PROTECTING MINORITY SHAREHOLDERS IN PRIVATE CORPORATIONS: A COMPARATIVE STUDY FROM CANADIAN AND CHINESE PERSPECTIVES

by

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ABSTRACT

Minority shareholder protection is a perpetual subject in the legal research of corporate law. This thesis presents a comparative study of minority shareholder protection in private corporations from Canadian and Chinese perspectives. The objective is to explicitly compare and analyze the similarities and differences of the two legal systems, and make suggestions for improving corporate legislation of Canada and China in this area.

The study first focuses on the common theoretical framework that informs the protections of both Canada and China and constitutes the prerequisite for the comparative study in this thesis. Then, the study articulates ten minority shareholder protections in China and twelve remedies in Canada to deepen the understanding of the two legal systems.

Two comparative approaches are adopted in this thesis. Normative comparison focuses on four protections of same name in China and Canada. Functional comparison concentrates on other protections of different name that are applied to solve similar issues relating to minority shareholder protection in the two countries. By identifying the similarities and differences, the study compares and analyzes the protections from structural, substantive and legal cultural perspectives. In particular, much effort is made to look into the underlying reasons of these differences in the context of economic, legal and cultural perspectives.
Although the protections of Canada and China have certain similarities, they differ significantly in both procedural and substantive respects. As compared to the rights in China, the remedies in Canada have their superiority in many significant aspects. In general, they offer broader protection in scope and provide more effective protection to minority shareholders. They are always accompanied by check and balance measures to arrive at the balanced protection. Canadian courts play much more important role in this area than Chinese courts.

The study finally makes reassessment of the corporate laws of Canada and China with regard to minority shareholder protection, and puts forward some suggestions for their corporate statutes, that are aimed at improving and enhancing the balanced protection of minority shareholder. In the end, the study sets out the plan for future research in this life-long project.
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CHAPTER 1

INTRODUCTION

1.1 Overview

It is a thorny issue that modern rule of law has to face as to whether to lay stress on fairness or to uphold efficiency. There exists in every corporation control of the corporation by the controlling shareholder since it is not always possible to arrive at an even shareholding structure. In fact, the faults are not caused by the control of a corporation by the controlling shareholder, but rather the latter’s excessive control and abuse of its controlling power. When exercising its rights, the controlling shareholder often values its own interests and disregards the interests of the corporation and minority shareholders. This natural tendency exists, to some generality, in the business and operation of a corporation. In this connection, attention has been increasingly attached to minority shareholder protection in many countries of the

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1 In Canada, a body corporate is controlled by a person or by two or more bodies corporate if (a) securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those bodies corporate; and (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate. See section 2(3) of Canada Business Corporations Act (R.S.C. 1985, c. C-44). In China, a controlling shareholder means the shareholder whose amount of capital contribution accounts for more than fifty per cent of the total amount of capital of a limited liability company or, the shareholder holding more than fifty per cent of the total shares of a joint stock limited company or, the shareholder of either a limited liability company or a joint stock limited company whose voting right, represented by its capital contribution or shares, have a significant impact on a decision of the shareholders’ meeting or the general meeting of shareholders regardless of a percentage lower than fifty per cent as aforementioned. See Article 217(2) of the Company Law of the People’s Republic of China effective as of January 1, 2006.

2 Minority shareholders in this thesis refer to shareholders other than the controlling shareholder of a corporation.
world, and hence minority shareholder protection has become an important system in their legislation.

Although minority shareholder protection has been greatly improved and intensified in the past decades, it remains to be an outstanding legislative issue worldwide. One underlying reason is the inherent deficiency of the majority rule (the “Majority Rule”). As the basis of operating a corporation, the Majority Rule fully accords with the legal spirit of reciprocity between rights and obligations. Besides, the Majority Rule has played an extremely important role in, among other things, protecting investment enthusiasm of majority shareholders, balancing the interests between and among shareholders and promoting efficiency of the corporation’s decision-making, all of which is a fundamental reflection of shareholders’ equality. However, certain unfairness and irrationality of the Majority Rule are quite obvious. In applying the Majority Rule, it is evident that the rule itself inevitably brings about oppression of majority towards minority shareholders, the consequences of which are that the rights of majority shareholders signify all rights while those of minority shareholders purport to be no rights.

Second, minority shareholder protection embodies the value pursuit of modern rule of law. As modern civilization continues to advance and rule of law further progresses, minority

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3 The majority rule was established by the case of Foss v. Harbottle [(1843) 2 Hare 461, 67 E.R. 189] and North-West Transportation Co. v. Beatty [(1878), 12 App. Cas. 589 (PC)]. See Fasken Martineau Dumoulin LLP, Canada Business Corporations Act & Commentary, 2008/2009 ed. (Markham Ont.: LexisNexis Canada Inc., 2008) at 68. The majority rule sets out the principle that “the power to control the affairs of a corporation rests with the majority shareholders” and that “the courts will not intervene in internal disputes of corporations, as such disputes are up to the majority and not the Courts”. See Paul Martel, Business Corporations in Canada – Legal and Practical Aspects, 2008 – Release 2 (Toronto: Thomson Canada Ltd., 2007) at 30-2 and 30-3.
shareholder protection has been more and more highlighted in modern society. Pursuant to
the well-known equitable theory, the concept that shareholders shall be equally treated has
been infiltrated into the principles of corporate law. As a special group, minority shareholders
in private corporations are, although they account for a large number, in a relatively weak
position in many areas including capital quantity, information channel, voting rights and
preservation of rights. It shall, therefore, be one of the goals pursued by the social value of
modern democratic legal system to protect the rights and interest of such special group. In
this connection, more and more countries have come to realize that whether their corporate
law could assure a fair and equitable treatment towards this special group in the operation
and management of the corporation is the touchstone for testing and verifying the civilization
of their corporate law.

Third, legal remedies appear to be of special importance to a minority shareholder in a
private corporation due to its closed nature.⁴ One of the important factors is “the integration
of majority share ownership and the management of the corporation concerned.”⁵ By this
common feature, the controlling shareholder exercises much more “control over the business
and affairs of the corporation through multiple roles as directors and officers.”⁶ Excessive or

⁴ “There is no universally accepted definition of a closely held, or simply ‘close,’ corporation. However, a closely held
corporation is normally considered to have the following characteristics: (1) there are relatively few shareholders; (2)
most or all of the shareholders participate actively in the management of the corporation; (3) there is no established
market for the shares of the corporation; and (4) frequently, there is a restriction on the transfer of the shares of the
corporation.” See Robert Yalden, Janis Sarra, Paul Paton, Mark Gillen, Ronald Davis and Mary Condon, Business
Also see the description of a private corporation in section 1.2 of this Chapter.

⁵ Kevin P. McGuinness, Canadian Business Corporations Law, 2nd ed. (Markham Ont.: LexisNexis Canada Inc., 2007) at
1231.

⁶ Janis Sarra, “Wise People, Fiduciary Obligation and Reviewable Transactions; Directors’ Liability to Creditors”, in Janis
improper control by the controlling shareholder is often seen in a private corporation at the
sacrifice of the rights and interests of a minority shareholder (e.g., asymmetric information,
profit absorption, appropriation of the corporation’s funds, connected transactions, etc.).

Besides, shares of a private corporation “are rarely traded,”7 as share transfer by a
shareholder is restricted by law or articles in procedural or substantive manner. Shareholders
in a private corporation may not raise funds from a public issue of shares, which results in the
lacking of liquidity in withdrawing their investment and causes great difficulty to a minority
shareholder who wishes to withdraw from the corporation. As Kevin McGuinness noted,

“Generally, there is no ready market for the shares of a closely held corporation,
particularly where the shares concerned represent a minority interest in the
corporation, which can be frozen out effectively from any say in the running of the
company, with the attendant risk that the rights and concerns of the minority will
be ignored.”8

Minority shareholder protection is, in fact, a balanced protection. “Only rarely is the effort to
strike a balance a simple matter.”9 Due to the complexity and difficulty in arriving at
equilibrium between controlling and minority shareholders, it is evident that minority
shareholder protection is a perpetual subject in the legal research of corporate law.

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7 Kevin P. McGuinness, supra note 5, at 1231.
8 Ibid.
9 Kevin P. McGuinness, supra note 5, at 1230.
1.2 Scope of Research

As this thesis examines and compares the minority shareholder protections from Canadian and Chinese perspectives, it is important to first define the scope of the laws of the two countries to be examined and compared with herein.

In Canada, the federal Parliament, the ten provincial legislatures and three territorial legislatures all have “the ability to grant incorporation and to regulate the subsequent operation of business corporations.”\(^{10}\) The *Canada Business Corporations Act* (the *CBCA*) is a federal statute,\(^{11}\) while each of provinces and territories has their own corporate statutes. All these statutes are equally authoritative. This thesis will choose the *CBCA* for examination and comparison for three reasons. First, the counterpart in China to be examined and compared is a national statute. Second, the *CBCA* “has become the template for any of the subsequent provincial business corporations Acts.”\(^{12}\) Third, considerations of time and space preclude a full account of the *CBCA* and the provincial and territorial statutes. In these connections, the laws of Canada to be used for a comparative study in this thesis include case law, the *CBCA*, *Canadian Business Corporations Regulations, 2001*,\(^{13}\) the Forms required by the *CBCA* and the Canada *Interpretation Act*,\(^{14}\) but excluding provincial statutes.

\(^{13}\) *Canada Business Corporations Regulations, 2001*, SOR/2001-512.
In contrast to Canada, the *Company Law of the People’s Republic of China* (the “CLC”) is a national statute of China governing all companies incorporated and operated within the territory of China.\(^\text{15}\) None of the municipal, provincial or autonomous regional legislatures in China has the power and authority to enact their corporate statutes. Of course, Hong Kong, Macau and Taiwan have their regional corporate laws and statutes for historical reasons. This thesis will select the *CLC* as the sole corporate statute for examination and comparison from the Chinese perspective.

After the promulgation of the *CLC*, the Supreme People’s Court of China issued two judicial interpretations relating to the *CLC*.\(^\text{16}\) In China, judicial interpretations are the normative documents of general judicial effect issued by the Supreme People’s Court in relation to specific issues arising from the application of laws in accordance with its authority empowered by law. Under the *Organic Law of the People’s Courts of the People’s Republic of China*,\(^\text{17}\) the Supreme People’s Court is the highest judicial organ of the State,\(^\text{18}\) and gives

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15 The *Company Law of the People's Republic of China* was amended and adopted at the 18th session of the Standing Committee of the 10th National People’s Congress of the People's Republic of China on October 27, 2005, and became effective as of January 1, 2006. The term "company" as mentioned in the *Company Law of the People's Republic of China* refers to a limited liability company or a joint stock limited company established within the territory of the People's Republic of China in accordance with the provisions of that law. See Article 2, The *Company Law of the People's Republic of China*.

16 Judicial Interpretation (I) of the *CLC* refers to the *Regulations (Part I) of the Supreme People's Court on Certain Issues regarding the Application of the Company Law of the People's Republic of China* which was published by the Supreme People's Court of China on April 28, 2006 and became effective as of May 9, 2006. Judicial Interpretation (II) of the *CLC* refers to the *Regulations (Part II) of the Supreme People's Court on Certain Issues regarding the Application of the Company Law of the People's Republic of China* which was published by the Supreme People's Court of China on May 12, 2008 and became effective as of May 19, 2008.

17 The *Organic Law of the People's Courts of the People's Republic of China* was adopted at the 2nd session of the 5th National People’s Congress on July 1, 1979 and revised according to the Decision Concerning the Revision of the Organic Law of the People’s Courts of the People’s Republic of China adopted at the 2nd meeting of the Standing Committee of the 6th National People’s Congress on September 2, 1983.

18 Clause 1, Article 30 of The *Organic Law of the People’s Courts of the People’s Republic of China*. 
interpretation on questions concerning specific application of laws and decrees in judicial proceeding.\textsuperscript{19} Jurisprudentially, the legal effect of judicial interpretation is secondary to that of laws and decrees in China. Nevertheless, due to the hysteretic nature of laws, judicial interpretation plays a very important role in properly applying laws to solve a great number of newly-emerged cases and issues. As the Supreme People’s Court has the authority to supervise the administration of justice by the local People’s Courts at various levels and the special People’s Courts,\textsuperscript{20} judicial interpretation generates legal effect in judicial practice. Hence, judicial interpretation has the irreplaceable role and is the beneficial supplement to laws in China. The \textit{CLC} and the two judicial interpretations constitute the corporate legal framework in China.

Based on the foregoing, the Chinese laws to be included in this thesis for a comparative study are confined to the \textit{CLC} and the two judicial interpretations, but excluding the laws and statutes of Hong Kong, Macau and Taiwan regions.

Having defined the scope of the laws and statutes mentioned above, it is also important to define the scope of the subject to be examined and compared in this thesis. In many jurisdictions, “a clear status distinction is drawn between public and private corporations.”\textsuperscript{21} Private corporations are commonly featured by (1) restrictions on transferability of shares,\textsuperscript{22}

\textsuperscript{19} Article 33 of The \textit{Organic Law of the People’s Courts of the People’s Republic of China}.
\textsuperscript{20} Clause 2, Article 30 of The \textit{Organic Law of the People’s Courts of the People’s Republic of China}.
\textsuperscript{21} Kevin P. McGuinness, \textit{supra} note 5, at 187.
\textsuperscript{22} Fasken Martineau Dumoulin LLP, \textit{supra} note 10, at 11. In Canada, “[a] great many corporations (including nearly all small corporations) have restrictions upon the transfer of their shares set out in their articles. … The most commonly encountered restriction on share transfer is the so-called private company restriction required to enjoy the benefit of the
(2) a limited number of shareholders, usually fifty or less (excluding present and former employees), and (3) a prohibition on offering the corporation’s shares to the public. This thesis focuses on private corporations as the subject for a comparative study of minority shareholder protection because of two reasons. On one hand, the “problems arising from shareholder disputes are particularly cute” in private corporations. Oppression by the controlling shareholder towards minority shareholders is ubiquitous in such corporations. On the other hand, private corporations are generally in a larger number as compared to public corporations. Research on private corporations is, therefore, of both academic value and practical significance.

In China, there are two categories of companies under the CLC, namely limited liability companies and joint stock limited companies. These two categories indicate that China has a clear distinction between private and public corporations. Limited liability companies refer...
to private corporations because they have the common features of a private corporation mentioned above. Although limited liability companies under the CLC extend to cover “one-person limited liability companies” and “wholly State-owned companies,” these two kinds of companies are not appropriate to be the subject for the study in this thesis. In this respect, private corporations referred to in this thesis from the Chinese perspective mean the limited liabilities companies in China, excluding one-person limited liability companies and wholly State-owned companies.

In contrast to China, Canada does not “draw any status distinction between public and private corporations” under the CBCA. However, the CBCA does “contain a number of special rules applicable to corporation that offer their securities to the public”. Specifically, the CBCA specifies a term “distributing corporation,” and the Canada Business Corporation Regulations sets out the definition of this term. In this connection, the subject to be used for a comparative study from Canadian perspective in this thesis refers to business corporations under the CBCA other than distributing corporations. Where private

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28 See CLC, Chapter 2 & Chapter 3.
29 “One-person limited liability company” in China refers to a limited liability company with only one natural person shareholder or a legal person shareholder. See CLC, Article 58.
30 A “wholly State-owned company” in China refers to a limited liability company incorporated wholly through investment by the State, for which the State Council or the local people’s government authorizes the state-owned assets supervision and administration authority of the people’s government at the same level to perform the functions of the capital contributors. See CLC, Article 65.
31 Kevin P. McGuinness, supra note 5, at 188.
32 Ibid.
33 CBCA, s. 2(1).
34 A “distributing corporation” means (a) a corporation that is a “reporting issuer” under any legislation that is set out in column 2 of an item of Schedule 1; or (b) in the case of a corporation that is not a “reporting issuer” referred to in paragraph (a), a corporation (i) that has filed a prospectus or registration statement under provincial legislation or under the laws of a jurisdiction outside Canada, (ii) any of the securities of which are listed and posted for trading on a stock exchange in or outside Canada, or (iii) that is involved in, formed for, resulting from or continued after an amalgamation, a reorganization, an arrangement or a statutory procedure, if one of the participating bodies corporate is a corporation to which subparagraph (i) or (ii) applies. See the Canada Business Corporations Regulations, s. 2.
corporations are generally referred to in this thesis, they shall refer to business corporations under the CBCA other than distributing corporations from Canadian perspective.

1.3 Objective

This thesis articulates in an in-depth and systematic way minority shareholder protections under corporate laws of both Canada and China, and conducts a comparative study of Chinese and Canadian corporate laws in the area of minority shareholder protection in private corporations. The goal of this thesis is to explicitly identify and analyze the similarities and differences of the two legal systems relating to minority shareholder protection, and make suggestions for improving the legislation on minority shareholder protection in both Canada and China.

1.4 Thesis Structure

This thesis contains six chapters. Chapter 1 is the introduction. Chapter 2 will introduce the methodology adopted for a comparative study in this thesis, and set out the theoretical framework which informs the minority shareholder protections in Canada and China. The methodology consists of normative comparison and functional comparison. The theoretical framework includes (1) corporation’s contractual conception; (2) corporation’s legal
institutions; (3) corporation’s theory of association; (4) corporation’s theory of profitability; (5) corporation’s theory of legal person; and (6) theory of corporate governance.

Chapter 3 will examine ten minority shareholder protections under the CLC in a comprehensive, systematic and prescriptive manner. The protections consist of (1) self-governing right under the articles; (2) exclusion of voting rights of shareholders for whom the corporation issues a guarantee or guarantees; (3) right to request, convene and preside a meeting of shareholders; (4) duty of diligence and duty of loyalty for directors, supervisors and senior management persons; (5) no abuse of shareholder rights and connected relationship; (6) right to information; (7) motion for invalidating or reversing corporation’s resolutions; (8) right of a dissenting shareholder to withdraw from the corporation; (9) motion for dissolving the corporation under special conditions; and (10) shareholder’s derivative action.

Chapter 4 will articulate twelve remedies available to a minority shareholder under the CBCA. These remedies comprise (1) oppression remedy; (2) derivative action; (3) right to dissent; (4) proposal; (5) compulsory acquisitions; (6) voting rights; (7) compliance or restraining order; (8) investigation; (9) dissolution; (10) cancellation of contracts; (11) right to information and examination of financial statements; and (12) rectification of records.
Chapter 5 will compare and analyze the similarities and differences between the minority shareholder protections in China and the minority shareholder remedies in Canada. On one hand, normative comparison is applied with regard to four similar protections under both Canadian and Chinese corporate laws (i.e., derivative action, dissolution, right to information, right to dissent). On the other hand, functional comparison is conducted regarding the different solutions to many similar problems in Canada and China. These solutions involve the participation by a minority shareholder in the operation and management of the corporation, the voting rights of a minority shareholder, the protection against the failure by persons inside and outside the corporation to comply with the laws, regulations and the articles, as well as the broad, comprehensive and open-ended shareholder remedy.

Furthermore, this chapter will analyze the underlying reasons for the differences of minority shareholder protections between Canada and China from certain legal cultural perspectives (i.e., development of commercial activities, legal cultures, legal systems, legal framework, sense of freedom and equality for commercial subjects).

Chapter 6 is the conclusion. It will make reassessment of the corporate laws of both countries with regard to minority shareholder protection and put forward some suggestions for the improvement of the corporate legislation. Finally, this chapter will set out the plan for continuing legal research in the area of minority shareholder protection in Canada and China.
CHAPTER 2

METHODOLOGY AND THEORETICAL FRAMEWORK

Chapter 1 has introduced the research topic, the scope of research and the research objective of this thesis. This chapter discusses the methodology to be adopted for a comparative study in this thesis, and examines the concepts and principles concerning business corporations which have been developed by scholars as the theoretical framework to inform the minority shareholder protections in both Canada and China.

2.1 Methodology

Comparative analysis is the methodology adopted in the research of this thesis. It is a means of cognition in legal science rather than a specific approach to find law. Through comparison, certain solutions by different countries are combined together with a view to putting forward new and more favourable solutions as compared to those under the existing laws. To find out appropriate methodologies of comparative law by looking at the compared objects is very important to arrive at proper conclusion of comparison, and is also conducive to the completion of successful legal research in this thesis.
Generally speaking, a methodology of comparative law has three basic features: the pre-condition for the legal research on methodology of comparative law; the core of the methodology of comparative law; and the basic starting point and final destination of the methodology of comparative law.\(^{35}\) The first feature is quite explicit, namely that the research should go beyond the scope of domestic law. The core of the methodology of comparative law is to conduct research on how to compare the laws that are comparable and on what methodology of comparative law is adopted so as to make correct reassessment. To conduct research on how to work out the new findings on the basis of reassessment is the basic starting point and final destination of the methodology of comparative law.\(^{36}\) All these features are embodied in the research methodology and the research findings in this thesis.

2.1.1 Normative Comparison

The first comparative approach used in this thesis is normative comparison. As Xianyi Zeng and Liming Wang, the Chinese scholars noted, “normative comparison is, namely to compare the legal systems and legal rules of same name in different countries.”\(^{37}\) It is important to note that normative comparison used in China has a very different sense from that in Canada.

\(^{35}\) Xinxin Zhang, *Cong bi jiao fa de gai nian dao yan jiu fang fa* (From Conception to Methodology of Comparative Law), online: Chinalawinfo.com <http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=34478>.

\(^{36}\) *Ibid.*

In fact, normative comparison used in this thesis refers to descriptive comparison in the Canadian context.

Both Canada and China have their corporate legislation. There exists similar legal structure in the two countries. These similarities form the prerequisite to carry out this comparative approach. Moreover, corporate law in Canada and China has the same functions – providing for legal norms of adjusting conduct of a corporation. These same norms also constitute another important pre-condition to conduct a comparative study on minority shareholder protection under corporate laws of both countries.

Insofar as minority shareholder protection is concerned, both Canada and China specify four similar protections, i.e., derivative action, dissolution, right to information, right to dissent. In Chapter 5, normative comparison is conducted in section 5.1 with regard to the similarities and differences of these four protections between Canada and China.

2.1.2 Functional Comparison

Functional comparison is the second comparative approach used in this thesis. “Functional comparison does not focus on rules, but on issues. Namely, so long as the countries or
regions to be compared have same or similar issues, comparison may be conducted on the solutions of these countries or regions to the issues.\textsuperscript{38}

In addition to the four similar protections mentioned in the preceding section, Canada and China set out different protections or remedies to solve many similar issues arising from minority shareholder protection. These issues involve the participation by a minority shareholder in the operation and management of the corporation, the voting rights of a minority shareholder, the violation by persons inside and outside the corporation of the laws, regulations and the articles, and the broad, comprehensive and open-ended shareholder remedy. Functional comparison is, therefore, conducted in section 5.1 of Chapter 5 with regard to these different protections or remedies.

It is also important to note that functions of laws will be accurately mastered only when they are placed in the legal, economic and cultural contexts. In this regard, comparison and analysis of the differences of minority shareholder protections between Canada and China from certain legal cultural perspectives is necessary in order to deepen the understanding of the laws in book and the laws in action in both countries. The last section of Chapter 5 will further address the underlying reasons for the differences of minority shareholder protections in the legal, economic and cultural contexts.

\textsuperscript{38} \textit{Ibid}, at 27.
2.1.3 **Comparison Procedures**

The procedures of a comparative study are summarized to contain four stages, namely, the preparation stage, the analysis stage, the stage of analyzing similarities and differences, and the summary stage.\(^{39}\)

Stage 1 selects the law to be compared, the comparing law and the comparative law.\(^{40}\) The second stage breaks down the compared law and the comparing law into a series of elements. The comparing law will be broken down according to the elements of the compared law while treating the compared law as the model, although the structures of the comparing law and the compared laws may be different.\(^{41}\) Stage 3 compares and analyzes the similarities and differences. Comparison is to be made with regard to each element after legal norms are broken down into certain elements.\(^{42}\) The last stage is the most important stage in the research of comparative law. Prescriptive reassessment shall be made on the comparative results on the basis of comparing the similarities and differences.\(^{43}\)

In this thesis, Chapter 1 (Introduction) is the first stage, which defines the scope of laws and the subject to be compared. Chapter 2 (Minority Shareholder Protections under Chinese Corporate Law) and Chapter 3 (Minority Shareholder Remedies under Canadian Corporate Law) and Chapter 3 (Minority Shareholder Remedies under Canadian Corporate Law)
Law) relate to the second stage. Stage 3 is Chapter 5 (Comparison and Analysis from Canadian and Chinese Perspectives). Chapter 6 (Conclusion) is the last stage, which makes reassessment of the corporate laws of Canada and China in the area of minority shareholder protection and puts forward some suggestions for the improvement of the corporate legislation of both countries.

2.2 Theoretical Framework

2.2.1 Corporation’s Contractual Conception

A private corporation is “simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.” This well-known contractual conception “has dominated the law-and-economics literature in corporate law” over the past decades. As Michael J. Whincop and Mary E. Keyes noted, “[c]ontractual theories of the firm … have a decisive hegemony in economics, and have exerted enormous influence over contemporary corporate legal scholarship.” Minan Zhang, the Chinese scholar, also remarked that “the

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corporation’s contractual conception has been accepted by the laws of countries of the two legal families in modern history and become the dominant theory in modern corporate law.\textsuperscript{47}

As for shareholders, a corporation is “a contract between and among shareholders, and a kind of agreement entered into by shareholders through consultation.”\textsuperscript{48} Shareholders have the “contractual freedom in the selection of the terms to which corporate contracts are subject,”\textsuperscript{49} e.g. how to incorporate the corporation; how to operate and manage the corporation; how to distribute its profits, etc. Apparently, freedom of contract in civil and commercial activities is conducive to the evolution of corporate law and to the encouragement and stimulation of people’s enthusiasm in establishing business corporations. Besides, “contractual freedom is most likely to permit parties to achieve efficient contractual arrangements.”\textsuperscript{50}

The contractual theory is generally upheld by both Canada and China, and embodied in the \textit{Canada Business Corporations Act} (the “CBCA”)\textsuperscript{51} and the \textit{Company Law of the People’s Republic of China} (the “CLC”)\textsuperscript{52} respectively.

\begin{itemize}
\item \textsuperscript{47} Minan Zhang and Chuanwei Zuo, Editors-in-Chief, \textit{Gong si fa} (Corporate Law), 2nd ed. (Guangzhou: Sun Yat-sen University Press, 2007) at 15.
\item \textsuperscript{48} Ibid.
\item \textsuperscript{49} Michael J. Whincop & Mary E. Keyes, \textit{supra} note 46.
\item \textsuperscript{50} Ibid.
\item \textsuperscript{51} \textit{Canada Business Corporations Act}, R.S.C. 1985, c. C-44.
\item \textsuperscript{52} The \textit{Company Law of the People’s Republic of China} was amended and adopted at the 18th session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on October 27, 2005, and became effective as of January 1, 2006.
\end{itemize}
In the *CLC*, many provisions are qualified by the phrases “unless otherwise stipulated by the articles of a corporation” or “subject to the relevant provisions of the articles of a corporation”, with a view to ensuring the contractual freedom for shareholders in the establishment of a corporation. For example, the *CLC* specifies that all shareholders shall be notified fifteen days prior to the convening of a meeting of shareholders, unless otherwise stipulated by the articles of a corporation or agreed on by all shareholders.\(^{53}\) In this clause, the phrase “unless otherwise stipulated by the articles of a corporation” demonstrates the contractual freedom granted by the corporate legislation. In other words, the *CLC* regards the articles of a corporation as the contractual arrangements between and among shareholders, between shareholders and the corporation, between the corporation and its directors and supervisors.

Under the *CBCA*, the articles may set out any provisions permitted by the *CBCA* or by law to be set out in the by-laws of the corporation.\(^{54}\) In addition to the unanimous shareholder agreement, the *CBCA* also allows shareholders to enter into “[o]ther forms of shareholder agreements that are not unanimous or that do not limit the directors’ powers.”\(^{55}\) “A common form of shareholder agreement in a closely held corporation is an agreement to restrict the transfer of shares.”\(^{56}\) Furthermore, the *CBCA* allows the articles or a unanimous shareholder

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\(^{53}\) *CLC*, Article 42, Clause 1.

\(^{54}\) *CBCA*, s. 6(2).

\(^{55}\) *Fasken Martineau Dumoulin LLP*, supra note 10, at 66.

\(^{56}\) *Ibid.*
agreement to require a greater number of votes of directors or shareholders than that required by the CBCA to effect any action except for the removal of a director.\textsuperscript{57}

2.2.2 Corporation’s Legal Institutions

As Dr. Paul Dunn, Professor of Brock University noted, “Institutional theory adopts a sociological perspective to explain organizational structures and behavior,”\textsuperscript{58} and becomes “the institutionalized logic that guides organizational behaviour.”\textsuperscript{59} “Legal institutions provide a general atmosphere of security from personal aggression without which economic life could hardly be expected to unfold, an atmosphere wholly distinct from the particular technical regulation of any particular activity.”\textsuperscript{60}

“Corporations are juristic persons: the term ‘juristic’ meaning no more than they are entities that are considered to be persons for the purposes of law.”\textsuperscript{61} Unlike a natural person, a corporation does not have the legal personality unless it satisfies the prerequisites for such personality (e.g., independent property) and is conferred such personality in accordance with the corporation legislation. Under the theory of legal institutions, a corporation shall have the legal personality to enjoy legal rights and assume legal obligations and liabilities like a

\textsuperscript{57} CBCA, ss. 6(3) and 6(4).
\textsuperscript{58} Paul Dunn, Leading By Example: Corporate Governance at Socially Responsible Mutual Funds, online: Brock University <http://www.brocku.ca/webfm_send/6688>.
\textsuperscript{59} Ibid.
\textsuperscript{61} Kevin P. McGuinness, supra note 5, at 3.
natural person subject to the express or implied provisions of the legislation, and no legal personality of a corporation exists beyond the statutes formulated by the legislative body.\(^6\)

The theory of corporation’s legal institutions interprets the cause of a corporation to enjoy the corporate personality, namely that a corporation is not the outcome of the autonomy of the parties’ will, but rather the outcome of legal norms. Specifically, the founding shareholders must execute the relevant constituting documents and complete the required procedures for the purpose of incorporating a corporation. The fact that a corporation must be incorporated to enjoy the legal personality in accordance with the statutory provisions and procedures is, therefore, a typical reflection of the theory of corporation’s legal institutions in the corporate legislation.

