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Creditors' use of the oppression remedy

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Masters of Law
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ABSTRACT

This thesis examines creditors' use of the oppression remedy under the *Canada Business Corporations Act* and its provincial equivalents from historical and critical perspectives, assesses the consequences of the increasing willingness of Canadian courts to make the remedy available to creditors and concludes by offering some solutions to the problems that are identified. Part I traces the historical development of the oppression remedy, first in the United Kingdom and then in common law Canada. Next, the current state of the law relating to the oppression remedy is briefly examined, followed by a review of recent developments with respect to the use of the oppression remedy by creditors. Part II is a critical review of the evolving law with respect to creditors' use of the oppression remedy. This part of the thesis focuses on: (i) the relationship and potential conflict between the oppression remedy and other available remedies; and (ii) the impact of creditors' uses of the oppression remedy on the relationship between the corporation and its other stakeholders, including issues of shareholders' and directors' liability. In Part III, it is argued that the present use of the oppression remedy by creditors is not being developed in a coherent and principled manner. Certain guidelines are offered to provide the courts with reasonable controls on and principles to guide the use of the oppression remedy by creditors. In particular, it is argued that the oppression remedy should not be available to creditors when there are, either under corporate legislation or other, general legislation, appropriate remedies already available. The result would be that the oppression remedy should be available to creditors only in the limited category of cases where the creditor has no other effective remedy and the conditions for the use of the oppression remedy are met.

* * *
brosse un tableau historique du recours en cas d'abus, tout d'abord au Royaume-Uni, puis dans les provinces canadiennes de common law. S'ensuivent un bref résumé de l'état actuel de droit à l'égard de ce recours et une revue des faits récents concernant l'utilisation de ce recours par les créanciers. La deuxième partie de la thèse est consacrée à une revue critique du droit évolutif en cette matière. Cette partie est axée principalement sur: (i) la relation et le conflit éventuel entre ce recours et les autres recours, et (ii) l'effet de l'utilisation par les créanciers de ce recours sur la relation entre la société et ses actionnaires, y compris les questions relatives à la responsabilité des actionnaires et des administrateurs. Dans la troisième partie, on discute du fait que l'utilisation actuelle par les créanciers du recours en cas d'abus n'est pas développée de façon cohérente et raisonnée. Certaines lignes directrices sont suggérées pour permettre aux tribunaux de contrôler raisonnablement l'utilisation de ce recours par les créanciers et leur fournir des principes pour les guider dans son utilisation. On y discute principalement du fait que les créanciers ne devraient pas pouvoir se prévaloir de ce recours lorsqu'ils disposent d'autres recours pertinents en vertu du droit des sociétés ou d'une autre loi de portée générale. En fait, seuls les créanciers qui n'ont aucun autre recours efficace et qui remplissent les conditions requises pour faire appel à ce recours devraient pouvoir s'en prévaloir.
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INTRODUCTION

Prior to the mid-1970's, Canadian corporate law had developed in a manner that, with very few exceptions, allowed majority shareholders to exercise their legal rights virtually without consideration of the impact their actions would have on other corporate stakeholders. The applicable common law rules – not yet altered by company law statutes – generally permitted majority shareholders to make decisions even where such decisions were “unfair” or “prejudicial” to the rights of certain other corporate stakeholders.

Chapman has suggested how this strict common law attitude may have developed as well as a possible reason why its universal application may have become inappropriate:

As corporations historically arose in the context of large trading concerns and as limited liability was first envisaged as being directed to such concerns it is not surprising that 19th century corporate law was based on the theoretical model of a corporation as a large trading concern with its consequent sharp division between shareholders and management. The appropriateness of this model as a model for all business corporations became questionable with the rise of small, closely held businesses. Much of the debate and developments in Canadian corporate law in the late 20th century were sparked by the emerging view that it was not appropriate to have one set of corporate rules apply in all circumstances. Indeed, the oppression remedy may be a natural outgrowth of a belief that it is not appropriate, in advance, to attempt to break down corporations by categories and to set out different rules of corporate governance for different categories of corporations. ...It is felt for this reason

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1 The term “corporate stakeholders” refers to a broader category of parties than simply “shareholders”. The term “corporate stakeholders” is defined in the present thesis as it is defined in Dennis H. Peterson, Shareholder Remedies in Canada, (Toronto and Vancouver: Butterworths, 1989) at 1.2, §1.5, to include “parties interested in the management and affairs of the corporation, including shareholders, directors, officers, creditors and regulatory officials.” Peterson’s definition is adopted, with the important addition of company employees to his list of stakeholders.
that a residuary power must exist in the courts to deal with situations not squarely covered by specific provisions of corporate statutes.2

In Canada, the process of questioning the common law treatment of corporate stakeholders’ disputes came to a head in the 1970’s and 1980’s. Numerous Canadian jurisdictions decided to reform their company law statutes by adding, *inter alia*, a statutory oppression remedy. In 1960, British Columbia became the first Canadian jurisdiction to enact an oppression remedy.3 Federally, the oppression remedy was adopted in 1975 and several provinces subsequently followed Parliament’s lead.4 The enactment of an oppression remedy was – and was meant to be – an important reform of company law. It was a clear message from lawmakers that the common law approach was no longer viewed as acceptable.

Beginning in the 1980’s and continuing through the 1990’s, use of the statutory oppression remedy – and its generally broad acceptance by the courts – led to important changes in Canadian corporate law. The new company law statutes were interpreted broadly by Canadian courts, who began to see their role as the protectors of minority shareholders’ reasonable expectations. The impact of this shift and the accompanying change in the law is well-illustrated by the large body of cases relating to oppression actions, principally by minority shareholders.

Yet even as the search continues to delineate the boundaries of the oppression remedy *vis-à-vis* minority shareholders, another corporate stakeholder – the creditor – has taken on the role of the “oppressed”. Recently, creditors of corporations have begun to make oppression claims under the broad oppression remedy sections of the CBCA, as well as

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3 See the British Columbia *Companies Act*, R.S.B.C. 1960, c. 67, s. 185, which is now enacted in a broader form under the *Company Act*, R.S.B.C. 1996, c. 62, s. 200.
4 Federally, the oppression remedy was adopted under the *Canada Business Corporations Act* [hereinafter “CBCA”], S.C. 1974-75, c. 33, s. 234, now R.S.C. 1985, c. C-44, s. 241. Various other provincial company law statutes are modelled after the CBCA. For the sake of clarity, specific references to statutory provisions will, hereinafter, be cited to the CBCA only, except where it is necessary to point out a particular difference between that statute and its provincial equivalents. The oppression remedy provisions of certain other Canadian jurisdictions are listed in note 5, *infra*. 
under similar provisions found in various provincial “CBCA-type” statutes. In this thesis, the term “CBCA-type statute” is used to describe the CBCA as well as those provincial company law statutes that are modelled after or closely resemble the CBCA and which, in particular, have oppression remedy provisions that closely follow the CBCA. These include the company law statutes in Alberta, Manitoba, New Brunswick, Newfoundland, Ontario and Saskatchewan.5

The CBCA-type statutes are statutes which follow a “statutory division of powers” model.6 Under such statutes, persons who want to prevent or who want to seek relief for a breach of the statute or corporate constitution have two choices. They can either persuade the majority to support their position or they can seek a remedy from among those made available under the statute, the most important such remedy being the oppression remedy. The availability of the remedies is based on the nature of the complainant’s status, i.e., as director, officer, shareholder, etc. As a result, this model has been described as “status and remedy oriented”.7

Another type of statute which is still used in some Canadian jurisdictions is the "memorandum and articles of association" model, also known as the “contractarian” model.8 The contractarian model statutes include a specific provision which designates that the corporate constitution is a contract among the shareholders and between the

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6 See Bruce L. Welling, Corporate Law in Canada: The Governing Principles, 2d ed. (Toronto: Butterworths, 1991) at 54-55. Under the statutory division of powers model, the statute imposes a division of powers upon the participants in the company, i.e., the directors, officers, shareholders and to a limited extent creditors. Each of these categories of persons and each of the persons in each of the categories has certain powers and obligations assigned to them by the statute. Those powers can be clarified, modified or sometimes removed by the articles of incorporation or other constitutional documents of the corporation.

7 Ibid. at 55.

8 Under the contractarian model, the division of powers between corporate stakeholders is determined by the corporate constitution, although some jurisdictions with such models have fixed the division of powers by statute; Welling, ibid.
shareholders and the corporation. At least in theory, a breach of the corporate constitution can give rise to an action in breach of contract. Under the contractarian model, however, the directors and officers are not parties to the "contract." When a shareholder wishes to seek redress for a breach by a director or officer of his or her duties, the shareholder has two choices. The shareholder can try to persuade the majority to support his or her claim. Alternatively, the shareholder must prove that a personal right has been violated by the impugned conduct. As a result, this model has been described as "rights oriented". The only two Canadian jurisdictions which still follow the contractarian model are British Columbia and Nova Scotia. Nevertheless, the B.C. Company Act and the Nova Scotia Companies Act each include a statutory derivative action and a statutory oppression remedy.

A third, unique system is found in Quebec. Since the early 1980's, when certain amendments to the Quebec Companies Act came into force, Quebec companies can be incorporated under either of two systems: (1) the letters patent method; or (2) under Part IA of the Quebec act, which allows the incorporation of companies upon the filing of articles of incorporation. Part IA of the Quebec act was heavily influenced by the CBCA-type model. Importantly, however, Part IA of the Quebec act does not contain the broad remedies sections found in the CBCA-type statutes and, therefore, no

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9 For example, see s. 13 of the British Columbia Company Act, R.S.B.C. 1996, c. 62, which provides as follows: "Subject to this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if each had been signed and sealed by the company and by every member and contained covenants on the part of every member, his heirs, executors and administrators to observe the memorandum and articles."

10 Welling, supra note 6 at 55.

11 Ibid.

12 See B.C. Company Act, supra note 9, ss. 200, 201; and the Nova Scotia Companies Act, R.S.N.S 1989, c. 81, Third Schedule, ss. 4, 5.

13 The letters patent system was the sole method of incorporating in Quebec prior to the amendments in the early 1980's. Acceptance of an application for letters patent is at the discretion of the responsible government official. Under letters patent statutes, the allocation of power flows from the statute. See F. H. Buckley, M. Gillen & R. Yalden, Corporations: Principles and Policies, 3d ed. (Toronto: Edmond Montgomery Publications Limited, 1995) at 154.

14 Under the Quebec act, companies that were incorporated by letters patent can be "continued" as Part IA companies, although there is no requirement for them to do so.
oppression remedy or statutory derivative action is available with respect to Quebec companies.

* * *

This thesis examines creditors’ use of the oppression remedy under CBCA-type statutes from historical and critical perspectives. The thesis is not meant to examine the entire body of cases decided under the oppression remedy provisions found in the CBCA-type statutes. Nor is it intended to be an exhaustive examination of all of the aspects of oppression under those statutes.16 Rather, the thesis focuses on a more select body of cases in order to examine specific questions about the use of the oppression remedy by creditors.

Part I of the thesis begins by tracing the historical development of the oppression remedy in the United Kingdom and then in common law Canada. Next the current state of the law is examined, both in terms of the present statutory enactments and the interpretation given to them by the courts. Finally, the use of the oppression remedy by corporate creditors is traced.

Part II is a critical review of the current state of the law, as examined in the first part of the thesis. The critical analysis focuses on issues such as:

(i) the relationship between the oppression remedy and certain rights and remedies provided under other statutes, generally, and on the potential conflict between the oppression remedy and other statutory remedies; and

(ii) the impact of the use of the oppression remedy by creditors on the relationship between the corporation and its other stakeholders, including the effect on the fundamental company law principle of corporate personality17 and on shareholders’ and directors’ liability.

15 See Buckley et al., supra note 13 at 154.
16 For a comprehensive review of the oppression remedy case law, see Peterson, supra note 1 at c. 2 and c. 18.
17 See Salomon v. Salomon & Co. Ltd., [1897] A.C. 22 (H.L.) [hereinafter Salomon]. While it is true that creditors are not the only ones to use the oppression remedy to avoid the rigours of the principle of corporate personality, its use by creditors is particularly significant in view of the fact that, in the normal course, one of the most important features of the corporate structure is the shielding of shareholders and directors from claims by creditors.
Part III draws some preliminary conclusions about whether the present uses of the oppression remedy by creditors are being developed in a principled manner and suggests certain guidelines for creditors' use of the oppression remedy, including limitations that should be placed on the availability of the remedy to creditors and standards which should be applied to assess whether conduct is oppressive, unfair or prejudicial to creditors.
PART I: HISTORY AND ORIGINS OF THE OPPRESSION REMEDY AND ITS USE BY CREDITORS

Chapter 1: Historical Overview of the Development of the Oppression Remedy

A. Introduction

The rules of corporate governance – including the rights of minority shareholders – were developed under the common law during a period when laissez-faire attitudes were prevalent. As early as the mid-nineteenth century, the principle of “majority shareholder rule” was emerging as one of the dominant principles of traditional company law. Cases such as *Foss v. Harbottle*, *North-West Transportation Company, Limited v. Beatty* and *Percival v. Wright* are well-known illustrations of this attitude. In essence, majority shareholders were able to exercise their strict legal rights without concern about the effects their actions would have on other stakeholders and without fear of judicial supervision or intervention. Even the few limitations that were developed to control the abuse of power by the majority shareholders, such as the “fraud on the minority” exception, were narrowly interpreted by the courts.

The vulnerable position of minority shareholders created a major impetus toward the reform of modern company law which is discussed below. At first, the changes

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19 (1843), 2 Hare 461, 67 E.R. 189.
20 (1887), 12 App. Cas. 589 (P.C.) [hereinafter *North-West Transportation*].
21 [1902] 2 Ch. 421.
24 In Beck, “Minority Shareholders Rights”, *ibid.* at 312, Beck suggests that the major thrust of the reform in modern Canadian company law “has been to overcome the substantive and procedural roadblocks placed in the way of minority shareholders” by cases such as *Foss v. Harbottle, North-West Transportation* and *Percival v. Wright* and the principles established by those cases. For a summary of the post-war changes in
occurred incrementally, gradually chipping-away at the common law rules. Ultimately, however, the reforms included major changes in company law statutes through the development of the statutory derivative action and the oppression remedy.

B. The Rule in *Foss v. Harbottle*

"It is not the business of the court to manage the affairs of the company. That is for the shareholders and directors."25

"It is an elementary principle of 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 it has no jurisdiction to do so."26

The harsh treatment of minority shareholders under the common law has its origins in the case of *Foss v. Harbottle*27 from which the infamous Rule in *Foss v. Harbottle* was developed. The Rule in *Foss v. Harbottle* has been the subject of many textbook chapters28 and several thorough and well-known monographs.29 While the purpose of such works was to explain and analyze the "rule", the purpose of the present review is different. The goal here is "...to set the background against which Canadian statutory

Canadian corporate law that were designed to “remedy the more common examples of perceived unfairness”, see Chapman, *supra* note 2 at 175-176.
27 *Supra* note 19.
reform was set in order to better appreciate the fundamental changes to Canadian company law that have taken place during the past twenty-five to thirty years.

In *Foss v. Harbottle*, certain shareholders of a company sued its directors, another shareholder, as well as the company's architect and solicitor on behalf of all the other shareholders. The plaintiffs alleged that the directors had sold certain of their own lands to the company at inflated prices, that the capital of the company had been wasted and that company assets had been mortgaged without authority. The court concluded that the injury was not exclusive to the plaintiffs, rather it was to the whole corporation. As a result, the court held that the corporation itself was the only proper person to sue for the alleged wrongs and that the plaintiffs were without standing to sue on the corporation's behalf. The decision was based on the view that it was up to the majority of the shareholders to decide whether or not the corporation would bring an action.  

*Foss v. Harbottle* illustrates two of the fundamental principles of company law that developed under the English common law and that were later adopted by Canadian courts. Those principles are: (1) separate legal personality of the corporation, or "corporate personality"; and (2) majority rule in internal corporate affairs. To better understand these two principles, it is useful to consider their origins.

The principle of corporate personality is the consequence of the statutory structure adopted for corporations in the nineteenth century and was firmly established by the late nineteenth century. On the other hand, the principle of majority rule, i.e., non-interference in the internal management of companies acting within their powers, has its

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30 Welling, *supra* note 6 at 513. The present review is predominantly based on Welling's work at 509-516.
31 MacIntosh points out that this explanation no longer applies under the CBCA-type statutes which provide that the decision whether or not to sue now rests with the company's directors. See Jeffrey G. MacIntosh, "The Oppression Remedy: Personal or Derivative?" (1991) 70 Can. Bar Rev. 29 at 31, n. 12.
32 The principles laid down in *Foss v. Harbottle* were further "extended" by subsequent case law. For a thorough review of this area of the law, which is now mostly of historical interest only, see Wedderburn, *supra* note 29 at 197-198; and Beck, "The Derivative Action", *supra* note 29 at 164-166;.
33 In effect, this is the *Salomon* principle. See *Salomon*, *supra* note 17. See also Wedderburn, *ibid*. at 196; and Welling, *supra* note 6 at 511.
origins in partnership law.\textsuperscript{34} As Wedderburn points out, "[t]he law had long recognised majority rule as a fundamental principle concerning corporations, so that there was no difficulty in expressing majority rule as the justification for the refusal to interfere in internal management."\textsuperscript{35}

Ironically, at just about the time that the principle of non-interference in internal management was being extended from partnership law to company law, the courts were beginning to relax the rule in the context of partnerships.\textsuperscript{36} Unfortunately for minority shareholders, however, the courts continued to rigorously apply the principle to "irregularities" committed by those managing joint stock companies.\textsuperscript{37} As a result, a divergence between partnership and corporate law began to develop.\textsuperscript{38}

A possible cause of the continued rigorous application of the majority rule branch of the Rule in \textit{Foss v. Harbottle} may have been the courts' muddled combination of the principles of corporate personality and majority rule. That is, some judges mistakenly equated the corporation with the majority of shareholders.\textsuperscript{39} As a result, majority shareholders were sometimes able to "ratify" matters which they should not have been permitted to.\textsuperscript{40}

For example, in \textit{MacDougall v. Gardiner},\textsuperscript{41} a company's articles provided for the taking of a poll upon the demand of five members. On a motion to adjourn a shareholders meeting, the requisite number of members demanded a poll. The chairman, however, refused the poll. The Court of Appeal held that the matter was an internal dispute that could be ratified by the majority, which suggests that a shareholder cannot complain of "irregularities" even if they breach the company's articles of association.\textsuperscript{42}

\textsuperscript{34} See Wedderburn, \textit{ibid.} at 196-198; Welling, \textit{ibid.} at 511; Beck, "The Derivative Action", \textit{supra} note 29 at 165.
\textsuperscript{35} Wedderburn, \textit{ibid.} at 198 [footnote omitted].
\textsuperscript{36} See Wedderburn, \textit{ibid.} at 197; and Beck, "The Derivative Action", \textit{supra} note 29 at 165, n.14.
\textsuperscript{37} Wedderburn, \textit{ibid.}
\textsuperscript{38} Welling, \textit{supra} note 6 at 514.
\textsuperscript{39} For a thorough consideration of this view, see Welling, \textit{ibid.} at 67-69, 511-514.
\textsuperscript{40} See Wedderburn, \textit{supra} note 29 at 199 and 213-215; Beck, "The Derivative Action", \textit{supra} note 29 at 187ff; and Welling, \textit{ibid.} at 65-73.
\textsuperscript{41} (1875), 1 Ch. D. 13.
\textsuperscript{42} See Wedderburn, \textit{supra} note 29 at 213.
Beck has cogently argued that this decision failed to recognize that under the contractarian model of corporations, the corporate model at the time of this decision, the articles and by-laws were in the nature of a contract between the shareholders and the company.\(^{43}\) That “contract” could only be modified in accordance with particular rules which, in the case of a modification of the articles, required a special majority and not a simple majority.\(^{44}\) Thus the refusal to allow a poll in breach of the articles was not a mere “procedural irregularity” which could be ratified by the majority. Similarly, the issuance of shares contrary to the articles of association is not something that a majority of shareholders could “ratify” since only a special majority would have the power to amend the articles. This type of conduct is not a mere “procedural irregularity”, despite suggestions to the contrary.\(^{45}\)

Welling has suggested that Canadian company law is presently built on four basic principles. The principles include the two already noted above, that is (1) corporate personality\(^{46}\) and (2) majority rule, as well as two others, (3) managerial power (the principle that the daily operation of corporate business is carried out by a relatively independent management group); and (4) minority protection (the principle that certain corporate, management or majority preferences may be subject to restraint if they are “injurious” to minority members).\(^{47}\) The potential for conflict between the four principles is obvious. Unfortunately, English courts – and, later on, Canadian courts – were unable to deal with the inherent conflicts between the principles of majority rule and minority protection in a satisfactory manner, a failure that Welling has suggested arose from the “mistaken view of the relationship between majority rule and corporate


\(^{44}\) Ibid.

\(^{45}\) See, for example, Welling, supra note 6 at 67 who discussed the case of Hogg v. Cramphorn Ltd., [1967] Ch. 254, not for the result but for the reasoning of Buckley J. at 269-270 which suggested that if such a breach had been “ratified” by a majority of shareholders, the improper conduct could have been retroactively cured.

\(^{46}\) In fact, corporate personality encompasses both the principle of separate legal personality and the principle of limited liability. See Welling, supra note 6 at 82 for a discussion of the limited liability aspect of the principle of corporate personality. Both of these aspects of corporate personality are discussed in detail in PART II: Chapter 5: Section B, below.

\(^{47}\) Welling, supra note 6 at 53.
personality" discussed above. As a result of this inadequacy of the common law, Welling has argued that it became the function of corporations statutes to create rules for determining which principle will prevail when there is a conflict between them.

C. The Statutory Derivative Action

A derivative action arises where the corporation is the one injured by the alleged wrong, i.e., where there is no special harm to a shareholder or group of shareholders. Put another way, the harm or injury to the shareholder in a derivative action is considered to be "indirect" because it arises only through an injury to the corporation. In contrast, a personal action arises where the harm has a special impact on a shareholder or group of shareholders when compared to the impact on other shareholders. "It might be thought that the line between personal rights and corporate rights would be well and clearly drawn... Between the two poles, however, there is uncertain ground..." The scope of the shareholder derivative action under the common law was very small because under the Rule in Foss v. Harbottle the corporation was the only "person" that could sue for wrongs done to it. The exceptions to this restriction were few and narrow.

For example, in discussing the "fraud on the minority exception", which Beck has suggested was the one most often invoked by minority shareholders, Beck has argued that "...it is difficult to find judicial interference to halt conduct that falls short of an expropriation of corporate assets." The narrowness of the fraud exception is demonstrated by the decision in Pavlides v. Jensen, a case in which the directors were

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48 Ibid. at 511.
49 See text accompanying note 39, above.
50 Ibid. at 53.
52 Ibid.
53 Beck, "The Derivative Action", supra note 29 at 170; see also MacIntosh, supra note 31 at 31.
54 See Beck, "The Derivative Action", ibid. at 167-168; Peterson, supra note 1 at 17.13, §17.26.
56 [1956] Ch. 565.
sued for having negligently disposed of an asset at about one-fifth of its value. Fraud was not pleaded because the sale of the asset at such an under-valued price was merely negligent. The court held that the Rule in *Foss v. Harbottle* applied so that the majority at a general meeting had the power to ratify the directors' conduct or to decide not to take an action against them.\(^{57}\)

On the other hand, there were various situations where the "fraud on the minority" exception could be successfully invoked.\(^{58}\) These included, for example, situations where the directors had acted *male fide* by primarily considering interests other than those of the company,\(^{59}\) or where a director had received secret profits.\(^{60}\) Well-known examples of the rule that the majority cannot appropriate money or property which belongs to the company or in which the other shareholders were entitled to participate are *Burland v. Earle*\(^{61}\) and *Cooke v. Deeks*.\(^{62}\) In *Cooke v. Deeks*, the three defendant directors, while carrying on business of Company A, entered into a certain contract through a new company, Company B, which had been formed by the three defendants. The court held that Company A ought to have obtained the benefit of the contract and that the contractual rights were held on behalf of Company A. Further, the court held that the resolution the defendants had passed as shareholders could not stand.\(^{63}\)

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\(^{57}\) See also Wedderburn, *supra* note 29 ([1958] Camb. L.J. 93) at 99 who discusses this case.

\(^{58}\) See Wedderburn, *ibid.* at 93-106.

\(^{59}\) *Ibid.* at 98.

\(^{60}\) *Ibid.* at 99.

\(^{61}\) *Supra* note 26.


\(^{63}\) The statutory derivative action (see text accompanying notes 64ff, below) is broader than the common law exception of fraud on the minority or situations where directors are required to account for breaches of their fiduciary duties such as diversion of a corporate opportunity. The statutory derivative action allows parties to take proceedings for wrongs done to the corporation whether or not the harm is the result of fraud, breach of fiduciary duty or misappropriation of corporate opportunity by a director. In other words, while a derivative action may be based on a director's breach of fiduciary duty (e.g. diversion of corporate opportunity), it can also be based on a much broader spectrum of harms to the corporation that may or may not have involved a breach of fiduciary duty. For that matter, it may not even be based upon a wrong by a director (or other person who owes the company any fiduciary duties).
By the 1970’s, Canadian company law reformers began taking the first steps towards attenuating the harshness of the Rule in *Foss v. Harbottle*. In Ontario, a statutory derivative action was added to the OBCA in 1971. The statutory derivative action was also enacted in British Columbia in 1973 and then federally in 1975. As discussed above, the federal act was used as a model in several provincial jurisdictions.

The statutory derivative action is a procedural code that, under certain conditions, allows certain parties to enforce rights or remedies that would otherwise be available only to the corporation. The statutory derivative action provides protection to minority shareholders for wrongs done to the company where the “wrongdoers” are in control and fail to seek redress for the wrong. Welling has called it “…the minority shareholder’s sword to the majority’s twin shields of corporate personality and majority rule.”

The statutory derivative action is available only with leave of the court which can be granted, at the court’s discretion, where the complainant has satisfied the court that: (1) the directors have been given reasonable notice of the complainant’s intention to apply for leave; (2) the complainant is acting in good faith; and (3) the action appears to be in the interests of the corporation. Importantly, shareholder “ratification” of alleged wrongdoing does not exclude the possibility of a derivative action, although it can be taken into account by the court when it is considering the application for leave.

While the provision provides a way around the procedural barriers created by the Rule in *Foss v. Harbottle*, its drafters were concerned that the statutory derivative action

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64 The following excerpt from the *Dickerson Report*, infra note 100 at para. 482, makes the point: “In effect this provision [i.e., the statutory derivative action] abrogates the notorious rule in *Foss v. Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions. ...[W]e have relegated the rule to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties – and obvious injustices – engendered by that infamous doctrine.”

65 See OBCA, R.S.O. 1970, c. 53, s. 99.

66 See the British Columbia *Companies Act*, S.B.C. 1973, c. 18, s. 222.

67 CBCA, S.C. 1974-75, c. 33, s. 232. This statute also included the oppression remedy, discussed below in Section E of this chapter.

68 See *supra* note 5, above, and accompanying text.

69 See the *Dickerson Report*, infra note 100 at 160, para. 481 and the *Lawrence Report*, infra note 93 at 63, para. 7.4.3.

70 Welling, *supra* note 6 at 526.

71 CBCA, ss. 239(2).
could potentially be used in an abusive manner.\(^{73}\) The procedural requirements outlined above were included with the intention of preventing such abuses.

It is not yet clear what scope the statutory derivative action will ultimately have. Nor is it obvious the extent to which the derivative action will overlap with the other major statutory remedy, the oppression remedy.\(^{74}\) What is clear, however, is that under the CBCA-type statutes the statutory derivative action is only one part of the lawmakers' response to the abuses that minority shareholders were subjected to by the common law. The oppression remedy, which is discussed next, was the second part of that response. However, as is discussed below, the oppression remedy is so broad and open-ended that it threatens to completely overshadow the statutory derivative action.\(^{75}\)

D. The Evolution of the Oppression Remedy Begins: Developments in the United Kingdom

The evolution of the statutory oppression remedy began in Great Britain.\(^{76}\) In 1945, a committee studying possible reforms of U.K. company law completed its report, known as the Cohen Report.\(^{77}\) That report recognized the competing principles of: (1) the flexibility of management to conduct business efficiently; and (2) the interests of

\(^{72}\) CBCA, s. 242(1).

\(^{73}\) For example, there were fears that the remedy would be used for "strike suits" aimed at blackmailing management into settlement of unfounded suits, groundless claims or claims for trivial amounts and that it would lead to a multiplicity of lawsuits. See the Dickerson Report, infra note 100 at para. 482; and MacIntosh, supra note 31 at 32-33. See also the Lawrence Report, infra note 93 at 62-63, §6.4.2-6.4.3.

\(^{74}\) See MacIntosh, supra note 31, at 30.

\(^{75}\) See infra note 121.

\(^{76}\) See Peterson, supra note 1 at 18.1. A complete history of the U.K. oppression remedy is beyond the scope of this thesis and is, therefore, considered only where relevant to the development of the oppression remedy in Canada. For a summary of the developments in the U.K., see Peterson, ibid. at 18.1 to 18.7.

\(^{77}\) Report of the Committee on Company Law Amendment, United Kingdom, Cmd. 6659 (London: Her Majesty's Stationary Office, 1945) [hereinafter the Cohen Report].
corporate stakeholders. The “theoretical thrust” of the report considered the need to balance those competing principles.

The Cohen Report recommended, inter alia, the adoption of an oppression remedy. The recommendation was accepted and a statutory oppression remedy was enacted under Section 210 of the Company Act (U.K.), 1948. Section 210 was only available, however, where a complainant could show that: (1) the conduct complained of was oppressive; (2) the circumstances would have favoured the winding-up of the company on the “just and equitable” ground; and (3) a winding-up order would be unfairly prejudicial to the minority. Further, in addition to the rather onerous requirements found in the wording of Section 210 itself, the scope of this oppression provision became even more circumscribed through a series of conservative and restrictive decisions of the U.K. courts. It was not until 1980 that the U.K. provision was substantially revised to provide a broader oppression remedy.

Prior to the 1980 amendments, however, two important events occurred in the U.K. which contributed to the evolution of the oppression remedy, though their impact was not necessarily immediate. The first was the release of another report on the reform of U.K. company law, known as the Jenkins Report. That report addressed some of the shortcomings of the Section 210 oppression remedy, as it had been interpreted by the British courts, and recommended the adoption of a broader oppression provision. Like

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78 See the Cohen Report, ibid. at 7-8.
79 See Peterson, supra note 1 at 18.2.
80 Cohen Report, supra note 77 at 30, para. 60.
81 The important U.K. decisions and the limitations they created are well-detailed in the literature. See, for example, E. A. Cronk & Paul F. Monahan, “The Oppression Remedy Revisited” (1990) 11 Advocates’ Q 393 at 395, who even suggest that it was harder to obtain relief under the Section 210 oppression remedy than it was to obtain a winding-up order; see also Peterson, ibid. at 18.3-18.4;§18.7; and Chapman, supra note 2 at 176-177.
82 This was done via the Companies Act (U.K.), 1980; now ss. 459-461 of the Companies Act (U.K.), 1985.
84 Ibid. at 75, where it was suggested that “if the section is to afford effective protection, it must extend to cases in which the acts complained of fall short of actual illegality.”
the *Cohen Report*, the report recognized the need to balance the protection of shareholders against the flexibility of management to conduct business efficiently.\(^{85}\)

Also contributing to the evolution of the oppression remedy was the decision of the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd.*\(^{86}\) *Ebrahimi* was decided after the release of the *Jenkins Report* and the decision by the British government to reject the report’s recommendation to adopt a broader oppression remedy. However, the Law Lords’ decision in *Ebrahimi* was moving in a different direction, as is evident from Lord Wilberforce’s speech which contained the following famous statement:

>[The just and equitable provision] does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; 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 particular way.\(^{87}\)

Beck has suggested that:

[This] is one of the most important statements on company law that has been made by a final court of appeal in many years. Although made in a winding-up case, and being applied to an incorporated partnership, the words have a reach that extends beyond that situation and will, I suggest, be increasingly applied to protect the rights of minority shareholders. *Indeed, it could be argued that the entire sense of the oppression remedy is summarized in Lord Wilberforce’s statement.*\(^{88}\)

As will be seen in the following chapters, Beck’s view of the importance of this statement was correct. Arguably, the essence of Lord Wilberforce’s statement was

\(^{85}\) *Jenkins Report*, *ibid.* at 3, paras. 11 and 14.

