Oppression—Reducing Canadian Corporate Law to a Muddy Default

Mohamed F. Khimji and Jon Viner

THIS PAPER EVALUATES THE efficiency of the oppression action as a default contractual term between all corporate stakeholders. The judicial understanding of the action has resulted in the action effectively becoming a muddy default term in all corporate law relationships. The content of this default term is that the corporation has imposed upon it a very general obligation of reasonableness and fairness in its dealings with all stakeholders. In effect, the oppression action is a universal default rule that leaves unclear the rights and obligations of contracting corporate stakeholders until an *ex post* and potentially lengthy judicial analysis of the oppression action particular to the parties is undertaken. The key issue considered is whether, assuming transactions costs were zero, all stakeholders would hypothetically bargain for such a clause when dealing with a corporation. The paper argues that, aside from the particular context of minority shareholders in close corporations, they would not and, therefore, such an overarching default rule in corporate law is inefficient. Such a muddy default term for every corporate contract raises both *ex ante* business and contracting costs and *ex post* expenses of litigation and judicial inquiry. These costs are justified only in the context of minority shareholders in private corporations where the nature of the relationship precludes being able to account for every contingency at reasonable cost. Therefore, in this and only this particu-

DANS CET ARTICLE, LES auteurs évaluent l'efficacité d'une demande de redressement pour abus en tant que clause contractuelle par défaut entre toutes les parties prenantes de l'entreprise. L'interprétation judiciaire de ce type d'action en justice a fait en sorte qu'elle soit effectivement devenue une clause par défaut qui sème une certaine confusion dans toutes les relations juridiques d'une entreprise. Le contenu de cette clause par défaut implique qu'une société se voit imposer une obligation très générale d'agir de façon raisonnable et équitable dans le cadre de ses transactions avec toutes ses parties prenantes. En effet, la demande de redressement pour abus est une règle par défaut universelle qui laisse dans la confusion la portée des droits et obligations afférents aux contrats conclus avec des parties prenantes de l'entreprise jusqu'à ce qu'une analyse judiciaire a posteriori et qui risque d'être excessivement longue soit menée au sujet de la demande de redressement pour abus en ce qui a trait aux parties prenantes. La question-clé en jeu consistait à déterminer dans quelle mesure, en tenant pour acquis que les coûts des transactions soient nuls, les parties prenantes seraient enclines à négocier en faveur de l'adoption d'une telle clause pendant leurs transactions avec une société. Dans l'article, on soutient que, hormis le contexte particulier des actionnaires minoritaires de sociétés privées, les parties prenantes ne négocieraient pas dans ce sens et par

lar context, a muddy default in the form of the oppression action is necessary in order to allow courts to fill in any apparent contractual gaps after the fact in light of circumstances not anticipated before the fact.

conséquent, une règle par défaut avec une telle force obligatoire en droit des sociétés est inefficace. Une clause par défaut aussi indéterminée applicable à tous les contrats de société augmente non seulement les coûts *ex ante* des contrats et les prix de revient de l'entreprise, mais également les dépenses afférentes aux litiges et aux enquêtes judiciaires *ex post*. Ces coûts ne seraient justifiés que dans le cas des actionnaires minoritaires de sociétés privées où la nature des relations ne permet pas de répondre de chaque dépense imprévue à un coût raisonnable. Par conséquent, dans ce contexte particulier, et uniquement dans ce cas, une telle clause par défaut, sous la forme d'une demande en cas d'abus, est nécessaire pour permettre aux tribunaux de combler les lacunes contractuelles apparentes après les faits à la lumière des circonstances qui n'avaient pas été envisagées avant les faits.

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Mohamed F. Khimji[*] *and Jon Viner*[**]

INTRODUCTION

No discussion of the Canadian corporate law landscape is complete without an analysis of the oppression action.[1] The Canadian oppression action has been lauded as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world."[2] The oppression action[3] has been brought, not only by shareholders, but also by a var-

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1 Federally, the oppression action is set out in the *Canada Business Corporations Act*, RSC 1985, c C-44, s 241 [*CBCA*]. Under provincial corporate legislation, the oppression action is found in the following statutes: *Business Corporations Act*, SBC 2002, c 57, s 227 [*BCBCA*]; *Business Corporations Act*, RSA 2000, c B-9, s 242; *The Business Corporations Act*, RSS 1978, c B-10, s 234; *The Corporations Act*, RSM 1987 c C-225, s 234; *Business Corporations Act*, RSO 1990, c B.16, s 248 [*OBCA*]; *Business Corporations Act*, CQLR c S-31.1, s 450 as it appeared on October 2015 [*QCBCA*]; *Business Corporations Act*, SNB 1981, c B-9.1, s 166; *Companies Act*, RSNS 1989, c 81, Third Schedule, s 5; *Corporations Act*, RSNL 1990, c C-36, s 371. In the foregoing, this paper shall make references to only section 241 of the *CBCA*, but the arguments presented apply equally to all the provincial provisions.

2 Stanley M Beck, "Minority Shareholders' Rights in the 1980s" in Law Society of Upper Canada, eds, *Corporate Law in the 80s* (Don Mills: Richard De Boo, 1982) 311 at 312. In *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461 [*Peoples*] (the Court cited this passage from Beck and noted that "[w]hile Beck was concerned with shareholder remedies, his observation applies equally to those of creditors" at para 48).

3 Note that this paper refers to the statutory oppression provisions as the oppression *action*, unlike the majority of the literature and jurisprudence, which refers to oppression as a *remedy*. See e.g. Beck, *supra* note 2. This choice of wording is deliberate. The statutory language of the oppression provisions in section 241 of the *CBCA* sets out a cause of action that can

iety of other corporate stakeholders including lenders, debenture holders, trade creditors, and employees. The Supreme Court's discussions of the oppression action in the precedent-setting corporate law decisions of *Peoples v Wise*[4] and *BCE Inc v 1976 Debentureholders*[5] confirmed that the oppression action would have a place in shaping the contours of corporate obligations and to whom they are owed.[6]

This paper takes a step back and, through a contractarian lens, evaluates the efficiency of the oppression action as a default contractual term between all corporate stakeholders. Part I sets out the contractarian analytical framework through which the oppression action will be evaluated. Part II describes the historical development of the Canadian oppression action. Part III examines the judicial treatment of the oppression action through to the Supreme Court's decision in *BCE*. Part IV interprets judicial treatment of the oppression action within a contractarian framework. Finally, Part V analyzes the use of the oppression action categorized by type of claimant and assesses the efficiency of the action as a default term between corporate stakeholders. The paper will examine the use of the oppression action by minority shareholders in close corporations, minority shareholders in public corporations, contract creditors,[7] involuntary creditors, employees, and the corporation itself.

We observe that the judicial understanding of the oppression action has resulted in the action effectively becoming a muddy default term in all corporate law relationships.[8] The content of this default term is that

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be brought where particular corporate conduct effects a result that is oppressive, unfairly prejudicial, or in unfair disregard of a complainant's interests. This cause of action must be proven before the applicant is entitled to a remedy. Calling the oppression provisions a *remedy* presupposes that the claimant is entitled to such a remedy.

4 *Supra* note 2.

5 2008 SCC 69, [2008] 3 SCR 560 [*BCE*].

6 For commentary on *BCE* and *Peoples*, and their implications for corporate law duties and obligations, see Sarah P Bradley, "*BCE Inc. v. 1976 Debentureholders*: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?" (2009–2010) 41:2 Ottawa L Rev 325; Ed Waitzer & Johnny Jaswal, "*Peoples*, *BCE*, and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439; J Anthony VanDuzer, "*BCE v. 1976 Debentureholders:* The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision since *Peoples*" (2010) 43:1 UBC L Rev 205; Mohamed F Khimji, "*Peoples v. Wise*—Conflating Directors' Duties, Oppression, and Stakeholder Protection" (2006) 39:1 UBC L Rev 209.

7 The "contract creditors" section includes a survey of the use of the oppression action by each of debtholders, lenders, trade creditors, and contract counterparties, respectively.

8 The term "muddy default" was first used in Ian Ayres, "Making a Difference: The Contractual Contributions of Easterbrook and Fischel", Book Review of *The Economic Structure of Corporate Law* by Frank H Easterbrook and Daniel R Fischel, (1992) 59:3 U Chicago L Rev

the corporation has imposed upon it a very general obligation of reasonableness and fairness in its dealings with all stakeholders. In effect, the oppression action is a universal default rule that leaves unclear the rights and obligations of contracting corporate stakeholders until an *ex post* and potentially lengthy judicial analysis of the oppression action particular to the parties is undertaken.[9] While commonly lauded as the "most comprehensive and most open-ended shareholder remedy in the common law world,"[10] it is argued that a muddy default in the form of the oppression action is in fact inefficient in most corporate law relationships.

The key issue we consider is whether, assuming transactions costs were zero, all stakeholders would hypothetically bargain for such a clause when dealing with a corporation. Aside from the particular context of minority shareholders in close corporations, we argue that they would not and, therefore, such an overarching default rule in corporate law is inefficient. Such a muddy default term unduly raises both *ex ante* business and contracting costs and *ex post* expenses of litigation and judicial inquiry. Costs are raised both with respect to transaction planning before the fact when uncertainty exists regarding the content of the rule, and litigation costs after the fact when unpredictability exists regarding how the rule will be applied. We conclude that such costs are outweighed by the benefits only in the context of minority shareholders of private corporations. Of course, if parties other than minority shareholders in private corporations wished to contract expressly for such an "oppression" clause, they would be able to do so reasonably cheaply, as transaction costs would not be prohibitively high.[11] More importantly, such parties would be able to contract for an

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1391. The adjective "muddy" is used to describe rules that leave entitlements and obligations ambiguous until an *ex post* judicial inquiry is conducted. This language is credited to Carol M Rose, "Crystals and Mud in Property Law" (1988) 40:3 Stan L Rev 577.

9 The muddy quality of the oppression action has been observed before: see Deborah A DeMott, "Oppressed but Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents" (1993) 56:1 Law & Contemp Probs 181 at 221. DeMott, in comparing Canadian and American shareholder remedies, describes the Canadian oppression provisions as "the quintessential 'mud rules' in corporate law." The oppression action "frustrate[s] attempts to define entitlements in advance."

10 Beck, *supra* note 2.

11 Of course, this does not apply to involuntary creditors where the transaction costs would be prohibitively high. However, despite the inability of involuntary creditors to contract for an oppression clause, we argue that a muddy default in the form of an oppression action is inefficient even in this context; see below under the section titled "Category D: Involuntary Creditors' Use of the Oppression Action."

oppression clause at a lesser cost than forcing parties to contract out of oppression because it is a default term in all corporate relationships.

I. THE ANALYTICAL FRAMEWORK

A. The Corporation as a Nexus of Contracts

Before illustrating how the Canadian oppression action has effectively become an overarching muddy default, it is important to first set out the broader analytical lens through which the action is being assessed. Law and economics scholars have long theorized the corporation to be a nexus of contracts.[12] That is, the corporation is analyzed not as an entity itself but as a series of explicit and implicit contracts between corporate constituents.[13] These corporate constituents, such as employees, managers, investors, and creditors, voluntarily enter into complex contractual arrangements rationally and for their own self-interest.[14] Each corporate actor may choose to accept the terms of a contract, negotiate for more advantageous terms, or reject the terms offered and search for a participant who is offering more desirable terms.[15] Note that a contract in this sense is not limited to strictly legal contracts but also long-term relational contracts.[16]

This contractarian approach to the corporation influences how corporate law is evaluated. Corporate law codes are said to be "enabling" in nature. In other words, these codes form the backdrop against which

12 The firm was first theorized as a "nexus for a set of contracting relationships" in Michael C Jensen & William H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3:4 J Financial Economics 305. This article refined the firm-as-contracts theory set out in Armen A Alchian & Harold Demsetz, "Production, Information Costs and Economic Organization" (1972) 62:5 American Economic Rev 777. The corporation as a nexus of contracts approach was most famously adopted into law and economics literature written by Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991) [Easterbrook & Fischel, *Economic Structure*]. This "nexus of contracts" approach to the corporation, however, has been subject to criticism. See e.g. Victor Brudney, "Corporate Governance, Agency Costs, and the Rhetoric of Contract" (1985) 85:7 Colum L Rev 1403; William W Bratton, Jr, "The 'Nexus of Contracts' Corporation: A Critical Appraisal" (1989) 74:3 Cornell L Rev 407.

13 Thomas S Ulen, "The Coasean Firm in Law and Economics" (1993) 18:2 J Corp L 301 at 320.

14 Frank H Easterbrook & Daniel R Fischel, "The Corporate Contract" (1989) 89:7 Colum L Rev 1416 at 1421, 1426 [Easterbrook & Fischel, "The Corporate Contract"].

15 Easterbrook & Fischel, *Economic Structure*, *supra* note 12 at 17.

16 Stephen M Bainbridge, "The Board of Directors as Nexus of Contracts" (2002) 88:1 Iowa L Rev 1 at 10.

corporate participants bargain and contract for their own self-interest.[17] Under this framework, corporate law exists as a set of standard default contractual terms which corporate parties are free to contract around.[18] These default terms serve an important gap-filling function that reduces transaction costs and facilitates private contracting. Transaction costs are reduced as parties may choose to contract only on matters that are of specific importance to their particular circumstances.[19] As well, should an unexpected contingency arise that was not addressed in the contract, the default terms provided will fill this contractual gap.[20]

From the contractarian mode of analysis flows the conclusion that, generally, the courts should enforce voluntary agreements between rational self-interested corporate actors.[21] However, it must be acknowledged that, in a world of transaction costs, no contract is entirely complete.[22] That is, no contract will define each party's rights and obligations in every possible state of the world.[23] Therefore, a contract between corporate actors will consist not only of the terms that the parties specifically contracted for but also the default terms provided by corporate statutes and interpreted by the courts. While the explicit contractual terms are understood to be a mutually beneficial and efficient agreement between self-interested actors, the question arises as to how default terms should be structured to facilitate efficient private ordering. This will be discussed in the next section.

17 William T Allen, "Contracts and Communities in Corporate Law" (1993) 50:4 Wash & Lee L Rev 1395 at 1400. See also Easterbrook & Fischel, "The Corporate Contract", *supra* note 14 at 1417–18. Whether corporate law is (or ought to be) enabling or mandatory in structure has been subject to debate. While Easterbrook and Fischel are some of the leading proponents of corporate law that is enabling in nature, others have critiqued this approach; see Jeffrey N Gordon, "The Mandatory Structure of Corporate Law" (1989) 89:7 Colum L Rev 1549; Melvin Aron Eisenberg, "The Structure of Corporation Law" (1989) 89:7 Colum L Rev 1461; John C Coffee, Jr, "The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role" (1989) 89:7 Colum L Rev 1618; Lucian Arye Bebchuk, "The Debate on Contractual Freedom in Corporate Law" (1989) 89:7 Colum L Rev 1395.