In addition to the incorporation of a corporation, mandatory provisions are specified in many aspects of the corporate statute in order to regulate the organizational structure and behavior in the operation and management of a corporation. These mandatory provisions also fall within the theory of corporation’s legal institutions. Some of them constitute minority shareholder protections and are regarded as one of the important legal means used by the legislature to protect the legitimate rights and interests of minority shareholders. For example,

the motion for dissolving the corporation in the *CLC*\(^{63}\) and the dissolution remedy under the *CBCA*\(^{64}\) are mainly based on the theory of corporation’s legal institutions.

### 2.2.3 Corporation’s Theory of Association

“A corporation is a group of persons or a series of holders of an office, who are deemed in law to constitute collectively a single, separate legal entity.”\(^{65}\) “Incorporation confers on the members of a company the privilege of acting together in concert as a collective body.”\(^{66}\)

As a member of a corporation, a shareholder generally enjoys four basic rights: the voting right, the right to participate in the profit distributions of the corporation, the right to participate in the distributing of the residual assets of the corporation in its winding-up, and the right to transfer his or her shares.\(^{67}\) For a closely held corporation, a shareholder may also acquire the right to participate in the operation and management of the corporation.

While enjoying the aforesaid rights, a shareholder assumes his or her obligations and liabilities towards the corporation and other shareholders in accordance with the corporate legislation, the articles and other constituting documents of the corporation. For example, capital contribution is the precondition for incorporating a corporation. It is, therefore, a

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\(^{63}\) For the discussion about the motion for dissolving the corporation under special conditions in the *CLC*, see Chapter 3, section 3.4.9.

\(^{64}\) For the discussion about the dissolution under the *CBCA*, see Chapter 4, section 4.2.9.


\(^{66}\) Kevin P. McGuinness, *ibid*, at 183.

\(^{67}\) Kevin P. McGuinness, *ibid*, at 1104.
“fundamental obligation of each shareholder that he or she must make his or her capital contribution in accordance with the agreed or prescribed percentage.”

Xudong Zhao, the Chinese scholar described association as “a basic characteristic of a corporation as a legal person.” He further argued that “the basic institutions of modern corporate law are all based on the structure of association, with a focus on adjusting the conflict of interests among shareholders.”

The membership rights of a shareholder in a corporation may be categorized into two kinds: “individual membership right and corporate membership right.” They are of particular importance for a minority shareholder to protect his or her legitimate rights and interests. On one hand, “where the individual membership right is encroached or dispute arises in connection with such right, a shareholder may bring a lawsuit in his or her own name, and such right shall not be affected by the resolutions adopted by the controlling shareholder.” On the other hand, “where the corporate membership right is encroached, some members of a corporation will be allowed to bring an action in the name of the corporation under certain exceptional situations.”

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68 Xudong Zhao, Editor-in-Chief, Gong si fa xue (Theory on Corporate Law), 2nd ed. (Beijing: Higher Education Press, 2006) at 7.
69 Ibid.
70 Ibid.
71 “Individual membership right refers to the right acquired by a shareholder as a member of the corporation based on the contractual arrangements executed between the shareholder and the corporation, and which may not be deprived of without his or her consent. Corporate membership right refers to the right enjoyed as a member of the corporation to make various resolutions in accordance with the corporate law and the articles.” Minan Zhang, Gong si fa de xian dai hua (Modernization of Corporate Law), 1st ed. (Guangzhou: Sun Yat-sen University Press, 2006) at 362.
72 Ibid.
73 Ibid.
In view of these two types of rights, both Canada and China specify different minority shareholder protections to deal with the encroachment in different cases. For instance, right to dissent is an important remedy for a minority shareholder under special circumstances to request for repurchase of his or her equity or shares and withdraw from the corporation.74 This right is obviously his or her individual member right. In the meantime, the motion for dissolving the corporation under special conditions in the CLC, the dissolution remedy under the CBCA, and the derivative action75 belong to the corporate membership rights of a minority shareholder. It is evident that the legal remedies mentioned above are all based on the corporation’s theory of association.

2.2.4 Corporation’s Theory of Profitability

Profit making refers to the gaining of profits through operation, with less cost but obtaining greater operating gains. “The profitability of a corporation comes from its inherent nature.”76 While investors contribute their capital, they make their investment with the aim of making gains and returns thereon. This objective inevitably drives a corporation to pursue profit maximization. In this respect, “a corporation is nothing more than a legal means by investors

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74 For the discussion about the right of a dissenting shareholder to withdraw from the corporation in the CLC, see Chapter 3, section 3.4.8. For the discussion about the right to dissent under the CBCA, see Chapter 4, section 4.2.3.
75 For the discussion about the shareholder’s derivative action in the CLC, see Chapter 3, section 3.4.10. For the discussion about the derivation action under the CBCA, see Chapter 4, section 4.2.2.
76 Xudong Zhao, supra note 68, at 3.
to realize their interests on investment. The pursuit of profits is the perfectly justifiable and undissembled goal of a corporation.”\textsuperscript{77}

Corporation is an organization which considers profit making as its objective, and profit making is the starting point and final destination of a corporation’s business and activities. “[I]n what William Bratton calls the neoclassical new economic theory, a corporation exists to maximize the wealth of its shareholders, and the corporation’s management ought to act as the shareholders’ economic agent in pursuing this end.”\textsuperscript{78} As Richard A. Posner noted, “[t]he system of wealth maximization consists of institutions that facilitate, or where that is infeasible approximate, the operations of a free market and thus maximize autonomous, utility-seeking behavior.”\textsuperscript{79}

However, some corporations in China can continue business and operation despite their losses for consecutive years, because they are of public policy nature and operate not for their own interests or the interests of their shareholders, but for the national or social interests of the country. There are also some corporations of administrative nature in China, having their dual roles of a government organ and a business organization, namely performing their

\textsuperscript{77} \textit{Ibid.} \\
government functions while seeking operating profits. With such dual functions, it is extremely hard for them to avoid the sacrifice of the corporations’ interests in order to perform their administrative functions. These two types of corporations are, in fact, not truly the business corporations in China.

In order to ensure profit making of a corporation, the operating efficiency of the corporation must be safeguarded in corporate law. It is, therefore, important that corporate law shall not ignore the prevention of a minority shareholder from abusing his or her rights while offering protection to a minority shareholder. In this context, both Canada and China attach great importance to the check and balance measures when specifying minority shareholder protections. For example, the check and balance measures set out in the right to information in the two countries play a very important role in preventing a minority shareholder from abusing his or her right.

Furthermore, some protections in both Canada and China contain provisions relating to “the exhaustion of intra corporate remedies which is also named the demand rule.” This rule requires a plaintiff shareholder to request the board of directors of the corporation to take

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80 For example, State Grid Corporation of China (SGCC) is a “backbone state-owned enterprise that may affect national energy safety and economic lifelines”, and “is to build and operate power grids and provides secure and reliable power supply for the development of the society”. Concurrently, SGCC assumes the functions entrusted by the State Council and other relevant government departments. Pursuant to the 2007 Annual Report of SGCC Power Grid Development, SGCC “implements the spirit of the 17th CPC National Congress and the Central Economic Work Conference” in 2007, and “pushes on ‘two transitions’ and implements the 11th five-year development plan and annual work plan.” See the official website of SGCC, online: SGCC <http://www.sgcc.com.cn/ywlm/gsgk-e/gsgk-e/gsgk-el.shtml>. Also see the Abstract of the 2007 Annual Report of SGCC Power Grid Development, online: SGCC <http://www.sgeri.sgcc.com.cn/upload/attachment/200931161219672.pdf>.

81 The right to information in the CLC is discussed in section 3.4.6 of Chapter 3, and the right to information under the CBCA is discussed in section 4.2.11 of Chapter 4.

necessary measures in bringing an action before the shareholder applies to the court for the protection. In applying this rule, adequate communication between the corporation and the shareholder will be carried out to avoid any possible misunderstanding and unnecessary litigation. The exhaustion of intra corporate remedies also enables both the corporation and the shareholder to reach an agreement or compromise through non-litigation channels (e.g., consultation, mediation, etc.), which would effective eliminate any possible damages against the corporation and safeguard the legitimate interests of the corporation. The proposal, right to information and dissolution in Canada are good examples of this rule while the motion for dissolution in China reflects the exhaustion of intra corporate remedies.

Based on the foregoing, it is evident that both the check and balance measures and the exhaustion of intra corporate remedies contained in the minority shareholder protections of Canada and China are a reflection of the corporation’s theory of profitability.

2.2.5 Corporation’s Theory of Legal Person

“The separate personal status of a corporation is one of the chief defining characteristics which differentiates it from other forms of business enterprises.”

“The basic principle of corporate personality was settled in the Salomon case in 1897.”

Ibid.

The proposal, dissolution and right to information are minority shareholder remedies in Canada discussed in sections 4.2.4, 4.2.9 and 4.2.11 of Chapter 4 while the motion for dissolution is a minority shareholder protection in China discussed in section 3.4.9 of Chapter 3.

Kevin P. McGuinness, supra note 5, at 41.

the company as a separate person is entitled not only to enjoy rights and assume obligations independently, but also to “acquire rights against, and become subject to enforceable obligations that favour, the persons who stand behind it.”

In general, a corporation has its three main features. First, it possesses its independent property. The property is functioned not only as “the material prerequisites and operating conditions of a corporation to carry out its business”\(^8\), but also as “the material guaranty to assume its obligations and liabilities.”\(^9\) Second, a corporation establishes its independent institutional framework, which is an institutional condition for conducting its normal business and operation. Third, it acquires rights and assumes obligations and liabilities independently.\(^10\) Based on these features, a corporation “cannot be anything but a legal person.”\(^11\)

As a corporation is a virtual person in law, it is very hard to avoid the control by the \textit{de facto} controller\(^12\) of the business and operation of the corporation, or the control by the controlling shareholder of the business and operation of the corporation. The outcome of a corporation’s business and activities precisely reflect the inherent defect of the legal person’s nature of a corporation, namely that the controlling shareholder is to prejudice the interests of the

\(^9\) Kevin P. McGuinness, supra note 5, at 36.
\(^10\) Xudong Zhao, supra note 68, at 4.
\(^11\) Ibid.
\(^12\) Ibid.
\(^13\) “A \textit{de facto} controller means a person who is not a shareholder of the company but has actual control over conduct of the company by means of investment relations, agreement or other arrangements.” See CLC, Article 217, Clause (3).
corporation and its minority shareholders in pursuit of its own interests. In this connection,
both Canada and China specifies a particular minority shareholder protection, namely
derivation action to solve the inherent defect of the legal person’s nature of a corporation.\textsuperscript{94}

Derivative action plays a very important role in protecting the interests of a corporation, but it is “a breakthrough in the corporation’s theory of legal person after all.”\textsuperscript{95} As Judge Linqing Wang, the senior judge of the Supreme People’s Court of China noted, “this breakthrough shall be validated only when the internal operational mechanism of the corporation is out of order. Otherwise, it would prejudice the normal operation of the corporation and materially increase the operating cost of the corporation.”\textsuperscript{96} As the improper application of a derivation action would be detrimental to the interests of a corporation, both the \textit{CBCA} and the \textit{CLC} specify certain preconditions for invoking a derivative action.\textsuperscript{97}

Based on the foregoing, it is important to note that derivation action is specified not to deny, subrogate or overturn the corporation’s theory of legal person. It is, in fact, functioned as an adjustment of and supplement to the corporation’s theory of legal person.

\textsuperscript{94} Shareholder’s derivative action in China is discussed in section 3.4.10 of Chapter 3, and the derivative action in Canada is discussed in section 4.2.2 of Chapter 4.
\textsuperscript{96} \textit{Ibid}.
\textsuperscript{97} For the detailed discussion about derivative action in Canada and China, see section 3.4.10 of Chapter 3 and section 4.2.2 of Chapter 4
2.2.6 Theory of Corporate Governance

The concern by western economists about corporate governance could be dated back as early as Adam Smith (1776). However, separation of ownership and control within a corporation was first explicitly raised by Adolf Berle and Gardiner Means in their 1932 book of *The Modern Corporation and Private Property*. Their scholarship forms the starting point of modern corporate governance.

“Corporate governance refers to oversight mechanisms, including the processes, structures and information used for directing and overseeing the management of a corporation.” As the board of directors and senior management are generally designated as key control functions, effective oversight of the business and affairs of an institution by its board and senior management is essential to the maintenance of an efficient and cost-effective supervisory system in a corporation. In this connection, corporate governance also “encompasses the means by which members of the board of directors and senior management are held accountable for their actions and for the establishment and implementation of

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oversight functions and processes,”\textsuperscript{102} aiming at rational distribution of the power structure between the corporation’s operation, management, supervision and control to “achieve the operation objective of the corporation and the wealth maximization of the shareholders.”\textsuperscript{103}

There are six major principles in corporate governance, namely that (1) the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders;\textsuperscript{104} (2) the rights of shareholders should be protected;\textsuperscript{105} (3) equitable treatment of shareholders should be ensured, including full disclosure of material information and the prohibition of abusive self-dealing and insider trading;\textsuperscript{106} (4) other corporate constituencies, such as creditors, employees, suppliers, and customers should have their interests protected by contractual and regulatory means rather than through participation in corporate governance recognition;\textsuperscript{107} (5) timely and accurate disclosure and transparency should be complied with in relation to matters material to corporation’s performance, ownership and governance;\textsuperscript{108} and (6) a framework of corporate governance should be established to ensure strategic guidance of the corporation and effective monitoring of its

\textsuperscript{102} Ibid.
\textsuperscript{103} Xudong Zhao, \textit{supra} note 68, at 362.
\textsuperscript{107} Henry Hansmann & Reinier Kraakman, \textit{supra} note 104.
\textsuperscript{108} Andrew Cornford, \textit{supra} note 105.
management by the board of directors as well as the board’s accountability to the corporation and its shareholders.  

Corporate governance is of absolute importance in minority shareholder protection. As Marco Becht, Patrick Bolton and Alisa Röell noted, “the fundamental issue concerning governance by shareholders today seems to be how to regulate large or active shareholders so as to obtain the right balance between managerial discretion and small shareholder protection.”  

Minority shareholders “should receive strong protection from exploitation at the hands of controlling shareholder.” In this connection, statutory minority shareholder protections based on the corporate governance theory are necessary. As Canadian scholars noted, “the structure of Canadian corporations suggests that some regulatory intervention may be necessary to ensure that directors, officers, and controlling shareholders do not engage in self-dealing transactions to the detriment of investor interests.”

Both Canada and China attach great importance to the role of corporate governance in protecting the legitimate rights and interests of minority shareholder. Both the CBCA and the CLC set out many protections which are based on the theory of corporate governance. In Canada, the CBCA expressly specifies the duty of care and the fiduciary duties for a director

109 Ibid.
111 Henry Hansmann & Reinier Kraakman, supra note 104.
112 Robert Yalden, Janis Sarra, Paul Paton, Mark Gillen, Ronald Davis and Mary Condon, supra note 4, at 629.
and officer of a corporation. In case that any of such duties is breached in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a minority shareholder, the oppression remedy will be available to a minority shareholder. Other protections relating to the theory of corporate governance in Canada are compulsory acquisitions, voting rights, compliance or restraining order, cancellation of contracts, right to information and examination of financial statements.

In China, great efforts have been made in creating a balanced mechanism for sound corporate governance in the CLC. For example, the CLC specifies the duty of diligence and duty of loyalty for directors, supervisors and senior management persons. Second, the CLC subjects the voting procedures and rules of procedures of the board of directors of a limited liability company to being negotiated and agreed to in the articles by shareholders, except for certain mandatory provisions of the CLC. Third, voting right of a shareholder for whom the corporation issues a guarantee or guarantees in favour of the shareholder’s debt obligations is excluded. Fourth, the CLC confers on a minority shareholder the right to request, convene and preside a meeting of shareholders. Fifth, shareholder rights and connected relationship may not be abused to be detrimental to the interests of the corporation.

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113 CBCA, s. 122(1).
114 CBCA, s. 241(2). For a detailed discussion about the oppression remedy, see section 4.2.1 of Chapter 4.
115 See Chapter 4, section 4.2.5.
116 See Chapter 4, section 4.2.6.
117 See Chapter 4, section 4.2.7.
118 See Chapter 4, section 4.2.10.
119 See Chapter 4, section 4.2.11.
120 CLC, Article 148. See Chapter 3, section 3.4.4.
121 CLC, Article 44.
122 CLC, Article 16. See Chapter 3, section 3.4.2.
123 CLC, Article 41. See Chapter 3, section 3.4.3.
and a minority shareholder.\textsuperscript{124} Other relevant protections are the right to information\textsuperscript{125} and the motion for invalidating or reversing resolutions of a corporation.\textsuperscript{126} All these protections are a reflection of the theory of corporate governance.

\begin{itemize}
\item \textsuperscript{124} CLC, Article 20. See Chapter 3, section 3.4.5.
\item \textsuperscript{125} CLC, Article 34. See Chapter 3, section 3.4.6.
\item \textsuperscript{126} CLC, Article 22. See Chapter 3, section 3.4.7.
\end{itemize}
CHAPTER 3

MINORITY SHAREHOLDER PROTECTIONS UNDER CHINESE CORPORATE LAW

3.1 Introduction

This chapter is part of the second stage of a comparative study in this thesis. At the outset, it briefly introduces the historical development of the corporate legislation in China. It then describes the nature of Chinese private corporations and elaborates the governance structure in such corporations. Afterwards, this chapter articulates ten minority shareholder protections under the corporate legislation of China in a comprehensive and systematic manner.

Before going to the minority shareholder protections, it is important to have a brief discussion about the historical development of Chinese corporate legislation. Early in the Western Zhou Dynasty (B.C. 1046 - B.C. 771), the ruler raised the legal thought of “Li Yue Xing Zheng, Zong He Wei Zhi”. Since then, the rulers in ancient China had placed

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127 See Chapter 2, section 2.1.3.
education and enlightenment of virtue and morality as the core and then combined the
education of aesthetics, the effective enforcement of criminal laws and the intensification of
administrative functions to carry out the overall ruling of the country.\textsuperscript{129} As the ancient rulers
did not focus on the rule of law, the laws were less developed in ancient China. Particularly,
China stayed in an agricultural society and emphasized agriculture and restrained commerce
for a long period of time. In this context, civil and commercial laws were not properly
developed until modern China.

The first corporate statute in China was “the Company Law enacted by the last feudalist
dynasty of China - Qing Dynasty in 1904. After the Republic of China was founded, it
promulgated its Company Law in December 1929.”\textsuperscript{130} The Company Law promulgated by
the Republic of China was subsequently abolished when the People’s Republic of China was
founded in 1949. As a result of its economic reforms, the People’s Republic of China
promulgated its Company Law (the “Former Company Law”) on December 29, 1993.

Statutory protection in corporate law is essential for the protection of minority shareholders.
However, the Former Company Law offered very limited protection with regard to the rights
and interests of minority shareholder. Even under such limited protection, enforcement
remained to be a problem due to the inadequacy and inefficiency of such protection. For

\textsuperscript{130} Xudong Zhao, Editor-in-Chief, Shang Fa Xue (Theory on Commercial Law), 1st ed. (Beijing: Higher Education Press, 2007) at 156.
example, Article 111 thereof conferred on a shareholder a right to bring an action before the People’s Court for an order restraining any person from any illegal act and tort in the event that the resolutions of a meeting of shareholders or of the board of directors contravened the laws and administrative regulations and infringed the legitimate rights of shareholders. However, it neither provided for the liability of indemnity with regard to the losses suffered or incurred by the corporation or the minority shareholder from the controlling shareholder’s improper conduct in adopting such resolutions, nor specified any remedy for a minority shareholder to claim the indemnity in case that the interests of the corporation were unfairly prejudiced as a result of such resolutions and that the corporation was reluctant to bring an action to that effect.

With the rapid economic development in China, legal reforms became imperative in Chinese corporate law. In 2005, China made its significant changes to the Former Company Law by using the latest achievements in theoretic research and legislation of other countries for reference and also taking into account the Chinese characteristics. Among these legal reforms, one of the outstanding achievements is to intensify the minority shareholder protection in the corporate statute. Due to the far-reaching effects of such reforms, the

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131 Article 111 of the Former Company Law provides that, where the resolutions of a meeting of shareholders or of the board of directors contravenes the laws and administrative regulations and infringes the legitimate rights of a shareholder, the shareholder is entitled to bring an action before the People’s Court for an order restraining any person from any illegal act and tort.

132 Legal reforms had far-reaching effects because they involved both theoretical breakthroughs and institutional renovations, including but without limitation (i) adjusting the legislative objective of corporate law from the perspective of a planned economy to that of a market economy; (ii) abandoning the deeply-rooted perception of grading the ownership rights; (iii) abolishing certain “special treatment” provisions towards state-owned enterprises; (iv) intensifying the duties and responsibilities of directors, supervisors and senior management persons by expressly providing for their duty of loyalty and their duty of care; (v) reforming the incorporation and capital structure of a corporation for the purpose of encouraging nongovernment investment; (vi) improving corporate governance; and (vii) enhancing the protections relating to the interests of a minority shareholder.
amended Former Company Law was hailed by the Chinese legal profession to be the “New Company Law” (i.e., the CLC referred to in this thesis).

3.2 Nature of Private Corporations

As discussed in section 1.2 of Chapter 1, the Company Law of China (the “CLC”) categorizes Chinese companies into two kinds: one is limited liability company and the other is joint stock limited company. A limited liability company is a private corporation in nature because (i) it shall have less than fifty shareholders, (ii) it may not offer its shares to the public, and (iii) transfer of equity is restricted by the laws and the articles. By the end of 2008, domestic limited liability companies accounted for 99.6% of all domestic corporations incorporated within China.

In limited liability companies in China, the majority is privately-owned companies, which refer to for-profit economic enterprises whose property is owned by the individuals (rather than the State) with more than 8 employees. By the end of 2008, domestic

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133 CLC, supra note 15.
134 CLC, Article 2.
135 CLC, Article 24.
136 CLC, Chapter 2, section 1.
137 CLC, Chapter 3.
138 Pursuant to the official website of the State Administration for Industry and Commerce of China, all domestic corporations incorporated in China by the end of 2008 reached the number of 5,284,800 while all domestic limited liability companies arrived at the number of 5,263,600. These figures are available at the official website of the State Administration for Industry and Commerce of China, online: The State Administration for Industry and Commerce of China <http://www.saic.gov.cn/zwgk/tjzl/200903/t20090320_50532.html>.
139 Privately-owned companies refer to for-profit economic enterprises whose property is owned by the individuals (rather than the State) with more than 8 employees. See Article 2, the Provisional Regulations of the People's Republic of China on Privately-owned Enterprises, which was published by the State Council of China on June 25, 1988 and became effective as of July 1, 1988.
privately-owned companies accounted for 70.8% of all domestic companies in China.\textsuperscript{140}

China does not have the definition of a close corporation or closely-held corporation.

However, China differentiates large corporations from small- and medium-sized ones which are generally abbreviated as the SMEs.\textsuperscript{141} The criteria for SMEs vary from one industry to another in terms of employee number, total assets and/or sales.\textsuperscript{142} For example, the SME criterion for wholesale and retail business is that a corporation has less than 500 employees or less than sales of RMB150 million.\textsuperscript{143} The SMEs normally have relatively few shareholders, and most or all of the shareholders actively participate in the operation and management of the corporation. Besides, there is no established market for the transfer of equity of a SME. In most cases, restriction is imposed on the transfer of equity of a SME.

With these features, the SMEs are close or closely-held corporations in nature. By the end of September, 2009, the SMEs accounted for over 99\% of all enterprises in China.\textsuperscript{144}

\textsuperscript{140} Pursuant to the official website of the State Administration for Industry and Commerce of China, all domestic companies in China (including branches) by the end of 2008 reached the number of 9,279,600 while all domestic privately-owned companies arrived at the number of 6,574,200. These figures are available at the official website of the State Administration for Industry and Commerce of China, online: The State Administration for Industry and Commerce of China <http://www.saic.gov.cn/zwgk/tjzl/200903/t20090320_50532.html>.

\textsuperscript{141} Under the laws of China, the SMEs refer to the different forms of enterprises under different ownerships that are established within the territory of China according to law, that help to meet the social needs and create more job opportunities, that comply with the industrial policies of the State and that are small and medium-sized in production and business operation. See Article 2, the \textit{Law of the People's Republic of China on Promotion of Small- and Medium-sized Enterprises}, which was adopted at the 28\textsuperscript{th} Meeting of the Standing Committee of the 9\textsuperscript{th} National People's Congress on June 29, 2002 and became effective as of January 1, 2003.

\textsuperscript{142} See the \textit{Provisional Regulations on the Criteria for Small- and Medium-sized Enterprises} which were jointly promulgated by the State Economic and Trade Commission, the National Development and Reform Commission, the Ministry of Finance and the State Statistics Bureau on February 19, 2003, online: The National Development and Reform Commission of China <http://www.ndrc.gov.cn/zxqy/zcfg/t20050715_36687.htm>.


\textsuperscript{144} By the end of September 2009, there are 10,300,000 enterprises in China (excluding 31,300,000 individual industrial and commercial households). The SMEs reached 10,231,000 in number. For the time being, the ultimate products and
As minority shareholder protection does not apply to one-person limited liability company or wholly State-owned companies, private corporations referred to in this thesis from the Chinese perspective refer to the limited liabilities companies in China other than one-person limited liability companies and wholly State-owned companies.

### 3.3 Governance Structure of Private Corporations

The *CLC* requires a limited liability company to set up three bodies internally, namely the meeting of shareholders, the board of directors and the board of supervisors. These three bodies form the governance structure of a private corporation in China.

The meeting of shareholder of a limited liability company comprises all shareholders, and is the authority of the corporation. The meeting of shareholders decides on all major issues relating to the corporation, including (i) to decide on the business policy and investment plan of the corporation; (ii) to elect and remove directors and supervisors and to decide on matters

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service value of the SMEs were equal to about 60% of gross domestic product (GDP). The taxes paid by the SMEs were around 50% of the total national tax revenues. The SMEs provides nearly 80% of job opportunities in cities and towns. See the Report on Promoting the Development of Small- and Medium-sized Enterprises submitted by Yizhong Li, Minister of Industry and Information Technology of China to the 12th Meeting of the Standing Committee of the 11th National People’s Congress on December 24, 2009, online: www.xinhuanet.com<br>http://news.xinhuanet.com/fortune/2009-12/25/content_12702874.htm>; online: www.sohu.com<br>http://news.sohu.com/20091224/n269186942.shtml>. Industrial or commercial households are citizens who are the unemployed in cities and towns, villagers and other persons permitted by the State policy and have undergone approval and registration to engage in individual industrial or commercial operation in the areas of industry, handicraft, building, transportation, commercial, catering, service, repair and other permitted business. Individual industrial or commercial households may be operated by an individual or a family. See Articles 2, 3 and 4 of the *Provisional Regulations on Administration of Individual Industrial and Commercial Households in Cities and Towns* which was promulgated by the State Council of China on August 5, 1987 and became effective as of September 1, 1987.

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145 *CLC*, Chapter 2, section 2.
146 *CLC*, Article 37.
concerning the remuneration of directors and supervisors; (iii) to examine and approve reports of the board of directors and of the supervisory board or supervisors; (iv) to examine and approve the annual financial budget plan and final accounts plan of the corporation; (v) to examine and approve plans for profit distribution of the corporation and plans for making up losses; (vi) to adopt resolutions on the increase or reduction of the registered capital of the corporation, on the issuance of corporate bonds, and on matters such as the merger, division, transformation, dissolution and liquidation of the corporation; (vii) to amend the articles of the corporation; (viii) to exercise other functions and powers provided for in the articles of the corporation. With the broad power conferred by the CLC, the meeting of shareholder is also called “the highest authority of a corporation.”

The board of directors is formed through election by the meeting of shareholders, and shall be accountable to the meeting of shareholders. It is the “permanent body to act for and on behalf of the corporation and to exercise the business decision-making power.” In general, the board of directors is composed of three to thirteen members. It shall have a chairperson and may have a vice chairperson.