\(^{86}\) [1973] A.C. 360 [hereinafter *Ebrahimi*].

\(^{87}\) *Ibid.* at 379.

\(^{88}\) Beck, “Minority Shareholders Rights”, *supra* note 23 at 334 [emphasis added].
incorporated into the oppression remedies in the CBCA-type statutes and it has had an important impact upon how Canadian courts have interpreted the CBCA-type remedy.

E. Origins of the Oppression Remedy in Canada

The oppression remedy came to Canada more than a decade after the British remedy was first enacted. In 1960, British Columbia became the first jurisdiction in Canada to adopt an oppression remedy. However, the B.C. provision was identical to the (ineffective) U.K. Section 210. As a result, this form of the B.C. oppression remedy was subject to the same pitfalls as its U.K. counterpart.

In Ontario, a report on the possible reform of Ontario company law was released in 1967. Like the U.K. reports discussed above, the competing principles of fairness (protection of minority shareholders) versus efficiency and certainty were once again in issue. However, the report, known as the Lawrence Report, recommended against adopting an oppression remedy. The authors of the report cited concerns that an oppression remedy would lead to excessive judicial interference in the workings of corporations and too large a degree of uncertainty in corporate transactions. Chapman has suggested that the recommendation against the adoption of an oppression remedy “was inconsistent with the looming developments in many areas of commercial and tort law which foreshadowed a broad re-balancing of the often competing values of fairness and certainty.” Interestingly, Beck suggested that the Ontario courts “...were well on their way to articulating a jurisprudence of majority shareholders’ duties...” even before the

89 Chapman, supra note 2 at 179, suggested that Ebrahimi was one of the factors that contributed to the “interventionist” approach taken under the CBCA oppression remedy.
91 See note 3.
92 See Peterson, supra note 1 at 18.8, n. 2; and Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 (S.C.).
93 Interim Report of the Select Committee on Company Law (Toronto: Ontario Queen’s Printer, 1967) [hereinafter the “Lawrence Report”].
94 Chapman, supra note 2 at 176; and Lawrence Report, ibid. at 60, §7.3.12.
enactment of the statutory oppression remedy, a jurisprudence that now continues to develop under the OBCA and CBCA oppression remedy sections. In support of this argument, Beck cited the case of *Goldex Mines Ltd. v. Revill*, a case which primarily concerned the distinction between derivative and personal actions. Nevertheless, the judgment of the Ontario Court of Appeal contained the following statement which Beck suggested is "a succinct summary of what the oppression remedy is trying to achieve":

The principle that the majority governs 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.

Meanwhile, at the federal level, a report on proposed amendments to federal company law was released in 1971. The report, known as the *Dickerson Report*, considered reforms to federal company law and it too considered the need to balance the competing principles of the efficient management of companies' affairs against the interests of corporate stakeholders.

Unlike the *Lawrence Report*, the *Dickerson Report* recommended the adoption of a broad oppression remedy, a recommendation that was ultimately accepted by the federal

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95 Chapman, *ibid.* at 177 [footnote omitted]. He also suggested, at 177, n. 29, that the re-balancing of these competing interests in company law has occurred in areas such as tort law and the law of fiduciary obligations.


97 (1975), 54 D.L.R. (3d) 672 (Ont. C.A.).


99 *Supra* note 97 at 680. Similarly, the court may exercise its discretion to prevent a creditor from exercising its voting rights abusively or improperly in the context of a vote on the approval or rejection of a proposal under the BIA, *infra* note 145 (see, for example, *Re Laserworks Computer Services Inc.* (1998), 27 B.L.R. (2d) 226 (N.S.C.A.)).


101 See the *Dickerson Report*, *ibid.* at 2-3, para. 8. See also para. 23 which discusses the need for both fairness and efficiency in corporate law.
government. Further, unlike the U.K. Section 210 oppression remedy, the oppression remedy provisions that were recommended and subsequently adopted were: \textsuperscript{102} wide-ranging ...provisions designed to give the courts a broad discretion to apply general standards of fairness to decide cases on their merits. ...[They were] an abandonment of the traditional disinclination to become involved in the internal affairs of the corporation. They made the courts the legislated overseers of the consciences of Canadian corporations. \textsuperscript{103}

\textsuperscript{102} See \textit{supra} note 3, now CBCA, s. 241 and the provincial equivalents listed in \textit{supra} note 5.
\textsuperscript{103} Chapman, \textit{supra} note 2 at 179-180.
Chapter 2: The Oppression Remedy: An Overview

A. Statutory Provisions

Before proceeding with an overview of the oppression remedy, it is worthwhile to take a moment to review the relevant “remedies” sections under the CBCA. For that purpose, the oppression remedy provisions are reproduced immediately below. The derivative action provisions and certain relevant definition sections are also reproduced so that all of the provisions can be read in their proper context.

238. In this Part,
“action” means an action under this Act;
“complainant” means
(a) a registered holder or beneficial owner and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
(c) the Director,\(^\text{104}\) or
(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

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

\(^{104}\) See, below, s. 260. See, also, the text accompanying notes 107 and 108.
(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 bring, diligently prosecute 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, prosecute, defended or discontinued.

240. In connection with an action brought or intervened in under section 239, the court may at any time make any order it thinks fit including, without limiting the generality of the foregoing,
   (a) an order authorizing the complainant or any other person to control the conduct of the action;
   (b) an order giving directions for the conduct of the action;
   (c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and
   (d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

241. (1) A complainant may apply to a court for an order under this section.105

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
   (a) any act or omission of the corporation or any of its affiliates effects a result,
   (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner,
   (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

105 Subsections 241(4)-(7) are not reproduced here.
that is oppressive or unfairly prejudicial to or that unfairly disregard the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;
(b) an order appointing a receiver or receiver-manager;
(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
(d) an order directing an issue or exchange of securities;
(e) an order appointing directors in place of or in addition to all or any of the directors then in office;
(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;
(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
(j) an order compensating an aggrieved person;
(k) an order directing rectification of the registers or other records of a corporation under section 243;
(l) an order liquidating and dissolving the corporation;
(m) an order directing an investigation under Part XIX to be made; and
(n) an order requiring the trial of any issue.
242. (1) An application made or an action brought or intervened under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order under section 214, 40 or 241. 106

260. The Minister may appoint a Director and one or more Deputy Directors to carry out the duties and exercise the powers of the Director under this Act.

The Dickerson Report summarized the role of the Director as follows: "[t]he [Director’s] function, for the most part, is to ensure that the law has been observed. Where an adjudication on conflicting rights is required, the adjudication should be made by a court, not a government official." 107 The Director, as an appointed civil servant, has various duties under the CBCA which can be placed in three categories: (1) purely administrative; (2) aiding self-help remedies; and (3) active intervention. 108 The latter category includes the Director’s active involvement in legal actions, including those under the oppression remedy provisions.

B. The Derivative Action and Oppression Remedy: Are they Purely Procedural Remedies?

Keeping the above statutory provisions in mind, it is possible to begin to see how the oppression remedy can be used to regulate the inter-relations between the four basic principles of modern company law which were discussed above. 109 It will be recalled that the four principles are: (1) corporate personality; (2) managerial power; (3) majority rule; and (4) minority protection. Welling has suggested that when the interests of minority shareholders conflict with the other basic principles, particularly the principle of

106 Subsections 242(2)-(4) are not reproduced here.
107 Dickerson Report, supra note 100 at para. 13.
108 See Welling, supra note 6 at 598. Welling gives a description of each of these categories and the relevant sections under the CBCA at 598-599.
109 See text accompanying note 47, above.
majority rule, the statutory remedies can be employed as \textit{procedural} tools to protect minority interests.\textsuperscript{110} He has argued that rather than outlining any \textit{substantive rights} of corporate shareholders, the CBCA "...provides a series of \textit{procedural remedies}, each designed to handle particular minority complaints."\textsuperscript{111}

Three comments on Welling's analysis are necessary. First, of the "procedural remedies" he alluded to, the oppression remedy (as opposed to the derivative action or the other remedies available in Part XX of the CBCA) has become by far the most important.\textsuperscript{112} Secondly, Welling referred to "minority protection" of "minority interests" and described the procedural remedies as applying to "particular minority complaints". In fact, this is too narrow an analysis because the derivative action and, as is discussed in the section that follows, the oppression remedy are also available to certain other corporate stakeholders. Therefore, at least in the context of the oppression remedy, the analysis should refer to "stakeholder protection", "stakeholder interests" and "particular stakeholder complaints". Thirdly, Welling is only partly correct in suggesting that the CBCA remedies are procedural remedies. While this may be correct in respect of the derivative action, the oppression remedy is not purely procedural; it creates \textit{substantive rights} through a statutory standard of liability that is stricter than the common law standard.\textsuperscript{113}

C. A Broad and Open-ended Remedy

"The sweep of the oppression remedy has been so broad that, as applied at times, it has threatened to subsume all of corporate law."\textsuperscript{114}

It is difficult to overstate the impact that the oppression remedy has had on Canadian company law during the past twenty-five years. Peterson has called the oppression

\begin{itemize}
\item \textsuperscript{110} Welling, \textit{supra} note 6 at 58-60 and 516.
\item \textsuperscript{111} \textit{Ibid.} at 59 [emphasis added].
\item \textsuperscript{112} The Part XX remedies are reviewed by Welling, \textit{supra} note 6 at 509ff.
\item \textsuperscript{113} CBCA, ss. 241(2). See MacIntosh, \textit{supra} note 31 at 56-57 who suggests that the standard is based on "fair conduct". The types of conduct that are subject to review are considered in the next section.
\end{itemize}
remedy the *Charter of Rights and Freedoms* of corporate law.\textsuperscript{115} Beck, as early as 1982, suggested that:

>[the CBCA oppression remedy is] beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world. ... The potential for remedy is so broad that I would confidently predict that over the next decade it will result in a fundamental change in the nature of minority shareholders' rights.\textsuperscript{116}

Three aspects of the drafting of the oppression remedy are considered in this Section: (i) the broad categories of conduct that are subject to review;\textsuperscript{117} (ii) the broad and open-ended range of remedies that can be granted when there has been oppression;\textsuperscript{118} and most importantly for the purposes of this thesis, (iii) the standing requirements for claims under the oppression remedy which determine the types of persons who qualify as "complainants". This latter aspect of the oppression remedy has expanded its application far beyond claims by minority shareholders – and, for that matter, beyond claims by shareholders altogether – to include other corporate stakeholders under the definition of "complainants".\textsuperscript{119}

Before considering these three aspects of the drafting of the oppression remedy, two additional factors that have contributed to its impact should be noted. First, claims under the oppression remedy can provide complainants with quicker relief than ordinary civil actions since they are available by way of application rather than by action.\textsuperscript{120}

\textsuperscript{114} Chapman, *supra* note 2 at 171.

\textsuperscript{115} Peterson, *supra* note 1 at 18.1.

\textsuperscript{116} Beck, "Minority Shareholders Rights", *supra* note 23, at 312. This prediction has come true, although it was, arguably, too modest in terms of the ultimate effect the oppression remedy would have; see, below, text accompanying notes 136-143.

\textsuperscript{117} As Cronk & Monahan have pointed out, *supra*, note 81 at 402, the OBCA oppression remedy is even broader than the CBCA remedy in that it covers "threatened" conduct. See OBCA, ss. 248(2)(a)-(c).

\textsuperscript{118} Or, in Ontario, when oppression is threatened, *ibid.*


\textsuperscript{120} Generally speaking, an application is a summary proceeding in which the court determines questions of law only and in which there are no material facts in dispute. Where there is conflicting evidence before the court, it may not be appropriate to proceed
faced with a choice, a complainant may, therefore, choose to make a claim under the oppression remedy simply for the procedural advantages it offers. Secondly, as if the oppression remedy sections were not drafted broadly enough, the courts have not hesitated to give these "remedial" statutory provisions a broad and liberal interpretation.

(1) Conduct Subject to Review

CBCA ss. 241(2) provides the substantive preconditions for relief which can be characterized as falling into three different categories: (i) wrongful conduct; (ii) unfair results; and (iii) unfair process. Campion et al. have suggested that modern analysis focuses not only on the nature of the conduct but also on the effects the conduct has had and on the process through which the conduct has been implemented.

The terms "unfairly prejudicial" and "unfairly disregards" have been interpreted as less rigorous than the term "oppression" and the meaning and effect of the term

by way of application and it may be necessary to have a trial of an issue or to convert the application into an action. See, for example, Rules 14, 38 and 39 of the Ontario Rules of Civil Procedure, R.R.O. 1990, Regulation 194, as amended.

See, for example, VanDuzer, supra note 119 at 476, who has suggested, at 465, that: "[t]raditional remedies like the shareholder’s derivative action for injuries to the corporation have been significantly displaced by the flexible and procedurally simple oppression remedy" and Peterson, supra, note 1 at 17.1, § 17.2. But see MacIntosh, supra note 31 at 41ff, who questions whether the oppression remedy is or should be available for all types of derivative actions.


The following is a brief overview of an area of law about which a great deal has been written and which continues to develop. For a detailed review of this area of the law see Peterson, supra note 1, at §18.39-18.65.4.


Campion et al., ibid.

See Mason, supra note 122 at 635; and Cronk & Monahan, supra note 81 at 404.
“unfairly prejudicial” has been given a more expansive definition than that given to the term “oppressive”.127

In the present thesis, the term “oppression” is used broadly to include all conduct that is oppressive or which has an effect that is unfairly prejudicial to or which unfairly disregards the interests of a security holder, creditor, director or officer of the company. As well, the phrase “oppressive or unfair” is given a similarly broad meaning and is used interchangeably with the term “oppression”.

(2) Available Remedies128

Subsection 241(3) of the CBCA, reproduced above, allows the court to make “any interim or final order it thinks fit” to rectify the matters complained of. The breadth of this provision is amazing. Consider for a moment that the court can, inter alia: re-write a corporation’s by-laws, articles or unanimous shareholders’ agreement; reverse or vary a company’s transactions; order the issue, exchange or purchase of securities; and appoint or remove directors.129

The subsection provides a non-exhaustive list of possible orders which is so broad that one wonders how often courts will have to go beyond the list in order to fashion a “special” remedy.130 Nevertheless, the wording of this subsection is clear in that, at least theoretically, there are no limitations on the court’s remedial powers.131

The courts have not hesitated to make orders they consider necessary to provide effective remedies. It is submitted, however, that not enough consideration has been

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127 Dilgenti v. RWMD Operations Kelowna, supra note 92.
128 This topic is also covered only briefly. For further discussion see: Peterson, supra note 1 at §18.149-18.239.
129 So much for not interfering in a company’s internal corporate affairs!
131 The broad remedial powers allow courts, in effect, to “re-write” the parties’ relationships (e.g. CBCA, ss. 241(3)(c)), and to help “oversee” the parties’ behaviour (e.g. CBCA, ss. 241(3)(a), (i) and (k)), something the courts have, traditionally, been hesitant to do in other areas of law, such as contract law. In this respect, see, for example, Zang Tumb Tuum Records Ltd. & Another v. Holly (July 26, 1989), (C.A., Civ. Div., Dillon & Mann, L.JJ. & Sir John Megaw); A. Schroeder Music Publishing Co. Ltd. v. Macauley, [1974] 1 W.L.R. 1308 (HL).
given to the impact that the liberal use of these broad remedial powers has had on certain basic principles of company law.\textsuperscript{132}

It should also be noted that once the court’s discretion has been exercised in selecting a remedy, appeal courts have been reluctant to interfere with the discretion of the judge at first instance.\textsuperscript{133}

(3) \textit{Standing as a “Complainant”}

Without question, the oppression remedy was enacted with the plight of minority shareholders in mind\textsuperscript{134} and when the remedy was introduced it was expected that minority shareholders would be its primary users and beneficiaries.\textsuperscript{135} However, the scope of the oppression remedy has been interpreted by the courts to include claims by “non-minority” shareholders\textsuperscript{136} and persons claiming to be shareholders.\textsuperscript{137} Further, the oppression remedy was always meant to be available to some complainants who were not shareholders. CBCA ss. 238(b) and (c) provide that the Director, as well as present and former directors and officers of the corporation or its affiliates, can make oppression claims.\textsuperscript{138}

\textsuperscript{132} See, for example, VanDuzer, \textit{supra} note 119 at 466, n. 4 and accompanying text and see PART II: Chapter 5: below.


\textsuperscript{134} See \textit{supra} note 24 and accompanying text.

\textsuperscript{135} See VanDuzer, \textit{supra} note 119 at 468ff.

\textsuperscript{136} E.g. see \textit{Gandalman Investments Inc. v. Fogle} (1985), 52 O.R. (2d) 614, 22 D.L.R. (4\textsuperscript{th}) 638 (H.C.J.). See also Chapman, \textit{supra} note 2 at 181, n. 50 and accompanying text; and Cronk & Monahan, \textit{supra} note 81 at 399-401.

\textsuperscript{137} E.g. see \textit{Czak v. Aumon} (1990), 69 D.L.R. (4\textsuperscript{th}) 567 (H.C.J.).

\textsuperscript{138} See VanDuzer, \textit{supra} note 119 at 473-474; and Peterson, \textit{supra} note 1 at §2.17 and §2.18-2.28.1.
However, it is the interpretation given to the “proper person” provision under CBCA s. 238(d) that has been most responsible for the expansive interpretation of standing for “complainants” under the oppression remedy. The discretion granted under this provision has been interpreted as “a grant to the court of a broad power to do justice and equity in the circumstances of a particular case where a person who otherwise would not be a ‘complainant’ ought to be permitted to bring an action... to obtain [relief]”. 139 Peterson has suggested that “a ‘proper person’ is one ... who has rights under the relevant company act, has acquired rights directly from the corporation pursuant to some contractual arrangement, or has bona fide economic interests, any of which have been breached or abused in an oppressive manner.” 140 In some cases, “proper person” has been interpreted to include the corporation itself. 141

However, the most important category of claimant seeking this “discretionary standing” has been creditors. Some have argued that the exercise of the court’s discretion to grant standing to creditors under CBCA s. 238(d) (and its provincial equivalents) is an extension of the oppression remedy that goes beyond the limits envisaged by its “framers”. 142 Nevertheless, this extension has now been confirmed by the courts in several jurisdictions. 143

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139 First Edmonton Place v. 315888 Alberta Ltd. (1988), 60 Alta L.R. (2d) 122 at 151; 40 B.L.R. 28 (Q.B.) [hereinafter First Edmonton cited to Alta. L.R.], rev’d on other grounds (1989), 71 Alta. L.R. (2d) 61, 45 B.L.R. 110 (C.A.). The facts of First Edmonton are summarized in the text accompanying notes 178ff, below.

140 Supra note 1 at 2.16.4, §2.30. See also First Edmonton, ibid. at 151-152; and West v. Edson Packaging Machinery Ltd. (1993), 16 O.R. (3d) 25 at 29 (Gen. Div.).


142 See, for example, Jacob S. Ziegel, “Creditors as Corporate Stakeholders: The Quiet Revolution – An Anglo-Canadian Perspective” (1993) 43 U.T.L.J. 511 at 527 [hereinafter “Creditors as Corporate Stakeholders”], as well as VanDuzer, supra note 119 at 466, who referred to the Dickerson Report, supra note 100 at 158-163. However, see Beck, supra note 23 at 313-314, who predicted that creditors would likely be granted standing as complainants in view of the fact that creditors are specifically referred to in what is now ss. 248(2) of the OBCA (the equivalent of ss. 241(2) of the CBCA) and despite the fact creditors are not specifically enumerated as a “complainant”.

Another interesting question to consider is whether the oppression remedy can be used by a trustee in bankruptcy to bring an oppression action on behalf of the creditors. To date, there is no clear answer to this question. In *Canada (Attorney General) v. Standard Trust Co.*, the trustee in bankruptcy sought leave to bring proceedings against a subsidiary of the bankrupt under s. 100 of the *Bankruptcy and Insolvency Act* as well as under the OBCA oppression remedy. The trustee in bankruptcy attacked the transfer of $25 million in assets from the bankrupt to the subsidiary. The transfer was made at the request of the Superintendent of Financial Institutions and with the unanimous approval of the bankrupt’s board of directors. While the trustee was permitted to proceed under s. 100 of the BIA, standing under the oppression remedy was denied. Houlden J.A. concluded that because the company’s directors had unanimously approved the transaction which the trustee sought to attack, the bankrupt could not have complained that the other contracting party’s conduct had been oppressive or unfair. Therefore, leave was not granted to bring the oppression claim because the trustee’s rights could be no better than those of the bankrupt’s.

The decision in *Standard Trust Co.* should be compared to *Gainers Inc. v. Pocklington*. In *Gainers*, the company had been taken over by its principal creditor. The court held that it was possible for a corporation to bring an application under the oppression remedy, dismissing the argument that in such circumstances the company could not be a “proper person”. The court distinguished *Standard Trust Co.* on the grounds that in *Gainers* the corporation was complaining that the directors had breached their fiduciary duties to the corporation. As such, the acts complained of were not ones which could be approved of by the directors.

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145 R.S.C., 1985 c. B-3, as amended [hereinafter the “BIA”].
146 (1992), 7 B.L.R. (2d) 87 (Alta. Q.B.) [hereinafter *Gainers*].
Gainers could be used in support of an argument that a company’s right to bring an oppression claim against its directors or officers vests in the trustee in bankruptcy who can assert that claim for the benefit of the bankrupt company’s creditors.  

D. Developing Principled Guidelines for Applying the Oppression Remedy

(1) Considering the Coherence of the Oppression Remedy on Different Levels

Having reviewed the historical evolution of the oppression remedy, it remains necessary to consider the theoretical framework upon which the remedy exists.

First, it is necessary to consider whether the oppression remedy is being developed in a coherent manner, i.e., whether its development has been and is being based upon a coherent set of principles and standards. This issue – the “theoretical framework” for the oppression remedy – is considered in the balance of this chapter.

It is also necessary to consider the oppression remedy on another level, that is its relationship to related areas of the law, i.e., its relation to traditional doctrines of contract, tort and certain statutorily based areas of the law, such as bankruptcy. Such an analysis considers whether the principles upon which the oppression remedy are being developed are coherent with the principles being applied in related areas of the law, i.e., whether comprehensive and coherent solutions are being developed for the redress of “civil wrongs”.  

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147 McCarthy Tétrault, Directors’ and Officers’ Duties and Liabilities in Canada, (Markham, Ont.: Butterworths, 1997) [hereinafter Directors’ and Officers’ Duties] at 249.

148 The term “civil wrongs” is borrowed from Justice McLachlin who, in discussing the role of equity in Canadian law, has asked: “...how best are we to achieve the goal of a comprehensive and consistent legal system of redress of civil wrongs? In short we are realizing that it is not enough to focus merely on equitable principles; we must also work toward reconciling equity with other rule systems to create a single, coherent doctrine of civil remedies.” [emphasis added] See, The Honourable Beverley M. McLachlin, “The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective” in Donovan W.M. Waters (ed.) Equity, Fiduciaries and Trusts, 1993 (Scarborough, Ont.: Carswell, 1993) at 40. In referring to “civil wrongs”, Justice McLachlin was speaking of wrongs and remedies in areas such as fiduciary obligations in commercial dealings, unconscionable transactions and personal-economic relations. The
areas of the law is beyond the scope of this thesis. Instead, issues of coherence are raised throughout Part II the thesis, where appropriate.\(^{149}\)

(2) *Remedy First: A Structured Approach to the Oppression Remedy is Deferred*

"Too often, the courts, in dealing with the oppression remedy, have operated under the justification [sic] guise of vague notions of fairness and have failed to devise a coherent set of principles and standards against which these notions of fairness can be measured."\(^{150}\)

The early oppression cases may have given some support to the fears of those opposed to a broad oppression remedy. Chapman has suggested that the early cases can be characterized as fact-specific and that, initially, the courts may have wanted to avoid making statements that were too general in nature, perhaps in fear of creating rigid rules that would stultify the development of oppression remedy.\(^{151}\) As a result, the early cases lacked an obvious standard for applying the oppression remedy. Chapman has argued that "[i]n many cases one senses that the analysis of oppression was result oriented. The court knew the common sense solution and worked toward it. The analysis of the rights and interests *inter se* was driven by the remedy sought."\(^{152}\) He then summarized some of the potential problems in developing such a broad, discretionary remedy in this manner:

The wide discretion afforded by the legislation, the initial reluctance of the courts to structure that discretion and certain judicial decisions which displayed a less than complete knowledge of related legal doctrines created questions as to whether discernible standards existed in the decision-making process related to shareholder oppression complaints. If a fundamental requirement of a rational adjudicative process is the existence of standards for decisions based upon

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\(^{149}\) See, in particular, PART II: Chapter 4: below.

\(^{150}\) Campion et al., *supra* note 124 at 229.

\(^{151}\) *Supra* note 2 at 181.

\(^{152}\) *Ibid.* at 182 [footnotes omitted].
rational principles which allow the adjudicator to explain to the parties the reasons for the decision, it was debatable whether this goal was being met by the courts in the early cases in exercising an unstructured and largely unreviewable discretion under the oppression remedy. The process was susceptible to the criticism that it amounted to subjective judicial responses to minority shareholder cries of "'t'aint fair". What had been one of the most certain areas of the law had become one of the most unsure.\footnote{Ibid. at 184 [footnotes omitted].}

It would be unsatisfactory if the oppression remedy was nothing more than a "fairness" remedy, based solely on broad notions of "equity". As Chapman pointed out in the above quotation, there is a need for discernable standards in a rational adjudicative process in order to increase the certainty in the law and to avoid criticism that decisions are purely subjective. Further, if the oppression remedy is not developed in a principled manner – with its applicability subject to rules, standards or guidelines – it will fail to provide the necessary coherence discussed above.\footnote{See page 32, above, subsection (1) "Considering the Coherence of the Oppression Remedy on Different Levels".} In other words, critics' fears that the oppression remedy would lead to uncertainty in company law and "palm-tree" justice will be realized.\footnote{E.g. see the Lawrence Report at 60, para. 7.3.12; and Welling, supra note 6 at 564.}

(3) 'Reasonable Expectations': A Theoretical Framework for the Oppression Remedy

(a) Introduction

Developing a theoretical framework for the oppression remedy is not merely an intellectual exercise. On a practical level, the framework is necessary to create a reasonable level of "certainty" in the law so that corporate stakeholders, as well as their lawyers and other advisors, can determine what forms of corporate governance are acceptable. Searching for such a framework, authors have tried to distil some general rules or principles from the oppression remedy case law.
Chapman’s analysis suggests that there are two common themes running through the oppression cases. First, complainants have used the oppression remedy to enforce rights that were traditionally owed to the corporation and not to the complainant directly.156 Secondly, the remedy has been used to protect “private interests” that were not otherwise protected in the relevant statute, corporate constitution or by-laws.157 In using the term “private interests”, Chapman was referring to the ability of the courts to protect corporate stakeholders’ “reasonable expectations” and their willingness to recognize “…relational factors which frequently exist in corporations, [so that] the oppression remedy could be used to protect the relationship between the parties and supplement their legal rights in a way which contract law had historically refused to do”.158 He also argued that “[t]he embrace of the reasonable-expectation doctrine was sweeping and, in some ways, not unexpected. To judicial ears the phrase ‘reasonable expectations’ might well have [had] a comforting ring.”159

(b) “Reasonable Expectations” and Contract Law

The concept of “reasonable expectations” is not new to the common law and it is familiar to those who study contract law. Corbin, a proponent of the “reasonable expectations” analysis in the contractual setting, suggested as follows:

That portion of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.

The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no

156 Supra note 2 at 185-186. The appropriateness of this is considered by MacIntosh, supra note 31 and is discussed below in PART II: Chapter 4: Section C, “The Breakdown of the Distinction Between Personal and Derivative Actions”.

157 See Chapman, supra note 2 at 185-186.

158 Ibid. at 186-187.
system of law are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform.\textsuperscript{160}

Under the reasonable expectations analysis, the law of contracts is said to help secure the “realization of expectations reasonably induced by the expressions of agreement, when that can be done without running counter to other expectations and understandings that were also reasonably induced.”\textsuperscript{161}

Other authors have considered the law of contracts from the “reasonable expectations” viewpoint. Swan, Reiter & Bala have suggested that many contract issues are really about protecting the parties’ reasonable expectations or, sometimes, the need to choose which party will have its expectations protected.\textsuperscript{162} For example, they have argued that many of the cases that are often classified under the heading of “mistake”, do not really fit under the traditional analysis of mistake. Instead, such cases are better analyzed in terms of the protection of the parties’ reasonable expectations.\textsuperscript{163}

The concept of “reasonable expectations” is not, however, without its limitations. For example, in recognizing the open-ended nature of the concept, Corbin suggested that “it must not be supposed that contract problems have been solved by the dictum that expectations must be ‘reasonable’. Reasonableness is no more absolute in character than

\textsuperscript{159}Ibid. at 188.

\textsuperscript{160}Arthur L. Corbin, \textit{Corbin on Contracts}, One Volume ed. (St. Paul, Minn.: West publishing Co., 1952) at 2 [hereinafter “Corbin (One Volume)’].


\textsuperscript{162}Swan \textit{et al.}, \textit{ibid.} at 698.

\textsuperscript{163}See, for example, cases such as \textit{Smith v. Hughes} (1871), L.R. 6 Q.B. 597 and \textit{Hobbs v. Esquimalt and Nanaimo Railway Co.} (1899), 29 S.C.R. 450. See, also, \textit{H.W. Leibig & Co. v. Leading Investments Ltd.}, (1986), 25 D.L.R. (4\textsuperscript{th}) 161 (S.C.C.) where the Supreme Court’s “interpretation” of the contract was based on the “common understanding of people” (at 175, 177).
is justice or morality."\(^{164}\) Thus, the open-ended concept of "reasonable expectations" takes its place next to other well-known but equally ambiguous common law concepts such as "reasonable foreseeability" which is used in the context of the law of damages.

Despite its shortcomings, however, Corbin argued that the term "reasonable expectations" is:

... useful, giving direction to judicial research, and producing workable results. The reasonably prudent man, reasonable care and diligence, reasonable expectations, are terms that are not to be abandoned, at least until we can demonstrate that others will work better.\(^{165}\)

(c) "Reasonable Expectations" and Stakeholders' Oppression Claims

The reasonable expectations analysis can be (and has been) transposed from the contractual setting into the context of stakeholders' oppression claims. In this way, oppression actions often consider the types of expectations that should be protected by the courts as well as which party will have its expectations protected.