18 Easterbrook & Fischel, *Economic Structure*, *supra* note 12 at 15.

19 Easterbrook & Fischel, "The Corporate Contract", *supra* note 14 at 1444.

20 Ulen, *supra* note 13 at 322. See also Easterbrook & Fischel, "The Corporate Contract", *supra* note 14 at 1445.

21 *Ibid*.

22 Russell Korobkin, "The Status Quo Bias and Contract Default Rules" (1998) 83:3 Cornell L Rev 608 at 609.

23 Mariana Pargendler, "Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered" (2008) 82:4 Tul L Rev 1315 at 1318.

B. The Setting of Efficient Default Terms

When corporate law is viewed as a set of default contractual terms, it becomes important to assess the efficiency of such default rules, as provided for by statute and supplemented by the common law. That is, it is important that default terms facilitate an environment where parties can reach the most mutually beneficial contractual arrangements at the lowest cost.

The leading approach when it comes to creating corporate law as a set of contractual defaults is to design default terms that most contracting parties in similar circumstances would have agreed upon *ex ante*, referred to as majoritarian defaults.[24] When designing majoritarian defaults, a choice has to be made between untailored default terms and tailored or muddy default terms.[25] Untailored default terms are designed as "one-size-fits-all" terms that consider what the majority of parties would have negotiated had they bargained before the fact with little or no regard to specific circumstances, and tend to be expressed as rules as opposed to standards.[26] By contrast, tailored or muddy default terms examine what the particular parties in the particular circumstances would have contracted for and tend to be expressed as standards as opposed to rules.[27]

The rationale for setting a "what the parties would have wanted" default term is that such a default minimizes private contracting costs.[28] It follows that there are associated transaction costs when parties choose to contract around a default. Parties are content to minimize costs by avoiding contracting for every contingency knowing that, should there be any gaps in the contract, the default terms are those that the parties would have agreed to before the fact.[29]

When choosing between an untailored default and a muddy default, it has been noted that untailored defaults are cheaper for the courts in their

24 Easterbrook & Fischel, *Economic Structure*, *supra* note 12 at 14–15. See also Ulen, *supra* note 13 at 322; Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99:1 Yale LJ 87 at 93 [Ayres & Gertner, "Filling Gaps"]. Ayres and Gertner coined the particular term "majoritarian default" to describe the "what most parties would have wanted" approach to default terms.

25 Ian Ayres, "Preliminary Thoughts on Optimal Tailoring of Contractual Rules" (1993) 3:1 S Cal Interdisciplinary LJ 1 at 4–5.

26 *Ibid*. See also Louis Kaplow, "Rules versus Standards: An Economic Analysis" (1992) 42:3 Duke LJ 557.

27 Ayres & Gertner, "Filling Gaps", *supra* note 24 at 91.

28 Ulen, *supra* note 13 at 322.

29 Ayres & Gertner, "Filling Gaps", *supra* note 24 at 93.

determination of how to fill the contractual gap *ex post*.[30] This is because, with an untailored default, a court does not need to consider the specific characteristics and circumstances of the contractual parties. It has also been suggested that untailored defaults tend to entail lower litigation costs and less potential for judicial error.[31] If contractual parties desire terms other than those that the majority would prefer, it is likely to be cheaper for the parties to settle the particular terms *ex ante* than for the courts to determine such terms *ex post*.

Muddy defaults tailored to particular parties and circumstances, on the other hand, are appropriate where contingencies are verifiable by the courts *ex post* more cheaply than by the parties *ex ante*.[32] A muddy default may also be justified where it is recognized that it is cheaper for corporations to explicitly contract around a muddy default with a clear term than for corporations to contract around a clear default term with a muddy "reasonableness" clause.[33]

While "what the parties would have wanted" default terms aim to minimize costs by inducing parties to avoid contracting on every contingency, penalty defaults minimize costs by encouraging parties to contract around a default.[34] A penalty default rule is set as a term that at least one party would *not* have contracted for, thereby inducing the parties to explicitly contract on a particular issue.[35] Penalty defaults are cost-efficient in that they recognize that it can be cheaper for parties to explicitly contract *ex ante* than to place the burden on the court to determine *ex post* what the parties would have negotiated.[36]

The foregoing discussion sets out three types of default rules as to how lawmakers and the courts may choose to fill contractual gaps. In different

30 Ian Ayres & Robert Gertner, "Majoritarian vs. Minoritarian Defaults" (1999) 51:6 Stan L Rev 1591 at 1608 [Ayres & Gertner, "Majoritarian"]; Ayres & Gertner, "Filling Gaps", *supra* note 24 at 117.

31 Ayres & Gertner, "Filling Gaps", *supra* note 24 at 117–18. Ayres and Gertner cite *Jordan v Duff & Phelps Inc*, 815 F (2d) 427 (7th Cir 1987) (as an example where Judge Easterbrook and Judge Posner, two prominent law-and-economics proponents, disagreed as to what the particular parties would have wanted *ex ante*).

32 Ayres, *supra* note 8 at 1404–05.

33 Ayres & Gertner, "Majoritarian", *supra* note 30 at 1600–01.

34 Ayres, *supra* note 8 at 1397–98. The term "penalty default" was coined by Ayres & Gertner in "Filling Gaps", *supra* note 24.

35 Ayres & Gertner, "Filling Gaps", *supra* note 24 at 91.

36 *Ibid* at 93. Another advantage of penalty defaults is that they can induce a more informed party, who otherwise may strategically withhold information, to reveal such relevant information to the other party, resulting in more efficient contractual outcomes (*ibid* at 102–04).

circumstances, each approach will come with its own set of private and public benefits and costs. To minimize *ex ante* contracting costs, *ex post* litigation costs, and the public expense of judicial gap filling, it is important to pay attention to the type of default that lawmakers and the courts are employing when filling contractual gaps. Before locating Canada's oppression action within the "corporate law as default terms" framework, it is instructive to review the historical development and application of the oppression provisions.

II. HISTORICAL DEVELOPMENT OF THE CANADIAN OPPRESSION ACTION

A. UK Origins

In implementing the oppression action, Canada was very much influenced by the experience in England and Wales when it came to developing an action to protect minority shareholders from oppression by the majority. The United Kingdom had created an oppression action in response to the recommendations of the 1945 *Cohen Report*.[37] The *Cohen Report* had recognized that, when oppression by the majority occurred, the preeminent remedy of winding up the company was not always sufficient to advance the interests of minority shareholders.[38] The report recommended that courts be given broad jurisdiction to grant remedies that were appropriate in the circumstances where winding up was not a satisfactory remedy.[39] Following the *Cohen Report*, the *Companies Act, 1948* was enacted which included section 210, a limited oppression action for minority shareholders.[40] The oppression action in section 210 allowed a member of the company to bring a complaint that the "affairs of the company" were "being conducted in a manner oppressive" to the member.[41] Section 10 further provided that a court could make an order "as it [thought] fit" to remedy the situation where it found that: (a) the company was engaged in oppressive

37 UK, HC, "Report of the Committee on Company Law Amendment", Cmd 6659 in *Sessional Papers*, (1945) 7 (President: Hugh Dalton) [*Cohen Report*]. For a history of the development of the oppression action from the *Cohen Report* to its present form in section 241 of the *CBCA*, see: Markus Koehnen, *Oppression and Related Remedies* (Toronto: Carswell, 2004) at 4–5; Dennis H Peterson & Matthew J Cumming, *Shareholder Remedies in Canada*, 2nd ed (Markham: LexisNexis Canada, 2009) (loose-leaf 2009 supplement), ch 17 at 17.1–17.3.

38 *Cohen Report*, *supra* note 37 at para 60.

39 *Ibid* at paras 60, 153.

40 *Companies Act, 1948* (UK), 11 & 12 Geo VI, c 38, s 210.

41 *Ibid*.

activity, (b) in light of this behaviour, it would be just and equitable to wind up the company, and (c) winding up the company would "unfairly prejudice" the complainant.[42]

In 1962, the Report of the Company Law Committee, referred to as the *Jenkins Report*,[43] found that section 210 did not adequately protect minority shareholders. In particular, the *Jenkins Report* recommended that: (a) the action extend to protect not only "oppressive" behaviour, but also corporate activity that is "unfairly prejudicial," (b) the action be available for isolated acts, as well as continued patterns of behaviour, and (c) the action drop the condition that a claimant must first show that it would be just and equitable to wind up the company.[44] The *Jenkins Report* in essence argued that to effectively protect minority shareholders from oppression, it would be necessary to amend section 210 so that it captured a broader range of corporate behaviour. Canadian lawmakers turned to the UK experience with section 210 and the recommendations in the *Jenkins Report* in developing the oppression action now found in Canadian jurisdictions.

B. Development of the Canadian Oppression Action

British Columbia was the first Canadian jurisdiction to enact an oppression action, adopting the wording of section 210 of the *Companies Act, 1948* into its companies legislation in 1960.[45] British Columbia amended this legislation in 1973 to reflect the recommendations of the *Jenkins* report.[46]

It is worth noting that Ontario initially refrained from including an oppression action in its legislation because of the findings of the 1967 *Lawrence Report*.[47] The *Lawrence Report* described the common law's tradition of non-intervention in the internal disputes of corporations and then acknowledged that the rights of minority shareholders needed to be strengthened.[48] However, referring to both the *Cohen Report* and the *Jenkins Report*,

42 *Ibid*. See also Peterson & Cumming, *supra* note 37 at para 17.7.

43 UK, HC, "Report of the Company Law Committee", Cmnd 1749 in *Sessional Papers* (1962) 1 (President: Lord Errol of Hale) [*Jenkins Report*].

44 *Ibid* at paras 200–05, 212. See also Peterson & Cumming, *supra* note 37 at para 17.7.

45 *Companies Act*, RSBC 1960, c 67, s 185. See also Koehnen, *supra* note 37 at 5.

46 *Ibid*.

47 Ontario, Legislative Assembly, "Interim Report of the Select Committee on Company Law" in *Sessional Papers*, (1967) [*Lawrence Report*]. See also Brian Cheffins, "The Oppression Remedy in Corporate Law: The Canadian Experience" (1988) 10:3 U Pennsylvania J Intl Business L 305 at 312 [Cheffins, "Corporate Law"].

48 *Lawrence Report*, *supra* note 47 at paras 7.3.1–7.3.10.

the Committee expressed its disapproval with section 210 of the UK *Companies Act, 1948*. The Committee saw the oppression action as a "complete dereliction of the established principle of judicial non-interference in the management of companies."[49] In the Committee's view, section 210 amounted to a legislative concession that there could be no principled solution to addressing the position of minority shareholders apart from transferring the issue wholesale to the judiciary to be determined on a case-by-case basis.[50]

By contrast, the 1971 *Dickerson Report*,[51] which the federal government relied on in amending its corporate legislation, expressed no such reservations against an oppression action. The *Dickerson Report* stated that its proposed oppression provisions were based on section 210 of the UK *Companies Act, 1948* as modified by the recommendations of the *Jenkins Report*.[52] "Oppressive" and "unfairly prejudicial" behaviour, as well as any conduct that was "in disregard of the interests" of a claimant, would be subject to the action.[53] In creating a more expansive oppression action, the Committee was mindful that the section 210 oppression action had been criticized for its limited effectiveness.[54] The proposed oppression provisions were crafted so as to not suffer the same fate.

The proposed action would protect the interests of any security holder, creditor, director, or officer.[55] Although this language on its face protects a wide variety of stakeholders, commentators have noted that the Dickerson Committee only intended the oppression action to protect shareholders.[56] By including broad language protecting the interests of security holders, creditors, directors, and officers, the Dickerson Committee recognized the different relationships a shareholder may have with a corporation and intended to avoid limiting the oppression action to cases where a shareholder was oppressed in his or her capacity as a shareholder.[57] The oppression

49 *Ibid* at para 7.3.12.

50 *Ibid*.

51 Robert WV Dickerson, John L Howard & Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) vols 1–2 [*Dickerson Report*].

52 *Ibid*, vol 1 at para 485.

53 *Ibid*, vol 2 at para 19.04.

54 *Ibid*, vol 1 at para 485.

55 *Ibid*, vol 2 at para 19.04.

56 J Anthony VanDuzer, "Who May Claim Relief from Oppression: The Complainant in Canadian Corporate Law" (1993) 25:3 Ottawa L Rev 463 at 468.

57 Jacob S Ziegel, "Creditors as Corporate Stakeholders: The Quiet Revolution – An Anglo-Canadian Perspective" (1993) 43:3 UTLJ 511 at 527.

provisions actually proposed by the *Dickerson Report* did not, however, clarify that the action was only meant to be brought by shareholders.[58]

This is significant as Parliament adopted much of the recommended wording regarding the oppression action from the *Dickerson Report* into what is now section 241 of the *CBCA*.[59] Section 241 states:

> 241 (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
> (a) any act or omission of the corporation or any of its affiliates effects a result,
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

The provinces that enacted legislation based on the *CBCA* adopted an oppression action similar in wording to section 241.[60] As we explain in this paper, courts have allowed bondholders, lenders, and other corporate stakeholders beyond shareholders to take advantage of the broadly worded oppression provisions to bring such actions against corporations. These judicial developments are contrary to the intention of the Dickerson Committee that designed the oppression provisions. As a result, the oppression action has effectively become an all-encompassing muddy default term in all private contractual arrangements between all corporate parties. This idea will be developed further by examining the judicial application of the oppression action.

58 *Ibid.*

59 For a list of provincial equivalents to section 241 of the *CBCA*, see *supra* note 1.

60 Cheffins, "Corporate Law", *supra* note 47 at 312.

III. JUDICIAL APPLICATION OF THE OPPRESSION REMEDY

A. The Beginning: *Ebrahimi* as the Basis for the Application of the Oppression Action

The enactment of the broadly worded oppression action described above drastically changed the nature of corporate relationships.[61] The provisions clearly showed Parliament's desire to grant minority shareholders, in whatever capacity, a wider ambit to seek remedial relief from oppressive or unfairly prejudicial acts of the majority. While the statutory oppression action called on the courts to intervene when such unfairly prejudicial corporate behaviour was occurring, the provisions did not instruct the courts as to how such behaviour was to be defined.[62]

Many commentators have noted that the courts, in searching for a theoretical basis in which to frame the oppression action, were heavily influenced by Lord Wilberforce's judgment in *Ebrahimi v Westbourne Galleries Ltd*.[63] *Ebrahimi* considered when a court could order a company to be wound up under the "just and equitable" provision found in section 222 of the *Companies Act, 1948*. While oppression was not at issue before the House of Lords, Lord Wilberforce set out the basis on which the court may equitably intervene in company affairs. Lord Wilberforce's oft-cited judgment states:

> The words ["just and equitable"] are a recognition of the fact that 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.[64]

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61 John J Chapman, "Corporate Oppression: Structuring Judicial Discretion" (1996) 18:2 Adv Q 170 at 180.