The board of directors exercise the powers including (i) convening a meeting of shareholders

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147 CLC, Article 38.
148 Xudong Zhao, supra note 68, at 371.
149 CLC, Article 38, Article 47.
150 Xudong Zhao, supra note 68, at 383.
151 CLC, Article 45. There is, however, one exception that a small-sized limited liability company or a limited liability company with only a few shareholders may have one executive director without establishing a board of directors. The executive director may serve concurrently as the general manager of the company. See CLC, Article 51.
152 Ibid.
and presenting reports to the meeting of shareholders; (ii) implementing resolutions adopted by the meeting of shareholders; (iii) determining the company’s operational plans and investment programs; (iv) preparing annual financial budget plans and final accounting plans of the corporation; (v) preparing profit distribution plans and plans to cover the corporation’s losses; (vi) preparing plans for increasing or reducing registered capital of the corporation or issuing corporate bonds; (vii) drafting plans for merger, division, change of corporate form or dissolution of the corporation; (viii) determining the structure of the corporation’s internal management; (ix) appointing or removing the manager of the corporation, appointing or removing, on the manager’s recommendation, deputy managers of the corporation and the officer in charge of financial affairs, and determining the remuneration for these officers; (x) formulating the basic management rules and regulations of the corporation; and (xi) exercising other powers stipulated by the articles of the corporation.153

A limited liability company shall have a board of supervisors composed of no less than three members.154 The CLC requires the board of supervisors to include shareholders’ representatives and representatives of the staff and workers of the corporation.155 The board of supervisors shall have one chairperson elected by more than half of all the supervisors, and the chairperson shall convene and preside the meetings of the board of supervisors.156

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153 CLC, Article 47.
154 CLC, Article 52. A small-sized limited liability company or a limited liability company with only a few shareholders may have one or two supervisors without establishing a board of supervisors. See CLC, Article 52.
155 CLC, Article 52. The number of the staff and workers’ representatives shall not be lower than one third of all the supervisors, the specific percentage of which shall be determined in the articles of the corporation. The representatives of the staff and workers on the board of supervisors shall be democratically elected by the staff and workers through the congresses or assemblies of the workers and staff members or other forms. See CLC, Article 52.
156 CLC, Article 52.
CLC also prohibits a director and a senior management person of the corporation to serve concurrently as a supervisor.\textsuperscript{157}

The authorities of the board of supervisors include (i) reviewing the financial affairs of the corporation; (ii) monitoring the acts of the directors or the senior management persons in the course of performance of their duties, and making a proposal of removing the director or senior management person in violation of laws, administrative regulations or the articles; (iii) requiring the directors or the senior management persons to make rectification when their act causes harm to the interests of the corporation; (iv) proposing for interim meetings of shareholders, and convening and presiding over the meeting of shareholders when the board of directors fails to perform its function to convene and preside over a meeting of shareholders as set forth in the CLC; (v) submitting proposals at a meeting of shareholders; (vi) filing suit against the directors or senior management persons of the corporation in accordance with the provisions of Article 152 of the CLC; and (vii) exercising other authorities prescribed by the articles of the corporation.\textsuperscript{158} Based on the foregoing, it is evident that the board of supervisors is the “permanent body to exercise supervision over operational and managerial conduct of directors and managers and over financial affairs of the corporation.”\textsuperscript{159}

\textsuperscript{157} Ibid. Senior management persons refer to the manager, deputy manager and person in charge of financial affairs of a corporation, secretary of the board of directors of a listed company, and any other persons so appointed in the article of a corporation. See CLC, Article 217.

\textsuperscript{158} CLC, Article 54.

\textsuperscript{159} Zhao, Xudong, \textit{supra} note 68, at 391.
Although the *CLC* distributes and balances powers among the three bodies of a corporation, there is a big gap between these provisions in statutes and these provisions in action. In the real world, the board of directors has little independence in making its business decisions and is often controlled by the controlling shareholder.\textsuperscript{160} Members of the board of directors mainly come from the controlling shareholder; candidates for new directors are mainly decided by the controlling shareholder; the criteria for becoming a director mainly reflect the views and opinions of the controlling shareholder; the motion for removing a director is mainly brought by the controlling shareholder.\textsuperscript{161} Most corporations do not set up the board of supervisors.\textsuperscript{162} Where a corporation sets up the board of supervisors, the corporation does not attach due importance to the role of the board of supervisors; the board is too small in scale and its members are not properly represented; most of its members do not possess relevant expertise; and the board is controlled by the controlling shareholder.\textsuperscript{163} In fact, the board of supervisors of many corporations only exists in name and does not function properly.\textsuperscript{164}

In addition to the three bodies mentioned above, it is also important to note that a limited liability company may have a manager, to be appointed or removed by the board of directors.\textsuperscript{165} The manager is a senior management person in the corporation, and shall be

\begin{footnotesize}
\begin{itemize}
\item[-] \textsuperscript{160} Xudong Zhao, *supra* note 68, at 369.
\item[-] \textsuperscript{161} Xudong Zhao, *supra* note 68, at 369-370.
\item[-] \textsuperscript{162} Xudong Zhao, *supra* note 68, at 370.
\item[-] \textsuperscript{163} Ibid.
\item[-] \textsuperscript{164} Xudong Zhao, Editor-in-Chief, *Xin gong si fa zhi du she ji* (System Design of New Company Law), 1st ed. (Beijing: Law Press China, 2006) at 137.
\item[-] \textsuperscript{165} *CLC*, Article 50.
\end{itemize}
\end{footnotesize}
accountable to the board of directors. The functions of the manager generally include (i) managing the corporation’s production and operation, and organizing the implementation of the resolutions of the board of directors; (ii) organizing the implementation of annual operating plans and investment programs of the corporation; (iii) preparing the plan for the structure of the company’s internal management; (iv) preparing the basic management rules and regulations of the corporation; (v) formulating detailed rules of the corporation; (vi) recommending the appointment or removal of a deputy manager and the officer in charge of financial affairs; (vii) appointing and removing officers of the corporation other than those to be appointed or removed by the board of directors; (viii) exercising other powers delegated by the board of directors. The manager may also sit in on a meeting of the board of directors.

3.4 Minority Shareholder Protections under the CLC

As discussed in the former section, one prominent feature of the reforms to the Former Company Law is to enhance minority shareholder protection by specifying a series of rights under the CLC to be conferred on a minority shareholder in case that its legitimate rights are encroached. As most of such rights are unprecedented, Chinese corporate law has entered into a new era in the protection of minority shareholders. This section articulates ten minority shareholder protections under the CLC in a comprehensive and systematic manner.

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166 Ibid.
167 CLC, Article 50. In the event that the articles of the corporation stipulate otherwise in respect of the manager’s functions, the provisions of the articles shall prevail. See CLC, Article 50.
168 Ibid.
3.4.1 Self-governing Right under the Articles

The articles of a corporation plays an extremely important role in its operation and management. “As a legal document fully reflecting corporate self-governance, the articles is called the ‘constitution’ in the life of a corporation, and is an important source of corporate law.”

Unlike a natural person, a corporation is a legal person that needs specific bodies and persons both to internally exercise its decision-making and supervision and carry out its operation and management and to externally enjoy its rights and perform its obligations. These bodies and persons include the meeting of shareholders, the board of directors, the board of supervisors, and managers of a corporation. Their duties and responsibilities are not only stipulated by the corporate law, but also provided in the articles.

Under the planned economy in 1990s, China laid excessive emphasis on the legislative control and administrative intervention in the business and operation of a corporation, regardless of its corporate self-governance. The Former Company Law contained too many mandatory provisions and administrative discretions on the issues that should be actually dealt with by the shareholders and the corporation themselves. The registration authorities

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169 Junhai Liu, supra note 82, at 64.
170 The registration authorities refer to the State Administration for Industry and Commerce of China and its local branches, which are in charge of effecting the registrations relating to the establishment, annual examination, corporate changes and de-registration, and granting and revoking the business license of a corporation.
formulated the formatted articles to be used by the investors for the purpose of establishing a
corporation. However, such formatted articles was too simple, general and principled to be
adapted or responsive to the particular situations of a corporation.

In practice, local registration authorities often denied the articles prepared by the investors
and requested the latter to purchase, sign and submit the formatted articles prior to the
establishment of a corporation. The investors faced a situation in which they had to either
accept the formatted articles or give up the registration of the proposed corporation. As a
result, the formatted articles was ubiquitous throughout China. As the formatted articles did
not reflect the real intention and expectations of investors, many disputes arose between and
among them after the establishment of the corporation, in which cases the formatted articles
could hardly offer adequate protection.

One of the major legal reforms in Chinese corporate law in 2005 was to uphold corporate
self-governance in order to meet the needs of developing a market economy. As the “main
means of corporate self-governance is the self-governance in the articles”\textsuperscript{171}, the CLC applies
the corporation’s contractual conception (as discussed in section 2.2.1 of Chapter 2) to
diminish the State’s intervention in the operation and management of a corporation, advocate
contractual freedom and conferred self-governing right on a corporation. For example,
investors may, when establishing a corporation, formulate their own individualized articles to
the extent permitted by law, subject to the negotiation and agreement by all investors. Hence,

\begin{quote}
\textsuperscript{171} Junhai Liu, \textit{supra} note 82, at 64.
\end{quote}
the self-governing right is a reflection of the corporation’s contractual conception.

Self-governing right under the articles is expressly provided in the CLC, characterized by “unless otherwise provided by the articles” or “subject to the relevant provisions of the articles” in Articles 38, 42, 43, 44, 45, 47, 49, 50, 51, 54, 72 and 76. For example, Clause 1, Article 44 of the CLC stipulates that “the rules of procedures and voting procedures of the meeting of shareholders shall be subject to the relevant provisions of the articles of a corporation, unless otherwise provided by this Law.” Clause 2, Article 51 of the CLC provides that “the authority of the executive director is subject to the relevant provisions of the articles of a corporation.”

The self-governing right under the articles is extended in the CLC to cover a variety of issues including the authority of the meeting of shareholders, notice of a meeting of shareholder, the rules of procedures and voting procedures of the meeting of shareholders, the authority of the board of directors, selection of the chairperson, the rules of procedures and voting procedures of the board of directors, the authorities of managers and the executive director, the authority of the board of supervisors, the rules of procedures and voting procedures of the board of supervisors, equity transfer, the inheritance of the shareholder’s qualifications, and so on.

This legislative reform is also in line with the corporate governance theory of modern
corporate law,\textsuperscript{172} and provides more legal protection for a minority shareholder. In China, a limited liability company has generally the corporate governance structured by the meeting of shareholders, the board of directors, managers and the board of supervisors.\textsuperscript{173} By applying the self-governing right under the articles, a minority shareholder is, in essence, able to counter-balance the rights of the controlling shareholder by means of establishing a sound corporate governance (e.g., requesting directors, supervisors, senior management persons to perform their duty of loyalty and duty of care; safeguarding the rights of a minority shareholder by having access to information and participating by way of proposal in the operation and management of the corporation).

Under the \textit{CLC}, the self-governing right under the articles may be realized by a minority shareholder in four aspects. First, a minority shareholder may attempt to increase the ratio of voting rights while capital contributions to the corporations remain unchanged. Pursuant to Article 43 of the \textit{CLC}, the shareholders of a corporation shall exercise their voting rights in proportion to the capital contributions at the meeting of shareholders, unless otherwise provided by the articles. Obviously, this Article lays down the principle that the voting rights of shareholders are generally based on the percentages of capital contributions, but at the same time allows shareholders to negotiate and arrive at alternative provisions in replace of this principle in the articles. In other words, a minority shareholder may gain more voting rights if the articles does not require the shareholders to exercise their voting rights in

\textsuperscript{172} See Chapter 2, section 2.2.6.\textsuperscript{173} See the discussion in section 3.3 above.
proportion to their capital contributions. In this regard, this Article makes it possible for a minority shareholder to bargain with the controlling shareholder and strive for more voting rights regardless of its percentage of capital contribution in the corporation.¹⁷⁴

Second, a minority shareholder may request for formulating the rules of procedure and voting procedures of the corporation which could effect the balanced protection of the former’s interests. In particular, voting right is an extremely important means for a minority shareholder to participate in the operation and management of the corporation. Besides, adequate exercise by the minority shareholder of its voting rights will provide more convenience and conditions in further exercising its other rights.

In practice, there are many ways of exercising voting rights: voting in person,¹⁷⁵ voting by proxy,¹⁷⁶ voting on the spot, voting via telecommunications,¹⁷⁷ direct voting, and

¹⁷⁴ Article 43 of the CLC provides that the shareholders of a corporation shall exercise their voting rights in proportion to the capital contributions at the meeting of shareholders, unless otherwise provided by the articles. This provision allows shareholders of a corporation to negotiate in the articles the voting rights to be enjoyed either pursuant to the percentages of capital contribution or according to the percentages different from those of capital contribution. It is, therefore, possible that a minority shareholder may negotiate in the articles to have 51% or more of the total voting rights on certain matters which he or she has the strength for the interests of the corporation, regardless of the low percentage of capital contribution to the corporation. In practice, the matters to be voted for in the corporation are normally divided into several categories, e.g., corporate financing, purchase of raw material, technology, sales, profit distributions, etc. For example, where a venture capitalist contributes 10% of the total capital to a corporation, he or she may negotiate in the articles to enjoy 51% or more of the total voting rights on the matters relating to the corporation’s financing because he or she has the expertise in corporate financing as well as financing resources and channels. If a minority shareholder has the strength of technology, he or she may negotiate in the articles to enjoy 51% or more of the total voting rights on the matters relating to IP or R&D of the corporation.

¹⁷⁵ Voting in person means that a shareholder attends the meeting of shareholders and vote by himself or herself.

¹⁷⁶ Voting by proxy means that a shareholder appoints another shareholder, director, supervisor, manager or other person to attend the meeting of shareholders and vote for and on behalf of himself or herself.

¹⁷⁷ Voting via telecommunications means that a shareholder attends the meeting of shareholders and votes by way of telephone, facsimile, internet and other modern telecommunication facilities. With the fast scientific and technological development, high-tech products (e.g., telephone, internet, etc.) become more and more popular in people’s daily life. Many countries have validated in their legislation the voting of a corporation to be carried out through modern telecommunication facilities in order to lower the voting cost and promote the enthusiasm of minority shareholders to vote.
Cumulative voting. Comparatively speaking, cumulative voting is an effective measure for minority shareholders to elect their representative(s) into the board of directors of the corporation. As the CLC allows shareholders to negotiate and specify the rules of procedures and voting procedures concerning the meeting of shareholders in the articles, a minority shareholder may request the cumulative voting for the election of directors and supervisors to be provided in the articles, with a view to protecting its legitimate rights and interests.

Third, a minority shareholder may request for the inclusion in the articles of detailed provisions relating to the information disclosure obligations to be assumed by directors, supervisors, senior management persons. These provisions are aimed at enriching the duty of diligence and the duty of loyalty of directors and senior management persons of the corporation and also preventing any interested or connected business and transactions from harming the interests of the corporation and the minority shareholder.

While the CLC requires directors and senior management persons to assume the duty of diligence and the duty of care, and prohibits directors and senior management persons to harm the interests of the corporation by taking advantage of their connected relationship.

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178 Pursuant to Clause 2, Article 106 of the CLC, cumulative voting means that, in the event of voting for directors or supervisors at the general meeting of shareholders, a shareholder of a joint stock limited company may multiply his voting rights by the number of candidates and cast all votes for one candidate director or supervisor.

179 Clause 1, Article 44 of the CLC provides that the rules of procedures and voting procedures of the meeting of shareholders shall be subject to the relevant provisions of the articles of a corporation, unless otherwise provided by this Law.

180 The statutory rights and obligations of a director, supervisor and senior management person are discussed in section 3.4.4 below.

181 CLC, Article 148.

182 CLC, Article 21. Connected relationship means the relationship between the controlling shareholder, de facto controller, director, supervisor, or senior management person of a company and the enterprise directly or indirectly controlled thereby, and any other relationship that may lead to the transfer of any interests of the company. However, the enterprises
it does not specify the provisions relating to the disclosure of interest for directors and senior management persons (e.g., the scope of information to be disclosed, the time of disclosure, continuing disclosure, etc.). As the CLC is silent on information disclosure obligations for directors and senior management persons, detailed provisions in the articles to that effect thus become extremely important to fill the gap in the CLC. These provisions may cover the content of the agreements or contracts under connected transactions, the execution, change, performance and termination thereof, and the price, basis of pricing and commercial principles to be followed under such transactions, time for disclosure and continuing disclosure. Apparently, this approach is an effective measure to be used by a minority shareholder to fight against the breach by directors and senior management persons of the duty of diligence and the duty of care specified in the CLC as well as the information disclosure obligations set out in the articles.

Fourth, a minority shareholder may specify the rational remuneration and incentive mechanism in the articles, which is aimed at solving any possible conflict between the interests of management and those of shareholders. Currently, the incentive mechanism regarding equity option is only at its initial stage in China. It is actually a double-edged sword, namely that a rational and sound incentive mechanism will optimize the combination of the interests of management with those of shareholders while an irrational and unsound one will easily evolve to be a new means used by management to empty the corporation.

controlled by the State do not incur a connected relationship simply because their shares are controlled by the State. See CLC, Article 217.
As the CLC does not pay adequate attention to the remuneration and incentive mechanism, a minority shareholder may make full use of this self-governing right to incorporate detailed provisions of a protective mechanism in the articles, which could become an important means for a minority shareholder to seek protection when its rights and interests are encroached. Pursuant to Article 11 of the CLC, the articles of a corporation shall be legally binding on the corporation, shareholders, directors, supervisors and senior management persons.

3.4.2 Exclusion of Voting Rights of Shareholders for Whom the Corporation Issues Guarantees

Prior to the enactment of the CLC, the controlling shareholder frequently took advantage of its dominant position in the corporation and managed to empty the corporation by having the corporation issue guarantee in favour of the controlling shareholder’s debt obligations for whatever reasons. A minority shareholder often had to swallow his or her anger and dared to say nothing when his or her interests were infringed in such a situation. When commenting

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183 In such economic activities as fund lending and borrowing, selling and purchasing, carriage of goods and contracting for processing, a form of guarantee may be issued in favor of a creditor who needs to ensure the realization of his or her rights. The forms of guarantee in China include guarantee, mortgage, pledge, lien and deposit. See Article 2 of the Guarantee Law of the People’s Republic of China which was adopted at the 14th Meeting of the Standing Committee of the 8th National Congress on June 30, 1995 and became effective as of October 1, 1995.

184 “The controlling shareholder … even forced the listed companies to issue guarantees in favour of its own borrowings or the loans borrowed by its subsidiary … In recent years, there have been frequent cases where the controlling shareholder appropriated the funds of listed companies. … The common characteristics of these companies are all that the controlling shareholder took advantage of its controlling position to breach its fiduciary duties, used the listed companies as the vehicles of making profits and financing to derive cash and to empty the listed companies. Such conduct of the controlling shareholder has materially harmed the interests of small- and median-sized shareholders.” “To take advantage of connected transactions and to appropriate the funds of listed companies are the most commonly-used means [of the controlling shareholder].” See Xudong Zhao, Editor-in-Chief, Xin gong si fa zhi du she ji (System Design of New Company Law), 1st ed. (Beijing: Law Press China, 2006) at 195.
on the Former Company Law, Guangyuan Ma, the Chinese scholar, remarked that:

“one of the deficiencies of the 1993 Company Law was that shareholders did not have legal weapons to protect their own legitimate rights and interests, and that shareholder protection was not regarded as a chief objective of the corporate legislation, not to mention the infiltrating of the spirit of shareholder protection into the whole Company Law.”\(^{185}\)

China has made great efforts in applying the theory of modern corporate governance to protect minority shareholders in the *CLC*.\(^{186}\) One example is the exclusion of the voting rights of the shareholder for whom the corporation issue a guarantee in favour of the shareholder’s debt obligations. This protection is aimed at setting out different statutory requirements for authorizing the issuance of guarantees by the corporation in favour of the debt obligations of a shareholder, *de facto* controller or a third person,\(^ {187}\) and in particular precluding the voting right of the shareholder in respect of the guarantee to be issued in favour of its debt obligations by the corporation. Article 16 of the *CLC* provides that:

“All where a company intends to ... issue a guarantee for other persons, the guarantee shall, subject to the provisions of the articles of the company, be resolved by the board of directors or the meeting of shareholders, the general meeting of shareholders. If limits are prescribed in the articles with regard to the total amount of ... the guarantee, and the amount of a single ... guarantee, the aforesaid total amount [of guarantee] or amount [of a single guarantee] may not exceed such prescribed limits.

If a company intends to issue a guarantee for a shareholder or *de facto* controller of the company, the issuance of the guarantee must be resolved by the meeting of shareholders or the general meeting of shareholders.


\(^{186}\) For the discussion about the theory of modern corporate governance, see Chapter 2, section 2.2.6.

\(^{187}\) Junhai Liu, *supra* note 82, at 105-110. A *de facto* controller means a person who is not a shareholder of the corporation, but has virtual control over corporate actions through investment in, agreement or other arrangements with the corporation. See *CLC*, Article 217.
The aforesaid shareholder in the preceding paragraph or the shareholder dominated by the *de facto* controller mentioned in the preceding paragraph may not participate in voting on the matter as mentioned in the preceding paragraph. Such matter requires the affirmative votes of more than half of the other shareholders attending the meeting and having the right to vote.”

Based on the foregoing provisions, the *CLC* explicitly reassures the capability of a corporation to issue guarantees by expressly allowing the corporation to issue guarantees in the forms of guarantee, mortgage, pledge, lien and deposit in favour of the debt obligations of its shareholders, *de facto* controller and other persons. These provisions of the *CLC* have addressed the issue regarding whether the corporation’s conduct to issue guarantees is legal and valid, which has been outstanding for many years in the practice of corporate law in China. The solution to this issue is conducive to the promotion and development of commercial activities between and among the corporation and its stakeholders.

Second, the *CLC* has identified different bodies which have the power and authority to approve the issuance of a guarantee by the corporation under different situations. For example, in case of a guarantee to be issued in favour of the debt obligations of persons other than a shareholder and *de facto* controller, the *CLC* has affirmed the contractual freedom of shareholders by allowing the power of reviewing and approving the issuance of the guarantee to be specified in the articles. In other words, the articles may freely select the board of directors or the meeting of shareholders to be the approving authority in respect of the guarantee. This arrangement has provided some room for a minority shareholder in negotiating the individualized articles.
In case of a guarantee to be issued by the corporation in favour of the debt obligations of a shareholder and *de facto* controller, the *CLC* specifies a mandatory provision that the issuance of the guarantee must be resolved by the meeting of shareholders. The word “must” used in the *CLC* means that the guarantee to be issued for a shareholder and *de facto* controller may not be resolved by any body other than the meeting of shareholders. In case of violation thereof, a minority shareholder may, according to the relevant provisions of the *CLC*, apply to the People’s Court for an order invalidating such resolutions, which will be discussed in a separate minority shareholder protection below.

Third, the *CLC* specifies the decision-making procedures relating to a guarantee to be issued by the corporation for three categories of persons.\footnote{The three categories of persons are (i) shareholders of the corporation, (ii) the *de facto* controller of the corporation, and (iii) other persons. See *CLC*, Article 16.} In case of a guarantee to be issued for persons other than a shareholder and *de facto* controller, the procedures shall be subject to the relevant provisions of the articles including but without limitation the review of the proposed guarantee, the adequate discussion thereof, the exclusion of the voting right of any interested person, vote casting and counting, announcement of voting result, formation of the meeting’s resolutions, the meeting minutes and signature, public notice.

With regard to a guarantee to be issued in favour of the debt obligations of a shareholder of the corporation, the meeting of shareholders is the body which has the power and authority to
approve the guarantee. The shareholder for whom the corporation is to issue the guarantee may not participate in the voting. Affirmative votes by a simple majority of the other shareholders present at the meeting of shareholders are necessary in order to adopt the resolutions relating to the guarantee.

With regard to a guarantee to be issued in favour of the debt obligations of a de facto controller, who may be any person other than the shareholder, director, supervisor, senior management person or other person working at the corporation, the CLC specifies mandatory provisions to regulate the conduct of the corporation in issuing a guarantee for the de facto controller, with a view to restraining the corporation from issuing a guarantee which would be unfairly prejudicial to the interests of a minority shareholder. These mandatory provisions include that the authority to review and approve the issuance of the guarantee is the meeting of shareholders, that the shareholders dominated by the de facto controller may not participate in the voting, and that affirmative votes of the other shareholders present at the meeting of shareholders are necessary in order to adopt the resolutions relating to the issuance of the guarantee.

Fourth, the CLC provides for restrictive provisions relating to the amount of a guarantee so as to protect the interests of the corporation and the shareholders as well. The CLC allows the shareholders to specify in the articles a limit on the total amount of guarantees and/or the amount of a single guarantee to be issued for other persons. This arrangement has provided
some room for a minority shareholder in negotiating a limit in the articles which he or she considers important to protect his or her rights and interests. Once such limit is prescribed in the article, it is legally binding on the corporation in issuing a guarantee or guarantees for other persons.

However, this protection still has some imperfections. One issue relates to the narrowness regarding the scope of voting right exclusion, namely that it is only limited to the issuance by a corporation of its guarantees. Regretfully, this protection is not extended to cover the exclusion of the voting rights relating to connected transactions. The CLC provides a definition about the connected relationship in Clause (4), Article 217,

“Connected relationship refers to the relationship between the controlling shareholder, de facto controller, director, supervisor, or senior management person of a company and the enterprise directly or indirectly controlled thereby, and any other relationship that may lead to the transfer of any interests of the company. However, the enterprises controlled by the State do not incur a connected relationship simply because their shares are controlled by the State.”

This definition clearly indicates that the coverage of companies having connected relationship is far broader than that of the corporation and its shareholders only.

Issuance of a guarantee by the corporation only accounts for a small part in the context of connected transactions, most of which actually relate to transactions between the corporation and the companies having connected relationship with the corporation and their mutual guaranty as well. Although China “has continuously improved its rules governing the
connected transactions under the civil and commercial legal system, such rules are, due to their private law nature, too weak to deter those ill-willed connected parties. Consequently, the conduct to empty the company has been exacerbated in practice.”189

Based on the foregoing, it is far from enough that the CLC focuses its mandatory provisions of the voting right exclusion on the issuance of a guarantee by a corporation. Instead, it is important that the exclusion of voting rights of a shareholder having connected relationship with the corporation shall be extended to cover other areas of connected transactions.

Another issue is that the CLC is silent on the voting rights of a director having connected relationship with other persons to whom the corporation is to issue a guarantee. Pursuant to Clause 1, Article 16 of the CLC, the board of directors may be the authority to review and approve a guarantee to be issued by the corporation for persons other than a shareholder and de facto controller, subject to the relevant provisions of the articles. In this regard, it is very important to further exclude the voting right of the director having connected relationship with such other persons if the issuance of the guarantee is to be resolved by the board of directors according to the articles. As it is time-consuming to make an amendment to the CLC to that effect, it would be wise to fill the gap under the CLC by specifying in the articles that, where a guarantee to be issued for other persons is to be approved by the board of directors, any director having connected relationship with such other persons shall be excluded from voting in relation to the guarantee and that the resolutions shall be made by

189 Linqing Wang and Dongwei Gu, supra note 95, at 123.
affirmative votes of a simple majority of the other directors present at the meeting.

3.4.3 Right to Request, Convene and Preside a Meeting of Shareholders

Attending a meeting of shareholders is a very important right of a minority shareholder to participate in the operation and management of the corporation. Over the past years, however, many corporations were unable to or did not legally hold regular meetings of shareholder annually or interim meetings of shareholders under emergency situations for whatever reasons, which has become a critical factor that caused the frequent infringement of the legitimate rights and interests of a minority shareholder. The CLC has applied the corporation’s theory of association\textsuperscript{190} to confer on a minority shareholder the right to request, convene and preside a meeting of shareholders.

In China, the meeting of shareholders has two concepts: one means the authority of a corporation,\textsuperscript{191} and the other refers to a meeting of shareholders.\textsuperscript{192} As the authority of the corporation, the meeting of shareholders is conferred by the CLC greater authorities.\textsuperscript{193} Judging from such authorities, the meeting of shareholders is regarded as the highest authority of a corporation.

\textsuperscript{190} For the discussion of the corporation’s theory of association, see Chapter 2, section 2.2.3.
\textsuperscript{191} The meeting of shareholders of a limited liability company shall comprise all the shareholders, and shall be the authority of the company and exercise its authorities according to the CLC. See CLC, Article 37.
\textsuperscript{192} Meetings of shareholders are classified into regular meetings and interim meetings. See CLC, Article 40, Clause 1.
\textsuperscript{193} For the discussion of the authorities of the meeting of shareholders, see section 3.3 above.
The CLC expressly specifies in Article 41 the procedures to convene and preside a meeting of shareholders, namely:

“Article 41 Where a limited liability company has set up the board of directors, a meeting of shareholders shall be convened by the board of directors and presided over by the chairperson of the board of directors. If the chairperson is unable to or fails to perform his or her duties, the meeting shall be presided over by the vice chairperson. If the vice chairperson is unable to or fails to perform his or her duties, the meeting shall be presided over by a director jointly recommended by half or more than half of the directors.

Where a limited liability company does not set up the board of directors, a meeting of shareholders shall be convened and presided over by the executive director.

If the board of directors or the executive director is unable to or fails to perform the duties of convening a meeting of shareholders, the meeting shall be convened and presided over by the board of supervisors or the supervisor of the company with no board of supervisors. If the board of supervisors or supervisor does not convene or preside over such meeting, the shareholders representing 1/10 or more of the voting rights may convene and preside over such meeting on their own initiative.”