However, just as in the contract context, it would be wrong to imagine that the reasonable expectations analysis is a solution to all stakeholders' disputes. As Chapman has suggested:

[under the oppression remedy... the judges only [have] a widely worded, open-ended statute. Stating that the goal of the remedy [is] to protect reasonable expectations raise[s] as many questions as it answer[s]. There [are] no rules set out as to how the existence and scope of the expectations worthy of legal protection [are] to be ascertained. What expectations [are] "reasonable"?\(^{166}\)

Despite its shortcomings, Campion et al. describe the reasonable expectations analysis as "the most satisfactory theoretical framework upon which to understand, analyze and develop the oppression remedy". These authors have suggested that the

\(^{164}\) Corbin (One Volume), supra note 160 at 2. See also Swan et al., supra note 161 at 824, who point out that there can be considerable problems in deciding what expectations are reasonable.

\(^{165}\) Ibid.
Ebrahimi case is the origin of this reasonable expectations analysis. 167 In Ebrahimi, Lord Wilberforce stated:

The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality 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... 168

While Ebrahimi was an "incorporated partnership" case decided under the "just and equitable" jurisdiction of the British courts, the "expectations" analysis has been adopted more generally in Canadian oppression remedy cases. 169

(4) Other Preliminary Questions

Other preliminary questions quickly come to mind, such as: (1) is a court of law the proper place to settle such disputes?; (2) will the solutions be coherent with the solutions developed in related areas of the law?; and (3) what impact will a "reasonable expectations" analysis have on basic company law principles? 170

The first issue, i.e., "institutional competence" is beyond the scope of this thesis. 171 The second issue has been briefly discussed above and will be returned

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166 Chapman, ibid. at 189. Chapman, at 201ff, goes on to provide some suggestions for "structuring the discretion" based on the principle of detrimental reliance.
167 Supra note 124 at 230 and 236-237. For a thorough consideration of the application of the reasonable expectations analysis to shareholders, see 239ff.
168 Supra note 86 at 379. Similar to Chapman's analysis in the text accompanying note 157, above, Campion et al., supra note 124 at 237, suggest that Ebrahimi, is an express recognition that there can be expectations by corporate stakeholders that are deserving of legal protection even where they are not reflected in the articles, by-laws or shareholders' agreements of the corporation.
169 Campion et al., ibid. at 239ff. See also Chapman, supra note 2 at 187, n. 68; and Cronk & Monahan, supra note 81 at 404-407.
170 For discussion of some of these issues, see Chapman, ibid. at 182-184, 205ff; and Cronk & Monahan, supra note 81 at 405.
171 For a review of some of the issues relating to institutional competence, see, generally, H.M. Hart & A.M. Sacks The Legal Process: Basic Problems in the Making and Application of Law, tent. ed. (Cambridge, Mass: 1958); Lon L. Fuller, "The Forms and
to in Part II of the thesis\textsuperscript{172} and the third issue is the subject of a complete chapter in the Part II of the thesis.\textsuperscript{173}

E. Conclusions

This chapter has provided a brief overview of the oppression remedy. The main statutory provisions were outlined and the breadth of the application of the oppression remedy was then considered, including issues such as: (a) conduct subject to review; (b) availability and scope of remedies; and (c) standing. The chapter also reviewed the principles under which the oppression remedy is being developed, the most important of which was the reasonable expectations analysis.

Issues of the coherence of the oppression remedy with related areas of the law and the impact of the use of the oppression remedy on basic company law principles were also raised, albeit in a preliminary fashion as they will be returned to in later chapters of the thesis.

\textsuperscript{172} See PART II: Chapter 4: "The Dangers of the Liberal Use of the Oppression Remedy", below.

\textsuperscript{173} See PART II: Chapter 5: "The Impact of Creditors’ Use of the Oppression Remedy on the Principle of Corporate Personality", below.
Chapter 3:  Use of the Oppression Remedy by Creditors: A New Dimension

A. Introduction

There is a growing body of case law where creditors have sought relief under the oppression remedy. The cases demonstrate that, in certain circumstances, the oppression remedy can be available to creditors. Creditors will want to use the oppression remedy where it offers them procedural advantages, an easier burden of proof than other remedies, or, most importantly, relief that would not otherwise be available.

This chapter reviews some of the cases where creditors have claimed relief under the oppression remedy. Certain preliminary comments are interposed into the summaries. However, the purpose of this survey is to lay the foundation for Part II of the thesis which is a critical analysis of the use of the oppression remedy by creditors.

B. Preliminary Questions

As discussed above,174 it has now been established that creditors can be granted standing under the CBCA-type statute oppression remedy. In order to understand the reasoning behind this expanded view of the oppression remedy, it is useful to review various preliminary issues that have arisen when creditors have sought relief as “complainants”.

(1) Can Creditors be ‘Complainants’?: The Early Cases

In Sands Motor Hotel,175 one of the early cases where creditors sought relief under the oppression remedy, the federal Crown was allowed to make a claim under the Saskatchewan Business Corporations Act176 (“SBCA”), a CBCA-type statute. Without any real analysis of the issues, the court concluded that the Crown had the status of a

174 See text accompanying notes 142 and 143, above.
175 Supra note 143.
176 Supra note 5.
"complainant" on the basis that: (i) creditors are a class of persons whose interests are protected under the SBCA oppression remedy provision;\textsuperscript{177} and (ii) the acts complained of were alleged breaches of certain statutory solvency requirements under the SBCA.

Another early case, \textit{First Edmonton},\textsuperscript{178} provided a better analysis of the issue of whether creditors have standing under the oppression remedy. In \textit{First Edmonton}, the applicant-lessee leased certain premises to the corporate respondent for a period of ten years. The lease included a leasehold improvement allowance, an eighteen month rent-free period and a signing bonus. The signing bonus was paid to the corporate respondent which then paid it out to the individual respondents who were its sole shareholders and directors. The individual respondents, who did not sign a sublease, occupied the premises during the rent free period and a further period of three months for which the corporate respondent paid the rent.\textsuperscript{179} The individual respondents then vacated the premises and no further rent was paid. The lessor sought, \textit{inter alia}, leave to bring an action against the individual respondents in the name and on behalf of the corporate respondent (under the ABCA derivative action provisions) or for relief from oppression (under the ABCA oppression remedy). The ABCA is a CBCA-type statute.\textsuperscript{180}

The judgment reviewed the historical background and policy considerations of the derivative action and oppression remedy provisions of the ABCA. Ultimately, McDonald J. granted leave to the lessor to bring a derivative action but refused to grant it leave to bring an oppression claim.\textsuperscript{181} He concluded, however, that the ABCA oppression remedy \textit{could} be available to creditors in order to protect their interests from unfair prejudice and from being unfairly disregarded, although it was not available on the facts of the case.\textsuperscript{182}

\begin{footnotes}
\item[178] \textit{Supra} note 139.
\item[179] The rent paid to the lessor was actually less than the amount of the signing bonus paid to the individual respondents by the lessor!
\item[180] See \textit{supra} note 5.
\item[181] The appeal was adjourned by the Court of Appeal, \textit{supra} note 139 (Alta. C.A.), and the order was stayed pending disposition of a separate action by the applicant against the corporate respondent.
\item[182] \textit{Ibid.} (Alta. Q.B.) at 145.
\end{footnotes}
McDonald J. noted that the use of the oppression remedy by creditors must be balanced against the policy of preserving freedom of action for management to deal with creditors, so long as those dealings do not unfairly disregard or prejudice the interests of the creditors.

An analysis of the tests for determining whether a creditor can make an application under the oppression remedy is returned to below.183

(2) Who is a 'Creditor'?

Once creditors began making claims under the oppression remedy as “proper persons”, it became necessary to consider the types of persons who would be considered “creditors” for the purposes of claims under the oppression remedy. For example, one issue that arose was whether the applicant had to already have been a creditor at the time of the alleged oppression. To answer this question, it also became necessary to consider whether persons with contingent and unliquidated claims could be treated as “creditors”, and thus “proper persons”, for the purposes of oppression claims. The case law in this area has not been consistent.

In First Edmonton, McDonald J. denied leave to a lessor to bring an application under the oppression remedy because it was not a creditor at the time of the alleged acts of oppression.184 McDonald J. noted that a “proper person” could include a person to whom the corporation had a contingent liability at the time of the complained of conduct.185 However on the facts of the case before him, McDonald J. concluded that he would not be justified in extending the meaning of “creditor” to include a lessor to whom, at the time of the conduct complained of, no rent was actually due.

183 See below, in this chapter, Section C, “Reasonable Expectations Analysis Applied to Oppression Claims by Creditors” and Section D, “Position Analogous to Minority Shareholders’ or ‘Particular Legitimate Interests’: Other Standing Tests?”.
184 Supra note 139 at 164.
185 Ibid. at 151. McDonald J. noted, at 163, that the Ontario Court of Appeal had extended the common law definition of “creditor” under the liquidation provisions of the OBCA to include unliquidated claims where such an extension was necessary to avoid an unjust and unreasonable result; citing G.T. Campbell & Associates v. Hugh Carson Co. (1979), 7 B.L.R. 85, 99 D.L.R. (3d) 529 (Ont. C.A.) [hereinafter G.T. Campbell].
The courts have also denied the applicant status as a "complainant" under the oppression remedy on the grounds that a person claiming to have become a creditor as a result of oppression was not a "proper person". In order to have standing, the courts have held that the applicant had to already have been a creditor at the time of the alleged oppression. 186

In some cases the courts have opted for a wide definition of the term "creditor" and granted standing to complainants as "proper persons" even though their claims as creditors were contingent and unliquidated at the time of the alleged oppression. 187 In one case, 188 the court suggested that the term "creditor" must be given a fair, large and liberal construction and interpretation under s. 10 of the Ontario Interpretation Act. 189 As a result, it concluded that the applicants' claims, which were to be determined on a

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186 See Trillium Computer Resources Inc. v. Taiwan Connection Inc. 10 O.R. (3d) 249 at 253 (Gen. Div.) [hereinafter Trillium Computer]. In this respect, the court cited and applied the reasoning of First Edmonton (see text accompanying note 184, above) and also referred to Canadian Opera, supra note 177. However Trillium Computer was distinguished in Tavares v. Deskin Inc., [1998] O.J. No. 195 (Gen. Div.), online: QL (OJ). In Tavares, a plaintiff-employee claimed to have been wrongfully dismissed and sought relief, inter alia, under the oppression remedy against the company that dismissed him and against an individual defendant. The plaintiff alleged that the individual defendant had been involved in the stripping of assets of the corporate defendant so as to render it judgment proof. The individual defendant attempted to have the pleadings against him struck and argued that the plaintiff was not yet a "creditor". Somers J. refused to strike out the oppression pleading. Applying Canadian Opera and distinguishing Trillium Computer, he concluded that the plaintiff was a "creditor" of the corporate defendant. The court added that "for a plaintiff to qualify as a creditor [under the oppression remedy]... the act complained of must relate to the operations of the company itself." See Tavares, ibid. at para. 10.

187 A E Realisations (1985) Ltd. v. Time Air Inc. (1994), [1995] 3 W.W.R. 527 (Sask. Q.B.), aff'd [1995] 6 W.W.R. 423 (Sask. C.A.). At 536, the court referred to First Edmonton and Sands Motor Hotel as cases where the courts gave a wide definition to the term "creditor". The first was cited in support of allowing a claim that was only a contingent liability, the second in support of granting standing for creditors with unliquidated claims. The court distinguished Royal Trust Corp. of Canada v. Hordo, infra note 191, on the basis that the claim in the present case had a better foundation than the uncertain and speculative claim in Hordo.


quantum meruit basis, qualified them as "creditors" and that, as creditors, the applicants qualified as complainants under the oppression remedy.\textsuperscript{190}

However, a narrower view of the term creditor has been taken in other cases. For example, in *Royal Trust Corp. of Canada v. Hordo*,\textsuperscript{191} the court held that a person with a contingent interest in an uncertain claim for unliquidated damages was not a creditor and, therefore, was not a proper person. Farley J. stated that:

[t]he court may use its discretion to grant or deny a creditor status as a complainant... It does not seem to me that debt actions should be routinely turned into oppression actions... I do not think that the court's discretion should be used to give a 'complainant' status to a creditor where the creditor's interest in the affairs of a corporation is too remote or where the [complaints] of a creditor have nothing to do with the circumstances giving rise to the debt or if the creditor is not proceeding in good faith.\textsuperscript{192}

(3) **Compensating the Complainant: Who Will have to Pay?**

As discussed above, the wording of the statute does not limit the remedies a court can chose to order under the oppression remedy. This includes the absence of any formal limitations on the persons against whom the order can be made.

In the context of creditors' claims this has proved to be important. This is because oppression claims are often made in situations where the corporate defendant is not in a position to remedy the impugned conduct, i.e., the company cannot pay the creditor the debt owing.

The response by the courts has been to make orders in which directors and shareholders are held personally responsible for company conduct. However, the use of

\textsuperscript{190} *Gignac, Sutts, supra* note 188 at 226. It is not clear why the court concluded that the applicants' claims had to be determined on a quantum meruit basis. In any event, the amount claimed by the applicants for their services was not put in issue by the respondents. See also *Levy-Russell Ltd. v. Shieldings*, infra note 252 where the court held that a person with an unliquidated claim can be considered a creditor of a corporation for the purposes of the OBCA where an expanded definition is necessary to ensure that an unreasonable or unjust result does not occur (citing *G.T. Campbell, supra* note 185 and referring to *Gignac, Sutts*).

\textsuperscript{191} (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div.) [hereinafter *Hordo*].
the oppression remedy to make awards against directors and shareholders as a result of corporate conduct has important implications on certain fundamental rules of company law. In particular, this use of the oppression remedy impacts on two aspects of the principle of corporate personality: (1) the principle of limited liability (shareholders' liability); and (2) separate legal personality (which is important with respect to, *inter alia*, directors' and officers' liability). A discussion of this issue is deferred to Part II of the thesis.  

Examples of cases where the oppression remedy has been used to make orders against shareholders and directors personally (thereby by-passing the principle of corporate personality) include the following:

(i) the president (and controlling shareholder) of a company who had stripped the company of its cash assets at a time when it was in financial trouble was ordered to pay some of the funds that he had received to the sheriff.  

(ii) following a questionable land transfer, a company was without assets with which to pay the applicants (who were two of the company's creditors). The court held that this conduct was oppressive and unfair and ordered the directors/shareholders to pay the applicants the amounts owing for their services.  

(iii) a "reorganization" in respect of the debtor corporation's "corporate group" had the effect of protecting the debtor corporation from its payment obligations while at the same time benefitting its corporate group and its owners with the advantages of the ongoing business. The court held the directors jointly and severally liable to the complainant, a creditor under a promissory note that had obtained a judgment against the debtor corporation.

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195 *Gignac, Suits, supra* note 188.
196 *SCI Systems, supra* note 133 at 314. The court noted the following (at 313):

Can it be equitable for the directors to recover an exposed position, to pay themselves substantial dividends, and reap the benefits of all future business whereby in doing so they rendered valueless [the debtor corporation's] promise to
Such orders have typically "involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question redounded directly to the benefit of that person."197

C. Reasonable Expectations Analysis Applied to Oppression Claims by Creditors

As discussed above,198 the reasonable expectations analysis has been generally applied to oppression claims. For example, in First Edmonton, McDonald J. identified two circumstances (that were not intended to be exhaustive) where a creditor could be a "proper person" to make an oppression claim.199 The first was where the act complained of constituted the use of the corporation as a vehicle for committing fraud on the creditor. The second was where the act or conduct which was complained of constituted a breach of the underlying reasonable expectations of the creditor arising from the circumstances in which the creditor's relationship with the corporation arose.200 Thus the court applied the reasonable expectations analysis to claims by creditors under the oppression remedy in order to determine whether the creditor had been unfairly prejudiced. The court held that:

[i]n deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected and general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard pay the [applicant]? In my opinion, the answer must be no, that such acts collectively are oppressive to [the applicant].

The Divisional Court affirmed Epstein J's decision, subject to an adjustment to the remedy ordered against certain of the related-company respondents; see supra note 133 (Div. Ct.) at 163, paras. 5, 8.

197 See Sidaplex, supra note 133 at 405-406. In that case, an order was made against the director/shareholder who had personally benefitted from the impugned conduct.
198 See PART I: Chapter 2: Section D, (3) "Reasonable Expectations: A Theoretical Framework for the Oppression Remedy".
199 Supra note 139 at 152.
200 Ibid.
should encompass the following considerations: *the protection of the underlying expectations* of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.\(^{201}\)

Thus a person who was a creditor at the time of the impugned conduct could be a "proper person", so long as the oppression or unfairness was in respect of the interests of a security holder, creditor, director or officer.\(^{202}\)

Other cases where the reasonable expectations analysis has been applied to oppression claims by creditors include *Sidaplex*,\(^{203}\) and *SCI Systems*.\(^{204}\) In *Sidaplex*, a corporation had consented to a judgment by one of its creditors. As security for the judgment, the corporation had to obtain a letter of credit that would renew automatically pending disposition of the issues between the parties. Through inadvertence, the letter of credit was only for a fixed term and it was not renewed upon its expiry. The corporation later sold its assets and used the proceeds to eliminate its debt with its bank. By paying off the company's bank loan, the sole shareholder's liability to the bank as guarantor was also eliminated. The shareholder was also the sole director of the company. The creditor brought, *inter alia*, an application for relief under the oppression remedy. The court held that:

(i) it is well-established that a creditor has status to bring an application as a complainant under the oppression remedy;\(^{205}\)

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201 *Ibid.* at 147 [emphasis added].
203 Supra note 133.
204 Supra note 133.
(ii) while some degree of bad faith or lack of probity in the impugned conduct may be the norm, neither is essential to a finding of "oppression" in the sense of conduct that is unfairly prejudicial or which unfairly disregards the complainant's interests;\footnote{Ibid. at 403-404.}

(iii) the "reasonable expectations" of the creditor must be considered in determining whether the circumstances amounted to unfair prejudice or unfair disregard of the creditor's interests;\footnote{Ibid. at 405.}

(iv) balanced against the creditor's underlying expectations is the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself.\footnote{Ibid.}

Blair J. concluded that it had been a reasonable expectation of the creditor that its security (i.e., the letter of credit) would be preserved and that this was "one of the rare cases" where the oppression remedy was applicable notwithstanding that there was no bad faith or lack of probity by the corporation or its sole shareholder/director/officer.\footnote{Sidaplex, ibid. at 404.}

In \textit{SCI Systems},\footnote{Supra note 133.} a corporation executed a promissory note in favour of a creditor. Within the six months before the promissory note came due, the directors (and only shareholders) of the corporation caused it to: (1) declare and pay dividends to the shareholders which left the corporation with a negative net worth; (2) pay down certain shareholder loans; and (3) carry out certain transfers between the corporation and related companies which left the corporation with fewer assets than before. When the corporation did not pay the amounts owing under the note, the creditor obtained a default judgment against the corporation. The creditor then brought an application for relief from oppression against the shareholders/directors/officers personally.\footnote{The applicant also relied on the Ontario \textit{Fraudulent Conveyances Act}, R.S.O. 1990, c. F.29 and the Ontario \textit{Assignments and Preferences Act}, R.S.O. 1990, c. A.33 and asked that various transactions be set aside. However, arguments under those statutes were not advanced on the agreement of the parties that they would be made only if the application under the oppression remedy failed, in which case the hearing would have been resumed. The use of the oppression remedy where alternative remedies are available is discussed.}
The respondents submitted that the applicant was trying to use the oppression remedy to improve its bargain with the corporate debtor and that the creditor could have better protected itself from the difficulties that arose. In view of the facts, however, the court rejected the argument that the creditor should have better protected itself.\(^{212}\) Further, the court held that while the inability of the creditor to collect on its judgment was not, on its own, sufficient to establish oppression, the repayment of shareholder loans and the sale of assets to related companies were contrary to the creditor’s reasonable expectations. It stated that the “most reasonable of all [of the creditor’s] expectations ... [was] that the directors [would] manage the company in accordance with their legal obligations”\(^{213}\) and that

> [t]he creditor was entitled to expect that the directors would act with appropriate corporate conduct and would particularly not authorize non-arm’s length transactions that would have the effect of depriving [the debtor corporation] of its ability to pay the debt when it came due.\(^{214}\)

The court held that the exclusion of the applicant from moneys and the diversion of funds to others was \textit{prima facie} evidence that the acts were unfairly prejudicial to the applicant.\(^{215}\) It also found that the declaration of dividends breached the applicable OBCA solvency tests and concluded that the payment of dividends in violation of the solvency requirements were acts that effected a result that was unfairly prejudicial to or unfairly disregarded the interests of the applicant as creditor.\(^{216}\) The question of whether breaches of the solvency requirements should be remedied through an oppression claim is discussed below.\(^{217}\)

\(^{212}\) This is only implicit in the decision at first instance; see \textit{supra} note 105 (Gen. Div.) at 308, but this holding is made clear by the decision of the Divisional Court, see \textit{supra} note 133 (Div. Ct.) at 162, para. 2. See also \textit{Gignac, Sutts, supra} note 188 at 229-230.

\(^{213}\) \textit{Supra} note 133 at 308.

\(^{214}\) \textit{Ibid.} at 312.

\(^{215}\) \textit{Ibid.} at 313.


\(^{217}\) See PART II: Chapter 4: Section B, “The Availability of Other Remedies”.

below; see PART II: Chapter 4: Section B, “The Availability of Other Remedies” as well as in PART III: Chapter 8: Section B, below.
D. 'Position Analogous to Minority Shareholders' or 'Particular Legitimate Interests':
Other Standing Tests?

The reasonable expectations test has not been accepted by all judges. In some cases, the courts have applied other standards to determine if creditors should have standing to make an oppression claim. For example, in one line of cases,\(^{218}\) the courts have required the creditor to show that it was in a "position analogous to a minority shareholder" or had a "particular legitimate interest" in the way the company was managed. These tests originated in the B.C. courts and first arose in the context of applications for leave to bring derivative actions. However, the reasoning was subsequently adopted in the context of oppression claims. While the tests may be appropriate for claims under the derivative action, they are not well-suited for oppression claims.\(^{219}\)

The origins of these tests can be traced back to *Re Daon Development Corporation*.\(^{220}\) In that case, the applicant was a debenture-holder who sought leave to bring a derivative action under the B.C. *Company Act*\(^{221}\) ("BCCA") on the grounds that the directors had failed to ensure that the solvency tests for the payment of dividends were met. The court denied standing to the applicant, noting that there was no default under the debenture and that if there was any merit to the claims, other classes of persons with a more direct interest in the affairs and management of the company could pursue them. Wallace J. held that "proper persons" are "those who have some particular legitimate interest in the manner in which the affairs of the company are managed"\(^{222}\) and he added:

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\(^{218}\) See *Re Daon Development Corporation*, infra note 220.

\(^{219}\) The narrow view of standing which arises from these tests has also been criticized by Peterson, *supra* note 1 at 2.17, §2.34-2.34.2. Further, as discussed below (see text accompanying note 229ff), this narrow view of standing for a derivative action under the B.C. statute has not been followed in jurisdictions which have CBCA-type statutes since the definition of complainant under the CBCA-type statutes is defined more broadly to include security holders in addition to shareholders.


\(^{221}\) Then R.S.B.C. 1979, c. 59, s. 225; now R.S.B.C. 1996, c. 62, s. 201.

\(^{222}\) *Supra* note 220 at 243.
[without attempting to limit or define with exactitude the category of person who constitutes a ‘proper person’…, I consider the history of the derivative action and the wording of the section requires that the category be composed of those persons who have a direct financial interest in how the company is being managed and are in a position – somewhat analogous to minority shareholders – where they have no legal right to influence or change what they see to be abuses of management or conduct contrary to the company’s interest.223

Wallace J. also held that a person “whose only interest in the management of the company is the general and indirect one of wishing the company to prosper” had insufficient interest to qualify as a “proper person”.224

In Benaroch v. City Resources (Canada) Ltd.,225 the B.C. Court of Appeal held that the Re Daon test also applied in the context of an oppression claim.226 In that case, a director sought relief as a “proper person” under the BCCA oppression remedy227 which does not expressly grant directors standing. The court held that only those persons with a direct financial interest in how the company was being managed had standing as “proper persons” under the BCCA oppression remedy. On the facts, the court denied the director standing since his only interest in how the company was being run was as a director and not as someone with a direct financial interest.228

In First Edmonton, McDonald J. explicitly refused to adopt the Re Daon approach in the context of the ABCA,229 which is a CBCA-type statute. He rejected the conclusion in Re Daon that a person who does not have a direct financial interest in the company could not be a “proper person” and he held that this principle should not influence the

223 Ibid.
224 Peterson, supra note 1 at 2.17, §2.34, suggests that this is too narrow an approach and that harm to bona fide legal rights or economic interests should satisfy the test for standing as a “proper person”.
226 See also Lee v. International Consort Industries Inc. (1992), 63 B.C.L.R. (2d) 119 (B.C.C.A).
227 Then, R.S.B.C. 1979, c. 59, s. 224; now R.S.B.C. 1996, c. 62, s. 200.
228 This decision was also criticized by Peterson, supra note 1 at 2.18, §2.34.1.
229 Supra note 139 at 154.
interpretation of the ABCA section which defines “complainant”. He stated that the ABCA provision was “intended to give protection to persons who have not directly invested money in corporations and are not shareholders in the corporation.” In particular, McDonald J. was of the view that a debenture holder would have a sufficient financial interest in the manner in which a corporation’s affairs are managed to justify protection.

However, the Re Daon test has been applied outside British Columbia. For example, it was applied in the Ontario case of Hordo, where Farley J. held that “[s]tatus as a complainant should ... be refused where the creditor is not in a position analogous to that of a minority shareholder and has no particular legitimate interest in the manner in which the affairs of the company are managed” (citing Jacobs Farms Ltd. v. Jacobs and Lee v. International Consort Industries Inc.).

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230 Ibid. at 155.
231 Supra note 191. In Hordo, the respondent trust company brought an action on a promissory note against the applicant and his wife. The applicant advanced a complicated defence and counterclaim with various allegations concerning a joint venture. The applicant claimed that certain conduct of the respondents in connection with the joint venture was oppressive. The motion for relief under the oppression remedy was dismissed. Farley J. concluded that, at best, the applicant had a contingent claim against the respondent. Farley J. also noted that the while the applicant was a shareholder of the respondent, he had only become a shareholder after the events he complained about. Farley J. held that the court had a discretion to “deny status to a such a person where the shares were purchased with a view towards bringing an application under the oppression remedy or in full awareness of the circumstances alleged to constitute oppression”; ibid. at 92, para. 16.
232 Hordo, supra note 191 at 92, para. 14.
233 The Re Daon test was also applied in the Ontario case of Jacobs Farms Ltd. v. Jacobs, [1992] O.J. No. 813 (Gen. Div.), online QL (OJ) [hereinafter Jacobs Farms], where Blair J. refused to exercise his discretion to recognize a creditor as a complainant under the OBCA derivative action provisions. The court considered the plaintiff’s standing as a creditor in respect of certain outstanding shareholder loans from the plaintiff to the defendant corporation in the amount of $5,000. The court held that the debt was small and not at arm’s-length and that the complaints in question had nothing to do with the circumstances giving rise to the debt. The court also rejected the plaintiff’s argument that the court should grant him standing as a “proper person” based on his status as a judgment creditor. Blair J. was influenced by the fact that the plaintiff was not actually a judgment creditor of the defendant corporation. Rather, he was only a judgment creditor of certain shareholders of the defendant corporation. Applying Re Daon, Blair J. held
E. Confused Application of the Tests

The existence of different lines of cases and various tests has led to a certain amount of confusion in some of the decisions.

For example, in *Leon Van Neck and Son Ltd. v. McGorman* the court appeared to modify the reasonable expectations test. However, a careful reading of the case suggests that the court’s reasoning is inconsistent with the principles enunciated in the decisions it purports to follow.

In *Leon Van Neck*, the plaintiff sued the directors of a development firm personally for relief under, *inter alia*, the OBCA oppression remedy. In denying the oppression claim, Kennedy J. purported to adopt the reasonable expectations analysis from *First Edmonton*. However, he interpreted *First Edmonton* in the following way:

Although *First Edmonton* establishes the principle that the underlying expectations of the creditor with regard to its arrangement with the corporation is crucial in deciding what is unfair conduct towards the creditor, *these expectations have never provided the basis for applying the oppression remedy in [the] absence of transactions which have the effect of diverting company assets away from the reach of the creditor*. Although the test of reasonable expectations has been applied in recent cases, it has usually been applied within the context of a closely-held corporation where one or

that the plaintiff was not in a position analogous to a minority shareholder and that he did not have a “particular legitimate interest in the manner in which the affairs of the company are managed’, at least in the corporate sense.” (at QL p. 19 of 20) He concluded that the plaintiff’s interest was no different from that of any judgment creditor whose debtor had exigible assets in the form of shares in a company that happened to be in financial difficulty.

*Supra* note 226.


236 The allegations of oppressive and unfair conduct were numerous and included: (1) failures to inform the plaintiff of certain financial risks; (2) the failure to use certain loan funds to pay the plaintiff; (3) an agreement by a director to a payment schedule at a time when the corporation he acted for had almost no funds; and (4) the sale of two properties with none of the funds from those sales having been used to pay the plaintiff and with certain individual directors benefitting from one of the sales.
more of the directors is diverting company assets toward their own personal benefit at the expense of the creditor. 237

Kennedy J. went on to consider the cases such as SCI, Sidaplex, and Gignac, Sutts. 238

He concluded that the plaintiff's expectations, even if reasonable, were:

...not sufficient to base a claim for oppression without some evidence that establishes the directors obtained a personal benefit from their inability to pay [the plaintiff]... The heart of the case for the oppression remedy is whether any of the directors obtained a direct or indirect benefit..., or enjoyed reductions in their personal liability... 239

This confuses the test for oppression with the test for whether it is appropriate to hold the directors personally responsible for the oppression. 240 To determine if there has been oppression, the reasonable expectations test requires the court to consider the effect that the impugned conduct has had on the interests of the complainant. 241 Kennedy J. has turned this test on its head. Rather than assessing the impact of the conduct on the plaintiff's interests, he examined the defendants' position to determine whether they received any benefits. Kennedy J.'s reasoning would have been correct if it applied only in respect of the appropriateness of awarding a remedy against the directors personally. That is because in order to make a successful claim against directors personally, the plaintiff must show that the impugned conduct was oppressive or unfair and that it occurred in circumstances which justify a remedy against the directors. However, while the personal liability of directors may depend, at least in part, on whether they received personal benefits, the receipt of such benefits should not be determinative of whether the conduct was unfair to the creditor. Surely a creditor can be prejudiced without any

237 Supra note 235 at para. 101 [emphasis added].
238 Supra note 188.
239 Supra note 235 at paras. 110 and 112.
240 A proper reading of Sidaplex, supra note 133, makes this clear. See also Budd v. Gentra Inc. (1998), 111 O.A.C. 288 at 301, para. 43 [hereinafter Gentra], citing Gottlieb v. Adam (1994), 21 O.R. (3d) 248 (Gen. Div.), where the Court of Appeal makes a distinction between finding oppression and "[t]he further question whether the director or officer should be required to rectify that oppression personally...".
benefit going to the directors personally. Therefore, it is submitted that the reasoning in *Leon Van Neck* should not be applied in future cases.\(^\text{242}\)

The *Benarroch*\(^\text{243}\) and *Heap Noseworthy*\(^\text{244}\) cases provide other examples of a confused application of the principles developed in the case law. The confusion in these cases relates to the test for determining when creditors will have standing to bring oppression claims. In both *Benarroch* and *Heap Noseworthy*, the court purported to apply *First Edmonton* in support of the proposition that a "proper person" would be someone who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right a wrong allegedly done to the corporation. However, this analysis is a misapplication of *First Edmonton*. While McDonald J. did hold in *First Edmonton* that a "proper person" could be someone who could reasonably be entrusted with advancing the interest of the corporation, this dictum was made in the context of the ABCA derivative action provision.\(^\text{245}\) The test McDonald J. suggested for determining whether a creditor is a "proper person" under the ABCA oppression remedy is the one outlined above, i.e., the reasonable expectations analysis.\(^\text{246}\) It is submitted that the use of the test suggested in *Benarroch* and *Heap Noseworthy* is not appropriate for oppression claims and that it should not be applied in future cases that consider standing issues under the oppression remedy.

