

# A BRIEF CONSIDERATION OF THE RELATIONSHIP BETWEEN DIRECTORS' FIDUCIARY DUTIES AND THE OPPRESSION REMEDY

Steven H. Leitl<sup>1</sup>  
Timothy J. Richardson<sup>2</sup>

## Introduction

This article considers the interplay between directors' fiduciary duties to a corporation on the one hand and, on the other, the rights of various stakeholders created by the 'oppression provisions' of business corporation legislation. It particularly considers certain case law which concludes that an oppression action may succeed, notwithstanding that the impugned conduct was carried out in discharge of the directors' fiduciary duties to the corporation.

While the authors' view is that the courts ought to reasonably insulate directors who have discharged their fiduciary duties to the corporation, the simple point of this paper is that this discharge *may* not answer a claim in oppression against the directors, and *will* not answer such a claim against the corporation.

## The Fiduciary Relationship and the Oppression Remedy

The fiduciary relationship was founded in equity and has been generally articulated in the Ontario *Business Corporations Act*<sup>4</sup> and similar Acts<sup>5</sup>, which provide that directors and officers shall act honestly and in good faith with a view to the best interests of the corporation. The best interests of the corporation have been equated with the best interests of the company's shareholders *as a whole*. Thus, officers and directors do not owe fiduciary duties to minority shareholders. In *Brant v. Keepright Inc.* the Ontario Court of Appeal stated:

Acting in the best interests of the corporation could, in some circumstances, require that a director or officer act other than in the best interests of one of the groups protected under s. 234. *To impose upon directors and officers a fiduciary duty to the corporation as well as to individual groups of shareholders of the corporation could place directors in a position of irreconcilable conflict*, particularly in situations where the corporation is faced with adverse economic conditions.<sup>6</sup> [Emphasis added.]

The oppression remedy concerns the conduct of directors and officers, but also the conduct of the corporation and its affiliates. It seeks to redress conduct by any of these parties "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer" of the corporation.<sup>7</sup> The remedy may be pursued by a

<sup>1</sup> Partner, Commercial Litigation, Macleod Dixon LLP

<sup>2</sup> Associate, Securities, Macleod Dixon LLP

<sup>3</sup> *Teck Corporation v. Millar* (1972) 33 D.L.R. (3d) 288 (B.C.S.C.)

<sup>4</sup> RSO 1990, c.B-16, ss. 115(1) and 134.

<sup>5</sup> e.g. *Business Corporations Act* (Alberta), S.A. 1981 c.B-15 ("ABCA"), ss. 97 and 117.

<sup>6</sup> *Brant Investments Ltd. v. Keepright Inc.* (1991), 80 DLR (4th) 161 at 172 (CA)

<sup>7</sup> OBCA, s. 248; ABCA, s. 234. The derivative action is also a statutory creation which entitles a complainant, as earlier defined, to apply to the Court for leave to bring an action in the name of a corporation when the directors of the corporation refuse to do so. This may be a useful tool to seek remedies against directors who have breached their fiduciary duty to the corporation.

variety of stakeholders; namely, current or former registered or beneficial shareholders of the corporation or its affiliates, current or former officers or directors, and "any other person who, in the discretion of the court, is a proper person to make an application ..."<sup>8</sup>

Certain early Canadian jurisprudence had suggested that bad faith need be found in order to grant a remedy based in oppression. However, the courts had not given consistent answers on the question.<sup>9</sup> Additionally, it appears that certain oppression actions have been founded, at least in part, on allegations of breach of fiduciary duty to the corporation. A review of Canadian case law over the last ten years indicates that, while bad faith or a breach of fiduciary duty may be a *sufficient* condition to establish oppression, neither are *necessary* requirements to establish oppression. Short of bad faith or breach of fiduciary duty then, where may a claim in oppression nonetheless succeed?

