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SHAREHOLDERS' REMEDIES

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1. Action by Shareholders

The central issue in shareholders' actions is the shareholder's *locus standi*. Gower remarks that while fellow partners may call another partner to account, a director's duties are owed to the company and not to the shareholders, who thus do not normally have *locus standi* to complain of the director's breach.[1]

The director's duty being to the company, the company itself has the right of action for the breach, but unless there were some way of circumventing the fact that a board of directors will not instigate action against itself, both the company and the shareholder would be without remedy.

While the shareholder may exercise control over the board through the general meetings of the company -- the principle of majority rule -- this is no solace to a minority group, nor does it give the individual shareholder a right to bring an action for a wrong done to the company.

This disability of the individual shareholder or minority group of shareholders is the so called rule in *Foss* v. *Harbottle*.

2. The Rule in *Foss* v. *Harbottle*[2]

Really the so called rule is a compilation of dicta from a number of cases. However, for clarity it might be useful to review *Foss* v. *Harbottle* itself. The Victoria Park Company had been formed with a view to developing certain land as a housing estate. The defendant directors of the company had bought a large portion of the lands in question and resold them to the company

at a substantial profit. Sir James Wigram, V.-C., then stated the principal allegation of the plaintiffs:[3]

> One ground is that the Directors of the Victoria Park Company, the defendant Harbottle . . . have in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or rather taken to themselves out of the monies of the company a price exceeding the value of such lands . . ..

To this the defendants demurred claiming that the plaintiffs could not sue in their own name or in that manner sue on behalf of and represent the company itself. The Vice-Chancellor agreed:[4]

> Since the shareholders [the supreme governing body] retain the power of exercising the functions conferred upon them by the Act of Incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the Plaintiffs on the present record. This in effect purports to be a suit by a cestui que trusts complaining of a fraud committed or alleged to have been committed by a persons in the fiduciary character. . .. Now, who are the cestui que trusts in this case? The corporation, in a sense, is undoubtedly the cestui que trust ; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bond.

A succinct statement of the the effect of the rule was given by Jenkins L.J. in Edwards v. Halliwell:[5]

> "The rule in *Foss* v. *Harbottle* . . . comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or associations is in favour of what has been done, then *cadit quaestio*".

The rule stands for (1) majority rule in corporations, (2) the principle that courts will not interfere in the internal disputes of corporations, and (3) that the company is the proper plaintiff to seek redress for a wrong done to it.[6]

At a glance the real difficulty for minority shareholder becomes apparent. If the wrongdoers are in control of the company, and only the company can sue for a wrong done to it (but substantially affecting the rights and investments of the minority), how is the minority to get its remedy? This aspect of the problem has been well elucidated in the Lawrence Committee's Report.[7]

> While the corporation's personality may be a fiction, as an economic organization it has a reality of its own. It follows, therefore, that a wrong done to a company results in injury to it in a direct and real sense. At the same time, injury has occurred, in an indirect sense, to the shareholders of the company, as the value of their investment may thereby be reduced. Therefore, one of the substantial problems arising out of the Rule in *Foss v. Harbottle* is—who shall determine and instigate what action or proceedings, if any, the company shall take to redress a wrong done to it?

> "7.3.4. It is absolutely essential to an understanding of the Rule and the difficulties which surround it to understand that under English law the decision whether or not to sue in the corporate name belongs to the general meeting of shareholders where the majority rule applies. The principle of the supremacy of the majority is fundamental to corporation law and is expressly stated in the Ontario Act (s. 79(1)(c); see also *Noble v. Cameron* [1955] O.R. 608 (C.A.)). The principle is that persons who acquire shares in a company are deemed to have agreed to submit themselves to the decision of the majority at shareholders' meetings in respect of all matters which are within the competence of such meetings. The majority rule principle is significantly strengthened by the further principle that a director is not disqualified in voting as a shareholder on a resolution to approve a contract that he has entered into with the company (*North-*

> *West Transportation Co. Ltd. v. Beatty*](1887), 12 App. Cas. 589 (P.C.)). In fact, in his capacity *as a shareholder,* he can use his voting power to ratify a breach of his fiduciary duty. Since under United Kingdom law the power to commence proceedings in the company's name is vested in the shareholders in general meeting, it can readily be seen how the 'majority rule' led to the decision in *Foss v. Harbottle.* [If the company, as represented by a majority of the shareholders, considers that a wrong has been done to the company, it can bring appropriate action. On the other hand, if the company, as so represented, does not consider that it has been wronged, no proceedings need be taken.]. .

The Report, above, notes that the affect of the decision in North-West Transportation Co. Ltd. v. Beatty[8] is to reinforce the power of the directors to exclude actions in the companies name by the shareholders in general meeting. The Lawrence Report considered this aspect of the route even more critical in Ontario than in England, because residual management power in a letter patents type company does not rest in a majority of the shareholders in general meeting as the English registration type of company (a debatable point) but is clearly conferred upon the directors as an incidence of management powers. "And nothing is more germane to the management of a company than the decision to sue, or not to sue, on the companies behalf." (Lawrence Report, 7.3.5.).

The Select Committee saw this difference in corporation law as potentially frustrating the exceptions to the rule:

> "7.3.6. This significant distinction between the United Kingdom and the Ontario law considerably confuses the application of the Rule in *Foss v. Harbottle* and the so-called 'exceptions' to the Rule, to which reference is made below. If the will of an Ontario company is the will of a majority of the directors rather than a majority of the shareholders, the availability of the 'exceptions' to the rule whereby an action can be brought by a shareholder on behalf of the Ontario company to remedy a wrong done to the company is clearly frustrated by the fact that the wrong is likely to have been done by one or more of the directors who themselves, as managers, determine whether or not the suit shall be brought.

Although the distinction is undoubtedly correct in theory, in practice most registration type companies give up the residual power to manage to the directors by a provision in the articles: see Article 55 of Table A in the Alberta Companies Act.[9]

3. Exceptions to the Rule in Foss v. Harbottle

As the Lawrence Report, supra., notes, the "rule" and the "exceptions" thereto are often confused. The rule is simply that the majority of members voting in the general meeting may determine whether or not the company shall commence action against the directors for a wrong done to it. The exceptions are three in number, and the statement by Jenkins L.J. in Edwards v. Halliwell[10] has been rephrased and approved in Canada in the following words:[11]

> "I. The majority cannot confirm an act which is ultra vires or illegal.
>
> II. The majority cannot confirm an act which constitutes a fraud against the minority where the wrongdoers are themselves in control of the company.
>
> III. The majority cannot confirm an act which can only be validly done or sanctioned, not be a simple majority but by some special majority; otherwise the company could de facto do by simple majority something which required a special majority."

In these situations the individual shareholder may sue as plaintiff to enforce a right of the company, provided, however, that four conditions precedent are fulfilled. Addy, J. in D'Amore v. McDonald, supra, summarized these conditions, on the basis of a statement in Buckley on Companies:[12]

1. The right must be one which the company itself could assert.

2. The shareholder suing must have exhausted all the reasonable means of obtaining the institution of an action before suing for the company.

3. The alleged wrongdoers must turn the scale of the majority.

4. The wrongs sought to be redressed must be fraudulent in character in the sense that those committing the alleged acts must be endeavoring to secure either a direct or an inderect advantage over the shareholders or else the acts complained of must be incapable of ratification by reason of the fact that they are ultra vires or that they require a special majority which has not been obtained.

4. Cases on the Rule and the Exceptions

Though it appears at first glance to be a simple rule with clear-cut exceptions, in fact Foss v. Harbottle has led to no end of problems in its application. Not only is it surrounded by a procedural thicket that was not intended by Wigram V.-C.[13] but it is with emphasis on the rule rather than the exceptions that the courts have approached the cases. In this sense the rule represents the accumulation of dicta from subsequent cases that reinforce the principle of majority rule as an overriding consideration.

One of the earliest cases in which the court refused to involve itself on the principle of majority rule was Macdougall v. Gardiner.[14] At a shareholders' meeting the chairman had ruled that a motion for adjournment was carried on a show of hands alone, the polling provision in the articles not being applicable to adjournments. The plaintiff commenced an action on behalf of himself and all other shareholders to

enjoin the directors from entering into a proposed transaction, and alleged that calling a meeting would be useless since the defendants "would again be able to break up . . . the said meeting by improperly deciding that it was adjourned by a mere show of hands held up by a few friends . . . ." At the Court of Appeal James L.J. said:[15]

> **James L.J.:** . . . Everything in this bill, as far as I can see, if it is wrong is a wrong to the company, because every meeting that is called must be for some purpose or other—it must be for the purpose of doing or undoing something which is supposed to accrue for the benefit of the company. Whether it ought to have been done, or ought not to have been done, depends upon whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the thing should be done, or should not be done, or left unnoticed. I cannot conceive that there is any equity on the part of a shareholder, on behalf of himself and the minority, to say, "True it is that the majority have a right to determine everything connected with the management of the company, but then we have a right—and every individual has a right—to have a meeting held in strict form in accordance with the articles." Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view? That is an equity which I have never yet heard of in this court, and I have never known it insisted upon before; that is to say, that this court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *viva voce* at a meeting of the shareholders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the shareholders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back to a question of internal management;

Mellish L.J. concurred in these words:[16]

> In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that,

> as I understand it, is what has been decided by the cases of *Mozley* v. *Alston* (1847), 1 Ph. 790, and *Foss* v. *Harbottle* (1843), 2 Hare 461. In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself.

An Ontario case, decided in the Privy Council--North-West Transportation Co. Ltd. v. Beatty[17]--was perhaps the most important decision in giving an overriding consideration to majority rights in a company. Plaintiff Henry Beatty, a shareholder, sued on behalf of all the shareholders except the defendants to set aside the sale of a steamship to the company by defendant director James H. Beatty. The sale had been approved by the board of directors and by the shareholders in general meeting in which the defendants' votes, as shareholders, had swung the balance. The Supreme Court of Canada agreed with the plaintiff that this was an oppressive use of the defendants' voting power that invalidated the bylaw. But the Judicial Committee of the Privy Council disagreed, and found the voting of these shares to be a valid exercise of a shareholder's rights although "the matter might have been conducted in a manner less likely to give rise to objection." A statement with a hollow ring to it indeed.

Sir James Bagalley stated the law as follows:[18]

> The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

> On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.

The rule of majority rule in corporate decision making has been extended even further in Hogg v. Cramphorn,[19] which stands for the proposition that a majority may still ratify an act of the directors that was undertaken for an "improper purpose" (though otherwise within the powers of the company). To prevent control of the Cramphorn company from falling into the hands of one Baxter, an outsider, the board of directors devised a scheme whereby the company established a trust of preference shares, attaching ten votes per share. The defendants were the trustees, and they now had sufficient voting power to defeat any take-over scheme. The plaintiff alleged that the scheme was ultra vires. Buckley J. held that this was a breach of the directors' fiduciary duties since the allottment was for an "improper purpose" even though the board was acting in the bona fide belief that it was for the benefit of the company. However, he held the door open for the company to validate the allottment in general meeting, which the company proceeded to do.

The net effect of these decisions is that a board of directors which can effectively control the largest number of votes at a general meeting, is practically immune from attack by minority shareholders. Where a minority might successfully complain of a fiduciary breach by the directors, the directors-qua-shareholders might successfully pull themselves out of this difficulty. This last statement must be qualified to the extent that the fiduciary breach is not perceived as a direct fraud on

the minority. In the U.S. the courts have signalled an attempt to remedy this situation at least in so far as close corporations are concerned by imposing a fiduciary duty of "utmost good faith and loyalty" on controlling shareholders "to protect minority stockholders from abuses arising from the conjunction of management and ownership in controlling groups."[20] However, this approach is useful only where shareholding is restricted to a very small number of persons who have entered the company on the same footing. It is, however, clear that especially the minority shareholders of private companies need better protection than the exceptions to the rule in Foss v. Harbottle can offer. In large publicly held corporations the position of the shareholder is, in terms of the Berle and Means study[21] more investor than capitalist-owner, and he has a ready escape hatch in the securities market.[22] The real protection, Stanley Beck asserts as does the Massachusetts Supreme Judicial Court, is required for the minority shareholder in private companies. Beck writes:[23]

> The private minority shareholder is not in so secure a position. In law and in practice he is treated as a rugged individualist. There is no securities legislation with a host of proscriptions, commands and remedies upon which he can rely and neither do securities commissions, financial institutions, independent financial analysts, and large, sophisticated investors maintain watch for him and stand ready to help him. He must be his own watchdog and seek his own remedies. And if a remedy is not available then he should realize that "he is a minority shareholder and must endure the unpleasantness incident to that situation".[5] For this reason much of the reform of the corporation Acts should be directed toward giving adequate protection to the private shareholder. It is not necessarily so directed, but that is often one of its primary effects. That is, from a purely company law aspect the rights and remedies that are written into the statutes are as equally available to the public as to the private shareholder—the public shareholder is as limited in the company law remedies he can pursue as is the private shareholder. But for the reasons adverted to above, it is to the private shareholder that adequate avenues of redress are most crucial.

Beck continues:[24]

> But shareholder litigation has, through variations on the theme of the rule in Foss v. Harbottle, proved to be a narrow, hazardous and generally unsatisfactory remedy. Moreover,attempts to encourage shareholder litigation and clear the procedural thicket that all

but blocks the entrance to the courts have not, until recently, received much support.

The "procedural thicket" is partly a result of the difficulty of delineating the line between personal and derivative actions. The rule, of course, has no application to rights of a shareholder that are purely personal rights.[25] There is no problem in applying the "ultra vires" and "special majority" exceptions to the rule, but whether a particular corporate act amounts to a fraud on the minority generally or to a specific interference with a personal shareholder right given by statute or by the terms of the contract with the company is much more difficult to determine.[26]

5. The Personal Action

Since recovery is a successful derivative suit belongs exclusively to the corporation[27] and, until quite recently, there was no right of indemnification for legal costs incurred by the initiator of a derivative action[28] the shareholder who has been damnified by some corporate act should, wherever possible, frame his action as a personal one. Beck lists a number of purely personal rights of a shareholder - the right to receive timely and informative notice of meetings, the right to vote thereat, the right to have a properly executed proxy accepted, the right to inspect those records which the Companies Act makes available to shareholders.[29] Beck states:[30]

> It might be thought that the line between personal rights and corporate rights would be well and clearly drawn. There is after all not much confusion between being denied the right to vote and a taking of property which depletes the corporate treasury. Between those two poles, however, there is uncertain ground and it is suggested that the personal rights category is in fact much broader than has been thought to be the case.
>
> The reason for the confusion and for limiting personal actions stems from the idea that all wrongs committed by corporate directors and officers, and all duties owed by them, run exclusively to the corporation. The fictional legal entity is viewed by the courts as an unbreachable barrier behind which the directors are safe from personal shareholder attack. Moreover, acts by the

> directors which could readily be construed as their own personal acts are invariably seen as corporate acts. All of which is a natural result of the fact that a company acts only through its board of directors and, occasionally, its shareholders. But a director acts in a variety of capacities--as an agent of the company, as the company itself, and as an appointed officer to carry out such formal functions as running the proxy machinery and calling and conducting meetings. If a functional analysis were given to the directors' actions in each case it is suggested that it would lead to a result that would accord more with reality while widening the ambit of the shareholders' personal action.