62 Cheffins, "Corporate Law", *supra* note 47 at 312.

63 (1972), [1973] AC 360 (HL (Eng)) [*Ebrahimi*]. For commentary on how this judgment influenced judicial application of the oppression remedy, see Koehnen, *supra* note 37 at 84–85; Chapman, *supra* note 61 at 178–82, 188.

64 *Ebrahimi*, *supra* note 63 at 379.

Lord Wilberforce's judgment explained that corporate stakeholders have equitable rights created by representations or expectations arising from the relationship between corporate parties.[65] These equitable rights can supersede strictly legal rights.[66] While the *Ebrahimi* decision dealt with corporate parties in a highly personal "quasi-partnership" relationship, the principles from Lord Wilberforce's judgment were broadly accepted as the basis for the oppression action even when the parties could not be characterized as having such a personal relationship.[67]

B. The *Ebrahimi* Framework and the Concept of Reasonable Expectations

The influence of *Ebrahimi* in shaping the courts' approach to the oppression action is demonstrated by the number of judgments that, when grappling with the cause of action, cite Lord Wilberforce's decision.[68] Courts understand the application of the oppression action to involve a determination as to whether the corporate complainant had any equitable rights, the infringement of which was unfair.[69] A complainant could show the existence of an equitable right by showing that there existed reasonable expectations of a particular interest in the relevant company's affairs. Application of the oppression action, therefore, involved a judicial examination of the relationship between the parties as well as any conduct or representations that would suggest that the complainant had a reasonable expectation of a particular interest deserving of protection.[70]

It is not surprising that courts gravitated towards an analytical framework grounded in equitable rights and, more specifically, reasonable expectations. In *Westfair*, Kerans JA at the Alberta Court of Appeal explained

65 Koehnen, *supra* note 37 at 85.

66 Chapman, *supra* note 61 at 178–79, 188.

67 *Ibid* at 188.

68 See e.g. *Naneff v Con-Crete Holdings Ltd* (1995), 23 OR (3d) 481 at 487–88, 23 BLR (2d) 286 (CA) [*Naneff*]; *First Edmonton Place Ltd v 315888 Ltd* (1988), 60 Alta LR (2d) 122 at 144, 40 BLR 28 (QB), rev'd on other grounds (1989), 45 BLR 110, (1990) 2 WWR 670 (Alta CA); *Diligenti v RWMD Operations Kelowna Ltd*, 1 BCLR 36 at 46–49, 1976 CanLII 238 (SC); *Keho Holdings Ltd and Oliver v Noble* (1987), 78 AR 131 at paras 39–40, 38 DLR (4th) 368 (CA).

69 Koehnen, *supra* note 37 at 78.

70 See e.g. *Themadel Foundation v Third Canadian General Investment Trust Ltd* (1998), 38 OR (3d) 749, 107 OAC 188 (CA) [*Themadel* cited to OR]; *AMCU Credit Union Inc v Olympia & York Developments Ltd* (1992), 7 BLR (2d) 103, 35 ACWS (3d) 55 (Ont Ct J (Gen Div)); *Westfair Foods Ltd v Watt* (1991), 115 AR 34, 79 DLR (4th) 48 (CA) [*Westfair* cited to AR]; *Naneff*, *supra* note 68.

frankly that, in enacting the oppression action, Parliament entrusted the judiciary to determine what is fair and just between the corporate parties and left it entirely to the courts to determine the measure of fairness.[71] Moreover, the statutory language, using the terms "oppressive," "prejudicial," and "unfair," only provides "elastic" adjectives that are not clearly distinguishable conceptually.[72] Kerans JA stated that, in determining what is fair in the corporate context, the court must work from a framework grounded in values that have been widely accepted.[73] Reflecting on other areas of law that govern voluntary relationships, Kerans JA stated:

> In general terms, one clear principle that emerges is that we regulate voluntary relationships by regard to the expectations raised in the mind of a party, by the word or deed of the other, and which the first party ordinarily would realize it was encouraging by its words and deeds. This is what we call reasonable expectations, or expectations deserving of protection. Regard for them is a constant theme, albeit variously expressed, running through the cases on this section or its like elsewhere.[74]

In the diverse array of circumstances in which a corporate participant sought relief from unfair conduct, protecting reasonable expectations became the "unifying thread" of the oppression action.[75] Each case involved a detailed fact-specific inquiry to determine whether a complainant had equitable rights arising from reasonable expectations that deserved judicial protection.[76]

C. The Oppression Action Today: The Supreme Court Ruling in *BCE*

As courts conducted a fact-specific inquiry to determing whether the complainant had reasonable expectations worthy of protection, there was no clear analytical step-by-step process as to how a court should determine whether there existed such expectations deserving of equitable protection.

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71 *Westfair*, *supra* note 70 at para 20.

72 *Ibid* at para 18.

73 *Ibid* at para 23.

74 *Ibid* at para 26.

75 *CanBev Sales & Marketing Inc v Natco Trading Corp* (1996), 30 OR (3d) 778 at 791, 65 ACWS (3d) 274 (Ct J (Gen Div)), aff'd (1998), 42 OR (3d) 574, 84 ACWS (3d) 78 (CA).

76 *Re Ferguson and Imax Systems Corp* (1983), 43 OR (2d) 128 at 137, 150 DLR (3d) 718 (CA) [*Ferguson*]; *Westfair*, *supra* note 70 at para 28.

In *BCE Inc v 1976 Debentureholders*,[77] the Supreme Court of Canada weighed into the oppression action and clarified the analytical approach that should be taken when assessing a complaint brought under section 241 of the *CBCA* or any of its provincial equivalents.

In *BCE*, the Court first affirmed the equitable nature of the oppression action. The oppression action "seeks to ensure fairness" and gives courts "broad, equitable jurisdiction to enforce not just what is legal but what is fair."[78] Then, citing *Ebrahimi*, the court described reasonable expectations as the "cornerstone of the oppression remedy."[79] The judgment proceeded to set out a two-pronged inquiry to determine when the court should use the equitable jurisdiction granted under section 241 to protect the expectations of corporate stakeholders.[80]

First, there must be evidence that the complainant had expectations that were held reasonably.[81] The reasonable expectations inquiry is highly fact-specific, though the Court set out a number of factors to determine whether reasonable expectations existed.[82] Such factors include 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.[83]

Second, the breach of the reasonably held expectations must amount to "oppression," "unfair prejudice," or "unfair disregard" of the complainant's

77 *Supra* note 5.

78 *Ibid* at para 58.

79 *Ibid* at para 61. That the Court cited *Ebrahimi* as the theoretical basis of the oppression action, even in *BCE*, where the corporate stakeholders in dispute were a large corporation and sophisticated financial institutions, shows that the original *Ebrahimi* principle set out by Lord Wilberforce has been accepted in circumstances very far removed from the personal "quasi-partnership" arrangement in which *Ebrahimi* was decided.

80 It should be noted that in England and Wales, expectations play a far more limited role in the analysis of the oppression action equivalent. In *O'Neill v Phillips*, [1999] 1 WLR 1092, 245 NR 119 (HL), Lord Hoffman of the House of Lords expressed regret at using the term "legitimate expectations" as the basis for determining what is fair in the company context and stated that "[t]he concept of legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application" (at 1102). Rather, in determining when equity may intervene, the court must examine whether allowing one to rely on their strict legal rights would run contrary to some agreement reached by the parties through words or conduct.

81 *BCE*, *supra* note 5 at para 70.

82 *Ibid* at paras 62, 71–72.

83 *Ibid* at para 72.

interest.[84] The Court recognized that oppression, unfair prejudice, and unfair disregard are flexible concepts that often "overlap and intermingle."[85] Only corporate conduct that both breaches a reasonably held expectation *and* amounts to oppression, unfair prejudice, or unfair disregard gives rise to the remedial provisions of section 241.[86]

While Court set out an elegant two-pronged inquiry within which to analyze oppression actions, it was less clear when it came to explaining how the availability of an oppression action would, in practice, affect the relationships privately arranged between different corporate stakeholders. The Court did note that all corporate stakeholders are entitled to reasonably expect "fair treatment" from the directors of the corporation.[87] While directors only owe a fiduciary duty to the corporation, they may have to consider the impact of their decisions on other corporate stakeholders.[88] In describing the directors' duties to all corporate constituents, the Court noted:

> In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.[89]

In fact, the Court noted that fair treatment is the "central theme running through the oppression jurisprudence."[90] What may be implied from the judgment is that, because it is reasonable to expect that the corporation behaves fairly in regard to all corporate stakeholders, any corporate activity that arguably does not treat a particular stakeholder "fairly" may be subject to litigation through the oppression action. Unfortunately, the judicial language of "fair treatment," like the statutory language of "oppression," "unfair prejudice," and "unfair disregard" is malleable and not easy to define. As we argue in this paper, the approach that Canadian

84 *Ibid* at para 89.

85 *Ibid* at para 91.

86 *Ibid* at para 89.

87 *Ibid* at para 64. Confusingly, the Court later noted that while directors may be obligated to consider the impact of their decisions on various corporate actors, the reasonable expectation of such stakeholders is "simply that the directors act in the best interests of the corporation" (*ibid* at para 66).

88 *Ibid*.

89 *Ibid* at para 82.

90 *Ibid* at para 64.

courts have taken to the oppression action has, in any context not involving a minority shareholder of a private corporation, amounted to an inefficient "muddy default" which unduly raises both *ex ante* contracting costs and *ex post* litigation expenses.

IV. LOCATING THE OPPRESSION ACTION WITHIN A CONTRACTARIAN FRAMEWORK

A. Rethinking Reasonable Expectations as an Exercise in Contractual Gap-Filling

Under a contractarian framework, the oppression action is a default contractual term embedded in any contract between a corporate stakeholder and the corporation. Parties contract understanding that they may bring an oppression action where particular "oppressive" or "unfairly prejudicial" corporate behaviour is not governed by explicit contractual provisions.[91] When an oppression action is brought, the idea is that a latent contractual gap has become apparent. The parties had not contracted explicitly on a particular contingency that in fact materialized and there is a contractual gap as to the rights and obligations of the parties in such a situation. The broad language of section 241 of the *CBCA* leaves it to the courts to determine what approach to contractual gap-filling should be undertaken when interpreting the oppression provisions.

Tracing the historical judicial application of the oppression action to the decision in *BCE* can be understood as an examination of how courts have chosen to fill contractual gaps between corporate stakeholders. A survey of this history, outlined above, reveals three universal features when it comes to the judicial treatment of the oppression action. Firstly, protection of reasonable expectations is the foundation of the Canadian oppression action.[92] Secondly, all corporate stakeholders are entitled to

91 If the parties explicitly define their rights and obligations under contract in the precise circumstance that is being complained of, the courts tend to give effect to the voluntarily arranged contractual provisions and dismiss any claim of oppression. See e.g. *Beazer v Hodgson Robertson Laing Ltd* (1993), 12 BLR (2d) 101, 43 ACWS (3d) 385 (Ont Ct J (Gen Div)); *Chan v 160466 Ontario Inc*, 2011 ONSC 5654, 95 BLR (4th) 154 [*Chan*]. See also *Krynen v Bugg* (2003), 64 OR (3d) 393 at 410, 24 CCEL (3d) 74 (Sup Ct J) [*Krynen*] where Killeen J states: "[w]here expectations are apparently reasonable on their face but where there is a contract dealing with these expectations, the reasonableness of these expectations cannot prevail over the contract."

92 *BCE*, *supra* note 5 at paras 61, 89.

reasonably expect "fair treatment."[93] Thirdly, what constitutes reasonable expectations is contextual and highly fact-specific.[94] Courts have noted on multiple occasions that precedents are only of limited value.[95]

These three universal features, understood in the context of contractual gap filling, effectively amount to a muddy default being placed in every corporate contract involving every corporate stakeholder in the form of a general "fairness" or "reasonableness" obligation imposed upon the corporation. Recall that a muddy default term requires courts to determine the rights and obligations of the particular parties in light of the particular circumstances that have occurred. Under such a muddy default term, the obligations of the parties are deemed to be unclear *ex ante* and extensive judicial examination is required *ex post* to determine what was "fair" or "reasonable." In applying the oppression provisions with a new fact-specific inquiry in each case involving every type of stakeholder, the judiciary incorrectly assumes that it is always more costly for parties to identify contingencies *ex ante* than it is for courts to verify contingencies *ex post*.

Such a muddy default term, when applied in a context not involving a minority shareholder of a private corporation, is inefficient as it unjustifiably raises contracting costs, litigation expenses, and the public cost of judicial adjudication. Business and contracting costs are raised since directors, even while acting in the best interests of the corporation, must take efforts to ensure that they consider the impact of corporate actions on all stakeholders so as to avoid an accusation of unfair treatment. Litigation costs are higher because of the unpredictable nature of the judicial application of the oppression action. Adverse parties will have a more difficult time reaching a settlement not knowing how the court may apply the oppression provisions. The malleable concept of reasonably expected fair treatment might encourage more corporate actors to proceed with an oppression claim, even when such actors could have explicitly contracted for protection from the corporate behaviour complained of reasonably cheaply *ex ante*. Corporate participants may even use the oppression action for nefarious purposes to extract a settlement from a corporation.[96] Furthermore, the courts' judicial treatment of the oppression provisions

93 *Ibid* at para 64.

94 *Ibid* at paras 59, 62.

95 *Ibid* at para 59; *Westfair*, *supra* note 70 at para 28; *Ferguson*, *supra* note 76 at 137.

96 Brian R Cheffins, "An Economic Analysis of the Oppression Remedy: Working towards a More Coherent Picture of Corporate Law" (1990) 40:4 UTLJ 775 at 789 [Cheffins, "Economic Analysis"].

through fact-specific investigation has a high public cost and potential for judicial error that is not justified in most corporate situations.[97]

This paper will proceed to survey the different types of oppression claims that have been brought, categorized by the type of complainant bringing the action.[98] We argued that, in the vast majority of contexts in which the oppression action is brought, the action is inefficient and/or redundant. Most parties dealing with a corporation can efficiently solve their disputes without reliance on the oppression action and the ambiguous discussions of reasonable expectations and fair treatment that it entails by negotiating for more specific terms before the fact and/or through a more specialized legal mechanism after the fact. We conclude that the oppression action is appropriate only when it comes to minority shareholders of private corporations.