The Ontario Court of Appeal analysed s. 234(2) of the *Canada Business Corporations Act*<sup>10</sup> in the case of *Brant, supra*, noting that subsection (a) is aimed at the *results* of corporate conduct; subsection (b) is aimed at the *manner* in which the *corporate affairs* are conducted; and subsection (c) is aimed at the *manner* in which the *directors' powers* have been exercised.<sup>11</sup> Instructive discussion which distinguishes the notions of 'oppression,' 'unfair prejudice' and 'bad faith' is found at p.173:

In considering whether conduct is "oppressive" one can appropriately look to the English cases decided before 1980 which defined that word in a similar context. Adopting the definition applied by Lord Simonds in the *Scottish Co-operative* case - namely, "burdensome, harsh and wrongful" - it is unlikely that an act could be found to be oppressive without there being an element of bad faith involved. *However, in considering the alternative question of whether any act is unfairly prejudicial to, or unfairly disregards the interests of one of the protected persons or groups, I am of the view that a requirement of lack of bona fides would unnecessarily complicate the application of the provision and add a judicial gloss that is inappropriate given the clarity of the words used.*<sup>12</sup>

Of course, there may be situations where the rights of minority shareholders have been prejudiced or their interests disregarded, without any remedy being appropriate. The difficult question is whether or not their rights have been prejudiced or their interests disregarded "unfairly." *In testing the facts in a given case against the word "unfairly," evidence of bad faith as to motive could be relevant, but there may be other cases where particular acts effect an unfair result, but where there has been no bad faith whatsoever on the part of the actors. ...*<sup>13</sup> [Emphasis added.]

With respect to the distinction between fiduciary duties and the oppression remedy, there is

<sup>8</sup> OBCA, s. 245; ABCA, s. 231(b)

<sup>9</sup> Jeffery G. MacIntosh *Bad Faith and the Oppression Remedy: Uneasy Marriage or Amicable Divorce?* (1990) 69 C.B.R. 276

<sup>10</sup> R.S.C. 1985, c. C-44

<sup>11</sup> *Brant, supra* note 7.

<sup>12</sup> Also see the Court of Appeal's decision in *Themadal, infra* note 19.

<sup>13</sup> See also *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.).

<sup>14</sup> Also see *Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989) 56 D.L.R. (4th) 128, 41 B.L.R. 128, 67 O.R. (2d) 161 where an amalgamated company took on the large acquisition debt of one of the amalgamating companies achieving a tax saving for a parent company. While there was no bad faith, the step disregarded the

perhaps no clearer statement of the law than that of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.*:

It is also clear that s. 134 OBCA is separate and distinct from s. 247 OBCA. That is, a director may, after a proper analysis, act in good faith in what he considers to be the best interests of the corporation; if he does so he will not run afoul of s. 134. However, the result of such action may be such that it oppresses or unfairly deals with the interests of a shareholder; in which case s. 247 comes into play ...<sup>15</sup>

Accordingly, directors must be beware that, while actions may be undertaken in good faith and in accordance with their fiduciary duties, they or the corporation may be vulnerable to challenge by minority shareholders or other stakeholders on the basis of oppression.<sup>16</sup>

This conclusion begs the question of by what standards the courts will determine the issue of *unfairness* in the sense of 'unfair prejudice to' or 'disregard of' these interests.<sup>17</sup> The Ontario Court of Appeal in *Brant, supra*, observed that the test boils down to whether, in considering the acts complained of, "a reasonable by-stander observing the consequence of the majority's conduct would regard it as having unfairly prejudiced the petitioner's interest."<sup>18</sup> One of the most frequently cited standards is the *reasonable expectations* of the party in question. In *Re Westfair Foods Ltd. and Watt*<sup>19</sup>, the Alberta Court of Appeal reasoned as follows:

---

interests of shareholders. The case constituted the first clear indication that bad faith was not a requirement of the oppression remedy following the trial decision in *Brant* which had indicated that it was a necessary condition as discussed in *J. MacIntosh, supra*.

<sup>15</sup> (1991) 3 BLR (22) 113 at 178

<sup>16</sup> For another example see *Mazzotta v. Twin Gold Mines Ltd.* [1987] O.J. No. 837, in which a dilution of shareholders by way of an issuance of shares to another shareholder was found to be oppressive notwithstanding that the issuance of shares was in the best interest of the cash strapped company. However, while not conclusive against a claim of oppression, a determination that the actions were in the best interests of the corporation may nevertheless defeat any derivative action that is brought on the corporation's behalf: See for instance *Furry Creek Timber Corp. v. Laad Ventures Ltd.* (1992) 75 B.C.L.R. (2d) 246 (B.C.S.C.).