In American jurisprudence, the more realistic view of the ambit of the derivative action pervails: see, for example, Perlmam v. Feldman.[31]

Beck suggestion for a "functional analysis" of directors' actions is based on the descending judgment of Fuld, J., in the New York case of Gordon v. Elliman[32] in which the majority held that failure to pay dividends in fraud of the minority to effect a freeze-out was a derivative action requiring security for costs, and not a personal action. Fuld J., stated:[33]

> "I am . . . unable to follow the legal alchemy by which a breach of duty by the corporation -- a corporate wrong is trasnmuted into a corporate right.
>
> The vice of the test is that it presupposes that in every duty owed by corporate directors runs exclusively to the corporation as such and never directly to the stockholders in their personal and individual right. The law is otherwise.
>
> ". . . it simply is not the law that an attack on directors' conduct is, ipso facto, the assertion of a corporate right of action. The mere fact that the power to declare dividends resides in the directors and that a suit to compel a dividend payment challenges directors' action has no bearing on the question of whose right is involved in such a suit. We must seek

> elsewhere to ascertain the manner of the 'right' that a court enforces when it overules the decision of corporate directors . . ..

Beck suggests that the question of whether or not a fiduciary breach of the directors gives rise to a derivative or a personal action if best approached "by asking who, in reality, is the aggrieved party and not by the mechanistic application of the formula that the director is an agent, the company is the principal and therefore action for fraud, negligence or irregularity lies only at the suit of the directors."[34]

> "Most cases of fraud will clearly involve a taking by the director to the detriment of the company and the company is the only proper complainant. But a variety of other cases in which the directors act improperly involve not a breach of duty by the agent but a causing of the company to perform a corporate act in an improper or irregular manner to the direct detriment of the shareholders and for which they ought personally to be able to sue.

As an example of a proper case for a shareholder to be able to sue personnally Beck suggests to the wrongful issuance of shares, in which the company is only theoretically injured by the directors' misuse of power. Citing American authority[35] Beck states that such an issuance, although a breach of fiduciary duty, does not necessarily mean that the right of action lies with the company, but rather with the real aggrieved party, the shareholder whose personal contractual rights have been interferred with through a tainted allotment of shares. Beck suggests that in fact the English and U.S. jurisprudence is closer than first appears in the cases dealing with an invalid issuance of shares:[36]

> The line of cases from Piercy v. Mills [1920] 1 Ch. 77 and Punt v. Symons [1903] 2 Ch. 506 that deal with an invalid issuance of shares

> do not give any clear guide as to whether they were considered to be personal or derivative actions. The form of the action was usually representative (as it may be when personal rights are being asserted, and as it must be in a derivative suit) and the company and the wrongdoing directors were joined as defendants, so an argument for either cause of action is plausible. With one exception, however, there is no discussion in all these cases of the procedural necessities of the derivative action, or indeed any mention of the derivative action as there invariably is in the true derivative suit. In fact, Piercy v. Mills was an individual shareholder's action and it is submitted that each of the other cases where also personal actions brough in representative form.

However, Beck's analysis of the cases makks it clear that the availability of the personal action in a tainted issuance question is to be deduced, and by no means clearly stated in the cases, although some Australian decisions are more explicit on this point.[37]

Finally, the issue of whether an particular action is derivative or personal becomes more confused when a corporate right of action co-exists with a personal right of action, so that the same allegations of fact, -- the same pleadings support both a derivative and personal action.[38]

6. Procedural Problems

Beck states:[39]

> "The distinction between a personal and a derivative action becomes more acute if leave of the court is required to commence a derivative action. A personal action brought in representative form cannot be turned into a derivative action merely by asking that it be so treated is the plaintiff is faced

> with a motion for dismissal on the basis that the cause of action belongs exclusively to the company. Nor will the court grant a request by the plaintiff on the hearing of such a motion that leave be granted nunc pro tunc."

This, at least, is the holding of the Ontario courts in interpreting the effect of s. 99 of the O.B.C.A. So the Divisional Court held that all derivative actions are embraced by these provisions, "which provide an exclusive code for their conduct in Ontario."[40] While the other new companies acts have enacted similar provisions[41] to help overcome the procedural difficulties associated with the derivative action, in three respects the problem has been aggravated. So in the borderline case where a person may quite legitimately commence an action as a representative action claiming on behalf of the company, only to find in the course of the action that the relief claimed is personl, if he is out of time he may be precluded from obtaining that relief by simple amendments to the pleadings. In the other case, where a borderline case has been begun as a representative action claiming personal relief, if no simple amendment is possible, time and money will have been wasted. And finally, in the case where an action is properly maintained for both personal relief and relief for the company, separate actions are required.

It should not be taken from these remarks that Ontario' statutory remedy is appropriate. Indeed, Beck, who has indicated some of the shortcomings of the section writes:[42]

> It seems clear that the section was intended to be a code for the expansion and control of the derivative suit....It would only lead to confusion to allow both common law and statutory actions. A more orderly development of the law would result from the one point of access to a derivative action and would allow for a body of experience and precedent to be built up to guide shareholders.

However, the criticism that may be levelled at the Ontario section is that it does not take into account the grey area between a shareholder's personal contractual rights and his rights to sue on the company's behalf. In that sense it restricts the scope of the remedy rather than permitting it to be employed expansively and flexibly. While the requirement that leave of the court be obtained in order to commence a derivative action, I can see no reason to make this a provision restricted to the commencing of such proceedings. The requirement should be expanded to permit a court to grant leave to continue proceedings nunc pro tunc as a derivative action where the same criteria are fulfilled as would be fulfilled if the matter were commenced as a derivative action.

7. Scope of the Statutory Remedies

(i) Ontario

Section 99 of the O.B.C.A. does not change the form of the derivative action from the common law (i.e. the shareholder sues representatively joining the company in as a nominal defendant) but introduces the requirement of leave of the court.

Leave may be applied for:

1) on 7 days' notice to the corporation
2) if the shareholder was a shareholder at the time the cause of action arose
3) the shareholder has made reasonable efforts to cause the corporation to commence or prosecute diligently the action on its own behalf (this would catch the case in which an action is started merely to delay and still a dissident shareholder)
4) the shareholder is acting bona fide
5) the action is prima facie in the interests of the corporation or its shareholders

It is to be noted that the right to bring a derivative action is restricted to a present shareholder under s. 99(1) who must also have been a shareholder at the time the cause of action arose: s.99(3)(a).

Provision is made for interim costs to be granted to the plaintiff in s. 99(4). This section avoids the very grave problems that have hindered plaintiffs in derivative actions in years past. Although the equitable jurisdiction of the courts in England has now been expanded to permit a successful plaintiff to be indemnified by the company[43] it appears that the courts on their own have not yet gone to the extent of granting interim costs.[44] The unsuccessful plaintiff, of course is accountable for costs on final disposition.

(ii) British Columbia

Unlike Ontario, the B.C. statute changes the form of the derivative action from the common law. S. 222 of the British Columbia Companies Act provides that where leave of the court has been obtained a "member or director" may bring an action "in the name and on behalf of the company."

While the addition of "director" broadens the scope of the section slightly, the change in the style of cause would create difficulties if the scope were to be given to amend a personal action against the company into a derivative action. The addition of "directors" is significant insofar as it permits an action to be brought be a person who need not have been one of the members of the company at the time the cause of action arose.

In all other respects the conditions precedent for obtaining leave of the court are identical to those in Ontario. The provisions with respect to interim costs and costs on final disposition, including solicitor-client costs, are similar to Ontario's.

(iii) The Canada Business Corporations Act

Section 232 of the C.B.C.A. regulates the bringing of a derivative actions, and grants further broad discretionary powers to the court under s. 233.

The C.B.C.A. follows the B.C. Statute as to the form of the action ("in the name and on behalf of a corporation") but grants powers to bring the action to a "complainant."

"Complainant" is defined very broadly in s. 231 to include shareholder, debenture holder, former shareholder or debenture holder, director, officer, former director of officer, the Director or any person deemed by the court to be a proper person. In paragraph 480 of his report, Dickerson acknowledges that the term "complainant" is taken from the Jenkins' report. He states: "no specific reference is made on the definition of "complainant" to legal representatives of a deceased shareholder, notwithstanding the express recommendation to that effect by the Jenkins' committee, since he thinks it better, rather than attempt to list all the persons who might acquire ownership of shares by operation of law, to give the court discretion to determine who is a proper person to make an application."

The notice requirement is less exact than in Ontario, being only "reasonable notice."

The other conditions precedent are substantially as in Ontario. However, instead of requiring a prima facie case to be made out that the action is in the interests of the corporation, the C.B.C.A. merely requires that it "appears" to be in the interests of the corporation or its subsidiary. Whether this difference in wording will be judicially interpreted as requiring a different standard remains to be seen.

An important new development in Anglo-Canadian company law is contained in s. 233(c), which, as one of the broad discretionary powers of the court in a derivative action, allows the court to direct the payment of damages normally accruing to the company in a derivative action to the damnified shareholders. This is intended, obviously, to catch the Perlman v. Feldman[45] situation. However, it goes further than the U.S. courts did in that case, because it allows recovery for former shareholders as wll. The ramifications of this particular extension of the law are not yet clear. Where a wrongdoer remains incontrol and is himself the transferee of sha probably acquired at a lower price because of the wrongdoing, then the case for a direct recovery by the former shareholder is fairly clear. What, however, of the case where the transferee is a third party who has bought the shares with the knowledge of their potentially enhanced value through recovery in a derivative action? Potentially, he stands to be deprived of that recovery. One might say that this is properly so, particularly since the person who suffered the damage was the shareholder whose selling price was impaired by wrongdoing. How far back should such recovery be allowed? The C.B.C.A. sets no guidelines for the discretion of the court. Before such a section is adopted, the question of clear guidelines should be considered.

A further novelty of the C.B.C.A. is the discretion of the court to order the corporation to pay the "reasonable legal fees" of the complinant. We note that this discretion is in no way tempered to placing the burden for final costs on the unsuccessful party, and that the corporation might find itself in the awkward position of having to pay a complete stranger in (a Naderite!) all the costs of prosecuting the corporation.

I am of the opinion that this is an unreasonable burden to place on any defendant, one, which without reasonable restraints, smacks too mucy of the sophomoric notion that corporations are faceless entities with inexhaustible coffers.

(iv) The U.S. Model Business Corporation Act

The Model Code has long enshrined the derivative action in statutory form. The conditions precedent of s. 49, however, are quite different from those adopted in the Canadian jurisdiction.

The plaintiff must be a shareholder and either must have been one at the time of the alleged wrongdoing, or must hold his shares from a person who was a holder of record at that time.

A value limit of $25,000 is placed on the holder's shares, which, if not satisfied, makes the plaintiff liable to give security for costs.

The unsuccessful plaintiff may be required to pay the reasonable legal expenses of the defendants if the action is found to have been brought without reasonable cause.

Both of the latter provisions seem designed to discourage "strike" suits.

The full text of s. 49 is reproduced below.

SECTION 49. PROVISIONS RELATING TO ACTIONS BY SHAREHOLDERS

No action shall be brought in this State by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of record of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder of record at such time.

In any action hereafter instituted in the right of any domestic or foreign corporation by the holder or holders of record of shares of such corporation or of voting trust certificates therefor, the court having jurisdiction, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the parties named as defendant the reasonable expenses, including fees of attorneys, incurred by them in the defense of such action.

In any action now pending or hereafter instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of record of less than five per cent of the outstanding shares of any class of such corporation or of voting trust certificates therefor, unless the shares or voting trust certificates so held have a market value in excess of twenty-five thousand dollars, the corporation in whose right such action is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with such action or may be incurred by other parties named as defendant for which it may become legally liable. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervenor, as of the date that he becomes a party to the action. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or is excessive. The corporation shall have recourse to such security in such amount as the court having jurisdiction shall determine upon the termination of such action, whether or not the court finds the action was brought without reasonable cause.

The fear that similar legislation would give rise to unwarranted "strike" suits in Ontario was clearly considered--and discounted--by the Lawrence Committee:

> "7.4.2. As is well known, derivative actions in company law matters are common in the various United States and are the subject of statutory attention in a number of important American jurisdictions. In many or most of the United States, the rules of ethics of State and local bar associations apparently permit lawyers to act in civil litigation on a 'contingency fee' basis. This has led to the so-called 'strike bar' in the field of derivative actions against corporations. Further, plaintiffs frequently threaten to bring derivative actions or in fact commence them solely for the purpose of provoking secret settlements with the companies even in circumstances where the action is not well founded. In the result, the derivative action has achieved a notable degree of unpopularity in Canada and elsewhere. There is no doubt that this unpopularity is merited in many instances as the actions which have been commenced are frequently of an harrassing nature, brought in the hope that a judgment will carry with it a substantial award for lawyers' fees and expenses as is expressly permitted by the statutes of many States. The Committee is satisfied, however, that the undesirable characteristics of the derivative action can be avoided and that the remedy is one which can and should be adapted to Ontario law and practice to serve as an effective procedure whereby corporate wrongs can be put right.

8. Case Law under the Statutory Derivative Action

Ontario's s. 99 has given rise to most of the case law under the new statutory derivative action.

Although the Lawrence Committee would make it seem otherwise, the basic thrust behind s. 99 is to provide procedural relief rather than a substantive remedy--since it does no more than to codify the common law right of derivative action.[46]

"7.4.3. The Committee therefore recommends that the Ontario Act be amended by adding a substantive provision to the effect that a shareholder of a company may maintain an action in a representative capacity for himself and all other shareholders of the company suing for and on behalf of the company to enforce any rights, duties or obligations owed to the company which could be enforced by the company itself or to obtain damages for any breach thereof. The Act should be further amended to set out the following procedural aspects of the substantive remedy. The shareholder should be required to sue in a representative capacity, it being clear that the judgment or award is to be in favour of and for the benefit of the company. As conditions precedent to the right to bring the action, the plaintiff should be required to establish that he was a shareholder of record at the time the wrong was alleged to have occurred and that he has made reasonable efforts to cause the company to commence or maintain the action on its own behalf. Further, the Act should provide that the intended plaintiff must make application *ex parte* to a judge of the High Court of Ontario designated by the Chief Justice of the High Court for an order permitting the plaintiff to commence the action. In practice, it can be assumed that the application will be supported by affidavit material which would include the draft writ of summons and statement of claim. The shareholder should be required to establish to the court that he is acting *bona fide* and that it is *prima facie* in the interests of the company or its shareholders that the action be brought. If, under proper circumstances, the court makes an order permitting the intended plaintiff to commence the action, no order shall be made as to security for costs although the judge would be free to make the order on such other terms and conditions as he sees fit. Keeping in mind, however, that the true plaintiff is the company, the nominal plaintiff should be permitted, while the action is pending, to obtain from a judge or the Master an order against the company for the payment of interim costs which would include, among other things, specified solicitor's and counsel fees. The plaintiff, of course, will be accountable to the company in respect of any such interim costs and, as is the case with any other plaintiff in our jurisdiction, runs the risk of the action being dismissed with costs against the plaintiff. In the opinion of the Committee, the Judicature Act would permit the judge at the trial to include in his judgment or order a provision that costs will be payable to the plaintiff as between a solicitor and his own client. However, if there is any doubt as to the correctness of this opinion or if there is concern that judges will not exercise their discretion to award such costs, the Act should specifically provide that the judgment rendered by the court can include an award to the plaintiff for his reasonable costs, including counsel and solicitor's fees and disbursements, incurred in maintaining the action. The Act should contain a provision comparable to that in the New York Business Corporation Law and in the law of many of the United States to the effect that any derivative action so brought shall not be discontinued, compromised or settled without the approval of the court, in the hope that 'secret settlements' shall not be made. (See also Rule 23(c) of the United States Federal Rules of Civil Procedure.)"

