Feminism(s), Progressive Corporate Law and the Oppression Remedy

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This article concerns the Canadian oppression remedy – which is well known for advancing minority shareholder protection in a context that is expressly animated by the values of fairness and justice. The article concludes that the oppression remedy’s success in combatting the pro-majoritarian bias of Canadian common law is at least partially due to courts understanding the remedy in a manner that is fortuitously consistent with a matrix of insights offered by feminist and progressive legal scholars such as Kellye Testy. The oppression remedy regards as legally significant the consequences and implications of human relationships; it rejects abstractions, choosing context instead; it is concerned about the reach of limited liability; and it demands accountability from those who trade in unfairness. In short, certain values and perspectives associated with feminism(s) actually find expression in the oppression action – as it turns out – and thereby help to propel its ameliorating influence. The overarching purpose of this article is to build on the work of scholars who have identified what is wrong with corporate law by taking the opposite tack. Focusing on the closely-held corporation where the remedy tends to have its greatest traction, this article identifies oppression as an important example of what is right about corporate law and, based on the work of authors such as Testy, offers an explanation for that success. The upshot of this analysis also works to indirectly offer insight as to best practices for the governance of closely-held corporations.

Introduction

An important thread in the history of companies and corporations concerns how these vehicles have been used to betray trust\(^1\) and exploit vulnerability – from the South Sea Bubble in 1720-21, to the disintegration of Bre-X Minerals Ltd. in 1997, to the subprime mortgage crisis (which triggered mass foreclosures, social disruption, and the collapse of global capital markets in 2008), to the less public forms of disloyalty practiced in closely-held corporations. In response

to these themes of betrayal, a corresponding thread in corporate law and policy concerns the extent to which the law should extract accountability from those who perpetrate unfairness.

Historically, Canadian corporate law showed a surprising reluctance to halt corporate misfeasance, overreaching, and abuse in relation to the minority shareholders which fell short of fraud. By the 1970’s and 1980’s, however, Canadian courts were located in a new a doctrinal landscape when federal and a majority of provincial governments enacted the oppression remedy provisions. This remedy required (and continues to require) the judiciary to constrain majority rule and embrace a radical architecture for doing so: judges are to openly engage the values of fairness, reasonableness, and accountability in assessing the merits. For this reason, Justice Gomery concluded in the 1986 case of Sparling v. Javelin International Limited that the “former principle of judicial non-interference in the management of corporations has been abrogated” and concurred with Professor Beck’s now very familiar description of Canada’s oppression remedy as being "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world. It is unprecedented in its scope."

The oppression remedy – which is more accurately termed the oppression action – advances the insight that majority conduct (either directly or through management) can be unscrupulous and egregious even while staying within the strict, black-and-white-letter lines of legality. By virtue of oppression’s entirely novel regime, courts are admonished not to reflexively invoke the long-standing principle of unmitigated majority rule or, more aggressively, to dismiss minority stakeholder complaints as being just so much buyer’s remorse over a private ordering they had freely chosen. As will be discussed in more detail, fairness and equity became the mandatory referents for Canadian corporate jurisprudence.

This article takes the novel position that certain values associated with feminism(s) actually find themselves expressed in the oppression action and propel its success. In short, the oppression action is effective, in part, because courts understand it in a manner that is fortuitously consistent

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2 See MARCUS KOEHNEN, OPPRESSION AND RELATED REMEDIES 6 (2004).
3 First enacted in 1975, the Canada Business Corporations Act, R.S.C., ch. C-44, § 241(2) (1985) states:
   If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
   (a) any act or omission of the corporation or any of its affiliates effects a result,
   (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, 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.

6 See Mohamed Khimji & Jon Viner, Oppression: Reducing Canadian Corporate Law to a Muddy Default, 47 OTTAWA LAW REVIEW 123 (2015-2016). These authors correctly note that, while the majority of case law and scholarship refers to the oppression remedy, it is more properly known as the oppression action. Put another way, as they do, until the ingredients of oppression are demonstrated, there is no remedy. I, too, will largely adopt the oppression action nomenclature in this paper.
with a matrix of insights offered by feminist and progressive legal scholars such as Kellye Testy.7 This is not to suggest that the perspective of such scholars is univocal8 or that the mistreatment of minority stakeholders somehow trumps patterns of exclusion in other aspects of law and society. It is, rather, to offer a partial explanation of why the oppression action is able to advance such a potentially robust form of fairness to the minority stakeholder and how it can prophylactically set the tone for effective corporate governance.

Accordingly, the purpose of this article is to build on the work of scholars who have identified what is wrong with corporate law by taking the opposite tack. Focussing on the closely-

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held corporation where the oppression action tends to have its greatest traction, this article identifies the action as one example of what is right about corporate law and, based on the work of authors such as Testy, offers an explanation for that success. As will be seen, the oppression action regards as legally significant the consequences and implications of human relationships; it actively recognizes how governance structures can be manoeuvred and abused at the expense of minority stakeholders; and it extracts a nuanced form of accountability from those who trade in unfairness. The upshot of this analysis also works to indirectly offer insight as to best practices for the governance of closely-held corporations.

This article is divided into several parts. Part I explores the harsh judicial perspective on minority rights prior to enactment of the oppression action as well as offers a very brief introduction to the current law governing oppression in common law Canada. Part II shifts gears to explore, as a touchstone, how the oppression action was applied by the Ontario Court of Appeal in Ferguson v. Imax Systems Corp. It also assesses the extent to which Canada’s oppression action – as reflected in Ferguson – aligns with perspectives and analysis offered by Testy. Part III offers some modest conclusions, including how the closely-held corporation would benefit from being more attune with feminism(s) and other progressive values going to fairness – both for the sake of these values alone and as a strategy for avoiding the disruption and cost of oppression litigation.

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9 According to a useful definition provided by Douglas Moll, a closely-held or close corporation “is a business organization typified by a small number of stockholders, the absence of a market for the corporation’s stock, and substantial shareholder participation in the management of the corporation”. See Douglas K. Moll, Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History, 40 Wake Forest L. Rev. 883, 888 (2005). See also Edward Rock & Michael Wachter, Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in the Close Corporation, Faculty Scholarship, Paper 644 (1999), available at http://scholarship.law.upenn.edu/faculty_scholarship/644, who note that the lack of a public market for the holder of shares in a close corporation “causes parties to be locked into their investments to a much greater extent than in either the partnership or the publicly traded corporation. Because the majority shareholders elect the directors and control the management of the corporation, minority shareholders are particularly vulnerable if there is a falling-out with the majority” at 916.

10 See Stephanie Ben-Ishai & Poornam Puri, The Canadian Oppression Remedy Judicially Considered 1995-2001, 30 Queen’s L.J. 79 (2004). In summarizing Ben-Ishai and Puri’s results, Mohamed Khimji and Jon Viner, supra note 6 at 22, conclude: “While the study does not specify exactly what proportion of minority shareholders were stakeholders in closely-held corporations, the study does note that overall, 92% of oppression claims brought involved closely-held corporations while only 8% involved widely-held corporations Taken together, these statistics suggest that most oppression actions have been brought by minority shareholders of close corporations”.

11 It should be noted, as Hodge O’Neal and Robert Thompson do, that the equities are not always on the side of the minority shareholder whom the majority seek to dispatch: Minority shareholders may be so uncooperative and act so unreasonably and improperly that controlling shareholders are justified in moving to eliminate them from the enterprise, although even then the minority shareholders should receive fair payment for their interests. In some instances, obstreperous conduct by the minority shareholders is prompted by a determination to compel majority shareholders to buy the minority interest at price in excess of value. Furthermore, minority shareholders not uncommonly consider themselves aggrieved when in fact they are being fairly treated....In the mind of the unhappy shareholder there is often no clear-cut line between unpleasantness, dissension, or frustration on the one hand and oppression, injustice, or squeeze-out on the other [footnotes omitted].


I. Common Law and Statutory Protection of the Minority

It is beyond the scope of this article to offer a detailed history of the oppression action. This is, in part, because such a history has already been very effectively generated by others, but, moreover, because a broad and expansive treatment is not necessary to the article’s main contentions. Instead, what follows is a targeted account; it illustrates how the judiciary historically endorsed majority abuse of minority interests and how such judicial endorsements, falling so very short of justice, triggered the modern statutory oppression action by way of legislative corrective and rebuke.