<sup>17</sup> In addition to consideration of the standards, one should be cognizant of the burden of proof. Some cases have suggested that there is a lower burden of proof concerning unfair prejudice or disregard of interest than that concerning oppression. See, for instance: *Sohata v. Basra*, [1999] O.J. No. 186 (Gen. Div.); *Such v. R.W.-L.B. Holdings Ltd.* (1993), 11 BLR (2d) 122 (Alta. Q.B.); *Mason v. Intercity Properties Ltd.* (1987), 38 DLR (4th) 681 (Ont. C.A.)

<sup>18</sup> *Brant, supra* note 7 at 174

<sup>19</sup> (1991), 79 DLR (4th) 48 (Alta. C.A.) at 54-5; see also, for instance: *820099 Ontario Inc.*, *supra* note 15; *Nanef v. Con-Crete Holdings Limited* (1995), 23 OR (3d) 481 (C.A.); *Re Chiaramonte and World Wide Importing Limited* (1996), 28 OR (3d) 641 (Gen. Div.); *Neri v. Finch Hardware (1976) Ltd.*, [1995] O.J. No. 1932 (Gen. Div.); *Hurley v. Slate Ventures Inc.*, [1996] N.J. No. 14 (Nfld. S.C.); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 18 BLR (2nd) 20 (Ont. Gen. Div.), 38 O.R. (3d) 749 (C.A.); *GATX Corp. v. Hawker Siddley Canada Inc.*, [1996] O.J. No. 1462 (Gen. Div.); *SCI Systems, Inc. v. Gornitzki Thompson & Little Co.*, [1997] O.J. No. 2115 (Gen. Div.); *Maple Leaf Foods v. Schneider Corp.* (1998), 42 OR (3d) 177 (C.A.); *Armstrong World Industries Inc. v. Arcand*, [1997] O.J. No. 4620 (Gen. Div.), leave to appeal denied, [1997] O.J. No. 5427 (Gen. Div.); *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998) 160 D.L.R. (9th) 131 (Ont. Ct. Gen.); *Stierman v. Genserve Ltd.*, [1998] O.J. No. 2008 (Gen. Div.); *Schwenke v. Fortune Financial Management Inc.*, [1998] O.J. No. 497 (Gen. Div.); *Comuzzi v. 705542 Ontario Inc.*, [1998] O.J. No. 3572 (Gen. Div.); *Leon Van Neck and Son Ltd. v. McGorman*, [1998] O.J. No. 4813 (Gen. Div.); *Levy-Russell Ltd. v. Shieldings Inc.*, [1998] O.J. No. 3932 (Gen. Div.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.*, [1998] O.J. No. 2299 (Gen. Div.); *Kempf v. Fraser*, [1999] O.J. No. 1988 (Sup. Ct.); *Stern v. Imasco Ltd.* (1999), 1 BLR (3d) 198 (Ont. S. Ct. J.); *Re Canadian Airlines*, [2000] A.J. No. 771 (Q.B.); *Lewis v. Coastal Acquisition Corp.*, [2000] O.J. No. 4538 (Sup. Ct.); *Goldhar v.*

It is said for the shareholders that yet another rule exists. This is that the directors must have due regard for, and deal fairly with, the “interests” of all shareholders. I have concern about over-use of the word *interests* . . . I do not accept that all ambition to acquire property deserves protection. I do accept that our tradition is that a *hope* for profit, as opposed to a mere *desire*, sometimes deserves protection.

One deserving case is where the person to whom the profit will go has *nourished* that hope. The company and the shareholders entered voluntarily, not by duty or chance, into a relationship. Our guides are the rules in other contexts, such as contract law, equity, and partnership law, where the courts have also considered just rules to govern voluntary relationships. In very 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. I emphasize that *all* the words and deeds of the parties are relevant to an assessment of reasonable expectations, not necessarily only those consigned to paper, and not necessarily only those made when the relationship first arose.