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However, the experience of the Ontario courts must lead us to have serious doubts as to whether the section really manages to cut through the procedural morass surrounding the derivative action, whether it does not in fact impose its own labyrinth.

Farnham v. Fingold[47] was the first case to deal with the section. The defendants, a tightly-knit group of controlling shareholders secretly negotiating to sell their control to outside interests at a premium above market value, brought an application to strike out the defendant's statement of claim as disclosing no cause of action. The plaintiffs had not obtained leave pursuant to s. 99 of the O.B.C.A. Morand J., who heard the application, dismissed the application:[48]

> "In my view, the class action is properly constituted."
>
> "The basis of this cause of action is the existence of a judiciary obligation upon a control group, which is owed to all other shareholders (as opposed to the company) in the sale of their shares. At common law the position seems to be that no such general obligation exists, but such a specific obligation might exist turning upon the special facts of each case."

The applicants appealed to the Court of Appeal. While not disagreeing with Morand, J., upon any principle of law alone, the Court of Appeal (per Jessup J.A.) did disagree that the allegations in the statement of claim were wholly concerned with rights, duties and obligations owed directly to the plaintiffs. On this mixed question of fact and law, the Court of Appeal found that some of the paragraphs in the statement of claim alleged duties that went to the company, not the plaintiff personally. Jessup J.A. held that "the very broad language of s. 99(1) embraces

all causes of action under any statute or in law or in equity, that a shareholder may sue for on behalf of a corporation."[49] In the result the plaintiffs were confronted with the need to issue two statements of claim separating the derivative from the personal causes, (and a third statement of claim against two brokers for conspiracy). At least the causes represented by the first two statements of claim could be jointed at trial. The third would be tried separately because it did not arise out of the same set of facts and give rise to plaintiff classes of shareholders whose interests were antagonistic.

The important dictum of the Farnham case was that part of the judgment giving a broad scope to s. 99. This was expanded in the web of a litigation cited as Goldex Mines Ltd. v. Revill et al,[50] a case that illustrates the problems surrounding the application of s. 99, of separating personal actions from derivative actions, of giving great discretion to courts in the area of shareholder remedies.

The facts of the case, as taken from the decision of Haines J. on three motions before him[51] may be summarized in the following manner:

1. Probe Mines Ltd.: a) authorized capital--7,000,000 shares
NPV: issued and outstanding--5,039,889

b) Properties: (1) Gypsum claims on the Alberta-B.C. bor
(2) Gold claims in Quebe

c) 5 directors, quorum of three
--Revill, Breukelman, Kitchin, Bendall
--dissident: O'Connor

2. Goldex Mines Ltd.:

- 350,000 shares of Probe

- held gold claims abutting Probe's in Quebec, and had an option on Probe's claims, which, if brought into production, it would acquire absolutely subject to a 50% royalty on net profits to Probe.

3. Murdo McLeod:

   - had originally stated Probe's gypsum claims, which he had transferred to Mountain Gypsum Ltd.

   - McLeod had 5,000 shares of Mountain Gypsum, Breukelman about 1,100, and Kitchin 1,000. Revill was also beneficially interested in this company.

4. Mountain Gypsum Ltd.:

   - had vended its gypsum claims to Probe for 500,000 treasury shares of Probe, these being held subject to an escrow agreement

   - the shares were to be voted according to the directions of a majority of Probe's board.

   - the shares were to be returned to Probe and the claims to Mountain Gypsum on the discontinuance of development or diminution of value of the claims.

5. Bowerman Investments Ltd.:

   - Probe director Revill was president of Bowerman, having 85% of the common and 100% of the preferred shares.

   - Bowerman had 50% of an option to purchase a further 900,000 shares of Probe

1972 was a crucial year for Probe. Goldex was in the process of tunnelling into the Probe gold claims, and at the same time exploratory diamond drilling on the Gypsum property was being completed. A report on this driling was received from a professional engineer, McGill. This report was to be the catalyst in this dispute.

At the director's meeting receiving the report (it had not yet been circulated prior to the meeting), it was agreed, and a resolution passed, that the synopsis of the report

presented by Breukelman indicated a substantial enhancement of the value of the property and that it was fair and equitable to the vendors and not contrary to Probe's interests to release the escrowed 500,000 shares. Breukelman and Revill having declared their interest in Mountain Gypsum, O'Connor and Bendall did not form a quorum to pass the resolution (the fifth director was absent).

O'Connor then reviewed the McGill report privately and was informed by McGill that in his opinion the claims were presently not economically exploitable. O'Connor dissented at the next directors' meeting which confirmed and approved the release from escrow of the 500,000 shares. At this point O'Connc aligned himself with the opposing shareholders headed by Goldex. O'Connor believed that the issue of the escrowed shares, being for an essentially worthless asset would dilute the value of existing shareholders' equity.

Meanwhile Goldex was working on the Probe claims and wanted representation on Probe's board of directors. No arrangement agreable to both Goldex and the existing board was arrived at.

To forestall a Goldex solicitation of shareholders, the majority directors of Probe--acting in concert with McLeod, the dominant shareholder in Mountain Gypsum--had a private strategy meeting to defeat the O'Connor-Goldex factions. A key piece to this plan was for McGill to revise the wording of his report so as to make a more positive interpretation of the report possible. McGill did this. The revised report was to be part of Probe's proxy solicitation material.

The next formal directors' meeting resolved to call a shareholders' meeting on a timetable which in fact, taking into account the intervening Thanksgiving holiday, gave shareholde

less than 5 business days to remit their proxies. It was virtually impossible for O'Connor to solicit his Irish clients. The following day Goldex started legal proceedings in the nature of a class action to enjoin the convening of the shareholders meeting among other things. The injunction was granted. Probe management rescheduled the meeting, and Goldex brought another representative action seeking to enjoin not only the meeting but also an injunction restraining the voting of the 500,00 escrowed shares at that meeting and the voting of any proxies solicited by the defendants (on the basis of failure to make full disclosure in the information circular sent out by the management). As a counter move Probe brought an action to have all proxies solicited by Goldex declared null and void as a result of fraud and misrepresentation. In the acrimony of the battle underway (Mr. Justice Haines' judgment goes into a great deal of detail on other serious allegations between the parties) it is easy to lose sight of the nature of these proceedings: they are only motions to continue interim injunctions, not a trial of the merits, and a motion to appoint an interim receiver.

Probe argued that since Goldex had not obtained leave pursuant to s. 99(2) of the O.C.B.A. the action could not succeed Mr. Justice Haines did not yet have the benefit of the decision of the Ontario Court of Appeal in Farnhan v. Fingold[52] and observe

> I would like to make the observation that interpreting s. 99(1) as the only way of commencing a derivative action would appear unduly harsn. My understanding of the common law in this area was that a shareholder was entitled, as of right, to commence a derivative action provided he could satisfy the requirements of Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189. Accordingly, it would seem more appropriate to apply the rule of statutory construction that common law rights are not held to have been taken away or affected unless it is so expressed in clear language or must follow by necessary implication.

He then granted the motions:[54]

> I have come to the conclusion that it is just inconvenient [per Judicature Act, R.S.A. 1970, c. 288, s. 19(1)] that the Clarkson Co. Ltd. be appointed interim receiver and manager of Probe....The circumstances of this case demonstrate that the existing Probe board cannot be relied upon to convene and conduct fairly and impartially an annual meeting, especially Revill, who as president would be chairing the meeting and ruling upon the validity of proxies. It is also very clear that McLeod had considerable influence over board decisions and I am concerned about the possible release of the escrowed shares for gypsum claims that have little economic value.

Probe Mines Ltd. applied for leave to appeal to the Divisional Court.[55] Leave was granted by Galligan J. On the facts as recited by Jaines J. he would not disagree as to the desirability of the order made, however, he doubted the legal validity thereof.

In any event, Galligan J. disagreed with Haines' J. interpretation of Morand's J. judgment in Farnham v. Fingold.[56] Galligan J. stated:[57]

> As I read the judgment of Morand, J., he specifically decided the issue which Jaines, J., left to be determined by the trial Judge, namely whether the action was a class action for relieft personal to the members of the class and that, therefore, s. 99 was not applicable....
>
> However, the application of the plaintiffs before Haines, J., was for interim injunctive relieft and it was incumbent upon them to establish a substantial prima facie case to the relieft south before they were entitled to an interim injunction. In my view that as an essential part of the proof of such prima facie case it must be established prima facie that the plaintiffs are entitled by law to bring the action. Accordingly, in my view, it is necessary that the Judge, from whom the injunction is sought, determine prima facie whether or not the plaintiffs have status. It is respectful view that the decision as to the status of the plaintiffs cannot be left to the trial Judge.

And later:[58]

> It appears to me that that claim [being part of writ filed] for relief is derived directly from the rights of the corporation itself. The relief is sought in part at least because of breach by the directors of their judiciary duty to Probe and to protect the best interests of Probe. That being the case it appears to me to be one to which s. 99 applies and, therefore, that action cannot properly be brought without leave of the Court first having been obtained.

Finally:[59]

> I should also indicate that I have reservations with regard to Jaines, J.'s observation about the harshness of s. 99. As I read that section and the rule in Foss v. Harbottle, supra, I am led to believe that the Legislature in enacting s. 99 sought to alleviate against the hardshness and rigours of the rule in Foss v. Harbottle. I think it appropriate that a higher Court decide whether a plaintiff has two avenues open to him or whether s. 99 now completely governs derivative actions.

The case was next heard by the Divisional Court (three Justices of the Ontario High Court en banc).[60] That court disagreed almost completely with the original order made by Mr. Justice Haines:[61]

> In due course the learned Judge ordered the appointment of the Clarkson Company Limited as receiver and manager during this period and to call and conduct the meeting. This was a more serious intervention in the internal affairs of the company than the relief at first sought which contemplated tne appointment of the Master to preside as chairman....Both management and assets were thereby taken out of the hands of the duly elected board of directors and the company saddled with considerable expense.... By installing the receiver and manager and enjoining the voting of the 500,000 shares held in escrow, the learned Judge effectively disposed of the whole dispute between Goldex and Probe because it is evident that the Goldex group are in a position to displace the defendant directors if those shares are not voted in accordance with with the trustee.

The Divisional Court had the benefit of the reasons of the Court of Appeal in Farnham v. Fingold. In this aspect too, then Haines J.'s judgment was overturned. However it is this Court's elucidation of the decision of the Court of Appeal which is interesting. Hughes J. writes:[62]

> If I may venture to summarize the effect of this decision [in Farnham v. Fingold], I think it stands for two propositions: (1) no matter how the action is framed, if relief is sought against a wrong alleged to be done to a corporation it is derivative, and (2) that all derivative actions are embraced by the provisions of s. 99 of the Business Corporations Act which provides an exclusive code for their conduct in Ontario.

Finally, the Court disposed of the argument that the order granting leave would be granted nunc pro tunc on the basis that the wording of s. 99 precludes any such discretion. Goldex appealed to the Ontario Court of Appeal.[63] Noting that the Divisional Court had concluded that the Goldex action was "wholly derivative in nature, the Court of Appeal asked:[64]

> In broad terms the issue is whether the Divisional Court was right in its conclusion. We think the issue can be confined in narrower terms. It is this: Where the same acts of directors or of shareholders cause damage to the company and also to shareholders or a class of them, is a shareholder's cause of action for the wrong done to him derivative"

In effect the Court gave recognition to and adopted the test of who is principally damnified proposed by Stanley M. Beck.[65] It is on this basis that the Goldex action begins to totter, as the Court states:[66]

> Turning to the way the plaintiff's case is pleaded in the extensive endorsements on the writ,...there is no clear allegation anywhere that the plaintiff sues in respect of wrongs to shareholders personally.

However:[67]

> We have concluded that the facts set out in the material would support an endorsement making some claims for relief that are personal and not derivative, if properly pleaded, but they are inextricably woven into the derivative claims, in the present endorsement.
>
> We consider whether it would be appropriate merely to strike out the writ itself, as the Divisional Court did. We have decided against doing so, for two reasons. No limitation period is involved, and a new writ can be issued. In addition, the plaintiff may decide to apply for leave under s. 99, and if it obtains leave, it can add to the derivative claims thus permitted such personal claims as it sees fit (subject, of course, to the Rules).
>
> The Divisional Court was asked to grant leave nunc pro tunc under s. 99(2), if it concluded that the claims were derivative. It declined to do so....We agree with the reasons...given.

As was noted earlier, the reasoning of the Divisional Court in the Goldex case was adopted by the B.C. court in Shield Development Co. Ltd. v. Snyder et al.[68] even though there are significant differences in the wording of the statutes.

The Ontario Divisional Court has again had a chance to wrestle with the problem of s. 99 in Re Goldhar and Quebec Manitou Mines Ltd. et al.[69] That case involves the relationship of s. 99 to the remedial provisions of s. 261. The Chambers Judge had dismissed an application under s. 261(1) of the O.C.B.A. for an order for compliance directed to the directors of Quebec Manitou Mines, the order being essentially one to declare void a scheme whereby the directors of Quebec Manitou attempted to retain control of the parent through control of the subsidiary. Reid, J., for the Divisional Court, put the issue thus:[70]

> Suppose corporations A and B are public companies whose shares are listed on the stock exchange. May the directors of A properly maintain themselves in positions of influence and advantage in B by virtue of A having "working control" through share ownership of B, which has, in turn working control of A? It is argued that as a practical matter the directors of A, unless the Court intervenes, will be able to maintain perpetual control of both A and B and, in effect, stultify the votes of the "outside" shareholders of both companies.
>
> ....
> Basically, it is submitted that for the directors of Quebec to use that company's control of Manitou-Barvue to their personal advantage...is a breach of s. 144, and of a trust obligation the directors owe to the shareholders of Quebec which can only properly be met by causing Quebec to refrain from voting the shares in Manitou-Barvue owned by Quebec.