\(^{241}\) E.g. see *Sidaplex*, *supra* note 133 at 404; and *Campion et al.*, *supra* note 124 at 233.
\(^{242}\) Further, the decision may have also been wrong on the facts. At least two of the company’s transactions that were in issue before the court appear to have benefitted the directors personally. The first was the sale of a piece of land, the proceeds of which were used, in part, to pay the directors’ management fees. The second was the sale of another property, known as the Leamington land, which was valued at $320,000. The Leamington land was sold to a numbered company affiliated to one of the directors in return for only $150,000. After considering these transactions (as well as certain others), Kennedy J. concluded that the only benefit received by the directors was the continuing viability of the company “with the possible exception of [the] management fees and [the director’s] numbered company owning the 0.9 acres of the Leamington land”. It is not apparent why these two benefits were not sufficient grounds for finding against the directors personally, although, strangely, the plaintiff conceded that none of the directors received any personal benefit from the impugned transactions except for the continuing viability of the company.
\(^{243}\) *Supra* note 225 at 570.
\(^{244}\) *Supra* note 143 at 244.
\(^{245}\) See *First Edmonton*, *supra* note 139 at 151.
\(^{246}\) See the text accompanying note 199.
A third example of the confusion amongst the tests arises from a dictum of Blair J. in Jacobs Farms. In that case, Blair J. held that a creditor should not be granted standing as a "proper person" to bring a derivative action where the complaints of the creditor "have nothing to do with the circumstances giving rise to [the] debt or its liquidation." This dictum has since been applied in several oppression cases. It is not clear why Blair J. held that the complaints must relate to the circumstances giving rise to the debt. Perhaps he meant to apply the reasoning from First Edmonton, where it was held that a creditor may be granted standing "if the act or conduct complained of constituted a breach of the underlying expectations arising from the circumstances in which the applicant's relationship with the corporation arose". However, there is a significant difference between these two statements. It is one thing to require a connection between a creditor's expectations and the circumstances giving rise to the debt. It is another thing altogether to require a link between the conduct which is complained of and the circumstances giving rise to the debt. It is not difficult to imagine conduct which would be a breach of a creditor's expectations that arose from the circumstances of the creation of the debt even where the conduct has nothing to do with the actual circumstances that gave rise to the debt itself.

F. Towards A Multi-faceted Test?

In Levy-Russell Ltd. v. Shieldings Inc., a recent decision regarding a claim by creditors for relief under the oppression remedy, certain defendants brought a motion contesting the right of the plaintiffs to bring an oppression claim. The moving parties argued that the creditors (who were tort plaintiffs that had obtained a judgment against the defendants) were without standing under the oppression remedy since:

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247 Supra note 233.
248 Ibid. at QL p. 17 of 20.
250 Supra note 139 at 152.
251 Consider, for example, the facts of SCI Systems, supra note 133, facts summarized at text accompanying note 210; or Gignac, Suits, supra note 188.
(i) the creditors did not have a particular legitimate interest in the manner in which the affairs of the defendant company were managed because: (a) their interest in how the affairs were managed was too remote; (b) their complaints were not related to the circumstances giving rise to the debt; and (c) they were not acting in good faith; (ii) the creditors were not in a position analogous to that of a minority shareholder; and (iii) the creditors did not have any “reasonable expectations” that the defendant company’s affairs would be conducted with a view to protecting their judgment.

In essence, these criteria cover all of the various tests which have been applied to determine whether a creditor should be granted standing under the oppression remedy.253

Before specifically considering these criteria, Pitt J. made the general observation that, in certain cases, the courts have invoked their discretionary powers to grant creditors standing to assert oppression claims. He also noted, however, that debt actions should not be routinely turned into oppression actions. Pitt J. then went on to consider each of the three criteria listed above.

First, he concluded that the creditors had a “particular legitimate interest”, noting that while most of the alleged acts of oppression took place before they became judgment creditors, this did not necessarily mean that their interests as creditors were too “remote”. An interest would be too remote where, for example, an applicant has a judgment against a shareholder of a corporation rather than the corporation itself.254 Pitt J. also noted that the entitlement under the judgment was significant when compared to the company’s assets.

Next, Pitt J. concluded that the creditors were in a “position analogous to minority shareholders” in view of the fact that they could not have exerted any influence on the

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253 The first two criteria were developed in the Re Daon line of cases, discussed above. The third criterion is the “reasonable expectations” analysis that has been applied more generally in the oppression remedy cases and that has been applied to creditors’ claims under the oppression remedy in the First Edmonton line of cases, also discussed above.
company to protect their interests as judgment creditors. This was because involuntary
tort creditors, as distinct from secured creditors or other lenders, have few possibilities to
ensure that the debtor will not engage in conduct that will eliminate the prospect of
recovery.\textsuperscript{255}

Finally, in considering the "reasonable expectations" analysis, Pitt J. held that it
would be reasonable for a tort plaintiff (who later became a judgment creditor) to expect
that the defendant would not engage in conduct during or after trial that would reasonably
be expected to hinder even partial satisfaction of the potential judgment.\textsuperscript{256}

It is not clear from the judgment whether, in Pitt J.'s view, the tests were applied as
alternative grounds for allowing creditors to make oppression claims or whether, in his
view, creditors have to satisfy all of these criteria before a court will exercise its
discretion to grant them standing as complainants.

\textsuperscript{254} This was the case, for example, in \textit{Jacobs Farms}, \textit{supra} note 233. In such a case, the
applicant's interest would be "once removed" since its only interest in the corporation
would be by virtue of its claim against the \textit{shareholder's interest} in the corporation.
\textsuperscript{255} \textit{Supra} note 252 at 190-191, para. 31. It would have been preferable if Pitt J. had used
slightly broader terminology, such as "affect" or "worsen" the prospect of recovery. This
would be more consistent with the conclusion, at 191, para. 33, that a judgment creditor
would have a reasonable expectation that the debtor would not engage in conduct (during
and after trial) that would hinder "even partial satisfaction" of the judgment.
\textsuperscript{256} \textit{Ibid.} at 191, para. 33. Again, it is unfortunate that Pitt J. used language which
appeared to limit the period in question to "during or after trial". Surely, once the
eventual judgment debtor is aware of the claim, either by a formal demand or the
initiation of proceedings, it should not be permitted to engage in the conduct referred to.
PART II: A CRITICAL ANALYSIS OF THE CURRENT STATE OF THE LAW

Chapter 4: The Dangers of the Liberal Use of the Oppression Remedy

A. The Oppression Remedy as a Panacea: Too Much of a Good Thing

As seen above, the commercial courts consider the oppression remedy to be remedial legislation and they are, generally, giving it a large and liberal interpretation. This has included a broad view of the term “complainant” which has enabled creditors to make claims under the oppression remedy.

Judicial pronouncements to date have focused on the manner in which the oppression remedy could be used to protect those who traditionally had no remedies under corporate law and, with few exceptions, the courts have promoted new developments in this area of the law. However, the case law also suggests a willingness (if not a desire) by judges to use the oppression remedy as a panacea for a myriad of company law problems. One is left with the impression that the courts are treating the oppression remedy as a new and powerful source of “equity”. Unfortunately, relatively little attention has been paid to the question of whether the decisions are internally coherent or whether they are coherent with other related areas of the law. At this stage in the development of the oppression remedy, there has been little in the way of “sober second-thought” about the impact of the early decisions.

As a result, the protection of minority shareholders and other corporate stakeholders has been going through a period of rapid and radical change over the past twenty-five years. The pendulum has swung toward increased protection and may still be swinging even further in that direction. However, if minority shareholders and other corporate stakeholders received too little protection in the past, perhaps too much protection is being offered to them under the present interpretations of the oppression remedy.

Once the impact of this radical shift has set in, it is suggested that some retrenchment will take place and some of the recent developments may not survive in the long term.
From a doctrinal view, it is suggested that, much as the Courts of Chancery eventually recognized the need to develop a coherence to their decisions, and much as the early broad decisions under the Canadian Charter of Rights and Freedoms gave way to a more refined analysis, the commercial courts will soon recognize the need to develop a more coherent and principled structure for the application of the oppression remedy.

This chapter focuses on two specific areas where the oppression remedy may be developing in an unsatisfactory manner because it is being interpreted too broadly. The first such area arises where the oppression remedy is used despite the availability of other remedies (whether under an applicable CBCA-type statute or under another statute). As is discussed below, the problems that arise in this context include the potential for unjustified inconsistency of results and the possibility that the intended result of statutory provisions specifically enacted to deal with particular problems will be "overridden" by the oppression remedy.

A second area of difficulty is the apparent breakdown of the distinction between personal and derivative actions. This is occurring because the oppression remedy is not being restricted to personal claims but is also being made available for virtually all derivative claims. It will be argued below\(^{257}\) that despite the problems that arose under the common law as a result of the strict application of the distinction between personal and derivative actions, there remains an important place in commercial law for maintaining the distinction. For example, allowing oppression claims for what are essentially derivative claims can cause significant prejudice to certain corporate stakeholders, especially for oppression claims outside the context of closely-held corporations. Further, ignoring the distinction carries the risk of making the derivative action a redundancy and nullifying the procedural safeguards that were intended to apply to derivative claims.

Both of these areas demonstrate the dangers of using the oppression remedy for too wide a range of commercial problems without considering the repercussions such use will have on some of these broader issues.

\(^{257}\) See, below, PART II: Chapter 4: Section C, "The Breakdown of the Distinction Between Personal and Derivative Actions".
B. The Availability of Other Remedies

(1) Fraudulent Conveyances and Preferences Legislation and Insolvency Legislation

In *Gignac, Sutts*,258 the court was faced with an application for relief under the oppression remedy. The court (seemingly on its own initiative) considered the possibility that the impugned conduct had contravened the Ontario *Assignments and Preferences Act*.259 However, the court found it unnecessary to rule on the question since the application before the court had been made under the oppression remedy which had a different standard of liability than did the *Assignments and Preferences Act*.260 In *SCI Systems*, the applicant sought relief under the oppression remedy as well as under the *Assignments and Preferences Act* and the *Fraudulent Conveyances Act*.261 However, the parties agreed to adjourn arguments with respect to the latter statutes until the court decided whether an oppression claim was available and, if so, whether the conduct had been oppressive. The court accepted this method of proceeding.

In both of the above cases, it was accepted without argument that the applicant had (or would have had) an option to proceed under either, or both, the oppression remedy or the relevant fraudulent conveyances and preferences statute(s).

This question was put more directly into issue in *Levy-Russell*.262 In that case, the respondent argued that a judgment creditor should not be allowed to use the oppression remedy as a substitute for or alternative to proceedings to set aside a fraudulent transaction or the granting of a preference.263 The court rejected this argument on the grounds that the language used in the oppression remedy provisions suggests a broadening of the comparable remedial provisions in statutes governing fraudulent conveyances and preferences that rely on bad faith or the commission of acts which prejudice, hinder, defeat or delay.264

258 *Supra* note 188.
260 That is, under the oppression remedy, the applicants did not have to prove any bad faith or lack of probity on the part of the respondents.
262 *Supra* note 252.
263 *Ibid.* at 185, para. 2.
If this analysis is correct—and it seems that it will be the accepted analysis unless it is overruled at the appeal level—then, in situations where the respondent/defendant is a corporation, applicants will almost always prefer seeking relief under the oppression remedy instead of the fraudulent conveyances and preferences statutes because of the easier burden of proof and the procedural advantages. If this is the case, however, then a cautionary note should be sounded. First, for the reasons discussed above, there must be some coherence to the solutions that are developed between “parallel” remedies. Further, differing results should not be deemed to be acceptable merely because they arise under different statutes. There must be some justification for allowing different relief under the oppression remedy, some reason why a different result is necessary in the circumstances of oppression when compared to the circumstances covered by the fraudulent conveyances and preferences statutes.

Obviously, the answer may lie in the different purposes for which the statutes were enacted. But if this is case, then those differences should be articulated by the courts in order to ensure that the different result is necessary to meet the intended purpose of the oppression remedy. If not, there is a risk that the oppression remedy will be (mis)used as a cure-all for all corporate misconduct, including misconduct that should be regulated by statutes specifically enacted to deal with particular types of behaviour.

The argument here is not that the oppression remedy should never be available to creditors when other statutes “overlap” with it. Rather, it is a suggestion that where another statute has been enacted to cover certain types of conduct, the generally broad interpretation given to the oppression remedy may not be appropriate in respect of such conduct. In those situations, the court should carefully analyze the purposes of the oppression remedy before assuming that relief should be made available under it. The analysis should do more than simply say that the oppression remedy is broader than an alternative statute. It should tell us why, in the circumstances of that case, the oppression remedy should be broader. If such an analysis does not show that existing creditors’ rights doctrines are inadequate so that relief under the oppression remedy is necessary, then the better interpretation of the oppression remedy in such circumstances would be a

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265 PART I: Chapter 2: Section D, “Considering the Coherence of the Oppression Remedy on Different Levels” at 32.
narrower one and the complainant should be forced to seek relief under the alternative statute (to the extent that statute provides relief). In this respect, it is interesting to note that the remedies for fraudulent settlements, fraudulent preferences and reviewable transactions under the BIA rest with the trustee in bankruptcy who acts on behalf of the mass of creditors.

(2) *Other CBCA Provisions*

The scope of the oppression remedy may also be affected where the conduct in question is specifically regulated by another provision directly in the CBCA (or its provincial equivalents). This is especially so where the statutory provisions not only regulate the behaviour but also include a specific remedy for breaches of the section(s) in question. In other words, interpreting the oppression remedy becomes more complicated where the relationship between the oppression remedy and another specific remedy provided *directly under the applicable company act* must be taken into account.

A review of the CBCA “solvency tests” illustrates this issue. The solvency tests provide that the payment of dividends by the corporation (CBCA, s. 42) or the purchase, redemption or other acquisition of shares by the corporation (CBCA, ss. 34, 35 and 36) are prohibited in certain circumstances, i.e., where as a result of such actions the corporation would not be able to meet its liabilities as they become due or where the realizable value of its assets would be less than its liabilities.

Several cases have already been decided in which the alleged oppression had been or had included a breach of the statutory solvency tests. For example, in *SCI Systems* and *Sands Motor Hotel*, the court held that breaches of the solvency tests constituted oppression. In *Sands Motor Hotel*, the court reasoned as follows:

[i]f the applicant cannot be a complainant then I fail to see who is to complain on her behalf. If a creditor does not come within the definition of complainant

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266 This point is discussed further, below, in PART III: Chapter 8: Section B, subsection (2)(a) “No Standing Where Other Remedies Exist”.

267 BIA, *supra* note 145, s. 91 (fraudulent settlements), ss. 95-96 (fraudulent preferences), and s. 101 (reviewable transactions)

268 *Supra* note 133.

269 *Supra* note 143.
one wonders how a creditor can obtain remedies for breaches of those provisions of the [SBCA] which were obviously inserted for the protection of creditors, such as the solvency tests contained in [the SBCA].

However, an order under the oppression remedy was not the only available remedy in this situation and, rather than allowing a claim under the oppression remedy, the correct approach should require the complainant to seek relief for breaches of the solvency tests under the specific provisions regulating such breaches. For example, under the CBCA-type statutes, liability and relief are governed by CBCA s. 118 and its provincial equivalents. The CBCA section provides as follows:

118. (1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

(2) Directors of a corporation who vote for or consent to a resolution authorizing

(a) a purchase, redemption or other acquisition of shares contrary to section 34, 35 or 36, [i.e., contrary to the solvency tests]
(b) a commission contrary to section 41,
(c) a payment of a dividend contrary to section 42,
(d) financial assistance contrary to section 44,
(e) a payment of an indemnity contrary to section 124, or
(f) a payment to a shareholder contrary to section 190 or 241,

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270 *Ibid.* at 64.
are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation. [emphasis added]

(3) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act on which the judgment was founded.

(4) A director liable under subsection (2) is entitled to apply to a court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 34, 35, 36, 41, 42, 44, 124, 190 or 241. [i.e., contrary to, *inter alia*, the solvency tests]

(5) In connection with an application under subsection (4) a court may, if it is satisfied that it is equitable to do so,

(a) order a shareholder or other recipient to pay or deliver to a director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 34, 35, 36, 41, 42, 44, 124, 190 or 241; [i.e., contrary to, *inter alia*, the solvency tests]

(b) order a corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares; or

(c) make any further order it thinks fit.

(6) A director is not liable under subsection (1) if he proves that he did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money.
(7) An action to enforce a liability imposed by this section may not be commenced after two years from the date of the resolution authorizing the action complained of.

The wording of s. 118 strongly suggests that breaches of the solvency tests are derivative wrongs. For example, pursuant to under s. 118(2), directors who authorize a resolution in breach of the solvency tests are jointly and severally liable to restore to the corporation the amounts paid out. Further, directors who are liable under s. 118(2) may apply to the court for an order compelling a shareholder who has received money or property to deliver it to the director and the court may make such an order where it is equitable to do so.272

While it is unlikely that the directors would initiate or authorize an action against themselves for breaches of the solvency tests, a remedy for such wrongs could be sought by or on behalf of the corporation through a derivative action. In fact, for the reasons discussed below,273 this situation strongly suggests that a derivative action would be generally more appropriate than an oppression claim. It should be noted, however, that for s. 118 to have its intended effect, creditors would have to be granted standing as “proper persons” to commence derivative actions. Therefore, creditors should almost always be granted standing to bring derivative actions where the allegations include a breach of the solvency tests and the Re Daon test discussed above274 should be rejected in this context, subject to certain limitations that may be necessary in bankruptcy situations.275

272 See CBCA ss. 118(4)-(5).
273 See below, this chapter, Section C, “The Breakdown of the Distinction Between Personal and Derivative Actions”.
274 See text accompanying note 220, above.
275 That is, in the bankruptcy context, the rights of creditors are generally protected by the trustee in bankruptcy and this process should not be upset by a creditor who wishes to commence a derivative action. In this respect, see the discussion of Gainers, supra note 146 and accompanying text.
The argument is even stronger under ABCA, s. 113,\textsuperscript{276} which is the Alberta equivalent of CBCA, s. 118, in a somewhat modified form. ABCA, s. 113 provides as follows:

113(1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 25 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

(2) Subsection (1) does not apply if the shares, on allotment, are held in escrow pursuant to an escrow agreement required by the Executive Director and are surrendered for cancellation pursuant to that agreement.

(3) Directors of a corporation who vote for or consent to a resolution authorizing

(a) a purchase, redemption or other acquisition of shares contrary to section 32, 33 or 34 \{i.e., contrary to the solvency tests\},
(b) a commission on a sale of shares not provided for in section 39,
(c) a payment of a dividend contrary to section 40,
(d) financial assistance contrary to section 42,
(e) a payment of an indemnity contrary to section 119, or
(f) a payment to a shareholder contrary to section 184 or 234,

\textit{are jointly and severally liable to restore to the corporation any amounts so paid and the value of any property so distributed, and not otherwise recovered by the corporation.} [emphasis added]

\textsuperscript{276} Supra note 5.
(4) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act on which the judgment was founded.

(5) If money or property of a corporation was paid or distributed to a shareholder or other recipient contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234 [i.e., inter alia, contrary to the solvency tests], the corporation, any director or shareholder of the corporation, or any person who was a creditor of the corporation at the time of the payment or distribution, is entitled to apply to the Court for an order under subsection (6). [emphasis added]

(6) On an application under subsection (5), the Court may, if it is satisfied that it is equitable to do so, do any or all of the following:

(a) order a shareholder or other recipient to restore to the corporation any money or property that was paid or distributed to him contrary to section 32, 33, 34, 39, 40, 42, 119, 184 or 234 [i.e., inter alia, contrary to the solvency tests] [emphasis added];

(b) order the corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares;

(c) make any further order it thinks fit.

(7) A director is not liable under subsection (1) if he proves that he did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money.

(8) A director is not liable under subsection (3)(d) if he proves that he did not know and could not reasonably have known that the financial assistance was given contrary to section 42.
(9) An action to enforce a liability imposed by this section may not be commenced after 2 years from the date of the resolution authorizing the action complained of.

Just as under CBCA s. 118, ABCA s. 113(3) provides that directors who authorize a resolution in breach of the solvency tests are jointly and severally liable to restore to the corporation the amounts paid out. However, unlike the CBCA provision, ABCA s. 113(5) section explicitly grants standing to any person who was a creditor of the corporation at the time of the payment or distribution to make an application for relief under subsection (6). Subsection (6) allows the creditor to seek an order requiring the shareholder or other recipient to restore to the corporation any money or property that was paid or distributed to him contrary to, inter alia, the solvency tests or to make any other order it thinks fit.

ABCA s. 113 was discussed in First Edmonton,277 where McDonald J. considered whether a creditor could be a “proper person” to make a claim under the oppression remedy or the derivative action. McDonald J. took note of various creditors’ rights under the ABCA, in order to help him determine whether a creditor could be a “proper person”. He stated that:

[i]t is not without significance that the ABCA does provide specific remedies to creditors where, for example money is paid out of the corporation and the solvency test has not been passed, or where a director contravenes other parts of the Act (such as ss. 113(5), (6) and 240). 278

McDonald J. then cited parts of s. 113, as well as ABCA s. 240 (the ABCA equivalent to CBCA s. 247), a section dealing with restraining orders and orders of compliance.279 He then continued:

277 Supra note 139.
278 Ibid. at 153.
279 ABCA s. 240 provides as follows:
240. If a corporation or creditor or any shareholder, director, officer, employee, agent, auditor, trustee, receiver-manager, or liquidator of a corporation contravenes this Act, the regulations, the articles or by-laws or a unanimous
In these provisions [i.e., ABCA ss. 113(5) and 240], creditors are specifically mentioned as persons entitled to apply to the court for remedies. While these sections do not preclude creditors from applying for other remedies (such as those provided by ss. 232 and 234) [i.e., the ABCA derivative action and oppression remedy sections] the legislature has singled out cases in which creditors generally are specifically entitled to protection.²⁸⁰

These statements by McDonald J. "do not preclude" the possibility that the oppression remedy and derivative action would be available in addition to the remedies under ABCA s. 113. However, it is suggested that the wording of s. 113 (even more so than the wording of CBCA s. 118) is most consistent with a derivative-type claim for which the legislature has provided a specific remedy. That remedy, as is apparent from s. 113(6)(a), is meant to be, at least primarily, the restoration of money or property to the corporation.

Finally, two additional differences between the CBCA-type derivative action and ABCA ss. 113(5) and 113(6) should be noted. First, as mentioned above,²⁸¹ ss. 113(5) and 113(6) explicitly make creditors eligible to apply for relief whereas under the derivative action the standing of creditors is in the discretion of the court. In this respect, it is submitted that creditors should almost always be granted standing as complainants under the derivative action in respect of a claim that the solvency tests were breached. Second, and more importantly, ss. 113(5) and 113(6) do not require the applicant to obtain leave of the court to commence proceedings.

To summarize, it is suggested that remedies for breaches of the solvency tests can be best achieved through a derivative action (in the case of CBCA-type corporations, except ABCA companies) or through a derivative-like action under s. 113(6) (for ABCA corporations). Further, as the primary recourses, the CBCA derivative action and the shareholders agreement, a complainant or a creditor of the corporation may, in addition to any other right he has, apply to the Court for an order directing that person to comply with, or restraining that person from contravening any of those things, and on the application the court may so order and make any further order it thinks fit. [emphasis added by McDonald J.]

²⁸⁰ Supra note 139 at 154.
ABCA s. 113(6) remedy both allow the court to "make any order it thinks fit" which could, where appropriate, include remedies such as an award directly to the applicant. As a result, while the availability of oppression claims for breaches of the solvency tests should not be altogether precluded, the need to apply the oppression remedy for such breaches should be rare.

In a more general sense, it is submitted that where specific remedies are provided under the CBCA-type statutes, those remedies should be the primary remedies available to claimants and the oppression remedy should not be the remedy of first resort. Rather, the oppression remedy should only be used to "fill gaps". Otherwise, the specific sections will become redundant or, even worse, they could be overridden by the oppression remedy which, for example, may be interpreted as having a different standard of liability than that provided in the specific sections. By allowing creditors to use the oppression remedy even where other remedies are available, the court is, for all practical purposes, rendering those other remedies superfluous wherever the defendant is a company. Plaintiff-creditors will almost always prefer the oppression remedy which is faster procedurally than ordinary civil proceedings and which gives the court the broadest possible remedial powers.

C. The Breakdown of the Distinction Between Personal and Derivative Actions

It appears that with the advent of the oppression remedy there has been a breakdown of the traditional distinction between personal and derivative actions. It will be recalled that the strict application of this distinction was one of the factors that contributed to the unfair results of the Rule in *Foss v. Harbottle*. It is submitted, however, that there remains a need for such a distinction in modern company law.

First, the distinction is still relevant because certain limits have been placed on the statutory derivative action that would be lost if all derivative actions could be brought under the oppression remedy. As discussed above, the wider availability of the statutory

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281 See the text following note 276.
282 See CBCA s. 240. ABCA s. 113(6)(c) actually provides that the court can "make any further order it thinks fit".
derivative action than at common law prompted fears that there would be an explosion of “strike” suits, claims without merit, and situations where a single cause of action would lead to a multiplicity of claims. The statutory leave provision was one of the safeguards put in place to avoid such problems. If derivative actions could, without limitation, be brought as oppression claims, then the statutory leave requirement would become worthless and the statutory safeguards would be lost.

Secondly, a statutory derivative action is different and has different consequences than an oppression claim. The differences can be categorized in terms of issues of: (1) standing; (2) procedure; (3) costs; (4) standard of liability; and (5) remedial options or parties subject to attack. The merits of these differences are discussed in detail elsewhere by MacIntosh, where he has noted that not all of the differences should be accepted as inevitable. Nevertheless, there is arguably merit in at least maintaining the procedural differences between derivative and oppression claims, a difference that supports the continuing need to distinguish between these remedies. Obviously, if it develops that the only differences are procedural ones, this second argument in support of the continued distinction merges with the one discussed in the preceding paragraph.

Thirdly, the distinction remains important because the use of the oppression remedy for certain derivative claims may harm the interests of corporate stakeholders who are not involved in the proceedings. This third reason to maintain the distinction between derivative and oppression claims assumes, however, that a complainant has a choice between bringing a derivative action and an oppression claim for some, or all, derivative claims. Therefore, before further exploring this third reason, it is necessary to consider the relationship between the oppression remedy and the derivative action and to ask whether the oppression remedy is (and whether it should be) available for personal

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283 See text accompanying notes 51-54, above.
284 See text accompanying note 73, above. See also MacIntosh, supra note 31 at 59, 63.
285 MacIntosh, ibid. at 68.
286 Ibid. at 52-59 where MacIntosh considered these issues in some detail.
287 Ibid. at 67. MacIntosh has suggested that aside from procedural differences, it is difficult to find support for the balance of the present differences between the oppression remedy and derivative action.
288 Ibid.
actions, derivative actions, or both. In other words, does a plaintiff have a choice between bringing a "derivative claim" under the derivative action or the oppression remedy, and if so, is that option always available?

MacIntosh has pointed out that the drafting of the CBCA suggests an intention that the oppression remedy would cover both purely personal actions and at least some actions of a derivative character. This interpretation is based on the following arguments:

(i) CBCA s. 241(c) focuses on the conduct of directors' duties which, at the time of the drafting of the CBCA (and probably still today), were owed only to the corporation and not to the shareholders either collectively or individually. Thus breaches of directors' duties are normally wrongs of a derivative character and the inclusion of such conduct under the oppression remedy suggests that the CBCA drafters intended to make these derivative wrongs actionable under the oppression remedy;

(ii) the ratification provision (CBCA s. 242(1)), which applies to both s. 240 (the derivative action) and s. 241 (the oppression remedy), refers to breaches of rights or duties owed to the corporation. If the oppression remedy was intended to be purely personal in nature, then it would not have been necessary for the ratification provision to apply to the oppression remedy because shareholder ratification can never affect a personal cause of action; and

(iii) one of the specifically enumerated orders that a court can make under the oppression remedy is an order "varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract."  

289 Many of the points considered here are borrowed from or are adaptations of arguments made by MacIntosh. See, generally, MacIntosh, supra note 31.
290 Ibid. at 42-43.
291 Ibid. at 43-44.
292 However, see the discussion regarding the developing area of directors' duties toward creditors, below, in PART II: Chapter 5: Section B, Subsection (5) (e) "Liability for Insolvent Trading" and PART II: Chapter 5: Section C, Subsection (3) (b) "Directors' Duties to Creditors Revisited".
293 See CBCA s. 243(h) [emphasis added].
Further, a review of the case law shows that “the balance of authority appears to favour the proposition that all types of derivative actions are permitted under the oppression remedy”\textsuperscript{294} despite the fact that the \textit{Dickerson Report} seems to have suggested that “the oppression remedy was intended to have a fundamentally personal character... [and that it should only be available for derivative wrongs that] ...could more properly be characterized as personal in nature”.\textsuperscript{295}

Assuming that a creditor can seek relief under the oppression remedy for what are, essentially, wrongs to the corporation, it is necessary to consider the suggestion made above that the use of the oppression remedy for certain wrongs of a \textit{derivative} character can harm the interests of corporate stakeholders who are not involved in the oppression proceedings. More particularly, it is necessary to consider the impact that a creditor’s oppression action for an essentially derivative claim would have on the interests of other creditors and stakeholders. Several simple fact scenarios illustrate the issue.\textsuperscript{296}

\textbf{Scenario 1:} A company with a sole shareholder/director has $100 in cash as its only asset. The company authorizes and pays a dividend to the shareholder in the amount of $100. At the time the dividend is authorized and paid, the company has only one creditor, Creditor X, a supplier owed $200. There is no evidence of bad faith on the part of the shareholder/director. Creditor X tries to collect the debt and is told that the company has no assets. Creditor X obtains a (default) judgment against the company. Later, recognizing that the company has nothing against which to realize, the creditor decides to seek relief under the oppression remedy. Its lawyer appears in court and argues that the payment of the dividend was a breach of the statutory solvency

\textsuperscript{294} MacIntosh, \textit{supra} note 31 at 52. The cases in the area are summarized at 46-52.
\textsuperscript{295} \textit{Ibid.} at 45, citing the \textit{Dickerson Report}, \textit{supra} note 100 at para. 484. Macintosh also pointed out, at 45-46, that this point is strengthened when one considers that the oppression remedy was intended to be used primarily, although not exclusively, in the case of private companies. He adds, at 46, that “[i]n the private company context, the distinction between derivative and personal actions loses a good deal of its bite, and wrongs to the corporation frequently reflect an underlying dispute between corporate constituents.”
\textsuperscript{296} The scenarios presented here are simply variations of the scenarios suggested by MacIntosh, \textit{ibid.} at 60.
requirements. She cites SCI Systems and Sidaplex in support of her argument that (1) the shareholder/director's conduct was oppressive and/or unfair conduct; (2) judgment should be granted against the shareholder/director personally; and (3) the shareholder/director should be ordered to pay the $100 dividend he received directly to Creditor X in (partial) satisfaction of the debt.

**Scenario 2:** Assume the same facts as in Scenario 1, except that the company has numerous creditors, only some of whom have liquidated debts.