I do not for a moment suggest that analysis about expectations deserving protection is the sole basis for rules under the statute. I think, for example, of totally unforeseen windfalls or calamities. This is not such a case, but I dare say that even in those cases the expectations of the parties are a sound starting point. And the test will always be helpful in cases where mere interests collide.

The test then is always fact-specific, and cases decided on other facts offer only a limited guide . . .

Again, the question as to what may be the reasonable expectations of the complainant will depend upon all of the facts. The courts will not intervene to protect 'wish lists' or 'hopes,' nor will they be keen to question legitimate business judgment.<sup>20</sup> Rather, they will intervene to protect commercially reasonable expectations - determined on an *objective* basis.<sup>21</sup> On the other hand, it must be remembered that the powers and remedies given to the courts under the

---

*J.M. Publications Inc.*, [2000] O.J. No. 843 (Sup. Ct.); *Working Ventures Canadian Fund Inc. v. Angoss Software Corp.*, [2000] O.J. No. 4537; *Gazit (1997) Inc. v. Centrefund Realty Corp.*, [2000] O.J. No. 3070 (Sup. Ct.); *Flatley v. Algy Corp.*, [2000] O.J. No. 3787; *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Sup. Ct.); *Gold v. Rose*, [2001] O.J. No. 12 (Sup. Ct.); *Adecco Canada Inc. v. J. Ward Broome Ltd.*, [2001] O.J. No. 454 (Sup. Ct.); *Devry v. Atwood's Furniture Showrooms Ltd.*, [2000] O.J. No. 4283; *Radtke v. Machel*, [2000] O.J. No. 3019 (Sup. Ct.); *Picavet v. Salem Developments Ltd.*, [2000] O.J. No. 2806; *Gordon Glaves Holdings Ltd. v. Care Corporation of Canada Limited* (2000), 48 O.R. (3d) 737 (C.A.); *Agnew v. Village Contractors Ltd.*, [2000] O.J. No. 3211 (Sup. Ct.); *Taylor v. London Guarantee Insurance Co.*, [2000] O.J. No. 1430 (Sup. Ct.); *Sahota v. Basra*, [1999] O.J. No. 186 (Sup. Ct.); *George S. Petty Management Ltd. v. Repap Enterprises Inc.*, [1998] Q.J. No. 3873 (Que.S.C.); *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 (C.A.); *Kabutey v. New-Form Manufacturing Co.*, [1999] O.J. No. 3635 (Sup. Ct.); *Joncas et al. v. Spruce Falls and Power and Paper Company Limited* (2000), 48 O.R. (3d) 179 (Sup. Ct.); *Alberta (Treasury Branches) v. SevenWay Capital Corp.*, [2000] A.J. No. 801 (Q.B.); *Lindemann v. Duguay*, [2000] O.J. No. 1543 (Sup. Ct.); *Main v. Delcan Group Inc.*, [1999] O.J. No. 1961 (Sup. Ct.); *Majorich Investments Inc. v. Paul*, [1999] O.J. No. 4789 (Sup. Ct.).

<sup>20</sup> See, for instance, *CW Shareholdings*, *supra* note 19.

<sup>21</sup> *Themadel*, *supra* note 19; *Re Canadian Airlines*, *supra* note 19; *Taylor v. London Guarantee Insurance Co.*, *supra* note 19; *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, *supra* note 19 at para. 31.

oppression remedy are very broad and discretionary. In the words of one court, the threshold test is "one of fairness and a broad discretion is conferred to the court to exercise its equitable jurisdiction in determining what is fair in each case."<sup>22</sup>

## Conclusions

In the authors' view, satisfaction of the directors' fiduciary duties to the corporation should provide reasonable insulation against a claim in oppression *against the directors*. That is to say, all stakeholders should be presumed to expect that the directors will consider their first priority to be the satisfaction of their fiduciary duties to the corporation. However, directors must be mindful that recent Canadian case law suggests that they may nonetheless be found to have acted oppressively in regards to certain stakeholders. Perhaps more importantly, while such satisfaction of duty may provide insulation to the directors, the *corporation* may be left out in the cold.

---

<sup>22</sup> 218125 *Investments Ltd. v. Patel*, [1995] A.J. No. 1222 (Q.B.), cited in *Main v. Delan Group Inc.*, *supra* note 19 at para. 28