By bringing an action under s. 261 the applicants were seeking to enforce the directoral standard of care set out in s. 144 of the O.C.B.A. Noting that cases on directoral duties "tended to be lengthy and difficult" and that the standards to be enforced "can be and normally are questions of nicety and complication" the Court acceded to the respondents' argument "that s. 261 was not intended to provide a summary means of trying the kinds of questions described above and should be confined to the rectification of simple 'mechanical' omissions of a type that lend themselves to summary dispositions.:[71]

For our present purpose, however, a more interesting point is that the court found support for this conclusion in the two decided cases on. 2. 99. The court held:[72]

> It is true that in neither case was s. 144 directly raised. It is clear, however, that s. 144 states the obligations owed by directors to a corporation. Directors must act "in the best interests of the corporation," not the shareholders.

> The second is a restatement, with perhaps some variation, of the common law which has been the source of shareholder rights for many years. The rights conferred on shareholders under s. 144 being derived from rights owed to the corporation, are therefore the "derivative" rights spoken of in s. 99. It is such rights that the appellant seeks to assert by way of motion. An action to enforce them would fall within s. 99. The strong implication of the above decisions is that only through s. 99 could such rights be enforced.
>
> The question may be tested in yet another way. A glance at s. 261 discloses that the rights conferred upon shareholders by s. 261 are direct rather than derivative. It is not corporations that are entitled to apply for their enforcement; it is shareholders under s.-s(1) and the Ontario Securities Commission under s.-s(2). The instances in s.-s(2) of s. 261 are examples of non-derivative rights.

A further novel argument by the applicants failed, but must be raised here for the shortcoming that it reveals in s. 99. The applicant had argued that s. 261 and s. 95 were at lease complimentary since no summary relief is available under s. 99 and the conditions precedent in s. 99 create the impression that the traditional right to apply for an ex parte interim injunction has been lost; the Legislature should not be assumed to have swept away this relief. Reid J. refused to accept this argument, but commented:[73]

> I have commented on the apparent disservice done to shareholders by the Legislature in depriving them of the time-honoured right to an *ex parte* interim injunction. It may be that in appropriate circumstances in an action under s. 99 an order for leave could be granted *nunc pro tunc* and the seven-day notice period abridged. That possibility was scanned by Hughes, J., in *Goldex* (see report pp. 826-7 O.R., pp. 530-1 D.L.R.), but as he pointed out, "there are no words [in the section] such as 'unless otherwise ordered' to suggest that the requirement in this respect should be in any way abridged". And, even if such an order could be made, it could not be made *ex parte*; there is nothing in the section contemplating that possibility and no external authority to support it. The point is not directly before us, but the dilemma of shareholders is, for we were given to understand that an application for an interim injunction made concurrently with the application under s. 261 failed for want of leave. I respectfully draw this awkward situation to the attention of the Legislature. It may well have been created by inadvertence and could be cured by a simple amendment.

One further case has been heard on s. 99. In Feld. v. Glick[74] two physicians had extended their practicing partnership into a number of related businesses, but under form of incorporation with an equal split of the beneficial shareholding. On the death of Dr. Feld, Dr. Glick apparently continued to run things almost as if he were the survivor in a joint tenancy. Dr. Feld's widow launched an action as executrix of her husband's estate, and personally. The defendants (Glick, his wife, and 3 limited companies) moved to strike out the statement of claim, since the plaintiff had failed to obtain leave under s. 99. Counsel for the plainti asserted that on the particular facts of the case the plaintiff' case should be decided on partnership principles. Morden J. responded:[75]

> This is an interesting theory, and of course, raises a host of problems--not the least of which is a lifting of the cooperative veils. For the purposes of this motion all that I can say is that I do not think that if such be the basis of the plaintiff's claim that this act could repeal it--or to put the matters positively, the particular claims in question appear to be based on Glick's violation of obligations to the companies (not the plaintiff) and involved, surrounded by other relief, relief claimed against Blick in favor of the companies. The companies are not being by-passed. The veils are not being lifted.... It is difficult to escape the conclusion that the pleading includes albeit possibly in alternative form, derivative claims.

Another more difficult point was whether s. 99 was broad enough to embrace such a cause as the present one where a suit in a representative capacity is practically impossible because the only other shareholder of the corporation is the defendant Glick or his wife. Although His Lordship did not feel there was any significant benefit in time and expense flowed from dismissing the action insofar as it is derivative in nature at this point in the proceedings, he was clearly of the opinion that despite

the wording of s. 99 a derivative action need not be representative of a class. In other words, he regarded the words in s. 99(1)--"in a representative capacity" and "for and on behalf of the corporation"--as being merely descriptive of a typical derivative action where there are shareholders other than the plaintiff, and thus words of a subordinate role. His Lordship went on to say:[76]

> I should say that I can see little or nothing in the way of policy considerations indicating that the statute serves a useful purpose in a case such as the present where the only two shareholders are in fact before the court.

It might be worthwhile to bear in mind these words of Morden J. when drafting our statutory form of derivative action.

Of course, no course have as yet been heard under the s.232 of the Canada Business Corporations Act, which provides for derivative actions.

9. A General "Oppression" Remedy

The impetus behind a reform of the derivative action comes from the hardship caused by the almost inflexible adherence by courts to the rule in Foss v. Harbottle and the narrow compass given to the exceptions. A salutory effect of the new statutory right of derivative action in Ontario, B.C. and in the C.B.C.A. is the break with the narrowly circumscribed categories of the exceptions to the rule.

It is by no means certain that the courts of the late nineteenth century intended such a rigid development. In his review of the law on whether or not certain shareholder's resolutions were "oppressive" to the minority, Foster J. in

Clemens v. Clemens Bros. Ltd.[77] noted that the first use of the word "oppressive" of the minority came in the following passage from North-West Transportation Co. Ltd. v. Beatty[78] dealing with whether a director voting as shareholder can do so to overcome the conflict of his duty and his interest in dealing with the company:

> Any such dealing or engagement may...be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.

Foster J. also looked at a case[79] under s. 210 of the Companies Act 1948 which deals specifically with "oppression" and might be viewed as a first statutory attempt to give shareholders a broader remedy than the highly restricted right of derivative action left to them. In that case Lord Cooper had said:[80]

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

Unfortunately, the Clemens case is somewhat unsatisfactory. It is by no means clear from the report whether s. 210 was ever pleaded. If not, then it would seem that Foster J. is finding a common law tort of corporate oppression. A brief review of the facts of the case may be of assistance: A niece and aunt held 45 and 55 per cent respectively of the issued shares of an old, established family construction business. The articles

gave a right of pre-emption to the other members if a member wish to transfer his shares. Because of unhappy differences, the niece was excluded from the management. The aunt and the four other directors proposed to issue a further 1650 ordinary shares, in part for services rendered by the directors other than the aunt, in part to establish an employee trust. The niece signifie her opposition to the scheme because it would reduce her share-holding to under 25%. The aunt replied that she was aware of the implication, but intended to proceed with the scheme. Resolutions to effect the scheme were passed at a shareholders' meeting, the niece voting against. She then brought an action against the company and her aunt for a declaration that the resolutions were oppressive of the plaintiff, and for an order setting them aside. The aunt contended, on the basis of the North-West Transportation case, that she was entitled to consider her own interests and to vote in any way she believed to be in the interests of the company.

The court held that the aunt's right to vote was subject to equitable considerations which might make it unjust to exercise it in any way. There was an irresistible inference that the resolutions were designed to put complete control of the company into the hands of the present board and deprive the plaintiff of her 25% block against special resolutions. We note however, that Foster J. was unwilling to formulate any general principle. The conclusion of his judgment is reproduced below:[81]

> I think that one thing which emerges from the cases to which I have referred is that in such a case as the present Miss Clemens is not entitled to exercise her majority vote in whatever way she pleases. The difficulty is in finding a principle, and obviously expressions such as 'bona fide for the benefit of the company as a whole', 'fraud on a minority' and 'oppressive' do not assist in formulating a principle.
>
> I have come to the conclusion that it would be unwise to try to produce a principle, since the circumstances of each case are infinitely varied. It would not, I think, assist to say more than that in my judgment Miss Clemens is not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleases. To use the phrase of Lord Wilberforce[3], that right is 'subject . . . to equitable considerations . . . which may make it unjust . . . to exercise [it] in a particular way'. Are there then any such considerations in this case?

Conclusion

I do not doubt that Miss Clemens is in favour of the resolutions and knows and understands their purport and effect; nor do I doubt that she genuinely would like to see the other directors have shares in the company and to see a trust set up for long service employees. But I cannot escape the conclusion that the resolutions have been framed so as to put into the hands of Miss Clemens and her fellow directors complete control of the company and to deprive the plaintiff of her existing rights as a shareholder with more than 25 per cent of the votes and greatly reduce her rights under art 6. They are specifically and carefully designed to ensure not only that the plaintiff can never get control of the company but to deprive her of what has been called her negative control. Whether I say that these proposals are oppressive to the plaintiff or that no one could honestly believe they are for her benefit matters not. A court of equity will in my judgment regard these considerations as sufficient to prevent the consequences arising from Miss Clemens using her legal right to vote in the way that she has and it would be right for a court of equity to prevent such consequences taking effect.

Whether or not the Clemens case involves an extension of the common law or is in fact based on s. 210, it is clear that some further protection of minority shareholders is needed in cases where the strict application of the rule in Foss v. Harbottle effectively prevents a minority suit because the majority may affirm the "wrong" done to the company. Theoretical this need not be so: if we adopt Beck's test of who is most directly harmed by a majority act--a shareholder or class or the company as a whole--then the statutory right of derivative action together with the expanding personal rights might be broad enough to encompass the whole field. Certainly Ontario did not see fit to follow s. 210 of the UK Companies Act 1948. In fact, the Lawrence Committee considered the matter, and concluded:[82]

> 7.4.1. The committee considered the alternative to a Section 210 [of the United Kingdom Companies Act of 1948] approach (to the extent that Section 210 is available to relieve against the Rule in Foss v. Harbottle and concluded that the derivative action is the most effective remedy to enforce the suggested statutory standard of conduct and care to be imposed upon directors in the exercise of their duties and responsibilities. . . .

I submit, however, that it is somewhat unrealistic to expect the courts, so long accustomed to the rigours of Foss v. Harbottle, to quickly adopt a wide open, liberal approach that requires a good deal of interference in the affairs of companies. Certainly both B.C. and the Federal Act have chosen to adopt the more readily apparent approach to minority protection afforded by the general oppression remedy. The working of this remedy can be seen from decided cases in England, Australia and B.C.

It should be noted that in concept at least an "oppressio remedy has been available in Alberta through the "just and equitable" winding-up under s. 197(e) of the Alberta Companies Act, R.S.A. 1970, c. 60. However, where there has been a real oppression such as a freeze-out (which, incidentally, was attempted in the Clemens case: No dividends were paid in the immediate preceding years because the directors had stripped the company's profits through their emoluments), such a winding-up would only continue and finalize the oppression since there is no discretion in the court to adjust the pro-rata entitlement of shareholders to take account of the monies already taken out in salaries, etc. Furthermore, if the business is profitable, it is non-sensical to wind it up.

It is with such considerations in mind that the Cohen Committee recommended the oppression remedy adopted as s. 210 in the U.K. Companies Act, 1948.[83]

(a) The "Oppression" Remedies under the UK Companies Act, 1948.

210. Alternative remedy to winding up in cases of oppression

(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of section one hundred and sixty-nine of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.

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

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

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

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

(3) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.

(4) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fourteen days after the making thereof, be delivered by the company to the registrar of companies for registration; and if a company makes default in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(5) In relation to a petition under this section, section three hundred and sixty-five of this Act shall apply as it applies in relation to a winding-up petition, and proceedings under this section shall, for the purposes of Part V of the Economy (Miscellaneous Provisions) Act, 1926, be deemed to be proceedings under this Act in relation to the winding up of companies.

Substantially the same section was enacted as s. 186 in the Companies Acts of both Victoria and New South Wales, Australia.

(b) B.C. Companies Act, S.B.C. 1973, c. 18

B.C. originally adopted the oppression section from the UK Companies Act in substantially unaltered form: R.S.B.C. 1960, c. 67, s. 185. However, when the section was re-cast for the 1973 Companies Act, it reappeared in a completely overhauled form which eliminated some of the procedural hurdles in the older section.

(c) Relief from Oppression

Complaint by member

221. (1) A member of a company or an inspector under section 230 may apply to the Court for an order on the ground

(*a*) that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including himself; or

(*b*) that some act of the company has been done, or is threatened, or that some resolution of the members or any class of members has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including himself.

(2) On an application under subsection (1) the Court may, with a view to bringing to an end or to remedying the matters complained of, make such interim or final order as it considers appropriate, and, without limiting the generality of the foregoing, the Court may

(*a*) direct or prohibit any act or cancel or vary any transaction or resolution;

(*b*) regulate the conduct of the company's affairs in future;

(*c*) provide for the purchase of the shares of any member of the company by another member of the company, or by the company;

(*d*) in the case of a purchase by the company, reduce the company's capital or otherwise;

(*e*) appoint a receiver or receiver-manager;

(*f*) order that the company be wound up under Part 9;

(*g*) authorize or direct that proceedings be commenced in the name of the company against any part on such terms as the Court may direct;

(*h*) require the company to produce financial statements;

(*i*) order the company to compensate an aggrieved person; and

(*j*) direct rectification of any record of the company.

(3) Every company referred to in subsection (1) shall file a certified copy of any order made by the Court under this section, or on appeal therefrom, with the Registrar within fourteen days from its entry in the Court registry.

(4) The rights granted by this section are in addition to those granted under section 248.

(5) Every company that contravenes subsection (3) is guilty of an offence. 1973, c. 18, s. 221.

To obtain relief under the older s. 185 (s. 210, UK Companies Act, 1948), one had to establish facts that:

(a) at the time the petition was presented the affairs of the company were conducted in a manner oppressive to the complainant in his capacity as a shareholder,

(b) that this conduct would justify making a winding up order under the just and equitable rule; and

(c) that to make such an order would be unfairly prejudicial to the complainant.[84]

These conditions precedent are cumulative, all three must be met. The revised remedy in s. 221, although limited to members or inspectors, no longer requires the need to prove that a winding-up order under the just and equitable rule would lie, and puts two alternative grounds for making the application--"oppressive conduct", or some "unfairly prejudicial act or resolution", which need not even be executed but merely "threatened". The judge's broad discretion to make any order he thinks fit is maintained, but is spelled out to emphasize the expansive nature of this discretion.

(c) The Canada Business Corporation Act

Even more expansive than the new B.C. remedy is its C.B.C.A. counterpart, s. 234.

It begins more expansively by making the remedy available to a broader class of persons than merely "members" or "inspectors". "Complainant" under the C.B.C.A. remedy is the same as for the derivative action in that Act.

Application to court re oppression

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

Grounds

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

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

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

(*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

The application under s. 234 does not apply only to the company itself, as in B.C., but to any affiliate thereof as well, and is not concerned only with the Act or omission (again more expansive than the B.C. Act), but also with the result effected. The focus is thus shifted. This shift effectively encompasses the attempt to capture "threatened" acts in the B.C. legislation.