Based on the foregoing provisions, not every single minority shareholder may exercise the right to request, convene and preside a meeting of shareholders. Obviously, the CLC has set a prescribed percentage of voting rights for a minority shareholder who intends to request, convene and preside the meeting, namely 1/10 of the voting rights. Although such pre-condition is very important to avoid any possible abuse of this right by a minority shareholder, the limit on voting rights is far from enough, and that limits should be not only set on the voting rights, but also extended to cover the percentage of equity or shares and the time length of holding such equity or share.
As an important counter-balancing measure, the CLC prescribes certain procedures before a minority shareholder may exercise its right to request, convene and preside a meeting of shareholders. Such procedures relate to the duties of the board of directors and of the board of supervisors to convene and preside a meeting of shareholders. However, the duties of the board of supervisors are somewhat imperfect. The CLC does not expressly specify whether a meeting of shareholders shall, in case that the board of directors fails to convene and preside the meeting, be convened and presided over by the chairperson of the board of supervisors and whether the meeting shall be presided over by a supervisor jointly recommended by half or more than half of the supervisors if the chairperson is unable to or fails to perform his or her duties.

One serious mistake in the CLC is the silence of the quorum for a meeting of shareholders. Generally, a corporation is a commercial organization comprising many investors. The authorities conferred on the meeting of shareholders are of fundamental importance to the operation and management of the corporation. If there are few shareholders present at a meeting of shareholders, it would not be possible to conduct brain-storming and make proper decisions at the meeting. Such a situation may become even worse if the meeting were manipulated by such few shareholders to adopt some resolutions which were unfairly prejudicial to the interests of other shareholders. As a quorum is absolutely necessary

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194 Quorum herein refers to the statutory minimal number of shares with voting rights held by shareholders present at a meeting of shareholders in person or by proxy.
whether from the perspective of corporate governance theory or from the perspective of protecting membership right of a shareholder under the corporate theory of association, it may be a wise choice to provide for detailed provisions relating to the quorum for a meeting of shareholders in the articles before further improvement is made to the CLC to that effect.

In real world, disputes about the right of a minority shareholder to request, convene and preside a meeting of shareholders often arise from or in connection with the form and substance of the meeting notice, the timing of serving the notice, the quorum, the qualification of the person who presides the meeting, etc. The case of *Tian Ge Ke Ji You Xian Gong Si v. Shanghai He Jun Chuang Ye Guan Li Zi Xun Gong Si* and *Da Peng Zheng Quan Guan Li You Xian Gong Si* is a good example.

“On September 28, 2002, *Tian Ge Ke Ji You Xian Gong Si* (‘*Tian Ge*’) brought an action before the People’s Court of Wu Hou District, Chengdu City, [Sichuan Province] against *Shanghai He Jun Chuang Ye Guan Li Zi Xun Gong Si* (‘*He Jun*’) and *Da Peng Zheng Quan Guan Li You Xian Gong Si* (‘*Da Peng*’), on the grounds that the board of directors of *Tian Ge* did not receive the formal proposal [of the interim meeting of shareholders] and that the notice of *He Jun* and *Da Peng* to convene an interim meeting of shareholders on their own initiatives contravenes the articles of the corporation. *Tian Ge* applied to the People’s Court of Wu Hou District, [Chengdu City, Sichuan Province] for an order restraining the first interim meeting of shareholders of the year 2002 which was scheduled to be convened by the defendants (i.e., *He Jun* and *Da Peng*) on their own initiatives. The court accepted the case on October 8, 2002 and made an order on the same day restraining the interim meeting of shareholders which *He Jun* and *Da Peng* decided to hold on October 12, 2002.”

As the CLC does not specify detailed provisions governing the right of a minority

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195 Xiaofeng Chen, *Gong si fa ren zhi li ji zhong xiao gu dong quan yi bao hu fa lü feng xian fang fan* (Corporate Governance and Legal Risk Control in relation to Protection of Small- and Medium-sized Shareholders), 1st ed. (Beijing: China Procuratorial Press, 2007) at 50.
shareholder to request, convene and preside a meeting of shareholders, it is important to incorporate in the articles detailed provisions on the rules of procedures and voting procedures (e.g., notice, registration, review and proper deliberation of proposals, vote casting and counting, announcement of voting result, formation of the meeting’s resolutions, the meeting minutes and signature, public notice, etc.), with a view to avoiding any possible dispute, minimizing legal proceedings and economizing judicial resources in connection therewith.

3.4.4 Duty of Diligence and Duty of Loyalty for Directors, Supervisors and Senior Management Persons

In the old planned economy system, the ownership right was not separated from the control power in a corporation, and directors, supervisors and senior management persons exercised their authorities in most cases solely for the interests of the controlling shareholder rather than those of the corporation. Besides, the Former Company Law did not provide for the fiduciary duties to be assumed by directors, supervisors and senior management persons of a corporation. Their improper conducts often gave rise to the infringement of the legitimate rights and interests of a minority shareholder.

Following the enactment of the CLC, directors, supervisors and senior management persons are expressly required to abide by the laws, administrative regulations and the articles of a

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196 Duty of diligence is also called duty of care in China.
corporation and to assume the duty of diligence and duty of loyalty towards the corporation. 197 Meanwhile, none of them may take any bribe or other illegal income by taking advantage of their authorities, or appropriate any assets or property of the corporation. 198 In this connection, the CLC has applied the theory of modern corporate governance to provide for the liability of indemnity for the breach of duty of diligence and duty of loyalty by directors, supervisors and senior management persons. 199

With regard to the duty of loyalty, the CLC has enumerated a series of prohibitive acts for directors and senior management persons. First, they may not violate the articles to, without the consent of the meeting of shareholders or the board of directors, loan the corporation’s funds to any other person or issue any guarantee for any other person by using the corporation’s property. 200 Second, they may not enter into a contract or transact with the corporation by violating the articles or without the consent of the meeting of shareholders. 201 Third, they may not seek any business opportunity, which belongs to the corporation, for themselves or any other person by taking advantage of their authorities, or operate for themselves or for any other person any like business of the corporation, without the consent of the meeting of shareholder. 202 Fourth, they may not misappropriate the corporation’s funds, 203 deposit the corporation’s funds into an account in their own name or in any other

197 CLC, Article 148, Clause 1.
198 Ibid, Clause 2.
199 For the discussion of the theory of modern corporate governance, see Chapter 2, section 2.2.6.
200 CLC, Article 149, Clause (3).
201 Ibid, Clause (4).
202 Ibid, Clause (5).
203 Ibid, Clause (1).
individual’s name,\textsuperscript{204} take commissions on the transactions between the corporation and other persons into their own pockets,\textsuperscript{205} or disclose the corporation’s secrets without permit.\textsuperscript{206}

In contrast to the duty of loyalty, the \textit{CLC} does not set out the detailed provisions relating to the duty of diligence. The statutory provision that directors, supervisors and senior management persons shall assume the duty of diligence towards the corporation thus becomes a conceptual or declaratory statement. With the fast development and continuous innovation of commercial activities in China, directors, supervisors and senior management persons have been granted more and more control power in a corporation. In this context, such a conceptual or declaratory statement in the \textit{CLC} is apparently far from enough, which could neither binds them to give due care to the affairs of the corporation and act diligently to maximize the corporation’s profits, nor protect themselves from being liable for their proper conduct based on their business judgment.

In order to ensure due compliance of the duty of diligence and duty of loyalty, the \textit{CLC} also specifies the statutory minimum requirements with regard to the qualifications of becoming directors, supervisors and senior management persons. When the practicing experiences and performances of those people adequately prove that they are not loyal or diligent citizens, the \textit{CLC} mandatorily excludes them from being engaged as directors, supervisors or senior

\textsuperscript{204} \textit{Ibid}, Clause (2).
\textsuperscript{205} \textit{Ibid}, Clause (6).
\textsuperscript{206} \textit{Ibid}, Clause (7).
management persons.

“Article 147 A person who is under any of the following circumstances may not take the post of a director, supervisor or senior management person of a company:

(1) Being without or with limited capacity of civil conduct;

(2) He or she has been sentenced to any criminal penalty due to an offence of corruption, bribery, encroachment of property, misappropriation of property or disrupting the economic order of the socialist market economy and 5 years have not passed since the completion date of the execution of the penalty; or has ever been deprived of his political rights due to any crime and 3 years have not passed since the completion date of the execution of the penalty;

(3) Where he or she was a former director, factory director or manager of a company or enterprise which was bankrupt and liquidated, and was personally liable for the bankruptcy of such company or enterprise, three years have not passed since the date of completion of the bankruptcy and liquidation of the company or enterprise;

(4) Where he or she was the legal representative of a company or enterprise, and the business license of the company or enterprise was revoked and the company or enterprise was ordered to close due to violation of the law, and he or she is personally liable therefor, three years have not passed since the date of the revocation of the business license thereof;

(5) He or she has a relatively large amount of outstanding debt which is due.”

The prohibition clauses mentioned above are a big step forward as compared to the Former Company Law. However, they appear to be little help in precluding the breach by such a person of his or her duties, since due diligence could not be based on a “reasonable person” or “reasonable director”. It is important for China to set out the criteria of the conduct of due diligence for a director, supervisor and senior management person so as to enrich the duty of diligence and impose the thresholds for these positions.
In case that a corporation elects or appoints any director or supervisor, or hires any senior management person by violating the provisions in Clause 1, Article 147 of the CLC, the election, appointment or hiring thereof shall be invalidated. In case that any director, supervisor or senior management person, during his term of office, is under any of the circumstances as mentioned in Clause 1, Article 147 of the CLC, the corporation shall dismiss him from his post.207

Under the CLC, directors, supervisors and senior management persons have an obligation to accept supervision and be cooperative in such supervision. For example, a director, supervisor or senior management person shall attend the meeting of shareholders as a non-voting delegate and answer the shareholders’ inquiries at the request of the meeting of shareholders.208 Besides, directors and senior management persons shall faithfully produce relevant information and materials to the board of supervisors or the supervisor of the limited liability company with no board of supervisors, and none of them may obstruct the board of supervisors or supervisor from exercising its (his) authorities.209

Furthermore, the CLC specifies in a very principled manner the liability of indemnity to be assumed by directors, supervisors and senior management persons, namely that, where any director, supervisor or senior management person violates laws, administrative regulations

207 CLC, Article 147, Clause 2.
208 CLC, Article 151, Clause 1.
209 Ibid, Clause 2.
or the articles during the course of performing his or her duties and such violation results in any loss of the company, he or she shall assume the liability of indemnity thereof.\textsuperscript{210} In the meantime, the \textit{CLC} provides for an exemption that a director may be exempted from liabilities if he or she is proved to have expressed his or her objection to the voting on such resolution and his or her objection was recorded in the meeting minutes.\textsuperscript{211}

The foregoing provision of assuming indemnity obligation has laid a foundation of the right of a shareholder to invoke a derivative action.\textsuperscript{212} However, in view of the fact that directors, supervisors and senior management persons could often be controlled or influenced by the controlling shareholder, the ground that any director, supervisor or senior management person violates laws, administrative regulations or the articles during the course of performing his or her duties appears to be such a general, superficial and low criterion for them to assume their obligation of indemnity. Besides, the \textit{CLC} does not have provisions on how to assume the obligations of indemnity, how to distribute the burden of proof and what obligations of indemnity includes. All such issues would easily give rise to disputes in legal proceedings.

Finally, the \textit{CLC} establishes the standard of losses based on the objective outcome rather than the subjective motive.\textsuperscript{213}

\begin{itemize}
\item \textsuperscript{210} \textit{CLC}, Article 150.
\item \textsuperscript{211} \textit{CLC}, Article 113, Clause 3.
\item \textsuperscript{212} Derivative action is one of the minority shareholder protections under the \textit{CLC} and is articulated in detail in section 3.4.10 of this Chapter.
\item \textsuperscript{213} Article 150 of the \textit{CLC} provides that, where any director, supervisor or senior management person violates laws, administrative regulations or the articles during the course of performing his or her duties and such violation results in
\end{itemize}
3.4.5 No Abuse of Shareholder Rights and Connected Relationship

In the past decade, controlling shareholders were often seen to take advantage of the inherent defects of the Majority Rule to abuse its control power in the corporation. Such abuse could be found everywhere in the forms of (i) encroachment of the corporation’s property, (ii) misappropriation of the corporation’s property, (iii) connected transactions, (iv) insider transactions, (v) absorption of the corporation’s profits, (vi) transfer of its equity or shares above the market value, and (vii) other illegal or improper conducts which were oppressive to or disregarded the interests of the corporation and of a minority shareholder. As the Former Company Law offered little protection for a minority shareholder, the abuse of the controlling shareholder has become increasingly rampant in the absence of all conventional restraints.

In view of the fact that the controlling shareholder’s abuse becomes one of the major factors which cause the legitimate interests of the corporation and a minority shareholder to be blatantly encroached, the CLC expressly sets out a series of mandatory provisions aiming at normalizing the conduct of the controlling shareholder and preventing it from abusing its right in the corporation. Clause 1, Article 20 of the CLC provides that,

“Shareholders of a company shall comply with the laws, administrative regulations and the articles, and shall exercise their shareholder rights according to law. None of them may harm the interests of the company or of other shareholders by abusing its shareholder rights, or injure the interests of any creditor of the company by any loss of the company, he or she shall assume the liability of indemnity thereof.”
abusing the company’s independent status as a legal person or the shareholder's limited liabilities.”

These provisions, which are based on the corporate theory of institutions and the corporate governance theory,\textsuperscript{214} play an important role in restraining the controlling shareholder from taking advantage of its shareholder’s rights to seek illegal or improper gains and benefits at the sacrifice of the interests of the corporation and the minority shareholders.

In practice, the controlling shareholder often abuses its control power and influence to grab the interests of the corporation and minority shareholders by way of connected transactions, which is also unfairly prejudicial to the interests of the creditors of the corporation.\textsuperscript{215} In the denouncement made by Shanghai Stock Exchange on October 29, 2004, it was stated that,

“Henan Lianhua Gourmet Power Co., Ltd. provided its funds totaling RMB1,393,335,579.85 to its controlling shareholder, Henan Lianhua Gourmet Power Group Co., Ltd. and its subsidiaries from January to June 2004. With regard to all such material connected transactions, the company (Henan Lianhua Gourmet Power Co., Ltd.) has neither gone through the process of its internal corporate review and approval procedures, nor timely performed its obligation of disclosing such information in its interim public notice.”\textsuperscript{216}

In this regard, the CLC expressly provides that the controlling shareholder may not injure the interests of the corporation by taking advantage of its connected relationship.\textsuperscript{217} Although it

\textsuperscript{214} See Chapter 2, section 2.2.2 and section 2.2.6.
\textsuperscript{215} “Since 2000, the controlling shareholders of many listed companies including “Zheng Bai Wen”, “Hou Wang”, “San Jiu Yi Yao”, “Yi An Ke Ji”, “Yin Guang Sha”, “Dong Hai Gu Fen”, “Lian Hua Wei Jing”, “De Long”, “Ke Long” have directed a series of farces of listed companies. In April 2002, 71 listed companies in both Shanghai and Shenzhen Stock Exchanges publicized the statistics of the appropriation of their funds by their controlling shareholders and connected parties. The total funds of these listed companies appropriated by their controlling shareholders and connected parties amounted to RMB29.04 billion,…, among which two listed companies have accounts receivable exceeding RMB1 billion, which are payable by their connected parties.” Guo Tai Jun An, “Da gu dong qian kuan chu mu jing xin” (Shocking Debts Payable by Majority Shareholders), published in Fu wu dao bao (Service Guide) on April 12, 2002.
\textsuperscript{217} CLC, Article 21.
is regretful that China does not codify the fiduciary duty of the controlling shareholder as the mandatory provisions of the CLC,218 significant progress has been made in the CLC as compared to the Former Company Law.

While imposing mandatory provisions on the controlling shareholder, the CLC expressly requires that the controlling shareholder and de facto controller of the corporation may not take advantage of its connected relationship to prejudice the interests of the corporation, and shall assume the liability of indemnity for any losses incurred by the corporation from their violation thereof.219 Besides, the CLC establishes the standard of losses based on the objective outcome rather than the subjective motive.220

However, similar to those provisions on the liability of indemnity for directors, the provisions for the controlling shareholder and de facto controller appear to be very general, superficial and principled in nature, and the CLC does not have provisions on how to assume the obligations of indemnity, how to distribute the burden of proof and what obligations of indemnity includes. All these outstanding issues could easily give rise to disputes in legal proceedings. Nonetheless, it is undoubtedly a significant progress in the Chinese legislation to incorporate the de facto controller in the scope of regulation in this aspect. Meanwhile,

218 “Traditional theory of corporate law believes that a shareholder is different from a director and shall not assume this duty [fiduciary duty] towards the corporation and other shareholders. However, as the controlling right has been increasingly abused and the cases in which the interests of a minority shareholder are encroached by the controlling shareholder have been continuously disclosed, the conception that the controlling shareholder shall assume the fiduciary duty [towards a minority shareholder] has been gradually accepted.” Xudong, Zhao, supra note 68, at 309.

219 Article 21 of the CLC provides that “The controlling shareholder, the de facto controller, directors, supervisors, senior management persons of a corporation may not take advantage of their connected relationship to prejudice the interests of the corporation. In violation thereof, they shall assume the liability of indemnity for any losses incurred by the corporation in relation thereto.”

220 CLC, Clause 21.
these mandatory provisions have laid down a legal basis for a minority shareholder to bring a derivative action in case that the interests of the corporation were encroached in the event that the controlling shareholder abused its rights or that the controlling shareholder and the *de facto* controller took advantage of their connected relationship.221

3.4.6 Right to Information

Right to information is a right conferred on a shareholder to have access to the corporation’s information in order to participate and make its own judgment in the decision-making process of the corporation. “It is a pre-condition that the shareholder must get to know the operations of the corporation and related information if it wishes to be involved in the decision-making of major issues of the corporation.”222

Due to the fact that the right of a minority shareholder to information was wantonly trampled by the controlling shareholder in practice, the CLC affirms the right to information, confers on a minority shareholder a right to examine relevant documents of the corporation and provides for the procedures and legal action to exercise such a right. The right to information is a reflection of the shareholder’s membership right under the corporation’s theory of association.223

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221 Derivative action is one of the minority shareholder protections under the *CLC* and is articulated in detail in section 3.4.10 of this Chapter.
222 Xudong Zhao, *supra* note 68, at 302.
223 For the discussion of the corporation’s theory of association, see Chapter 2, section 2.2.3.
First, a shareholder shall be entitled to review and copy the articles, minutes of the meetings of shareholders, resolutions of the meetings of the board of directors, resolutions of the meetings of the board of supervisors, and financial reports of the corporation. The CLC does not impose a requirement on the minimum shares held by a minority shareholder in exercising such a right. Hence, this right belongs to an individual shareholder right and may be exercised by a minority shareholder, regardless of the number of shares he or she holds in the corporation.

Second, a shareholder may also request to examine the accounting books of the corporation. Currently, the overall credit level of Chinese companies is so low that misstatements or misrepresentations frequently appear in companies’ financial reports. It would be most unlikely that a shareholder could get to know the real information through the financial reports of the corporation. Hence, “it is the most important part in the right to information that a shareholder is allowed to examine the accounting books of the corporation.”

In the case of Beijing Fei Tai Ke Engineering and Technical Services Co., Ltd. (“Fei Tai Ke Co.”), Danqing Zhu was one of the three shareholders in Fei Tai Ke Co., and brought an action before the People’s Court of Chaoyang District, Beijing in early 2006, complaining

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224 CLC, Article 34, Clause 1.
225 Ibid, Clause 2.
226 Xudong Zhao, supra note 68, at 303.
227 Xianming Zhang, the journalist of People's Court Daily reported that “this case is a case in which the court in China first affirmed the right of a shareholder to examine the original accounting books of the corporation since the promulgation of the amended Company Law, and this case will play an exemplary role in future protection of minority shareholder’s right to information.” People's Court Daily, September 11, 2006, at 5.
that (i) Fei Tai Ke Co. had made no profit distribution to Danqing Zhu for nearly 10 years by using the excuse at all times that the corporation suffered the losses or broke even in its operation; and (ii) Danqing Zhu, as a shareholder, was unable to know the business and financial conditions of the corporation or to review any financial and accounting documents of the corporation. The court made its order requesting Fei Tai Ke Co. to provide to Danqing Zhu for examination and photocopying (i) all the minutes of the meetings of the shareholders from May 29, 1996 to April 3, 2006; (ii) all the annual financial reports (including the balance sheets, the profit and loss statements, the statements of changes in financial position, the explanations of financial information, and the statements of profit distribution from 1996 to 2005; and (iii) all the accounting books from May 29, 1996 to April 3, 2006. Fei Tai Ke Co. refused to accept the order and appealed to Beijing Second Intermediate People’s Court. Finally, the appeal court upheld the order made by the court of first instance and dismissed the appeal.228

In practice, a minority shareholder sometimes doubts about the financial report of the corporation because the accounting books could hardly be sufficient to provide the true information. In some cases, real information could be obtained only when the original accounting evidence of the corporation (e.g., the original accounting vouchers and documents) is provided. However, the CLC only specifies that a shareholder may examine the accounting books of the corporation, but does not further entitle the shareholder to request the

228 Xianming Zhang, “Gu dong ‘cha zhang quan’ zhong huo zhi chi” (Shareholder “Right to Examine Accounting Books” Finally Supported), People’s Court Daily, September 11, 2006, at 5.
examination of the original accounting evidence of the corporation. Therefore, “the most disputable issue in the right to information under the CLC is whether a shareholder could examine the original accounting documents of the corporation.”

Third, the CLC sets out the detailed provisions for a minority shareholder to exercise the right to information. Based on the corporation’s theory of profitability, the corporate theory of association and the theory of corporate governance, these provisions are designed to protect the legitimate rights of a minority shareholder, and also to balance the protection of the normal business order of the corporation and the protection of the minority shareholder’s right to information and to prevent the minority shareholder from abusing his or her rights. In fact, they are a reflection of the principle of exhausting intra corporate remedies. They include as follows:

“Where a shareholder requests to examine the accounting books of the company, it shall submit to the company a written request stating its purpose. If the company has the reasonable grounds to determine that the shareholder has any improper purpose in requesting to examine the accounting books and that such examination may damage the legitimate interests of the company, it may reject the request of the shareholder, and shall, within 15 days after the shareholder submits the written request, give it a written reply which shall include an explanation. Where the company rejects the request of a shareholder to examine the accounting books, the shareholder may apply to the People’s Court for an order requesting the company to provide the accounting books for examination.”

229 Linqing Wang and Dongwei Gu, supra note 95, at 213.
230 See Chapter 2, Section 2.2.4.
231 See Chapter 2, section 2.2.3.
232 See Chapter 2, section 2.2.6.
233 The exhaustion of intra corporate remedies is also named the demand rule. See Chapter 2, section 2.2.4.
234 CLC, Article 34, Clause 2.
In order to examine the accounting books, a minority shareholder shall submit its request in writing to the corporation. Obviously, an oral request will not be acceptable by the corporation. Meanwhile, the written request must contain the purpose thereof. On receipt of the written request, the corporation may either provide the accounting books for examination or reject the request on the grounds that the minority shareholder has its improper purpose thereof and that its examination may damage the interests of the corporation. The justification of the request to examine the accounting books, therefore, becomes a key focus in having the request enforced. As the CLC does not set out detailed criteria for such justification, disputes thereof often arise and the courts have discretional power in such disputes, which makes a case more uncertain or unpredicted.

Likewise, the corporation shall reply to the minority shareholder in writing if the former rejects the request of the latter, and give its explanation in its reply. The requirements that both the request and the reply shall be made in writing are aimed at ensuring an adequate and accurate exchange of information between the minority shareholder and the corporation, and also providing convenience for both of them to submit evidence in a legal action later on. If the corporation neither provides the accounting books for examination nor replies to the minority shareholder in writing, the latter may, on expiry of the prescribed period, directly bring an action before the People’s Court on the grounds that the corporation’s action itself has demonstrated its rejection for such request.
Finally, the \textit{CLC} expressly provides for administrative penalties with regard to the off-the-book accounts kept by a corporation\textsuperscript{235} and the misrepresentation or omission of material facts in the financial reports of the corporation.\textsuperscript{236}

3.4.7 \textbf{Motion for Invalidating or Reversing Corporation’s Resolutions}\textsuperscript{237}

“Jurisprudentially, due procedures are the life of law, and no resolutions can be validated if legal form and procedure thereof are not duly complied with. Due procedures are vital to the interests of shareholder and those of a corporation.”\textsuperscript{238} In the real world, resolutions of a corporation are sometimes adopted in violation of its rules of procedures, the voting procedures as well as the laws, administrative regulations and the articles. Such resolutions are called defective resolutions in China, which are divided into two categories: the procedurally defective ones and the substantially defective ones. As defective resolutions are directly or indirectly prejudicial to the interests of a minority shareholder, it is very important that a minority shareholder be conferred a right to apply to the People’s Court for an order invalidating or reversing such resolutions. This right is, in essence, the application of the corporation’s contractual conception in the \textit{CLC}.\textsuperscript{239}

\textsuperscript{235} Any company which has violated the \textit{CLC} to establish the off-the-book accounts in addition to the legally prescribed account books shall be ordered by the treasury department of the people’s government at the county level or above to make rectifications, and shall be fined not less than RMB50,000 Yuan but not more than RMB500,000 Yuan. See \textit{CLC}, Article 202.

\textsuperscript{236} Where a company makes any misrepresentations or conceals any material facts in its financial and accounting reports submitted to the relevant departments in charge, the relevant department in charge shall impose a fine of not less than RMB30,000 Yuan but not more than RMB300,000 Yuan on the directly liable persons in charge and other directly liable persons. See \textit{CLC}, Article 203.

\textsuperscript{237} Resolutions of a corporation herein generally refer to those of the meeting of shareholders and of the board of directors. See \textit{CLC}, Article 22.

\textsuperscript{238} Xudong Zhao, \textit{supra} note 68, at 382.

\textsuperscript{239} For the discussion of the corporation’s contractual conception, see Chapter 2, section 2.2.1.
The *CLC* specifies the respective conditions for the defective resolutions to be invalidated or reversed. The resolutions which shall be invalidated are only limited to those that contravene the laws and administrative regulations.\(^{240}\) In other words, a minority shareholder may apply to the People’s Court for an order invalidating any resolutions of the corporation that contravene the laws and administrative regulations. The grounds for the resolutions to be reversed are that (i) the procedures of convening a meeting of shareholders or a meeting of the board of directors and/or the voting form at the meeting thereof contravene the laws, administrative regulations or the relevant provisions of the articles; and (ii) the resolutions are in violation of the relevant provisions of the articles.\(^{241}\) It should be stressed that any resolutions that contravene the articles does not fall within the scope of those that shall be invalidated like those that contravene the laws and administrative regulations, but those that shall be reversed.

Under the *CLC*, a scheduled period is expressly prescribed in respect of a legal action concerning the resolutions that shall be reversed, while there is no such a period for a legal action involving the resolutions that shall be invalidated. In the event that (i) the procedures of convening a meeting of shareholders or a meeting of the board of directors and/or the voting form at the meeting thereof contravene the laws, administrative regulations or the relevant provisions of the articles, or (ii) the resolutions are in violation of the relevant provisions of the articles, or (ii) the resolutions are in violation of the relevant

\(^{240}\) Any resolutions of the meeting of shareholders, the general meeting of shareholders and the board of directors of a corporation that contravene the laws and administrative regulations shall be null and void. See *CLC*, Article 22, Clause 1.

\(^{241}\) *CLC*, Article 22, Clause 2.
provisions of the articles, a shareholder may, within 60 days after the resolutions are adopted, request the People’s Court to reverse the resolutions. Any action which is to be filed after the expiry of the scheduled period will not be accepted by the People’s Court.

In a legal action filed by a shareholder relating to the defective resolutions, the People’s Court may demand the shareholder to give the corresponding security at the request of the corporation. As the right of a shareholder with regard to the defective resolutions belongs to an individual shareholder right, any shareholder may bring a legal action as the plaintiff as long as it has reasonable grounds. In such an action, the defendant is the corporation instead of the shareholder(s), director(s) or senior management person(s) who manipulate the resolutions. In order to prevent a minority shareholder from abusing its right and ensure the normal operation and business of the corporation, the corporation, as the defendant, will normally apply to the People’s Court for an order demanding the plaintiff shareholder to give security. The People’s Court will not accept the application filed by the plaintiff shareholder if the latter refuses to give the required security. However, the People’s Court itself may not demand the plaintiff shareholder to give security if the corporation does not raise its request to that effect.

The *CLC* also imposed an obligation of public notice on a corporation after the defective resolutions are adjudged to be invalidated or reversed. In view of the fact that the registration

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of change may be effected with the registration authority in relation to the defective resolutions, the corporation shall apply to the registration authority for cancelling the registration of change originally effected in relation to the defective resolution after the People’s Court declares the resolutions null and void or reversed.\textsuperscript{244} Originated from the legal effect of “public notice”, this provision is not only a reflection of an obligation of legal assistance, but also a necessity of maintaining the normal order of commercial transactions. If the corporation fails to perform this obligation, the counterparty in a transaction to which the corporation is a party may suffer actual economic losses from its decisions based on the original registration of change in respect of the defective resolutions. Under such a circumstance, the corporation shall assume its liability of indemnity in accordance with the provision of the \textit{Tort Law of the People’s Republic of China} although the CLC has no provision to that effect.

Regarding legal effect of a judgment made in relation to the defective resolutions, the defective resolutions do not have the legal effect from the beginning once they are adjudged by the People’s Court to be invalidated or reversed. Linqing Wang and Dongwei Gu held that:

\begin{quote}
\textquote{“Pursuant to the general theory of civil law, the civil juristic acts that are invalidated or reversed have no legally binding effect from the very beginning. In this regard, a judgment made by a court adjudging the company’s resolutions to be invalidated or reversed shall be retroactively applicable as of the date of the resolutions.”}\textsuperscript{245}
\end{quote}

\textsuperscript{244} \textit{Ibid}, Clause 4.
\textsuperscript{245} Linqing Wang and Dongwei Gu, supra note 95, at 132.
Though the CLC does not have express provision to that effect, it is quite obvious that a judgment made by the People’s Court is legally binding on a third party and has its retroactivity.

