rule in *Allen's* case involves a number of important developments. One of these is a substantive redefinition of the nature of the anti-discrimination principle to embrace more than merely formally unequal treatment. Another is the uncoupling of the principle from rigid notions of majoritarianism and a relaxation of the earlier unquestioning deference accorded the majority's avowed perception as to what constitutes the "best interests of the company as a whole." As a general matter, the courts have shown far less timidity than would once have been the case in objectively reviewing the declared business purposes or fairness of the transaction while also demonstrating a greater willingness to find improper motives. Finally, the courts have ventured further afield in search of the bargain of the parties, paying heed to shareholder expectations and implicit understandings in cases involving private corporations.

These developments can be seen in a number of doctrinally distinct (if related) areas of the law. They are both judicial and statutory in origin. They relate both to the substantive rights of shareholders and to shareholder remedies.

These changes have afforded minority shareholders a much greater ability to challenge the actions of a majority of shareholders. It is therefore no great surprise that the number of minority shareholder actions has escalated considerably in the past 10 years.<sup>304</sup>

---

<sup>303</sup> *Wedge v. McNeill* (1981), 126 D.L.R. (3d) 596, 33 Nfld. & P.E.I.R. 272 (P.E.I.S.C.), rev'd on other grounds 142 D.L.R. (3d) 133, 29 Nfld. & P.E.I.R. 205 (P.E.I.C.A.).

<sup>304</sup> Recent developments have also afforded *majority* shareholders a greater ability to attack the obstructionist actions of a *minority* of shareholders. See, for example, *Carrington Viyella Overseas (Holdings) Ltd v. Taran*, *supra*, note 230 (a small minority of shareholders constituting a majority of directors held to have oppressed the majority of shareholders);

## VI. SUMMARY

The main aim of this article has been to scrutinize the changing balance of rights between majority and minority shareholders in English, federal and Ontario company law since the enactment of the first general incorporation statutes around the middle of the last century. It is possible to make a number of observations in this respect.

The first general incorporation statutes erected a relatively inflexible corporate structure in failing to provide mechanisms for effecting most types of fundamental changes. Absent specific authority in the constitutional documents of the corporation for effecting fundamental changes, shareholder rights were "vested" and exempt from alteration save with unanimous shareholder consent (and in some cases, not even with unanimous consent). The unanimity principle has eroded over time to the point where it has nearly disappeared, being preserved only by private agreement in small incorporated partnerships. It was at first replaced by a principle of uncritical majoritarianism which tended to leave minority shareholders hostage to predatory actions by majority shareholders. This majoritarianism was pervasive in company law and was visible in a great variety of corporate law contexts, including rules of a fiduciary character governing corporate and shareholder conduct, the absence of dissenters' rights, and (at least in England) the

---

*Gandalman Investments Inc. v. Fogle*, (27 November 1985), (Ont. S.C.) Ont. Corp. L. Guide (CCH) ¶150,296 (the oppression provision is not restricted to minority shareholders; on facts, provision extended to a 50 percent shareholder); *Re Stewarts (Brixton) Ltd*, *supra*, note 253 (the oppression provision is not restricted to minority shareholders; on facts, provision extended to a 50 percent shareholder). See also *Bern v. Millcroft Inn, Limited*, (30 January 1986), (Ont. S.C.) [unreported] (refusing to issue an injunction under the oppression provision to a 12 percent shareholder on the basis that this might result in irreparable harm to the 88 percent majority which opposed him). But see *In the Matter of Garden House Inn Ltd* (1985), 29 B.L.R. 236 (Ont. H.C.) (holding that the OBCA oppression provision was enacted only to protect minority shareholders from an abuse of majority power, and could not therefore be used by a 50 percent shareholder); *Elder v. Elder & Watson, Limited*, *supra*, note 255 (holding that the provision was enacted for the benefit of an oppressed minority of shareholders); *Re H.R. Harmer Ltd*, *supra*, note 254 (allowing shareholders holding a majority of the equity but a minority of votes to sue under the oppression provision, but suggesting in *obiter* that the oppression remedy is not available to those holding voting control). See also *Re Welpport Investments*, *supra*, note 209 at 248.

administration of requirements to secure prior judicial consent for effecting fundamental changes.

This uncritical majoritarianism was not without its notable exceptions. One of these arose in connection with the advance consent mechanism of the Canadian statutory arrangement provisions, particularly in the period from about 1930 to 1950. While purporting to follow the English standard, the Canadian courts exhibited a surprising degree of sensitivity to shareholder conflicts of interest, sometimes ranging beyond this to an unwarranted paternalism quite uncharacteristic of the predominant tendencies in other doctrinal settings. A similar concern to protect minority shareholders is evident in a number of compulsory acquisition cases.

Increasingly, uncritical majoritarianism has yielded to judicial activism on behalf of minority shareholders. This is most clearly seen in the revival and transformation of the anti-discrimination principle in the *Allen* case, both under the statutory oppression remedy and in the inchoate principle of shareholders' fiduciary duties. The *Allen* principle has been recast to look beyond the narrow issue of formally equal treatment, and the standard transformed from a subjective one to an objective one. At the same time, so far as private corporations are concerned, the courts have shown a willingness to search beyond the technical legal relationship of the parties and consult shareholder expectations in establishing the legal rights of the parties.

The enactment of the shareholder's appraisal remedy in Canada has also furnished minority shareholders with a new tool for escaping the effects of unwise or discriminatory fundamental changes, although deficiencies in the provisions as currently drafted have rendered this protection less effective than might otherwise have been the case.<sup>305</sup>

On the basis of the foregoing, a crude assessment might suggest that minority shareholders have been the main beneficiaries of developments in English and Canadian corporate law over roughly the last last century and a quarter. However, any simple-minded assessment of this character should be strongly resisted. As suggested in the introduction, an efficient regime of rules regarding

---

<sup>305</sup> See MacIntosh, *supra*, note 1.

corporate fundamental changes and the relations between majority and minority shareholders must balance the dangers of majority *and* minority opportunism and facilitate productive fundamental changes while discouraging purely or predominantly redistributive transactions. Fiduciary or quasi-fiduciary duties drawn too one-sidedly in favour of minority shareholders potentially hurt *all* shareholders, by encouraging litigation designed only to redistribute in favour of the minority and by delaying or blocking productive changes in the enterprise. A full assessment of whether the current rules strike an appropriate balance of rights awaits another day.