A. A Brief History of the Common Law

As is well known, Canadian corporate law prior to passage of the oppression action gave very little cover to minority shareholders. The affairs of the joint stock company were governed by the majority rule principle inherited from England, with the judiciary pursuing a studied strategy of non-interference. Among the most formidable blockades against the minority was an aspect of the 1843 rule in *Foss v. Harbottle* which the Dickerson Committee (1971) observes “bars a shareholder from complaining of alleged misconduct on the ground that the impugned act might be authorized or ratified at a meeting of shareholders.” Though the Dickerson Committee goes on to cite L.C.B. Gower’s assessment of this aspect of *Foss* as “a major absurdity,” it held sway until functionally repealed as the legislative oppression action swept through Canada.

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14 As the Ontario Court of Appeal observed in *Rea v. Wildeboer*, 126 O.R. (3d) 178 at ¶ 14: “At common law, minority shareholders in corporations had very little protection in the face of conduct by the majority (or by directors controlled by the majority) that negatively affected either the corporation itself or their interests as minority shareholders.”


16 As Lord Eldon stated in 1812: “This Court is not required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom,” quoted by Mary Anne Waldron, *Corporate Theory and the Oppression Remedy*, 6 CAN BUS L.J. 129 at 130 (1981-1982). Note that the judicial comment – in the context of a very large partnership – is perhaps less of a rebuke then it first appears given that the dispute in question actually did involve a brewhouse. See Carlen v. Drury, [1812] 1 Vesey & Beames 154 at 158 (U.K.).


18 See *RWV Dickerson et al., Proposals for a New Business Corporations Law for Canada* Vol. 1 at ¶ 487 (1971). (Note that the Dickerson Committee was an advisory body which was tasked by the federal government to propose how to reform and modernize Canadian corporate law, as noted by Jeffrey Bone, *Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought*, 24 CAN. J.L. & JUR. 277 (2011).) The extent of the judiciary’s refusal to assist the minority on this front is well illustrated in MacDougall v. Gardiner, [1875] 1 Ch. D. 13, C.A. (U.K.). Here, the chair of a shareholders’ meeting refused to take a poll on a motion to adjourn, even though the company’s articles provided for such a poll to be taken upon the demand of five shareholders. The Court of Appeal was unperturbed by the chair’s refusal to follow the articles, noting that the matter concerned an internal dispute which could be ratified by the majority. It refused to recognize any personal right in the shareholder to insist on the Articles. See also Koehnen, supra note 2, who observes that when the rule in *Foss v. Harbottle* was judicially combined with the principle of majority rule, “the result was disastrous for minority shareholders” at 2.

19 Dickerson Report, *id.*
Prior to effective statutory reform, the fact of minority shareholder vulnerability was widespread. In 1916, for example, the Canadian textbook writer Victor Mitchell was able to identify less than a handful of legislative provisions in various companies acts across the country which protected minorities, such as provisions requiring that important changes be approved by a “certain specified majority” and the provision permitting an application to the court to appoint an investigator. But Mitchell is quick to add that even this latter protection was less robust than it appears: the appointment of an inspector did not, in fact, afford “substantial relief” because the inspector’s report “could not be made the foundation of any subsequent action.” It only provided a means for shareholders to try to access information. And based on what were then recent amendments to the Ontario companies legislation, the company’s constating documents could include a right in the hands the Provincial Secretary to appoint an auditor – a measure which, if made available, presumably would offer some degree of minority protection. But all in, these provisions are thin gruel, with Mitchell opining that the minority is “best protected against the major by appropriate provisions in the company’s letters patent or memorandum of association.” In this way, Canadian company legislation echoed the laissez-faire ideology animating contract law: there should be little legislative or judicial interference with chosen relationships. In P.S. Atiyah’s words (in the context of contract law) it “is not the Court’s business to ensure that the bargain is fair, or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of superior bargaining power... Nor is it the Court’s business to create or impose obligations on anybody from its own sense of justice.”

With no legislative mandate to the contrary, Canadian judges were infused with the English perspective that beleaguered minority shareholders should largely be left to their own devices.

Indeed, a literalist construction as to what the minority could object to often ruled the day. For example, in the 1937 English case of In re. Cuthbert Cooper and Sons Ltd., the court refused an application for dissolution brought by the minority who complained that the directors refused to register executed share transfers. According to the court:

> Whether it be a matter of articles of association or articles of partnership the rights of the parties are determined by these articles, and the question whether it is right for me applying here the principles of partnership to the question of dissolution to wind up this company or not largely depends on what are the contractual rights of the parties as determined by the articles of association in this case. Accordingly, when I come to consider the allegations which are made in the

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20 Mitchell, supra note 15 at 74. It is ironic that one of the strongest examples of minority protection – the necessity of a special resolution to alter the company’s memorandum of association – is actually a derogation of the minority’s historical right to block such amendments in their entirety. For a very thorough historical assessment of minority shareholder rights, see ARMAND DU BOIS, THE ENGLISH COMPANY AFTER THE BUBBLE ACT: 1720 – 1800 (1938). Note that Gower identifies this book as one of the best accounts of this period. See LCB Gower, The English Private Company, 18 Law and Contemporary Problems 535 at 535 (1953).

21 Mitchell, supra note 15 at 75.

22 Id. at 75.

23 Id. at 76.

24 Id. at 75.


26 Cheffins, supra note 13 at 307.

27 In re. Cuthbert Cooper and Sons Ltd, [1937] Ch. 392 (U.K.).
petition, I must be guided by what are the legal rights of the parties as determined by the bargain into which they entered.28

Michael Treibilcock is rightly critical of this terse judicial pronouncement, noting that in such a view, “the literal contract between the parties is almost exhaustive of their obligations to each other, and scarcely any scope is left for the concept of judicial restraint on the abuse of power.”29 Mary Ann Waldron shares this kind of conclusion when she notes that the judicial perspective on minority shareholder rights found its roots in the contractual basis of holding shares in a joint stock company "and only there or in a very limited statute could the parties' rights be found. It was this law rather than that of partnership or principal and agent that the courts attempted to apply to the corporation."30

That this approach drove the court’s laissez-faire perspective is unmistakeable in Ontario Court of Appeal Justice Middleton’s 1928 decision31 wherein he dismissed a minority shareholder’s application for a winding up order with the following very telling observation as an add-on:

[The applicant] is a minority shareholder and must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transaction ultra vires, the majority must govern, and there should be no appeal to the Courts for redress.32

Reducing this judicial perspective to just three words, Montague J. stated, in a 1934 decision of the Manitoba King's Bench, "Might is right,"33 and went on to dismiss the minority shareholder’s action for a winding up order.34 No doubt with cases like these in mind, Justice D.C. McDonald of the Alberta Court of Queen’s Bench succinctly summarizes Canadian law prior to the statutory oppression action as follows: “business decisions were to be made by the directors and the majority shareholders. The courts took the position that they were powerless to interfere with the internal management of a corporation.”35 A largely unmitigated majoritarianism actively

28 Id. at 389.
30 Waldron, supra note 16 at 150.
32 Id. at ¶ 8 (Ont. C.A.), quoted in Hanemaayer v. Freure, [1999] 100 A.C.W.S. (3d) 153 (Ont. S.C.) at ¶ 148. The court in Jury Gold was not unhappy to deny the winding up application, noting that if the minority shareholder wanted to allege misapplication of assets, he could “bring an action on behalf of himself and other shareholders, making the company and the directors against whom he charges wrongdoing parties defendant” at ¶ 8.
34 The court Winnipeg Saddlery, id., observed that unless the substratum of the company has evaporated, the mere fact of serious company losses does not bring the applicant in the “just and equitable” ground for a windingup order, at ¶ 32.
stymied protection of the minority or, as Jeffrey McIntosh puts it: “a sort of caveat emptor was the rule of the day.”

But with all this, courts on an exceptional basis did recognize or at least articulate how a majoritarian perspective could work injustice. For example, in Allen v. Gold Reefs of West Africa Ltd., Lindley MR offered this assessment in 1900 when weighing the powers of a corporation to amend its articles:

. . . it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded.

In the context of this assessment, the court went on to permit an amendment of the articles which gave the company a retroactive lien on the shares of the deceased.

B. Legislative Reform

In response to the general inadequacy of the common law as well as legislative insights from the Dickerson Committee commenting on same, both federal and a majority of provincial governments in Canada have enacted the oppression action in its modern form. Justice Haddad of the Alberta Court of Appeal accurately notes that legislative intent in such an action is “to ensure settlement of intra-corporate disputes on equitable principles as opposed to adherence to legal rights.” In this way, the official principle of judicial non-interference was resoundingly reversed.