Based on the foregoing, it is evident that the legal action relating to the defective resolutions has its limitations. The first is the scheduled period in Clause 2 of Article 22. The limitation of action in relation to the defective resolutions that shall be reversed is 60 days only, and the People’s Court will not accept the application of a minority shareholder after the expiry of the prescribed period. In the real world, the controlling shareholder could easily take advantage of loopholes in the schedule period. For example, the controlling shareholder might intentionally conceal the adoption of the resolutions or send no notice to a minority shareholder in relation to the meeting of shareholders. Under such circumstances, it would be not possible for a minority shareholder to obtain relevant information and apply this right to protect its legitimate interests within the scheduled period. The second is the security to be given by the minority shareholder for the legal action. As a minority shareholder is generally unable to give the required security, this right appears so hopeful yet so unrealizable.

However, the positive effects of this right are also obvious because of its timeliness. Once the corporation effects the cancellation of the original registration with the registration authority in relation to the resolutions that are adjudged to be invalidated or reversed, such cancellation will prevent any further harmful act or any further losses thereof. Besides, as long as the
minority shareholder could prove that there exist the losses suffered by the corporation from the defective resolutions for which the controlling shareholder, directors, supervisors and senior management persons are adjudged to be responsible, it may bring an action against them in the name of the corporation and claim their liabilities of indemnity towards the corporation.

3.4.8 Right of a Dissenting Shareholder to Withdraw from the Corporation

A private corporation is generally prohibited to issue shares to the public for raising funds. Due to its closed nature, equity transfer by a shareholder is normally restricted by the laws, administrative regulations and the articles from both procedural and substantive perspectives. A minority shareholder often finds itself in a difficult position to withdraw from a corporation once it loses trust in other shareholders or has other justified reasons.

A corporation is incorporated to earn profits, and shareholders have reasonable expectations in investing in the corporation. Peizhong Gan, Professor of Law School, Peking University remarked that,

“It is not possible that the medium- and small-sized shareholders, when investing in a corporation controlled by the controlling shareholder, were originally motivated to participate in the management of the corporation. Instead, they did so on the basis of their trust in the controlling shareholder and the corporation, and expected the returns on their investment.”

246 Peizhong Gan, Gong si kong zhi quan de zheng dang xing shi (Proper Exercise of Control over a Corporation), 1st ed. (Beijing: Law Press China, 2006) at 80.
Protection of reasonable expectations of a shareholder embodied “the greatest value of the right to request for the shares to be repurchased under the traditional corporate law, and even today remains to demonstrate the important value of this right.”247 When the expected interests of a shareholder are infringed by other shareholders or the reasonable expectations of a dissenting shareholder come to nothing in the end, “the Company Law shall allow minority shareholders to withdraw from the corporation which has no longer been of any interest to them or been attractive to them.”248

However, in practice, the controlling shareholder often takes advantage of its dominant position in the corporation to encroach the interests of a minority shareholder.249 For example, the corporation does not make profit distribution for consecutive years when it earns profits; the controlling shareholder takes all means to absorb the corporation’s profits and empty the corporation; the corporation that shall be dissolved remains to be subsisting; etc. Consequently, a minority shareholder is left in a situation to have no exit mechanism but to suffer the damages to its interests hopelessly.

The CLC specifies the right of a dissenting shareholder requesting the corporation to

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247 Linqing Wang and Dongwei Gu, supra note 95, at 248.
248 Minan Zhang, supra note 71, at 379.
249 “The controlling shareholder … even forced the listed companies to issue guarantees in favour of its own borrowings or the loans borrowed by its subsidiary … In recent years, there have been frequent cases where the controlling shareholder appropriated the funds of listed companies. … The common characteristics of these companies are all that the controlling shareholder took advantage of its controlling position to breach its fiduciary duties, used the listed companies as the vehicles of making profits and financing to derive cash and to empty the listed companies. Such conduct of the controlling shareholder has materially harmed the interests of small- and median-sized shareholders.” “To take advantage of connected transactions and to appropriate the funds of listed companies are the most commonly-used means [of the controlling shareholder].” See Xudong Zhao, supra note 184, at 195.
repurchase its equity is an exit mechanism for a minority shareholder under specific circumstances. First, the grounds of applying this right are explicitly identified, which all relate to the reasonable expectations of a dissenting shareholder. The first ground is that the corporation has not distributed any profit to its shareholders for five consecutive years, though it has made profits for five consecutive years and meets the conditions of profit distribution as prescribed in the *CLC*.\(^{250}\) Obviously, the right of a shareholder to receive gains or returns on its investment has been infringed, and such a situation is contrary to the original intent of the dissenting shareholder to incorporate the corporation.

The second ground is the merger, division and transfer of the major assets of the corporation.\(^{251}\) Merger, division and transfer are all the major issues in the operation and management of the corporation. Merger and division will bring about material impact on the organizational structure, shareholding relationship and operational development mode of the corporation prior to the merger and division, while transfer of major assets will result in possible disputes between the shareholders arising from the development of the corporation’s business. In these connections, the right of a dissenting shareholder to withdraw from the corporation shall be protected by law in the event that such merger, division and transfer are not affected.

The third ground is that the meeting of shareholder makes the corporation continue by

\(^{250}\) *CLC*, Article 75, Clause 1(1).
\(^{251}\) *Ibid*, Clause 1(2).
adopting its resolutions to amend the articles, when the business term provided in the articles expires or any other reason for dissolution provided in the articles occurs.\textsuperscript{252} The articles is the outcome of repeated negotiations among shareholders prior to the incorporation of the corporation, and fully reflects the reasonable expectations of the shareholders. The corporation shall make its legal act in accordance with the relevant provisions of the articles when its business term expires or any other reason of dissolution provided in the articles occurs. Where the corporation’s act is contrary to the articles, the dissenting shareholder shall have the justifiable right to withdraw from the corporation, and such right shall be protected by law.

The CLC also specifies the prerequisite procedures for applying this right, which embodies the principle of exhausting intra corporate remedies.\textsuperscript{253} In fact, these procedures are based on the corporation’s theory of profitability and the theory of corporate governance.\textsuperscript{254} When any of the said grounds occurs, the dissenting shareholder may request the corporation to purchase its equity at a reasonable price.\textsuperscript{255} Then, the dissenting shareholder shall conduct adequate consultations and negotiations with the corporation about the purchase. If, within 60 days after the resolutions are adopted at the meeting of shareholders, no agreement is reached between the shareholder and the corporation on the purchase of equity, the shareholder may bring an action before the People’s Court within 90 days after the resolutions are adopted at

\begin{footnotes}
252 \textit{Ibid}, Clause 1(3).
253 The principle of exhausting intra corporate remedies is discussed in section 2.2.4 of Chapter 2.
254 The corporation’s theory of profitability is discussed in section 2.2.4 of Chapter 2, and the theory of corporate governance is discussed in section 2.2.6 of Chapter 2.
255 CLC, Article 75, Clause 1.
\end{footnotes}
the meeting of shareholders.\textsuperscript{256} This 60-day period is the period to be used for consultations and negotiations between the shareholder and the corporation about the purchase of equity and the purchase price in particular, and the shareholder may not file a lawsuit during such period. Meanwhile, the extended 30-day period after the said 60-day period is the scheduled period for the shareholder to file a lawsuit in case that no agreement is reached between the shareholder and the corporation on the purchase of equity, and any lawsuit to be filed by the dissenting shareholder after the expiry of the scheduled period will not be accepted by the People’s Court.

The purchase price is the core of the right of the dissenting shareholder to withdraw from the corporation. However, the \textit{CLC} does not specify the method about how the price is to be determined or provide for how to apportion the fees and expenses after an authoritative intermediary institution renders its assistance in determining the price on the purchase of equity. Furthermore, the \textit{CLC} does not set out relevant provisions on how to compensate the dissenting shareholder about its losses suffered in the long, long legal proceedings. All these outstanding issues in the \textit{CLC} are not interpreted in the judicial interpretations of the Supreme People’s Court of China relating to the \textit{CLC}. Hence, no established or unified principles could be followed by a court in dealing with these issues. The silence of the \textit{CLC} and the judicial interpretations on these issues would give rise to greater possibility in causing disputes and making a case more complicated and unpredicted in the legal proceedings.

\textsuperscript{256} \textit{Ibid}, Clause 2.
3.4.9 Motion for Dissolving the Corporation under Special Conditions

Dissolution of a corporation would not be necessary so long as a shareholder has the exit
mechanism to withdraw from the corporation and transfer its equity under reasonable
conditions. In the real world, a minority shareholder often encounters unfair and unjust
treatment or fraudulent situations in the operation and business of the corporation. To some
extent, motion for dissolving the corporation means the retaliatory oppression of a minority
shareholder against the controlling shareholder. It is a reflection of the corporation’s theory
of association and the theory of corporate governance.257

The motion is a too strict and costly remedy which shall be used sparingly. Although
dissolution may extricate the shareholder from the dilemma, it has tremendous side effect,
namely causing possible harms to other shareholders, employees and other stakeholders of
the corporation. Minan Zhang noted that “dissolution of the corporation ordered by a court
may not necessarily conform to the interests of minority shareholders. In this regard, the
court may select not to dissolve the corporation, but seek an alternative remedy whenever
applicable.”258 Therefore, motion for dissolving the corporation “is generally regarded as
the last remedial remedy for a shareholder in the closed nature problem. In other words, a

257 The corporation’s theory of association is discussed in section 2.2.3 of Chapter 2, and the theory of corporate governance
is discussed in section 2.2.6 of Chapter 2.
258 Minan Zhang, Xian dai ying mei dong shi fa lü di wei yan jiu (Research on Directors’ Legal Status in Modern U.K. and
judgment dissolving the corporation will be made only when the issue could not be solved by other remedies. ”

The CLC expressly specifies the grounds for this motion, the standing of a plaintiff shareholder and the prerequisite procedure of this motion. Pursuant to Article 183 of the CLC, if a corporation encounters serious difficulty in its operation and management and its continued existence will cause significant losses to the shareholders’ interests and such a situation cannot be solved through other channels, the shareholders representing ten percent or more of all shareholders’ voting rights of the corporation may request the People’s Court to dissolve the corporation.

As for the ground that a corporation encounters serious difficulty in its operation and management and its continued existence will cause significant losses to the shareholders’ interests, the Supreme People’s Court of China has set out four situations as its official interpretation in the Regulations (Part II) of the Supreme People’s Court on Certain Issues regarding the Application of the Company Law of the People’s Republic of China (the “Judicial Interpretation (II) of the CLC”)²⁶⁰, namely that,

“(i) the corporation has been unable to convene the meeting of shareholders or the general meeting of shareholders for consecutive two years or more and the corporation has experienced serious difficulty in its operation and management;


²⁶⁰ The Regulations (Part II) of the Supreme People’s Court on Certain Issues regarding the Application of the Company Law of the People’s Republic of China which was published by the Supreme People’s Court of China on May 12, 2008 and became effective as of May 19, 2008.
(ii) the votes by shareholders have not satisfied the requirements of the statutory percentage or the percentage prescribed in the articles, and no valid resolutions have been adopted by the meeting of shareholders or the general meeting of shareholders for consecutive two years or more, and the corporation has experienced serious difficulty in its operation and management;

(iii) long-lasting conflicts have existed between and among directors and such conflicts could not be settled through the meeting of shareholders or the general meeting of shareholders, and the corporation has experienced serious difficulty in its operation and management;

(iv) other serious difficulties have occurred in the operation and management, and the continuance of the corporation would cause material damages to the interests of shareholders.”

Apparently, motion for dissolution is the only way out for a minority shareholder when the corporation gets into a deadlock and the meeting of shareholder and the board of directors thereof do not function properly and even are not able to adopt the resolutions for dissolving the corporation.

In order to strictly restrict the application by a minority shareholder of this motion, Clause 2, Article 1 of the Judicial Interpretation (II) of the CLC provides that:

“the People’s Court shall not accept the motion for dissolving a corporation which is based on the grounds that the right to information and the right to request profit distribution are encroached, or that the corporation suffers losses and its assets are not sufficient to discharge its total indebtedness, and that the corporation fails to proceed with the liquidation after its enterprise legal person business license is revoked.”

261 Judicial Interpretation (II) of the CLC, Article 1, Clause 1.
To understand the rationale of this clause, it is important to note that this motion under the 
*CLC* is “the dissolution adjudged by a court.”262 There are many types of dissolution in 
China. This clause is specified to differentiate the dissolution adjudged by a court from 
dissolution from bankruptcy, administrative dissolution or other remedies. Where the right to 
information and the right to request profit distribution are encroached, a minority shareholder 
may apply the remedy under the right to information (as discussed in section 3.4.6 above) or 
request to withdraw from the corporation (as discussed in section 3.4.8 above), but may not 
apply the motion for dissolving the corporation, namely the dissolution adjudged by a court.

When the corporation suffers losses and its assets are not sufficient to discharge its total 
indebtedness, the corporation shall proceed with liquidation and dissolution in accordance 
with the relevant provisions of bankruptcy law, rather than applying this motion. Where the 
corporation fails to proceed with the liquidation after its enterprise legal person business 
license is revoked, administrative dissolution specified by Clause 4, Article 181 of the *CLC* 
will apply and the corporation shall be subject to the special liquidation procedures set out in 
Article 184 of the *CLC*.

As for the standing of a plaintiff shareholder, the *CLC* expressly requires the shareholder to 
hold ten percent or more of all shareholders’ voting rights of the corporation. In other words, 
those who hold less than ten percent of all the voting rights of the corporation are not entitled 
to file this motion. There is no requirement under the *CLC* with regard to the time length of 
holding such voting rights.

262  Xudong Zhao, *supra* note 68, at 501.
As the *CLC* does not specify who shall be the defendant in the legal proceedings, the Judicial Interpretation (II) of the *CLC* then interprets who shall be the defendant in the legal proceedings, namely that the corporation shall be named as the defendant in a legal action for dissolving the corporation.263

When a corporation gets into a deadlock in its business and operation, all contradictions are being intensified from time to time and the assets and property and particularly the company seal, accounting books and documents of the corporation may be misused, lost or destroyed at any time. It is quite natural that the plaintiff shareholder, when filing the motion for dissolving the corporation, also applies to the People’s Court for immediate preservation of property and evidence. However, in order to maintain the normal order of the corporation to the fullest possible extent and also to restrain the plaintiff shareholder from abusing its right, Article 3 of the Judicial Interpretation (II) of the *CLC* provides that the People’s Court may take such preservation measures provided that the shareholder has given security and the preservation will not prejudice the normal business of the corporation.

As the corporation is meant to close its business and proceed with liquidation after the order of dissolving the corporation is made, the Judicial Interpretation (II) of the *CLC* sets out a provision to ensure the legally binding effect of such order against the corporation, namely that the judgment made by the People’s Court of dissolving the corporation shall be legally

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263 Judicial Interpretation (II) of the *CLC*, Article 4, Clause 1.
binding on all shareholders of the corporation. However, if the motion for dissolving the corporation is dismissed by the People’s Court, any other motion to be filed by the same shareholder or any other shareholder based on the same facts and reasons will be rejected by the People’s Court in accordance with the principle of *non bis in idem*.

Dissolution is not equal to liquidation. In practice, a great number of corporations that should be liquidated after dissolution are actually not liquidated, which is unfairly prejudicial to the interests of a minority shareholder. Article 184 of the *CLC* is specially designed to solve this issue, namely that:

“Where any company is dissolved according to the provisions of Article 181 (1), (2), (4), or (5) of this Law, a liquidation group shall be formed, within fifteen days after any cause of dissolution occurs, to carry out the liquidation. The liquidation group of a limited liability company shall comprise the shareholders, while that of a joint stock limited company shall comprise the directors or any other people determined by the general meeting of shareholders. Where no liquidation group is formed within the prescribed period, the creditors may plead the People’s Court to designate relevant persons to form a liquidation group and to carry out the liquidation. The People’s Court shall accept such request and timely form a liquidation group to carry out the liquidation.”

In order to ensure that the members of the liquidation group perform their duties diligently and in good faith, the *CLC* requires the members of the liquidation group to devote

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264 Judicial Interpretation (II) of the *CLC*, Article 6, Clause 1.
265 Ibid, Clause 2.
266 Article 181(1) of the *CLC* refers to the situation where the business term specified in the articles of the corporation expires or any other cause for dissolution specified in the articles occurs.
267 Article 181(2) of the *CLC* refers to the situation where the meeting of shareholders or the general meeting of shareholders has adopted the resolutions to dissolve the corporation.
268 Article 181(4) of the *CLC* refers to the situation where the business license of the corporation is revoked by law or the corporation is ordered to be closed or de-registered by law.
269 Article 181(5) of the *CLC* refers to the situation where the People’s Court decides to dissolve the corporation in accordance the Article 183 of the *CLC*.
themselves to their duties and fulfill their obligations of liquidation according to law.\textsuperscript{270} None of the members of the liquidation group may take any bribe or any other illegal proceeds by taking advantage of his or her position, nor may he or she misappropriate any of the properties of the corporation.\textsuperscript{271} If any of the members of the liquidation group causes any loss to the corporation or any creditor intentionally or due to gross negligence, he or she shall assume the liability of indemnity.\textsuperscript{272}

The \textit{CLC} specifies the prerequisite procedure for this motion, which embodies the principle of exhausting intra corporate remedies. Under the \textit{CLC}, a minority shareholder shall, when filing the motion for dissolving the corporation, prove to the court that the complaining issue could not be settled through other channels. However, the procedure is simply worded to be “such a situation cannot be solved through other channels”\textsuperscript{273}. The \textit{CLC} neither specifies what such other channels refer to, nor provides for the time limit within which the consultations should be conducted through normal channels. Puzzled by such principled procedure, the minority shareholder does not know what course to take, and would be easily driven to pursue this remedy in a blind, subjective and ineffective manner. Meanwhile, the court has greater discretion in this aspect, which would make the case uncertain and unpredicted.

\textsuperscript{270} \textit{CLC}, Article 190, Clause 1.  
\textsuperscript{271} \textit{Ibid}, Clause 2.  
\textsuperscript{272} \textit{Ibid}, Clause 3.  
\textsuperscript{273} \textit{Ibid}, Article 183.
3.4.10 Shareholder’s Derivative Action

“Shareholder’s derivative action refers to an action which a shareholder being entitled to act for other shareholders brings in place of the corporation to claim compensation towards the corporation by any wrongdoer (dominating shareholder, director, supervisor, etc.) in the event that the wrongdoing of such person has caused damages of the corporation and the latter is reluctant to claim compensation against such person.”

Based on the theory of separate legal person, a corporation has its legal personality capable of independently enjoying its civil rights and assuming its civil obligations. It is out of question that a corporation, as a separate legal person, shall be entitled to bring an action when its interests are infringed by its internal persons or a third party. “By strict logic of law, only the corporation can be entitled to such a right, and any other person including its shareholders shall not be entitled to file a lawsuit in respect of the damages of the corporation.”

*Foss v. Harbottle* is a well-known case in this aspect. However, the Majority Rule established by this case has its inherent defects which the controlling shareholder, directors and supervisors often take advantage of to harm the interests of the corporation and other shareholders.

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275 Linqing Wang and Dongwei Gu, *supra* note 95 at 413.

276 *Foss v. Harbottle*, (1843) 2 Hare 461.
“Shareholder’s derivative action is a breakthrough towards the independent personality of a corporation,” and has its great significance in “ensuring the performance of the corporation’s obligations, supervising the conduct of directors or other persons to engage in activities on behalf of the corporation and rectifying any internal conduct of the corporation which is in violation of the articles and the by-laws.” CIFCO case has played an important role in the implementation of the shareholder’s derivation action under the CLC.

In China, any shareholder of a limited liability company may have the standing of a plaintiff shareholder in a derivative action regardless of the number of equity he or she holds in the corporation and the time length within which it holds such shares. Obviously, the right to bring a derivative action is an individual shareholder right. In other words, a minority shareholder of a private corporation need not unite with other minority shareholders when it intends to file a derivative suit.

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277 Linqing Wang and Dongwei Gu, supra note 95, at 417.
278 Minan Zhang and Chuanwei Zuo, supra note 47, at 172.
279 Sichuan Hongda Co., Ltd. (“Hongda Co.”) and Sichuan Hongda Group Co., Ltd. (“Hongda Group”) jointly held 46.9% of the shares of China CIFCO Futures Co., Ltd. (“CIFCO”) and became the controlling shareholder thereof. The Chairperson of Hongda Co. and Hongda Group was appointed to be a director of CIFCO, and the Chairperson of CIFCO also acted as the Vice Chairperson of Hongda Group. Suzhou New Development Co., Ltd. and Yankuang Group Corporation Limited are two minority shareholders of CIFCO. From July 2003 to June 2004, the controlling shareholder took advantage of the connected relationship to appropriate the funds of CIFCO amounting to RMB164 million by way of borrowings and transfer of claims. None of such transactions between CIFCO and the controlling shareholder were approved by the meeting of shareholders or board of directors of CIFCO. This issue was disclosed at the annual examination of CIFCO given by the securities regulatory authority in June 2004. In the absence of any action taken by CIFCO, the two minority shareholders had to file an action against Hongda Co. and Hongda Group and also named CIFCO as the third party in the action. On December 8, 2005, Beijing Higher People’s Court made its judgment ordering that Hongda Co., and Hongda Group repay the appropriated funds of RMB164 million and pay the interest accrued thereon to CIFCO. Beijing Higher People’s Court Makes Judgment in Favour of Minority Shareholders in “Shareholder’s Representative Action” Involving the Largest Amount in Question in China, online: www.sohu.com <http://business.sohu.com/20051213/n240952238.shtml>; Xiaofeng Chen, supra note 195, at 197; Beijing Evening News, July 25, 2007, at 17.
280 CLC, Article 152, Clause 1. A minority shareholder in a joint stock limited company may not have the standing of a plaintiff shareholder unless it satisfies the requirements on the minimum shares it holds in the company and the time length of holding such shares. According to Clause 1, Article 152 of the CLC, a plaintiff shareholder or shareholders in the derivation action must individually or aggregately hold 1% or more of the total shares of the corporation for consecutively 180 days or more.
The CLC provides for a wide scope of defendants in a derivative action. According to the CLC, defendants may include the controlling shareholder, de facto controller, directors, supervisors, senior management persons and other persons.

The CLC specifies four categories of grounds for invoking the derivative action. First, the controlling shareholder, directors, supervisors or senior management persons of the corporation damage the interests of the corporation by taking advantage of their connected relationship.\(^{281}\) Second, the corporation suffers material losses as a result of the resolutions of the board of directors which violate the law, administrative regulations or the articles, the resolutions of the meeting of shareholders, and directors are held responsible for such resolutions.\(^{282}\) Third, directors, supervisors or senior management persons violate the laws, administrative regulations or the articles during the course of performing their duties and such violation results in any loss of the corporation.\(^{283}\) Fourth, the corporation suffers any losses in the event that its legitimate rights and interests are infringed by other persons.\(^{284}\)

In addition to the grounds mentioned above, the CLC also sets out the prerequisite procedures for a derivative action so as to reflect the principle of exhausting intra corporate remedies.\(^{285}\)

“A derivative action brought by a minority shareholder without any restriction will be

\(^{281}\) CLC, Article 21.
\(^{282}\) CLC, Article 113.
\(^{283}\) CLC, Article 150.
\(^{284}\) CLC, Article 152, Clause 3.
\(^{285}\) The principle of exhausting intra corporate remedies is discussed in section 2.2.4 of Chapter 2.
harmful to the fundamental principle of corporate governance.” 286 If the action is aimed at “only being favourable to the plaintiff …, but not rectifying the wrongdoing of the corporation, it could be easily abused, including ‘strike suits’ or ‘blackmail by litigation’” 287. Therefore, it is very important to impose the prerequisite procedures in a derivative action.

Where directors or senior management persons of a corporation violate the laws, administrative regulations or the articles during the course of performing their duties and such violation results in any loss of the corporation, a minority shareholder shall conduct adequate communications with the board of supervisors or the supervisor of a corporation with no board of supervisors, produce relevant information in writing and strive to have the board of supervisors or the supervisor seek judicial remedy.

Where supervisors of a corporation violate the laws, administrative regulations or the articles during the course of performing their duties and such violation results in any loss of the corporation, a minority shareholder shall conduct adequate communications with the board of directors or the executive director of a corporation with no board of directors, produce relevant information in writing and strive to have the board of directors or the executive director seek judicial remedy.


287 Ibid.
The outcome of the prerequisite procedures includes any of the followings: (i) the board of supervisors or the supervisor refuses to file a lawsuit after receiving the written request from the minority shareholder(s); (ii) the board of directors or the executive director refuses to file a lawsuit after receiving the written request from the minority shareholder(s); (iii) the board of supervisors or the supervisor fails to file a lawsuit within 30 days after receiving the written request from the minority shareholder(s); or (iv) the board of directors or the executive director fails to file a lawsuit within 30 days after receiving the written request from the minority shareholder(s).288

There is an exception to the prerequisite procedures mentioned above. According to Clause 2, Article 152 of the CLC, if in case of an emergency, the failure to file a lawsuit immediately will cause irrevocable damages to the interests of the corporation, a minority shareholder shall be entitled to directly file a lawsuit in the People’s Court in its own name for the interests of the corporation.

The CLC differentiates a derivative action from a shareholder’s direct action.289 Where any director or senior manager damages the interests of a minority shareholder by violating any law, administrative regulation or the articles, the shareholder shall file a lawsuit directly in

288 CLC, Article 152, Clause 2.
289 “A shareholder’s direct action refers to an action brought by a shareholder for its own interests against the corporation or other wrongdoers relating to a tort arising from their act or omission.” Guoping Zhang, “Chu yi wo guo gu dong su song zhi du de que yu shi” (2002) 11 Nanjing Social Science.
the People’s Court in its own name,290 and may not bring a derivative action in the name of the corporation.

However, the CLC does not specify the status of the corporation in a derivative action, whether the third party with or without independent right of claim, defendant or other capacity. “Hot debate arises among scholars.”291 In general, there are two different views. Some scholars suggest that the corporation should be a nominal party defendant that is actually the real party plaintiff in a derivative action, and others believe that the corporation should be named as the third party without independent right of claim.292

In view of the fact that the corporation is in the best position to know its own operation and management and possesses adequate information required for the legal proceedings of a derivative action, the silence of the status of the corporation in the CLC has caused the judicial practice to be in a state of perplexity, confusion, or bewilderment, which consequently weakens the practical protection of a minority shareholder in a derivative action. In this connection, it necessary to make more efforts in providing convenience for an action in which the interests of a minority shareholder are unfairly prejudiced. For example, it will be of practical significance for a minority shareholder to lower the legal cost in a derivative action.

290 CLC, Article 153.
291 Linqing Wang and Dongwei Gu, supra note 95, at 417.
292 Ibid.
A minority shareholder faces certain legal risks when seeking protection of its legitimate rights and interests by way of a derivative action. The first issue is the high litigation cost. In the *CIFCO* case mentioned above, “the litigation fee was as high as RMB830,000”\(^{293}\) when the minority shareholders brought the derivative action. “If they had not been financially strong, the two plaintiff shareholders could not have afforded this action at all.”\(^{294}\)

The second is the issue about asymmetric information. A minority shareholder normally has very limited information about the operation and business of the corporation, which causes much difficulty in assuming the burden of proof and places the minority shareholder in a risk of losing the case. Fuqing Guo, the Chinese scholar, once noted that:

> “As the controlling shareholder has power control over the corporation, it not only manipulates the major decisions, operation and activities of the corporation, but also controls the manpower, funds, property, production, material supply and product marketing. Besides, there is poor transparency in the operation of the corporation. In these connections, serious asymmetric information exists between the controlling shareholder and a minority shareholder.”\(^{295}\)

### 3.5 Summary

This chapter presents a full account of ten minority shareholder protections in China. As the rights and interests of a minority shareholder could be easily infringed by the controlling shareholder of the corporation for various reasons, it is necessary to provide remedies and

\(^{293}\) Xiaofeng Chen, *supra* note 195, at 200.
\(^{294}\) *Ibid.*

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offer protection to a minority shareholder in both corporate legislation and judicial practice.

Based on many corporate theories, the CLC sets out a series of innovative systems and improves the protection towards minority shareholders. From the discussion of these protections, it is seen that China has taken a significant step in intensifying the minority shareholder protection and made great breakthroughs in both institutional designing and judicial practice in relation to these protections. However, there are still many outstanding issues in the CLC. Continuous improvement and reform is anticipated in the coming years to build up a sound corporate legal framework in China.
CHAPTER 4

MINORITY SHAREHOLDER REMEDIES
UNDER CANADIAN CORPORATE LAW

4.1 Introduction

As the comparative study in this thesis focuses on the minority shareholder protections in China and Canada, it is not possible to commence such a study by only understanding the minority shareholder protections in China. Hence, this chapter examines Canadian minority shareholder remedies under the Canadian Business Corporation Act (the CBCA),296 which also forms part of the second stage of a comparative study,297 and lays a foundation for a comparative study in the following chapter.