V. EXAMINING THE USE OF THE OPPRESSION ACTION BY CATEGORY OF CLAIMANT

A. Defining Which Stakeholders May Bring an Oppression Action

Section 238 of the *CBCA* defines which corporate stakeholders constitute a "complainant" who may bring an oppression action under section 241:

> "complainant" means
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
> (b) a directors or an officer or a former director or officer of a corporation or any of its affiliates,
> (c) the Director, or
> (d) any person who, in the discretion of a court is a proper person to make an application under this Part.[99]

Section 241 then states a the court may make an order to rectify the matters complained of when the impugned conduct is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of any *security holder*, *creditor*, *director or officer*."[100]

97 See *ibid* at 790 regarding the costs of the potential for judicial error.

98 The paper will examine cases where the oppression action has been brought under the *CBCA* or the equivalent provincial legislation as cited in, *supra* note 1.

99 *CBCA*, *supra* note 1, s 238.

100 *Ibid*, s 241 [emphasis added]. Note that British Columbia's provincial oppression action is more limited, only expressly protecting the interests of shareholders, beneficial share-

It is evident that, on its face, the *CBCA*'s language allows many different types of corporate stakeholders to bring an oppression action. This paper will analyze the use of the oppression action by minority shareholders in close corporations, minority shareholders in public corporations, debtholders, lenders, trade creditors, contract counterparties, involuntary creditors, employees, and the corporation itself. Particular focus will be placed on the type of contractual arrangement the claimant has with the corporation. Under a contractarian analysis, application of the oppression action is a judicial exercise in contractual gap-filling. By recognizing the type of contractual relationship the claimant has with the corporation, a court can apply the oppression action in a more efficient and predictable manner while still protecting corporate stakeholders from unfair acts of the corporation.

B. Category A: Minority Shareholders in Closely Held Corporations[101]

The *Dickerson Report* anticipated that the oppression action would most often be used by minority shareholders of closely held corporations.[102] An empirical study of oppression actions brought in Canada from 1995 to 2001 suggests that this prediction has, indeed, been correct.[103] Minority shareholders in closely held corporations have standing as complainants under section 238 of the *CBCA* because they are security holders.[104] These complainants are unique in contrast to the vast majority of other corporate stakeholders eligible to bring an oppression action because of

holders, and others whom the court considers to be "appropriate person[s]." See *BCBCA*, *supra* note 1, s 227. The Quebec action, in contrast to the *CBCA*, refrains from wording that protects the interests of creditors. See *QCBCA*, *supra* note 1, s 450.

101 Note that for the purposes of this paper, a minority shareholder is defined as a shareholder who does not have a controlling interest in the corporation.

102 *Supra* note 51 at para 484.

103 Stephanie Ben-Ishai & Poonam Puri, "The Canadian Oppression Remedy Judicially Considered: 1995–2001" (2004) 30:1 Queen's LJ 79 at 92, 102, 109, 111. The study indicates that 80% of oppression claims were brought by shareholders in some capacity. A total of 67% of shareholder complaints were made by minority shareholders, while 19% of complaints were brought by 50% shareholders. While the study does not specify exactly what proportion of the 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, the statistics suggest that most oppression actions have been brought by minority shareholders of close corporations.

104 VanDuzer, *supra* note 56 at 469.

the fundamentally different nature of their contractual arrangement with the corporation.

1. The Relational Contract

Commentators have noted that contractual arrangements can be understood on a spectrum ranging from discrete contracts at one end to relational contracts at the other.[105] Traditional contract law concerns itself primarily with more discrete contractual agreements.[106] Discrete contracts are those arrangements where there is limited continuing personal interaction and an exchange of more precisely measurable consideration.[107] In such a discrete contract, the parties understand that the terms established at the time of the contractual arrangement constitute the entire agreement between the parties.[108] A relational contract, by contrast, is one characterized by a longer duration and more personal involvement in the contractual arrangement.[109] Parties to a relational contract do not intend their entire source of obligations to be set out in a formal document at any particular time because a relational contract allows for a more dynamic interaction between the parties.[110]

More than any other type of oppression claimant, a shareholder in a closely held corporation is a party to a relational contract with the corporation.[111] Such shareholder contractual relationships with the corporation are often overlaid with personal or family relationships with other corporate shareholders.[112] In these arrangements, characterized by trust and confidence, the contractual terms are not often, if ever, fully encapsulated in a written shareholder agreement.[113] Some important terms arise out of

105 Paul J Gudel, "Relational Contract Theory and the Concept of Exchange" (1998) 46:3 Buff L Rev 763 at 764. See also Charles J Goetz & Robert E Scott, "Principles of Relational Contracts" (1981) 67:6 Va L Rev 1089 at 1091.

106 Douglas K Moll, "Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes" (2002) 86:4 Minn L Rev 717 at 753 [Moll, "Shareholder Oppression"]. See also Goetz & Scott, *supra* note 105 at 1091.

107 Ian R MacNeil, *Contracts: Exchange Transactions and Relations*, 2nd ed (Mineola, NY: Foundation Press, 1978) at 12.

108 Moll, "Shareholder Oppression", *supra* note 106 at 754.

109 Gudel, *supra* note 105 at 765.

110 MacNeil, *supra* note 107 at 13.

111 See Moll, "Shareholder Oppression", *supra* note 106 at 756–57.

112 *Ibid* at 723–24.

113 Raymonde Crête, "Dealing with Unfairness: Some Observations on the Role of the Courts in Designing a Fair Solution" (2003) 36:3 UBC L Rev 519 at 530.

oral promises or unspoken understandings.[114] In close corporations, there is a close link between shareholders who provide capital and those who manage.[115] Shareholders in close corporations may expect employment, a management position, or a dividend to be an essential part of their shareholder bargain.[116] Yet, because of the relational quality of the shareholder's bargain, these terms may not be explicitly written into a contract. Therefore, a muddy default in the form of the oppression action is necessary in order to allow courts to fill in any apparent contractual gaps after the fact, in light of circumstances not anticipated before the fact.

2. A Tailored Default Approach to Contractual Gaps

In relational contracts, it is not feasible for legislation or the common law to fill contractual gaps with untailored default terms. That is, given the idiosyncratic and dynamic nature of the arrangement between a minority shareholder in a closely held corporation and the corporation itself, the law cannot fill the contractual gap by trying to determine what the majority of parties would have wanted with specificity before the fact. Rather, a court must examine the situation it is faced with after the fact, and use its discretion through the oppression provisions to tailor the default terms to the particular circumstances between the parties.

Even a brief review of oppression cases illustrates how minority shareholders have brought oppression actions claiming to have been unfairly prejudiced in various capacities, including as employers, creditors, directors, and shareholders.[117] A description of some of these cases illustrate that, because the relational contracts arranged by minority shareholders are so idiosyncratic and context-specific, it is sensible for a court to give effect to the relational contract by giving meaning to a tailored or muddy default and invoking the remedial provisions of the oppression action.

In the oft-cited Ontario Court of Appeal decision in *Naneff*,[118] the applicant claimed to have been unfairly prejudiced in his role as a shareholder,

114 F Hodge O'Neal, "Oppression of Minority Shareholders: Protecting Minority Rights" (1987) 35:1 Clev St L Rev 121 at 124.

115 Robert B Thompson, "The Shareholder's Cause of Action for Oppression" (1992–1993) 48:2 Bus Law 699 at 702.

116 *Ibid*.

117 Recall that the *Dickerson Report* proposed broad language to the oppression provisions in the first place, as a way to ensure that shareholders would be protected not only in their capacity as shareholders, but also as creditors, directors, and officers. See VanDuzer, *supra* note 56; Ziegel, *supra* note 57.

118 *Supra* note 68.

employee, manager, and officer. Here, the applicant, Alex Naneff, and his brother Boris, each held a 50 percent equity stake in the family business that their father had started. Their father had gifted the shares to Alex and Boris when they were in high school but retained complete control of the company through redeemable voting preference shares. The father intended to control the operation of the business until his retirement or death. Alex worked in the business full-time for nine years when, following a family feud, the father and Boris began to undertake actions that allegedly oppressed Alex's interests. Specifically, Alex was removed as officer and his employment as a manager was terminated.

In deciding how to tailor the remedy under the oppression action to the parties in this case, the Court reflected that an appropriate remedy would need to consider the particular family and business arrangements that existed between Alex, Boris, and the father.[119] The trial judge held that the business should be sold openly to the public, with any of Alex, Boris, or the father free to make a purchase offer. The Court of Appeal decided that this remedy was not appropriate as, rather than rectifying the oppression, this remedy was punitive towards the father. Mr. Naneff had founded the business and retained control of the corporation through preferred shares. Alex could not have reasonably expected to obtain control of the entire business prior to his father's retirement. The Court of Appeal instead made an order for the father and Boris to acquire Alex's share of the business at fair market value. The Court also upheld the trial judgment awarding Alex $200,000 as part of the remedy for oppressive conduct to compensate for his wrongful dismissal.[120] The Court affirmed that dismissal might be considered oppressive conduct when it is part of an "overall pattern" of oppression and when one's employment interest is bound up with other shareholder interests.[121]

The circumstances in *Naneff* are drastically different from those in *Flatley v Algy Corp (cob Mezzrow's)*.[122] In *Flatley*, the applicant, Flatley, agreed to invest in a bar managed by the majority shareholder and director, Skinulis. Two years after becoming a shareholder, Flatley began to work at the bar until she was terminated two years later. She brought an oppression action claiming to have been unfairly prejudiced as a shareholder and employee.

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119 *Ibid* at 488.

120 *Ibid* at 495.

121 *Ibid*. See also the trial level decision *Naneff v Con-Crete Holdings Ltd* (1993), 11 BLR (2d) 218 at para 113, CarswellOnt 157 (WL Can) (Ont Ct J (Gen Div)).

122 (2000), 9 BLR (3d) 255, 100 ACWS (3d) 411 (Ont Sup Ct) [*Flatley*].

The Court found that Skinulis had indeed oppressed Flatley in her capacity as a shareholder. Amongst other oppressive behaviours, he refused to provide her with financial statements, used corporate money to pay for personal expenses, and wrongfully paid himself dividends without paying any to her. Given the risk of further oppression of Flatley's interests as a shareholder, the Court ordered Skinulis to purchase Flatley's shares.

In regard to Flatley's alleged oppressed employee interests, the Court distinguished the situation from that in *Naneff*. It was noted that nothing in Flatley and Skinulis' arrangement suggested that Flatley would be involved in management or employment of the business. She only began to work at the bar two years after investing, and was neither an officer nor director. The Court found Flatley's employee interests not to be sufficiently linked to her shareholder interests and did not provide her with compensation for termination under the oppression action.[123]

Like in *Flatley*, the Court in *Jansezian v Hotoyan*[124] also distinguished its facts from those in *Naneff*, albeit in altogether different circumstances. In this case, Jansezian owned 40 percent of a Country Style Donuts franchise, while his brother-in-law Hotoyan owned 60 percent. Jansezian worked at the company and managed the day-to-day operations while Hotoyan served as a director. Both parties had undertaken oppressive conduct towards the other and, because the parties could no longer work together, they turned to the Court for a remedy under the oppression provisions.

Each party claimed that it should have the right to buy the other's shares in the company. Hotoyan relied on *Naneff* to argue that a minority shareholder cannot expect to control a company in place of the majority shareholder. The Court ultimately ordered that Jansezian, the minority shareholder, buy Hotoyan's shares in the business. The Court distinguished *Naneff* as, in that case, the oppressed shareholder, Alex, had no expectation of ever acquiring control of the company during his father's lifetime. In *Jansezian*, on the other hand, the fact that Hotoyan had previously offered to sell his shares to Jansezian created some expectation that Jansezian, even as a minority shareholder, could expect to control the company at some point in the future prior to Hotoyan's retirement.

The Court also commented that, although Jansezian was a minority shareholder, he was more intimately involved in the business. The company provided Jansezian with his sole source of income and employment

123 *Ibid* at paras 24–25.

124 (1999), 1 BLR (3d) 56, CarswellOnt 3856 (WL Can) (Ont Sup Ct) [*Jansezian*].

for nearly ten years, while Hotoyan was an investor with many different interests. The Court was influenced by Jansezian's relatively closer connection to the business in allowing him to buy Hotoyan's shares.[125]

The cases of *Naneff*, *Flatley*, and *Jansezian* illustrate how minority shareholders in closely held corporations can have multiple roles and interests within their shareholder arrangements. Minority shareholders in close corporations have brought several oppression actions claiming that their interests as shareholders, employees, directors, officers, creditors, or any combination thereof, have been unfairly prejudiced.[126] These arrangements are relational in quality, dynamic in nature, and include terms that are not explicitly written in a legal contract. Crucially, a muddy default term such as the availability of the oppression action is essential in these relational contracts, as neither the parties nor the law are able to account for every future contingency *ex ante* at reasonable cost.

A tailored remedy pursuant to a successful oppression action in each particular case is efficient in the context of shareholders in closely held corporations. Interpreted through a contractarian lens, courts investigate the reasonable expectations of the parties and fill contractual gaps by determining the unwritten terms of the hypothetical bargain between the parties. Recall that, in a relational contract, the parties cannot set out all of their rights and obligations to each other in a formal document at one particular time at reasonable cost. If courts do not use their equitable discretion provided by the oppression action to give effect to relational contracts, they would be ignoring the fundamental manner in which these participants make corporate bargains.

Courts are facilitating an efficient outcome by giving effect to the privately arranged contractual bargain between the self-interested parties. The judicial inquiry into the terms of the relational contract entails a high public cost, but this cost is justified given how idiosyncratic and fact-dependent each relational contract is. There is no more efficient way for the judiciary to fill gaps in such relational contracts. That is, the fact-specific

125 *Ibid* at para 12.

126 See e.g. *Eiserman v Ara Farms Ltd*, 52 DLR (4th) 498, [1988] 5 WWR 97 (Sask CA); *Mohan v Philmar Lumber (Markham) Ltd* (1991), 50 CPC (2d) 164, CarswellOnt 445 (WL Can) (Ont Ct J (Gen Div)) [*Mohan*]; *Wright v Donald S Montgomery Holdings Ltd* (1998), 39 BLR (2d) 266, CarswellOnt 370 (WL Can) (Ont Ct J (Gen Div)); *Krynen*, *supra* note 91; *Burdeny v K & D Gourmet Baked Foods and Investments Inc* (1999), 48 BLR (2d) 16, CarswellBC 911 (WL Can) (BCSC); *Elliott v Opticom Technologies Inc*, 2005 BCSC 529, 4 BLR (4th) 103; *Alleluia v Wilson*, 2011 BCSC 666, 86 BLR (4th) 262; *Chan*, *supra* note 91; *Callahan v Callahan*, 2011 BCSC 40, 78 BLR (4th) 35; *Korolis v Koutouki Taverna Saksatoon Inc*, 2010 SKQB 183, 73 BLR (4th) 270.

nature of each bargain does not allow a court to fill contractual gaps with an untailored default term.