Section 241(2) of the Canada Business Corporations Act (C.B.C.A), which is representative of provincial statutes as well, states as follows:

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

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

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

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

36 MacIntosh, supra note 13 at 603.
38 Id. at 671, quoted with approval in Ferguson (C.A.), supra note 12 at ¶ 28, though with the caveat that Canada’s new oppression remedy was not simply a codification of the common law, at ¶ 30.
39 Allen, supra note 37.
40 See Dickerson Committee, supra note 18. For historical analysis, see Koehnen, supra note 2 at 4 and following.
42 It is interesting to note that Ontario initially resisted including an oppression remedy in its corporate law statute for just that very reason. As First Edmonton, supra note 35 observes at 138, The INTERIM REPORT OF THE SELECT COMMITTEE ON COMPANY LAW (known as the Lawrence Report), warned that enacting the oppression remedy would be “a complete dereliction of the established principle of judicial non-interference in the management of companies.”
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 purpose of using such broad terms such as “unfairly prejudicial” for example, is, according to the Dickerson Committee, to enable the courts “to develop the common law of responsibility of corporate management unhampered by the legal fetters created at a time [in England] when courts were preoccupied with enforcing ‘democratic’ structures – particularly voting power–as the one real object of the law.”43 The idea is that something less than conduct which was “burdensome and harsh”44 was impeachable. And in summarizing the heart of the proposed oppression action, the Dickerson Committee stated:

it is difficult to improve on the frequently quoted interpretation of the meaning of § 210 made by Lord Cooper in Elder v. Elder and Watson Ltd, [1952] S.C. 49 at 55: "... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.”45

Beyond this, the oppression action broke with a laissez-faire legislative past by offering judges the opportunity to issue remedies beyond the all-or-nothing winding-up order.46 Courts were to actively forge remedies that addressed the wrong in question and were provided a very large discretion to do so by oppression. Section 241 of the Canadian Business Corporations Act gives the court jurisdiction to “make any interim or final order it thinks fit.” 47

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43 Dickerson Committee, supra note 18 at ¶ 477.
44 This narrow definition of the word ‘oppression’ under the English Companies Act was offered in Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] AC 324 at 342 (U.K.) and subsequently rejected. As Farley et al. observe, supra note 13 at 269, the “legislative developments following the initial adoption of the Companies Act, however, made it clear that a broader conception of oppression having more to do with the idea of fairness would govern.”
45Dickerson Committee, supra note 18 at ¶ 485. Note that the Supreme Court of Canada in BCE Inc. v. 1976 Debenture Holders, [2008] 3 SCR 560 (Can.) delineates the kind of conduct that falls under each kind of impugned behaviour under the statutory oppression section. According to BCE, the matter, the term oppression used in § 241 refers to conduct that has variously been described as “burdensome, harsh and wrongful”, at ¶ 91, as “a visible departure from standards of fair dealing” at ¶ 91, and an “abuse of power going to the probity of how the corporation’s affairs are being conducted”, at ¶ 91. By way of relative contrast, conduct that “unfairly prejudices” or “unfairly disregards” captures a lower level of misconduct though impeaching it all the same. As the Supreme Court of Canada states in BCE at ¶ 93, examples of unfair prejudice include:
squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm...
And here is what Canada’s highest court says about ‘unfair disregard’ at ¶ 94:
‘Unfair disregard’ is viewed as the least serious of the three injuries, or wrongs, mentioned in § 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder’s dividend, or failing to deliver property belonging to the claimant...
46 As Koehnen observes, supra 2 at 3, the winding up order did not protect the integrity of a shareholders’ investment. Instead, it “destroyed it.”
47For discussion on how courts are to devise a remedy pursuant to the oppression provision, see Naneff v. Con-Crete Holdings Ltd., (1995) 23 O.R. (3d) 481 (Ont. C.A.). See also Raymonde Crete, Dealing with Unfairness: Some
In sum, the oppression action constitutes legislative recognition of the shining insight offered by Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.*, in his assessment of what “just and equitable” means:

a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. The just and equitable provision... does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

C. The Oppression Action According to the Supreme Court of Canada

Lord Wilberforce’s revelation above has become a significant foundation for the oppression action, having been quoted with approval by numerous courts including, though in a shortened form, by the Supreme Court of Canada in *BCE*. In the context of explaining protection of the minority’s “reasonable expectations” – the centre of what the oppression action seeks to address – the Supreme Court of Canada in *BCE* then goes on to opine as follows:

The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to “reasonably expect.”

As for the how to assess the complainant’s reasonable expectation, the court states:

In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

Echoing Lord Wilberforce, the Supreme Court of Canada observes that reasonable expectations “may emerge from personal relationships” and moreover, that relationships based

*Observations on the Role of the Courts in Designing a Fair Solution*, 36 U.B.C. L. REV. 519 at 533 and following (2003). Note too Ben-Ishai’s and Puri’s observation, *supra* note 10 that “courts have been most creative when fashioning remedies for successful applicants” at 108.

49 *Id.* at 379.
50 *Supra* note 45.
51 *Id.* at ¶ 64.
52 *Id.* at ¶ 62.
53 *Id.* at 75.
on friendship or family ties “may be governed by different standards than relationships between arm’s length shareholders in a widely held corporation.”

The court also added this analysis:

It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful"... The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play... It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

And finally, BCE also offers the leading test in Canada for determining availability of the oppression action in these broad terms:

One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.

In short, as noted by the Supreme Court of Canada, the oppression action recognizes the need “to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen” with the action’s main concern being “justice and fairness,” to rely on the words of Farley, Chouinard and Daube. Oppression’s equitable, contextualized, fact-specific and potentially discerning focus helps provide a strong rejoinder to the unbridled laissez-faire zeitgeist previously inhabiting the field of minority stakeholder rights. The oppression action treats the human relationships behind the corporation as highly relevant, giving them some of the legal consequences that are their due. The need for this is particularly acute in the closely-held corporation. As Douglas Moll observes, “[p]ossessed with financial and participatory expectations, but powerless in a majority rule and ‘no exit’ environment, the close

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54 Id.
55 Id. at ¶ 71-72.
56 BCE, id. at ¶ 56.
57 BCE, supra note 45 at ¶ 82.
58 Supra note 13 at 262.
corporation’s minority shareholder is peculiarly vulnerable to abuse.”

Unlike the holder of shares in a publicly traded corporation, the minority shareholder has no ready market – or no market at all – within which to sell her shares in face of poor treatment. As well, and as the Ferguson case illustrates, sometimes the minority shareholder does not wish to sell her shares at all.

II. Relating the Oppression Action to Feminism(s) and Progressive Corporate Law

Since the enactment of the oppression action federally, provincially, and territorially, Canadian courts have considered the action thousands upon thousands of times. Cases range from determining whether concealing the sale of shares constitutes oppression to assessing the status of wrongful dismissal as a form of oppression, to the oppressive qualities of paying dividends absent formal declaration or imposing a cash call. From this tremendously large mass of common law, Ferguson v. Imax Systems Corp., a decision of the Ontario Court of Appeal, emerges as significant because it illustrates so persuasively the action’s focus on fair play, fair dealing, and fair treatment. The case demonstrates how the oppression action (in the context of the closely-held corporation) can successfully temper the inflexible and unjust application of majoritarian corporate law principles which historically carried the day. With this illustration in place, Part II goes on to assess the extent to which the oppression action resonates with the Testy’s analysis of feminism(s) and progressive corporate law. This will include an assessment of how the oppression remedy is attune to what Testy references as the importance of connection and its consequences, the importance of attending to context, as well as the need to reject abstraction and embrace the importance of human flourishing. And because the oppression action also dovetails with the progressive good faith norms and values associated with fairness, the relevance of the Supreme Court of Canada’s recent assessment of contractual good faith in Bhasin v. Hrynew will be canvassed.

A. Ferguson v. Imax Systems Corp.

59 Moll, supra note 9 at 883-884, (footnotes omitted). See also, footnote 9 of this paper for definitions of the closely-held corporation.
60 Supra note 12.
61 Id. at 129.
69 Supra note 12. Note that Ferguson was cited with approval by S.C.C. in BCE, supra note 45 at ¶ 75.
70 [2014] 3 S.C.R. 494 (Can.)
The salient facts, as recounted by the motions judge and the Ontario Court of Appeal are these: Imax Systems Corp. was incorporated in 1967 with the goal of advancing its patented film projection system. Capital structure was as follows: Messrs. Ferguson, Kerr (Ferguson’s friend since school days) and Koiter (Ferguson’s brother-in-law) were each issued an equal number of common shares while their wives were each issued an equal number of class B shares, including the applicant Mrs. Ferguson. Class B shares were non-redeemable and largely non-voting. While the company was establishing itself, Mrs. Ferguson, a film editor, worked full time at Imax while the men maintained their day jobs. Mrs. Ferguson was, for the most part, not paid for this early corporate work. The other wives did not work at all for the company in any capacity.