In Scenario 1, it is easy to identify the creditor and the amount of her loss. Leaving aside for the moment whether the oppression remedy should be available for breaches of the solvency tests, a topic which has been discussed above, a judgment which allows (1) an oppression claim, (2) requires the shareholder/director to personally pay the claim and (3) orders the payment directly to the creditor, seems to be an appropriate and effective remedy based on the facts. At first glance, it does not appear to be harming the interests of any other parties. However, allowing the creditor to make an oppression claim with relief going directly to that creditor converts what is, in effect, a derivative claim into a claim in the form of a personal action. Further, it assumes that there are no other creditors of the company who have a valid claim to a portion of the funds in question. These latter two points are highlighted by considering Scenario 2.

In Scenario 2, the facts are more complicated and a number of "unknowns" are introduced. Allowing Creditor X to get paid directly by the shareholder is tantamount to awarding a court sanctioned preference over other creditors of the corporation. To paraphrase MacIntosh, it is taking money out of the pockets of the other creditors. Before allowing a creditor to take a "personal" oppression action in these circumstances, the court should be considering the impact this would have on all of the company's creditors as well as its other potential claimants.

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297 While creditors will certainly want to characterize such breaches as personal wrongs to them, breaches of the solvency requirements give rise to wrongs of a derivative character. As discussed above, support for this view can be found in CBCA s. 118(2) which stipulates that the directors authorizing a resolution in breach of the solvency test are "liable to restore to the corporation" the amounts paid out. See text accompanying notes 271ff, above.

298 See text accompanying notes 268ff.

299 Supra note 31 at 60.
Obviously, the scenarios could be made more complex or uncertain in terms of the number or types of claims and claimants. For example, there could be claims for unliquidated debts, contingent claims, or the facts could suggest a high likelihood that there are various “unknown” creditors. As MacIntosh points out:

...there may be many other potential claimants who suffer harm as a result of a wrong done to the corporation, especially in cases involving public corporations. Where injury is done to the corporation, all those with an economic interest in the corporation, and not merely shareholders and creditors, suffer an indirect harm. Fixed claimants like trade creditors and employees, and contingent claimants like consumers holding unexpired warranties and tort plaintiffs with unadjudicated (or simply unpaid) claims suffer a loss as well, to the extent that the probability of payoff diminishes. As the number of claimants multiplies, the difficulties of calculating the loss of each correspondingly increase. The administrative difficulty and expense of ensuring that each claimant is paid increase concomitantly.

These difficulties are circumvented where the action proceeds derivatively. Where a single suit is undertaken in the name of the corporation, and a corporate recovery follows, all corporate constituents benefit indirectly in precisely the same proportions in which they were initially injured. A derivative action therefore accomplishes the same result as joinder in a personal action of all members of all classes of corporate constituents who might conceivably have been injured by the wrong.300

Therefore, before a court orders a payment directly to a complainant via the oppression remedy, there should be some safeguard in place to ensure that the court (knowing, for example, that a company has breached the solvency tests), has heard evidence that other creditors/claimants will not be prejudiced by the order. A review of the cases, however, demonstrates that the courts are not always making the necessary inquiries into the potential claims of other creditors/claimants.
For example, in cases such as SCI Systems\textsuperscript{301} and Gignac, Sutts,\textsuperscript{302} the court failed to take into consideration the possibility that creditors other than the complainants could be prejudiced by orders that require payments directly to the complainants.

In the Prime Computers case, the court considered whether it would be more appropriate to have the director/shareholder repay the sums in question to the company. The court held that the moneys in question "belonged, for the most part, to the applicant" and that, apparently, there was "but one other judgment creditor of the corporate respondent."\textsuperscript{303} The court, it seems, did not consider whether there were other creditors who had not obtained judgment against the company. The court ordered the personal respondent to make the payment to the sheriff because an order to pay the funds to the company "may [have] result[ed] in little assistance to the applicant, the company remaining under the full control of [the director/shareholder]."\textsuperscript{304} Presumably, the money was then paid out by the sheriff to either the applicant alone or, perhaps, to the applicant and the other judgment creditor on a \textit{pro rata} basis (assuming that other judgment creditor had carried out the necessary formalities to share in the proceeds pursuant to the Ontario Creditors' Relief Act).\textsuperscript{305}

Thus a creditor who was at best one of two judgment creditors of the corporate respondent was given a court sanctioned preference to the funds in issue \textit{vis-à-vis} other creditors and possibly even toward the other, known judgment creditor. Certainly the court's fears that the personal respondent could thwart the applicant's attempts to get its hands on the funds after they were returned to the company could have been allayed by an order that any funds returned would have to be paid forthwith to the applicant (and the other judgment creditor) or, if the company had other creditors, to its creditors on a \textit{pro rata} basis. This type of order was made in Royal Bank of Canada v. Amatilla Holdings Ltd.,\textsuperscript{306} where dividends were declared in breach of the solvency tests. After finding that there had been oppression, the court ordered the shareholders to repay the dividends they

\textsuperscript{300} MacIntosh, \textit{ibid.} at 61-62 [footnotes omitted].
\textsuperscript{301} \textit{Supra} note 133.
\textsuperscript{302} \textit{Supra} note 188.
\textsuperscript{303} \textit{Supra} note 194 at 735.
\textsuperscript{304} \textit{Ibid.} at 735-736.
\textsuperscript{305} R.S.O. 1990, c. C.45.
received to the corporation and by the same order prohibited the corporation from disposing of the funds so received except in payment of its debt to the applicant. 307

The dangers of a direct award to the plaintiff-creditor are well-summarized by MacIntosh who cautions that while in some actions of a derivative character it may be more efficient to make the award directly to the claimant,

...[i]t is important in such cases that the interests of all claimants be taken into account. Where all possible claimants are not represented, or where difficulties in calculating the injury of each intervene, the court should refrain from ordering personal recoveries, rather than a corporate recovery. Thus, it can be expected that a personal recovery by a claimant or claimants will be very much the exceptional case. 308

Unfortunately, as is apparent from cases such as SCI Systems, Gignac, Sutts and Prime Computers, the courts do not always give proper consideration to the rights of other claimants. These cases demonstrate that rather than granting direct recovery in the "exceptional case", there is a danger that personal recovery by a claimant is becoming the norm despite the potential prejudice to other creditors/claimants of the corporate defendants.

D. A Narrower View of the Scope of the Oppression Remedy

The above analysis demonstrates that, despite its broad drafting, the oppression remedy should not be used as a cure-all for every type of commercial dispute. The danger of overextending the use of the oppression remedy threatens its legitimacy by allowing it to be developed into a parallel system of rules and remedies, offering different

306 Supra note 216.
307 See also Sands Motor Hotel, supra note 143, where the remedy ordered the monies to be returned to the corporation rather than being paid directly to the claimant.
308 MacIntosh, supra note 31 at 70 [emphasis added]. While MacIntosh speaks in terms of situations where an award should be made directly to a shareholder or shareholders, the argument applies equally to claims by creditors for a direct award.
results than the common law and other statutes, without providing any justification for those differences. It is submitted that such a result was not the intention of those who drafted the oppression remedy and, in any event, is not satisfactory.

The analysis in this chapter suggests that a narrower view of the scope of the oppression remedy may be more appropriate than some of the broad interpretations given to date. For example, it suggests that the oppression remedy should not be used to nullify the effects of specifically enacted rules and remedies. Further, it suggests that care must be taken to ensure that the use of the oppression remedy to assist certain corporate stakeholders – such as creditors – does not prejudice the rights of other stakeholders. It also suggests that care must be taken to ensure that the apparently justified use of the oppression remedy in the context of closely-held companies does not lead to rules that are inappropriate when applied more generally. In other words, if the result does not make sense outside the context of the closely-held corporation, it may be evidence that the oppression remedy is not an appropriate means of dealing with the problem in question.

Each of these issues, as well as the impact that the broad use of the oppression remedy by creditors may have on certain basic principles of company law – which is discussed in the next chapter – suggest the need to slow the development of the oppression remedy in order to ensure that it evolves in a manner which does not create more problems than it solves.
Chapter 5: The Impact of Creditors' Use of the Oppression Remedy on the Principle of Corporate Personality

A. Introduction

This chapter considers the traditional bases for shareholders', directors' and officers' liability as well as the impact of the oppression remedy on such liability and on the principle of corporate personality.

In Section B, the traditional bases for shareholders', directors' and officers' liability are explored in some depth. The analysis will show that while it is possible to identify various bases for shareholders', directors' and officers' liability, such liability continues to be treated in a relatively restricted fashion. The main argument made in Section B is that the courts are reluctant to extend shareholders', directors' and officers' liability for fear of intruding on the principle of corporate personality. Because it is argued that the principle of corporate personality is the main reason for the restrictive approach taken by the courts in imposing liability on shareholders, directors and officers, Section B contains an extended review of the background of the principle of corporate personality and its affect on (limiting) shareholders', directors' and officers' liability.

The principle goal of the chapter is to consider how the oppression remedy has recently been used to expand shareholders', directors' and officers' liability. However, it will be argued that in light of the potential impact on the principle of corporate personality, there is a need for caution in this developing area. These issues are considered in Sections C and D of this chapter.

309 The lengthy review of the principle of corporate personality and its effect on shareholders', directors' and officers' liability is provided in order to provide a backdrop for a discussion of the recent use of the oppression remedy to obtain relief against shareholders, directors and officers. While this latter discussion is a more important part of the development of the main arguments contained in the thesis as a whole, the arguments would lose a great deal of their force without the initial review the basic principles of corporate personality and their impact on shareholders', directors' and officers' liability.
B. Background to the Principle of Corporate Personality

(1) Basic Aspects of Corporate Personality

As discussed above, one of the fundamental principles of company law is the principle of "corporate personality". Interestingly, an analysis of the oppression remedy cases shows that the use of the oppression remedy by a company's creditors may be having a significant impact on the principle of corporate personality. However, before considering the consequences the oppression remedy may be having on the principle of corporate personality, it is necessary to review two basic aspects of this principle, each of which has an impact upon important liability issues that arise in the company law context.

One aspect of corporate personality considered in this chapter is the concept of "separate legal personality" pursuant to which a company is treated, to the extent possible, by analogy to an individual. The second basic aspect of corporate personality considered in this chapter is the "limited liability" of shareholders for acts of a corporation.

Separate legal personality means that it is the company itself that enters into legal relationships with third persons, whether through contract, tort, etc. However, while the law may treat a company as a separate "legal person", a company can only act in the real world through its "human" appendages, i.e., its directors, officers, senior managers, employees and other agents (collectively referred to in this chapter as the "company representatives" or the "human representatives"). As recently explained by the Ontario Court of Appeal, "[w]hen a corporation acts, it must act through the persons who are fixed with the power to act as the corporation, principally, its officers, directors and senior management." Therefore, in considering liability issues, it is necessary to consider how the fact that a corporation must act through its human representatives

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310 It is beyond the scope of this thesis to discuss the various theories of corporate personality, such as the "fiction" and "realist" theories, as well as the theories of corporate activity, such as the "identification" theory. For a review of these theories see, for example, Welling, supra note 6 at 79ff, 109ff.
311 Welling, ibid. at 78.
impacts upon the civil liability of the corporation as well as the civil liability of those representatives.\textsuperscript{313}

The other aspect of corporate personality considered in this chapter is the extent to which a company’s shareholders can be personally responsible for the company’s liabilities notwithstanding the separate legal personality of the corporation. While the general rule is one of limited liability for shareholders, the rule has various exceptions that, unfortunately, have often been incorrectly lumped together under the concept of “piercing the corporate veil”. The concept of the “corporate veil” is considered below, allowing for a more useful analysis of the so-called exceptions to the principle of limited liability, many of which are not really exceptions to the principle at all.

This latter aspect of corporate personality, i.e., limited liability, is considered first, after which the concept of separate legal personality is returned to for further discussion.

\textit{(2) Limited Liability of Shareholders and the ‘Corporate Veil’}

The limited liability of a company’s shareholders can be seen as the “logical consequence of the separate legal personality of the corporation”.\textsuperscript{314} Limited liability insulates shareholders from the company’s liabilities, thereby limiting their exposure to the amounts they have invested in the company.

There have been various justifications offered in support of the principle of limited liability, the history and discussion of which is beyond the scope of this thesis.\textsuperscript{315} For present purposes, it is sufficient to note that the general rule of limited liability of

\textsuperscript{313} This chapter focuses solely on issues of civil liability.

\textsuperscript{314} Hamilton, \textit{supra} note 271 at 260.

\textsuperscript{315} For example, various economic arguments have been made in favour of limited liability. One such argument suggests that limited liability encourages investment from both small and large investors by limiting their liability with the result that there is a net increase in the aggregate level of economic activity; see P. Halpern, M. Trebilcock & S. Turnbull, “An Economic Analysis of Limited Liability in Corporation Law” (1980) 30 U.T.L.J. 117 at 118 who make reference to this argument. These authors conclude that limited liability is the most efficient regime for widely held companies, although they add that certain exceptions to the general rule would be appropriate. On the other hand, they argue that limited liability is less appropriate (i.e., less efficient) for closely held corporations. Other economic arguments with respect to limited liability are found in Buckley \textit{et al.}, \textit{supra} note 13 at 86ff.
shareholders is expressly recognized by the CBCA-type statutes. For example, CBCA s. 45(1) provides that “[t]he shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection 38(4), 146(5) or 226(5).” These statutory exceptions are discussed below.

The limited liability aspect of the principle of corporate personality has spawned one of the best known images in all of corporate law, that of the “corporate veil”. Because of the limited liability of shareholders, the separate legal personality of the corporation has often been portrayed as a corporate veil which separates shareholders from the acts of the corporation.316 Despite this powerful imagery, however, it has been suggested that the corporate veil is an outdated and inappropriate concept in the context of modern company law.317 It has also been suggested that the concept of the corporate veil has led to unnecessary confusion in the cases dealing with the principle of limited liability and that the related concept of “piercing the corporate veil” has been misused as a justification for imposing liability on shareholders where other bases for imposing liability are available which do not harm the integrity of the principle of limited liability.318 Therefore, in the discussion which follows, an effort is made to distinguish the different categories of exceptions to the principle of limited liability in order to avoid (incorrectly) lumping all of them together as cases which “pierce the corporate veil”.

(3) Exceptions to Shareholders' Limited Liability

The principle of limited liability has various exceptions which can be categorized as follows: (1) statutory exceptions (Category One); (2) common law exceptions, which are cases where it is said that the corporate veil is “pierced” (Category Two); and (3) cases which do not fall into either of the first two categories of exceptions and which are made up of the many situations where shareholders can be liable for corporate conduct notwithstanding the principle of limited liability (Category Three). As will be further explained below, cases in this third category are not exceptions to the general rule of limited liability although they are sometimes incorrectly described as such.

316 Hamilton, supra note 271 at 260.
317 Welling, supra note 6 at 52.
318 Hamilton, supra note 271 at 259.
The Category One statutory exceptions are quite straightforward and they are provided in CBCA ss. 38(4), 146(5) and 226(5). These sections provide as follows: (1) where a company, in breach of the solvency tests, has reduced its stated capital for any purpose, with the result that a shareholder has received property or money from the corporation or had a liability to the corporation extinguished, then a creditor can apply to have the shareholder pay or deliver to the corporation the money or property paid or distributed to him or for an order compelling the shareholder to pay to the corporation an amount equal to any liability of the shareholder that was extinguished (s. 38(4)); (2) where the shareholders have restricted the powers of the directors through a unanimous shareholder agreement, the directors are relieved of their duties and liabilities and the shareholders thereby assume those duties and liabilities (s. 146(5)); and (3) where the shareholder has received money or property upon the dissolution of the corporation, the shareholders are liable to creditors who were unpaid prior to the dissolution for the amounts they received (s. 226(5)).

As explained above, the Category Two cases include situations where the principle of limited liability for shareholders is held not to apply. These cases are the only true exceptions to the principle of limited liability (aside from the statutory ones discussed above) because only in these cases are shareholders liable solely as a result of their status as shareholders. The Category Two common law exceptions are difficult to identify or define from a doctrinal point of view. In essence, the courts have made exceptions to the principle of limited liability and imposed liability on the shareholder qua shareholder where the shareholder is considered to be acting as the “alter ego” of the corporation.319

319 It is beyond the scope of this thesis to review the “alter ego” test in detail. For present purposes, it is sufficient to recognize that the test is a rather nebulous one. Generally, the courts will require a significant degree of interrelation between the shareholder and the corporation in order to satisfy the “alter ego” test, for which a number of different factors are considered. See, Hamilton, ibid. at 286-287. For a more complete analysis of the “alter ego” tests see Hamilton, ibid. 286-289. Where the claim arises in a contractual context, the “alter ego” test may be modified somewhat such that, in addition to satisfying the general “alter ego” test, the claimant may also have to prove the existence of fraud or other serious impropriety. See, Hamilton, ibid. at 289-292. However, the law in this area is not entirely clear and in many cases the fraud test has been treated as a separate test altogether from the “alter ego” test. See, Hamilton, ibid. at 290. Hamilton suggests, ibid. at 292, that the only situations where it is truly necessary to lift the
The scope for the Category Two exceptions often appears exaggerated because many of the cases that fall under this category have used loose language or poor analysis and have purported to find facts which justify an exception to the principle of limited liability where no such exception is necessary. In other words, many judgments have often confused situations where there is a true exception to the principle of limited liability (Category Two) with situations where a shareholder can be held liable for acts of the corporation despite the application of the doctrine of limited liability (Category Three). Much of the confusion stems from the sloppy use of the concept of “piercing of the corporate veil” and every effort is made to avoid using that term in this chapter in order to more carefully differentiate the second and third categories of cases. Nevertheless, even when the Category Three cases are properly identified and segregated from the Category Two cases, it is apparent that the Category Three cases do not account for all of the situations where the court claims to “pierce the corporate veil”. Hamilton has suggested that beyond the Category Three cases there are (and there should be) a “limited and clearly defined notion of lifting the corporate veil” which could be used to cover situations such as, for example, the improper use of thinly capitalized subsidiaries. It is only in such limited circumstances where the true Category Two cases arise.

The Category Three cases include cases where, despite the continued application of the principle of limited liability, shareholders can be made liable pursuant to various legal doctrines. In these situations, the shareholder is not liable qua shareholder. Rather, the shareholder is liable pursuant to principles such as agency, partnership, contract or tort, any of which may be the basis for imposing liability. It is beyond the scope of this thesis to consider each of these grounds of liability of shareholders in detail, although tortious liability, one of the most important of the above-mentioned grounds of liability of corporate veil are those where the basic “alter ego” test is applied. This would be limited to situations where the injury is the result of tortious conduct. In cases where fraud must also be proved, i.e., in contract situations, Hamilton suggests that liability should be imposed directly on the fraudulent party without any need to lift the corporate veil.

320 Ibid. at 285.
321 Ibid.
322 For a thorough consideration of these grounds see Hamilton, ibid. at 267-282 and Welling, supra note 6 at 122ff.
shareholders, is considered below in some detail in the context of directors’ liability.\footnote{See text accompanying notes 302ff, below.} Many of the issues raised below in the discussion regarding directors’ liability apply equally to shareholders’ liability, although there are certain differences between shareholders’ and directors’ liability in tort that need to be recognized. As will be seen below, tortious liability has been used by plaintiffs to make claims against directors and officers, as well as shareholders, for acts of a corporation. Unlike shareholders’ liability, however, the personal liability of directors and officers is not affected by the scope of the principle of limited liability which applies only to shareholders. Rather, directors and officers’ liability in tort runs up against the other major aspect of the principle of corporate personality – the principle of separate legal personality.

(4) The Effect of ‘Separate Legal Personality’ on the Liability of Corporate Representatives

The principle of separate legal personality has been well-entrenched in Anglo-Canadian company law since the \textit{Salomon} case\footnote{Canada (Attorney General) v. \textit{Salomon and Co}., [1897] A.C. 22.} and is provided for expressly in the CBCA-type statutes. For example, CBCA s. 15(1) provides that a “corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.”

Since a corporation must act through human representatives, one obvious issue is the extent to which persons other than the corporation can be liable for acts of the corporation. For example, where a company breaches a contract or produces a product that causes harm to third persons, can a claimant seek relief against the company’s human representatives? Can the claim be made in addition to a claim against the company itself? Looking at it from the opposite point of view, the question is whether a director, officer, employee or agent can be insulated from liability for conduct which causes harm to a third party simply because he or she was acting “as” or “on behalf of” the corporation.

The principle of separate legal personality can be affected by common law doctrines as well as by various statutory provisions, including the oppression remedy. The balance of this section of the chapter focuses on the common law principles of liability as well as
certain statutory principles of liability other than the oppression remedy. The impact of the oppression remedy on liability issues is then returned to in Section C of this chapter, below.\textsuperscript{325}

The starting point for the common law analysis must begin by recalling the basic principles of tort law and agency law. The general rule is that an agent who commits a tort is liable to the injured party as the tort-feasor and that the principal can also be vicariously liable to the injured party for the damages caused by the torts of her agent. Under this rule of vicarious liability, the additional liability of the principal does not limit the liability of the tort-feasor. Further, while a principal may be relieved of vicarious liability where the act was outside of the agent’s scope of authority, real or implied, the agent himself or herself will remain liable for the damages.

In the corporate context, the normal principles of agency and vicarious liability run up against the principle of corporate personality. The issue to be determined is which principle will override the other. Or, put another way, the issue is the extent to which the law will extend the fiction of the separate corporate personality to deem that certain tortious acts are strictly those of the corporation (such that the tort-feasor is the corporation and not the human representative) rather than those of an individual who happens to be acting on behalf of the corporation (with the possibility of vicarious liability of the corporation).

While one would expect that, “as a general rule, an agent is always liable personally for his tortious acts, notwithstanding that his acts (and hence his liability) may in law also be those of the corporation”,\textsuperscript{326} the caselaw demonstrates that the courts are not always comfortable applying this “general rule”, especially when the defendants are directors or officers. Hamilton summarizes the issue as follows:

Essentially, the approach of the courts has been to consider whether, as a matter of policy, the shareholder, director, officer or employee of a

\textsuperscript{324} Supra note 17.
\textsuperscript{325} See PART II: Chapter 5: Section C, “Repercussions of the Oppression Remedy on Limited Liability of Shareholders and Directors’ Liability”.
corporation should be relieved of a tort liability that would normally attach to his or her actions because he or she performed an act on behalf of the corporation and in connection with his or her position within the corporation. In appropriate cases, the shareholder, director, officer or employee is relieved of liability on the ground that the act was an act of the corporation and not of the defendant personally.327

In other words, the law deems that the corporation and not the human representative has committed the tort and the human representative is relieved of liability unless one of a number of different tests which have been applied by the courts imposes personal liability on the human representative.328

Unfortunately, the scope of the limitations on the above-noted "general rule" remains unclear. Further, an analysis of the cases suggests that the limitation on liability has become the rule and that personal liability of the tort-feasor has become the exception in the company law context, at least for directors and officers. That is, rather than assuming that a tort-feasor is liable for his or her acts and that the company can be vicariously liable for such conduct, there is a presumption that the conduct is simply not the conduct of the human representative, it is the conduct of the company.329

An analysis of the current state of the law and the liability "tests" in this area follows. The focus of the analysis is on difficult issues of directors' and officers' liability for acts of a corporation and the justifications for limiting their liability for such acts. (For the balance of the chapter, reference to directors' liability includes both directors' and officers' liability unless it is expressly stated otherwise).

Many of these questions raise equally difficult issues about the liability of employees and other agents of corporations, although it appears from the cases that the principles for

327 Hamilton, supra note 271 at 273.
328 The different tests that have been applied to determine whether the human representative can be personally liable are discussed in the text accompanying notes 335ff, below.
329 See, for example, Welling, supra note 6, c. 3, at 99ff (see especially at 117-118) and c. 4, (see especially at 151-160, 172).
determining liability of directors may be different than those applied to employees’ liability. Some of these differences in treatment are considered below.

(5) Directors’ Liability in Tort

As mentioned above, there are various situations where tort claims have been made against directors personally. The law in this area is, to say the least, quite uncertain. In some situations – including trespass, libel, assault and at least certain types of negligence – the representative capacity of a director will not shield him or her from personal liability. In other situations – including some forms of negligence and certain economic torts such as copyright and patent infringement – the representative character of the director is more likely to succeed as a defence. In all of these situations, the court is required to balance the principle of separate legal personality against the principle that all persons should be liable for their tortious actions. Essentially the courts are concerned about imposing unrestricted liability on a company’s human representatives each and every time the corporation breaches a contract or commits a tort or some other civil wrong.

The cases in this area can be loosely categorized under the following headings: (a) misrepresentation; (b) inducing breach of contract; and (c) torts other than misrepresentation and inducing breach of contract. Each of these is considered in turn.

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331 Materials on Canadian Business Corporations, ibid.
333 These categories are borrowed from Hamilton, supra note 271 at 273-274, who actually suggested a fourth category, “Directing the Commission of a Tort” which, in the present analysis, forms part of the discussion of “Torts other than Misrepresentation and Inducing Breach of Contract”.
(a) Misrepresentation

Misrepresentation can lead to directors’ liability under statute or under the common law. Some of the statutory duties are referred to below.\(^{334}\) Leaving aside the statutory liabilities for misrepresentation, liability is governed by the common law doctrines of fraudulent and negligent misrepresentation. Unlike misrepresentation outside of the corporate context, however, directors’ liability for misrepresentation must take into account the fact that directors are human representatives of the companies they act for. As a result, a determination of directors’ liability for misrepresentation requires the court to determine whether the misrepresentation was made by the director or by the company (acting through its human representatives).\(^{335}\) Only in the former case will a director be personally liable in tort.

The recent Ontario Court of Appeal decision of *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.*, known more commonly as the *Peoples* case,\(^{336}\) considered the potential liability of directors for misrepresentation. In that case, the plaintiff purchased certain corporate debentures issued by Peoples Jewellers Limited (“Peoples”). The plaintiff later brought an action alleging misrepresentation against the underwriter, ScotiaMcLeod, and the firm of lawyers that represented both the plaintiff and Peoples. A third party claim was made against the individual directors of Peoples.

A motion by the individual directors to have the third party claim struck out as not disclosing a reasonable cause of action was successful. On appeal, the Court of Appeal dismissed the appeal except as against two of the directors who were also senior officers of Peoples and against whom certain more specific allegations of misrepresentation were made. The court held as follows:

The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of the employees or officers, they are also rare. ... Absent allegations which fit within the categories described above,

\(^{334}\) See text accompanying note 429ff, below.

\(^{335}\) Hamilton, *supra* note 271 at 276.
officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. 

...A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called 'directing mind'. Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act. To hold the directors of Peoples personally liable, there must be some activity that takes them out of the role of directing minds of the corporation. In this case, there are no such allegations.  

At first glance, these statements appear merely to be a forceful endorsement for upholding the principle of separate legal personality in the circumstances of a company’s representations. However, a closer review of the decision reveals a number of difficulties.

First, the Court of Appeal does not explain how the test adopted in this case is to be applied in the future and, as a result, Peoples does not go very far in clarifying the law. This refusal to elaborate on the types of behaviour necessary before personal liability will be imposed on a director begs the question that really needs to be answered. Thus the uncertainty remains from the earlier caselaw regarding directors’ personal liability for misrepresentation, although it is possible to exclude the line of cases which suggested

337 Ibid. at 719-721 [emphasis added].
that the misrepresentation always belongs to the person making it regardless of whether it was made on behalf of the corporation.\textsuperscript{338}

The result in \textit{Peoples} can be compared to the liability directors face under certain provisions of the Ontario \textit{Securities Act},\textsuperscript{339} for example, that impose liability on directors simply as a result of their status as a director of a company that issues a prospectus which contains a misrepresentation.\textsuperscript{340} It is beyond the scope of this thesis to discuss the rationale applied by securities regulators in support of this statutory liability for directors. For present purposes, it is sufficient to note that the exception is well circumscribed such that there is no fear that it will lead to a potentially unlimited number of claims against directors personally. Further, any well advised director will be aware of this potential liability and will be in a position to protect himself or herself through appropriate behaviour and by obtaining any necessary insurance. Finally, the statute provides certain general defences that are available to directors and others, as well as certain specific defences available specifically to directors.\textsuperscript{341}

The second criticism of the \textit{Peoples} decision is that it appears to contain certain inconsistencies. What the court seems to take away with one hand, it gives back with the other. This becomes apparent from an analysis of the decision to allow the third party claim against two of the directors to proceed to trial. The court held that two of the directors were in a “different position” than the other directors because of their positions as senior officers of Peoples. However, the only difference in the pleadings with respect to the two senior officers was that, unlike the other directors, it was alleged that the officers were directly and personally involved in the marketing of the debentures and that each had made certain representations that were relied upon by the plaintiffs. The court refused to dismiss the action against the officers at the pleadings stage\textsuperscript{342} and held that:

\textsuperscript{338} See, for example, \textit{Hall-Chem Inc. v. Vulcan Packaging Inc.} (1994), 12 B.L.R. (2d) 274 (Ont. Gen. Div.).
\textsuperscript{339} R.S.O. 1990, c. S.5 [hereinafter the OSA].
\textsuperscript{340} \textit{Ibid.} at s. 130. The directors can also be liable for offences under the OSA. See, for example, s. 122.
\textsuperscript{341} \textit{Ibid.}
\textsuperscript{342} \textit{Supra} note 336 at 725. In fact it was not, as the court suggests, a refusal to dismiss the action but a refusal to strike out a pleading.
[w]hile the authorities make clear that officers of a corporation who are the directing minds of the corporation have the same identity of interest as the directors and thus the same immunity to suit, I am not prepared to dismiss the action against [the senior officers] at this stage. The threshold of sustainability of pleadings is very low. ...[A]n action should not be dismissed at this stage simply because it is novel law.343

This analysis is inconsistent with the analysis in relation to the other directors. While it is true that there were certain specific allegations against the two officers (i.e., that the officers were involved in the marketing of the debentures and in making certain representations personally), the court does not suggest that the pleadings contained any allegations of conduct that was tortious or that exhibited a separate interest of the officers such that the officers would have exposed themselves to personal liability.

In considering the scope of application of the Peoples decision, it should be noted that the language in Peoples does not appear to be limited to the tort of misrepresentation. Reference is also made to the tort of inducing breach of contract,344 as well as claims against “principals of failed businesses through insolvency litigation”.345 Further, the decision is also consistent with the recent Ontario Court of Appeal decision in Normart Management Limited v. West Hill Redevelopment Company Limited,346 discussed below,347 in which conspiracy was alleged.

Peoples also raises an important point about the evolution of directors’ and officers’ liability. One of the reasons that the court refused to dismiss the appeal against the two director-officers was that it felt that a dismissal of a claim, even one novel in law, was not appropriate at the pleadings stage. In doing so, the Court of Appeal left the door open for future developments in the area of directors’ liability for misrepresentation. The possibility of future developments has also been expressly suggested in certain other

343 Ibid. at 725 [emphasis added].
344 See Peoples, supra note 336 at 720, referring to Ontario Store Fixtures Inc. v. Mmmuffins Inc., infra note 358.
345 See Peoples, ibid.
types of misrepresentation cases. For example, it remains possible that the law may develop to the extent that directors (or officers) could be liable for misrepresentation when they fail to disclose the insolvency (or pending insolvency) of a corporation they represent. In other words, the silence of the directors in such circumstances may potentially constitute a misrepresentation by the directors rendering them personally liable. Hamilton has suggested that "there are indications that Canadian courts may follow the trend of American, British and Australian caselaw which has, in certain circumstances, imposed duties upon directors of financially troubled corporations to warn creditors of the corporation's problems." 348 In coming to this conclusion, Hamilton cited Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of), 349 where the Ontario Divisional Court dismissed an appeal of Lang J.' s refusal to strike out a claim against the directors and officers of certain corporate defendants. The claim alleged, *inter alia*, deceit and misrepresentation by the directors and officers for failure to disclose that the representations in a certain comfort letter provided to the plaintiff were no longer true. In dismissing the appeal and refusing to strike out the claims against the directors and officers personally, Rosenberg J., speaking for the Divisional Court, held that there was a possibility that Canadian courts will find an independent duty on behalf of directors, officers, and employees to inform creditors about certain financial information in certain circumstances. 350 It should be noted that following the publication of Hamilton's article, the claims in *Leigh Instruments* against the directors and officers personally were dismissed, albeit on consent, prior to the commencement of trial. 351

347 See below, text accompanying note 371ff.
348 *Ibid.* at 278.
However, in the recent case of *Peoples Department Stores inc. (Trustee of) v. Wise,* Greenberg J. held that directors owe a general duty of care to creditors. This case and the issue of directors’ duties to creditors is returned to below.