While setting out the oppression action as a tailored default term is sensible in the close corporation context where bargains are relational in character, it is important to recognize that most other categories of oppression action claimants arrange their corporate bargains through discrete contracts. When corporate stakeholders are involved in discrete contractual relationships, the rationale for a muddy default in the form of the oppression action disappears. In such circumstances, it would be most efficient if the default rules simply defined the rights and obligations of the parties using narrower tailored defaults,[127] untailored defaults, or penalty defaults. It would be cheaper for most parties who desire a muddy standard in the form of oppression to contract explicitly for one, rather than requiring all parties to contract out of oppression, should that be their preference. This will be explained below by examining the other types of oppression action claimants.

C. Category B: Minority Shareholders in Publicly Held Corporations

Despite the fact that the *Dickerson Report* anticipated that the oppression action would most often be used by shareholders in closely held corporations[128]—and there has been some academic and judicial suggestion that the oppression action is more suitable in that context[129]—a number of oppression actions have been brought in the context of publicly held corporations.[130] An empirical study on oppression actions brought in Canada between 1995–2001 found that eight percent of oppression claims were brought against widely held corporations.[131] These actions had a lower suc-

127 Such as fiduciary obligations owed to the corporation.

128 *Dickerson Report*, *supra* note 51 at para 484.

129 See *Re Goldstream Resources Ltd* (1986), 2 BCLR (2d) 244 at 247 (SC). See also Cheffins, "Corporate Law", *supra* note 47 at 317–18.

130 See e.g. *Ford Motor Co of Canada v Ontario Municipal Employees Retirement Board* (2006), 79 OR (3d) 81, 263 DLR (4th) 450 (CA) [*Ford Motor Co*]; *Catalyst Fund General Partner I Inc v Hollinger Inc* (2006), 79 OR (3d) 288, 266 DLR (4th) 228 (CA) [*Catalyst Fund*]; *Themadel*, *supra* note 70; *Greenlight Capital Inc v Stronach* (2006), 22 BLR (4th) 11, 152 ACWS (3d) 616 (Ont Sup Ct) [*Greenlight Capital*]; *Palmer v Carling O'Keefe Breweries of Canada Ltd* (1989), 67 OR (2d) 161, 56 DLR (4th) 128 (Div Ct).

131 Ben Ishai & Puri, *supra* note 103 at 92.

cess rate than oppression claims against close corporations.[132] Numerous commentators have noted fundamental differences in the relationship between a shareholder and a public corporation as compared to a shareholder and a close corporation.[133] Given that the oppression action is simply an exercise in contractual gap filling, the characteristics of the contractual relationship between a shareholder and a public corporation must be analyzed to determine whether the oppression action is an efficient mechanism through which to fill contractual gaps that arise.

1. *The Shareholder's Relationship with the Public Corporation: The Passive Investor*

In contrast to the personal, dynamic relationships that characterize the close corporation context, the arrangement between a shareholder and a public corporation is more discrete, impersonal, and static.[134] Shareholders in public corporations are seen as passive investors who are far removed from the management of the corporation.[135] Shareholders do not expect any employment or management interest as flowing from their status as shareholders.[136]

Another essential element of the shareholder-public corporation relationship is that shareholders invest knowing that their shares can be sold easily for market value on the stock exchange when they do not approve of particular corporate conduct.[137] In contrast, in the close corporation context, shareholders cannot easily exit from their shareholding position

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132 *Ibid*. Ben-Ishai and Puri observed that from 1995 to 2011, the success rate of oppression claims against closely held corporations was 54%, compared to a rate of 33% for claims against publicly held corporations.

133 For an explanation of these differences and their implication for the oppression action, see Cheffins, "Economic Analysis", *supra* note 96 at 799–806. See also Moll, "Shareholder Oppression", *supra* note 106 at 737–38; Terry A O'Neill, "Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations" (1992) 22:3 Seton Hall L Rev 646 at 658–67; Henry G Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53:2 Va L Rev 259 at 278–79; Krishnan S Chittur, "Resolving Close Corporation Conflicts: A Fresh Approach" (1987) 10:1 Harv JL & Pub Pol'y 129 at 131, 159–60.

134 O'Neill, *supra* note 133 at 666–67.

135 *Ibid* at 660. See also William A Klein, "The Modern Business Organization: Bargaining Under Constraints" (1982) 91:8 Yale LJ 1521 at 1551; Douglas K Moll, "Reasonable Expectations v Implied in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?" (2001) 42:5 BCL Rev 989 at 996.

136 Chittur, *supra* note 133 at 131; Moll, "Shareholder Oppression", *supra* note 106 at 737–38; O'Neill, *supra* note 133 at 663.

137 Cheffins, "Economic Analysis", *supra* note 96 at 800–01.

given the lack of liquidity in their shares.[138] Indeed, it has been suggested that oppressive conduct is less likely to occur when all corporate stakeholders recognize that shareholders can easily end their relationship with the corporation through a share sale.[139]

That shares of public corporations can be sold on the market has relevance for minority shareholders beyond liquidity and ease of exit concerns. Under a law and economics framework, it is assumed that the price of publicly traded shares reflects understanding about the quality of management and potential for oppressive conduct.[140] In other words, a shareholder is compensated before the fact for any abusive conduct that may occur through a lower purchase price.[141]

Given the aforementioned features of the minority shareholder-public corporation relationship, there are no compelling fairness or efficiency justifications to explain why the law as a contractual gap-filler between these corporate parties should utilize a muddy default in the form of the oppression action. In regard to fairness concerns, recall that, under an efficient markets framework, shareholders are compensated for potentially oppressive conduct *ex ante* through a lower share price.[142] Allowing recovery under the oppression action would not be compensation but a windfall to minority shareholders.[143] If shareholders are dissatisfied with particular corporate activities, they can sell their shares for market value on the stock exchange.

Even if one does not fully ascribe to the efficient markets theory, other characteristics of the minority shareholder-public corporation relationship indicate that a muddy default in the form of the oppression action is not justified in this context. The courts have recognized that, for there to be oppression, the impugned conduct must "fall foul of the reason-

138 *Ibid*. Cheffins explains that in the close corporation context, minority shareholders often find that the only potential purchasers of their shares are the other invested shareholders. Recognizing that the selling shareholder is locked into his position, these shareholders do not offer fair market value for the seller's shares.

139 Chittur, *supra* note 133 at 134–35.

140 Cheffins, "Economic Analysis", *supra* note 96 at 803. See also Henry N Butler, "The Contractual Theory of the Corporation" (1989) 11:4 Geo Mason L Rev 99 at 106.

141 *Ibid*.

142 *Ibid*.

143 In *Ford Motor Co*, *supra* note 130 (the Ontario Court of Appeal, in denying compensation for past oppressive conduct, recognized that any historical oppression would "normally be reflected in the market price of the shares at the time the shareholder purchased them" at para 114). However, the Court did not go as far as to acknowledge that the share price might also reflect the market's understanding about the potential for future oppressive conduct.

able expectations of the complainant *according to the arrangements existing between the principals*."[144] Minority shareholders, in their above-described arrangement as passive investors, should not expect particularly special regard for their interests from the corporation. The courts have already held that majority shareholders in public corporations do not owe fiduciary duties to minority shareholders,[145] and that minority shareholders should not have the expectation that the majority will "exercise its voting power with regard to the interests of the minority as opposed to the interests of the corporation as a whole."[146]

The courts have found that shareholders may reasonably expect to rely on "public pronouncements"[147] made by public corporations. This approach, however, unduly interferes with the ability of management to respond to changing market conditions. Management may stray from a prior public announcement for the best interests of the corporation. The better approach is to recognize that minority shareholders of public corporations, in their role as passive investors, are only entitled to reasonably expect that management will comply with their legal obligations, including the statutory fiduciary duty to "act honestly and in good faith *with a view to the best interests of the corporation*."[148] If management's breach of the fiduciary duty to the corporation is the only conduct that allegedly amounts to oppression by a minority shareholder of a public corporation, then the oppression action is redundant.[149] Minority shareholders who believe that management has breached their fiduciary duty to the corporation may seek a remedy for the corporation through a derivative action.[150]

144 *Stabile v Milani* (2004), 46 BLR (3d) 294 at para 47, 132 ACWS (3d) 477 (Ont CA) [emphasis added]. Note that this case dealt with a complainant creditor, rather than a minority shareholder.

145 *Brant Investments Ltd v KeepRite Inc* (1991), 3 OR (3d) 289 at 298, 80 DLR (4th) 161 (Ont CA) [*Keeprite*].

146 *Greenlight Capital*, *supra* note 130 at para 55.

147 *Themadel*, *supra* note 70 at 753.

148 *CBCA*, *supra* note 1, s 122(1)(a) [emphasis added].

149 See Khimji, *supra* note 6 at 230–31. The director's fiduciary duty to the corporation can also be seen as a default rule in corporate contracts. See e.g. Frank H Easterbrook & Daniel R Fischel, "Contract and Fiduciary Duty" (1993) 36:1 JL & Econ 423 at 426–28. Easterbrook and Fischel explain that in a principal-agent relationship, contracting for a broad "duty of loyalty in pursuit of the objective" is sensible for long-term sophisticated tasks; it would be prohibitively costly to expressly contract for the parties' entire obligations.

150 See *Rea v Wildeboer*, 2015 ONCA 373, 126 OR (3d) 178. The interaction between the oppression action and the statutory fiduciary duty enforced through a derivative action is complex, and indeed, deserving of its own thorough analysis. For such an analysis, see Jeffrey G MacIntosh, "The Oppression Remedy: Personal or Derivative?" (1991) 70:1 Can Bar Rev 29. See

Indeed, an examination of oppression actions brought against public corporations seems to suggest that many minority shareholder applicants have complained of corporate behaviour that may be characterized as derivative in nature.[151] That is, many cases have involved minority shareholders who have sought a remedy under the oppression action in response to managerial conduct that was allegedly to the detriment of the entire corporation. In these cases, courts have often relied on a discussion of compliance with the corporate fiduciary duty to determine whether there was oppressive conduct towards the applicant.[152] In other cases, courts have avoided analyzing the statutory fiduciary duty despite the fact that the applicant's oppression action could have been construed as essentially a claim that the board has breached this duty.[153] A case example will illustrate how the Ontario Court of Appeal ruled when minority shareholders used the oppression action to complain of corporate harms that are derivative in nature.

2. *A Case Analysis of Oppression in the Minority Shareholder-Public Corporation Context:* Ford Motor Co v OMERS

In *Ford Motor Co*,[154] the Ontario Municipal Employees Retirement Board (OMERS) and other minority shareholders brought an oppression action

also Edward M Iacobucci & Kevin E Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000) 12 Sup Ct L Rev (2d) 87. Also note that under section 239 of the *CBCA*, to proceed with a derivative action, leave must first be obtained from the court. There is no such leave requirement to commence an oppression action. MacIntosh and Iacobucci & Davis provide differing commentaries on the rationale behind the leave requirement.

151 Many of these cases involve a minority shareholder complaining of non–arm's length transactions between related companies. See e.g. *Ford Motor Co*, *supra* note 130 (a transfer pricing arrangement that disadvantaged the profits of the subsidiary and kept the share price artificially low); *Greenlight Capital*, *supra* note 130 (investments and transactions with a non-arm's length company were allegedly unreasonable and oppressive); *Catalyst Fund*, *supra* note 130 (non-arm's length loan arrangement that violated corporate governance standards); *Keeprite*, *supra* note 145 (non–arm's length asset purchase allegedly unfairly prejudicial to the interests of minority shareholders).

152 See e.g. *CW Shareholdings Inc v WIC Western International Communications Ltd* (1998), 39 OR (3d) 755, 160 DLR (4th) 131 (Ct J (Gen Div)) [*CW Shareholdings*]; *Pente Investment Management Ltd v Schneider Corp* (1998), 42 OR (3d) 177, 113 OAC 253 (CA); *Benson v Third Canadian General Investment Trust Ltd* (1993), 14 OR (3d) 493 (Gen Div).

153 See *Ford Motor Co*, *supra* note 130. See also Kim Brooks & Anita I Anand, "The Allocation of Profits Between Related Entities and the Oppression Remedy: An Analysis of *Ford Motor Co. v. Omers*" (2004–2005) 36:1 Ottawa L Rev 127 (where the authors recognize that in oppression cases, "directors can be made subject to a fiduciary standard without a fiduciary analysis being undertaken" at 155).

154 *Supra* note 130.

against Ford US and Ford Canada. Ford US owned 94 percent of the shares in Ford Canada and planned to take it private. When the minority shareholders refused an offer by Ford US for their shares, Ford Canada started an action to determine the fair value of the shares held by OMERS and other dissenting shareholders. OMERS and some of the dissenting shareholders counterclaimed against Ford Canada and Ford US by bringing an oppression action.

The minority shareholders argued that the transfer pricing structure as between Ford US and Ford Canada had the effect of unfairly depressing Ford Canada's profitability and share price. The Court recognized that the oppression applicants were, in essence, complaining of corporate activity that harmed the entire corporation.[155] The effects of the transfer pricing system unfairly benefitted Ford US to the detriment of Ford Canada. Nevertheless, given that the minority shareholders did not seek leave to commence a derivative action and requested only a personal remedy, their complaint was properly located within the oppression action.[156]

The Court assessed the merits of the oppression action by examining the reasonable expectations of the minority shareholders. The Court admitted that, in the context of minority shareholders in public corporations, it is difficult to find direct evidence as to the reasonable expectations of shareholders.[157] Reasonable expectations may be inferred through the "company's public statements and the shared expectations about the way in which a public company should be run."[158] The Court, relying heavily on the findings of the trial judge, evaluated the wording in the financial statements of Ford Canada to find that the corporation had publicly represented that it would negotiate prices with Ford US at arm's length. Failure to do so constituted a breach of the minority shareholders' reasonable expectations.

Furthermore, the Court held that reasonable expectations arise not only from the corporation's public statements, but also by "implicit assumptions about the manner in which a public company operates."[159]

155 *Ibid* at para 109. See also *ibid* (where the Court cited the trial judge's statement that the shareholders' oppression action is "in the nature of a personal action for damages for breach of a statutory and common law duty to act fairly in the best interests of the corporation, i.e. in the best interests of all the shareholders" at para 170).

156 *Ibid* at paras 110–12, 119.

157 *Ibid* at para 66. This may be because, as this paper asserts, minority shareholders do not have reasonable expectations beyond that management will comply with its fiduciary duty.

158 *Ibid*.

159 *Ibid* at para 100.

Minority shareholders had the reasonable expectation that management would "act in the best interests of the corporation and take all reasonable steps to enhance profitability by changes to the intercorporate pricing system."[160] Here, the Court essentially acknowledged that, even beyond any public statements made by the corporation, minority shareholders are entitled to expect that management will comply with its fiduciary duty.[161] The judgment showed the Court's concern with the fact that, in its failure to negotiate a more advantageous transfer pricing arrangement, Ford Canada had not acted as a "truly independent entity."[162]

In *Ford Motor Co*, the applicants' oppression complaint was derivative in nature and the Court analyzed the action in part by acknowledging that shareholders are entitled to reasonably expect that management will act in the best interests of the corporation. Given our position in this paper that shareholders in public corporations should *only* reasonably expect compliance with the corporate fiduciary duty, it is a wasteful and misdirected exercise for courts to inquire into reasonable expectations of the shareholders, as was done in *Ford Motor Co*.[163] Any complaint that shareholders have should be made in reference to the corporate fiduciary duty and brought on behalf of the corporation through a derivative action. This approach is more economically efficient and preserves conceptual clarity, as will be explained further below.