When Mr. and Mrs. Ferguson separated, matters became acrimonious. Mrs. Ferguson’s view, expressed to both levels of court, was that her husband was determined to drive her from the company and ensure that she did not participate in its future profits. In short, she was the subject of a squeeze-out orchestrated by her husband and acquiesced in by the other couples who responded to his wishes. For example, soon after their separation, Mrs. Ferguson was fired from the company at which point Mr. Ferguson suggested it was not in the interests of Imax to have non-working shareholders. He also saw to it that virtually no dividends were paid out (presumably to starve Mrs. Ferguson financially) and orchestrated a special meeting to approve a motion to redeem all class B shares via a fundamental change. This latter resolution would have the effect of putting Mrs. Ferguson out of the company once and for all.

In response, Mrs. Ferguson sought an injunction against the holding of such a meeting pursuant to the oppression action provision of the C.B.C.A. The motions judge refused such an order, being highly persuaded by counsel for the respondents in this particular regard:

Ms. Block [counsel for Imax] in her submissions, begins by stating that there is no inalienable right for a person to be a shareholder for all time. Has a person a subsisting right to remain a shareholder? Has Mrs. Ferguson an indefeasible right to hang on to her shares until she wishes to sell them? Ms. Block argues persuasively that a shareholder does not have this indefeasible right and that the structure of the CBCA was such as to allow fundamental change while still affording the shareholder protection.  

In short, the court agreed that Mrs. Ferguson had not been oppressed. If she was unhappy with the valuation of her shares pursuant to the fundamental change provisions of the C.B.C.A., Mrs. Ferguson could seek for example, a valuation action under section 184. In fact, that is exactly what the motions judge ordered as a remedy, even though Mrs. Ferguson had not even sought this form of relief in her application.

The motions judge took a highly narrow path to conclude that since the C.B.C.A. permitted a company to alter its capital structure and “retire, eliminate or redeem classes of shares” upon achieving the requisite number of votes, there was no good reason not to allow that to happen in the case at bar. The court was simply not sympathetic with Mrs. Ferguson’s argument that through

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72 Id. at ¶ 28.
73 Note that the motion judge’s order was set aside on appeal to the Divisional Court on the basis that there was no jurisdiction to make an order pursuant to § 184(4) (appointment of an appraiser) on a motion under § 234 (the oppression remedy provision). See Ferguson v. Imax Systems Corp., [1982] 38 O.R. (2d) 59 at ¶ 8 (Ont. C.A.).
74 Supra note 71 at ¶ 20.
the buy-out, she would unfairly be denied participation in the future growth of the company. It is hard not to conclude that, in the motion judge’s view, rough justice was good enough. In short, Mrs. Ferguson should simply be content with the large return on investment she would receive pursuant to a valuation. The fact that Mr. Ferguson and the other founding shareholders would directly (through common shares) or indirectly (by being currently married to and not estranged from someone who held common shares) receive a much larger return simply did not come into the equation. And the fact that she had been denied dividends in the time leading up to the application – which the other shareholders would inevitably recapture upon her ouster – was not even addressed by the motions judge.

Fortunately, the Court of Appeal excoriated the decision of the motions judge. The appellate court saw Mr. Ferguson’s manoeuvrings as an oppressive squeeze-out. Mr. Ferguson’s reason for asking Mrs. Ferguson to sell her shares – that it was not in the interests of Imax for have non-working shareholders – was risible. The Court of Appeal opined that Mr. Ferguson’s contention on the interests of Imax “was obviously untenable having regard to the share position of each of Mrs. Kroiter and Mrs. Kerr [class B shareholders who also did not work for Imax].” Likewise, the non-declaration of dividends was also oppressive: “Ferguson simply did not want Mrs. Ferguson to share in the benefits in the growth of the company and wanted to force her to sell her shares to him or to one of the other men in the company.”

Beyond this, there was no valid purpose behind the plan to redeem all class B shares. The information circular accompanying the text of the special resolution stated that its purpose was, inter alia, to help Imax plan for future growth through the provision of a “cleaner” equity structure. The Court of Appeal makes short work of this and other ostensible rationales, noting that affidavit evidence offered at the hearing only gave a possible explanation of why the special resolution was being brought forward; it did “not give the reasons that motivated those in management and so does not refute the inference of unfairness.”

The Court of Appeal insisted on the importance of assessing the overall context, noting that “when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such.” The following passage demonstrates the court’s intensely contextual approach and is quoted at some length to illustrate the nature of the court’s analysis:

Here we have a small close corporation that was promoted and is still controlled by the same small related group of individuals. The appellant’s part in that group and her work for the corporation is important. Further, the attempt to force her to sell her shares through non-payment of dividends was not simply the act of Mr. Ferguson, but was also the act of the others in the group including the present director, in concert with him. Having regard to the intention of that group to deny the appellant any participation in the growth of the company I think the resolution authorizing the change in the capital of the company is the culminating event in

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75 The court, id., implicitly endorsed counsel for Imax’s submission that Mrs. Ferguson was not being particularly hard done by: “for an investment of $730, a return on the sale of $110,000 was pretty substantial; that is 630 shares at $175 per share” at ¶ 19. The other view is to note that return on investment in this context is a relative question.
76 Ferguson (Ont. C.A.), supra note 12 at ¶ 15.
77 Id. at ¶ 22.
78 Id. at ¶ 25.
79 Id. at ¶ 26.
80 Id. at ¶ 30, (cited with approval by the Supreme Court of Canada in BCE), supra note 45 at ¶ 75.
a lengthy course of oppressive and unfairly prejudicial conduct to the appellant. In my opinion the company has not acted bona fides in exercising its powers to amend. By the payment of moneys now as a capital payment, which moneys on the evidence ought to have been paid by way of dividends over the years the appellant's non-redeemable shares are now to be redeemed and those in control of the company will be rid of her. She is the only one so affected. All of the other class B shareholders hold an equal number of common shares personally or through their spouses. The appellant cannot be considered like someone who came to the company lately and took a minority position in one of several classes of stock. Like the Kroiters and the Kerrs, her investment must be regarded as being in the shares which she and her husband held. The agreements as to the disposition of family shares in the event of the death of the husband or the wife confirm that this was really a family venture not only in the case of the Fergusons but for each of the three couples.

…IIt is idle to suggest that the vote on the resolution would be anything other than a means to get moneys which they had eagerly sought by way of dividends but were denied because of the appellant's presence and as a means to end her presence as an obstacle to further payment…. The resolution was a final solution to the problem of the ex-wife shareholder.81

The appellate court issued an injunction to prevent Imax from organizing its corporate structure as proposed.

**B. Relating the Insights of Ferguson to Testy's Analysis**

As Testy observes, progressive corporate law scholars are not generally anti-market82 – nor are they anti-corporation83 for that matter – since they recognize the positive aspects of the corporate form and of regulated markets.84 They are, however, concerned with the dangers posed by multinationals, for example.85 In short, and as Testy states, it is “not the corporate form per se that concerns progressive corporate law scholars; rather, it is particular incantations of that form and its effect upon the firm’s many constituents.”86

Turning to feminism(s), Testy notes that its perspectives are diverse and even divergent,87 manifesting many threads and strands88 but do group around “analysis of the use and distribution

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82 Testy, supra note 7 at 93.
83 Id.
84 Id.
85 Id.
86 Id. at 93.
87 Id. at 94.
88 Id.
of power, seeking to articulate both a normative vision of equality and human flourishing for society as well as a critique of structures of subordination, particularly for women, that impede these values.\footnote{Id. at 98.} Telescoping the work of those feminists who directly assess corporate law, Testy detects three key points: (1) the importance of challenging the shareholder primacy doctrine\footnote{Id. at 99.} and insisting that a larger number of stakeholders be considered in corporate decision making; (2) the importance of recognizing deficiencies in the status quo regarding directors/official’s duties and the need to import the feminist concepts of care and connection to provide substantive content to what those duties should entail; and (3) the importance of critiquing “concentrations of undemocratic corporate power” and recognizing how the burden these concentrations create fall disproportionately on women, especially women of the third world.\footnote{Id. at 100.} Seeing a great deal of promising overlap between these feminist critiques and the critiques offered by progressive corporate law scholars, Testy regards feminism(s) as identifying normative values “that can and should give content to a new vision of corporate law and governance.”\footnote{Id. at 100, citing MARTHA CHAMALAS, INTRODUCTION TO FEMINIST LEGAL THEORY 62-67 (1999). Note that Testy takes her discussion of the value of connection to recommend heightened cross-disciplinary work, at 100.} Testy then formulates three “categories of pursuit” for progressive corporate law which categories are already infused with “key feminist values” as follows: “nurturing connectedness, attending to context, and furthering equality and human flourishing.”\footnote{Id. at 100, citing MARTHA CHAMALAS, INTRODUCTION TO FEMINIST LEGAL THEORY 62-67 (1999). Note that Testy takes her discussion of the value of connection to recommend heightened cross-disciplinary work, at 100.}

Building on Testy’s insights, the next section of this paper will seek to relate these key feminist values to the oppression action.