Nor did the draftsman stop at a test of "oppressive" or "unfairly prejudicial", but again expanded it to encompass acts, imissions or results that "unfairly disregard the interests" of persons dealing with the company who are not shareholders.

How broadly and effectively the courts will use their discretion with section 234 still remains in the air, since no cases have yet been decided on it.

Powers of court

(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 directing changes in the directors as permitted by subsection 185(3);

(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 149 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 236;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XVIII to be made;

(n) an order requiring the trial of any issue.

Duty of directors

(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 185(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

Exclusion

(5) A shareholder is not entitled to dissent under section 184 if an amendment to the articles is effected under this section.

Limitation

(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Alternative order

(7) An applicant under this section may apply in the alternative for an order under section 207.

10. Case Law on the "Oppression" Remedy

Most of the case law on the general oppression remedy has been decided under s. 210 of the UK Companies Act and similar enactments in B.C. (s. 185 of the old B.C. Companies Act) and of Australia.

Gower remarks that while the clear intent of the Cohen Committee was that the court should have unfettered discre to make salutory orders,[85]

> Unfortunately our High Court procedure is ill adapted for the exercise of the inquisitorial and salvationist role thus imposed upon the judges and doubtless in recognition of this, it has been held [in Re Antigen Laboratories Ltd., [1951] 1 All E.R. 110] that the petitioner cannot ask the

> court to exercise its discretion but must indicate the nature of the relief wanted. This, though perhaps inevitable, seems regrettable and inconsistent with the intention that the court should have power "to find and impose a solution." Furthermore the wording of the section is unfortunate in a number of respects, and the courts, despite two bold decisions, have, on the whole, construed it narrowly.

Gower further notes that the section is more effective as a control on management: "as a weapon in the shareholder's armory it will probably always prove more potent when brandished in terrorem then when actually used to strike."[86] Hence, a good tool for negotiations within the company.

As Gower indicates, the narrow approach taken by the English courts in cases under s. 210 was first illustrated by the refusal of the court to exercise broad discretion with respect to remedies in Re Antigen Laboratories Ltd.[87] The petitioner had merely asked (i) that an order be made for regulating the conduct of the company's affairs in future, or (ii) such other order as might be just. The court thought this too vague: "A petitioner . . . ought to state . . . in clear terms the general nature of the relief sought. . . . The petitioner must take the responsibility of stating specifically what he wants."[88]

Obviously courts are reluctant to accept such broad discretion as might place them into management's shoes; however, this is exactly what has been achieved in the broadly drafted legislation of s. 234 of the C.B.C.A. and s. 221 of the new B.C. Companies Act. Implicity, in both sections, the court is not in any way restricted to granting relief of the nature specifically prayed for. However,

whether such broad, expansive drafting is necessary might be debated: the same purpose might be achieved by expanding the phrase "the court may make such order as it considers appropriate" to include "whether or not this relief has been specifically prayed for."

This is in fact the approach taken more recently by Toy J. of the B.C. Supreme Court in Re Peterson et al. and Kanata Investment Ltd. et al.[89] In that case the judge found fit to make an order under s. 221 of the new B.C. Companies Act directing the President of Kanaka Investments Co. Ltd. to resell to the company the 140,000 Class "B" voting share for the same price that he had paid for them--1§ each, thereby giving the company the freedom to elect a new and independent board. The facts revealed that these shares had not been offered to other existing shareholders and were issued solely as device to enable McBride, the President, to obtain control. Whether or not this relief specifically had been prayed for is not to be deduced from the facts. However, Toy J. did make the following statement with respect to the effect of s. 221:[90]

> However, I am prepared to accede to the three members' application for relief under s. 221 of the Companies Act, which section has given to the court much wider powers than under the former statute and the prerequisites to its applicability are less onerous as far as applicants are concerned.

An example of such narrow interpretation may be found in the decision of Buckley J. in Re Five Minute Car Wash Service Ltd.[91] The petitioner in that case held 62 shares out of 3,101 issued shares, 1,240 of which were held by Evison , the managing director, and 1,549 held by Hodge and Co. Ltd. The petitioner alleged that Evison had conducted

the affairs of the company in an oppressive manner by disregarding the interests of shareholders other than himself and his wife, and that Hodge and Co. Ltd. had failed to use their voting control to curtail his activities. The essence of the claim was, at the facts revealed, that the company was being hurt by poor management. Buckely J. held, however, that this does not in itself constitute oppression. His Lordship held that the essential element, namely that the act of omission was designed to achieve some unfair advantage over the petitioners, was not alleged. In dismissing the petition, he stated:[92]

> These allegations suggest that Evison is unwise, inefficient and careless in the performance of his duties as managing director and chairman of the board of the company. I can find in them no suggestion that he has acted unscrupulously, unfairly, or with any lack of probity towards the petitioner or any other member of the company, or that he has overborne or disregarded the wishes of the board of directors, or that his conduct could be characterised as harsh or burdensome or wrongful towards any member of the company.
>
> The complaint against Gwent and West and Hodge Ltd. is that they have failed to use their voting control to curtail Evison's actions and that, by reason of such failure, they have permitted and condoned Evison's alleged oppressive conduct of the company's affairs. If, as in my judgment is the case, the circumstances alleged in paragraph 13 are insufficient to amount to oppressive conduct on the part of Evison, the complaint against Gwent and West and Hodge Ltd. falls to the ground. An act of omission, such as is here alleged against these two companies, might perhaps in some circumstances be held to amount to oppressive conduct, but it seems to me that it would be necessary to allege and establish that it was designed to achieve some unfair advantage over those claiming to be oppressed before mere omission could be held to be oppressive. No such allegation is made in this case. Be that as it may, if the omission is, as in the present case, a failure to prevent acts which do not themselves amount to oppressive conduct, such omission without more cannot, in my judgment, constitute oppressive conduct.

Another reason for refusing to make an order under s. 210 is failure to show a course of oppression. A single act, even though it be severely abused by one of the parties, is insufficient grounds for granting an order. In Re Westbourne Galleries Ltd.[93] Plowman J. held that a winding up order under s. 222(f) of the UK Companies Act 1948 should issue, but not an order under s. 210. The company, a carpet dealership, had originally been a two man partnership that evolved into a private company in which both partners participa equally at 400 shares, but the one partner's son held an additional 200 shares. Shokrollah Ebrahimi, the minority shareholder, began to complain about the business practices of Nazar and George Achoury, the majority of shareholders. As a result he was voted out as a director. Plowman J. found that the company had continued substantially as a partnership, and even though there was no deadlock, the "partnership doctrines" for dissolution applied. He stated:[94]

> While no doubt the petitioner was lawfully removed in the sense that he ceased in law to be a director, it does not follow that in removing him the respondents did not do him a wrong. In my judgment they did do him a wrong, in the sense that it was an abuse of power and a breach of the good faith which partners owe to each other to exclude one of them from all participation in the business upon which they have embarked on the basis - that they should participate in its management.

On this basis his Lordship was able to avoid the difficulty that he perceived in s. 210, insofar as there was here neither a course of conduct but simply an isolated act, nor was there here evidence that a winding up order would unfairly prejudice the petitioner.

Whether there was a course of conduct giving rise to oppression was again an issue in the Re Jermyn Street Turkish

Baths Ltd.[95] The factual situation behind the complaint of oppression in this case is long, involved and complicated by the fact that the petitions under s. 210 are the administraters of an estate bringing the complaint from fifteen years after the events commenced. All the material events occurred after the death of the intestate shareholder and director Joseph Aaren Littman in 1953. Littman then held 50% of the issued shares. At the time of his death the company was under capitalized, deeply in debt, and in danger of being wound up by creditors. Mrs. Peskoff, the other 50% shareholder, acting on the advice of her solicitor, attempted to raise further capital to keep the company going. The administrators pendente lite of Littman refused to provide further funds (indeed, it is difficult to see how they could have done so without being guilty of meddling in the estate). Mrs. Peskoff took the risk upon herself by providing further debenture capital, but at the same time increased her own shareholding to 75% by issuing more shares to herself at par. (An additional share was issued to Woodley, an employee, who became the second shareholder and director.) Through Mrs. Peskoff's management the company eventually became quite successful and paid off all its debts. At a meeting of Directors Peskoff and Woodley had resolved in 1955 to pay themselves yearly salaries and percentage bonuses on the net cash receipts of the company in excess of stipulated amounts. Though the resolution was improper because this was a matter for a shareholders' meeting, as a result of this resolution Mrs. Peskoff received approximately £108,000 over the nine years from 1961 to 1970. In the years up to 1961 she received lesser, but also substantial sums. No dividends were ever paid.

The Court of Appeal (per Buckley L.J.) did not agree with the Trial Judge (Pennycuick J.) that there was "chain of events" justifying a finding of oppression leading to an order to purchase the estate's shares at a value to be determined as if the oppression had not taken place. It

was clear to the panel that the issue of new shares in 1954 wa part and parcel of a bona fide attempt to inject badly needed new capital into the company; that although formal irregularities with respect to the calling of meetings and passing of resolutions existed, there ws never anything less than full disclosure by the company and its solicitor to the estate the estate always had knowledge of the directoral remuneration by commission and never objected; and that the shares of the petitioners had benefited substantially from Mrs. Peskoff's conduct of the business.

Buckley L.J. made the following statement with respect to interpreting s. 210:[96]

> We are not concerned in this case to consider whether the minority shareholder could succeed either in misfeasnace proceedings against the directors or in a minority shareholder action in the name of the company. We are concerned here only to consider whether the affairs of the company were, when the petition was presented, being conducted in a manner oppressive to some part of the members of the company. What does the word "oppressive" mean in this context? In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324, 342 "hurdensome, harsh and wrongful" to the other members of the company or some of them and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs.
>
> . . . Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

I would submit that on its facts this is a borderline cas Determinative of the final outcome seems to have been the combination that Mrs. Peskoff toom substantial risks in addition to those which she had at the time of Littman's death and that the estate was at all times informed of what was being done. Failure to have done the latter might have led to a different result. Quaere also, whether the alleged events can really be restricted to the isolated acts of increasing her own shareholding and passing irregular directoral resolution, or whether the results of these acts (the substantial sums received by Mrs. Peskoff) should not be seen as potentially oppressive. Under the wording of the C.B.C.A. this would be caught. Note, however, that Buckley J. deems oppression to occur when it is threatened , thus anti-cipating the actual inclusion of this formulation in the new B.C. section.

While the narrow interpretation of the English courts may not be entirely satisfactory, the decision dismissing the petition in Re Balladar Silk Ltd.[97] is clearly a salutary one. The petitioner, Moss Simmons, held 25% of the shares in a thre man company (2 other shareholders held 25% and 50% respectively and was a director. Which friction and conduct of the others would thus prima facie appear to justify a winding up order under the "just and equitable" rule, on cross examination it appeared that the real object of presenting the petition was to get repayment of a loan owed by the company to the petitione group of companies. On a winding up there would have been no assets for the contributories after the creditors' claims had been met. The court held that the petition had been brought for collatoral purposes, mainly to pressure for the repayment of the loan, thus amounted to the abuse of the process of the court. Furthermore, as the petitioner, Qua contributory to the company had no tangible interest in the liquidation because the lack of assets of the company meant that a contributory could not be entitled to a winding up order on the just and equitable rule.

The latter point would be irrelevant under the B.C. Companies Act and the C.B.C.A. However, the breadth of drafti of the C.B.C.A. section 234 may well invite applications brought for a collateral purpose.

1959 app-ars to have been a bounty year for obligation under s. 210 of the UK Companies Act, for in that year two cases succeeded. Scottish Co-operative Wholesale Society Ltd. v. Meyer[98] appeared to give a glimmer of immorality in the dicta of Lord Keith of Avonholm, who held:[99]

> Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know:

and further:[100]

> Oppression under section 210 may take various forms, suggests to my mind, as I said in Elder v. Elder and Wilson [(1952), S.C. 49, 60], a lack of probit probity and fair dealing in the affairs of a company to the prejudice of some portion of its members.

More notable still for its facts was the decision in the In Re H. R. Harmer Ltd.[101] The facts very briefly are that Harmer had founded the business of philatelic auctioneers and valuers, had turned this business over to a company in which he controlled the votes but in which his two sons held the majority of the beneficial interest, as a result of a gift from their father. AT the time of the petition the father was 88 years old and for some 10 years had been running the company in a highly autocratic manner as "chairman" with a casting vote, leaving little say to the two sons, who were also directors. His business judgment also appeared to be deteriorating. It was common ground that the fac would justify a winding up order on just and equitable grounds.

Although the father had absolute voting control, and the sons' shares by a gift from the father, Lord Justice Romer held that oppression existed:[102]

> Viewing the evidence as a whole, no one could doubt that the father acted oppressively in the sense in which that word is ordinarily used. He rode roughshot over his sons and everybody else, and dictated the general conduct of the company's affairs and its policy with an intolerant disregard of the best interests of the company itself. . . .
>
> The word "oppression" was defined by Viscount Simonds, as my Lord has pointed out in Scottish Co-operative Wholesale Society Ltd. v. Myer where he accepted the dictionary meaning "burdensome, harsh and wrongful" and I respectfully would adopt that definition of the word to be found in s. 210. With regard to that section, Lord Morton in his speech said that he was not disposed to give a narrow meaning to the word "oppression" having regard to the manifest object of section 210.

Some further points of interest recalled from this case are:

1. That the father was found "to ignore the wishes of his co-directors at resolutions of the Board," which obliquely would appear to put directors in a position to bring the application. This, of course, would be contrary to the plain reading of the section, but it must be remembered that the sons were being principally oppressed in the quality of directors and not so much as shareholders, although the spill over effect of the bad management undoubtedly hurt their equity position.

2. It was found that the fact of the gift did not disentitle the petition. and

3. Perhaps the most interesting point, it was held

that there was no need to prove desire for pecuniary benefits, but oppression remained oppression even though it was simply to further the controlling shareholders overwhelming desire for power.

The lack of recorded cases under s. 210 and of successful cases after 1959 may not necessarily indicate that the words of Lord Justice Romer with respect to the "manifest object of the section" have fallen on deaf ears. On the contrary, it may well be that Gower is correct in thinking that real value behind s. 210 is its usefulness as a negotiation lever.

Decisions under s. 105 of the British Columbia's Companies Act, 1960

Apart from the decision of Mr. Justice Aikins in Re National Building Maintenance Ltd.[103] there was only one other successful case under the B.C. equivalent of section 210 of the UK Companies Act 1948.