This section briefly introduces the historical development of corporate legislation in Canada. The first general statute in Canada was “passed in 1849 and was called the Act to authorize the formation of Joint Stock Companies in Lower-Canada for the construction of macadamized roads, and of bridges and other works of like nature.”298 In 1860, another general statute was adopted, “where the method of incorporation was a judicial decree

296 CBCA, R.S.C. 1985, c. C-44.
297 See Chapter 2, section 2.1.3.
obtained by petitioning the Court.” A third statute was passed in 1864, “which provided for another method of incorporation: letters patent issued under the seal of the Governor in Council.”

The Canada’s Constitution Act, 1867 gave the power of incorporation to both the federal and provincial governments. In 1869, the federal government of Canada adopted the first general incorporation Act. Subsequent incorporation legislation was adopted by various provinces.

In 1970, the Ontario Business Corporations Act (the OBCA) was adopted and started a “new era in corporate legislation” in Canada. In 1975, the federal government enacted the Canada Business Corporations Act (the CBCA), which “largely mirrored changes and concepts that had already been adopted in the OBCA.” Thereafter, the CBCA became “the template for many of the subsequent provincial business corporations Acts.” From 1985 to 2007, the federal government had made continuous amendments to the CBCA, with the aim of making it a modern framework legislation that ensures business promotion and good corporate governance, encourages investment, innovation and risk-taking and allows

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300 Ibid.
301 The Constitution Act, 30 & 31 Victoria, c. 3. (U.K.).
302 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 56-57.
303 OBCA, R.S.O. 1970, c. 53.
304 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 57.
305 CBCA, R.S.C. 1985, c. C-44.
306 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 57.
307 Ibid.
corporations to profit from rapid technological progress.308

Meanwhile, it is important to note that Québec adopts civil law system and has its own corporate legislation, the Companies Act309 which is based on the civil law system.

4.2 Minority Shareholder Remedies in Canada

Canada attaches great importance to the protection of minority shareholders and codifies minority shareholder remedies as the mandatory provisions in the corporate statutes. Early in 1960, British Columbia adopted the oppression remedy,310 which started the pioneering stage of protecting minority shareholders in Canada.311 When the OBCA was enacted, minority shareholder protection was greatly improved in many important aspects by means of “codifying] the duties of directors and officers, regulat[ing] insider trading in the corporation’s securities and permit[ting] derivative action.”312

The protection of minority shareholder rights went even further under the CBCA at the time of its adoption. For example, the federal oppression remedy has not only inherited the relevant provisions of the U.K. Companies Act and the Companies Act of British Columbia,

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308 Paul Martel, supra note 299, at 2-6.
309 Companies Act, R.S.Q., c. C-38.
310 The oppression remedy is a minority shareholder remedy under the CBCA. See section 4.2.1.
312 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 57.
but also made two breakthroughs: one is to extend the scope of this remedy from shareholders to security holders, creditors, directors and officers; and the other is to “introduce a third category of conduct that could give rise to a remedy – namely, conduct that unfairly disregarded the interests of the complainant.”  313

Furthermore, substantial amendments made to the *CBCA* in 2001 enhanced the minority shareholder protection in many respects. 314 As minority shareholder remedies are “primarily statutory,”315 this section examines twelve remedies available to a minority shareholder under the *CBCA*.

4.2.1 Oppression Remedy

“It is often stated that, although statutory in origin, the oppression remedy is fundamentally equitable in nature. The discretion enjoyed by the courts with respect to providing a remedy in a form specifically addressed to the needs of the case is clearly comparable to the discretion historically enjoyed by courts of equity.” 316

The oppression remedy for the most part reflects the corporation’s contractual conception and the corporation’s theory of profitability discussed in sections 2.2.1 and 2.2.4 of Chapter 2. 317

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313 David S. Morritt, Sonia L. Bjorkquist and Allan D. Coleman, *supra* note 311, at 1-3.
314 “In 2001, the federal government adopted substantial amendments to the CBCA. … The changes largely benefited publicly held corporations, but protection of minority shareholder interests was also enhanced in important respects.” Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, *supra* note 12, at 58.
316 Kevin P. McGuinness, *supra* note 5, at 1252-1253.
317 “Our study suggests that Canadian court decisions on the oppression remedy have for the most part reflected the shareholder primacy and contractual nexus theories of corporate law. The judiciary’s interpretation of the remedy legitimizes the view that the goal of corporate activity is profit maximization for the benefit of shareholders.” Stephanie
It is also based on the corporation’s theory of association and the theory of corporate governance,\textsuperscript{318} and is a reflection of equity and justice of law.

Under the oppression remedy, there are a variety of applicants for this remedy, including a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security\textsuperscript{319} of a corporation or any of its affiliates,\textsuperscript{320} a director or an officer or a former director or officer of a corporation or any of its affiliates,\textsuperscript{321} the Director,\textsuperscript{322} and any other person who, in the discretion of a court, is a proper person to make an application under this remedy.\textsuperscript{323} Obviously, a minority shareholder falls within the scope of applicants mentioned above and has the standing to invoke this remedy.

The \textit{CBCA} specifies the grounds for applying this remedy, namely that the result or manner of any of the three categories of conduct in respect of a corporation or any of its affiliates is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder, creditor, director or officer.\textsuperscript{324} The three categories of conduct refer to (a) any act or omission of the corporation or any of its affiliates; (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted; and (c) the

\textsuperscript{318} See Chapter 2, section 2.2.3 and section 2.2.6.
\textsuperscript{319} “Security” means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation. See \textit{CBCA}, s. 2(1).
\textsuperscript{320} \textit{CBCA}, s. 238(a).
\textsuperscript{321} \textit{CBCA}, s. 238(b).
\textsuperscript{322} \textit{CBCA}, s. 238(c)
\textsuperscript{323} \textit{CBCA}, s. 238(d).
\textsuperscript{324} \textit{CBCA}, s. 241(2).
powers of the directors of the corporation or any of its affiliates are or have been exercised.325

When a complainant brings an action relating to the oppression remedy, the court will first examine the grounds. Once the grounds are satisfied, the court will then make an order rectifying the oppressive conduct complained of, depending on the merits of a particular case.

A court has a broad discretion in making an order under this remedy. Section 241(3) of the CBCA empowers a court to make fourteen types of relief.326

The relief may be divided into four categories: first, orders “assisting the complainant in self-help within the existing power structure and ground rules”327 (e.g., an order restraining the conduct complained of; an order appointing a receiver or receiver-manager; an order requiring a corporation to produce financial statements; an order directing rectification of the registers or other records of a corporation; an order directing an investigation; an order requiring the trial of any issue); second, orders “bailing out either the complainant or the corporation from a particular situation, but leaving intact the intra-corporate power structure and ground rule”328 (e.g., an order directing a corporation or any other person to purchase security of a security holder and pay the consideration thereof; an order varying or setting aside a transaction or contract and making compensation); third, orders “re-aligning the power structure established in the corporate constitution”329 (e.g., an order directing an issue or exchange of securities; an order appointing directors); fourth, orders “changing the

325 Ibid.
326 CBCA, s. 241(3).
327 Bruce Welling, supra note 315, at 551.
328 Ibid.
329 Ibid.
grounds rules themselves”\textsuperscript{330} (e.g., an order directing the amendment to the articles or creation of or amendment to the unanimous shareholder agreement; an order liquidating and dissolving the corporation).

Furthermore, the \textit{CBCA} not only puts the wording “including, without limiting the generality of the foregoing”\textsuperscript{331} before the fourteen types of relief mentioned above, but also empowers a court to “make any interim or final order it thinks fit.”\textsuperscript{332} This clearly indicates that the fourteen types of relief set out in section 241(3) of the \textit{CBCA} are not exhaustive, and that a court may make a novel order depending on a particular case.

Based on the foregoing, the oppression remedy has two prominent features: one is its wide scope of application and the other is the broad discretion of a court. In view of the fact that these two features might lead to possible abuse of this remedy, the \textit{CBCA} sets out meticulous check and balance measures in the following three respects so as to achieve the balanced protection of minority shareholder.

First, this remedy precludes the “intention or subjective nature of the oppressors whose behavior brought about the consequences”\textsuperscript{333}. Second, the application by a minority shareholder shall be subject to examination of a court. If the court determines that the grounds for this remedy are not satisfied, the court will dismiss the application. Third, the

\textsuperscript{330} Ibid.
\textsuperscript{331} \textit{CBCA}, s. 241(3).
\textsuperscript{332} Ibid.
\textsuperscript{333} Bruce Welling, supra note 315, at 537.
broad discretion of a court will be restricted in two ways: one is that the court shall apply the
general principles of equity, and the other is that the court shall make an order to rectify
the matters complained of. In *Naneff v. Con-Crete Holdings Ltd.*, the Court held that
“Broad as that discretion is, however, it can only be exercised for a very specific purpose;
that is, to rectify the oppression.” In *82099 Ontario Inc. v. Harold E. Ballard Ltd.*, Farley J. held that “The job for the court is to even up the balance, not tip it in favour of the hurt party.”

It is important to note that case law plays a very important role in common law countries.
Kevin P. McGuinness noted that:

> “Where an extensive body of fact specific case law evolves in relation to a remedy (particularly a statutory remedy), it is common for the courts to seek to reformulate that body of case law by reference to some unifying principle.”

Reasonable expectations of a complainant have constituted a very important principle of case
law in granting an oppression remedy. As Kevin noted, “[t]he prevailing view in Canadian case law is that the oppression remedy is available where the reasonable expectations of a
director, shareholder, security holder, officer, or other complainant have been defeated.”

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334 Kevin P. McGuinness, *supra* note 5, at 1252-1253.
335 “The stated purpose of the grant of discretion is to allow the court to make an order ‘to rectify the matters complained of’”. Bruce Welling, *supra* note 315, at 550.
337 *Naneff v. Con-Crete Holdings Ltd.*, *ibid*, para. 22 at 10.
Stephanie and Poonam observed that “[a]n important result of the judicial application of the oppression remedy has been the development of a test of the reasonable expectations of shareholders, which must be taken into account by the management and other shareholders.”

In *BCE Inc. v. 1976 Debentureholders*, the Supreme Court of Canada established two principles in applying the reasonable expectations to grant an oppression remedy, namely that (i) the evidence supports the reasonable expectation asserted by the claimant; and (2) the evidence establishes that the reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest.

In applying the first principle, the Supreme Court of Canada set out useful factors from the case law in determining whether a reasonable expectation exists, which include: “general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicts between corporate stakeholders.”

As for the second principle, the Supreme Court of Canada held that “the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences

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344 *BCE Inc. v. 1976 Debentureholders*, *ibid*, para. 68 at 24-25.
345 *BCE Inc. v. 1976 Debentureholders*, *ibid*, para. 72 at 25.
under s. 241 of the *CBCA.*” 346 In order to better understand this principle, the Supreme Court of Canada further held that,

“Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi.*” 347

Under the oppression remedy, two types of relief relate to the orders directing the corporation to purchase securities of a security holder, 348 and to pay to the security holder any part of the moneys that the security holder paid for securities. 349 However, as such relief could possibly have material and adverse impact on the corporation under certain special circumstances, perfect arrangements have been made by the legislature to include an exemption in the *CBCA* of such payment obligations for the corporation under two situations. Specifically speaking, a corporation shall not make a payment to a shareholder under the said orders if either the corporation is or would after that payment be unable to pay its liabilities as they become due, or the realizable value of the corporation’s assets would thereby be less than the aggregate of its liabilities. 350

Due to the inherent defects of the Majority Rule, it is very easy for the controlling shareholder to disguise the oppressive conduct by the so-called approval of the shareholders.

346 *BCE Inc. v. 1976 Debentureholders*, *ibid*, para. 89 at 28.
347 *BCE Inc. v. 1976 Debentureholders*, *ibid*, para. 89 at 28.
348 *CBCA*, s. 241(3)(f).
349 *CBCA*, s. 241(3)(g).
350 *CBCA*, s. 241(6).
In order to solve this issue, the *CBCA* sets out a particular provision to the effect that an application or an action brought or intervened under the oppression remedy shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order under the oppression remedy.\[^{351}\]

By taking into account the particular status and conditions of a minority shareholder, the *CBCA* sets out its humanitarian provision, which solves the financial predicament of a minority shareholder in bringing an action and provides much convenience for it to invoke the oppression remedy. For example, a complainant is not required to give security for costs in any application made or action brought or intervened under the oppression remedy.\[^{352}\]

Besides, the court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, although the complainant may be held accountable for such interim costs on final disposition of the application or action.\[^{353}\]

The oppression remedy has turned a new and successful page in the protection of minority shareholders in Canada, which has far-reaching effects and great significance. S.M. Beck noted that:

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\[^{351}\] *CBCA*, s. 242(1).
\[^{352}\] *CBCA*, s. 242(3).
\[^{353}\] *CBCA*, s. 242(4).
“The oppression remedy,…. is, beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world. It is unprecedented in its scope. It is being applied to a wide variety of situations in both public and private companies, and, most importantly, the courts have shown a willingness to carry out the mandate that the legislatures have given them to fashion remedies for shareholders who complain that they have been dealt with unfairly.”  

In commending the role of the oppression remedy, David S. Morritt, Sonia L. Bjorkquist and Allan D. Coleman spoke highly of the following:

“……, the oppression remedy statutory provisions have emerged as leading mechanisms for the control and regulation of conduct relating to the business or affairs of corporations. The provisions have achieved great significance in today’s corporate landscape, particularly in light of the general reluctance demonstrated by courts and legislators to disrupt the traditional roles and responsibilities of the various participants in the life of a corporation in other areas. As such, the oppression remedy serves as an important reallocation of power, from those who would otherwise be free to engage in conduct detrimental to others to those who may be victims of that conduct.”

However, it is also important to note the empirical study by Stephanie Ben-Ishai and Poonam Puri on Canadian judicial treatment of the oppression remedy. Their study concluded, namely that (i) “the Canadian judiciary has primarily used the oppression remedy for the benefit of minority shareholders in closely held corporations, and that the circumstances in which relief may be obtained have not been broadened considerably”; (ii) “the Canadian judiciary has used the oppression remedy as a method of monitoring corporate affairs, but has done so in a

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355 David S. Morritt, Sonia L. Bjorkquist and Allan D. Coleman, supra note 311, at 1-1 and 1-2.
356 Stephanie Ben-Ishai and Poonam Puri, supra note 317, at 81.
cautious and limited way”; 357 (iii) “[n]on-minority shareholders have been less likely to commence oppression actions, and their actions have been successful less often than those brought by minority shareholders”; 358 and (iv) “the oppression remedy has seen limited use by non-shareholder creditors and by minority shareholders in widely held corporations.” 359

The oppression remedy is not exclusive. While a minority shareholder is seeking this remedy, it may also resort to other remedies based on some of the same facts of a case, e.g., derivative action, 360 dissolution of the corporation, 361 etc.

Despite the open-end nature of the broadly-worded oppression remedy, it is not possible to apply the remedy to solve all problems arising from the minority shareholder protection. As other remedies are equally necessary and important, the following section will articulate another remedy, i.e., derivative action.

4.2.2 Derivative Action

Prior to the adoption of derivation action, two major principles of corporate law, namely the corporate personality 362 and the Majority Rule, 363 were the powerful weapons often used by the controlling shareholder to prevent a minority shareholder from invoking the legal process in a situation where the management of the corporation shuts their eyes to the infringement

357 Ibid, at 107.
358 Ibid.
359 Ibid.
360 See section 4.2.2 of this chapter.
361 See section 4.2.9 of this chapter.
362 See Chapter 2, section 2.2.5.
363 See footnote 3 in Chapter 1.
on the interests of the corporation. Although case law in common law countries had some
rules relating to derivative action, they were very limited in scope and procedures.

“When the \textit{CBCA} came into being in 1975, one of the guiding principles underlying it was to
enhance the degree of shareholder control over corporations.”\textsuperscript{364} Canada has taken a
clear-cut stand in codifying the derivative action as the mandatory provisions in the \textit{CBCA}.
“The statutory derivative action provisions replace the common law rules governing
derivative actions, both as to availability of such relief and the procedure to be followed.”\textsuperscript{365}
Specifically, they have not only “expanded the availability of derivative action relief,
compared to its availability in equity,”\textsuperscript{366} but also “introduced more precise procedural and
substantive requirements that must be satisfied before such relief will become available.”\textsuperscript{367}
However, these provisions are not to deny, overturn or subrogate the corporation’s theory of
legal person,\textsuperscript{368} but are the beneficial supplement to that theory.

Pursuant to section 239(1) of the \textit{CBCA}, a derivative action refers to an action where a
complainant applies to a court for leave to bring an action in the name and on behalf of a
corporation or any of its subsidiaries, or to intervene in an action to which any such body
corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on
behalf of the body corporate. Derivative action is also commonly known as “statutory

\textsuperscript{364} Kevin P. McGuinness, \textit{supra} note 5, at 1340.
\textsuperscript{365} Kevin P. McGuinness, \textit{supra} note 5, at 1342.
\textsuperscript{366} Kevin P. McGuinness, \textit{supra} note 5, at 1340.
\textsuperscript{367} \textit{Ibid}.
\textsuperscript{368} The corporation’s theory of legal person is discussed in section 2.2.5 of Chapter 2.
Like the oppression remedy, there are a variety of the persons who have the standing in invoking a derivative action. The complainants include 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, a director or an officer or a former director or officer of a corporation or any of its affiliates, the Director, and any other person who, in the discretion of a court, is a proper person to make an application under this remedy. Obviously, a minority shareholder falls within the scope of applicants mentioned above and has the standing to invoke this remedy.

The CBCA specifies three conditions precedent for applying a derivation action. First, the complainant has given notice to the directors of the corporation or its subsidiary of the former’s intention to apply to the court under section 239(1) of the CBCA not less than fourteen days before bringing the application, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action. Second, the complainant is acting in good faith. Third, it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or

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369 Bruce Welling, supra note 315, at 509-528.
370 “Security” means a share of any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or debt obligation. See CBCA, s. 2(1).
371 CBCA, s. 238(a).
372 CBCA, s. 238(b).
373 CBCA, s. 238(c).
374 CBCA, s. 238(d).
375 CBCA, s. 239(2)(a).
376 CBCA, s. 239(2)(b).
discontinued. These three conditions are cumulative, and none of them can be dispensed with.

The conditions mentioned above indicate express requirements in availability and procedure of a derivative action. The first condition reflects the concept of exhausting intra corporate remedies, with a view to advocating the pursuit of a solution first within the corporation so as to economize judicial resources and to prevent a minority shareholder from abusing its right.

The second condition is set with respect to a complainant. Obviously, the complainant has to assume the burden of proof. One underlying principle established by the courts is that the action to be brought should be in the interest of the corporation. In *Winfield v. Daniel*, the court stated that,

“This good faith is said to exist where there is *prima facie* evidence that the complainant is acting with proper motives such as a reasonable belief in the merits of the claim. Good faith is a question of fact to be determined on the facts of each case. The typical approach by the Courts is not to attempt to define good faith but rather to analyse each set of facts for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met.”

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377 CBCA, s. 239(2)(c).
378 See Chapter 2, section 2.2.4.
382 *Winfield v. Daniel*, ibid, at para. 16.
Kevin McGuinness suggested that “[a] better approach would be to presume good faith, unless those who contest the institution of the derivative proceeding can establish reason to believe that the claim is not being pursued in good faith.”\(^{383}\) However, the approach suggested by Kevin obviously indicates that the burden of proof will ultimately be shifted to the defendant. Nonetheless, the court has great discretion on this point before “acting in good faith” is clearly defined by legislation.

The third condition involves the evidence submitted by the complainant. There are two important factors which should be taken into account. First, the complainant must make it clear that the claims are those of the corporation or its subsidiary rather than those of its own. If the derivative action is to be brought by a minority shareholder not for the interests of the corporation or its subsidiary, but for its own interests, the court will not allow the minority shareholder to invoke the derivative action. Second, in view of the difficulty of a minority shareholder in the burden of proof due to its weak position and asymmetric information, the \textit{CBCA} allows it to produce \textit{prima facie} evidence that the action is brought, prosecuted, defended or discontinued for the interests of the corporation or its subsidiary. Therefore, the burden of proof for the complainant is relatively lighter in a derivative action than in an oppression remedy.

In a derivative action brought by a minority shareholder, the court may make four types of relief: (i) an order authorizing the former to control the conduct of the action; (ii) an order

\(^{383}\) Kevin P. McGuinness, \textit{supra} note 5, at 1348.
giving directions for the conduct of the action; (iii) an order directing any payment by a defendant directly to the former instead of to the corporation or its subsidiary; and (iv) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the former in connection with the action.\textsuperscript{384}

Besides, the \textit{CBCA} not only puts the wording “including, without limiting the generality of the foregoing”\textsuperscript{385} before the four types of relief mentioned above, but also empowers a court to “make any interim or final order it thinks fit.”\textsuperscript{386} This clearly indicates that the four types of relief set out in section 240 of the \textit{CBCA} are not exhaustive, and that a court is empowered broad discretion by the legislature in the derivative action.

As it does in the oppression remedy, the \textit{CBCA} specifies similar provisions in the derivative action to solve the inherent defects of the Majority Rule and the financial predicament of a minority shareholder in bringing an action.\textsuperscript{387}

Practice has shown in corporate law of both common law and civil law systems that the derivation action is absolutely essential and is not a right or remedy which may or may not be needed. Bruce Welling noted that “[a] statutory representative action is the minority shareholder’s sword to the majority’s twin shields of corporate personality and majority

\textsuperscript{384} \textit{CBCA}, s. 240.
\textsuperscript{385} Ibid.
\textsuperscript{386} Ibid.
\textsuperscript{387} \textit{CBCA}, ss. 242(1), 242(3) and 242(4).
However, derivative action by no means denies or abrogates these two important principles: corporate personality and the Majority Rule. While upholding these two principles, it is also important to note that the derivative action and other remedies play a role in rectifying the inherent defects of such principles, or are exceptions to the principles.

The CBCA has effectively solved the procedural issues in a derivative action, carried out the principle of exhausting intra corporate remedies and reflected the balanced protection of minority shareholders. Furthermore, the CBCA has, based on equity, solved the initiative mechanism, namely that the corporation will bear the legal fees and litigation fees incurred by a minority shareholder and pay such amounts directly to the minority shareholder instead of the corporation. In these connections, derivative action plays a very important role in protecting the legitimate rights and interests of a minority shareholder.

4.2.3 Right to Dissent

A corporation will, in its development, inevitably encounter certain fundamental changes in major areas including its corporate structure, business scope and material transactions. The controlling shareholder and a minority shareholder may reach an agreement on such changes and may also have differences with regard to such changes. When differences occur between the controlling shareholder and a minority shareholder, the views and opinions of the latter

388 Bruce Welling, supra note 315, at 509.
389 The principle of exhausting intra corporate remedies is discussed in section 2.2.4 of Chapter 2.
would be ultimately disregarded in most situations due to one of the underlying principles of corporate law – the Majority Rule. Under such circumstance, a minority shareholder has to endure it without protest and has no alternative but to accept these fundamental changes proposed and pursued by the controlling shareholder. “The protection afforded to minority shareholders at common law was limited.”

In 1970s and 1980s, Canada adopted a statutory remedy in the reforms of its corporate law, with the aim of permitting the implementation of the material changes to the corporation suggested by the controlling shareholder while assuring a minority shareholder a right to dissent and withdraw from the corporation by being paid a fair value of its shares. Based on the corporation’s theory of association, this remedy is named the right to dissent, which is also known as the appraisal remedy.

The *CBCA* sets out detailed provisions in section 190 regarding the subjects, grounds and procedures of this remedy. First, the subject to apply for this remedy is very specific, and is confined to a shareholder of the corporation only. Second, the *CBCA* specifies the scope of fundamental changes in the context of this remedy. These changes include: (i) to amend the articles under sections 173 or 174 of the *CBCA* to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class; (ii) to

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390 See footnote 3 in Chapter 1.
392 See Chapter 2, section 2.2.3.
393 *CBCA*, s. 190(1).
394 *CBCA*, s. 190(1)(a).
amend the articles under section 173 of the CBCA to add, change or remove any restriction on the business or businesses that the corporation may carry on;\(^{395}\) (iii) to amalgamate otherwise than under section 184 of the CBCA;\(^{396}\) (iv) to be continued under section 188 of the CBCA;\(^{397}\) (v) to sell, lease or exchange all or substantially all the assets of the corporation under section 189(3) of the CBCA;\(^{398}\) and (vi) to carry out a going-private transaction or a squeeze-out transaction.\(^{399}\)

Besides, if the corporation resolves to amend the articles in a manner as described in section 176 of the CBCA, a holder of shares of any class or series of shares entitled to vote under that section may exercise the right to dissent.\(^{400}\) Furthermore, a shareholder may also dissent if the corporation applies to the court for an order approving an arrangement\(^{401}\) proposed by the corporation\(^{402}\) and the court makes an order permitting the shareholder to dissent under

\(^{395}\) CPCA, s. 190(1)(b).
\(^{396}\) CPCA, s. 190(1)(c).
\(^{397}\) CPCA, s. 190(1)(d).
\(^{398}\) CPCA, s. 190(1)(e).
\(^{399}\) Pursuant to Canada Business Corporations Regulations, 2001 (SOR/2001-512), “going-private transaction” means an amalgamation, arrangement, consolidation or other transaction involving a distributing corporation, other than an acquisition of shares under section 206 of the CPCA, that results in the interest of a holder of participating securities of the corporation being terminated without the consent of the holder and without the substitution of an interest of equivalent value in participating securities of the corporation or of a body corporate that succeeds to the business of the corporation, which participating securities have rights and privileges that are equal to or greater than the affected participating securities. Pursuant to section 2(1) of the CPCA, “squeeze-out transaction” means a transaction by a corporation that is not a distributing corporation that would require an amendment to its articles and would, directly or indirectly, result in the interest of a holder of shares of a class of the corporation being terminated without the consent of the holder, and without substituting an interest of equivalent value in shares issued by the corporation, which shares have equal or greater rights and privileges than the shares of the affected class.
\(^{400}\) CPCA, s. 190(2).
\(^{401}\) Pursuant to section 192(1), “arrangement” in this section includes: (a) an amendment to the articles of a corporation; (b) an amalgamation of two or more corporations; (c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to the CPCA; (d) a division of the business carried on by a corporation; (e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate; (f) an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate; (f.1) a going-private transaction or a squeeze-out transaction in relation to a corporation; (g) a liquidation and dissolution of a corporation; and (h) any combination of the foregoing.
\(^{402}\) Pursuant to section 192(3) of the CPCA, where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of the CPCA, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.
section 190 of the *CBCA*.\(^{403}\)

Meanwhile, the *CBCA* also specifies the pre-condition for applying the right to dissent and the exception of this remedy. A dissenting shareholder may only claim under this remedy with respect to all the shares of a class held on behalf of any one beneficial owner and registered in the name of the dissenting shareholder.\(^ {404}\) There is one exception that the shareholder is not entitled to exercise this remedy in the event that an amendment to the articles is effected by the corporation subject to an order made by a court under (i) section 241 of the *CBCA*, (ii) the *Bankruptcy and Insolvency Act*\(^ {405}\) approving a proposal, or (iii) an other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.\(^ {406}\)

The procedures to invoke this remedy are classified into two parts: one is the requirements for internal procedures within the corporation and the other is the judicial proceedings. Generally speaking, the fundamental changes mentioned above shall be subject to approval of the meeting of shareholders. A shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution regarding such changes is to be voted, a written objection to the resolution.\(^ {407}\) Hence, the written objection is the first procedure for the dissenting shareholder to comply with. Of course, this procedure does not apply if the

\(^{403}\) *CBCA*, s. 192(4)(d).

\(^{404}\) *CBCA*, s. 190(4).


\(^{406}\) *CBCA*, s. 191.

\(^{407}\) *CBCA*, s. 190(5).
corporation did not give notice to the shareholder of the purpose of the meeting and of their right to dissent.

The second procedure requires that the corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection notice that the resolution has been adopted.\textsuperscript{408}

The third procedure is that a dissenting shareholder shall, within twenty days after he or she receives the said notice or, if the shareholder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the corporation a written notice containing (a) the shareholder’s name and address, (b) the number and class of shares in respect of which the shareholder dissents, and (c) a demand for payment of the fair value of such shares.\textsuperscript{409}

The fourth procedure provides that a dissenting shareholder shall, within thirty days after sending the said notice of demand for payment, send the certificates representing the shares in respect of which the shareholder dissents to the corporation or its transfer agent.\textsuperscript{410} If the shareholder fails to comply with this requirement, he or she will have no right to make a claim under this remedy.\textsuperscript{411} In this regard, this procedure is of utmost importance to a dissenting shareholder.