1. The Importance of Connection

Referencing the analysis and survey work of Martha Chamallas, Testy succinctly notes that feminism “is a discourse that privileges the value of connection.”\footnote{Id. at 100, citing MARTHA CHAMALAS, INTRODUCTION TO FEMINIST LEGAL THEORY 62-67 (1999). Note that Testy takes her discussion of the value of connection to recommend heightened cross-disciplinary work, at 100.} Likewise, the oppression action expressly recognizes that the corporation is not just a business vehicle: human beings stand behind it, often joining forces in the closely-held corporation because they are members of the same family or are friends, as in the Ferguson case. In short, the oppression action is empowered to treat as legally significant the fact that certain kinds of shareholders – including those in the family firm – are connected to and rely on each other.

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\footnote{Id. at 98. The shareholder primacy model (as it is now known), maintains that the sole purpose of a corporation is to maximize wealth for its shareholders whose earliest formulation is offered by Adolph A. Berle in the 1930’s. As Jill Fisch notes in Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 J. CORP. L. 637 at 647 (2005-2006), Berle “argued that corporate law was essentially a variant of trust law, in which corporate managers owed fiduciary duties to manage the corporation in the interests of the shareholder-beneficiaries. Berle’s claim was primarily descriptive: ‘[A]ll powers granted to a corporation or to the management of a corporation . . . are . . . exercisable only for the ratable benefit of all shareholders as their interest appears’” (footnotes omitted). By way of reply to the shareholder primacy model, scholars such as Theresa Gabaldon contend, as Testy describes it, that “corporate decision making should consider a wider array of constituents without the hierarchy of the shareholder primacy model.” See Testy supra note 7 at 98. This view is consistent with Merrick Dodd’s contemporary response to Berle’s thesis. As noted by Fisch at 647, Dodds concluded that managers “‘should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders.’ Dodd sought to distance corporate or business law from private law, claiming that public opinion was moving the law toward a view in which the business corporation has ‘a social service as well as a profit-making function’” (footnotes omitted).

\footnote{Id. at 99.}

\footnote{Id. at 100.}
For these kinds of reasons, Benjamin Means critiques the classic law and economics approach to corporate law (also called contractarianism or nexus of contracts). Law and economics scholars define the relationship between shareholders as contractual and admonish the minority shareholder to bargain for better protection from the majority or live with the consequences. Means regards such a perspective as unduly reductionist, and offers the compelling counter-argument that “social relationships matter, and rational shareholders may prefer to rely on trust—without which a small business venture would never be attempted—even when explicit contractual solutions are available.” Means goes on to state that “shareholders live in the real world, not in the pages of a game theory treatise, and the ties of family and friendship, the social norms of business, and the constraints imposed by transaction costs all impact the likelihood that the parties will negotiate adequate protections against possible future discord.” In short, the traditional contractarian approach misses the fact and importance of connection between shareholders in the closely-held corporation and makes little of social norms that are built on the values of cooperation and trust.

It follows that the traditional law and economics approach to the corporation is strongly reminiscent of pre-statutory oppression action case law where “Might makes right” and is therefore inevitably at odds with the oppression action. That is, the oppression action is expressly designed to sideline the literalist approach to the shareholder relationship which egregiously eschews both context and the possibility of implied terms as discussed in the previous section of this paper. Whereas historically, the fact of minority vulnerability could not ordinarily impinge on the judiciary’s pro-majority mind-set, the oppression action pulls hard in the opposite direction. Instead of regarding the relationship between shareholders as governed by a notional contract which is strictly construed through a hyper-textualist lens, the oppression action is empowered to be attentive to context, including the fact of minority vulnerability and majority dominance. In short, the oppression action – by providing legal consequences to betrayal – is

95 As summarized by Means, supra note 1 at 1165, law and economics scholars contend that “shareholder relationships are defined by contract” and argue for the following two claims:

(1) that shareholder investment decisions can best be understood via the rational actor theory of choice, which posits that people act to maximize their self-interest, however they may define it; and (2) that courts should enforce the parties’ explicit bargain (including any background rules of corporate law) to avoid inefficient meddling with privacy ordering [footnotes deleted].

According to Marleen O’Connor in her piece also critical of the economics approach, contractarians regard the firm as “as a bundle of explicit and implicit contractual relationships among shareholders, employees, consumers, and suppliers.” They see the corporation “in an equilibrium position as a result of the participants' competing for the optimal arrangement of risks and opportunities to allocate the costs and rewards within the organization.” See Marleen O’Connor, supra note 7 at 1203, citing Jensen & Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 at 306-07 (1976).

96 Means, id. at 1162.
97 Id. at 1164.
98 Id. at 1211.
99 Id. at 1164.
100 Supra note 33 and surrounding text.
101 Indeed, and as Means notes, supra note 1, contractarians object to the shareholder oppression action based on their contention “that rational shareholders bargain for necessary protections before investing in a close corporation” at 1185-1186.
102 See, e.g., as Moll observes, supra note 9 at 907, close corporation shareholders “typically fail to engage in advance planning and fail to contract for protection from dissension” cited by Means, supra note 1 at 1172. Means also cites Hodge O’Neal, Oppression of the Minority Shareholders: Protecting Minority Rights, 35 CLEV. ST. L. REV. 121 at 124
equipped to recognize connectedness and make something of it. The oppression action acknowledges, as Means does, that a corporate venture is much more about a relationship than it is a discrete bargain. It is therefore appropriate for courts to “prevent opportunistic abuse” and offer protection of the ‘parties’ reasonable expectations.”

Indeed, both the corporation itself and the compact between shareholders have been described as embodying relational contracts. As Patricia Tidwell and Allan Linzer note, these kinds of contracts are founded on “cooperation and sharing” rather than on “confrontation and a zero sum mentality.” Indeed, a party to a relational contract is not just focused on self-interest but also takes into account “the needs and expectations of the other party, with whom she has dealt before and will deal again.”

On a related front, the oppression action’s focus on reasonable expectations and fairness coalesces around broad notions of good faith. Means argues, for example, that a shareholder’s reasonable expectations are to be enforced by reaching for the “well-established, equitable principles of contract, including the implied covenant of good faith and fair dealing” under the Uniform Commercial Code – which is well known for referring to honesty in fact and reasonable commercial standards of fair dealing. This good faith term thereby provides a standard of behaviour that governs the entire relationship and fills in those contractual gaps that contractarians would otherwise permit the majority to exploit. In this way, the oppression action pushes back against the view of the corporation as manifesting a shareholder compact that is starkly and even abusively exhaustive of shareholder rights. Instead, good faith norms – in the sense of triggering a standard of fairness and reasonableness – set the context for the appropriate exercise of majority power. Connection matters as do the reasonable expectations arising from that connection.

The notion that a good faith norm animates the Canadian oppression action is strengthened by its apparent compatibility with the Supreme Court of Canada’s recent analysis in Bhasin v. Hrynew. In a unanimous decision concerning breach of a commercial contract, the Supreme

(footnote omitted).


Means, supra note 1 at 1198.

Court of Canada determined that “good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance.”

It is from this principle that a variety of contract law rules or doctrines emanate, including the doctrine of unconscionability (which prohibits an extreme form of unfairness) and the rule that a discretionary power under a contract must be generally exercised reasonably and non-abusively. In this way, the Supreme Court of Canada resoundingly rejected the common law’s classic ill-regard for the good faith principle, dramatically reversing the judicial perspective that accepting good faith would be equivalent to admitting to the presence of some kind of embarrassing social disease,” to quote, as the court did, Professor Swan.

By analogy to the Supreme Court of Canada’s analysis of good faith in Bhasin, one can argue that a corporate good faith principle is also at play and has its own emanations, including not just the oppression action but also the proper purpose doctrine, the fiduciary obligation owed by directors and officers to the corporation, the business judgment rule, as well as provisions to protect the dissenting shareholder, to name a few examples. Extrapolating from Bhasin, one might well conclude that there is also more good faith in the law of corporations than was previously accepted, acknowledged, or countenanced.