3. Complaining of Corporate Wrongs Exclusively Through the Derivative Action

It is much more efficient to require corporate stakeholders to proceed exclusively through a derivative action for harms done to the corporation.[164]

160 *Ibid* at para 69.

161 Reflecting its confusing thinking on the interaction between the corporate fiduciary duty and the oppression action, the Court would later state that an oppression action need not rest on a breach of any duty. See *ibid* at para 171.

162 *Ibid* at paras 47, 61–62.

163 Showing the muddled, unpredictable treatment of the oppression action, note that the trial judgment assessed the oppression action not only through analysis of reasonable expectations, but also by reference to reasonable foreseeability. This analysis of reasonable foreseeability was quite novel to the oppression jurisprudence. The Court of Appeal cited the trial judge's reasonable foreseeability analysis but then commented that "it is not at all clear that it was necessary" to engage in a reasonable foreseeability analysis in order to find oppression. See *ibid* at para 63.

164 See MacIntosh, *supra* note 150. MacIntosh argues that it would be best if the derivative and oppression provisions were collapsed into one cause of action. However, assuming that the two actions remain separate as in present legislation, MacIntosh asserts that

Requiring a complainant to bring a derivative action avoids the situation wherein multiple claimants would each bring a personal oppression action based on the same alleged harm to the corporation.[165] If each claimant were permitted to bring its own action, more private and public resources would be spent on litigation. Moreover, it would impose on the courts the difficult task of properly calculating separate damages for each claimant, despite the fact that each claim arose from harm that directly affected only the corporation.[166]

There are further difficulties with allowing claimants to bring an oppression action for harms that are derivative in nature. When a wrong is done to the corporation, there are many corporate stakeholders who indirectly suffer. Some of these stakeholders may not bring an oppression action for a remedy, possibly because they do not wish to incur the costs and risk of litigation or they lack standing to bring such an action.[167] When some complainants choose to bring a personal oppression action and are awarded a remedy from the corporation, the other corporate stakeholders are unfairly disadvantaged because the corporation may be less capable of fulfilling the financial obligations owed to them.[168]

Further, restricting claims to derivative actions more efficiently remedies the harm done to the corporation.[169] With a single derivative action, the cost of multiple lawsuits by different corporate parties is averted.[170] Court do not need to engage in difficult calculations to determine how much a party should be awarded for harms that only directly affected the corporation.[171] Rather, because it is the corporation that recovers, all corporate stakeholders will "benefit indirectly in precisely the same proportions in which they were initially injured."[172] A derivative action, therefore, is a much more economically efficient way for corporate stakeholders to address harms to the corporation.[173]

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claims that are essentially related to harm to the corporation should proceed exclusively through the derivative action.

165 *Ibid* at 59.

166 *Ibid* at 59–60.

167 *Ibid* at 60.

168 *Ibid* at 60–61.

169 *Ibid* at 59.

170 *Ibid*.

171 *Ibid* at 62.

172 *Ibid*.

173 MacIntosh further describes the advantages of the leave requirement that is necessary to bring a derivative action but not an oppression action. The leave requirement thwarts claimants from using the threat of litigation to extract a settlement from a corporation.

4. Conclusion: Minority Shareholders of a Public Corporation and the Oppression Action

This section explained the relationship between a minority shareholder and a public corporation as being impersonal and discrete, wherein the dissatisfied shareholder may freely sell his or her shares for market value when he or she disapproves of particular corporate conduct. In such an arrangement, the minority shareholder should not be entitled to reasonably expect any more from the corporation than compliance with its legal obligations, including management's fiduciary duties. It is more economically efficient, conceptually clear, and fair for the law to only allow minority shareholders to complain of corporate wrongs by seeking leave to proceed with a derivative action on behalf of the corporation.

Understood through a contractarian lens, the fiduciary duty owed to the corporation by management and a shareholder's ability to seek leave to bring a derivative action are two of the standard default terms that are included in each minority shareholder's bargain with a public corporation. In the minority shareholder-public corporation context, these default terms are sufficient and the oppression action is neither an efficient nor fair default term. Given the efficiency arguments for the separation of ownership and control,[174] the existence of fiduciaries duties, and the ease of exit, it is difficult to argue that an oppression action should be included in a corporate law code for this context as a term most parties would have negotiated for before the fact.

D. Category C: Contract Creditors' Use of the Oppression Action

Apart from minority shareholders in private and public corporations, a variety of other corporate stakeholders, including debtholders, lenders, trade creditors, and contract counterparties have relied on the oppression action. These claimants, in diverse sets of circumstances, have sought a remedy for conduct that they assert is unfairly prejudicial to their inter-

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It also allows the courts to quickly dismiss frivolous claims; *ibid* at 63–65. For a contrary viewpoint on the efficacy of using the oppression action to pursue relief for harms that are derivative in nature, see Iacobucci & Davis, *supra* note 150. Iacobucci & Davis dispute many of the above-described arguments as to why derivative harms should proceed solely through the derivative action.

174 See e.g. Eugene F Fama & Michael C Jensen, "Separation of Ownership and Control" (1983) 26:2 JL & Econ 301; Butler, *supra* note 140 at 106–07; Manne, *supra* note 133.

ests as creditors or security holders (in the case of debt investors).[175] An empirical study on the oppression action found that creditors brought 8 percent of all claims between 1995 and 2001.[176] Creditor actions increased to 23 percent of all claims between 2001 and 2004.[177]

The oppression action, as a default term included in the contractual relationship between these diverse stakeholders and the corporation, is neither merited nor efficient. The creditor-corporation relationship is one in which the parties are able to set out their complete obligations expressly before the fact and at a reasonable cost. The existence of the oppression action as a muddy default renders the obligations of the parties unclear and may disincentivize creditors from adequately protecting their interests through private bargaining.[178] Barring creditors from the statutory oppression action would amount to a penalty default setting that would encourage creditors to explicitly bargain for each of the covenants and guarantees it wishes to protect itself with when extending credit. Such a penalty default is efficient because it recognizes that, in this context, it is cheaper for parties to bargain explicitly *ex ante* than for a court to determine the terms of a hypothetical bargain *ex post*. If some parties desire to subject their agreement to a muddy reasonableness clause similar to the statutory oppression provisions, it would be cheaper to force these parties to expressly contract for such a clause than to require all parties to contract out of such a term. This section will, first, examine the four main types of contract creditors who have brought oppression actions and, second, explain why the use of the oppression action is not warranted in each type.

1. The Use of the Oppression Action by Debtholders

Debtholders[179] have relied on the oppression action to complain of corporate behaviour that is allegedly unfairly detrimental to their interests.[180]

175 Note that under section 238 of the *CBCA*, a registered security holder always qualifies as a "complainant" entitled to bring an oppression action. A creditor, on the other hand, must persuade the court to use its discretion to grant the creditor standing to bring such an action as a "proper person." When creditors have been granted such standing is discussed in VanDuzer, *supra* note 56 at 474–76.

176 Ben-Ishai & Puri, *supra* note 103 at 103.

177 *Ibid*.

178 DeMott, *supra* note 9, noted that the oppression action "seems to create weaker, rather than stronger incentives for *ex ante* definitions of entitlements" at 220.

179 This category encompasses both bondholders and debenture holders.

180 See *BCE*, *supra* note 5; *Casurina Ltd Partnership v Rio Algom Ltd* [2004], 181 OAC 19, 40 BLR (3d) 112 (Ont CA); *Catalyst Capital Group Inc v Data & Audio-Visual Enterprises Wireless Inc*,

These claimants have standing to bring an oppression action as security-holders.[181] In explaining why the oppression action is inefficient and unnecessary in this context, it is important to first describe the nature of the relationship between debtholders and the corporation.

The bargain between debtholders and the corporation is impersonal, discrete, and unchanging. The issuer and the debtholder may negotiate particular terms prior to any agreement at reasonable cost.[182] Both parties intend to expressly define the entire relationship in a formal contract such as an indenture or fiscal agreement. The end result is that the debtholders hold a fixed claim against the corporation, the specific terms of which are set out in a privately arranged contract.[183] The return on the instrument will reflect the negotiated risks and protections.

Given the nature of the bargain between debtholders and the corporation described above, debtholders should only be entitled to reasonably expect that the corporation act within the limits of its contractual arrangement and the confines of the law. The oppression action allows debtholders to complain of corporate conduct *ex post* despite the fact that they had not negotiated particular protection from such conduct *ex ante* when they had the opportunity to do so. In this way, the oppression action amounts to potential protection for debtholders that was not negotiated nor priced into the private agreement between the parties.[184]

2013 ONSC 2170 (QL), 228 ACWS (3d) 442; *Computershare Trust Co of Canada v Crystallex International Corp* (2009), [2010] 65 BLR (4th) 281, 183 ACWS (3d) 732 (Ont Sup Ct) [*Computershare*], aff'd 2010 ONCA 364, 263 OAC 137; *Deutsche Bank Canada v Oxford Properties Group Inc* (1998), [1999] 40 BLR (2d) 302, 78 OTC 108 (Ont Ct J (Gen Div)).

181 See *CBCA*, *supra* note 1, s 238. See also *BCE*, *supra* note 5 at para 51.

182 Klein, *supra* note 135 at 1531.

183 For a general brief description on the relationship between a creditor and the corporation in the context of the oppression action see Cheffins, "Economic Analysis", *supra* note 96 at 796. See also Klein, *supra* note 135 at 1531. The above description of the creditor as a fixed claimant assumes that the corporation is solvent. Once a corporation becomes insolvent, a creditor may be characterized as a residual claimant. See Iacobucci & Davis, *supra* note 150 at 114.

184 Even if one believes that the availability of the oppression action *is* factored into the price of the instrument, the oppression action is still unjustifiable in debtholder-corporation context. The oppression action amounts to a default term that provides potential protection to debtholders. Some debtholders may wish to forgo this potential protection, and the judicial uncertainty that comes with it, in exchange for a higher return. The existence of the oppression action as a universal default term prevents debtholders from doing so at a reasonable cost.

Unfortunately, in *BCE*,[185] the Court was not entirely attuned to the commercial realities of the relationship between a debtholder and the corporation.[186] Conversely, in *Computershare*,[187] an oppression case that followed *BCE* and was affirmed by the Ontario Court of Appeal, the Court did acknowledge that, given the nature of the contractual bargain between the complainant debtholders and the corporation, no remedy should be awarded. We explain below that, while the approach in *Computershare* is preferable to that in *BCE*, an optimal result would restrict debtholders from relying on an oppression action unless some "oppression" or "fair treatment" clause was expressly contracted for.

a. *BCE* and *Computershare*: A Brief Comparative Analysis

In *BCE*, debenture holders of Bell Canada brought an oppression action complaining that a proposed leveraged buyout was unfairly prejudicial and breached their reasonable expectations because it would decrease the market value of their debentures by 20 percent. The trust indenture agreements did not contain any provisions regarding change of control nor guarantees on the credit rating of the instruments.

The Court first seemed preoccupied with developing guidelines that could be applied in any case in which the oppression action arose between parties. As explained above, the Court established a two-pronged test to determine the reasonable expectations of a claimant and unfairly prejudicial conduct that may warrant a remedy under the oppression action.[188] When the Court applied the oppression framework to the case, it failed to recognize that, in the debtholder-corporation relationship, commercial reality demands that reasonable expectations only arise from the terms of the contractual relationship. The Court did mention that the complainants could have negotiated credit rating or change-of-control protections.[189] However, the Court examined no further evidence of the terms of the contractual trust indenture in determining the reasonable expectations of the debenture holders. Rather, the Court suggested that the debenture holders could reasonably expect the directors of BCE to consider their interests but, on the facts, this expectation was fulfilled.[190] The Court

185 *Supra* note 5.

186 For a description of the approach the Supreme Court set out for the oppression action, see above the section titled "The Oppression Action Today: The Supreme Court Ruling in *BCE*."

187 *Supra* note 180.

188 *BCE*, *supra* note 5 at para 56.

189 *Ibid* at para 108.

190 *Ibid* at paras 102, 113.

left open the possibility that debenture holders may have reasonable expectations beyond the terms of their contractual arrangement.[191]

In *Computershare*, the Court took a markedly different approach to assessing oppression in the debt investor-corporation context. In *Computershare*, Crystallex issued notes to raise funds for the development of a mine in Venezuela. When Crystallex was denied the permits required to develop the mine, bondholders[192] brought an oppression action complaining that the subsequent conduct undertaken by the directors was prejudicial to their interests and breached their reasonable expectations. The Court referred to the express terms of the prospectus and trust indenture to determine the reasonable expectations of the bondholders.[193] The Court only relied on *BCE* to affirm the position that a factor in considering reasonable expectations was whether the bondholders could have protected themselves in contract.[194] The trust indentures did not contain any particular representations, covenants, or protections that could form the basis of the bondholders' reasonable expectations.

The Court listed certain clauses that bondholders could have inserted into the agreement to protect themselves, but explained that these protective covenants would come "at a cost" in the form of a lower return on the note.[195] The bondholders had negotiated a certain level of risk and return that was reflected in the yield of the notes.[196] Given the trust indenture agreement between the corporate parties, the Court noted that "[t]he argument of the Noteholders is clothed in the language of reasonable expectations, but in reality their complaint is that they do not like the choices that the directors of Crystallex have made in dealing with the problem."[197] The bondholders were not found to have any reasonable expectations regarding the conduct complained of and their application under the oppression action was dismissed.

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191 *Ibid* at paras 102, 107.

192 While the decision most often refers to the claimants as note holders, they were also described as bondholders. See *Computershare*, *supra* note 180 at para 74. This paper will refer to these claimants as bondholders.

193 *Ibid* at paras 83–84, 88–89.

194 *Ibid* at para 86. Interestingly, the judge also cited the trial decision of *BCE*, where Silcoff J explained that reasonable expectations should be derived from the terms of the trust indenture agreed upon between the parties (*ibid* at para 74).

195 *Ibid* at paras 90–92.

196 *Ibid* at para 94.