The exclusion from the Act of management of the company of a shareholder who has gone into the company on the footing that he would participate in the management would appear to be the most fruitful ground for litigation under these sections, and, I would submit, one of the principal wrongs that the restrictive nature of s. 210 of the UK Act and s. 185 of the B.C. Act were not able to deal with. This appeared to be the basis of the action in Re B.C. Aircraft Propeller & Engine Co. Ltd.[104] a decision of Mr. Justice Verchere. One Walsh had sold all his interest in the company to Tak, on the promise that he would be able to redeem a quarter interest in the company from the tax paid reserves that it was anticipated the company would build up over the next years. Walsh remained active in the operation of the company. The agreement,

proven at trial, was never implemented by Tak, who then fired Walsh. Walsh petitioned both to be registered as a holder of 25% of the issued shares and under s. 185, to be bought out by Tak. The first order, registering Walsh was made, together with a credit on the company's books of $5,000 to Tak's account. Although Verchere J. found that Tak's dismissal of Walsh was influenced by Walsh's unsettled claim, he could not find that Tak's management of the company's affairs "will be such as to affect them adversely". He said further:[105]

> Put shortly, I accordingly find that the situation of which the petitioner complained is the exercise by the respondent arbitrarily and for emotional and personal reasons based on his attitude towards a previously unsettled claim against him by the petitioner of his power as the majority shareholder.

In the result, Tak was thereby not affecting or dealwint with Walsh's proprietory rights as a shareholder.

Standing quite apart on its facts is the decision of Ruttan J. in Re British Columbia Electric Co. Ltd.[106] in which oppression was found to have taken place as a result of expropriation of the company by the British Columbia government, which expropriation dictated that the preferred shareholders were to be converted into bond holders only. The very right of the preferred shareholder to subsist as a shareholder, and to have the rights pertaining to share ownership were being ignored. This was oppression of him and his policy as a shareholder, was a basis for winding up under the just and equitable rule, and under the circumstances of the expropriation, a winding up order was not practicable.

Onus of Proof of "Oppression"

In Bayshore Investments Ltd. et al. v. Endako Mines Ltd. (N.P.L.), Pacer Development Ltd. et al.[107] The plaintiffs

were minority shareholders in Endako Mines Ltd. (N.P.L.), a company in which Placer Development owned 82.8% of the issue common shares and nominated 5 of the 8 directors. A shareholders meeting of the defendant Endako resolved to amalgamate with Placer by transferring its assets to a wholly owned subsidiary of Placer. The plaintiffs sought to enjoin t transfer and amalgamation agreement alleging, inter alia, that the information circulars in support were inadequate and that the failure to obtain an undertaking from the M.N.R. to save the shareholders harmless from tax consequences under the then proposal tax reforms amounted to oppression.

Seaton J., who heard the application, found that the circular was not "tricky" because of inadequate disclosure. He stated, obiter:[108]

> A "tricky" circular would probably justify a finding of fraud in favour of the plaintiffs, and would also satisfy the first ground of attack. In this context the term "fraud" includes abuse of power by the majority without actual deceit.

As to the question of tax consequences:[109]

> A major ground of attack, in relation both to the deficiencies claimed and the claim of fraud and oppression, centres around the matter of depletion allowance. . . . What was sought was a commitment as to future legislation arising out of the White Paper, a commitment the Minister, for obvious reasons, could not give. . . . It is the plaintiff's position that the directors have acted fraudulently and oppressively in respect of this question, and have failed to properly advise the shareholders.
>
> A copy of a letter the company received from tax counsel was sent to each shareholder with the information circular. Included in that letter was the letter from the Minister, and an earlier letter setting out the risks and counsel's opinion on them. In addition the circulars expressed the director's views. I can conceive of no more fair and complete way to put the matter before the shareholders.

The application was refused as the plaintiff had had failed to discharge the onus of proving their case on the balance of convenience test. But the case is further helpf in showing what degree of proof may be needed to bring s. 222 of the new B.C. Companies Act (then s. 185) into operation to find either "oppression" or even "unfair prejudice". The onus is at least as strong to affirmatively make out a case of oppression or patent unfairness as is the onus in any other civil case. Indeed, it may well be that with the reluctance of the courts to intervene in the business affairs of private individuals in once a year onus will be demanded.

Conclusions

The right to bring an action derivatively in the name of the company and the right to bring an action personally for oppression or unfair prejudice together could provide a fairly arsenal for the shareholder. The critical question is to determine what degree of flexibility and what scope would have the best balance effect in practice.

Although judicial decisions, particularly those in the Goldex Mines and Revel case, seem to have resolved some of the doubts and procedural problems surrounding s. 99 of the O.C.B.A., I'm inclined to recommend an adoption of the somewhat more supple drafting of s. 232 and 233 of the C.B.C.A., limiting however the meaning of"complainant" to the definitions subsumed in 231 (a)(b)(c) of the C.B.C.A., and excluding (b), so as not to make applications for leave to commence derivative actions the hobbyhorse of every applicant of people power and other remedies. I would further recommend increasing the flexibility of section 232 to permit actions commenced as personal actions to be continued as derivative actions where a court is satisfied that this can be done without prejudice to any party, hoping thereby to avoid the result in Goldex Mines and

Revel. It is precisely thegrey area between corporate rights and personal rights which would be difficult to pin down at the beginning of an action.

I am not satisfied that the above proposed amendment is already contained in the words "intervening in an action to which any such body corporate is a party" since that I would anticipate a company should be able to take the place of a plaintiff in which was previously a personal action against the director.

The results arrived at by the American courts in Ploughman v. Feldman is a welcome one. For this reason I would recommend the adoption of s. 233 of the C.B.C.A. as well, since it provides a statutory basis for the result in that case. This would not be possible under the Ontario Act.

I would further recommend the adoption of the oppression remedy contained in the C.B.C.A. in s. 234 saving out subclause (h) since that unnecessarily traverses the boundaries of corporation law to effect the rights of strangers to any dealings between the company and its shareholders. It appears to me that s. 234 is drafted widely enough to include relief of an injunctive nature or the nature of mandamus insofar as this may be available to shareholders or others who come within the definition of "complainant".

It should be noted that s. 236 and s. 240 of the C.B.C.A. stand apart from s. 234 because they contemplate a remedy which are available to persons other than those coming under the concept of "complainant".

F O O T N O T E S

[1] Gower, Modern Company Law, 3rd, 581

[2] (1843), 2 Hare 461; 67 E.R. 189

[3] Id., at 201

[4] Id., at 203

[5] [1950] 2 All E.R. 1064 at 1066

[6] Report of the Select Committee on Company Law. Ontario "The Lawrence Report" par. 7.3.2.

[7] Id., par. 7.3.3. and 7.3.4.

[8] (1887) 12 App.Cas. 585 (P.C.): A director of the company who was able to muster a majority of votes at a general meeting of the company was there able to ratify the company's purchase from him of a steamship. Note, however, that this transaction was found to be a bona fide transaction, which on the business judgment of the board, was held to be for the benefit of the company. It seems that all later decisions based on this case have at least implicity demonstrated a bona fide business judgment on the part of the director or controlling shareholder whose dealing was attacked as a fraud on the minority. For a further discussion of this point see Earl Sneed, The Stockholder may vote as he pleases: Theory and Fact (1960-61) 22 U. of Pitt. L.R. 23 at 32.

[9] See also the discussion at length of this problem by K.A. Aickin. Division of Power Between Directors and General Meeting as a Matter of Law, and as a Matter of Fact and Policy (1965-67) 5 Melbourne U. Law R. 448

[10] supra., note 5

[11] Addy J. in D'Amore v. McDonald (1973) 32 D.L.R.(3d) 543, aff'd (1974) 40 D.L.R. (3d) 354 (Ont. C.A.) adopting a quotation from Fraser and Stewart, Company Law in Canada, 5th Ed. p. 650 as quoted by Fraser J in Charlebois et. al. v. Bienvenu et. al., [1967] 2 O.R. 635 at 647

[12] As quoted by Dankwerts J. in Pavlides v. Jensen [1956]

2 All E.R. 578 at 521 from Buckley on Companies (12th ed.) pp. 168-169

13 Who had stated that "the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue": Foss v. Harbottle (1843) 2 Aare 461 at 466

14 [1875] 1 Ch. 13

15 Id.,

16 Id.,

17 (1887) 12 App/ Cas. 589, P.C.

18 as reproduced in Palmer, Cases and Materials on Company Law, p. 380

19 [1967] Ch. 254, [1966] 3 W.L.R. 995

20 Note, Recent Cases (1975) 89 Harvard Law Review 423 at 425. The note deals with the decision in Donahue v. Rodd Electrotype Co. (1975) 328 N.E. 2d 505. Donahue, the largest non-family shareholder in the Rodd Family-controlled firm, refused to join in ratifying the purchase of the elder Rodd's shares. She them offered her shares for the same price as the older Rodd received and her offer was refused. She filed suit to have the Rodd purchase rescinded. The Massachussetts Supreme Judicial Court held in her favour on the basis that "stockholders in a close corporation owe one another." Whether the imposition of a partnership "trust and confidence" relationships is generally applicable to close corporations on the basis of the subjective expectations of the shareholders in entering the enterprise is questioned by the author of the vote.

S.M. Beck, in The Shareholders' Derivative Action (1974) 52 Can. B.R. 159 at 177 states:

> "It is certainly the accepted position in the United States that directors, and majority shareholders in certain cases, stand in a direct fiduciary relationship to the shareholders. But there is no case in the Commonwealth that so holds . . . as much as such a development is desirable and inevitable. . ..

21 A.A. Berle and Gardner C. Means, The Modern Corporation and Private Property (1932)

22 See S.M. Beck, The Shareholders' Derivative Action (1974) 52 Can. Bar. R. 159 at 160

23 Id., p. 162

24 Id.

25 As stated by Jenkins, L.J. in Edwards v. Halliwell [1950] 2 All E.R. 1064 (C.A.)

26 Beck, supra, note 22, pp. 167-168

27 See, however, the exception created in the U.S. by Perlman v. Feldman 219 F. 2d 173 (1955), which, although a derivative action, held that minority stockholders who establish that a former majority stockholder who sold his controlling interest in the corporation to the company's principal customer, thus potentially depriving the company of any future profit and making himself accountable for personal profit attributable to the purchase provision for control, -- that such minority stockholders are entitled to a recovery in their own right, rather than in right of the corporation.

28 English courts will now exercise their discretion to give an order of indemnity for the benefit of the litigating shareholder against the company benefiting if the shareholder has in good faith and on reasonable grounds sued in a derivative action, the test being "if it would have been reasonable for an independent board exercising the standard of care which a prudent man of business would exercise in his own affairs. Per Buckler L.J. in Wallersteiner v. Moir (No. 2) [1975] 1 Q.B. 373 at 403-404 (C.A.)

29 Supra, n. 22 at 170.

30 Id., at 170-171

31 See note 27, supra. The minority shareholder was allowed to recover directly in their own right from the wrongdoer. But note the peculiar facts of the case: if the corporation had recovered, the major benefit would have flowed to the purchaser of the controlling interest - the very party who was most likely to deprive the corporation of any future profits! The purchaser would have obtained control without paying the premium for it! Furthermore Clark C.J. stated, at p. 178, par. 11, "Defendants cannot well object to this form of recovery, since the only alternative, recovery for the corporation as a whole, would subject them to a greater total liability.

32 (1954), 119 N.E. 2d 331

33 Supra, n. 32 at 340-341

34 Supra, n. 22 at 172

35 Condec Corp. v. Lunken Heimer (1967), 230 A. 2d 769 (C. Ch. Del): A merger agreement by defendant company entered into with a third company involved a new share issue to that third company large enough to deprive the plaintiff company of the voting control it had just acquired for a cork offer. The court held the issue void and stated that is was not necessary to prove a corporate injury since this was a case of a stockholder with a contractual right being deprived of such control by what is virtually a corporate legerdemain." But see to the contrary the decision of Mr. Justice Berger in Teck Corp. Ltd. v. Millar (1973) 33 D.L.R. (3d) 288 - - the "Apon Mines" case.

In Clemens v. Clemens Bros. Ltd. [1976] 2 All E.R. 268 (Ch.) the English Courts have recently come to the same result as the american decision above by a broad application of the common law "oppression" expectation to majority ratification of directoral acts as stated by Sir Richard Bapallay in North-West Territories Co. Ltd. v. Beetty (1887) 12 App. Cas. 589 at 593: " . . . such dealing . . . may . . . be affirmed . . . provided such affirmance or adoption is not brought a sort by unfair or improper means, and is not illegal or fraudulent or oppressive toward those shareholders who oppose it." [my itilics] Note that the court did not rely on s. 210 of the U.K. Companies Act 1948.

36 Supra, n. 22 at 173

37 See Beck, supra n. 22, at 175-178. He also considers the Australian reasoning of the Australian cases to be confused.

38 Beck cites "insider trading" under Ontario Securities and Company legislation, and the U.S. case of J.I. Case Co. v. Borak (1964), 377 U.S. 426

39 Supra, n. 22, p. 179.

40 Per Hughes J. in Goldex Mines Ltd. v. Revill et al., (1973), 38 D.L.R. (3d) 513 at 521. See an earlier statement to the same effect to the Ontario Court of Appeal in Farnham et al. v. Fingold et al.(1973), 33 D.L.R. (3d) 156 at 159: "the very broad language of s.99(1) embraces all causes of action under any statute or in law or in equity, that a shareholder may sue for on behalf of a corporation."

41 The Supreme Court of British Columbia followed the Ontario cases with respect to a claim that the common law derivative action was not expressly excluded by s. 222 of the B.C. Companies Act: Shield Development Co. Ltd. Hugh R. Snyder et al. [1976] 3 W.W.R. 44. McKay J. held that although the Ontario statute is worded as a prohibition while the B.C. statute is permissive, in the latter the common law derivative action is prohibit by necessary implication. The learned judge quotes fro Beck's article (1974) 52 Can. Bar R. 159) to affirm that the co-existence of a statutory and common law derivative action would create confusion to an intolerable degree.

42 Supra, n. 22 at 207. These words were adopted by McKay J. in the Shield Development Co. Ltd. case: supra, n. 41, infra at p. 52.

43 See Wallersteiner v. Moir (No. 2) [1975] 1 Q.B. 373 (C.A.), particularly Lord Denning M.R. at 391.

44 For discussions of Wallersteiner v. Moir (No. 2) see: D. Sugarman, The Minority Shareholder, 91 Law Quarterly R. 482 and A.J. Boyle, Indemnifying the Minority Shareholder, The Journal of Business Law, Jan. 1976, 18

45 (1955), 219 F. 2d 173 (U.S.C.A., 2nd Cir.). Recovery in a derivative action was given for that portion of price representing control sold to the company's principal customers, since this sale was a wrong to the company depriving it of potential future profits. However,

since recovery by the company itself would be mostly to the benefit of one of the parties to the wrongful transaction, the court held that the damnified shareholders only were entitled to be compensated directly. This in effect prevented the purchaser from acquiring his control and then recovering the control premium through a derivative action!

46 The commentator of the U.S. Model Business Corporations Act, 1969, recognizes this, in 3. 49, par. 2, at p. 33: "Section 49 is a procedural, not substantive provision.

47 (1972), 29 D.L.R. (3d) 279 (H.C.J.), (1973), 33 D.L.R. (3d) 156 (Ont. C.A.)