Unlike the U.C.C., the Bhasin decision does not offer a broad definition of good faith except to note, inter alia, that it “exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner.” A more comprehensive assessment of good faith, however, is provided by the Nova Scotia trial division in Gateway v. Arton which links good faith to notions of honesty, reasonableness or fairness. Pending further direction from the Supreme Court of Canada as to what good faith encompasses, Gateway’s identification of

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112 Id. at ¶ 33.
113 Id. at ¶ 43.
114 Id. at ¶ 50.
116 As Kevin McGuinness notes, the proper purpose rule means that directors must only exercise their powers for “the purpose for which those powers were granted.” See CANADIAN BUSINESS CORPORATIONS LAW 2ND at ¶ 11.103 (2007).
117 See, e.g., C.B.C.A. § 122 which requires directors and officers to act “honestly and in good faith with a view to the best interests of the corporation”.
118 The Supreme Court of Canada in BCE, supra note 45 describes the business judgment rule with express reference to good faith at ¶ 89: “Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected.”
119 See Part IV (the fundamental change provisions) under the C.B.C.A.
120 Supra note 70 at ¶ 65.
122 According to the trial judge in Gateway, id. at 191-192: The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. “Good faith” conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in “bad faith” — a conduct that is contrary to community standards of honesty, reasonableness or fairness (emphasis added).

Gateway’s definition of good faith was cited by Bhasin at ¶ 38 but neutrally. Bhasin does refute, however, the conclusion in Gateway that all contracts contain a good faith term. For the Supreme Court, the matter of good faith is always a matter of contractual interpretation and the intention of the parties.
honesty, reasonableness and fairness as constituent of good faith offers insight as to what the oppression action mandates in a corporate context. Majority power must be exercised honestly – hence prohibiting bad faith opportunism which the oppression action regularly shuts down. It must be exercised reasonably – as captured in the notion of protecting the minority’s reasonable expectations. And it must be done fairly, a standard that the relevant legislation expressly identifies when it forbids conduct that “unfairly prejudices” or “unfairly disregards” the interests of the complainant.

In all these ways, the oppression action insists on the importance of connection identified by Testy as a feminist value. This is because the action attaches legal significance to the reasonable expectations derived from human relationships and thereby makes something of minority vulnerability and the validity of trust. On a related front, the action resonates with progressive good faith norms and values by requiring honesty, reasonableness, and fairness from the majority in the exercise of its power.

2. The Importance of Attending to Context and Rejecting Abstraction

As Testy notes, feminism “values attention to context, eschewing abstract rules and disembodied analyses. Thus, in addition to connection, the progressive corporate law project would be furthered by enhanced attention to context.” This dovetails with the perspective of the oppression action which, when it works properly, rejects abstraction and emphasizes context or social location. As previously noted, oppression is attentive to the human relationships behind the corporate form. On this front, the corporation is judicially regarded not as simply an abstract, legal entity wholly separate from its stakeholders nor are relationships understood through a literalist lens. As Justice Kerans notes: “I emphasize that all the words and deeds of the parties are relevant to an assessment of reasonable expectations, not necessarily only those consigned to paper, and not necessarily only those made when the relationship first arose.”

Indeed, the individual relationships imbuing the corporation raise an equity, as emphasized in Ebrahimi, which forbids the laissez-faire exercise of corporate or majority shareholder legal rights. Partly for this reason, the oppression action is expressly and unabashedly fact specific – courts are not to assess an oppression action application in isolation from narrative context. Next, reliance on strict legal rights by alleged perpetrators of oppression is never a trump card.

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123 Means, supra note 1 at 1164. As Means notes, “a party behaves opportunistically if it ‘behaves contrary to the other ‘party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party’” (footnotes omitted) at 1164, his footnote 13.
124 BCE, supra note 45.
125 These words are expressly contained in the statutory language surrounding the oppression action. See supra 3 for the wording of the C.B.C.A.’s oppression action.
126 Supra note 7 at 101.
128 BCE supra note 45 at ¶ 62. This insight is also offered by the Ontario Court of Appeal in Ferguson, supra note 12.
129 BCE, id. at ¶ 171. In fact, oppression can even disrupt the sanctity of contracts as the remedy permits a court to set aside unanimous shareholder agreements as a remedy. See Barry Slutsky, Shareholders’ Agreements and the Oppression Remedy – A Lesson in The Fragility of Contract in The ADVOCATE 375 and his discussion at 383 of In re Buy and Bell Gouinlock, [1984] 48 O.R. (2d) 57 (Ont.).
The values of context and on-the-ground analysis propelled the Court of Appeal’s assessment of the oppression action application in Ferguson, with the motions judge following the opposite and inapposite strategy. The court at first instance applied the C.B.C.A. legalistically and a-contextually – concluding that Mrs. Ferguson could indeed, by the rules, be parted from her shares subject only to a fair valuation. In this way, the motions judge ignored Mrs. Ferguson’s role as a founder of the company, her significant contributions to the company, Imax’s then current position as being poised for future growth, the fact that Mrs. Ferguson had been strategically starved for dividends in the time leading up to the application, that she had been fired from the company without cause, and that, in the end, all these were steps in her estranged husband’s plan to put her out of the company with as little recompense as possible. Though formally equal, the substantive context of Mrs. Ferguson’s Class B ownership varied greatly from that of the other women in the company who also held Class B shares. Fortunately, the Court of Appeal saw the squeeze-out for what it was and refused to allow the majority to expropriate from Mrs. Ferguson the future (and some of the past) value of her investment. The court assessed Mrs. Ferguson’s application in context, refusing to regard the majority’s conduct from an abstract vantage point. For example, contrary to their claims, there was no evidence that the majority and its directors were seeking to redeem all Class B shares in order to achieve a “cleaner” equity structure. Much more to the point, they were assisting Mr. Ferguson in depriving Mrs. Ferguson of her right to fair and equitable treatment. In this way, the court looked at the effect of the impugned transaction, refusing to allow the fundamental change procedures of the C.B.C.A. to be used as a “sanitizing cloak” referenced just above. And the court recognized that the differential impact of the redemption was tremendous: while the other wives – not being estranged from their husbands – could access Imax’s future profitability through the common shares held by their husbands, Mrs. Ferguson obviously had no similar avenue available.

Consistent with feminism(s)’ focus on context and rejection of abstraction, the oppression action is more than willing to look beneath a corporate facade, and, to use Stephanie Ben-Ishai words, “deal with unequal power relations in both widely and closely-held Canadian

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130 Supra note 35.
132First Edmonton, supra note 35 at 144.
134Ferguson, supra note 12 at ¶ 31.
corporations.” Indeed, the Alberta Law Reform Institute commented on how the oppression action (and derivative action) addresses abuse of power by someone in corporate control as follows:

In legal form the wrongdoers in one case may be doing a wrong to the corporation; in another they may be causing the corporation to act in a way which is wrongful; and in a third they may be changing the corporation’s constitution in a way which will give them an unfair advantage over the minority... The crux of the matter is that the wrongdoers are abusing their power of control.136

Likewise, the Court of Appeal in Ferguson saw the power structures at play and therefore made short work of the argument by Imax that Mr. Ferguson “was but one shareholder and one director and alone could not stop the company from the payment of dividends.”137 The court retorted as follows: “The fact is that he did so. Mr. Kerr, Mr. Shaw and Mr. Kroiter were his friends and close to him and from the evidence of Mrs. Ferguson it is clear that they yielded to the pressure that he brought on them to bring about this result.”138 In short, corporate manoeuvrings and abuse of the corporate form by Imax and its management exploited Mrs Ferguson’s vulnerable position as a minority shareholder. Imax, Mr. Ferguson and his colleagues acted opportunistically, unfairly, abusively, and in concert. This is a central reason why Mrs. Ferguson’s application for relief was ultimately successful.

Testy also observes that feminism’s focus on context would assist in the progressive corporate law project of enquiring into types of corporations. For example, as Testy notes, it is “not all corporations that progressive corporate law finds problematic: closely-held corporations present very different issues than multi-nationals, for instance. Thus, greater care should be taken to attend to context by being more exact in spelling out the kinds of corporate contexts that create problems for a progressive vision.”139 A parallel insight drives analysis in oppression action litigation, with courts making a distinction between closely and widely held corporations for the purposes of analyzing the applicant’s reasonable expectations.140 But with that said, the distinction oppression makes between these two broad types of corporations actually works in the opposite direction. That is, it is not multi-nationals or other publicly-traded corporations where oppression is generally a problem.141 Instead, it is the closely-held corporation that tends to practice this form

135 Stephanie Ben-Ishai The Promise of the Oppression Remedy: A Review of Markus Koehnen’s Oppression and Related Remedies, 42 CAN. BUS. L.J. 450 at 451 (2005). Note that while traditional gender dynamics may be at play in any given case, such as Ferguson, supra note 12, the feminist focus on context would apply in favour of whomever is on the receiving of a differential impact, regardless of gender.