(b) Inducing Breach of Contract

One of the more uncertain areas of liability relates to the tort of inducing breach of contract. Such cases typically involve situations where the plaintiff has been harmed by a breach of contract by a corporation as a result of wrongful interference by a director (or officer, shareholder, or employee) of the corporation that induced the breach.

Once again, this is not a situation where it is necessary to violate the principle of separate legal personality in order to impose liability. Rather the liability is directly imposed on the director (or officer, shareholder or employee). The tort explicitly recognizes the separate legal personality of the corporation since it requires the defendant to have induced the corporation to breach its contract with the plaintiff.

The cases demonstrate that several different, albeit similar, tests have been developed by the courts. For example, in *Imperial Oil Ltd. v. C&G Holdings Ltd.,* the court held that a director who acts *bona fide* within the scope of his or her authority in the best interests of the company will be immune from liability for inducing breach of contract. Further, a director will not become liable by the mere fact that he or she was not acting *bona fide.* Rather, a director who is not *bona fide* is liable only in circumstances which show that his or her dominating purpose was to deprive the plaintiff of the benefits of the contract.

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353 See PART II: Chapter 5: Section B, Subsection (5)(e) “Liability for Insolvent Trading”, below. See text accompanying notes 420ff, below, for a discussion of the *Wise* case.

354 Hamilton, supra note 271 at 279.


In McFadden,\(^{357}\) the court held that a director can be liable where he or she does not act under a duty to the corporation. This would include, for example, situations where he or she does not act bona fide within the scope of his or her authority.

In Ontario Store Fixtures Inc. v. Mmmuffins Inc.,\(^{358}\) the court held that there must be an intentional act which is wrongful or unlawful and that a specific tortious act which is independent of the breach of contract must be pleaded. The court stated that "...to give rise to a separate claim for intentional inducement of breach of contract as well as a claim for breach of contract arising out of the same circumstances, there must be separate identities of interest, otherwise there is mere duplication under another label."\(^{359}\) This analysis has recently been approved of and adopted by the Ontario Court of Appeal, albeit in relation to the torts of misrepresentation (see Peoples, above)\(^{360}\) and conspiracy (see Normart Management, below)\(^{361}\).

It is interesting to consider the justifications suggested by the courts for declining to impose liability on human representatives who cause a breach of contract while acting bona fide within the scope of their authority. The traditional view was that the employee was the "alter ego" of the company. However, as pointed out in McFadden, while the fact that an employee or agent is an "alter ego" of the corporation may afford a defence to the corporation (since it cannot both breach a contract and induce itself to breach a contract), it is no justification for relieving the employee of liability.\(^{362}\) Instead, it has been suggested that the proper justification for relieving the liability of the human representative rests on the fact that it was in the best interests of the corporation to so act.\(^{363}\)

These tests for liability for inducing breach of contract may no longer be applicable in Ontario. The recent Ontario Court of Appeal decision of ADGA Systems International

\(^{357}\) Supra note 326 at 146.

\(^{358}\) Supra note 326 at 146.

\(^{359}\) Ibid. at 44.

\(^{360}\) Supra note 336.

\(^{361}\) Supra note 346, discussed below in the text following note 371.

\(^{362}\) Supra note 357 at 145.

\(^{363}\) Ibid. at 145-146; C & G Holdings, supra note 355 at 264.
Ltd. v. Valcom Ltd.\textsuperscript{364} appears to impose a broader test for liability. Discussion of that case is deferred, however, to subsection (5)(d), below, in this chapter.\textsuperscript{365}

(c) Torts Other Than Misrepresentation and Inducing Breach of Contract

In this category, a further distinction should be made between (i) negligence and (ii) torts other than negligence. For negligence claims, the starting point of the analysis is \textit{London Drugs},\textsuperscript{366} in which the Supreme Court of Canada confirmed that employees can be personally liable for their negligent conduct even when such conduct is carried out in the course of their employment.\textsuperscript{367}

Although the law is not completely clear, \textit{London Drugs} has been interpreted to apply to torts other than negligence.\textsuperscript{368} For example, the Ontario court of Appeal has held, albeit in \textit{obiter}, that \textit{London Drugs} would apply in the context of a misrepresentation claim.\textsuperscript{369} However, it must be noted that \textit{London Drugs} concerned the liability of employees. Therefore, it is necessary to consider whether the principles of \textit{London Drugs} can and should be applied in the context of directors’ and officers’ liability.

Hamilton has suggested that directors and officers are more likely to be relieved of liability unless there is some evidence that the director acted maliciously or had a personal interest in the matter in issue which was independent of the company’s interest.\textsuperscript{370} This is consistent with the result in \textit{Peoples}, a misrepresentation case, as well

\textsuperscript{364} (1999), 168 D.L.R. (4\textsuperscript{th}) 351 (Ont. C.A.) [hereinafter \textit{ADGA Systems}].
\textsuperscript{365} See, below, Chapter 5: Section B, subsection (5)(d) “Inducing Breach of Contract Revisited”.
\textsuperscript{366} \textit{Supra} note 326.
\textsuperscript{367} Once liability of the employees was confirmed, the court went on to consider whether the employees could benefit from a limitation of liability clause in a contract between their employer and the plaintiff. The court held that the employees were third party beneficiaries of the clause.
\textsuperscript{368} See Hamilton, \textit{supra} note 271 at 274-275. See also \textit{ADGA Systems}, \textit{supra} note 364 at 360, para. 26.
\textsuperscript{369} The suggestion was that \textit{London Drugs} could form the basis of personal liability of an employee for his or her negligent misrepresentations. See, \textit{Peoples}, \textit{supra} note 336 at 719-720.
\textsuperscript{370} Hamilton, \textit{supra} note 271 at 275.
as the recent case of *Normart Management*\(^{371}\) a case in which the tort of conspiracy was in issue before the Ontario Court of Appeal.

The action in *Normart Management*, arose out of a joint venture agreement between the plaintiff corporation and the two corporate defendants. The plaintiff alleged that the corporate defendants had breached the joint venture agreement and had breached their fiduciary duties. The plaintiff also claimed damages for the tort of conspiracy and alleged that the directors of the corporate defendants were party to the conspiracy. The main allegations against the individual directors of the corporate respondents were as follows:

18. In breach of the Joint Venture Agreement and in furtherance of a conspiracy between the respondents, Lebovic and Kohn [the directors of the corporate respondents] conspired with and among each other directly and through the corporate defendants they then and continue to control to injure Normart [the plaintiff]. The plan agreed to, and embarked upon was, prior to the expiry of the redemption period pursuant to the Notice of Sale as extended, the principals of the [corporate defendants], Lebovic and Kohn a means \(\text{sic}\) to unlawfully obliterate Normart’s interest in the [joint venture] property and to secure the interest for themselves. In furtherance of the aforesaid conspiracy... the defendants engaged in substantial secret discussions with representatives of [the secured lender] with respect to acquiring the [joint venture] property from [the secured lender] which had, or was shortly to, acquire the [joint venture property] pursuant to the power of sale...\(^{372}\)

The directors moved to have the conspiracy claim against them struck out and were successful before the motions judge. The Ontario Court of Appeal dismissed the appeal. Once again the appeal court used very strong language to uphold the principle of separate personality of the corporation, thereby insulating the directors from liability. The court

\(^{371}\) Supra note 346.

\(^{372}\) Ibid. at 101, excerpting from the Statement of Claim, para. 18.
quoted from and repeated much of what it said in *Peoples.* As in *Peoples,* the court held that the “directing minds” of a corporation cannot be held civilly liable for conduct of the corporations they control and direct unless there is some conduct by them which is itself tortious or exhibits a separate identity or interest from that of the corporation.

The court held that the directors’ conduct is considered to be solely that of the corporation unless it could be shown that it had been transformed into their own personal conduct and stated that:

The directing mind could make an agreement with another corporation by making an agreement with the directing mind of that other corporation, but if both directing minds are acting on behalf of their respective corporations, the agreement is between the two corporations. *To conclude otherwise would be to challenge the recognized separate legal identity afforded corporations under our law and to conclude that every corporate action which may give rise to a breach, by virtue of the decision-making authority of the corporate management, is an action of the directing mind personally. As I will develop, an agreement between two corporations to injure can amount to the tort of conspiracy, but it does not necessarily follow that those who as directing minds caused their respective corporations to enter into the agreement are themselves party to the conspiracy.*

The court was of the view that the factual basis for and the damages resulting from the breach of the joint venture agreement and the alleged conspiracy were identical and that the allegations were insufficient to satisfy the common law tort of conspiracy. It held that:

*Assuming cold calculations, can the decision of the directing minds of the two corporate entities to cause their corporations to ignore their corporate obligations under the joint venture agreement and pursue an independent course amount to a conspiracy by the directing minds to injure the third*

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373 *Supra* note 336. See above, text accompanying notes 337ff.

374 *Supra* note 346 at 102.

375 *Ibid.* at 103 [emphasis added].
contracting party or its directing mind? I think not. To give effect to this argument simpliciter would eliminate any semblance of the corporate veil.\[377\]

The court stated that for the tort of conspiracy to be proven, the plaintiff must show that either: (1) the predominant purpose of the defendant’s conduct was to cause injury to the plaintiff (irrespective of whether or not the defendant’s conduct was unlawful); or (2) where, assuming the conduct of the defendant was unlawful, that conduct was directed towards the plaintiff in circumstances where the defendant should have known that injury was likely to result.\[378\] The court concluded that it was difficult to fit the allegations in this case into either of these categories. Further, the court held that the acts of the directors were not “unlawful per se” and that the directors were “not parties to the contract in issue and [had] no personal obligation to the appellant... either contractual or fiduciary.”\[379\]

It is interesting to contrast the approach taken in Normart Management to the one taken in Mentmore Manufacturing.\[380\] In that case, the court considered whether a corporate representative could be liable for having directed the commission of a tort. In particular, the plaintiff sued the principal shareholder and president of the corporate defendant personally for allegedly having directed the corporate defendant to infringe the plaintiff’s patent. In considering the test to apply to the claim against the individual defendant, Le Dain J. recognized that the manufacturing and selling activities that could ultimately be held to be patent infringement were part of the general business activities of the defendant corporation. Le Dain J. concluded that the directors and officers of such a company can be presumed to have authorized or directed the behaviour, i.e., the ordinary business activities of the company, at least in a general way. However, Le Dain J. also recognized that:

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\[376\] Ibid. at 102.
\[377\] Ibid. at 105-106 [emphasis added].
\[379\] Normart Management, ibid. at 105.
\[380\] Supra note 332.
Questions of validity and infringement [of patents] are often fraught with considerable uncertainty requiring long and expensive trials to resolve. It would render the offices of director or principal officer unduly hazardous if the degree of direction normally required in the management of a corporation’s manufacturing and selling activity could by itself make the director or officer personally liable for the infringement by his company. 381

Le Dain J. concluded that in order for the director or officer to be personally liable:

[T]here must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful, and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it. 382

Unfortunately, there is no reference to Mentmore Manufacturing in the Normart Management case. 383 However, it is submitted that this type of analysis, when applied to the facts of Normart Management, would justify imposing personal liability on the defendant directors. Unlike Mentmore Manufacturing, the impugned conduct in Normart Management cannot be construed as having been part of the general business activities of the defendant corporations. At a minimum there was an indifference by the directors that their conduct in directing their corporations to acquire the joint venture property would cause those companies to harm the plaintiff. Further, the allegations were even sufficient to suggest that the conduct was a wilful and knowing pursuit of a course of conduct that was likely to cause harm. Adding support to this conclusion is the fact that, unlike issues of patent infringement which by their very nature are “often fraught with uncertainty requiring long and expensive trials to resolve”, there were no such uncertainties in respect

381 Ibid. at 203.
382 Ibid. at 204-205.
of the impugned conduct in *Normart Management*. This point is also expanded upon below.

While the issue in *Mentmore Manufacturing* was the liability of an officer/shareholder for directing the commission of a tort, certain general principles can be abstracted from that case which, it is suggested, should be applied more generally to the determination of directors' liability for involvement in corporate conduct. The suggested principles include: (1) the need to consider the general business activities that the directors of the corporation in question are normally called upon to approve, either expressly or in a general sense; and (2) the need to take into consideration the nature of the wrong that is alleged and the context in which it occurred. These suggested principles focus on examining the corporate activity in order to try to assess whether the alleged wrongdoing falls within the company's "legitimate" business activity.

"Legitimate" business activity in the sense described here is not meant to be limited to conduct that is not ultimately proved to be wrongful (in a broad sense) by a plaintiff. On the contrary, certain wrongful conduct can be legitimately undertaken by the corporation. However, when assessing the behaviour of directors, it is necessary to take into consideration whether the directors have something akin to a reasonable, good faith belief that the conduct they approve or direct was legitimate (in the sense described above). In other words, some form of a "due diligence" type of standard should be applied in assessing directors' conduct. Further, while it may be acceptable to begin with the presumption that certain types of commercial agreements can be breached for legitimate business reasons, the same presumption may not be valid in the context of other types of alleged wrongs. For example, as explained above, a decision to manufacture and sell a product which may ultimately be shown to infringe a patent can nevertheless be legitimate.\(^{384}\) Similarly, a corporation may legitimately decide to breach a contract with a supplier because it is losing money under the contract or even because it can earn more money by contracting with another supplier. Various different

\(^{383}\) In *Peoples, supra* note 336, the Ontario Court of Appeal referred to *Mentmore Manufacturing* but did not comment on whether it agreed with Le Dain J.'s approach.

\(^{384}\) Obviously, it will not always be legitimate. For example, see the text accompanying note 382, above, quoting from the *Mentmore Manufacturing* case, where Le Dain J. suggests circumstances where such conduct would not be legitimate.
justifications have been suggested for limiting the damages recoverable following such a breach and even allowing a breaching party to profit from the breach. The point is that although these are actionable wrongs for which a company can be civilly liable, they are accepted by the law as legitimate business choices. There is a presumption that companies should be able to make these decisions even if they harm others, subject, of course, to compensating the aggrieved party for its damages.

The same cannot be said of certain other wrongs, such as fraudulent conduct, breach of trust, or breach of fiduciary duty. This is evident from a comparison of the way the law treats a breach of fiduciary duty as opposed to a breach of contract, including the more “powerful” remedies available for the former kind of wrongs. It is submitted that these differences demonstrate that, unlike a typical breach of contract, certain kinds of wrongs are not legitimate business choices. For these types of wrongs, there is no presumption of legitimacy, nor should there be.

Applying this analysis to Normart Management, it is suggested that the defendant directors could not reasonably have believed that the corporations they directed could legitimately have acquired the joint venture property. The companies involved were joint venture partners that owed each other fiduciary duties and obligations which, inter alia, prohibited them from taking away business opportunities from each other. Further, because of the obvious fiduciary duties owed between the joint venture companies, the directors could not reasonably have believed that the impugned conduct could have been legitimately undertaken by their companies. It is difficult to imagine how, in carrying out such conduct, the directors could have been acting “honestly and in good faith with a

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386 Compare, for example, a typical breach of contract where the remedy is based on proven damages, to a breach of fiduciary duty by an agent who must account for his entire profits, or a breach of fiduciary duty by a partner who must also account for the profits, although she is entitled to keep her “share” of them. Also consider the relative impact of a damages claim for breach of contract compared to a constructive trust remedy for breach of fiduciary duty.
view to the best interests of [their] corporation[s]". As a result, it is submitted that there is no reason to relieve the directors of personal liability for their involvement in the alleged conspiratorial conduct.

Further, this is certainly not a situation where it could be suggested that the directors had a duty to cause the corporation to breach its contract. Applying the C&G Holdings-type reasoning, for example, there is no question of bona fides by the defendant directors in Normart Management and, even accepting that not all bad faith conduct attracts personal liability, such liability would be justified if it were shown that the dominating concern of the directors was to deprive a joint venture partner of the joint venture property and thereby cause it injury. The allegations support just such a conclusion.

To summarize, it is difficult to accept that the defendant directors should be relieved of liability for their involvement simply on the basis that the conduct was that of the corporations for which they acted. It is difficult to conceive of reasonable directors believing that the conduct in question could have been legitimately undertaken by the corporate defendants.

Two final comments about Normart Management are necessary. First, even assuming the conclusion that the directors did not have a separate identity of interest from the corporation to be correct, striking out the claim at the pleadings stage is inconsistent with the decision in Peoples, at least in part. It will be recalled that in Peoples, the Court of Appeal held that the claims against the two director-officers should not be struck out at the pleadings stage simply because the claim was novel in law. In other words, despite the apparent identity of interest between the directors and the corporation, the court refused to strike out the claim at such an early stage in the Peoples case and, to be consistent, the same conclusion should have been reached in the Normart Management case.

Secondly, it should be noted that some of the language used in Normart Management is somewhat imprecise. For example, the court's comment that imposing liability on the directors would "eliminate any semblance of the corporate veil" is a misapplication of

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388 See CBCA s. 122(1).
389 See text accompanying note 363, above.
that principle. As discussed above, the corporate veil (i.e., the general rule that shareholders have limited liability) has no application to directors. Directors' liability for tortious conduct simply does not involve lifting the corporate veil. Liability is not imposed on directors as a result of their status as directors, except for certain statutory liabilities which are discussed below. Rather, liability is imposed on directors because of their personal conduct.\textsuperscript{390} Further, the protection afforded to directors does not arise because of the application of the corporate veil but rather as a result of the principle of separate legal personality. As Hamilton has pointed out, "[i]n appropriate cases, the ...director ...is relieved of liability on the ground that the act was an act of the corporation and not of the defendant."\textsuperscript{391}

(d) Inducing Breach of Contract Revisited

The narrow conception of directors', officers' and employees' liability expressed in \textit{Normart Management} and \textit{People's} was not echoed in \textit{ADGA Systems},\textsuperscript{392} another recent decision of the Ontario Court of Appeal. In that case, the Ontario Court of Appeal adopted a much broader view of liability for such persons. In doing so, the Court interpreted the exceptions to personal liability narrowly, thereby making it more difficult for directors, officers and employees to claim immunity for their tortious actions by hiding behind the corporations they act for.

In \textit{ADGA Systems}, ADGA (the plaintiff) and Valcom (the corporate defendant), were competing for the same contract. ADGA alleged that Valcom, through its director and two senior employees, had approached certain of ADGA's senior employees prior to the submission of tenders. In particular, Valcom was alleged to have obtained the agreement of ADGA's senior employees to work for Valcom should its tender be successful. By doing so, Valcom was able to put those employees on a list that it needed to submit as part of the tender process. As a result, both the plaintiff and Valcom submitted virtually identical lists of employees. After Valcom was awarded the contract, ADGA brought an

\textsuperscript{390} See Hamilton, \textit{supra} note 271 at 273. See, also, \textit{ADGA Systems}, \textit{supra} note 364 at 356, para. 10.

\textsuperscript{391} \textit{Ibid.} at 273 [emphasis added].

\textsuperscript{392} \textit{Supra} note 364.
action against its own employees, Valcom and the three Valcom representatives who had recruited the ADGA employees. The action against the Valcom representatives alleged that they had induced the ADGA employees to breach their fiduciary duties.

The Valcom representatives brought a motion to have the action against them dismissed. The motion was dismissed at first instance, but granted on appeal to the Divisional Court. An appeal to the Court of Appeal was allowed and the action against the Valcom representatives was allowed to proceed to trial.

After a thorough review of the prior case law, Carthy J.A. concluded that, as a general rule, directors, officers and employees could be held liable for the same tort as their employer, provided their own conduct was tortious. He also concluded that such persons would not be immune from liability simply because they were acting in a *bona fide* manner that was in the best interests of the company.

Carthy J.A. also considered circumstances where directors, officers and employees would have immunity for their actions. He recognized a narrow defence, known as the defence in *Said v. Butt*, that protects employees who act in a *bona fide* manner from actions in tort for inducing breach of contract between their employer and a third party. Carthy J.A. explained this limitation on liability under the exception in *Said v. Butt* as follows:

> [T]his provides an exception to the general rule that persons are responsible for their own conduct. That exception has since gained acceptance because it assures that persons who deal with a limited company and accept the imposition of limited liability will not have available to them both a claim for breach of contract against a company and a claim for tortious conduct against the director with damages assessed on a different basis. The exception also assures that officers and directors, in the process of carrying on business, are capable of directing that a contract of employment be terminated or that a business contract not be performed on the assumed basis that the company’s best interest is to pay the damages for the failure to perform.

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394 *Ibid.* at 355, para. 9 and at 365, para. 43.
the exception for these policy reasons, the court has left intact the general liability of any individual for personal conduct.\(^{397}\)

Applying these principles to the case before him, Carthy J.A. concluded that the exception in Said v. Butt did not apply and that no new exception should be created in the circumstances of this case. In coming to this conclusion, Carthy J.A. considered the Normart Management and Peoples cases and distinguished them by interpreting the principles enunciated in those cases narrowly.\(^{398}\) He held that:

...there is no principled basis for protecting the director and employees of Valcom from liability for their alleged conduct on the basis that such conduct was in pursuance of the interests of the corporation. It may be that for policy reasons the law as to allocation of responsibility for tortious conduct should be adjusted to provide some protection to employees, officers, directors, or all of them, in limited circumstances where, for instance, they are acting in the best interests of the corporation with parties who have voluntarily chosen to accept the ambit of risk of a limited liability company. However, the creation of such a policy should not evolve from the facts of this case where the alleged conduct was intentional and the only relationship between the corporate parties was as competitors.\(^{399}\)

This broader view of liability for directors, officers and employees is preferable to the approach taken in Normart Management and Peoples.\(^{400}\) The approach to liability is more coherent with basic principles of tort law than are the principles suggested in the Normart Management and Peoples cases. The approach in ADGA Systems also answers

\(^{396}\) Supra note 364 at 357.
\(^{397}\) Ibid. at 357, para. 15 [emphasis added].
\(^{398}\) Ibid. at 355, para. 9 and 363, para. 36. Carthy J.A. did not find it necessary to explicitly disagree with the decisions in Normart or Peoples. For example, he suggested at 364, para. 41 that the decision in Normart was correct because the exception in Said v. Butt had ostensibly applied to the facts of that case.
\(^{399}\) Ibid. at 365, para. 43.
some of the criticisms of *Normart Management* and *Peoples* that were outlined above. However, *ADGA Systems* does not go far enough. For example, even if the exception in *Said v. Butt* applied to the facts of *Normart Management*, the directors of the corporate defendants should not have been immune from liability. That is, for the reasons discussed above, the existence of a contractual relationship should not be sufficient to provide a company’s human representatives with immunity when their conduct could not have been reasonably considered as legitimate business activity.

Therefore, future cases should follow the general approach taken in *ADGA Systems* rather than the one in *Normart Management* and *Peoples*, although the *ADGA Systems* conclusions should be adapted to recognize that the exception in *Said v. Butt* must be limited so that it cannot be used abusively.

(e) Liability for Insolvent Trading

Traditionally, directors did not owe any duties to a company’s creditors. However, the law with respect to directors’ duties towards creditors is in a state of transition. The courts in Britain, Australia, New Zealand and the United States have held that directors have certain common law duties toward creditors, at least where a company is insolvent or nearly insolvent. In addition to these common law developments, England and Australia have enacted insolvent trading legislation which imposes liability on directors for “wrongful” and “reckless” trading, respectively.

While it is beyond the scope of this thesis to review all of the developments in this area over the past twenty years, the following brief overview provides a flavour of

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400 See also *Alper Development Inc. v. Harrowston Corp.* (1998), 38 O.R. (3d) 785 (C.A.), which interpreted *Peoples* narrowly and which provides a broader view of liability.

401 See the text accompanying notes 387 and 388, above.


403 In England, the *Insolvency Act* 1986 (U.K.), 1986, c. 45, s. 214 applies. In Australia, the *Corporations Law*, ss. 592, 593, applies.

404 A more complete review of these developments can be found, for example, in: Creditors as Corporate Stakeholders, *supra* note 142; C. Hansell & J. Gillies, “Nearing the Brink: Financial Crisis and Issues for the Unrelated Director” in *Corporate Restructurings and Insolvencies, Issues and Perspectives* (Scarborough, Ont.: Carswell, 1996) at 211ff; L.C. Sealy, “Directors’ ‘Wider’ Responsibilities – Problems Conceptual,
some of the issues and a backdrop for the discussion below of the impact the oppression remedy may have on this area of the law.

In the Australian case of *Kinsela v. Russell Kinsela Pty Ltd.*,\(^{405}\) an insolvent company had leased its premises to two of its directors, thereby moving certain assets out of the reach of the company’s creditors. The lease transaction was unanimously approved by the shareholders. The court concluded that the directors had breached their duty to the company by entering into the lease at a time when the company was insolvent and that the creditors had been prejudiced as a direct result of the lease. The court held that where directors are involved in a breach of their duty to the company that affects the interest of the *shareholders*, such a breach can be authorized or ratified. However, where the affected interests are those of the company’s *creditors*, the shareholders cannot authorize such a breach.\(^{406}\) This is because “…the directors’ duty to a company as a whole extends in an insolvency context to not prejudicing the interests of creditors… and the shareholders do not have the power or authority to absolve the directors from that breach.”\(^{407}\) The reasoning for imposing liability on directors for creditors’ claims is summarized in the following statement:

In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where the company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company’s assets. It is in a practical sense their assets and not the shareholders’ assets that, through the medium of the company, are under the management of the directors pending either

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\(^{405}\) (1986), 4 N.S.W.L.R. 722 (C.A.) [hereinafter *Kinsela*].


liquidation, return to solvency, or the imposition of some alternative administration.\textsuperscript{408}

_{Kinsela} followed in the footsteps of the New Zealand case of _Nicholson v. Permakraft (NZ) Ltd._\textsuperscript{409} In _Permakraft_, a company facing certain liquidity problems adopted a restructuring scheme whereby the company’s most important assets were moved out of the reach of the company’s creditors through a series of intercorporate transactions, including the payment of a substantial capital dividend to the members. The funds were immediately reinvested in a newly formed holding company. Later, the company became insolvent and the liquidator, acting on behalf of the company, sought to have the transactions set aside. The financial state of the company at the time of the impugned transactions was open to some debate. On the facts, the New Zealand Court of Appeal held that the company was solvent at all material times\textsuperscript{410} and that no transactions had been authorized by the directors which could be considered unfair to the creditors.\textsuperscript{411} Nevertheless, Cooke J. made the following important statements, albeit in _obiter_:

The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider _inter alia_ the interests of creditors. For instance, creditors are entitled to consideration, in my opinion, if the company is insolvent, or nearly insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardize its solvency...\textsuperscript{412}

The _Kinsela_ and _Permakraft_ line of cases\textsuperscript{413} has been interpreted to mean that the “insolvency or impending insolvency of the corporation gives rise to a duty on the part of the directors and officers to consider the interests of the corporation's creditors.”\textsuperscript{414}

\textsuperscript{408} _Ibid._ at 730.
\textsuperscript{409} [1985] N.Z.L.R. 242 (C.A.) at 250 [hereinafter _Permakraft_].
\textsuperscript{410} _Ibid._ at 254, 256.
\textsuperscript{411} _Ibid._ at 253.
\textsuperscript{412} _Ibid._ at 250.
\textsuperscript{413} See, for example, Sealy, _supra_ note 404 at 171ff; _Directors' and Officers' Duties_, _supra_ note 147 at 237, n. 8; and Hansell & Gillies, _supra_ note 404 at 223ff for a review of
Hansell & Gillies have suggested a different interpretation of directors' liability in this context, arguing that liability can be seen as a breach of the directors' obligations to the company. In other words, "[w]hat is loosely being called a 'duty to creditors' or even a 'fiduciary duty to creditors' may ultimately be seen not as a separate duty to creditors but an obligation to consider the interests of creditors as part of their duty to the company." These authors suggest that the Kinsela case can be interpreted to say "that there is a point at which... the best interests of the company become synonymous with the best interests of the creditors taken as a whole, rather than the shareholders taken as a whole."

Despite the developments in Australia, New Zealand and the United Kingdom, it is not clear at this time whether directors in the Canadian common law jurisdictions owe any duties to creditors. As recently as 1994, Hamilton suggested that, in common law Canada, directors did not have any general duty to creditors, nor did they have any duty to disclose information about a company's solvency, despite certain indications that the courts may be heading in that direction. However, directors' duties to creditors have now been recognized in at least two Canadian cases that may be part of a developing jurisprudence on the issue.

In *Re Trizec Corp.*, the court suggested that directors may owe a duty to creditors where the company's ability to pay its debts is uncertain. It should be noted that the *Re Trizec Corp.* decision was made in the context of an application for approval of a plan of arrangement under the CBCA, something which the court only has jurisdiction to do where the corporation is "not insolvent." However, the recent decision in the *Wise* case has recognized a much broader duty owed by directors to creditors. The facts of *Wise* were as follows. Wise Stores Inc.

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other cases from Australia and New Zealand which deal with the issue of directors' duties to creditors.

414 *Directors' and Officers' Duties*, ibid. at 236.
415 Hansell & Gillies, *supra* note 404 at 230 [emphasis added].
417 Hamilton, *supra* note 271 at 278.
419 See CBCA s. 192(3).
420 *Supra* note 352.
acquired all of the shares of Peoples Stores Ltd. Following the acquisition, the directors of the two companies adopted a domestic inventory procurement policy that was common for both companies. The inventory policy provided that all purchases for the corporate group were to be made through Peoples Stores. Inventory was then to be transferred to Wise Stores subject to the creation of an inter-company account receivable. Two years later, both companies were declared bankrupt and the trustee in bankruptcy for Peoples Stores instituted proceedings against the three individual respondents (the “Wise Brothers”) who were, at all material times, directors of Wise Stores and the sole directors of Peoples Stores. The relief claimed by the trustee in bankruptcy was the recovery of the debt owing as a result of the inter-company accounts receivables. The Wise Brothers' impleaded their insurer in warranty.

Greenberg J. held that the directors owed a duty of care to the creditors of Peoples Stores which arose under s. 122(1) of the CBCA. That section provides as follows:

122. (1) Every director of a corporation in exercising his powers and discharging his duties shall
(a) act honestly and in good faith with a view to the best interests of the corporation; and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

(3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves him from liability for a breach thereof.

On the facts before him, Greenberg J. concluded that the directors had breached their duty of care, noting that the Wise Brothers had: (i) not directed their minds to the
creditworthiness of Wise Stores, or what the financial consequences would be for Peoples; (ii) should have, as reasonably prudent and diligent people, realized that the process would strip assets (inventory) away from Peoples in return for an account receivable which likely would be uncollectible; (iii) preferred the interests of Wise Stores over those of Peoples with a reckless disregard for the negative financial implications to Peoples; and (iv) failed to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, thereby violating the obligations incumbent upon them in virtue of C.B.C.A. Section 122(1)\(^{421}\).

The court condemned the directors and their insurer jointly and severally to pay to the trustee in bankruptcy for Peoples Stores the value of the merchandise that Peoples Stores transferred to Wise Stores under the domestic inventory procurement policy.