48 (1972), 29 D.L.R. (3d) 279 at 286.

49 Id; at 159.

50 (1973), 32 D.L.R. (3d) 129 (H.C.J.); 34 D.L.P. (3d), 13 (H.C.J.)--leave to appeal to Dis. Ct.; 38 D.L.R. (3d) 513 (H.C.J., Div. Ct.); leave to appeal to Court of Appeal granted, interest reported, (1975), 7 O.R. (2d) 218 (Ont. C.A.)

51 (1973), 32 D.L.R. (3d) 129.

52 (1973), 33 D.L.R. (3d) 156.

53 Note 51, at 150.

54 Id., at 151.

55 (1973), 34 D.L.R. (3d) 13.

56 (1972) 29 D.L.R. (3d) 279.

57 Supra, n. 54, at 17.

58 Id., at 19.

59 Id.

60 (1973), 38 D.L.R. (3d) 513.

61 Id., at 517.

62 Id., at 520.

63 (1975), 7 O.R. (2d) 216. This report does not indicate which Justices heard the appeal or who gave the reasons of the Court.

64 Id., at 220.

65 Supra, n.

66 Supra, n. 61, at 224.

67 Id. at 226.

68 Supra, n.

69 (1976), 90 R. (2d) 740.

70 Id., at 742.

71 Id., at 742-743 passim.

72 Id. at 744-745.

73 Id. at 746.

74 (1976), 8 O.R. (2d) 7.

75 Id. at 12.

76 Id. at 15

77 [1976] 2 AM E.R. 268 (CL.D.).

78 (1887), 12 App. Cas. 589 at 593 (P.C.), per Sir Richard Bagallay.

79 Meyer v. Scottish Textile Manufacturing Co. Ltd. et al [1954] S.C. 381.

80 Id., at 392.

81 Supra, n. 75, at 282.

82 Report of the Select Committee on Company Law, Ontario, 1967.

83 Cmnd. 6695 at para. 60. Excessive remuneration of directors was mentioned as a specific example of oppression. Whether an arbitrary refusal to register a transfer of shares should also be caught under this section (the Committee thought it another case of oppression) or be subject to mandamus is open to question.

84 Re National Building Maintenance Ltd., [1971] 1 W.W.R. 8 (B.C.S.C.), per Aikins J. in Chambers.

85 Gower, 3rd, pp. 598-9.

86 Id., p. 599.

87 [1951] 1 All E.R 100.

88 Id.

89 (1975), 60 D.L.R. (3d) 527.

90 Id., at p. 542.

91 [1966] 1 W.L.R. 745 (Ch. D.).

92 Id. at 752-3.

93 [1970] 1 W.L.R. 1373 Ch.D.).

94 Id. at 1389. A similar result had been reached in one of the earliest cases decided under s. 210--Elder et al. v. Elder & Watson Ltd. (1952), S.C. 49 (Ct. of Session). In that case a petition under s. 210 averred that two of the petitioners, shareholders in a private company which was in effect a small family concern, had suffered oppression at the hands of other shareholders who had used their combined voting powefs to remove these petitioners from their offices as directors and from their employment as secretary and factory manager respectively. It was further averred that this action had been taken against them at the instigation of a director who had had serious differences with one of them and who had sought successfully in this way to obtain control of the company for himself and his nominees. There was no aversement that the business had been mismanaged to the detriment of the shareholders.

94 (Continued)

It was held:

(1) that s. 210 was intended to meet the case of oppression of members of a company in their character as such;

(2) that the matter complained of by the petitioners affected them solely in the character of directors or employees of the company, and there were thus in relevant aversements of oppression for the purposes of the section; and

(3) that there were no facts averred which would justify a winding up order or "just and equitable" grounds.

"It was not oppression to acquire a majority of the shares; oppression depended on how the power so acquired was used."

Per Lord President Cooper: [p. 57]

"The time grievance is that two of them, George Elder and James Glen, have lost the positions which they favourably held as director and officer of the company. I do not consider that section 210 was intended to revert any such case, the "oppression" required by the section being oppression of members in their character as such."

95 [1971] 1 W.L.R. 1042 (C.A.).

96 Id. at 1059-60.

97 [1965] 1 All E.R. 667 (Ch.D.), Plowman J.

98 [1959] A.C. 324 (H.L.).

99 Id., at p. 362.

100 Id., at pp. 363-4.

101 [1959] 1 W.L.R. 62 (C.A.).

102 Id. at p. 86.

103 [1971] 1 W.W.R. 8 (B.C.S.C., Chambers).

104 (1968), 66 D.L.R. (2d) 628 (B.C.S.C.).

[105] Id., at p. 635.

[106] (1965), 47 D.L.R. (2d) 754.

[107] [1971] 2 W.W.R. 622 (B.C.S.C.).

[108] Id. at 623.

[109] Id. at 628.

APPENDIX

SEMINAR MATERIALS ON s. 221 "OPPRESSION OF THE B.C. COMPANIES ACT, S.B.C., 1973, c. 18

1. Section 221 - Oppressive Conduct or Conduct that is Unfairly Prejudicial

(a) History and Purpose of Previous Legislation

(i) Companies Act, R.S.B.C., 1960, Chapter 67, Section 185.

According to the Table of Concordance set out in the new Companies Act, S.221 is equivalent to S.185 of the earlier Statute. There does not appear to be an equivalent section in the Ontario Business Corporations Act, R.S.O., 1970, Chapter 53. S.185 of The British Columbia Act of 1960 had its origin in the United Kingdom Companies Act, 1947, S.9 - now referred to as Companies Act, 1948, S. 210.

Palmer on Company Law, 21st Edition, Page 511, gives a short history of the Section and the reason for its enactment:

> "It has always been the law that if a majority acts in oppression of the minority, the latter may petition the Court to wind up the company, on the grounds that it is just and equitable to do so. (S. 222(f)).
>
> In many cases, however, it is not in the interest of the oppressed minority to have the company wound up. Liquidat of the company may result in the sale of its assets at bre up value, without regard to the value of the good will or "know-how" of the company, and the minority shareholder wh urged by the majority shareholders' oppression, petitions for a winding-up order might, in effect, play his opponent game.
>
> In an attempt to meet such cases, the law now gives an oppressed minority shareholder a remedy alternative to a petition for compulsory winding-up under the "just and equitable" clause (S. 2100."

There are four reported cases in British Columbia on this Section that I have been able to find and a new article is in the process of publication by Dave Huberman on "Winding Up of Business Corporations", Ziegel, 2nd Vol. (not yet published). The cases are:

(a) Re: B.C. Electric Co. Ltd. (1964), 47 D.L.R. (2d) 755

(b) Re: B.C. Aircraft Propeller & Engine Co. Ltd. (1968), 66 D.L.R. (2d) 628

(c) Re: Scotland and Adamson Paving Ltd. (1966), C.C.H. Dc Cos. Rep. No. 30-546, 7792

(d) Re: National Building Maintenance Ltd. (1971), 1 W.W.I affd.(1972), 5 W.W.R. 410(C.A.)

(e) Dave Hubermans' Article on Winding Up of Business Corporations, Ziegel, 2nd Vol. (not yet published)

(b) Review of the New Legislation

(i) Who may apply

The previous section only allowed a "member" to apply. The new section also gives an inspector, appointed under S. 230 (formerly S. 183) the right to apply. The words that follow in S. 221 (1) (a) and (b) seem inconsistent with giving an inspector the right to apply, since the oppression complained of must be "oppressive" or "unfairly prejudicial - to one or more of the members including himself." It could be argued that the inspector must be a member and be affected by the acts of which he is complaining before he can take proceedings under this section.

(ii) Grounds for Relief

Prior to the passage of this Section it was necessary that the applicant show there were grounds to wind up the company. This is no longer required by S. 221. The previous Section also required the applicant to prove that the affairs of the company were "oppressive to some part of the members" including the applicant.

The new Section provides that the affairs of the company or the powers of the directors are being exercised in an oppressive manner, or that

(a) some act of the company has been done or is threatened or
(b) some resolution of the members or any class of members has been passed or is proposed that is unfairly prejudicial

The distinction between "oppressive manner" and something that is "unfairly prejudicial" is not easy to grasp. One can only speculate that the reason this was inserted was because the courts were interpreting too strictly as against earlier applicants what was or was not "oppressive" under S. 185.

Gower on The Principles of Modern Company Law, Third Edition, P. 598 - 604, has a discussion of the U.K. S. 210 and the recommendations for its change made by the Jenkins Committee that suggested "in a manner oppressive" should be widened by adding words such as "or unfairly prejudicial".

Apparently these latter words were inserted at the recommendation of the Jenkins Committee for the purpose of entitling personal representatives, trustees in bankruptcy and others to whom shares are transmitted by process of law to be registered as shareholders in a private company when the Directors refuse to make the registration. Whether this kind of activity is prevalent in British Columbia so as to require the use of the phrase "unfairly prejudicial" is doubtful.

It is important to note that the section is directed to wrongs done to the member or inspector and not wrongs done to the Company which are covered by S. 222.

(iii) Relief

The specific relief is set out in S. 222 (2) (a) to (j) and may be provided for by an "interim or final order". It would also appear the Court is not limited to that specific relief since the Section provides for an order for general relief "with a view to bringing an end or to remedying the matters complained of". However, in keeping with the earlier authorities it is probably necessary that the applicant spell out the specific relief he wants and not leave it up to the Court to decide the relief it should give.

The section may also be useful to applicants who may wish to wind up the Company although they do not have sufficient facts under the just and equitable rule to entitle them to an order under S. 292(3).

(c) Procedure

(i) Originating Notice
Companies Act S. 224
Rules of Court

It is not altogether clear, by the Act and the Rules of Court as to what form should be used when an application is made under this statute. There is a suggestion by O. 54a, r. 5, (M.R. 762a (6)) that Form 1B, App. K is the appropriate form. This rule reads as follows:

> "Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute may apply by Originating Notice for the determination of such question of construction and for declaration as to the right claimed."

If Rule 5 is the Rule that gives the authority to make the application under the Companies Act, then Form 1B App. K must be used, There are disadvantages to this because it necessitates service upon the appropriate persons involved and the requirement that they file an Appearance within eight days after receiving the Notice. Once Appearances have been filed then a further motion, in accordance with Form 1C, App. K (O. 54a, r. 12B) must be issued, presumably giving seven more days' notice before the motion can in fact be heard. Thus the time elapsed before the applicant can get before a judge if Form 1B is used is at least fifteen days after the issuance of the Notice. If Form 1A is used, then only seven days' notice is required after service on the interested persons.

It appears to me that O. 54a, r. 5 refers to a situation where an application is being made for a "declaration". The distinctic that can be drawn here is that the statute in question does not refer to an application for a "declaration" but an application for an Order allowing the relief prescribed by the Section.

Rules of Court - O.71, r. 1 (M.R. 1041)
O.54a, r. 1 (M.R. 762a (2))
O.54a, r. 2 (M.R. 762a (3))

(ii) Service of documents

Assuming Form 1A is used the Originating Notice and Affidavits should be served upon the appropriate persons giving them seven days' notice of the hearing after receipt of service.

Companies Act S. 224
Rules of Court - O. 54a r.2 (M.R. 762a(3))
O. 54a r.3 (M.R. 762a(4))
O. 54a r.11 (M.R. 768)
O. 54a r.12 (M.R. 768a)

(iii) Abridging Time

Consideration should be given as to whether an application should be made to abridge the time for the hearing.

Rules of Court - O.64 r.7 M.R. 967)

(iv) Interim Relief

In the event the matter cannot come on for hearing because of a referral to the Trial List or for any other reason, consideration should be given to an application for an interlocutory or interim injunction.

(v) General Comments

1. It may not be possible to have the matter heard summarily before the Chamber Judge, and it may have to be referred to the Trial List.

a. Rules of Court - O. 54a, r.6 (M.R. 762(d))
b. Re: Nordstrom, (1961) 31 D.L.R. (2d) 255, 37 W.W.R. 16.

This procedure (0.54a) was not primarily designed for the purpose of having seriously contested questions of fact determined by the Court.

2. Cross-examinations on affidavits may be necessary. There is some question as to whether this cross-examination should take place at the hearing so that the presiding judge will have the benefit of observing the demeanor of the witnesses, or whether it can take place before the Court Reporter as is done on an examination for discovery.

a. Re: Stewart, (1961)35 W.W.R. 85
b. Re: Spurgeon X763/65 (Vancouver)
c. Rules of Court - O. 38, r. 1 (M.R. 521)
O. 37, r. 5 (M.R. 487)

(d) Forms

Name of Form	Form No.
Originating Motion - Form 1A, App. K	1
Affidavit	2

FORM #1

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES ACT, S.B.C., 1973, CHAPTER 18

AND

IN THE MATTER OF WATERGATE SECURITIES LTD.

TO: (The persons on whom service is to be made)

e.g.: Watergate Securities Ltd. (address)
Its Directors? (their addresses)
Its Majority Shareholders? (their addresses)

TAKE NOTICE that the Court will be moved on behalf of Sam Irwin, of Lytton, British Columbia, on the ___ day of _____, 197 __, at 10:30 o'clock in the forenoon, or as soon thereafter as Counsel can be heard for AN ORDER THAT:

1. (See S. 221(2) for the nature of the relief available)

2. Costs.

AND FURTHER TAKE NOTICE that in support of the motion will be read: (affidavits or other evidence intended to be used).

AND FURTHER TAKE NOTICE that if you do not attend in person or by your Counsel at the time and place above mentioned, such order may be made in your absence as to the Court may seem just.

DATED AT Vancouver, British Columbia, this _____ day of _____, 197 __.

"SAM DOT"
Solicitor for the Applicant, Sam Irw

This ORIGINATING NOTICE was taken out by Sam Dot, Barrister and Solici of 1700 Pennsylvania Avenue, Vancouver, British Columbia, whose place business and address for service is Suite 5010, 1700 Pennsylvania Aven Vancouver, British Columbia.

FORM #2

(use style of cause as described in Originating Motion)

I, SAM IRWIN, of Lytton, British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am just a country gentleman and the owner of 1,000 common shares in Watergate Securities Ltd.

2. Here recite facts that show.

(a) The affairs of the company are being conducted in a manner oppressive to Sam Irwin or
(b) The powers of the Directors are being exercised in a manner oppressive to Sam Irwin or
(c) Some act of the company has been done or is threatened that is unfairly unprejudicial to Sam Irwin or
(d) Some resolution of the members (or class of the members) has been passed or is proposed that is unfairly unprejudicial to Sam Irwin.

3. Additional forms - refer to Palmers' Company Precedents, 17th Edition, 1960, Part 2, Pages 56 and 57.

2. Section 222 - Representative Actions on Behalf of the Company

(a) History and Purpose of The Common Law Action

(i) Actions under the rule in Foss vs Harbottle (1843) 2 Hare 461.