136 The Alberta Institute of Law Research and Reform (now called the Alberta Law Reform Institute), in its REPORT ON PROPOSALS FOR A NEW ALBERTA BUSINESS CORPORATIONS ACT VOLUME 1 144 (1980), quoted with approval in First Edmonton Place, supra note 35 at 134-35.

137 Ferguson (CA), supra note 12 at ¶ 22.

138 Id.

139 Testy, supra note 7 at 103.

140 According to the Supreme Court of Canada in BCE, supra note 45, for example, relevant factors in assessing the applicant’s reasonable expectations include the “size, nature and structure of the corporation” at ¶ 74. Note that in Safarik v. Ocean Fisheries, [1995], 64 B.C.A.C. 14 (B.C.), the court made an even finer distinction, namely between family and non-family corporations, at ¶ 100-102.

of betrayal embodied by oppression. As Farley J notes in Ballard: “In a closely-held corporation, it will be much easier to consider the ‘factual’ expectations of the shareholders; in a widely held corporation, the expectations will have to be assumed or proxied if they are to be discerned at all.”

In sum, the oppression action shares what Testy calls feminism’s “discomfort with abstraction” and embraces feminism’s “sensitivity to context.” As discussed above, the oppression action is fiercely fact specific; it attaches significance to the human relationships that underlie the corporate form; it refuses to regard those relationships through the literalist lens; and it looks beneath the corporate façade to see the reality of power relations and minority mistreatment.

3. The Importance of a Commitment to Human Flourishing

As a final category, Testy refers to feminism’s commitment to equality and human flourishing. Under this heading, she considers feminist concerns over the reach of limited liability and wariness that this reduces personal responsibility for those behind the corporation. As Testy notes: “The idea that one can escape personal responsibility for harms caused to others is … contrary to feminist norms.” As expressed by Theresa Gabaldon, whom Testy references: “[l]imiting liability is about imposing risks that someone else must bear. Liability limitations artificially distance individuals from the real-life effects of the enterprise in which they invest, thus decreasing their acknowledged personal responsibility….” Claire Moore Dickerson expresses the same concern when she states: “limited liability when combined with a reduction of good faith standards of performance, substantially eliminates accountability.”

The oppression action does offer a partial respite from this fear because it considers the effects of corporate and individual conduct. It works to narrow the scope of limited liability and, therefore, its scope for abuse. That is, and as previously noted, oppression greatly expands what is actionable by minority stakeholders compared to the common law, thereby holding the corporation as well as its directors and officers to a higher standard of accountability. As the court in First Edmonton noted commenting on what was then Alberta’s new statutory oppression action:

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142 Block, supra note 133 at 7, relying Farley J in 820099 Ontario Inc. v. Harold Ballard Ltd., [1991], 3 B.L.R. 2d 113 at 125 (Ont. Gen. Div.) and Ben-Ishai & Puri, supra note 10. The latter note, at 92, that of the 71 cases studied in their empirical analysis sample, 8% (or six cases) dealt with widely held corporations with a success rate of 33%. Ninety-two percent of the cases involved closely-held corporations with a success rate of 54%.
143 Ballard, id. at 191. Note that Ben-Ishai, supra note 135 at 455, comments that in Canada, it can be complex to distinguish between widely-held and closely-held corporations because a “significant number” of widely-held corporations contain a dual-class share structure and “operate in a manner similar to the traditional closely-held corporation.”
144 Testy, supra note 7 at 104.
145 Id.
146 Id. at 104.
147 Id. at 105.
148 Id.
149 Gabaldon, supra note 7 at 1429.
Traditional corporate theory and the oppression remedy are, to an extent, inconsistent. As Professor Mary Anne Waldron has written, in the article already cited, at p. 130, when applying the oppression remedy "the courts have often violated many of the previously cherished tenets of corporate law". She continued: "They have ignored the corporate persona, extensively re-ordered corporate affairs relying upon the judge's own assessment of the business, and given remedies to others for wrongs once regarded exclusively as the corporation's own."\(^{151}\)

For example, directors and officers may be found personally liable under the oppression action thereby reducing protection of the limited liability principle. As the Ontario Court of Appeal notes in *Budd v. Gentra*,\(^{152}\) personal orders against directors and officers can be appropriate in certain cases:

These include cases in which it is alleged that the directors or officers personally benefited from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely-held corporations where a director or officer has virtually total control over the corporation provide another example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.\(^{153}\)

The court goes on to state that by “providing for remedies against individuals, including directors and officers, section 241 [the oppression remedy section] recognizes that the rectification of harm done to corporate stakeholders by corporate abuse may necessitate an order against individuals through whom the company acts.”\(^{154}\) This, of course, increases personal accountability and the cover or protection classically provided by *Salomon v. Salomon & Co.*\(^{155}\)

As a final example, the oppression action is attentive to notions of human flourishing because it recognizes the importance a minority shareholder will generally attach to employment by the enterprise in question. As O’Neal and Thompson note:

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151 First Edmonton, *supra* note 35 at 141. Note it is beyond the scope of this paper to discuss the extent to which a derivative action may be pursued by way of oppression.


153 *Id.* at ¶ 52.

154 *Id.* at ¶ 33.

155 [1897] AC 22 (U.K. H.L.). For example, in Downtown Eatery (1993) Ltd. v. Ontario, [2001] O.J. No. 1879 (Ont. C.A.), the Ontario Court of Appeal made an order against the defendant directors personally in the context of a successful oppression action. The court observed that, when re-organizing the corporations they controlled, the directors (Grad and Grosman) took no steps to establish a contingency fund to cover plaintiff’s wrongful dismissal claim against Best Beaver, should it be successful, at ¶ 62. As the court stated, this was unfair to the plaintiff, Mr. Alouche: “In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely held company, is clear. By diverting the accumulated profits of Best Beaver to other companies that they owned, they were able to insulate these funds from being available to satisfy Alouche's judgment” at ¶ 62. Accordingly, the court awarded the plaintiff an oppression remedy against the directors personally. Note too the court’s assessment in C.I. Covington Fund Inc. v. White, [2000] 10 B.L.R. (3d) 173 at ¶ 46 (Ont. S.C.) that the oppression remedy “has been used to make compensation orders against individual directors where their conduct has been found oppressive in small, closely held corporations… and they have personally benefited - for example, by the removal of assets from the corporation….”
Quite commonly when a participant invests in a close corporation, she expects to work in the business on a full-time basis. She may put practically everything she owns into the business and expect to support herself from the salary she receives as a key employee of the company. Whenever a shareholder is deprived of employment by the corporation (as she frequently is in these squeeze plays), she may be in effect deprived of her principal means of livelihood.\footnote{O’Neal and Thompson, supra note 11 at 1-4 to -05. Accord Michael Moliter, Eat Your Vegetables (or at least understand why you should): Can Better Warning and Education of Prospective Minority Owners Reduce Oppression in Closely-held Businesses?, 14 FORDHAM J. CORP. & FIN. L. 491 at 513-514 (2009).}

Indeed, and as observed by Moll, while a minority shareholder in the traditional public corporation is much more likely to be a “detached investor,”\footnote{Id., quoting Robert Thompson, The Shareholder’s Cause of Action for Oppression, 43 BUS. LAW. 699 at 702 (1993).} the situation in the closely-held corporation tends to be the opposite, where there is “a more intimate and intense relationship exists between capital and labor.”\footnote{Id. at 888, quoting Thompson, id.}

For example – and like Mrs. Ferguson whose matter before the Ontario courts was discussed earlier in this paper – shareholders in a closely-held corporation “usually expect employment and a meaningful role in management, as well as a return on the money paid for [their] shares.”\footnote{In re. Public Service Employee Relations Act (Alta.), [1987] 38 D.L.R. (4th) 161 at 199 (Can.).}

But the importance of work is not merely financial, which the Supreme Court of Canada has regularly acknowledged. For example, according to Chief Justice Dickson in In re. Public Service Relations (Alta.):

> Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.\footnote{Mohan v. Philmar Lumber (Markham) Ltd., [1991] O.J. No. 3451, 50 C.P.C. (2d) 164 (Ont. Gen. Div.) at ¶ 1.}

When the employee has an ownership interest in the enterprise, such emotions might well be even more pronounced. Employment for the minority shareholder is not necessarily just about a means of financial support. Employment in this context can also be tied to the shareholder’s pride of ownership, sense of autonomy, and feelings of accomplishment.