\textsuperscript{408} CBCA, s. 190(6).
\textsuperscript{409} CBCA, s. 190(7).
\textsuperscript{410} CBCA, s. 190(8).
\textsuperscript{411} CBCA, s. 190(9).
The fifth procedure is that the corporation or its transfer agent shall endorse on such share certificate received from the dissenting shareholder a notice that the holder is a dissenting shareholder under this remedy and shall forthwith return the share certificates to the dissenting shareholder.412

The sixth procedure provides that the corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice of demand for payment mentioned above, send to each dissenting shareholder who has sent such notice a written offer to pay for their shares in an amount considered by the directors of the corporation to be the fair value, accompanied by a statement showing how the fair value was determined.413 Every offer for shares of the same class or series shall be on the same terms.414 The term for such offer is valid for thirty days.415 The corporation shall make the payment within ten days after an offer has been accepted by the dissenting shareholder.416

It is important to note that, on sending the notice mentioned in the third procedures above, a dissenting shareholder will cease to have any rights as a shareholder (e.g. voting right, right to profit distribution) other than the right to be paid the fair value of their shares.417 However,

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412 CBCA, s. 190(10).
413 CBCA, s. 190(12).
414 CBCA, s. 190(13).
415 CBCA, s. 190(14).
416 Ibid.
417 CBCA, s. 190(11).
there are three exceptions, namely that (a) the dissenting shareholder withdraws that notice before the corporation make an offer; (b) the corporation fails to make an offer in accordance with subsection 190(12) of the *CBCA*; or (c) the directors revoke a resolution to amend the articles under subsection 173(2) or 174(5) of the *CBCA*, terminate an amalgamation agreement under subsection 183(6) of the *CBCA* or an application for continuance under subsection 188(6) of the *CBCA*, or abandon a sale, lease or exchange under subsection 189(9) of the *CBCA*. In any of such exceptions, the shareholder’s rights shall be reinstated as of the date the notice was sent.\(^{418}\)

The above-mentioned six procedures are all internal ones within the corporation as well as the non-litigation procedures of this remedy. The failure by the corporation to make an offer or by a dissenting shareholder to accept an offer would trigger the judicial procedures.

Although both the corporation and the dissenting shareholder may turn to the judicial proceedings, the procedures are different. If the corporation fails to make an offer or the offer is not accepted by a dissenting shareholder, it may within fifty days after the action approved by the resolution is effective (or any further period allowed by a court), apply to a court to fix a fair value of the shares of any dissenting shareholder.\(^{419}\) A dissenting shareholder may, however, apply to a court for the same purpose within a further period of twenty days (or any further period allowed by the court) only after the corporation fails to apply to a court in

\(^{418}\) *Ibid.*

\(^{419}\) *CBCA*, s. 190(15).
accordance with the subsection 190(15) of the *CBCA.*\(^{420}\)

In order to economize judicial resources after the legal proceedings are initiated, the *CBCA* requires that all dissenting shareholders whose shares have not been purchased by the corporation shall be joined as parties and be bound by the decision of the court. Meanwhile, the corporation shall notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.\(^{421}\)

The *CBCA* sets out express provisions governing the jurisdiction. Pursuant to subsection 190(17) of the *CBCA*, an application for this remedy shall be made to a court having jurisdiction in place where the corporation has its registered office or in the province where the dissenting shareholder resides if the corporation carries on business in that province.\(^{422}\)

On application to a court having jurisdiction, the court may determine whether any other person is a dissenting shareholder who should be joined as a party, and then fix a fair value for the shares of all dissenting shareholders.\(^{423}\) In order to assure a fair value, the court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of the dissenting shareholders.\(^{424}\) The final order of the court shall be rendered against

\(^{420}\) *CBCA*, s. 190(16).
\(^{421}\) *CBCA*, s. 190(19).
\(^{422}\) *CBCA*, s. 190(17).
\(^{423}\) *CBCA*, s. 190(20).
\(^{424}\) *CBCA*, s. 190(21).
the corporation in favour of each dissenting shareholder and for the amount of the shares as fixed by the court.425 Besides, the court may also in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective until the date of payment.426

In view of the particular status and conditions of a minority shareholder, the CBCA sets out its humanitarian provision which solves the financial predicament of a minority shareholder in bringing an action and provides much convenience for it to invoke this remedy. For example, a dissenting shareholder is not required to give security for costs in an application made to a court under this remedy.427 Although there is some concern that this provision would, in practice, lead to a situation where a dissenting shareholder might reject an offer from the corporation at will or willfully so as to seek greater benefits from abusing judicial resources, this possibility has been effectively restrained by both the detailed provisions in the statutes and the adequate application by the court of these provisions. From the perspective of statutory provisions, the legislature has ingeniously used the legislative art of both the corporation’s right to make an offer and the court’s decision to fix the fair value with regard to the shares of the dissenting shareholder. In other words, the court will have the final decision when differences on the fair value of such shares appear between the corporation and any dissenting shareholder. However, the fair value fixed by the court may not necessarily be equal or higher than the offer from the corporation at all times, and may be

425 CBCA, s. 190(22).
426 CBCA, s. 190(23).
427 CBCA, s. 190(18).
lower than the offer under some cases. Therefore, it is not risk free for a dissenting shareholder if it rejects the reasonable offer from the corporation and resorts to the court without reasonable grounds. On the contrary, the dissenting shareholder may face punishment (e.g., the fixing of the fair value lower than the corporation’s offer; no interest to be allowed on the amount payable to the dissenting shareholder; etc.) by the court if it rejects the reasonable offer from the corporation and abuses the judicial resources.

_Smeenk v. Dexleigh Corp._\(^{428}\) is a typical case. This proceeding related to applications made to the court by certain preference shareholders of Foodex Inc. and class A shareholders of Hatleigh Corporation, who dissented with respect to the 1984 amalgamation by which Foodex amalgamated with Hatleigh to form the respondent Dexleigh Corporation. The shares of Hatleigh and Foodex were traded on the Toronto Stock Exchange on April 19, 1984, the last trading day on which the shares were traded prior to the public announcement of the amalgamation proposal. On that day the stock market price of Foodex preference shares was $1.05. That price increased substantially following the public announcement of the proposal to a price of $1.30 per share on the valuation date, June 7, 1984. Hence, the directors of Dexleigh chose to offer the dissenting shareholders $1.30 as the fair value of their shares. However, the applicants rejected the offer and submitted that the dissenting shares ought to be valued at $11.11 per share. Finally, the court made the order fixing the price of $1.05 to be the fair value of the applicants’ shares. The court further decided that there would be no order.

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for payment of interest prior to judgment, the respondent Dexleigh was to have its costs of
the applications throughout, to be paid by the applicants jointly and severally. Henry J. noted
that,

“…The attitude of the court ought, therefore, to be to look at the reasonableness or
otherwise of the mandatory offer, and the reasonableness or otherwise of its
rejection: Domglas, supra. It is, in my opinion, appropriate and fair to use the
“carrot and stick approach” (Mr. Scott’s language) to achieve reasonableness on
the part of the company in making its offer which ought to be its best; and to
achieve reasonableness in the expectations of the shareholder in deciding whether
to accept the company’s offer. Neither the company nor the shareholder ought to
expect a “free ride” in the court if they do not agree. In my opinion, the party who
is seen to be unreasonable ought to pay for intransigence by having to assume
some or all of the financial burden of the proceedings.”

In view of the social responsibility of a corporation and the social and public interest, the

CBCA imposes a limitation on this remedy to the effect that the corporation shall not make a
payment to the dissenting shareholder if there are reasonable grounds for believing that (a)
the corporation is or would after the payment be unable to pay its liabilities as they become
due, or (b) the realizable value of the corporation’s assets would thereby be less than the
aggregate of its liabilities. Under such circumstance, the corporation shall, within ten days
after the pronouncement of the final order made by the court, send to the dissenting
shareholders a notification that it is unable lawfully to pay the dissenting shareholders for
their shares. With thirty days after receiving such a notification, a dissenting shareholder
may, by written notice delivered to the corporation, either withdraw their notice of dissent or

429 Smeenk v. Dexleigh Corp., ibid, at 66.
430 CBCA, s. 190(26).
431 CBCA, s. 190(24).
retain a status as a claimant against the corporation.  

As discussed above, an action for this remedy focuses on the calculation and determination of the fair value, and a court has discretion to fix the fair value of the shares of a dissenting shareholder. However, no single approach exists that could be adopted in determining such fair value for all cases. To select among a number of valuation methods will depend on the particular facts of the case. Hence, valuation may pose a challenge to the court in the application for an appraisal. In *Cyprus Anvil Mining Corp. v. Dickson*, Lambert J.A. held that:

“… the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation which will produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.”

Nonetheless, the right to dissent is a very important preventive right. On one hand, it upholds the Majority Rule, adheres to the reciprocity of rights and obligations and protects the investors’ enthusiasm. On the other hand, it provides an effective and fair exit mechanism for a minority shareholder so as to protect its legitimate rights and interests.

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432 *CBCA*, s. 190(25). If a dissenting shareholder selects to withdraw their notice of dissent, the corporation shall be deemed to consent to the withdrawal and the shareholder is reinstated to their full rights as a shareholder. If the dissenting shareholder selects to retain a status as a claimant against the corporation, they shall be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.


435 *Cyprus Anvil Mining Corp. v. Dickson*, *ibid*, at para. 50.
“Until the 1970s, there was a steady trend in the evolution of corporate law towards greater restriction on the ability of the shareholders of a company to the company that they owned.”

Case law offered limited protection to a minority shareholder in this respect.

The reforms in Canadian corporate law in the 1970s and 1980s have broken through the limitations of case law on shareholder’s management in a corporation and introduced a series of measures by which shareholders may participate in the operation and management of the corporation (e.g., limitations of the articles on the business of a corporation, the unanimous shareholder agreement, etc.). Meanwhile, the adoption of the right of a shareholder to make a proposal, which was based on the theory of modern corporate governance, has not only reinforced the shareholder’s participation in the operation and management of a corporation, but also demonstrated the accountability of a shareholder towards the corporation. Hence, the right to make a proposal is a powerful measure of protecting the legitimate rights and interests of a minority shareholder.

The right of a shareholder to make a proposal means that a shareholder having the voting right at an annual meeting of shareholders is entitled to submit to the corporation notice of

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436 Kevin P. McGuinness, supra note 5, at 1204.
437 See Chapter 2, section 2.2.6.
any matter to be raised at the meeting, and to discuss such matter at the meeting.\footnote{CBCA, s. 137(1).}

In order to ensure the seriousness and representation of a proposal and avoid the abuse by a shareholder of such right, the \textit{CBCA} sets out express provisions relating to the standing of a shareholder to make a proposal. In order to be eligible for the standing, a shareholder must be, for at least the prescribed period,\footnote{Pursuant to s. 46(b) of \textit{Canada Business Corporations Regulations, 2001}, the prescribed period is the six-month period immediately before the day on which the shareholder submits the proposal.} the registered holder or the beneficial owner of at least the prescribed number of outstanding shares\footnote{Pursuant to s. 46(a) of \textit{Canada Business Corporations Regulations, 2001}, the prescribed number of shares is the number of voting shares (i) that is equal to 1\% of the total number of the outstanding voting shares of the corporation, as of the day on which the shareholder submits a proposal, or (ii) whose fair market value, as determined at the close of business on the day before the shareholder submits the proposal to the corporation, is at least $2,000.} of the corporation, or have the support of persons who, in the aggregate, and including or not including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or the beneficial owners of, at least the prescribed number of outstanding shares of the corporation.\footnote{CBCA, s. 137(1.1).}

In order to verify the standing of a shareholder, the \textit{CBCA} requires a proposal must be accompanied by the relevant information, namely (i) the name and address of the person and of the person’s supporters (where applicable), and (ii) the number of shares held or owned by the person and the person’s supporters (where applicable) and the date the shares were acquired.\footnote{CBCA, s. 137(1.2).} On receipt of a proposal, the corporation may request the shareholder to provide proof of its standing within the prescribed period,\footnote{Pursuant to s. 47(a) of \textit{Canada Business Corporations Regulations, 2001}, the corporation may request that a shareholder provide the proof referred to in subsection 137 (1.4) of the \textit{CBCA} within 14 days after the corporation receives the shareholder’s proposal.} and the shareholder shall produce such
A corporation that solicits proxies shall set out the proposal in the management proxy circular required by section 150 of the CBCA or attach the proposal thereto. The shareholder submitting a proposal may request the corporation to include in the management proxy circular or attach to it a statement in support of the proposal by the person and the name and address of the person. The statement and the proposal must together not exceed the prescribed maximum number of words. However, the information about the standing of a shareholder does not form part of the proposal or of the supporting statement and is not included for the purpose of the prescribed maximum word limit.

In order to ensure the corporation’s efficiency and avoid any abuse of the shareholder’s right to make a proposal, the CBCA specifies five exceptions in which a corporation is not required to set out in the management proxy circular, or attach to it, a proposal or the supporting statement thereof. When the corporation refuses to do so, it shall, within the prescribed

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444 Pursuant to s. 47(b) of Canada Business Corporations Regulations, 2001, the shareholder shall provide the proof within 21 days after the corporation’s request.

445 CBCA, s. 137(2).

446 CBCA, s. 137(3). Pursuant to subsection 48 of Canada Business Corporations Regulations, 2001, a proposal and a statement in support of it shall together consist of not more than 500 words.

447 CBCA, s. 137(1.3).

448 Pursuant to s. 137(5) of the CBCA, the exceptions include that (a) the proposal is not submitted to the corporation at least the prescribed number of days before the anniversary date of the notice of meeting that was sent to the shareholders in connection with the previous annual meeting of shareholders; (b) it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders; (b.1) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation; (c) not more than the prescribed period before the receipt of a proposal, a person failed to present, in person or by proxy, at a meeting of shareholders, a proposal that at the person’s request, had been included in a management proxy circular relating to the meeting; (d) substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident’s proxy circular relating to a meeting of shareholders held not more than the prescribed period before the receipt of the proposal and did not receive the prescribed minimum amount of support at the meeting; and (e) the rights conferred by this section are being abused to secure publicity.
period, notify in writing the shareholder submitting the proposal its intention to omit the proposal from the management proxy circular and of the reasons for the refusal. The shareholder then may apply to a court claiming to be aggrieved by the corporation’s refusal, and the court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it thinks fit.

As a check and balance measure, the corporation or any person claiming to be aggrieved by a proposal may also apply to a court for an order permitting the corporation to omit the proposal from the management proxy circular, and the court may make such order as it thinks fit.

In an action, the applicant (whether the corporation, the shareholder submitting a proposal or any other person) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Under this remedy, the CBCA also specifies the immunity with respect to any liability of a corporation or person acting on its behalf to circulate a proposal or statement in accordance with section 137 of the CBCA.

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449 Pursuant to s. 53 of Canada Business Corporations Regulations, 2001, the prescribed period for giving notice is 21 days after the receipt by the corporation of the proposal or of proof of ownership under s. 137(1.4) of the CBCA, as the case may be.

450 CBCA, s. 137(7).
451 CBCA, s. 137(8).
452 CBCA, s. 137 (9).
453 CBCA, s. 137 (10).
454 Subsection 137 (6) of the CBCA provides that no corporation or person acting on its behalf incurs any liability by reason only of circulating a proposal or statement in compliance with section 137 of the CBCA.
It is important to note that a proposal may also include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than five per cent of the shares or five per cent of the shares of a class of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented. Of course, nominations may also be made at a meeting of shareholders.\textsuperscript{455}

Based on the foregoing, the right of making a proposal is a preventive right aiming at improving the rules of procedure with regard to a meeting of shareholders, which is conducive to the perfection of corporate governance within the corporation, and in the same time effectively protects the legitimate rights and interests of a minority shareholder. The strict requirements for the standing of a shareholder and the content of the proposal lead to balanced protection of a minority shareholder, because they are functioned not only to safeguard the minority shareholder protection, but also to prevent the corporation’s business and affairs from being affected by the speculation and improper conduct of a minority shareholder.

Many words like “prescribed period”, “prescribed number”, “prescribed minimum amount”, “prescribed minimum number” and so on are used in the provisions of the \textit{CBCA}, but they are further defined in \textit{Canada Business Corporations Regulations, 2001}. Such legislative art is well-designed and effective to solve the hysteresis of statutory provisions by amending the

\textsuperscript{455} \textit{CBCA}, s. 137 (4).
Canada Business Corporations Regulations, 2001 from time to time, and in the meantime to avoid frequent amendment to the CBCA which requires more complicated formalities and longer period of time.

There are two possible issues that need further consideration: one is the confidentiality issue regarding the shareholder information attached to a proposal. Could there be any further provision to ensure that such information would not be disclosed by the corporation or any person on its behalf without the written consent of the shareholder? Or could the standing of the shareholder be verified by the Director rather than the corporation? The second issue is whether 500 words are properly fixed as the prescribed minimum number for the proposal and the statement.

4.2.5 Compulsory Acquisitions

In a take-over bid, an offeror is entitled to acquire the shares held by the dissenting offerees if a take-over bid is accepted, within 120 days after the date of the bid, by the holders of not less than 90 per cent of the shares of any class of shares to which the take-over bid relates, other than shares held at the date of the take-over bid by or on behalf of the offeror or an affiliate or associate of the offeror. This is a compulsory and compelled acquisition in nature. Under such a transaction, the dissenting offerees are, in most cases,

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456 Pursuant to s. 206(1) of the CBCA, “take-over bid” means an offer made by an offeror to shareholders of a distributing corporation at approximately the same time to acquire all of the shares of a class of issued shares, and includes an offer made by a distributing corporation to repurchase all of the shares of a class of its shares.

457 CBCA, s. 206(2).
minority shareholders of the corporation and are frequently treated unfairly in terms of the purchase price due to their weak position in the corporation. Based on the corporation’s theory of association and the theory of modern corporate governance, a remedy is, therefore, conferred on a minority shareholder to fight against an unfair price under a compulsory acquisition which is a foregone conclusion.

The CBCA sets out detailed provisions of this remedy to ensure its practicability. First, with respect to an acquisition, an offeror shall send its notice to each dissenting offeree and to the Director by registered mail within 60 days after the date of termination of the take-over bid and in any event within 180 days after the date of the take-over bid. Second, a dissenting offeree faces two options within 20 days after receiving the offeror’s notice, namely either to transfer its shares to the offeror on the terms on which the offeror acquired the shares of the offerees who accepted the take-over bid, or to demand payment of the fair value of its shares in accordance with subsections 206 (9) to (18) of the CBCA. However, if the offeree does not elect the options, it is deemed to have elected to transfer the shares to the offeror on the same terms on which the offeror acquired the shares from the offerees who

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458 See Chapter 2, section 2.2.3 and section 2.2.6.
459 Pursuant to s. 206(3) of the CBCA, the offeror’s notice shall state that (a) the offerees holding not less than 90 per cent of the shares to which the bid relates accepted the take-over bid; (b) the offeror is bound to take up and pay for or has taken up and paid for the shares of the offerees who accepted the take-over bid; (c) a dissenting offeree is required to elect (i) to transfer their shares to the offeror on the terms on which the offeror acquired the shares of the offerees who accepted the take-over bid, or (ii) to demand payment of the fair value of the shares in accordance with subsections 206 (9) to (18) of the CBCA by notifying the offeror within 20 days after receiving the offeror’s notice; (d) a dissenting offeree who does not notify the offeror in accordance with subparagraph 206 (5)(b)(ii) of the CBCA is deemed to have elected to transfer the shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the take-over bid; and (e) a dissenting offeree must send their shares to which the take-over bid relates to the offeree corporation within 20 days after receiving the offeror’s notice.
460 CBCA, s. 206(3).
461 CBCA, s. 206(5)(b).
accepted the take-over bid.\textsuperscript{462} Meanwhile, a dissenting offeree shall, within 20 days after receiving the notice from the offeror, send the share certificates of the class of shares to which the take-over bid relates to the offeree corporation.\textsuperscript{463}

Where a dissenting offeree has elected to accept the take-over bid, the offeror shall, within 20 days after it sends its notice to the dissenting offeree, pay or transfer to the offeree corporation the amount of money or other consideration that the offeror would have had to pay or transfer to the dissenting offeree.\textsuperscript{464} In order to safeguard the interests of every shareholder, the offeree corporation is deemed to hold in trust for the dissenting shareholders the money or other considerations, and shall deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation or guaranteed by the Québec Deposit Insurance Board, and place the other consideration in the custody of a bank or such other body corporate.\textsuperscript{465} These requirements are also applicable to the corporation that is an offeror making a take-over bid to repurchase all of the shares of a class of its shares.\textsuperscript{466}

In the event that a dissenting offeree has elected to demand payment of the fair value of its shares, the \textit{CBCA} first confers a right on the offeror to apply to a court to fix the fair value of the shares of that dissenting offeree within 20 days after it has paid the money or transferred

\begin{footnotes}
\item[462] \textit{CBCA}, s. 206(5.1).
\item[463] \textit{CBCA}, s. 206(5).
\item[464] \textit{CBCA}, s. 206(6).
\item[465] \textit{CBCA}, s. 206(7).
\item[466] \textit{CBCA}, s. 206(7.1).
\end{footnotes}
the other consideration mentioned above.\textsuperscript{467} Only when the offeror fails to make an application to the court could the dissenting offeree apply to the court for the same purpose within a further period of 20 days.\textsuperscript{468} If the dissenting offeree makes no application within the prescribed period, it is deemed to have elected to transfer its shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the take-over bid.\textsuperscript{469}

In order to economize the judicial resources after legal proceedings are initiated, the \textit{CBCA} expressly requires that (a) all dissenting offerees whose shares have not been acquired by the offeror shall be joined as parties and are bound by the decision of the court; and (b) the offeror shall notify each affected dissenting offeree of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.\textsuperscript{470}

The \textit{CBCA} sets out express provisions governing the jurisdiction. Pursuant to subsection 206(12) of the \textit{CBCA}, an application for this remedy shall be made to a court having jurisdiction in place where the corporation has its registered office or in the province where the dissenting offeree resides if the corporation carries on business in that province.\textsuperscript{471}

On receiving an application, the court will first determine whether any other person is a

\textsuperscript{467} \textit{CBCA}, s. 206(9).
\textsuperscript{468} \textit{CBCA}, s. 206(10).
\textsuperscript{469} \textit{CBCA}, s. 206(11).
\textsuperscript{470} \textit{CBCA}, s. 206(14).
\textsuperscript{471} \textit{CBCA}, s. 206(12).
dissenting offeree who should be joined as a party, and then fix a fair value for the shares of all dissenting offerees.\textsuperscript{472} In order to assure a fair value, the court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of a dissenting offeree.\textsuperscript{473} The final order of the court shall be rendered against the offeror in favour of each dissenting offeree and for the amount of the shares as fixed by the court.\textsuperscript{474} In addition, the \textit{CBCA} empowers a court to make the following four types of relief: (a) to fix the amount of money or other consideration that is required to be held in trust by the offeree corporation; (b) to order that that money or other consideration be held in trust by a person other than the offeree corporation; (c) to allow a reasonable rate of interest on the amount payable to each dissenting offeree from the date they send or deliver their share certificates until the date of payment; and (d) to order that any money payable to a shareholder who cannot be found be paid to the Receiver General.\textsuperscript{475}

It is important to note that the \textit{CBCA} not only puts the wording “without limiting the generality of the foregoing”\textsuperscript{476} before the four types of relief mentioned above, but also empowers a court to “make any order it thinks fit”.\textsuperscript{477} This clearly indicates that the four types of relief set out in subsection 206 (18) of the \textit{CBCA} are not exhaustive, and that a court is empowered broad discretion by the legislature in this remedy under compulsory acquisitions.

\textsuperscript{472} \textit{CBCA}, s. 206(15).
\textsuperscript{473} \textit{CBCA}, s. 206(16).
\textsuperscript{474} \textit{CBCA}, s. 206(17).
\textsuperscript{475} \textit{CBCA}, s. 206(18).
\textsuperscript{476} \textit{Ibid.}
\textsuperscript{477} \textit{Ibid.}
In view of the particular status and conditions of a minority shareholder, the *CBCA* sets out its humanitarian provision which solves the financial predicament of a minority shareholder in bringing an action and provides much convenience for it to invoke this remedy. For example, a dissenting offeree is not required to give security for costs in an application made either by itself or by the offeror to a court under this remedy.478

Generally speaking, this remedy is perfectly designed and meticulously prescribed. The statutory provisions that require the offeror to pay the money or other consideration in advance enhance the efficiency of such a transaction, while those that require the money or other consideration to be deposited and placed in a designated institution ensure the transaction’s safety. The legislation of placing the application by the offeror before that by an offeree is a well-designed arrangement of mutual restraint, which will be conducive to arriving at a fair value price acceptable to both parties before ultimately resorting to judicial remedy. To use the judicial remedy as the last procedure not only enhances the efficiency of such a transaction, but also minimizes the judicial resources. On the other hand, such check and balance arrangements demonstrate the legislative intent of preventing an offeree from abusing its rights.

Base date of evaluation is a critically important factor which a court generally takes into account in fixing a fair value of the shares of a dissenting offeree. However, unlike the right

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478 *CBCA*, s. 206(13).
to dissent, this remedy does not have a base date of evaluation. The absence of such a base
date would cause great difficulty for a dissenting offeree in assessing or predicting the
possible outcome of this remedy. This outstanding issue could not but be subject to the
decision of a court, and the broad discretion of the court in this remedy would make a case
uncertain and unpredicted to some extent.

4.2.6 Voting Rights

Voting right is an important right for a shareholder of a corporation. The controlling
shareholder and a minority shareholder have quite different voting rights based on their
respective shareholding percentages in a corporation. In particular, the controlling
shareholder normally plays a dominant role in certain major issues of the corporation while
the legitimate rights and interests of a minority shareholder are frequently infringed by the
controlling shareholder. In this regard, it has become more and more important in the
legislation of modern corporate law that some special arrangements should be made to
protect the voting rights of a minority shareholder. Based on the theory of modern corporate
governance,479 the CBCA sets out three kinds of voting right for the interest of a minority
shareholder, namely the cumulative voting, the voting right under a squeeze-out transaction,
and the class vote.

First, cumulative voting is a right which may be elected by shareholders and provided in the

479 See Chapter 2, section 2.2.6.
articles with respect to the election of directors of a corporation. Kevin P. McGuinness noted that:

“Cumulative voting is a system of voting under which each elector has a number of votes determined by reference to the number of offices that are to be filled by election, with the elector being free to distribute those votes among such number of persons or concentrate those votes on any one person, as the elector may see fit.”

Once the articles provide for cumulative voting, the articles shall require a fixed number and not a minimum and maximum number of directors, and each director ceases to hold office at the close of the first annual meeting of shareholders following the director’s election.

Under cumulative voting, each shareholder entitled to vote at the election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by the shareholders multiplied by the number of directors to be elected, and may cast all of those votes in favour of one candidate or distribute them among the candidates in any manner. Unless a resolution is passed unanimously permitting two or more persons to be elected by a single resolution, a separate vote of shareholders shall be taken with respect to each candidate nominated for director. In the event that a shareholder has voted for more than one candidate without specifying the distribution of votes, the shareholder is deemed to have distributed the votes equally among those candidates.

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480 Kevin P. McGuinness, supra note 5, at 771.
481 CBCA, s. 107(a).
482 CBCA, s. 107(f).
483 CBCA, s. 107(b).
484 CBCA, s. 107(c).
485 CBCA, s. 107(d).
Check and balance measures are also provided in cumulative voting. For example, in the event that the number of candidates nominated for director exceeds the number of positions to be filled, the candidates who receive the least number of votes shall be eliminated until the number of candidates remaining equals the number of positions to be filled.\textsuperscript{486} Besides, a director may be removed from office only if the number of votes cast in favour of the director’s removal is greater than the product of the number of directors required by the articles and the number of votes cast against the motion.\textsuperscript{487} Furthermore, the number of directors required by the articles may be decreased only if the votes cast in favour of the motion to decrease the number of directors is greater than the product of the number of directors required by the articles and the number of votes cast against the motion.\textsuperscript{488}

Based on the foregoing, it is evident that the cumulative voting is an effective remedy available to a minority shareholder to realize its representation in the board of directors of the corporation and to enhance its supervision over the conduct of directors as well.