A brief summary of the rights of a minority shareholder under the rule in Foss vs. Harbottle (1843) 2 HARE 461, might help put the new legislation in its proper perspective. What we are concerned with here is the right of a minority, ie. those controlling less than 50% of the voting shares. The majority always have the right to obtain whatever relief they want without recourse to the Courts by the use of their voting power.

Minority shareholder litigation is an attempt to force the directors (usually the majority shareholders) to do, or stop doing something that is harmful to the company and eventually to them as the minority in that company. Since it is the company that is alleged to be suffering, in normal circumstances it would be the company that would take the action. However, the minority not being in control of the Board of Directors can not get the company to act. Consequently, they can only sue as representing the company and the result is that the fruits of the litigation belong to the company and not to the individual minority shareholder who took the action. Inconsistent with this, to some extent, is the usual practice of awarding the minority the costs of the action if they succeed (rather than the company) and making the minority pay the costs if he or they do not succeed).

The authorities indicate that the following circumstances entitle a minority to sue in a representative way.

(a) Where the company is doing or intends to do something beyond its powers;
(b) Where the company is doing or intends to do something which constitutes a fraud on the minority and the perso controlling the company's activities are the beneficiar of the fraud;

(c) Where a resolution has been or is proposed to be passed which requires more than 50% of the voting shares but is or has been passed by only 50% of the voting shares.
Palmers Company Law 21st Ed. 503.

(d) Any other case where the interests of justice require that the rule be disregarded.
Gower, Modern Company Law 3rd Ed. 584-585

(ii) Class Actions, Representative Actions, Derivative Actions.

Comment should also be made about the use of such phrases as "class actions", "representative actions" and "derivative actions". These words often unnecessarily confuse minority shareholder proceedings and the definitions I suggest are the appropriate ones are as follows:

(a) Class Action

This is a representative proceeding taken by shareholders which may or may not be a "representative action", but it is definitely not a "derivative action". For instance, 2 or 3 shareholders may be deprived of the right to vote. They may then sue as a class, but their claim has nothing to do with a wrong done to the company. It is a wrong done to them personally by the majority of shareholders who will not give them this right to vote. They, as a result, take a class action on behalf of this minority against the majority but not necessarily against the company nor are the fruits of the litigation those of the company, nor is the company necessarily a party.

(b) Representative Action

These actions are taken by minority shareholders which may involve them as representing either other shareholders who have been similarly injured or other shareholders and the company when the company has been injured. The authorities tend to confuse these two forms of actions from time to time and you should be careful when you are reviewing the cases to ascertain whether the action is one taken

to protect the interests of the class or whether it is one taken to protect the interests of the company in the name of the class, or both.

(c) Derivative Action

This term is of more recent origin and it is intended to identify the types of action described in the rule of Foss vs. Harbottle (supra) where the shareholders derive their authority to sue others for a wrong done to the company. They are usually not complaining about anything done to them. They derive this from the company itself and are therefore suing for and on behalf of the company. Some authorities refer to this kind of action as a class action or a representative action which strictly speaking is not true. The style of cause is not necessarily descriptive.

(b) Review of The New Legislation

(i) Comparison with Foss vs. Harbottle actions.

There was no previous action comparable to Section 222 in the Companies Act, R.S.B.C. 1960, Ch. 67. The remedy was provided by the common law, not by statute. The question therefore arises as to whether or not the legislature intended to prohibit the common law action or if it still exists side by side with the remedy given under Section 222 of the new Act. We can look to the Ontario statute and the interpretation given to it by the Courts for some guidance in this matter.

The Ontario Business Corporation Act, R.S.O., 1970, Ch. 53, S. 99 contains a similar section to our S.222. There are numerous distinctions between the two sections, but it would seem the British Columbia Act has in mind the same kind of proceeding as is contemplated by the Ontario legislation. There have been two recent decisions in Ontario that have interpreted their S. 99. They are as follows:

Farnham et al vs. Fingold (1973) 2 O.R. 132 C.A. (February 15th, 1973)

Goldex Mines Ltd. vs. Revill et al (1973) 34 D.L.R. (3rd) 13 (Ontario High Court)(February 21st, 1973

Both of these cases decided that the Ontario section precluded any Foss vs. Harbottle common law type of proceedings and all actions by shareholders taken on behalf of a company must follow the procedure set out in the Ontario Business Corporation Act. In other words a minority shareholder must first obtain leave of the Court in Ontario before he can issue a Writ for a wrong done to the company.

(ii) Does the common law action under the rule in Foss vs. Harbottle still exist in British Columbia as a result of the new Companies Act, Section 222?

Whether the Ontario Courts interpretation of its section will be accepted by the British Columbia Courts as a binding interpre of the B.C. Statute remains to be seen. There appears to be at leas two arguments to suggest that the B.C. legislature did not intend to take away the Foss vs. Harbottle action.

(1) The rule of statutory construction that common law rights are not to be taken away or affected by statute unless it is so expressed in clear language or must follow by necessary implication.

When looking at S. 222 of the new Companies Act and applying this rule of construction, it is apparent that the section does not expressly take away the common law right. Whether it does so by necessary implication is a matter for future interpretation. However, it would seem that the whole thrust of the new Act is to enlarge shareholder's rights and to deprive them of the Foss vs. Harbottle remedy would seem inconsistent with this objective.

(2) The British Columbia Statute allows proceedings by a director as well as a shareholder. The rule in Foss vs. Harbottle and the Ontario Act only allows proceedings by a shareholder. Presumably a director could proceed under S. 222 of the Companies Act of British Columbia, even though he did not hold one share in the company. Consequently there is further

argument that the new B.C. section is an alternative form of relief.

(3) The British Columbia statute does not have a similar section to Ontario upon which a great deal of emphasis was placed by the above two Ontario cases. This Ontario section reads as follows:

> "99(2) An action under subsection (1) shall not be commenced until a shareholder has obtained an order of the Court permitting the shareholder to commence the action."

The B.C. Statute permits an action under its section while the Ontario section prohibits any action for similar relief until an order is obtained.

(iii) Advantages and disadvantages of the new statutory action under Section 222

The preceding point may or may not be academic, since the are certain advantages given to the Plaintiff under the statutory ri of action that to date have not been available to the Plaintiff unde the Foss vs. Harbottle proceedings.

1. One person may be appointed by the Court to conduct the action on behalf of all of those who are complaini

While the common law action usually has one or a small group of people actively carrying on the litigation, those persons sit in an uneasy position and receive various degrees of support from other members of the class whom they claim to represent. Their rights to settle the action before trial and after trial are not altogether clear. The new section would seem to try and control such a problem.

2. Costs

Section 222(4)(b) and Section 222(5) of the new Act provide for substantial relief to the Plaintiff by way of payment for costs during the action and after. This again has not as yet been given to the Plaintiff in the Foss vs. Harbottle type of proceedings. The common law has the flexibility to award such costs

but to date no judge has seen fit to do so, to my knowledge.

(c) Procedure

(i) Originating Notice

The comments in respect to the issuance of an Originating Notice under S. 221 as set out on page 8 apply in this case and you should decide before proceeding whether the common law action is still open. This is particulary so when you want interim relief such as an injunction. It is doubtful an injunction would be granted during the S. 222 preliminary hearings since the plaintiff would not, as of that time, have established a prima facie case to support a cause of action. This is a requirement for the granting of injunctive relief.

If you intend to pursue the common law remedy then helpful precedents are available in Palmers Company Law 17th Ed. 1956 Part 1 P. 1126, 1127, 1128 and 1129.

(ii) Affidavit

Comments under S. 221 in respect to an Affidavit in Support of the Originating Notice apply except different facts must be shown so as to entitle the applicant to the relief allowed by the statute. Form #4 sets out some of the suggested material that should be in the Affidavit.

(iii) Writ of Summons

If an Order is obtained allowing the applicant to issue the Writ presumably there will be a new style of cause and hence a new action number. It may be that the Court will want the Writ issued with the same action number where the Order was made pursuant to the Originating Notice but no clear authority is available on this.

(d) Forms

Name of Form	Form No.
Originating Notice	3
Affidavit	4
Order	5
Indorsement	

FORM #3

(style of cause - see Form #1)

(see form #1 and form #1A App. K;S.C. Rules)

TO: Watergate Securities Ltd. (address)

TAKE NOTICE that the Court will be moved on behalf of Sam Irwin of Lytton, British Columbia, on the ___ day of _____, 197__, at 10:30 o'clock in the forenoon, or as soon thereafter as Counsel can be heard for AN ORDER THAT:

1. Leave be given by this Honourable Court to the applicant, Sam Irwin, to bring an action against Richard Nickson, John Deene, Robert Haldemoan and John Oilickman in the name of and on behalf of Watergate Investments Ltd. pursuant to the provisions of the Companies Act, S.B.C., 1973, Chapter 18, S.222 to enforce the alleged right of the Company to receive proper compensation for the sale of its assets made the 17th day of June, 1974 to the intended Defendants or to obtain damages for a breach of the alleged loss suffered by the company as a result of the said action of the intende Defendants on the 17th day of June, 1974 and for other necessary consequential and interlocutory relief.

2. The applicant be paid interim security for his costs and disbursements in the sum of $ _____.

3. The applicant be authorized to conduct the action for and on behalf of Watergate Securities Ltd.

4. Costs of this motion be costs in the intended action.

AND FURTHER TAKE NOTICE that in support of the motion will be read (here list affidavits or other evidence intended to be used):

AND FURTHER TAKE NOTICE that if you do not attend in person o by your counsel at the time and place above mentioned, such order may be made in your absence as [illegible]

DATED AT Vancouver, British Columbia, this ____ day of _____, 197 __.

" SAM DOT"
Solicitor for the Applicant, Sam Irwi

This ORIGINATING NOTICE was taken out by Sam Dot, Barrister and Solicitor of 1700 Pennsylvania Avenue, Vancouver, British Columbia, whose place of business and address for service is Suite 5010, 1700 Pennsylvania Avenue, Vancouver, British Columbia.

FORM #4

(style of cause as in form #3)

I, SAM IRWIN, of Lytton, British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am just a country gentleman and a shareholder (director) of Watergate Investments Ltd. the intended Plaintiff and have personal knowledge of the following facts except where such facts are expressed to be upon my information and belief.

2. The intended Defendants, Richard Nickson, John Deene, Robert Haldemoan and John Oilickman are the directors of Watergate Investments Ltd.

3. The intended Defendants have transferred to themselves assets of Watergate Investments Ltd. valued at $500,000.00 for the price or sum of $100,000.00 on the 17th of June, 1974 (S.222(3)(c)

4. I have made the following efforts to cause the said directors of the said Watergate Investments Ltd. to commence an action against the intended Defendants for the purpose of setting aside the Agreement and recovering the loss suffered by Watergate Investmerts Ltd. (S.222(3)(a)).

(a) On the ___ day of _____, 197 __, I caused a meeting of the shareholders of Watergate Investments Ltd. to be called and proposed a Resolution as follows:
(b) etc.
(c) etc.

5. This application is brought by me for the benefit of Watergate Investments Ltd. in good faith and not solely for any personal motive (S. 222(3)(b)).

6. At the time the said Agreement referred to in paragraph 3 above was made I was a shareholder of Watergate Investments Ltd. (S.222 (3) (d)).

7. The intended Defendants are also shareholders of the intended Plaintiff (or as the case may be).

8. That I am informed by _____, Barrister and Solicitor and verily believe that the legal fees and disbursements in respect to the proposed action could easily exceed $ _____.

9. That I verily believe the majority of shareholders would approve the transaction referred to in paragraph 2 above but they are composed of the intended Defendants (S.222(7)).

10. (Here add any other necessary facts).

SWORN before me at the City of Vancouver, in the Province of British Columbia this _____ day of _____, 197__.

_____
A Commissioner for taking Affidavits within British Columbia.

_____

FORM #5

ORDER PURSUANT TO ORIGINATING MOTION
Marginal Rule 770, Appendix K, Form No. 2

(use style of cause in form #3)

BEFORE THE HONOURABLE) _____DAY, THE _____
)
MR. JUSTICE _____) DAY OF _____, 197__

UPON this motion coming on for hearing this day in the presence of Sam Dot Esq., of Counsel for the Applicant and J.R. Buzzard, Esq., of Counsel for the intended Defendants; UPON reading the proceedings herein and what was alleged by Counsel as aforesaid;

THIS COURT DOTH ORDER AND ADJUDGE that Sam Irwin be at liberty to bring an action in the name of, and on behalf of, the intended Plaintiff, Watergate Investments Limited, against the intended Defendants, Richard Nickson, John Deene, Robert Haldemoan and John Oilickman within fourteen days from the date of entry of this order to enforce the alleged right of the Company, Watergate Investments Ltd. to recover proper compensation for the sale of its assets made the 17th day of June, 1974 to the intended Defendants or to obtain damages for a breach of the alleged loss suffered by the company as a result of the said action of the intended Defendants on the 17th day of June, 1974 and for other necessary consequential and interlocutory relief.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said Sam Irwin of Lytton, British Columbia, be granted conduct of the action on behalf of the intended Plaintiff, Watergate Investments Ltd.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that Watergate Investments Ltd. pay into this Honourable Court the sum of $_____

for interim costs on account of legal fees and disbursements incurred by the said Sam Irwin in the conduct of this action and the said sum or part thereof be paid out to the Solicitor for Sam Irwin upon the taxation of any interim or final bill of costs rendered by the said Solicitor to the said Sam Irwin on a solicitor and own client basis.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that in the event Watergate Investments Ltd. is not successful in the said action or any appeal therefrom, the said Watergate Investments Ltd. be at liberty to apply to this Honourable Court for the purpose of compelling the said Sam Irwin to account to the intended Plaintiff, Watergate Investments Ltd., for any such costs paid to him as aforesaid and to pay the said intended Plaintiff, Watergate Investments Ltd., such sums as may be found due.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that in the event the said Sam Irwin fails to commence the action in the name of Watergate Investments Ltd. within the time aforesaid, the said action be deemed to be dismissed and abandoned.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs in the cause between Watergate Investments Ltd. and the intended Defendants.

BY THE COURT

DISTRICT REGISTRAR

APPROVED AS TO FORM

J.R. BUZZARD

FORM #6

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WATERGATE INVESTMENTS LTD.

PLAINTIFF

AND:

RICHARD NICKSON, JOHN DEENE, ROBERT HALDEMOAN and JOHN OILICKMAN

DEFENDANTS

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her Other Realms and Territories, QUEEN, Head of the Commonwealth, Defender of the Faith.

(Rules of Court - App. A - Form No. 1)

INDORSEMENT

The Plaintiff's claim is for damages for breach of the duty o the Defendants as Directors of Watergate Securities Ltd. by reason of their failure to act honestly and in good faith and in the best inter of the company on the sale of the companies assets to them on January 1974 and for other necessary consequential and interlocutory relief.

This action is brought by the Plaintiff pursuant to the provi of the Companies Act, S.B.C., 1973, Chapter 18, S. 222 in accordance the Order of the Honourable Mr. Justice _____ pronounced t _____ day of _____, 19___, Vancouver Registry Number _____