The oppression action shows solidarity with human flourishing by providing a remedy for the fired complainant albeit when the firing occurs within certain parameters. Farley J., for example, states that a wrongful dismissal action can proceed by way of oppression only if there "an intertwining of his employment and his interests in the corporation as an indivisible package."\footnote{Naneff v. Con-crete Holdings Ltd., [1995] 23 O.R. 481 (Ont. C.A.). For further discussion on wrongful dismissal in this context, see Koehnen, supra note 2 at 157 and following.}

A similar test was following in Naneff v. Con-crete Holdings wherein the Ontario
Court of Appeal affirmed a $200,000 award for the wrongful dismissal portion of the oppression claim in the context of a family firm.  

In sum, the oppression action shares some of feminism’s commitment to human flourishing. First, it increases the scope of individual accountability by keeping the limited liability principle within proper limits. This includes the possibility of personal orders against directors who may have benefited from the oppressive conduct at issue. Second, the action, albeit on a reduced scale, is attentive to human flourishing by permitted a wrongful dismissal action to proceed under the oppression banner when the employment interests are linked with corporate ones. This functions to give legal significance to the importance a minority shareholder may attach to his or her employment with the enterprise, whether financially, emotionally, or both.

C. Conclusion to Part II

This Part has argued that the oppression action has several points of contact with the values of feminism(s) identified by Testy. In the ways discussed, the action recognizes the importance of connection, it attends to context, and it furthers human flourishing.

But this is not to claim, of course, that the oppression action is somehow perfect and guarantees justice. Indeed, with all its progressiveness and consistency with the values of feminism(s), the oppression action is simply no panacea. For example, even in the ground-breaking case of Ferguson, the remedy ordered only partially addressed Mrs. Ferguson’s very poor treatment at the hands of the majority. As Raymonde Crete points out, though the remedy strengthened Mrs. Ferguson’s bargaining power (because she could never be unwillingly parted from her class B shares), she “could not demand reintegration as a member of the company's personnel. Nor could she exercise a right of veto at shareholders' meetings or force the board of directors to declare dividends. The solution adopted in this case could not resolve these problems.”

Second, it remains the case that the range of stakeholders who can mount an oppression action is still reasonably constrained. In this context Ben-Ishai and Puri observe that if the oppression action “is to retain its importance in monitoring the power and role of corporations in Canadian society, courts and practitioners will need to work toward extending the action to offer better protection to non-shareholder stakeholders.”

But beyond this, the oppression action’s single, largest deficiency concerns cost: litigation is the only way to pursue a remedy and that it generally an expensive – even prohibitively expensive – proposition. However, with that said, the cost of litigation cuts both ways and thereby also generates incentives for the majority to agree to a prompt resolution of these kinds of claims. And as discussed infra, even just the prospect of an oppression action gives incentives for

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163 *Id.* at ¶ 47-48.
164 *Supra* note 47 at 539. Note though that Mrs. Ferguson would always have the option to bring another oppression action should the directors continue to refuse declare dividends.
166 *Id.* at 83 stating: “[g]roups with less access to the court system are less likely to become complainants and benefit from the oppression remedy.” *See also* ALDOLPHO PAOLINI, *RESEARCH HANDBOOK ON DIRECTORS’ DUTIES* 139 (2014), who notes the plaintiff must pay her costs related to pursuing an oppression action because it is clearly a personal action. Beyond this, and as Paolini notes at 139: [d]espite the availability of the oppression remedy...a separate question arises as to the likelihood that the plaintiff will pursue an oppression remedy or other private cause of action when corporate law has been violated. Private law remedies are generally difficult to pursue given the costs in involved in the litigation (lawyers’ fees and opportunity costs, for example.)...The precise remedy is still at the discretion of the court and certainly may not amount to the monies paid for the investment or the profit lost.
better behaviour by the majority. In short, though the oppression action is costly *ex post*, the action itself also has preventative properties.

### III. Conclusion

Testy offers momentum when she concludes that feminist legal theory can “bolster the progressive corporate law project by providing an enhanced normative and methodological framework for re-envisioning and restructuring the role and place of the modern corporation in society.”\(^1\) This progressive corporate law project is critical to addressing the ongoing exploitation and betrayal that can characterize corporate behaviour and to secure a higher level of corporate accountability and responsibility on all fronts.

As this paper has argued, part of re-envisioning and restructuring includes identifying what legal doctrines might already be reflecting the norms of fairness and good faith in the corporate arena. The doctrines making the list would depend on the list-maker, but surely the oppression action is a worthy candidate for inclusion. As the *Ferguson* case illustrates, the oppression action insists on the fact of connection and the consequences of its rupture (particularly though not exclusively in the small, closely-held corporation). It is well equipped to respond to vulnerability and exploitation; it disrupts corporate personality by expanding liability and, as appropriate, attaches personal liability to those behind the corporation; it corrects director domination; and it resists exclusion by being attentive to power structures. In short, as the premise of Testy’s article would perfectly predict, the oppression action is effective and successful from a progressive corporate law perspective because it resonates with *and enforces* some of the values informing feminism(s). For example, in discussing the proactive and reactive power of good faith (a value or norm that this article has already aligned with the oppression action), Dickerson observes:

> When good faith is a norm that has been fully internalized, the norm will be largely self-executing. Despite such a situation, however, certain members will have incentive to defect unless laws restrain them. …But whether or not there is an iterative or relational relationship, the law can increase the incentive to cooperate by penalizing defection, thus increasing the relative benefit of cooperation. A law that supports the good faith norm increases the likelihood of the other party’s cooperation and thereby reduces agency costs by reducing the need for monitoring. Note that the impact of the law in support of good faith should be particularly noticeable when the good faith norm has not been fully internalized because, in that situation, compliance normally would depend greatly on surveillance. By changing the calculation of any potential defector, therefore, the law can serve very effectively both as a stick and as a carrot. The law effectively changes the rational equation to make cooperation more attractive and defection more costly (footnotes omitted).\(^2\)

In sum, the mere presence of the oppression action – and risk of its deployment – can have a salutary effect on majority behaviour.

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1. Testy, *supra* note 7 at 100.
It is also the case that Dickerson’s comment above and Testy’s analysis explored more generally in this article lead to conclusions as to how corporate governance practices in the closely-held corporation\(^{169}\) would benefit from being more consistent with feminism(s) and other progressive values. In so doing, corporate directors, the corporation itself, and majority shareholders are less likely to run afoul of the oppression provisions. Conversely, exploitation and betrayal (with or without the triggering of oppression litigation) risk the survival of what is very often a closely-held family business. This consequence is particularly serious because risk of loss is generally non-diffuse and concentrated in such small companies. As is well known, the compromise of business or its outright failure can expose shareholders to emotional strife and dislocation; it can wipe out financial investment by shareholders; and, if shareholders are also employees of the venture (which is often the case), business failure can eliminate their current livelihoods.\(^{170}\) When directors avoid oppressive conduct and, instead, become animated by the more progressive standard of fairness and good faith, they foster an environment of accountability and are better able to meet the obligations of trust unavoidably placed in them by minority stakeholders. And ideally, this is the kind of enhanced corporate environment that would ultimately prove to be contagious.

\(^{169}\) Corporate governance of the closely-held corporation is a topic unto itself and beyond the scope of this paper. For discussion, however, see LEIF ME LIN ET AL., THE SAGE HANDBOOK OF FAMILY BUSINESS (2014) and in particular chapter 12: Governance in Family Firms. For discussion, inter alia, of conflict in the family firm and possible solutions, see Benjamin Means, Nonmarket Values in Family Businesses, 54 WILLIAM & MARY LAW REVIEW 1185 (2013).

\(^{170}\) Speaking from an American context which would certainly have points of contact with the Canadian experience, O’Neal & Thompson, supra note 11 at 1:4 state as follows: There is no way of knowing the extent of the economic loss resulting from dissension and squeeze plays. Obviously many businesses are seriously damaged by bitter squeeze-out fights. Although statistics are not available, squeeze-outs and attempted squeeze-outs undoubtedly bring to thousands of businesses each year friction and strife, impaired efficiency of managers, heavy loss of working hours by key personnel, expensive litigation, and diminished confidence in the business and its managers by banks, suppliers, customers and employees. Friction among the participants is often vindictive and vicious, sometimes culminating in physical encounters. Not uncommonly some participants refuse to speak to others. Shareholder dissension may interfere with the employment and retention of key personnel needed for the proper operation and development of the business. Occasionally the strife, litigation, and unfavorable publicity arising out of a squeeze-out destroy an enterprise.