197 *Ibid* at para 95.

b. Conclusion: Setting an Efficient Default in the Debtholder-Corporation Context

In both *BCE* and *Computershare*, the complainants were denied a remedy under the oppression action. However, in *BCE*, the Court ignored the fundamental nature of the relationship between debtholders and the corporation. Suggesting that debtholders may have reasonable expectations beyond their contractual bargain undermines private contracting. Given that all contractual terms are intended to be defined expressly and reflected in the price of the instrument in the debtholder-corporation context, it would be most efficient and fair to set a default term that excludes the use of an oppression action, unless it is specifically bargained for contractually. Such a default would be an efficient penalty default because debtholders who intend to benefit from the additional protection of a muddy "oppression" clause would be induced to explicitly bargain for such a clause. As a result, debtholders would be able to rely on the exact contractual protections that they expressly negotiated and paid for. Parties would be more certain that their agreements would not be upset. Moreover, unnecessary private and public costs of litigation would be avoided as debtholders would no longer be able to seek a remedy for protections that they could have bargained for more cheaply *ex ante*.

2. Lenders' Use of the Oppression Action

Lenders[198] have turned to the oppression action to complain of corporate conduct when the debtor corporation has been unable to repay its loan or has refused to comply with particular terms of a loan agreement.[199] The nature of the relationship between a lender and the corporation is very much identical to the relationship as between a debt investor and the corporation as described above. Lenders and the debtor corporation negotiate a lending agreement, which establishes a fixed claim against the corporation in favour of the lender.[200] The return on the loan reflects the protections

198 This category encompasses bank lenders and holders of promissory notes.

199 See e.g. *Royal Bank of Canada v Amatilla Holdings Ltd*, 45 ACWS (3d) 859, [1994] OJ No 198 (QL) (Ct J (Gen Div)); *Working Ventures Canadian Fund Inc v Angoss Software Corp*, 101 ACWS (3d) 282, [1994] OJ No 198 (QL) (Ont Sup Ct), aff'd [2001] OJ No 2950 (QL) (CA); *SCI Systems, Inc v Gornitzki Thompson & Little Co* (1997), 147 DLR (4th) 300, 36 BLR (2d) 192 (Ont Ct J (Gen Div)) [*SCI Systems* cited to DLR].

200 For a general brief description on the relationship between a creditor and the corporation in the context of the oppression action see Cheffins, "Economic Analysis", *supra* note 96 at 796. See also Klein, *supra* note 135 at 1531.

and risks that were bargained for as terms of the lending agreement. This agreement captures the entire discrete relationship between the parties.

In the context of such a relationship, the lender and debtor corporation would not hypothetically bargain for a muddy "oppression" or "fair treatment" clause that renders unclear the rights and obligations of each party. It is inefficient and unnecessary to have the oppression action as a default contractual term that allows lenders to complain of conduct prejudicial to their allegedly reasonable expectations. Lenders should only reasonably expect that the corporation act in compliance with the contract and within the limits of the law. Any complaint that lenders have can be resolved through alternative causes of action that are more appropriate.

For instance, in *SCI Systems*,[201] the applicant, SCI Systems (SCI), held an $800,000 promissory note issued by the defendant, Gornitzki Thompson & Little Co (GTL). SCI asserted that, in the six months before the note was due, the directors of GTL paid themselves large dividends, paid down their shareholder loans, and restructured their businesses, with the effect that GTL could not repay the note held by SCI. SCI applied to the Court to have these transactions set aside under the Ontario oppression action provisions,[202] the *Fraudulent Conveyances Act*,[203] and the *Assignments and Preferences Act*.[204] The parties agreed that the Court would first decide the matter under the oppression provisions and, only if necessary, proceed to examine the alternative claims.[205]

When the Court examined reasonable expectations as part of the oppression action, it held that "one of the most reasonable of all expectations of those dealing with corporations must be that the directors will manage the company in accordance with their legal obligations."[206] These legal obligations include the fiduciary duty and duty of care owed to the corporation.[207]

The Court made little further mention of a breach of reasonable expectations. Rather, the Court's analysis focused on whether the directors breached section 38(3) of the *OBCA*,[208] which restricts when dividends

201 *Supra* note 199.

202 *OBCA*, *supra* note 1, s 248.

203 RSO 1990, c F.29.

204 RSO 1990, c A.33.

205 *SCI Systems*, *supra* note 199 at 305. The case was decided for the applicant on the basis of the oppression action, and the alternative claims were not addressed.

206 *Ibid* at 308.

207 *Ibid*.

208 This section is equivalent to section 42 of the *CBCA*, *supra* note 1.

may be paid.[209] The Court found that the directors' breach of section 38(3) was unfairly prejudicial to SCI.[210] The Court also noted that the directors, as shareholders, were in a position of conflicted interest on the issue of dividend payments.[211] The directors' conduct had to be carefully examined and, in this case, the directors failed to fulfill their fiduciary obligations.[212]

SCI Systems illustrates that a muddy default term in the form of the oppression action is unwarranted in the lender-corporation context. The Court recognized that lenders can reasonably expect directors to comply with their legal obligations, and then analyzed whether the directors breached their fiduciary duty to the corporation for their own benefit through illegally issuing dividends. The crucial point is that the wrong complained of was already adequately addressed by other default rules. The oppression action and its analysis of reasonable expectations, unnecessarily render unclear the rights and obligations of each party, which ultimately raises the *ex post* costs of litigation and judicial gap-filling. Therefore, a penalty-default that excluded creditors from relying on an oppression action, unless it was specifically bargained for, would be more efficient. Such a default term would, more generally, induce the parties to bargain expressly on the covenants they wish to include in the lending agreement. It is cheaper for the parties in this context to explicitly contract *ex ante* than it is for a court to determine the terms of their hypothetical bargain *ex post*. Any disputes between lenders and the corporation could be resolved by contract law and through default rules set by the law specifically for the harm alleged. The oppression action as a default term is inefficient and unnecessary.

3. Trade Creditors' Use of the Oppression Action

Trade creditors have turned to the oppression action for a remedy when they have supplied goods or services on credit and found the corporation unable to pay its debts.[213] In these cases, the trade creditor typically alleges

209 *OBCA*, *supra* note 1, s 38(3) states: "[t]he directors shall not declare and the corporation shall not pay a dividend if there are reasonable grounds for believing that, (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or (b) the realizable value of the corporation's assets would thereby be less than the aggregate of, (i) its liabilities, and (ii) its stated capital of all classes."

210 *SCI Systems*, *supra* note 199 at 312.

211 *Ibid* at 314.

212 *Ibid*.

213 See e.g. *Gignac, Sutts and Woodall Construction Co v Harris* (1997), 36 BLR (2d) 210, 72 ACWS (3d) 1033 (Ont Ct J (Gen Div)) [*Gignac*]; *Heap Noseworthy Ltd v Didham* (1996), 137

that the director transferred assets out of the corporation for his or her own benefit, to the unfair prejudice of the creditor.[214]

As with the prior categories of creditor claimants, it is unnecessary and inefficient to allow creditors to seek a remedy under the oppression action for such corporate conduct. Trade creditors should have no particular expectations of corporate conduct beyond that the corporation and its directors comply with the law. Rather than assessing whether a trade creditor has certain reasonably held expectations, a court should directly examine whether the corporation or its directors breached any legal obligations, including the fiduciary duty and any fraudulent conveyance legislation.

For instance, in *Prime Computer*,[215] the respondent was indebted over $171,000 for computer components supplied by the applicant. The company was in financial difficulty and, with the debt still owing, the respondent director increased his salary by $79,700 from the previous year without any explanation. When the company was unable to pay its debt to the applicant, the applicant asserted that this inexplicable salary increase was unfairly prejudicial to its interests as a creditor. The Court held the behaviour of the director was oppressive with little analysis as to precisely why.[216]

Such a corporate dispute is more efficiently resolved through the *Fraudulent Conveyances Act* or the fiduciary duty. Section 2 of Ontario's *Fraudulent Conveyances Act* makes void any conveyance "made with intent to defeat, hinder, delay or defraud creditors."[217] Dealing with allegations of corporate asset stripping through fraudulent conveyance legislation, rather than through a broad oppression action, removes costly and unnecessary inquiries into the reasonable expectations of the parties. Alternatively, the law could allow the wronged trade creditor to enforce the director's statutory fiduciary duty to "act honestly and in good faith with a view to the best interests of the corporation" by granting leave to bring a derivative action.[218] In *Prime Computer*, the director, in drawing funds from the corporation to pay himself a much larger salary, was in a position of conflicting interests. The fiduciary duty is primarily concerned with the state of mind of corporate management when

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Nfld & PEIR 240, 29 BLR (2d) 279 (Nfld SC(TD)) [*Heap*]; *Prime Computer of Canada Ltd v Jeffrey* (1991), 6 OR (3d) 733, 30 ACWS (3d) 993 (Gen Div) [*Prime Computer* cited to OR].

214 *Ibid*; *Gignac*, *supra* note 213; *Heap*, *supra* note 213

215 *Supra* note 213.

216 The Court held that the corporate conduct was oppressive given that the director paid himself an excessive salary out of funds that belonged "in effect" to the creditor. See *ibid* at 735.

217 *Supra* note 203.

218 *CBCA*, *supra* note 1, s 122(1)(a).

making decisions on behalf of the corporation.[219] The law should analyze the resulting litigation between the corporation and its creditor by assessing whether the director, in his or her position of conflict, acted to further the best interests of the corporation. The oppression action is simply not needed to resolve disputes in the trade creditor-corporation context.

4. Contract Counterparties' Use of the Oppression Action

Contract counterparties have also made use of the oppression action when a corporation has failed to fulfill its contractual obligations.[220] It appears that, most often, claimants have complained of actions taken by management to strip the corporation of its assets, leaving the contract counterparty incapable of collecting its judgment claim.[221]

For instance, in *Piller Sausages*,[222] the applicant, Piller, purchased a sterilizing machine from the respondent, Cobb International. Cobb International failed to provide the machine. Piller obtained judgment for the purchase price, interest, and costs. An examination in aid of execution of the judgment determined that the director-respondent, Kenneth Cobb, executed a number of transactions to strip Cobb International of its assets, leaving it unable to pay Piller's judgment. The impugned corporate activities included the payment of dividends to related companies controlled by Cobb, a management bonus to Cobb, and a sale of machine parts to a related company, wherein Cobb International was not yet fully

219 Khimji, *supra* note 6 at 212.

220 The oppression action has been used when corporate vendors failed to perform on a sales contract; see *Canadian Opera Co v 670800 Ontario Inc* (1990), 75 OR (2d) 720, 75 DLR (4th) 765 (Div Ct); *Piller Sausages & Delicatessens Ltd v Cobb International Corp* (2003), 35 BLR (3d) 193, 124 ACWS (3d) 38 (Ont Sup Ct) [*Piller Sausages* cited to BLR]. The action has also been brought when lease agreements were breached. See *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, 2008 ONCA 183, 234 OAC 59, 41 BLR (4th) 51 [*Brick Furniture Warehouse*]; *1413910 Ontario Inc (cob as Bulls Eye Steakhouse & Grill) v McLennan* (2009), 309 DLR (4th) 756, 249 OAC 333 (Ont Div Ct).

221 The oppression action has also been brought where the lessor-applicant complained of the complex corporate structure of the respondent wherein the contractual lessee was a shell corporation, which subleased the premises to a related corporation that did have assets. See *Brick Furniture Warehouse*, *supra* note 220. In that case, the Ontario Court of Appeal recognized that there was no oppression in such a complex corporate organization. The reasonable expectations of the applicant lessor were to be confined to the bargain negotiated between the parties. The applicant did not inquire into whether the lessee had the ability to meet its obligations and did not request a further covenant or guarantee from a related company. While the applicant's agreement may have been improvident, the oppression remedy cannot be used to re-write contracts. The Court analyzed the applicant's complaint solely through the principles of the law of contracts.

222 *Supra* note 220.

paid for the parts. In light of these transactions, Piller brought an oppression action and, in the alternative, sought leave to commence a derivative action on behalf of Cobb International.

The Court analyzed the oppression application with reference to prior cases and noted that there was a reasonable expectation that debtors would not engage in conduct that would hinder satisfaction of a judgment.[223] Paying dividends when the corporation was unable to pay its liabilities is oppressive to creditors.[224] As well, directors who take money out of the corporation after being served a statement of claim have been held to be putting their interests ahead of those of creditors and the corporation, thereby unfairly disregarding these interests.[225] On the basis of the prior cases analyzed, the Court held that Cobb's actions were oppressive to Piller and ordered the respondents jointly and severally liable to pay the judgment owed.

The oppression action was not needed to resolve this litigation. The above-described reasoning for finding the impugned conduct to be oppressive is dealt with expressly through other default rules. There are default rules to deal with transactions that hinder satisfaction of debts,[226] default rules restricting when dividend payments may be made,[227] and the fiduciary duty which ensures that directors act in the best interest of the corporation.[228] In *Piller Sausages*, the Court noted that it would have, in the alternative, accepted the applicant's application to bring a derivative action and the result would have been a repayment to Cobb International of the impugned funds from where Piller could collect its judgment.[229] It has been explained above why the use of the derivative action is more efficient than the oppression action in evaluating corporate harms.[230]

For contractual counterparties, like other categories of creditors surveyed above, it is more conceptually coherent and efficient to resolve disputes with reference to more directed default rules, such as the statutory fiduciary duty, fraudulent conveyance legislation, and the law of contracts. The only reasonable expectation that contractual counterparties

223 *Ibid* at para 23.

224 *Ibid* at para 25.

225 *Ibid* at para 28.

226 See e.g. *Fraudulent Conveyances Act*, *supra* note 203, s 2.

227 *CBCA*, *supra* note 1, s 42.

228 *Ibid*, s 122(1)(a).

229 *Supra* note 220 at para 41.

230 See above at 36, the section titled "Complaining of Corporate Wrongs Exclusively Through the Derivative Action."

have of a corporation is for it to meet its contractual obligations explicitly bargained for and for management to comply with their duties when making decisions. Only the terms of the contract and duties of management should be directly assessed in these types of corporate disputes.

E. Category D: Involuntary Creditors' Use of the Oppression Action

Beyond shareholders and creditors, involuntary creditors such as tort claimants have also sought a remedy under the oppression action for alleged corporate wrongdoing.[231] For instance, in *Tannis Trading*,[232] the respondent, Coldmatic, negligently supplied and installed a refrigeration system for the applicant, Tannis. On receipt of Tannis' statement of claim, Zafir, Coldmatic's director, sold the corporation's assets, which left Coldmatic judgment-proof. Tannis' suit alleged negligence, breach of contract, and oppression, among other causes of actions.