In coming to this conclusion, Greenberg J. reviewed and adopted the reasoning in cases such as *Permakraft* and *Kinsela*. However, the decision in the *Wise* case appears to go further than those cases. It imposes a general duty of care on directors that is not necessarily restricted to actions that occurred when the company was insolvent or nearly insolvent. That is, the language used by Greenberg J. appears broad enough to create liability where the directors have failed to consider the negative impact their decisions could have on the company’s financial well-being and that could render it insolvent.\(^{422}\)

It is submitted that there is a flaw in Greenberg J.’s application of *Permakraft*, *Kinsela* to the facts in the *Wise* case. According to *Permakraft*, etc., the duty to creditors arises where an insolvent or near insolvent company continues to buy goods or services on credit at a time when the directors know that there is no reasonable prospect of the creditors ever being paid. In other words, liability is imposed on directors for “insolvent trading”. In such a situation, the directors are “delaying” the company’s bankruptcy by having the company continue to do business while it is insolvent, thereby prejudicing the company’s creditors who are, at that point, the “only ones” with a meaningful stake in the assets.

In *Wise*, however, the facts were quite different. The company (Peoples Stores) was not buying assets at a time when it was insolvent. Rather, the company was selling its

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\(^{421}\) *Ibid.* at paras. 63, 64, 69 and 80.

\(^{422}\) *Ibid.* at paras. 200-204.
assets (to a related company) in a manner that eventually rendered it insolvent. This was something much different from "insolvent trading". It was not conduct which "delayed" the bankruptcy, rather it was something which, as it turned out, contributed to the company's insolvency and eventual bankruptcy. Imposing a duty of care in this situation has much more serious implications for directors' liability with respect to the potential failures of the companies they act for.

It is submitted that Greenberg J.'s interpretation of directors' duties to creditors is too broad and that any duty of care owed by directors to creditors should be limited to circumstances involving "insolvent trading". Creditors should not be able to make claims against directors in respect of transactions such as those in the *Wise* case, at least not where such claims are based on a breach of a duty of care owed to the creditors. Rather, such transactions should only be open to attack under more specific provisions such as the reviewable transactions section of the BIA or the provincial fraudulent conveyances and preferences legislation. In fact, the trustee in bankruptcy for Peoples Stores successfully argued in the *Wise* case that the transactions were reviewable under s. 100 of the BIA. The court held that, under that section, the directors were liable to the bankrupt estate for the inadequate consideration paid to Peoples Stores because the directors had been "privy" to the transactions. Obviously, the finding of liability against the directors under BIA s. 100 was important because, in the *Wise* case, the other party to the transactions (i.e., Wise Stores) was bankrupt and a judgment under BIA s. 100 solely against Wise Stores would have been useless to the creditors of Peoples Stores.

In view of the *Re Trizec Corp.* and *Wise* cases, and the resulting uncertainty in the law at this time, prudent directors of financially troubled Canadian companies should be considering the impact their decisions may have on the interests of the company's creditors.

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423 BIA, *supra* note 145, s. 100.
424 *Supra* note 352 at para. 235.
425 Hansell & Gillies, *supra* note 404 at 231.
(6) Directors' Statutory Duties

In addition to liability under the common law, directors can also be liable under statute. Hamilton has suggested that the imposition of liability on directors (and officers) is "related to the emergence of public corporations, as it would not be appropriate to impose liability on holders of a small number of shares who had no influence or input in the running of the corporation."\(^{426}\)

It is beyond the scope of this thesis to consider the broad topic of directors' statutory duties and liabilities.\(^{427}\) As Hamilton has pointed out, it has been suggested that there are more than two hundred statutes which impose liability on persons other than the corporation for corporate actions.\(^ {428}\) Nevertheless, it is possible to gain a sense of the types of liabilities directors face from the following sampling of statutory duties:\(^ {429}\)

(i) liability for failure to exercise reasonable care, diligence and skill in the discharge of their obligations or for breach of fiduciary duty. These duties are said to be owed to the corporation such that, generally, only the corporation can sue for their breach;\(^ {430}\)

(ii) liability for failure to make, withhold or remit certain income tax deductions at source,\(^ {431}\) unemployment insurance contributions,\(^ {432}\) goods and service taxes,\(^ {433}\) pension plan contributions\(^ {434}\) or contributions to provincial health care plans;

(iii) liability for certain unpaid wages;\(^ {435}\)

\(^{426}\) Supra note 271 at 264. He also pointed out that in the context of closely held corporations, imposing liability on the directors and officers is often the same as imposing it on the shareholders since the same persons often are directors, officers and shareholders of the corporation.

\(^{427}\) For a complete review of this subject see, for example, Directors' and Officers' Duties, supra note 147.

\(^{428}\) Hamilton, supra note 271 at 265, n. 18, citing D. Saxe, Environmental Offences: Corporate Responsibility and Executive Liability (Aurora, Ont: Canada Law Book, 1990) at 71.

\(^{429}\) This list comes, for the most part, from Hamilton, ibid. at 265-266.

\(^{430}\) See CBCA s. 122. For a discussion of the interpretation of this section, see Directors' and Officers' Duties, supra note 147 at 14, §2:1220.


\(^{432}\) Unemployment Insurance Act, R.S.C. 1985, c. U-1, as amended, s. 54.


\(^{434}\) Canada Pension Plan, R.S.C. 1985, c. C-8, as amended s. 21.1.

\(^{435}\) CBCA s. 119(1).
(iv) liability for the payment of dividends, redemption of shares, provision of financial assistance to related parties through loans or guarantees, any of which are made in breach of the statutory solvency tests;436

(v) liability under provincial securities statutes for various offences such as misrepresentation in a prospectus437 or take-over bid circular;438 and

(vi) liability under environmental laws.439

There are also a number of statutory duties and liabilities imposed on directors and officers where a company is insolvent.440 For example, under the BIA, specific remedies are provided where there have been non-arm's length transactions at less than fair market value,441 preferences to creditors,442 or payment of dividends at a time when the company is insolvent.443

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436 CBCA s. 118. For a discussion of the cases dealing with the interpretation of the solvency tests, see Directors' and Officers' Duties, supra note 147 at 22ff, § 2.2230. See also the BIA, supra note 145, at s. 101(1), which imposes liability on directors for dividends paid and shares redeemed or purchased for cancellation by a corporation within one year of the bankruptcy of a corporation, if such transactions occurred at a time when the company was insolvent or was rendered insolvent by the transaction.

437 See OSA, supra note 339, s. 130.

438 Ibid. at s. 131.

439 This topic is dealt with extensively in Directors' and Officers' Duties, supra note 147 at c. 7. For example, under s. 122 of the Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th Supp.), as amended, directors can be liable for certain corporate activities that are offences under that act. They can also be liable for failure to take reasonable care to prevent the corporation from causing or permitting adverse environmental effects under s. 194 of the Ontario Environmental Protection Act, R.S.O. 1990, c. E-19, as amended.

440 For a thorough review of this subject matter, see Directors' and Officers' Duties, supra note 147 at c. 11.

441 BIA, supra note 145, s. 100.

442 BIA, supra note 145, s. 95.

443 BIA, supra note 145, s. 101.
C. Repercussions of the Oppression Remedy on Limited Liability of Shareholders and Directors’ Liability

(1) Introduction

The above analysis shows that: (1) both shareholders and directors have various statutory liabilities that can arise as a result of their status with the corporation; (2) shareholders and directors can be liable for corporate conduct pursuant to principles of agency, partnership, tort or contract; and (3) in limited circumstances, shareholders can be directly liable for the actions of a company or its agents solely because of their status as shareholders. Despite the existence of these various bases of liability, however, it is fair to say that the liability of shareholders and directors is still treated as somewhat exceptional and restricted to narrowly defined circumstances, at least under the principles enunciated in cases such as Peoples and Normart Management which provide strong protection for directors against personal responsibility for corporate conduct.

However, as discussed above, the courts have not completely closed the door to imposing liability on directors who share an identity of interest with the companies they represent even under the Normart Management and Peoples analysis. Further, recent developments suggest that liability may be imposed on directors when their conduct disregards the interests of creditors at times when a company is at or near insolvency. As well, the analysis in the ADGA Systems case suggests that the courts may be taking a broader view of liability for directors’ and officers’ conduct. Each of these developments would have an important impact on directors’ liability — and therefore on the principle of corporate personality.

Another area that is likely to have a significant impact on the principle of corporate personality is the use of the oppression remedy by creditors. This Section of the chapter explores creditors’ use of the oppression remedy to obtain relief against shareholders or directors, often in situations where such relief would have been otherwise unavailable. However, the cases to date demonstrate the need for caution in this developing area as a result of the potential impact on the principle of corporate personality. As VanDuzer recently pointed out, “[i]t is somewhat worrying that the courts have ignored separate corporate personality in this way [i.e., by awarding relief against shareholders and
directors personally under the oppression remedy] without even a reference to the extensive, if dense, body of cases dealing with circumstances where it is appropriate to do so.”

(2) The Impact of the Oppression Remedy on the Principle of Limited Liability

In a number of the oppression cases reviewed above, relief has been granted against shareholders. Despite the limited number of cases in this area, it has been suggested that, “[f]rom a creditor’s point of view, [the] precedents provide a promising avenue to piercing the corporate veil and by-passing the restrictive impact of shareholders’ limited liability.”

To date, the results of the decisions have been uncontroversial, principally because the shareholders have personally benefitted from the impugned conduct. The types of benefits received have included: the payment of dividends to the shareholders (Sands Motor Hotel and SCI Systems); the redemption of shares (Sands Motor Hotel); the repayment of shareholder loans; (SCI Systems and Gignac, Sutts); and the transfer of a real estate asset to a company controlled by one of the shareholders (Gignac, Sutts).

However, in each of these cases, the companies involved have been closely held corporations and, in most of them, the shareholders have also been the directors who authorized the actions. As a result, it is somewhat unclear whether the liability has been imposed on the individuals in their capacity as directors or as shareholders. For example, in SCI Systems and in Gignac, Sutts, the impugned conduct was the respondents’

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444 VanDuzer, supra note 119 at 478 [footnote omitted].
446 Supra note 143.
447 Supra note 133.
448 Supra note 188.
449 See also Tropxe Investments Inc. v. Ursus Securities Corp., [1993] O.J. No. 1736 (Gen. Div.), online: QL (OJ), where the applicant obtained a judgment against a corporate defendant. When its efforts to collect the debt as a judgment creditor were frustrated by payments from the judgment debtor corporation to its controlling shareholder, the judgment creditor brought an application for relief under the oppression remedy. The court held that the payments were not in the legitimate interests of the corporation or its creditors and were intended to divert money away from the judgment creditor. The court granted judgment against the shareholder personally.
behaviour *qua* directors although the benefits received were *qua* shareholders. As a result, these two cases are probably better analyzed as cases where the directors are held personally liable for corporate conduct which has personally benefitted them.\(^{450}\) On the other hand, in *Sands Motor Hotel*, two of the shareholders that received benefits were corporations and, as such, the order against them to return certain dividends they received was based solely on their status as shareholders.

Unfortunately, the decisions to date have failed to clearly make a distinction between liability as a director versus liability as a shareholder. Further, they have failed to consider the impact such orders can have on the basic principle of limited liability or the basis upon which such orders should be made against shareholders personally. It is true, as Hamilton has pointed out, that the oppression remedy allows the court to impose liability *directly* on individuals,\(^{451}\) including shareholders. As a result, when liability is imposed on a shareholder under the oppression remedy it is not necessary to create any (formal) exception to the principle of limited liability.\(^{452}\) Nevertheless, it is still necessary to provide a basis upon which to determine whether personal liability of the shareholder is appropriate. Failing that, there is a danger that the oppression remedy will be used too freely to "by-pass" the principle of limited liability and that it will be impossible to predict what limits will be placed on its use to impose liability on shareholders.

\(^{450}\) This is discussed further, in the subsection that follows immediately below, entitled: "The Impact of the Oppression Remedy on the Directors’ Liability". See also *Sidaplex*, *supra* note 133 where the director was held personally liable for certain benefits he received, essentially as a shareholder.
\(^{451}\) *Supra* note 271 at 285.
\(^{452}\) Hamilton, *ibid*. It is also the case that the court could impose liability directly on directors without violating the principle of separate legal personality; see *Gentra, supra* note 312 and *Sidaplex, supra* note 133.
(3) The Impact of the Oppression Remedy on the Directors' Liability

(a) Corporate Conduct Revisited

In a number of cases to date, relief has been awarded against directors under the oppression remedy. Unlike shareholders' liability, however, the courts have analyzed the basis upon which directors can be made liable.

For example, in Sidaplex, Blair J. considered the basis of liability of directors under the oppression remedy. Blair J. cited several cases where such orders had been made and noted that the cases typically "...involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question redounded directly to the benefit of that person."^{453} There was no doubt that the sole director/shareholder benefitted personally in Sidaplex. In considering whether the remedy should be granted against the director personally, Blair J. held as follows:

Lawyers and judges tend to worry and fuss a great deal about whether or not a given set of circumstances permits the piercing of the "corporate veil". They do so for legitimate reasons pertaining to corporate law. While personal liability of a director in an oppression remedy situation may be founded upon such a base... the issue, in my view, is not so much one of piercing the corporate veil as it is a question of the application of s. 248(2) [the OBCA oppression remedy] and the interplay between its various provisions.

...When the power of the director is exercised in a fashion which causes an act or omission of the corporation which effects an unfairly prejudicial result, or a result which unfairly disregards the interest of the complainant – or which causes the business or affairs of the corporation to be conducted in a manner which has the same effect – those powers themselves have been "exercised in

^{453} Supra note 133 at 406.
a manner” which is caught by the section, in my opinion. Liability therefore lies directly with the director, under the section, in appropriate cases.454

It is apparent from this analysis that Blair J.’s conception of directors’ liability under the oppression remedy is different than the common law analysis. As discussed above, directors will not be held liable at common law unless, for example, their actions are either tortious in themselves or exhibit a “separate identity of interest” from that of the corporation.455 In Sidaplex, Blair J. held just the opposite, i.e., that the impugned conduct for which the director is being made liable must be the conduct of the corporation and not the director.

This analysis was recently considered and elaborated upon by the Ontario Court of Appeal in Gentra.456 In that case, the court confirmed that the liability of directors under the oppression remedy is distinct from that created under the common law and that liability of directors under the oppression remedy is determined from a broader perspective than at common law.457 The Court of Appeal emphasized that unlike common law liability, the only conduct subject to review under the oppression remedy is that which can be defined as corporate conduct. Doherty J.A. explained:

Section 241 provides a statutory means whereby corporate stakeholders may gain redress for corporate conduct which has one of the effects described in s. 241(2). The section serves as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority. Section 241 enables the court to intercede in the affairs of a corporation and to effectively

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454 Supra note 133 at 406-407 [emphasis added]. This quotation is part of a larger quotation specifically cited with approval by the Ontario Court of Appeal in Gentra, supra note 312 at 301-302.
456 Gentra, supra note 312.
override decisions of those charged with the responsibility of corporate governance.

...By providing for remedies against individuals, including directors and officers, s. 241 recognizes that the rectification of harm done to the corporation may necessitate an order against individuals through whom the company acts. To the extent that the section contemplates that individuals will bear the remedial burden flowing from the oppressive exercise of corporate powers, s. 241 takes a different approach to assigning responsibility for corporate conduct than does the common law. The section permits the court to address the harm done by conduct described in s. 241 from a broader perspective than that permitted by a simple inquiry into the true identity of the actor.

...Where a plaintiff seeks a remedy against a director or officer personally under s. 241, I do not think it is accurate to suggest that the plaintiff is attempting to 'circumvent the principles with respect to personal liability of directors and officers'. On the contrary, the plaintiff is making a fundamentally different kind of claim than is contemplated in Peoples. The plaintiff is not alleging that he was wronged by a director or officer acting in his or her personal capacity, but is asserting that the corporation, through the actions of the directors or officers, has acted oppressively and that in the circumstances it is appropriate (i.e., fit) to rectify that oppression by an order against the directors and officers personally.458

Thus the Court of Appeal makes it clear that certain corporate actions by the directors can render the directors personally liable under the oppression remedy. Importantly, the court emphasized that "[t]he attribution of conduct to the corporation

458 Supra note 312 at 298-299, paras. 32, 33, 35 [emphasis added].
does not foreclose a remedy against directors personally. Individuals, including directors, can be made to bear what the court called the “remedial burden” where there has been an oppressive or unfair exercise of corporate powers.

Analysis of the Sidaplex and Gentra cases also demonstrates that a two step process takes place before liability is imposed on the directors under the oppression remedy. First, the court considers whether the conduct was oppressive, unfair or prejudicial. Once the court finds that oppression has occurred, it determines the appropriate remedy, including the person(s) against whom the order will be made.

Based on the cases to date, the courts have held that it can be appropriate to make an order against a director personally in the following circumstances: (1) where it is alleged that the directors personally benefitted from the oppressive conduct or furthered their control over the company through the conduct; or (2) where directors or officers of closely held corporations have virtually total control over the corporation. There has been no suggestion that these examples are meant to be exhaustive.

Of these two examples, it is submitted that the first, i.e., personal benefits received by a director, can be used as a workable basis for imposing liability on directors without also laying waste to the principle of corporate personality. However, it is not apparent why liability should be imposed in the second example, i.e., where directors have virtually total control over the company, since this fact alone does not justify imposing liability on directors. This latter basis for liability is little more than an unconditional invitation to the courts to ignore the principle of corporate personality in the context of closely held companies.

Perhaps this approach arose through a misinterpretation of the test applied by Blair J. in Sidaplex since both grounds mentioned in Gentra were also mentioned in Sidaplex. However, it appears that the two grounds mentioned in Sidaplex were not meant to be independent of each other, i.e., they were not meant to be alternative grounds for liability. Rather, they seem to be part of a two-part test under which both grounds needed to be

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460 In particular, see Gentra, ibid. at 302, para. 47.
461 Ibid. at 303-304.
462 Sidaplex, supra note 133 at 405-406.
satisfied before liability would be imposed on directors for corporate conduct. Therefore, it is submitted that the second ground referred to by the Court of Appeal should be combined with the first to create a two-part test for liability.

The *Gentra* analysis can be contrasted with the tests applied under the *Peoples* and *Normart Management* line of cases, pursuant to which directors will not be held personally responsible for corporate conduct unless there also has been improper behaviour by the directors which is independent of the corporate conduct. That is, under the common law, the justification for imposing personal liability on directors is restricted to the nature of their conduct. On the other hand, under the oppression remedy test of *Gentra* and *Sidaplex*, the focus is on the effect of the corporation's conduct, albeit through the director(s). Under the latter analysis, the oppressive or unfair conduct is the company's and not the director's, yet the director can be made personally liable because of the favourable effect for the director or the nature of his or her involvement in the conduct.

This important difference is highlighted by applying the *Gentra* reasoning to the facts of *Normart Management*. Even though the impugned conduct in *Normart Management* was considered to be corporate conduct, the directors of the defendant companies in *Normart Management* could have been held personally responsible for the oppressive or unfair results under the *Gentra* test, especially in view of the fact that they personally benefitted from the conduct in question. As a result of *Gentra*, the oppression remedy can be used to circumvent the precise problem that the court was presumably trying to avoid in the *Peoples* and *Normart Management* decisions, i.e., directors' liability for conduct of the corporation itself. The obvious question to ask is: why the difference?

The easy answer is almost reflexive. It is based on the tendency of many lawyers and some judges to simply accept that liability under the oppression remedy *must be* different (i.e., broader) than liability under the common law without explaining *how* the difference

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463 For the purposes of this example, it is assumed that the plaintiff in *Normart Management* would have been granted standing to bring an oppression claim as a "proper person" which, it is submitted, would likely have been the case. However, even assuming the plaintiff would not have been granted standing, it is easy to think of a fact situation where a plaintiff could bring a claim against a director personally that would fail
arises. But a moment’s reflection reveals that this is not a satisfactory answer. It is no more than a tautology which says “the result under the oppression remedy is different because the oppression remedy provides a different result”. It simply begs the question as to how the result is different.

Fortunately, the Gentra judgment does not fall into this trap. The court does not simply conclude that the oppression remedy provides a different perspective for remedying harm than does the common law, it also explains how the different perspective is arrived at. The rationale is apparent from two statements made by Doherty J.A. in Gentra, which, while already quoted above, merit repeating. They are as follows:

To the extent that the [oppression remedy] contemplates that individuals will bear the remedial burden flowing from the oppressive exercise of corporate powers, s. 241 takes a different approach to assigning responsibility for corporate conduct than does the common law. The section permits the court to address the harm done by conduct described in s. 241 from a broader perspective than that permitted by a simple inquiry into the true identity of the actor.

...[A]ctions of directors which are properly described as corporate conduct may render directors and/or the corporation liable under the oppression provision. The attribution of the [impugned] conduct to the corporation does not foreclose a remedy against directors personally.464

These important statements explain how the oppression remedy is broader than the common law perspective. They show that under the oppression remedy, the court is able to go beyond a mere inquiry into the identity of the person performing the impugned conduct and that remedies against individuals are not forestalled simply because the conduct is attributed to the corporation. Unlike the common law approach, the oppression remedy examines the issue of the responsibility of directors (and officers) by under the Normart Management test, while the same plaintiff would have standing under the oppression remedy and could presumably succeed under the Gentra test.

464 Gentra, supra note 312 at 298-299, para. 33, and at 300, para. 39 [emphasis added].
taking into account the nature of their involvement in the impugned conduct and the effects of the conduct, even where the conduct has been attributed to the corporation. These principles differentiate the analysis under the oppression remedy from the common law analysis, the latter being limited (at this time) by the identity of the person to whom the impugned conduct is attributed.

It will be recalled that the most likely reason why the courts have applied the principle of corporate personality so forcefully in the context of claims against directors is the concern that allowing such claims would lead to virtually unrestricted directors' liability for the actions of the companies they act for. The Gentra analysis shows that this need not be the case. Instead, it is possible to place limits on the effect of the principle of separate personality — thereby imposing liability on directors even when the conduct is corporate conduct — without also exposing directors to virtually limitless liability. These limits are only now beginning to be developed under the oppression remedy, as is apparent from the statement by the Court of Appeal regarding the circumstances where it is appropriate to make orders against individuals, including directors.\footnote{465}{See text accompanying note 461, above.} As discussed above, the Court of Appeal has held that directors can be made personally responsible for corporate conduct where they have received a personal benefit or where, as directors of closely held corporations, they have virtually total control over the corporation, although it was suggested above that the latter basis may be too vague and unprincipled to be maintained unless it is combined with the former basis.\footnote{466}{See text accompanying notes 461 and 462, above.} It is too early in the development of the oppression remedy to predict what other circumstances may be accepted as bases for imposing imposed on directors and, more particularly, whether something analogous to a personal benefit to the director will be required.

Nevertheless, even without knowing the precise limits that will be developed under the oppression remedy analysis, it is clear that the courts have recognized that the principle of corporate personality should not be permitted to offer directors a broad-based immunity that shields them from liability for virtually all forms of corporate conduct with which they are implicated. This is consistent with the other line of authority that seems to be developing under the common law, as seen in the ADGA Systems case, discussed
above.\textsuperscript{467} It will be recalled that the decision in \textit{ADGA Systems} offers a broader view of directors’ liability which, it is submitted, is more coherent with the \textit{Sidaplex} and \textit{Gentra} reasoning than are the \textit{Peoples} and \textit{Normart Management} cases. However, now that the door has been opened to this “broader perspective” on directors’ liability under the oppression remedy, the challenge will be to delineate clear limits for directors’ liability. Otherwise, fears that the failure to rigorously apply the principle of corporate personality would lead to virtually unrestricted directors’ liability will be realized.

(b) Directors’ Duties to Creditors Revisited

As discussed above,\textsuperscript{468} it is not clear whether the law in Canada will develop to the point of imposing some type of common law duty (fiduciary or otherwise) which is owed by directors to creditors. However, the importance of this issue under the common law may be diminishing as a result of recent developments under the oppression remedy which suggest that directors can be personally liable to creditors under the CBCA-type remedy. As well, it remains to be seen whether the decision in the \textit{Wise} case,\textsuperscript{469} in which it was held that the directors owe a duty of care to creditors pursuant to s. 122 of the CBCA, will be upheld on appeal or followed by courts in other jurisdictions.

With regard to the use of the oppression remedy to obtain relief against directors’, Hamilton has pointed out:

\begin{quote}
The approach in \textit{First Edmonton} may very well result in jurisprudence on a director’s duty towards creditors when the corporation is in financial difficulty… [T]he oppression cases requiring directors to consider the interests and expectations of creditors when making decisions respecting the conduct of a corporation’s affairs may become particularly pertinent when the corporation is in financial difficulty… Canadian case law has not yet developed extensively in this area although some of the recent creditor oppression cases do show signs of imposing liability on directors who fail to
\end{quote}

\textsuperscript{467} See text accompanying notes 392ff, above.

\textsuperscript{468} See PART II: Chapter 5: Section B, subsection (5)(e) “Liability for Insolvent Trading”.

\textsuperscript{469} \textit{Supra} note 352.
consider the interests of creditors when the corporation is in financial difficulty.

... 

The ...cases suggest that directors of a corporation in financial difficulty may become personally liable under the oppression remedy for actions of a corporation which reduce the ability of the corporation to pay its creditors. However, it should be noted that the director[s] in these cases did benefit personally from the actions.470

While both reasoning in the Wise decision and Hamilton’s analysis suggest that directors’ liability under the oppression remedy may result in the development of a directors’ duty toward creditors, at least where a corporation is in financial distress, it is conceivable that directors can be found liable under the oppression remedy without necessarily finding that they owe any duties to the creditors per se. This would be consistent with the Gentra analysis which suggests that directors can be liable under the oppression remedy even where the oppressive or unfair effects of the corporate conduct did not result from the directors’ personal conduct. A similar analysis has been suggested by Hansell & Gillies who have argued that directors’ potential liability to creditors under the oppression remedy is analytically distinct from directors’ potential liability for breach of duty to the creditors. They have suggested that:

the availability of the oppression remedy in Canada to creditors may obviate the need for creditors to advance or courts to decide arguments which would impose a further, generally untested, duty on directors of Canadian companies. Presumably, many complaints which could be framed as a breach by the directors of a duty owed to creditors could also be framed as an oppression action alleging conduct which was oppressive or unfairly prejudicial or that unfairly disregards the interests of the creditor. The “reasonable expectations” aspect of the test articulated by the Alberta court in

470 Hamilton, supra note 271 at 283-284.
First Edmonton introduces the prospect of some considerable scope for creditors to find relief under the oppression remedy.471

In other words, Hansell & Gillies suggest that the reasonable expectations analysis can form the basis of liability without the need to develop a directors’ duty owed to creditors. This interpretation preempts any discussion of directors’ duties to creditors, including the issue of whether they owe any fiduciary obligations to creditors. The benefits of avoiding the issue of fiduciary obligations is apparent from part of the analysis in the SCI Systems case. The following passages, which were part of Epstein J.’s reasons for imposing liability on the directors of the corporate respondent, illustrate the hazards of wading into this confused (and confusing) area of the law:

...[D]irectors must fulfill the statutory and common law fiduciary duties and duty of care that have evolved in the light of new corporate concerns and societal expectations.

There is an obvious position of potential conflict in the payment of dividends when a director is also a shareholder. In circumstances where the directors are in position of conflict of interest, their actions must be scrutinized more carefully.

In such a situation the test to be applied to the directors’ fiduciary obligations must necessarily be elevated. In this case, the actions of the directors fall far short of that test.472

It is unfortunate that Epstein J. felt the need to base her judgment, albeit in part, on the conclusion that the directors had breached their fiduciary obligations to the company’s creditors. In particular, it is submitted that the discussion of fiduciary

471 Supra note 404 at 229. The authors also have suggested, at 175, that it may not be sufficient for directors who wish to avoid liability under the “reasonable expectations” analysis simply to ensure that the company complies with its loan agreements or other formal arrangements with its creditors.

472 SCI Systems, supra note 133 at 314 [emphasis added].
obligations provided too broad an interpretation of directors’ fiduciary duties. Having already concluded that the facts of the case justified a finding of oppression based on a breach of the creditors’ reasonable expectations, and that the directors of the closely held corporate respondent had personally benefitted from the impugned conduct, it was not also necessary to find that the directors had breached their fiduciary duties to the creditors. Further, the finding that the directors had (and breached their) fiduciary obligations in the circumstances of this case abolishes the traditional view that directors’ fiduciary obligations are owed to the corporation, not its creditors. Therefore, the court should have made reference to at least some of the justifications for imposing such duties on directors and reviewed the cases in other commonwealth jurisdictions before making such an important extension to Canadian law.

As well, the court’s finding that the directors’ fiduciary duties to the creditors were “elevated” is also unfortunate. The court did not provide any reasons why the fiduciary obligations should be any different from those that would ordinarily arise, except to say that the directors were in a position of conflict of interest because they were also shareholders of the corporation who received certain dividends. This conflict or potential conflict alluded to by the court does not justify the imposition of an elevated fiduciary duty. Directors are commonly shareholders or even the sole or controlling shareholders of the corporations they act for. Yet it is not apparent why this fact alone would elevate the fiduciary obligations they owe to either the corporation or the creditors (assuming that they owe any fiduciary obligations to creditors). Moreover, it is not at all clear what the court meant by an “elevated” fiduciary duty. It is surprising that the Divisional Court did not even comment on the aspects of Epstein J.’s judgment dealing with directors’ fiduciary duties.\(^{473}\)

D. The Principle of Corporate Personality Revisited

The traditional common law analysis of the principle of corporate personality has shown itself to be too rigid. As argued above, attempts to universally apply the principle

\(^{473}\) *Ibid.* [Div. Ct.].
– whether under the rubric of limited liability or separate personality – can lead to unacceptable results.

In the context of limited liability, the problems that would arise if the principle were universally applied have led to the enactment of a number of statutory exceptions. Further, the doctrines of contract, tort, partnership and agency have been applied to attenuate the harshness of the principle although they do not, strictly speaking, create exceptions to it. Finally, where necessary, the courts have developed narrow common law exceptions to the principle of limited liability – commonly known as the piercing of the corporate veil. Each of these different incursions upon the principle of limited liability is a recognition that limited liability is not necessary or acceptable in all circumstances. Nevertheless, each of the different incursions has been conservatively developed for fear that the exception will become the rule.

Similar fears of the “slippery slope” have had an impact upon the scope and effect of the principle of separate legal personality. The result has been that separate personality has often been used as a justification for granting immunity to a company’s human representatives for their involvement in wrongful conduct. However, the principle of separate legal personality breaks down in certain situations. The most obvious situation where separate personality cannot be used to shield the wrongdoer from liability is where a company’s human representative causes physical harm to a third party. For example, an employee who negligently operates a company vehicle in the course of her employment, thereby harming someone, is no doubt liable for her actions despite the principle of separate legal personality. London Drugs 474 makes this clear.

Yet as one moves away from the “easy” cases, it is less obvious whether the company’s human representatives should be personally accountable for their involvement in the harmful conduct. As seen above,475 the courts have had particular difficulty where the impugned conduct is “intellectual” rather than physical and where the damages are economic in nature. This is particularly true for the conduct of directors and officers whose actions are deemed to be solely those of the corporation.

474 Supra note 326.
475 Chapter 5: Section B, (5) “Directors’ Liability in Tort”.
The idea that the corporation takes over the minds of its human representatives so that their thoughts are the thoughts of the corporation has proven to be a useful legal fiction in some circumstances. However, while the fiction of the "corporate mind" may be necessary so that, for example, corporations can be charged with criminal or penal offences,¹⁷⁶ there is no justification for applying the concept of the "corporate mind" to its logical conclusion in all situations. In other words, it is not necessary to protect a company's human representatives from liability for economic losses at all costs. For example, to conclude that a director's conduct, no matter what the circumstances, must be either the conduct of the corporation or the conduct of the director, but not both, is simply too rigid an analysis and ignores the basic principle of vicarious liability.