On the oppression issue, the Court cited a number of cases where creditors were granted relief under the oppression action when directors had engaged in asset-stripping transactions that left the corporation unable to pay its debts. Zafir's actions were found to be similarly oppressive, and the trial judge's order making Zafir personally liable for the tort damages was upheld.[233]

As explained above, there is no need for the law to use the broad oppression remedy to resolve allegations of asset-stripping to frustrate creditor claims. Fraudulent conveyance legislation expressly deals with transactions that aim to hinder, defeat, or delay creditors while the statutory fiduciary duty ensures that directors act in good faith for the best interests of the corporation. The oppression action and its analysis of reasonable expectations merely adds to litigation conceptual ambiguity, unnecessary expense, and unpredictability . Of course, unlike voluntary creditors, involuntary creditors cannot bargain for an oppression clause

231 See *Tannis Trading Inc* (*cob Tannis Food Distributors*) *v Coldmatic Refrigeration of Canada Ltd* (*cob Coldmatic Building Systems*), 2010 ONSC 5747, 85 BLR (4th) 77, OJ No 5109 [*Tannis Trading*]; *Levy-Russell Ltd v Shieldings Inc* (1998), 41 OR (3d) 54, 165 DLR (4th) 183 (Gen Div). See also *Manufacturers Life Insurance Co v AFG Industries Ltd* (2008), 44 BLR (4th) 277, 163 ACWS (3d) 750 (Ont Sup Ct) where the applicant sought a remedy under the oppression action for the recovery of environmental remediation costs.

232 *Supra* note 231.

233 The relationship between veil-piercing and the oppression action is an interesting subject worthy of a more thorough discussion.

before the fact at reasonable cost. However, we suggest that the case for a muddy default, in the form of the oppression action is not sufficiently strong even in this context, as involuntary creditors are able to rely on more directed default rules[234] and are able to free-ride on the monitoring of contract creditors.

F. Category E: Employees' Use of the Oppression Action

When employees bring oppression actions against a corporation, they generally complain of two types of corporate wrongs. First, employees have sought a remedy under the oppression action for wrongful dismissal.[235] Second, employees have turned to the oppression action to allege that certain corporate conduct has left them unable to recover a claim against the corporation.[236] The oppression action is not needed in either context, as the law sets out more specific default rules through which employees can redress corporate wrongs.

Courts have consistently denied claims where employees have alleged that their dismissal merits a remedy under the oppression action.[237] Courts have noted that the statutory language of the oppression provisions only protects the applicant's interests as a security holder, creditor, director, or officer, asserting that employment interests are not covered under the wording of the provisions.[238]

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234 Such as management's fiduciary duties, veil-piercing, and an action directly against the tortfeasor.

235 See Mohan, *supra* note 126; *Clitheroe v Hydro One Inc* (2002), 21 CCEL (3d) 197, 118 ACWS (3d) 193 (Ont Sup Ct) [*Clitheroe*]; *Warner v Nova Scotia Textiles Ltd*, 2008 NSSC 17, 262 NSR (2d) 82, 65 CCEL (3d) 198 [*Warner*]; *Benedetti v North Park Electronics (1980) Ltd*, (1997), 106 OAC 230, 69 ACWS (3d) 82 (Ont Ct J (Gen Div)) [*Benedetti*].

236 See *Tavares v Deskin Inc*, 38 ACWS (3d) 71, [1993] OJ No 195 (QL) (Ct J (Gen Div)) [*Tavares*]; *Downtown Eatery (1993) Ltd v Ontario* (2001), 54 OR (3d) 161, 200 DLR (4th) 289 (CA) [*Downtown Eatery*].

237 *Mohan*, *supra* note 126; *Clitheroe*, *supra* note 235; *Warner*, *supra* note 235; *Benedetti*, *supra* note 235. But recall that when an employee-shareholder is dismissed in a closely-held corporation, he may be awarded a remedy if his employee interests are sufficiently linked to his shareholder interests. See *Naneff*, *supra* note 68.

238 *Clitheroe*, *supra* note 235 at paras 25–29. Such reasoning has also been used to deny employees the use of the oppression action when complaining of other corporate harms detrimental to their employee interests apart from wrongful dismissal. See *Joncas v Spruce Falls Power & Paper Co* (2000), 48 OR (3d) 179, 6 BLR (3d) 109 (Sup Ct) (employees on long-term disability alleged that a corporate reorganization that resulted in shares being gifted to most employees to the exclusion of the claimants was oppressive).

From a contractarian perspective, this approach is appropriate. An employee's arrangement with the corporation includes both the law of employment as mandatory default terms as well as the particular terms of the employment contract. An employee has no reasonable expectation of means for redress for corporate harms beyond such terms. As reflected in its statutory wording, the oppression action was never intended to protect employee interests.

In the rare case where employees have turned to the oppression action alleging that corporate activity has unfairly disregarded their interests to recover a claim owing, employees have had more success.[239] In such a case, the employee-applicant has typically asserted his or her prejudiced interests as those of a creditor as opposed to an employee.[240] For instance, in *Downtown Eatery*,[241] the applicant, Alouche, successfully obtained judgment for wrongful dismissal against his employer corporation, Best Beaver. Best Beaver did not have any assets due to a large corporate reorganization executed months earlier, which caused it to cease operations. In subsequent litigation, Alouche brought an oppression action, among other claims, against the directors of Best Beaver and its related companies. Alouche claimed that the corporate reorganization that left Best Beaver judgment-proof unfairly disregarded his interests as a creditor. The Court held that Alouche could reasonably expect that the company's directors, knowing that Alouche may be awarded judgment in an upcoming trial, would leave a reserve of assets in Best Beaver.[242] Their failure to do so was unfairly prejudicial to Alouche's interests and Alouche obtained a remedy under the oppression action.

Here, the oppression action was not needed and it brought artificiality to the law and further expense to the parties. As an employee-creditor, Alouche's bargain with the corporation amounted to the terms of his employment contract and the default terms set out by the law of employment. Alouche held no reasonable expectations about the impact of the corporate reorganization on his employment status.

Not only did Alouche rely on the oppression action, but he also relied on the common employer doctrine, a principle of employment law, to bolster his claim for a remedy. The Court discussed past use of the common employer doctrine and found that it was applicable in the case. Best Bea-

239 See *Downtown Eatery*, *supra* note 236.

240 *Ibid*; *Tavares*, *supra* note 236.

241 *Supra* note 236.

242 *Ibid* at para 62.

ver and a number of related companies were held to be Alouche's employers at the time he was wrongfully dismissed.[243] Consequently, Alouche could recover judgment for wrongful dismissal from any of these employers. The discussion on oppression that followed the Court's analysis of the common employer doctrine was not necessary to resolve the employer-employee dispute.

As with the prior categories of claimants, litigation in the employee-employer context can, and should, be resolved without reference to reasonable expectations and the oppression action. Employees only reasonably expect that the corporation will comply with employment law standards and the terms of their particular contract. Contract and employment law should resolve employer/employee disputes.

G. Category F: Use of the Oppression Action by a Majority Shareholder or the Corporation Itself

Majority shareholders or the corporation itself have made use of the oppression action to seek relief from harms committed by a director (as agent for the corporation).[244] In these cases, courts have applied the oppression provisions without finding it problematic that the action was initially designed to provide a remedy for oppressed minority shareholders rather than those controlling the corporation.[245] Nor have courts quickly dismissed oppression claims on the basis that they should be brought as

243 *Ibid* at para 40.

244 See *228727 Ontario Ltd v Mardes Electrical Supplies Inc* (2005), 9 BLR (4th) 299, 143 ACWS (3d) 98 (Ont Sup Ct); *Calmont Leasing Ltd v Kredl* (1995), 165 AR 343, 30 Alta LR (3d) 16 (CA) [*Calmont Leasing* cited to AR]; *Carlson v Trans-Pac Industries Corp* (1990), 2 BLR (2d) 70, 20 ACWS (3d) 53 (BCCA); *Gainers Inc v Pocklington* (1992), 132 AR 35, 7 BLR (2d) 87 (QB); *Gillespie v Overs* (1987), 5 ACWS (3d) 430, OJ No 747 (QL) (H Ct J); *Hui v Yamato Japanese Steak House Inc*, (1988), 7 ACWS (3d) 388, OJ No 9 (QL) (H Ct J); *Stethem v Feher* (2000), 11 BLR (3d) 288, 102 ACWS (3d) 388 (Ont Sup Ct); *Jabaco Inc v Real Corporate Group Ltd* (1989), 13 ACWS (3d) 352, CarswellOnt 2683 (WL Can) (H Ct J) [*Jabaco* cited to WL Can].

245 See *Calmont Leasing*, *supra* note 244 (where the Court states: "It was suggested that the oppression sections were crafted to let someone other than the company sue those controlling the company for oppression. That may have been the inspiration, but the section is purposely drawn in very wide terms, and it is not so confined" at para 26). See also *Jabaco*, *supra* note 244 (where Doherty J states: "The applicant qualifies as a complainant regardless of the size of his share position, or the degree of authority which the constitution of the company permits him to exercise over the affairs of the company. . . . The complainant's position of superiority or equality within the company may make his claims more tenuous, or more difficult to establish, but it does not interdict his access to s. 241" at para 18).

claims for breach of fiduciary duties owed to the corporation.[246] We argue that, where a majority shareholder or the corporation itself is complaining of corporate harms, the law should not allow such disputes to be resolved under the oppression action. Given the historical reasoning for the creation of the oppression action as outlined in the *Dickerson Report*, there is no need for reliance on the oppression remedy in this context. Majority shareholders or the corporation can rely entirely on other legal means to redress corporate wrongs.

For example, in *Calmont Leasing*,[247] Calmont Leasing Ltd brought an oppression action against one of its directors, Otto Kredl. The Alberta Court of Appeal found that Kredl had engaged in a number of payment transactions that amounted to theft, fraud, or at minimum, a breach of the fiduciary duties that Kredl owed to the corporation as a director.[248] Such behaviour was collectively characterized as oppressive and the Court upheld the remedy awarded by the trial judge.[249]

The Court found oppression in conduct which was held to be fraudulent and in breach of the director's fiduciary duty to the corporation, which supports the view that the oppression action is not needed to redress harms done to the corporation.[250] Calmont Leasing Ltd could have entirely resolved its dispute directly in reference to the director's fiduciary duty to the corporation. Having the oppression action as a muddy default is redundant and only serves to add unnecessary costs. As in most other

246 See *Jabaco*, *supra* note 244 (where Doherty J asserts: "The fact that the same allegations could be made by way of derivative action, or by way of actions for breach of fiduciary duties commenced against the various respondents, does not deny access to s. 241, although it may affect how the application is ultimately disposed of by the court" at para 16).

247 *Supra* note 244.

248 *Ibid* at paras 22–23.

249 *Ibid*.

250 See also the trial level decision, *Calmont Leasing Ltd v Kredl* (1993), 142 AR 81 at para 134, 11 Alta LR (3d) 232 (QB), where it was held that a breach of fiduciary duty amounts to oppression. Note that the interaction between the fiduciary duty owed to the corporation and the oppression action has been subject to some judicial debate; i.e. whether compliance with fiduciary obligations bars an oppression action or whether oppressive conduct may be found despite compliance with fiduciary obligations. See, e.g. *820099 Ontario Inc v Harold E Ballard Ltd* (1991), 3 BLR (2d) 113 at 178, 27 ACWS (3d) 1160 (Ont Gen Div) (where it is stated that a director may be in compliance with his or her fiduciary duty and yet still be liable under the oppression action). But see e.g. *CW Shareholdings*, *supra* note 152 (where the applicant's claim for a remedy under the oppression action was denied largely on the basis that the respondent had complied with its fiduciary duties). This is a topic deserving of a more thorough analysis and is not the subject of this paper.

contexts, any dispute that a corporation or majority shareholder has is adequately addressed through other default rules, such as fiduciary duties.

CONCLUSION

This paper has analyzed the use of the oppression action, categorized by type of claimant, and assessed the efficiency of the action as an overarching default rule for all corporate stakeholders contracting with the corporation. It was explained that the oppression action, with its case-by-case tailored examination into reasonable expectations, is in effect a muddy default term the law imports into all corporate contracts. Such a default term deems unclear the rights and obligations of the parties until a lengthy *ex post* judicial inquiry has been conducted. In all situations, aside from the minority shareholders in the close corporations context, the oppression action as a muddy default term is inefficient. The lack of certainty and predictability as to rights and obligations raises unduly *ex ante* contracting and business costs and *ex post* litigation and judicial expenses.

These unnecessary costs would be reduced with a default term that limits the availability of the oppression action to minority shareholders in private corporations, in whatever capacity. Minority shareholders in public corporations are passive investors who may easily sell their shares on the market when they disapprove of particular corporate conduct.[251] They invest with an eye towards investment returns and therefore, the fiduciary duties owed to the corporation by managers and the ability to enforce these duties through a derivative action are more appropriate legal mechanisms for any harm they wish to redress. Debtholders, lenders, trade creditors, and contract counterparties enter into discrete contractual relationships with the corporation. Their disputes may be resolved entirely through contract law and any other more specific default rules that the law provides. Of course, if these contract creditors decide to insert a muddy "oppression" or "unfair treatment" clause into their agreements, they would be able to do so at reasonable cost before the fact.

While the transaction costs are high with respect to involuntary creditors *ex ante*, we conclude that a muddy default in the form of an oppression

251 Furthermore, shareholders are protected when they disagree with fundamental changes to the corporation through the appraisal remedy outlined in the *CBCA*, *supra* note 1, s 190. See generally, Kevin Patrick McGuiness, *Canadian Business Corporations Law*, 2nd ed (Markham: LexisNexis Canada, 2007) at 1405–16; J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3rd ed (Toronto, ON: Irwin Law, 2009) at 454–58.

action would not have been negotiated before the fact by most parties if they had the opportunity to bargain privately. Involuntary creditors, like voluntary creditors, have access to other more directed default rules, such as the fiduciary duties owed to the corporation by management and corporate veil piercing.[252] Employees, while not protected by the statutory language of the oppression provisions, have recourse in the law of employment. Finally, a corporation itself clearly need not rely on the oppression action and an artificial analysis of its reasonable expectations, as directors may be held accountable for conduct that harms the corporation through the fiduciary duty mechanism.

As mentioned in the introduction, Canada's oppression action has been praised as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world."[253] This paper, on the other hand, argues that a general "fair treatment" clause in all corporate relationships unnecessarily reduces all of corporate law to a muddy default. The oppression action as a default term is efficient only in the context of minority shareholders of close corporations whose idiosyncratic bargains are relational in quality and dynamic in nature. In most other contexts, it is more efficient to force parties to bargain for a "fair treatment" clause, should they wish to. Under the current regime, opportunistic behaviour after the fact is encouraged as parties have an incentive to litigate in order to have their rights defined. Even where the transaction costs are high before the fact, such as with tort creditors, a default term in the form of the oppression action is inefficient as the parties would prefer to have their rights defined more clearly before the fact.[254]

252 See generally McGuiness, *supra* note 251 at 47–66.

253 Beck, *supra* note 2.

254 Rather than uncertain protection for recovering involuntary claims through the oppression provisions, tort claimants would prefer more certain rules that directly prevent conveyances made with intent to hinder creditors. See *Fraudulent Conveyances Act*, *supra* note 203, s 2.