The trick, of course, is to develop a clear and coherent set of rules which determine when it is acceptable to deem the actions of a company's human representative to be those of the company alone. Only in circumstances where it is possible to articulate justifications for protecting the individual from responsibility should corporate personality act as a shield for the company's human representatives thereby protecting them from personal liability.

The oppression remedy offers a fresh opportunity to reconsider the effects that the principle of corporate personality has had on stakeholders' claims. The discussion in this chapter has shown that, in stark contrast to the common law, the oppression remedy has a flexibility which allows the courts to get around certain unacceptable results that can arise when the principle of corporate personality is applied too literally. The oppression remedy does this by allowing the court to focus on the effect that the impugned conduct has had on stakeholders. With the advent of the oppression remedy the courts are no longer "straightjacketed" by the principle of corporate personality. However, the importance of the oppression remedy in this respect may diminish if the common law approach shows more flexibility, as seen, for example, in cases such as ADGA Systems.¹⁷⁷

From an analytical point of view, a complainant under the oppression remedy need only show that the corporation has been governed in a manner that has had an oppressive or unfair impact. As a result, the analysis does not get bogged down by legal fictions

¹⁷⁶ See, for example, Welling, supra note 6 at 151-160.
¹⁷⁷ Supra note 364.
such as "corporate minds". For example, the oppression remedy undoes the fiction that a
director who acts as the "corporate mind" cannot also be acting as herself. Therefore, the
fact that the person involved in the "wrong" was acting as or on behalf of the corporation
no longer ends the inquiry or precludes a remedy against the company's human
representatives. If there has been oppression, the complainant can obtain a remedy that
can be imposed on the party who has benefitted or furthered her control of the
corporation, whether that person is a shareholder, director or officer.
PART III: CONCLUSIONS

Chapter 7: The Challenge of Developing the Use of the Oppression Remedy by Creditors Without Sacrificing the Certainty of Commercial Law

The use of the oppression remedy by creditors is but one example of the ever-changing world of company law. Fiduciary obligations, and restitutionary and equitable remedies such as the remedial constructive trust are other examples of such developments in the commercial world. Each is also an example of how the common law can, where necessary, evolve when traditional principles do not provide acceptable solutions in the context of modern commercial issues. The oppression remedy offers a similar evolution, albeit in a statutory rather than common law setting.

It may be that the development of the oppression remedy is part of a new emphasis on morality in business law. For example, in considering recent developments in commercial law, McLachlin J. has commented as follows:

The situations in which courts will find fiduciary duties in a commercial, and even contractual setting, seem to be expanding. Moreover, other equitable doctrines such as unconscionability and constructive fraud seem to be making their way into the commercial arena with increasing frequency.478

In her concluding remarks, McLachlin J. then added:

We cannot have morality without law, or law without morality. The challenge must be to define legal rules which, while providing the certainty so critical to commercial relations, reflect... the prevailing moral standards of our community.479

The same challenge applies to the use of the oppression remedy by creditors. To date, however, this challenge is not being met. The remedy, at least in the context of its use by creditors, is being developed too quickly and without the necessary analysis to

479 Ibid. at 327.
support the significant incursions on what are, generally, sound principles of company law and commercial transactions. The emphasis on what McLachlin J. calls morality – or what may, perhaps, be otherwise labeled as duties of good faith dealings, or the protection of reasonable expectations, or other such concepts which the courts have added to their arsenal in order to protect the integrity of relationships or to define the intended purposes of parties’ relationships – has been made at the expense of the certainty of commercial law.

The suggestion here is not that the oppression remedy, or its use by creditors, is fundamentally misguided. Rather, the problem is that the cases which employ it are going further than necessary. As a result, the remedy is being used in situations where it is not needed and where it should not be used.

At the end of the day, the fact that the oppression remedy is being used to challenge conservative company law principles will be seen as beneficial. It will force those who support the continued application of those principles to justify them. It will ensure that the fundamental principles of company law are not given too broad an interpretation or allowed to wield too much power over common sense results. In effect, it will place limits on those fundamental principles where such limits are necessary. Ultimately, it will allow the law to evolve in a manner that is consistent with modern notions of morality.

But the use of the oppression remedy should not be allowed to ride roughshod over the fundamental principles of company law. The newness of the remedy is not a justification for allowing it to sweep aside what preceded it. It should be employed to improve upon the old law rather than supplant it. It should not be seen as a panacea for all commercial problems.

The challenge, as in all developing areas of the law, is to ensure that the oppression remedy is developed in a manner that makes commercial sense to commercial players. However, for the oppression remedy to meet this challenge, it has to be developed in a principled manner that it is internally coherent and that leads to results that fit together coherently with other related areas of the law. The next chapter offers some preliminary suggestions on how the use of the oppression remedy by creditors can meet the challenge.
Chapter 8: Suggested Guidelines for Creditors' Use of the Oppression Remedy

A. Introduction

The discussion in the earlier parts of the thesis has shown that the use of the oppression remedy by creditors can help to advance the law. For example, it was argued that the solutions being developed under the oppression remedy with respect to issues of directors' liability are sometimes more easily justified than the ones being developed under the common law.\textsuperscript{480}

However, creditors' use of the oppression remedy is not always beneficial. For example, in some areas, its use by creditors is simply duplicating remedies that are already available or is leading to the development of remedies that actually conflict with other statutory provisions dealing with creditors' rights. The expanded scope of the oppression remedy in these circumstances was brought into question\textsuperscript{481} and is considered further, below.

Even worse, some relief granted to creditors under the oppression remedy has caused (or has had the potential to cause) prejudice to the rights of other corporate stakeholders.\textsuperscript{482} It is particularly at this point – where, for example, relief is provided to Stakeholder X while at the same time causing harm to Stakeholder Y – that one must seriously question the manner in which the oppression remedy is being used.\textsuperscript{483}

It is submitted that many of the difficulties discussed in Parts I and II of the thesis have arisen because it has been assumed that once creditors are granted standing as "proper persons" under the oppression remedy, they should be automatically treated the same as any other "complainants". While it would certainly be simpler to move forward

\textsuperscript{480} See text following note 463, above.
\textsuperscript{481} See PART II: Chapter 4: Section B, "The Availability of Other Remedies", above.
\textsuperscript{482} See PART II: Chapter 4: Section C, "The Breakdown of the Distinction Between Personal and Derivative Actions", above.
\textsuperscript{483} The same argument can be applied to cases where minority shareholders use the oppression remedy in a manner that prejudices other shareholders. See MacIntosh, supra note 31, as discussed in PART II: Chapter 4: Section C, "The Breakdown of the Distinction Between Personal and Derivative Actions". See, also, infra note 494.
on that basis – and while some may even argue that there is nothing in the wording of the CBCA-type statutes to suggest that any of the various categories of “complainants” should be treated differently than others – there are a number of differences between shareholders and creditors which suggest the need for differences in how the oppression remedy applies to each of them.

B. Developing Guidelines for Creditors’ Use of the Oppression Remedy

(1) Different Interpretations of the Scope of the Oppression Remedy for Creditors’ Claims

As discussed above,\(^{484}\) when a minority shareholder makes a claim under the oppression remedy, the statute creates a different standard for assessing the impugned conduct than would otherwise apply. In particular, the courts are able to focus not only on the nature of the conduct, but also on the impact or effect of the conduct and on the process through which that conduct was implemented.\(^{485}\) The oppression remedy, in this sense, is not purely procedural. It changes the substantive law as between shareholders and other corporate stakeholders. This was recently explained in the Gentra case, an action in which a shareholder brought an oppression claim against the company’s directors. As discussed above,\(^{486}\) the Court of Appeal held that the oppression remedy takes a different approach to assigning responsibility for corporate conduct than does the common law and permits the court to address the harm done from a broader perspective.\(^{487}\)

As a result of this broader perspective, a shareholder will have a remedy against directors in situations where no remedy would be available under the common law principles of company law, contract, tort, etc. It is important to note that this broader perspective of shareholders’ rights under the oppression remedy is not limited to claims

\(^{484}\) See PART I: Chapter 2: Section B and Section C, especially, subsection (1) “Conduct Subject to Review”.

\(^{485}\) Campion \textit{et al.}, \textit{supra} note 124 at 233.

\(^{486}\) See \textit{supra} note 464.

\(^{487}\) \textit{Supra} note 312 at 298-299, para. 33.
against directors. Rather, it applies to all types of shareholders' claims under the oppression remedy.

However, the broader perspective which applies to shareholders' claims under the oppression remedy need not necessarily apply to creditors' claims. That is, there are differences between shareholders' and creditors' claims that suggest that the interpretation of what constitutes "actionable oppression" should be narrower for a creditor than it is for shareholders or other stakeholders who have automatic standing to bring a claim.

For example, creditors never shared in the long history of mistreatment that minority shareholders faced prior to the development of the oppression remedy and the statutory derivative action. Creditors in the corporate context did not face the obvious and persistent abuses that shareholders were traditionally subjected to. They have never been vulnerable corporate stakeholders, powerless in the face of the rules of corporate law. One reason, of course, is that creditors have always been in a position to protect themselves from abuse (in a broad sense). It is submitted that the fact that creditors have not traditionally suffered from abuse at the hands of majority stakeholders supports the view that the broad perspective being given to the oppression remedy in the context of shareholders' rights is not necessary, or appropriate, when creditors are involved. However, it is important to emphasize that, while creditors do not need the same broad protection as shareholders, this does not mean that there are no circumstances where creditors need protection, as is discussed below. For example, when faced with abuses of the corporate structure that are not adequately dealt with under insolvency legislation, such as the use of thinly capitalized subsidiaries, creditors need (and are deserving of) protection.

Another important difference between shareholders' and creditors' claims is the fundamentally different relationship each has with the corporation. In the shareholder-company relationship, there often exist important "relational" factors (i.e., long-term relationships between the shareholders), at least in the context of closely held companies.

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488 But for a contrary argument see "Creditors as Corporate Stakeholders", supra note 142 at 530.

489 See text accompanying note 499ff, below.
Those relationships often change over time, although the changes are not always reflected in the corporate constitution. Recognition by the courts of the "relational factors which frequently exist in corporations", the integrity of which need to be protected, can be traced from *Ebrahimi* through many of the oppression decisions under the CBCA-type oppression remedy. Chapman has suggested that, in this way:

the oppression remedy could be used to protect the relationship between the parties and supplement their legal rights in a way which contract law had historically refused to do. Reliance over the course of the relationship may have made it inequitable for one party to insist upon its strict legal rights or may have created a right in the minority shareholder...

There may be some creditor-corporation relationships of a similar nature to the shareholder-corporation type relationship. Most often, however, the relational aspect of the shareholder-corporation relationship does not exist in the creditor-corporation relationship, even one which is "ongoing" in the sense that it is not a single, discrete transaction. This difference in the nature of the relationship between stakeholder and corporation is another justification for the distinction between creditors' and shareholders' use of the oppression remedy.

A third difference between shareholder versus creditor claims arises from the identity of the parties affected by the relief that is sought. In many shareholder claims under the oppression remedy, the stakeholders affected by the relief are limited to those who are involved in the dispute itself. However, creditors' claims almost always have broader

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490 This phrase is borrowed from Chapman, *supra* note 2 at 187.
491 *Supra* note 86 at 379-380.
492 For a summary of some of these cases, see Chapman, *supra* note 2 at 187-188, n. 68-74 and accompanying text. While the origins were in the "incorporated partnership" context of *Ebrahimi*, Chapman, *ibid.* at 188, has pointed out that the Canadian oppression cases have gone "well beyond the incorporated partnership considered in [Ebrahimi]".
494 Of course, this is not always the case. For example, the need to maintain the distinction between personal and derivative actions is equally applicable to shareholder disputes as it oppression claims by creditors. The point here is that creditors' claims will almost always affect a broader range of stakeholders whereas shareholders' claims often will not.
implications than shareholders' claims because they can affect a multitude of corporate stakeholders in a way that a typical shareholder dispute does not. This is another reason why the use of the oppression remedy should be more circumscribed for creditors than it is shareholders.

* * *

There are a number of different ways in which the above-noted differences between creditors and shareholders could be manifested in the context of claims under the oppression remedy. The goal of this chapter is to take a fresh look at the manner in which the oppression remedy is being made available to creditors (as opposed to shareholders) and to ensure that its use by creditors appropriately protects creditors' needs without harming the integrity of other, sound principles of law.

One possible scenario would be to deny standing to creditors altogether. However, the courts in various jurisdictions — including several appellate courts — have already held that they have the discretion to grant creditors standing as "proper persons" under the oppression remedy and it is very unlikely that the Supreme Court would reverse the law in this respect. Even if the arguments suggested below for limiting creditors' standing are accepted, and the oppression remedy is thereby circumscribed, a blanket denial would be wrong since there will be circumstances where a complainant may be without any appropriate recourse unless the oppression remedy is available.

Assuming that standing is not denied to creditors completely, there are a number of different ways the oppression remedy could be made available to them. The first would be to allow creditors to use the remedy as of right, i.e., in the same manner as it is available to shareholders. For the reasons discussed above, i.e., the numerous differences between shareholders and creditors, this approach would not be justified and this possible approach is not explored any further. Alternatively, the remedy could be made available to creditors in a more restricted manner. Limited standing is consistent with the case law

495 Consider, for example, the issues of personal versus derivative actions discussed above in PART II: Chapter 4: Section C, "The Breakdown of the Distinction Between Personal andDerivative Actions", where it was argued that granting relief under the oppression remedy for a derivative wrong can cause prejudice to creditors who are not involved in the proceedings.
to date and, it is submitted, is more appropriate than granting creditors standing as of right.

The balance of this chapter examines the following issues. First, possible limitations on creditors’ use of the oppression remedy are considered. Secondly, consideration is given to the development of a standard for assessing impugned conduct and determining the types of conduct that should entitle creditors to relief under the oppression remedy. More particularly, the appropriateness of using the reasonable expectations analysis in the context of creditors’ claims under the oppression remedy is considered. Finally, some preliminary suggestions on an appropriate standard are suggested.

(2) Suggested Limitations on the Use of the Oppression Remedy for Creditors’ Claims

The thesis is now venturing into uncharted territory. Although some limitations on the use of the oppression remedy by creditors have been suggested in the case law, none has yet become well-established.

The following is a preliminary exposition of some suggested limitations on the use of the oppression remedy by creditors which will help to ensure that the remedy develops in a reasoned manner.

(a) No Standing Where Other Remedies Exist

Creditors’ relief under the oppression remedy should be subsidiary to other forms of relief. That is, as argued above, the oppression remedy should not be available to creditors where other, specific relief is already available.

The need to develop remedies in a subsidiary fashion is seen in other areas of law. For example, restitutionary claims are based on broad and open-ended principles which are applied by the courts on a discretionary basis. As a result, it is unnecessary and inappropriate for the courts to exercise their broad discretion and grant restitutionary relief where specific remedies are already available.

See PART II: Chapter 4: Section B “The Availability of Other Remedies”, above.
The oppression remedy, like the law of restitution, is based on broad, discretionary principles. Therefore, where creditors have standing under the oppression remedy, relief should only be available to them in a subsidiary fashion, i.e., it should be precluded when a plaintiff has recourse to another effective form of relief, unless there is a specific justification for overriding the remedy which exists.

If the oppression remedy is not restricted to "gap filling", creditors will have an obvious incentive to proceed under the oppression remedy for virtually any type of claim because of its procedural advantages and the broad relief available under it. However, it is not appropriate for the oppression remedy to be available in his manner. A review of the kinds of relief that are specifically enumerated under the oppression remedy reveals that the majority of those remedies have no application to a typical creditor's claim. And that is precisely the point. The oppression remedy should have no application to a typical claim by a creditor. Instead, unless there is no cause of action in contract, tort, under statute, etc., the oppression remedy should not be available to a creditor-complainant.

For example, when a remedy is available under another statute (i.e., other than the applicable company law statute), there is, arguably, an implied intention of Parliament that the more specific remedy should take precedence over the more general. As a result, creditors should be limited to the specific relief provided under the applicable statute and creditors' claims should be subject to the limitations imposed by that statute.

More generally, when the facts surrounding a creditor's claim would support a cause of action under common law doctrines of contract, tort, etc., the oppression remedy should also be precluded. Although the justifications for this limitation may be less

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497 Pierre-André Coté, *The Interpretation of Legislation in Canada* (Cowansville, Quebec: Y. Blais, 1991) at 302. This point was discussed, generally, above, in PART II: Chapter 4: Section B, "The Availability of Other Remedies". Statutory interpretation also suggests that the oppression remedy should be unavailable where another remedy is already provided directly under the applicable company law statute; see Coté, *ibid.* at 260ff. This point was also discussed above, in PART II: Chapter 4: Section B, "The Availability of Other Remedies", in the context of the use of breaches of the solvency tests under company law statutes.

498 It may be necessary to develop some exceptions to this "general rule" so that the availability of certain remedies does not preclude a claim under the oppression remedy. The development of such distinctions, however, is left to another day.
apparent, it is submitted that only with such limitations can creditors’ use of the oppression remedy form a coherent part of our commercial law.

In essence, creditors’ rights and remedies under the common law, under company law statutes and under statutes that govern creditors’ rights (collectively referred to as “existing creditors’ rights doctrines”) are generally well-developed such that, in the normal course, creditors are not in need of further protection. To allow creditors, in all circumstances, to short-circuit existing creditors’ rights doctrines by seeking relief under the oppression remedy would undercut too much sensible commercial law that has been developed under the common law and under statute.

The line between circumstances where the oppression remedy should or should not be available will not always be clear. That is, it will not always be obvious when “another remedy” is available so that the oppression remedy should be made unavailable to a creditor-complainant. For example, many difficult cases will arise when the other “possible” relief would be based on statutes that potentially apply to a broad range of fact situations. For example, it could be argued that the BIA should be applied whenever a defendant is insolvent or that fraudulent conveyances legislation should be applied whenever there has been a transfer of assets by the defendant. In fact, it is foreseeable that the impugned conduct in many oppression claims will include a shift in assets that, at least theoretically, could be treated as a preferential payment under one of those statutes. However, it cannot be the case that those statutes should be said to always apply and, therefore, to preclude the oppression remedy. Rather, it must be left to the discretion of the courts to determine whether these statutes (or other existing creditors’ rights doctrines) apply, i.e., whether the allegations before the court are such that it would be appropriate to require that a particular statute or common law doctrine be applied to determine the issues between the parties to the exclusion of the oppression remedy. The courts are called upon to make these types of decisions on a regular basis and requiring them to make such decisions would not be any greater a stretch of the courts’ institutional competence than would be the application of the oppression remedy itself.

The above arguments suggest that creditors’ use of the oppression remedy should be quite circumscribed. However, while there may not be much room left for the oppression remedy to apply to creditors’ claims under the proposed interpretation, there would be
some situations where it would be available. One such situation may be found in the facts of *Sidaplex*.\footnote{Supra note 133. For a summary of the facts of *Sidaplex*, see the text following note 204, above.} It will be recalled that in *Sidaplex* there had been an inadvertent failure by the corporate respondent to renew a letter of credit in favour of the complainant. As a result of the lapse of the letter of credit, the security for a debt owed to the complainant was lost. As it turned out, the respondent corporation had sold its major assets which, when combined with the lapse of the letter of credit and the payment to the bank, left the complainant with an unsecured claim against a company with no assets.

But even in *Sidaplex*, there were reasons why relief under the oppression remedy should, perhaps, not have been available. First, the complainant may have been able to obtain restitutionary relief through the doctrine of subrogation.\footnote{While it is beyond the scope of this thesis to consider the issue fully, the creditor may have been able to argue that it should have been subrogated in the rights of the bank against the guarantor, i.e., the shareholder. Perhaps as the law of restitution continues to develop in a manner which provides relief where other common law remedies would not, the need for creditors to make claims – and to be given standing to make claims – under the oppression remedy will decrease.} Further, the complainant could have made, and in fact did make, a claim for relief under the Ontario *Bulk Sales Act*.\footnote{R.S.O. 1990, c. B.14. While this is a situation where the BIA or the Ontario fraudulent preferences legislation could have “potentially” applied, it is submitted that the matters in issue in *Sidaplex* do not suggest such an obvious application of those statutes that the oppression remedy should be precluded.} The Court of Appeal (reversing the decision of the trial judge) held that the statute applied and that the transaction in question was void as against the complainant as a result of the statute. The court directed a trial of the issue as to whether the complainant had waived its entitlement to a remedy under the *Bulk Sales Act* (pursuant to which the buyer would be personally responsible to the creditors of the corporate respondent for the value of the stock taken in possession from the sale). Therefore, based on the court’s conclusion, the oppression remedy should not have been available. Unfortunately, the court did not consider the possibility that relief under the oppression remedy should be limited where other relief was available.
(b) Maintaining the Distinction Between Personal and Derivative Claims

As explained above, there are valid reasons to maintain the distinction between personal and derivative claims. For example, when the oppression remedy is used for what amounts to an essentially derivative claim, the remedy can cause prejudice to the corporate stakeholders who are not party to the proceedings. Further, if the oppression remedy is universally available, the procedural safeguards which were put in place to prevent abusive proceedings will be too easily circumvented. For this reason, when a creditor’s claim is a derivative one, the statutory derivative action should be used to the exclusion of the oppression remedy. Where necessary, the derivative action could be amended to remove any unnecessary differences between it and the oppression remedy.

(c) Only Creditors Harmed by the Oppression Should be Able to Claim

Some of the cases discussed above have had to consider who constitutes a “creditor” for the purposes of making a claim under the oppression remedy. The case law on this subject is somewhat confused. However, it is suggested that the only relevant test is whether there is a connection between the impugned conduct and the creditor in question such that the conduct has been unfair or prejudicial to that creditor.

Obviously, if there is no debt owing either before or as a result of the impugned conduct, the creditor should not be able to make a claim under the oppression remedy (e.g. see First Edmonton). The reason is simple: in such a situation, the creditor has not been prejudiced or treated unfairly by the impugned conduct. There is no connection between the impugned conduct and the creditor and hence, no oppression. However, it is submitted that it should not matter whether the complainant’s status as creditor arose before the unfair or prejudicial conduct or as a result of it. Even if a complainant becomes a creditor as a result of oppressive or unfair conduct, he or she should be able to make a claim if there is a connection between the conduct and the oppression suffered by the creditor.

502 See PART II: Chapter 4: Section C, “The Breakdown of the Distinction Between Personal and Derivative Actions”.
503 See MacIntosh, supra note 31 at 68-70.
The most difficult issues will continue to be those relating to contingent and unliquidated claims. The problem is not a novel one, however, and it can be treated in a similar fashion to the approach taken in the bankruptcy context.\textsuperscript{505}

(d) Some General Limitations

Two other limitations are suggested. First, a distinction should be made between voluntary and involuntary creditors. The major thrust of the arguments in this chapter has focused on the fundamental difference in the nature of the relationship that a creditor has with the corporation when compared with the relationship a shareholder has with the corporation. This difference may not exist where involuntary creditors, such as tort plaintiffs, are concerned. Such persons are often "in a position analogous to minority shareholders".\textsuperscript{506} Therefore, it is submitted that involuntary creditors should be treated in a manner that is more consistent with the broader approach under the oppression remedy that is used for shareholders.

Secondly, the decisions to date in which creditors have been successful in obtaining relief under the oppression remedy have all related to claims against companies that are closely held companies, i.e., where the distinction between ownership and management has been blurred. The use of the oppression remedy by creditors in the context of larger companies that have a clear distinction between ownership and management will likely raise issues that have not been considered in this thesis. Therefore, the principles developed in the context of closely held companies should be cautiously used when applied to widely held companies.

\textsuperscript{504} Supra note 139.
\textsuperscript{505} See BIA, supra note 145, s. 135, which provides that the trustee in bankruptcy determines whether any contingent or unliquidated claim is a claim that is provable in bankruptcy and the trustee values the claim. The trustee’s determination is conclusive unless the creditor appeals the trustee’s decision within the delay provided under the BIA. Obviously, in the context of an oppression claim, the court rather than a trustee in bankruptcy would determine whether the claim is sufficient for the complainant to have a "provable" claim as a creditor under the oppression remedy.
\textsuperscript{506} See Levy-Russell, supra note 252 at 190-191, para. 31.
(3) The Standard Used to Assess Oppression Claims by Creditors

(a) Introduction

If creditors are granted standing under the oppression remedy – even in the restricted sense outlined above – then the standard against which the impugned conduct is measured must be different than the standard that would otherwise apply. If not, then the oppression remedy would have no useful application to creditors’ claims. Therefore, once it is accepted that creditors can use the oppression remedy, it is necessary to consider the standard against which the impugned conduct will be measured. However, at the risk of being repetitious, the many differences between shareholders’ and creditors’ claims suggest that the substantive standard that has been adopted for shareholders’ claims may not be appropriate in the context of creditors’ claims.

The challenge is to determine a justifiable basis for assessing what constitutes “actionable oppression” for creditors since not all oppressive, unfair or prejudicial conduct can be actionable. This is especially true in the context of creditors. For example, as discussed above,507 it is an accepted part of company law that corporations should be allowed to act in certain ways that can have negative consequences for creditors. However, even here, recent developments are creating some limits on the ability of companies to act in a manner which is harmful to their creditors.508

(b) Should the Reasonable Expectations Analysis be Used in the Context of Creditors’ Claims under the Oppression Remedy?

The most recognized standard for assessing conduct under the oppression remedy is the reasonable expectations analysis which was developed in the context of shareholders’ claims. It has since been applied in the context of creditors’ claims under the oppression remedy. But should it be used in this context?

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507 See, above, text accompanying note 384.
508 This was considered, above, in the discussion on “insolvent trading”, in PART II: Chapter 5: Section B, subsection (5)(e) “Liability for Insolvent Trading “.
In the shareholder context, "reasonable expectations" have been given a broad interpretation in order to "fill in" what are considered to be gaps in the formal legal rights between the disputing parties. The courts have used the oppression remedy to supplement shareholders' strict legal rights with equitable rights (e.g. see Ebrahimi).\textsuperscript{509}

When the courts use the oppression remedy to protect reasonable expectations, they are able to interpret the parties' agreements in the context of their relationship and, by doing so, they are in a position to consider and protect the parties’ true intentions. In this way, the courts can impose their view of a fair agreement/relationship, or their view of whose reasonable expectations should be protected in the context of the parties' particular relationship, in order to prevent things such as abuses of power.\textsuperscript{510} But it is important to remember the reasons why the courts have been called upon to protect shareholders' reasonable expectations in this fashion. They do so because of the history of abuse of minority shareholders and the nature of the shareholder-company relationship.

However, as argued above, the nature of the creditor-company relationship is such that the type of abuse suffered by shareholders does not generally apply to creditors, partly because creditors are better able than shareholders to protect themselves from abuse. Furthermore, in the field of commercial transactions, if there has been any systemic abuse of a "weaker" party, it has been debtors and not creditors who have usually suffered. Creditors have ample opportunity to obtain the necessary protection in case of their debtor's default. As a result, abuses of the corporate structure by debtors have been relatively limited and, generally, they are adequately dealt with by other remedies. Therefore, it may not be appropriate to use the oppression remedy to protect creditors' "expectations" in the same broad manner as it is used to protect shareholders' expectations.

An example helps to illustrate this point. In First Edmonton, McDonald J. suggested that, in order to determine whether the reasonable expectations of the lessor had been violated, the court should inquire into whether the lessor had intentionally contracted with the corporate respondent alone and whether the lessor intentionally decided that it

\textsuperscript{509} See Chapman, \textit{supra} note 2 at 187-188.
\textsuperscript{510} See a similar analysis in the context of contractual interpretation in Swan \textit{et al.}, \textit{supra} note 161 at 698.
would not obtain personal guarantees from the company’s three directors/shareholders. McDonald J. also suggested that another important question of fact was whether, at the time of contracting, the lessor was aware that the corporate respondent (a numbered company) might pay out the cash advance to the directors/shareholders, leaving it with no other assets, and that the court would want to determine whether the landlord was aware that the numbered company would permit the directors/shareholders to occupy the space without entering into a sublease.

It is submitted, however, that there are simply no reasonable expectations of the creditor-lessee that should be protected in this situation. Nothing short of actionable misrepresentation (or perhaps a claim in restitution, if one were available) should be sufficient to allow a landlord to make a claim against the directors/shareholders of the corporate respondent. A landlord who is aware that the company with which it is contracting (in this case, a numbered company with no assets!) may default, but which nevertheless fails protect itself, should have no recourse under the oppression remedy. The oppression remedy simply should not be available in these circumstances.

In First Edmonton, McDonald J. held that in determining whether a creditor’s expectations are reasonable, it is necessary to consider whether the creditor could or should have protected itself. McDonald J. wrote that:

…the test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectations of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor.  

In the above example, the landlord simply failed to protect itself from clearly foreseeable harm. When a creditor is concerned about the ability or the likelihood that its

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511 Supra note 139 at 152-153.
512 Ibid. at 147 [emphasis added].
debtor will perform, it can and should protect itself in a number of ways, the most obvious of which is to obtain a guarantee.\textsuperscript{513}

Therefore, the application of the reasonable expectations analysis should be much more circumscribed for creditors than it is for shareholders and it is only where a creditor has taken all reasonable steps to protect itself from foreseeable harm that the reasonable expectations analysis should come into play at all.

\textbf{(c) Tentative Suggestions for Developing a Satisfactory Standard}

Whatever standard is ultimately adopted, the above arguments suggest that greater emphasis should be placed on creditors' ability to protect themselves. For example, where the problem faced by a creditor could have been avoided through standard business practice such as a letter of comfort (see \textit{Leigh Instruments})\textsuperscript{514} or a guarantee (see \textit{First Edmonton}),\textsuperscript{515} then the creditor should not be able to use the oppression remedy.

Future cases must focus not only on the effect of the conduct on the creditor, i.e., the detriment to the interests of the creditor. The courts must also take into consideration the extent to which the acts complained of were foreseeable and the opportunity the creditor had to take reasonable commercial steps to protect itself. The courts must not simply pay lip-service to this requirement. Rather they must seriously consider the actions of the creditor (or the creditor's failure to act), so that an effect which was reasonably foreseeable is simply not considered to be unfair or prejudicial. To paraphrase the words of Farley J. in the \textit{Hordo} case, debt actions should not be routinely converted into oppression actions\textsuperscript{516} and, as Blair J. suggested in \textit{Sidaplex}, where there is no showing of bad faith or lack of probity, the cases where a creditor can seek relief under the oppression remedy should be "rare".\textsuperscript{517}

\textsuperscript{513} In the context of a closely held company, the guarantee would be given by the directors/shareholders. In the context of a public company, the guarantee would be given by a parent or sister company or majority shareholder.

\textsuperscript{514} \textit{Supra} note 349.

\textsuperscript{515} \textit{Supra} note 139.

\textsuperscript{516} \textit{Supra} note 191 at 92.

\textsuperscript{517} \textit{Supra} note 133 at 404.
Finally, it should be noted that in the context of shareholders’ claims, the reasonable expectations that are protected may change over time as a result of relational factors. In the context of creditors’ claims, if any “expectations” are to be protected, they should be limited to those arising from the circumstances in which the creditor’s relationship with the corporation arose,518 except where similar relational factors (or other conduct by the debtor, such as representations) would justify changes to those expectations over time. As discussed above, it is likely that it will only be in exceptional cases that a creditor-company relationship will include such relational factors.

518 See First Edmonton, supra note 139 at 152.