The second is the voting right under a squeeze-out transaction.\textsuperscript{489} Due to the nature of a squeeze-out transaction, the legitimate rights and interests of a minority shareholder may be

\textsuperscript{486} CBCA, s. 107(e).
\textsuperscript{487} CBCA, s. 107(g).
\textsuperscript{488} CBCA, s. 107(h).
\textsuperscript{489} Pursuant to section 2(1) of the CBCA, “squeeze-out transaction” means a transaction by a corporation that is not a distributing corporation that would require an amendment to its articles and would, directly or indirectly, result in the interest of a holder of shares of a class of the corporation being terminated without the consent of the holder, and without substituting an interest of equivalent value in shares issued by the corporation, which shares have equal or greater rights and privileges than the shares of the affected class.
unfairly prejudiced. Hence, the *CBCA* expressly specifies that no squeeze-out transaction 
may be carried out unless, in addition to any approval by holders of shares required by or 
under the *CBCA* or the articles, the transaction is approved by ordinary resolution of the 
holders of each class of shares that are affected by the transaction, voting separately, whether 
or not the shares otherwise carry the right to vote.\textsuperscript{490} The *CBCA* further provides that no 
voting right on the resolution of the transaction is conferred on affiliates of the corporation, 
and holders of shares that would, following the squeeze-out transaction, be entitled to 
consideration of greater value or to superior rights or privileges than those available to other 
holders of shares of the same class.\textsuperscript{491}

Third, class vote refers to the right for the holders of shares of a class or of a series to vote 
separately as a class or series on a proposal to amend the articles of a corporation in 
accordance with section 176(1) of the *CBCA*.\textsuperscript{492} So long as the proposal relates to the any of 
the amendments to the articles set out in section 176(1) of the *CBCA*, the holders of shares of 
a class or of a series shall be entitled to vote separately on such proposal whether or not such

\begin{footnotesize}
\textsuperscript{490} *CBCA*, s. 194.
\textsuperscript{491} Ibid.
\textsuperscript{492} *CBCA*, s. 176(1). Pursuant to section 176(1) of the *CBCA*, the relevant amendments to the articles of a corporation 
include (a) to increase or decrease any maximum number of authorized shares of such class, or increase any maximum 
number of authorized shares of a class having rights or privileges equal or superior to the shares of such class; (b) to 
effect an exchange, reclassification or cancelation of all or part of the shares of such class; (c) add, change or remove the 
rights, privileges, restrictions or conditions attached to the shares of such class and, without limiting the generality of the 
foregoing, (i) remove or change prejudicially rights to accrued dividends or rights to cumulative dividends, (ii) add, 
remove or change prejudicially redemption rights, (iii) reduce or remove a dividend preference or a liquidation 
preference, or (iv) add, remove or change prejudicially conversion privileges, options, voting, transfer or pre-emptive 
risks, or rights to acquire securities of a corporation, or sinking fund provision; (d) to increase the rights or privileges of 
any class of shares have rights of privileges equal or superior to the shares of such class; (e) to create a new class of 
shares equal or superior to the shares of such class; (f) to make any class of shares having rights or privileges inferior to 
the shares of such class equal or superior to the shares of such class; (g) to effect an exchange or create a right of 
exchange of all or part of the shares of another class into the shares of such class; or (h) to constrain the issue, transfer or 
ownership of the shares of such class or change or remove such constraint.
\end{footnotesize}
shares otherwise carry the right to vote.\textsuperscript{493} The proposed amendment to the articles is adopted only when the holders of the shares of each class or series entitled to vote separately thereon as a class or series have approved such amendment by a special resolution.\textsuperscript{494}

However, the \textit{CBCA} allows the articles not to provide for class vote with respect to the proposed amendments set out in subsection 176(1) (a), (b) and (e) of the \textit{CBCA}.\textsuperscript{495} In order to enhance the efficiency of a corporation and prevent a minority shareholder from abusing his or her rights, the \textit{CBCA} expressly confines the class vote to the holders of a series of shares of a class whose series is affected by an amendment in a manner different from other shares of the same class.\textsuperscript{496} Furthermore, the \textit{CBCA} specifies an exception of class vote, namely that class vote does not apply in respect of a proposal to amend the articles to add a right or privilege for a holder to convert shares of a class or series into shares of another class or series that is subject to a constraint permitted under subsection 176(1)(c) of the \textit{CBCA} but is otherwise equal to the class or series first mentioned.\textsuperscript{497}

4.2.7 Compliance or Restraining Order

In the real world, people often hear about or encounter the non-compliance of the \textit{CBCA}, the regulations, articles, by-laws, or a unanimous shareholder agreement by a corporation, the

\textsuperscript{493} \textit{CBCA}, s. 176(5).
\textsuperscript{494} \textit{CBCA}, s. 176(6).
\textsuperscript{495} \textit{CBCA}, s. 176(1).
\textsuperscript{496} \textit{CBCA}, s. 176(4).
\textsuperscript{497} \textit{CBCA}, s. 176(2).
persons within the corporation (e.g., directors, officers, employees, etc.) and outside the
corporation (e.g., agent, auditor, trustee, receiver, receiver-manager, liquidator, etc.). This
remedy is, therefore, designed as a procedural vehicle to rectify such non-compliance so that
a minority shareholder will have a legal and enforceable right to ensure the compliance with
the laws, regulations and the constituting documents of the corporation. It is a reflection of
the corporation’s theory of legal person and the theory of modern corporate governance. 498

Like the oppression remedy and the derivative action, this remedy has a variety of applicants
including 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, a director or an officer or a
former director or officer of a corporation or any of its affiliates, the Director, and any other
person who, in the discretion of a court, is a proper person to make an application under this
remedy. 499 In addition, a creditor of the corporation is also incorporated in the scope of
applicants for this remedy. 500 Obviously, a minority shareholder falls within the scope of
applicants mentioned above and has the standing to invoke this remedy.

The grounds of this remedy are also broad, covering the non-compliance of the laws,
regulations or the constituting documents of a corporation by the corporation, directors,
officers, employees, agent, auditor, trustee, receiver, receiver-manager and liquidator of the
corporation. If any of such persons violates the CBCA, the regulations, articles, by-laws, or a

498 See Chapter 2, section 2.2.5 and section 2.2.6.  
499 CBCA, s. 238.  
500 CBCA, s. 247.
unanimous shareholder agreement, a minority shareholder may apply to a court for an order
directing such person to comply with, or restraining such person from acting in breach of,
any provision thereof. 

The application may be made in a summary manner by petition, which not only enhances the efficiency of this remedy, but also minimizes the litigation cost and judicial resources.

Similar to the oppression remedy, the non-compliance complained of under this remedy refers to the wrongdoing which already occurs in an objective manner, whether from the perspective of statutes or from that of case law. In this regard, this remedy precludes the intention or subjective assessment of any wrongdoing. In the meantime, anticipated or future non-compliance is not incorporated in the scope of application of this remedy. Paul Martel noted that:

“A remedy under section 247, which is discretionary, should only be given in exceptional circumstances where the corporation or its shareholders are clearly threatened by harm, or where the behavior is manifestly unlawful or oppressive. Case law says that this remedy only contemplates situations where harm actually took place, not where it was only threatened.”

A court has broad discretion under this remedy. Pursuant to section 247 of the CBCA, a court may, on an application made under this remedy, make an order directing any such wrongdoer to comply with, or restraining such person from acting in breach of, any provision of the CBCA, the regulations or the constituting documents of a corporation, and make any further

501 Ibid.  
502 CBCA, s. 248.  
503 Paul Martel, supra note 299, at 31-137.
order it thinks fit.

Non-exclusivity is another important feature of this remedy. The words “in addition to any other right they have” are expressly provided in section 247 of the *CBCA* to empower an applicant of this remedy to enjoy any other right it has while invoking this remedy.

As it does in the oppression remedy and other remedies, the *CBCA* specifies similar provisions in this remedy to solve the inherent defects of the Majority Rule and the financial predicament of a minority shareholder in bringing an action.504

One possible issue may require further consideration. The scope of this remedy is not broad enough to cover the wrongdoings of a shareholder (particularly the controlling shareholder). In other words, a minority shareholder may not apply this remedy in the event that the controlling shareholder violates the law, regulations or the constituting documents of the corporation. Nonetheless, restraining or compliance order plays an important role in protecting the legitimate rights and interests of a minority shareholder.

4.2.8 Investigation

Asymmetric information is a big problem that a minority shareholder faces in both a common law country and a civil law country. It frequently places a minority shareholder in a situation

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504 *CBCA*, ss. 242(1), 242(3) and 242(4).
where its legitimate rights and interests are encroached. Because the aggrieved minority shareholder is unable to assume the burden of proof due to asymmetric information, it is often driven to a situation where it wants to bring an action but could not make it because of the burden of proof. The investigation under the *CBCA* is an important remedy available to a minority shareholder whereby it may apply to a court for an order directing investigation against the corporation and any of its affiliated corporations when it finds their improper conduct and is not able to assume the burden of proof. This remedy is specified on the basis of the corporation’s theory of association and the theory of modern corporate governance.\(^{505}\)

Under this remedy, the *CBCA* sets out meticulous provisions regarding the applicants, the grounds, the functions of the Director and inspector, the competent court and the interested persons.

In view of the wide coverage and material effect of this remedy, the *CBCA* confines the applicants to a security holder of a corporation and the Director only.

There are four grounds to invoke this remedy, namely (a) the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person; (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a security

\(^{505}\) See Chapter 2, section 2.2.3 and section 2.2.6.
holder; (c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or (d) persons concerned with the formation, business or affairs of the corporation or any of its affiliates have in connection therewith acted fraudulently or dishonestly.506

In view of the difficulty for a minority shareholder to assume the burden of proof, the CBCA qualifies the said grounds by “it appears to the court that”. Such a qualification indicates that a minority shareholder may submit to a court prima facie evidence in relation to any of the grounds mentioned above while seeking this remedy.

Pursuant to section 229(1) of the CBCA, a competent court shall be the court having jurisdiction in the place where the corporation has its registered office.

On an application, the court has broad discretion in granting judicial relief under this remedy. In addition to ordering an investigation, a court may also make other eleven types of relief in connection with the investigation. The orders of a court under this remedy are classified into five categories: first, orders made against the corporation or any of its affiliates (e.g., ordering an investigation to be made of the corporation and any of its affiliates;507 requiring the corporation to pay the costs of the investigation508); second, orders made with respect to an inspector (e.g., appointing and replacing an inspector and fixing his or her

506 CBCA, s. 229(2).
507 CBCA, ss. 229(2) and 230(1)(a).
508 CBCA, s. 230(1)(l).
remuneration;\textsuperscript{509} authorizing an inspector to enter any premises and to examine any thing and make copies of any document or record found on the premises;\textsuperscript{510} authorizing an inspector to conduct a hearing, administer oaths, examine any person on oath, and prescribing the rules for the conduct of the hearing;\textsuperscript{511} giving directions to an inspector on any matter arising in the investigation;\textsuperscript{512} requiring an inspector to make an interim or final report to the court;\textsuperscript{513} requiring an inspector to discontinue an investigation;\textsuperscript{514} third, orders made with respect to any person (e.g., determining the notice to be given to any interested person or dispensing with notice to any person;\textsuperscript{515} ordering any person to produce documents or records to the inspector;\textsuperscript{516} requiring any person to attend a hearing conducted by an inspector and to give evidence on oath;\textsuperscript{517} giving directions to any interested person on any matter arising in the investigation;\textsuperscript{518} fourth, orders made with respect to the Director (e.g., appointing the Director to be the inspector;\textsuperscript{519} ordering the Director to publish the report in whole or in part or to send copies to any designated person;\textsuperscript{520} fifth, orders made with respect to other matters (e.g., determining whether a report of an inspector should be published).\textsuperscript{521}

It is also important to note that the \textit{CBCA} not only puts the wording “including, without

\textsuperscript{509} CBCA, s. 230(1)(b).
\textsuperscript{510} CBCA, s. 230(1)(d).
\textsuperscript{511} CBCA, s. 230(1)(f).
\textsuperscript{512} CBCA, s. 230(1)(h).
\textsuperscript{513} CBCA, s. 230(1)(i).
\textsuperscript{514} CBCA, s. 230(1)(k).
\textsuperscript{515} CBCA, s. 230(1)(c).
\textsuperscript{516} CBCA, s. 230(1)(e).
\textsuperscript{517} CBCA, s. 230(1)(g).
\textsuperscript{518} CBCA, s. 230(1)(h).
\textsuperscript{519} CBCA, s. 230(1)(b).
\textsuperscript{520} CBCA, s. 230(1)(j).
\textsuperscript{521} Ibid.
limiting the generality of the foregoing522 before the twelve types of relief mentioned above, but also empowers a court to “make any order it thinks fit”.523 This clearly indicates that these twelve types of relief set out in section 230(1) of the CBCA are not exhaustive, and that a court may make a novel order depending on a particular case.

Once appointed and authorized, an inspector shall perform a variety of obligations (e.g., to submit an interim or final report to the court; to send a copy of every report to the Director;524 to discontinue an inspection; to produce a copy of the court’s order to an interested person;525 etc.) while exercising a variety of investigatory powers (e.g., entering into the premises for the purpose of examining any thing and making copies of any document or record found on the premises; conducting a hearing and administering oaths and examining any person on oath; etc.). Furthermore, the inspector may furnish to, or exchange information and otherwise cooperate with, any public official in Canada or elsewhere who is investigating any allegation or improper conduct of the corporation that is the same as or similar to those described in subsection 229(2) of the CBCA.526

As a government official, the Director plays an important role in this remedy. On an application to the court, the Director shall be entitled to appear and be heard in person or by counsel.527 On appointment, the Director may act as the inspector, exercise the investigatory

522 CBCA, s. 230(1).
523 Ibid.
524 CBCA, s. 230(2).
525 CBCA, s. 231(3).
526 CBCA, s. 231(2).
527 CBCA, s. 229(3)
powers and perform the obligations of an inspector. The Director will also follow the
directions of the court to publish the inspector’s report in whole or in part or send copies
thereof to any designated person.

Although a minority shareholder may make an ex parte application under this remedy, the
*CBCA* requires such application to be heard in camera,\(^528\) taking into account any possible
influence that the hearing or investigation may have on the corporation. The *CBCA* further
requires that no information regarding the ex parte proceedings may be published by any
person without the authorization of the court or the written consent of the corporation being
investigated.\(^529\) Furthermore, any interested person may apply to the court for an order that a
hearing conducted by an inspector be heard in camera.\(^530\)

Like other remedies, the *CBCA*, by taking into account the particular status and conditions of
a minority shareholder, sets out its humanitarian provision which solves the financial
predicament of a minority shareholder in bringing an action and provides much convenience
for it to invoke this remedy. For example, an applicant is not required to give security for
costs in an application made under this remedy.\(^531\)

Based on the foregoing, investigation is a remedy directed by a court, and focuses on
investigating facts rather than determining rights. In *Re Canada (Canada Business

\(^{528}\) *CBCA*, s. 229(5).

\(^{529}\) *CBCA*, s. 229(6).

\(^{530}\) *CBCA*, s. 232(1).

\(^{531}\) *CBCA*, s. 229(4).
Corporations Act, Director) v. Royal Trustco Ltd., Eberle J. stated in commenting on the nature of the investigation contemplated by the CBCA that:

“However, it is clear that an investigation is only an investigation, and is not a proceeding for the determination of rights. Resort must be had to other sections of the Act for that. It seems to me that the investigation provided for by Section 222 is an investigation which must focus on facts and, bearing in mind the complex nature of corporate organization and corporate operations, especially to the discovery and ascertainment of facts. It seems to me that the investigation provided for by the section is not one which should concern itself primarily with disputed or uncertain questions of law.”

In Michalak v. Biotech Electronics Ltd., the applicants brought an action for investigation. The application was finally dismissed by the court because the applicants were actually not pursuing the investigation of facts but seeking compensation and damages. Martin J. noted that,

“… In the first place if indeed the facts have not come to light the application, having regard for the manner in which it is drafted, does not reflect this. Rather it asks for an investigation to confirm what is already known. Secondly nowhere is it alleged that the applicants are unable to obtain particulars of the past conduct of the respondents. As far as I am concerned the applicants have hitched their wagon to the civil action claiming compensation and damages and have available to them the full range of discovery proceedings contemplated by the Code of Civil Procedure in order to obtain further clarification of any of the elements which may affect the civil action.”

He further noted that,

“On the face of the proceedings it appears to me that what the applicants are really

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533 Canada (Canada Business Corporations Act, Director) v. Royal Trustco Ltd., ibid, at para. 4.
attempting to do is to use the wide powers granted to the Court under the C.B.C.A. to assist them in preparing the civil proceedings. That, it is trite to say is not the purpose of an investigation under the C.B.C.A. Rather the purpose is to permit the Court in the light of the results of the investigation to make orders to protect the aggrieved shareholders.”\(^{536}\)

It is also important to note the differences between the burden of proof under this remedy and that under the oppression remedy and a derivative action. Under both the oppression remedy and a derivative action, a court must be satisfied that the evidence submitted by the complainant has constituted the prescribed grounds before making an order thereunder. However, \textit{prima facie} evidence would be sufficient for a court to order an investigation of the corporation or any of its affiliates. In this regard, a minority shareholder assumes heavier burden of proof in the oppression remedy and a derivative action, as compared to an investigation. This exactly reflects the legislative intent that this remedy focuses on investigating facts.

To certain extent, investigation may be used as a remedy before invoking other remedies including the oppression remedy and a derivative action. In the real world, a minority shareholder may have \textit{prima facie} evidence, which could not satisfy the requirements of a court to grant relief under other remedies, but may meet the requirements of a court to grant investigation so as to find out more facts. With more findings, a minority shareholder would be in a better position to determine what further remedies should be pursued on the basis of the additional facts obtained from the investigation.

\(^{536}\) \textit{Michalak v. Biotech Electronics Ltd.}, \textit{ibid}, at para. 30.
Investigation is an important remedy for a minority shareholder to solve the issues such as asymmetric information and the burden of proof, and is an effective measure which may be used by it to protect its legitimate rights and interests. Nevertheless, due to its wide coverage and material effect, this remedy may result in adverse impact on or damages to the corporation and any interested person if improperly applied. Therefore, it is absolutely critical that this remedy should be used in a prudent manner and also that a minority shareholder should be prevented from abusing its right under this remedy.

In this context, it might be useful to re-consider certain issues in the designing and structuring of this remedy. This remedy does not provide for effective check and balance measures for both the corporation and a minority shareholder; does not grant necessary proceedings to the corporation or any interested person; does not impose relevant restrictions on a minority shareholder; does not set out arrangements of exhausting intra corporate remedies to economize judicial resources; etc. Besides, the *CBCA* requires any person to produce documents or records to the inspector. However, the *CBCA* does not specify an explicit definition or scope of such documents or records, which may be disputable and cause excessive burden on such person.
Dissolutions of a corporation are often classified into two categories: voluntary and involuntary dissolutions. The dissolution in this section belongs to an involuntary dissolution decided by a court. Based on the corporation’s legal institutions and the corporation’s theory of association,\textsuperscript{537} it is a remedy sought by a shareholder in applying for an order dissolving and liquidating the corporation under certain specific circumstances, with a view to protecting its legitimate rights and interests.

As this remedy has the direct consequence of dissolving a corporation, the applicants thereunder are confined exclusively to a shareholder of the corporation.\textsuperscript{538} Neither the Director nor any interested person has the standing to make an application for this remedy.

The \textit{CBCA} specifies three grounds for invoking this remedy. The first ground is the same as that in the oppression remedy.\textsuperscript{539} In the oppression remedy, the court may make an order liquidating and dissolving the corporation.\textsuperscript{540} However, it is important to note that, although the fourteen types of relief under the oppression remedy includes an order liquidating and dissolving the corporation, it does not necessarily mean that a minority shareholder may

\textsuperscript{537} See Chapter 2, section 2.2.2 and section 2.2.3.
\textsuperscript{538} \textit{CBCA}, s. 214(1).
\textsuperscript{539} \textit{CBCA}, s. 214(1)(a). The first ground is that a court is satisfied that in respect of a corporation or any of its affiliates (i) any act or omission of the corporation or any of its affiliates effect a result, (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or (iii) 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.
\textsuperscript{540} \textit{CBCA}, s. 241(1).
definitely invoke this remedy of dissolution once the grounds prescribed thereunder occurs, and the court would not necessarily make such an order easily. Pursuant to subsection 214(2) of the *CBCA*, a court may, on an application under this remedy of dissolution, make such order under this remedy or the oppression remedy as it thinks fit.

As “the dissolution order is the most drastic form of shareholder relief,” its negative effects are also apparent. In this regard, a court will take careful consideration of the just and equitable rule and grant other possible remedies to allow the continuous existence of the corporation before making the order of dissolution. Only when the oppressive conduct is too serious to be rectified or dissolution and liquidation is the only remedy available would the court consider making an order dissolving and liquidating the corporation. In commenting on this remedy, “a leading Canadian judge has stated that: ‘The remedy is drastic, and hence must be addressed to a serious condition affecting the proper conduct or management of the company’s affairs.’” “Essentially, the liquidation remedy is one of the last resort.”

The second ground relates to the occurrence of any event specified in a unanimous shareholder agreement in which a complaining shareholder is entitled to demand dissolution of the corporation. This condition is relatively simple and explicit because the unanimous shareholder agreement is the expression of the shareholders’ genuine intention as well as a

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541 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, *supra* note 12, at 987.
542 Ibid, at 988.
544 *CBCA*, s. 214(1)(b)(i).
condition attached to the establishment of the corporation. Obviously, this is a contractual right of a shareholder. Although this remedy is discretionary in general, “it is difficult to see how an order could be refused in the face of an express agreement to that effect.”545

The third ground means that it is just and equitable that the corporation should be liquidated and dissolved.546 Obviously, this ground is based on the fair and equitable rule. However, “[t]here are no fixed definitions of what circumstances will constitute sufficient grounds under the broad ‘just and equitable’ rule…”547 In Ebrahimi v. Westbourne Galleries Ltd.,548 Lord Wilberforce stated that,

“The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; … It would be impossible and wholly undesirable, to define the circumstances in which these considerations may arise.”549

Nonetheless, David S. Morritt, Sonia L. Bjorkquist and Allan D. Coleman have, on the basis of judicial practice, summarized the following three circumstances in which the courts have traditionally exercised their discretion in granting the dissolution relief:

• where there is a deadlock between shareholders with respect to the management of the affairs of the corporation;
• where it is understood that a shareholder will participate in the management of the corporation and that shareholder is excluded from so participating; or

545 Kevin P. McGuinness, supra note 5, at p. 1550.
546 CBCA, s. 214(1)(b)(ii).
547 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 989.
549 Ebrahimi v. Westbourne Galleries Ltd., ibid, at 379.
where persons became shareholders in the corporation on the basis of personal relationships involving mutual confidence analogous to a partnership, and there is a justifiable loss of that confidence.”

“The power of the court to make a winding-up order is within the realm of its equitable jurisdiction and, as is traditional in courts of equity, the jurisdiction is construed liberally.”

As facts and reasons vary from a case to another, a court has its discretion as to whether the fair and equitable rule is applied or not, based on a particular case’s own circumstances. Because of such discretion, “the courts have, over the years, expanded the rule into new areas as fresh circumstances and situations have arisen and as the courts’ reformulation of standards or intra-corporate conduct have developed.”

The CBCA specifies strict procedures for applying this remedy. When making an application, the applicant must state the reasons therein and the application must be verified by an affidavit of the applicant. In view of the severity of this remedy, it is necessary to restrain or prevent a minority shareholder from abusing such right. Therefore, the court may, on an application, order the corporation and any interested person to show cause, within four weeks after the date of the order, why the corporation should not be liquidated and dissolved. A copy of such an order shall be served on the Director and each person named therein, and published as directed in the order, at least once in each week before the time appointed for

550 David S. Morritt, Sonia L. Bjorkquist and Allan D. Coleman, supra note 311, at 7-29.
551 Ibid.
552 Ibid.
553 CBCA, s. 216(1).
554 CBCA, s. 216(2).
555 CBCA, s. 216(4)(b).
the hearing, in a newspaper published or distributed in the place where the corporation has its registered office.\footnote{CBCA, s. 216(4)(a).} Publication and service of an order under this remedy shall be effected by the corporation or by such other person and in such manner as the court may order.\footnote{CBCA, s. 216(5).}

Moreover, the court may further order the directors and officers of the corporation to furnish the court with all material information known to or reasonably ascertainable by them.\footnote{CBCA, s. 216(3).}

Such material information includes (a) financial statements of the corporation; (b) the name and address of each shareholder of the corporation; and (c) the name and address of each known creditor or claimant, including any creditor or claimant with unliquidated, future or contingent claims, and any person with whom the corporation has a contract.\footnote{Ibid.}

Due to the inherent defects of the Majority Rule, it is very easy for the controlling shareholder to disguise the oppressive conduct by the so-called approval of the shareholders. In order to solve this issue, the \textit{CBCA} sets out a particular provision to the effect that an application or an action brought or intervened under the oppression remedy shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of such body corporate, but evidence of approval by the shareholders may be taken into account by the court in making an order under the dissolution remedy.\footnote{CBCA, s. 242(1).}
The dissolution relief is a powerful weapon against the abuse of the internal management rule, the business judgment rule and the Majority Rule, as well as the last resort that a minority shareholder has been forced to use in order to protect its legitimate rights and interests. As this remedy has the direct consequence of liquidating and dissolving the corporation, it should be used sparingly.

4.2.10 Cancellation of Contracts

In the real world, the interests of a corporation and of a minority shareholder are often unfairly prejudiced by a material contract or transaction with the corporation that a director or an officer has an interest, mainly because he or she fails to perform his or her disclosure obligations or to be excluded from voting on such contract or transaction in order to seek any profit or gain therefrom improperly. The cancellation of contracts is, therefore, an effective remedy available to a minority shareholder against the improper conduct of the director or officer in an interested contract or transaction with the corporation.

The CBCA imposes in section 120 express obligations on directors or officers of a corporation in relation to an interested contract or transaction with the corporation, including but without limitation the scope of an interested contract or transaction, the time limits of

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561 CBCA, s. 120(1). Where a director or an officer of a corporation has any interest in a material contract or material transaction entered into and to be entered into with the corporation, he or she shall disclose the nature and extent of such interest to the corporation in writing or by request to have it entered in the minutes of meetings of directors or of
disclosure for directors and officers,\textsuperscript{562} the continuing disclosure requirements,\textsuperscript{563} the exclusion of voting rights,\textsuperscript{564} the shareholder’s access to disclosures.\textsuperscript{565}

The applicants under this remedy are only confined to the corporation and a shareholder thereof. The grounds for this remedy include (a) a director or officer fails to comply with the disclosure obligations imposed by section 120 of the \textit{CBCA}; (b) a director is not excluded from voting on the contract or transaction; (c) a director or officer obtains profit or gain from the contract or transaction by violating his or her obligations imposed in section 120 of the \textit{CBCA}.

Whenever any of the grounds occurs, a minority shareholder may apply to a court for an

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\textsuperscript{562} \textit{CBCA}, s. 120(2), (3) and (4). In relation to a director, the disclosure shall be made (a) at the meeting at which a proposed contract or transaction is first considered; (b) at the first meeting after the director become so interested if he or she was not interested in a proposed contract or transaction at the time of the meeting mentioned in the preceding sub-sentence; (c) at the first meeting after the director becomes so interested if he or she becomes interested after a contract or transaction is made; and (d) at the first meeting after an individual becomes a director if he or she who is interested in a contract or transaction later becomes a director. In relation to an officer, the disclosure shall be made (a) immediately after the officer becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting; (b) immediately after the officer becomes so interested if he or she becomes interested after a contract or transaction is made; and (c) immediately after the officer becomes an officer if he or she who is interested in a contract or transaction later becomes an officer. If a material contract or transaction, whether entered into or proposed, does not require approval by directors or shareholders in the ordinary course of the corporation’s business, the disclosure shall be made immediately after he or she becomes aware of the contract or transaction.

\textsuperscript{563} \textit{CBCA}, s. 120(6). A director or officer shall perform his or her continuing disclosure obligations under the following circumstances: (a) the director or officer is a director or officer, or acting in a similar capacity, of a party thereto; (b) the director or officer has a material interest in the party; or (c) there has been a material change in the nature of the director’s or the officer’s interest in the party.

\textsuperscript{564} \textit{CBCA}, s. 120(5). If the director is obliged to perform its disclosure obligation in an interested contract or transaction with the corporation, he or she shall be excluded from voting on any resolution to approve the contract or transaction unless the contract or transaction (a) relates primarily to his or her remuneration as a director, officer, employee or agent of the corporation or an affiliate; (b) is for indemnity or insurance under section 124 of the \textit{CBCA}; or (c) is with an affiliate.

\textsuperscript{565} \textit{CBCA}, s. 120(6.1). The shareholders of the corporation may examine the portions of any meeting minutes or any other documents that contain disclosures made by a director or officer in relation to an interested contract or transaction with the corporation, during the usual business hours of the corporation.
order cancelling the contract or transaction. On an application, the court may set aside the contract or transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or do both those things.\(^{566}\)

In order to prevent a minority shareholder from abusing its right, the \textit{CBCA} also specifies two exceptions for this remedy. First, an interested contract or transaction is not invalid, and the director or officer is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, because of the director’s or officer’s interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting that considered the contract or transaction, provided that (a) the director or officer has duly performed his or her disclosure obligations; (b) the contract or transaction has been duly approved by the directors; and (c) the contract or transaction was reasonable and fair to the corporation when it was approved.\(^{567}\)

Second, even if the conditions set out in the first exception are not met, a director or officer, acting honestly and in good faith, is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, and the contract or transaction is not invalid only because of the director’s or officer’s interest in the contract or transaction, provided that (a) the contract or transaction is approved or confirmed by special resolution at a meeting of the shareholders; (b) disclosure of the interest was made to the shareholders in a

\(^{566}\) \textit{CBCA}, s. 120(8).

\(^{567}\) \textit{CBCA}, s. 120(7).
manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and (c) the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed.

Based on the foregoing, cancellation of contracts is an effective remedy against the improper conduct of a director or officer from violating the relevant provisions of the *CBCA* as well as the improper connected transactions or insider’s trading to illegally seek profit or gain from such transaction at the sacrifice of the interests of the corporation and the shareholders thereof. It is based on the theory of modern corporate governance,568 and is also the beneficial supplement to the corporation’s theory of legal person.569

4.2.11 Right to Information and Examination of Financial Statements

Asymmetric information and no access to financial statements in particular is a fiendish problem that a minority shareholder frequently encounters in the real world. Following the establishment of a corporation, the controlling shareholder usually declines to have the corporation furnish to a minority shareholder information relating to the business and financial affairs of the corporation by taking advantage of the Majority Rule or under the excuse of keeping confidential the corporation’s commercial secrets.

568 See Chapter 2, section 2.2.6.
569 See Chapter 2, section 2.2.5.
Based on the corporation’s theory of association and the theory of modern corporate governance,570 the CBCA grants the right to information in two ways: one is to confer the right to information on an auditor of a corporation, and the other is to entitle a minority shareholder to examine the financial statements of the corporation and provide a remedy for a minority shareholder to exercise such a right.

An auditor of a corporation has the duties of examining the financial statements of the corporation and producing a report thereon.571 In order to perform his or her duties, the auditor has the right to information, namely that the present or former directors, officers, employees or agents of the corporation shall on demand furnish all necessary information and explanations, and provide access to all required records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries.572 As the auditor’s report forms part of the annual financial statements of the corporation to be placed before the shareholders for review at the annual meeting of shareholders, a minority shareholder is, in essence, indirectly conferred the right to information by examining the auditor’s report. In view of its independent and professional nature, the auditor’s report is of great value to a minority shareholder.

In addition to the right to information conferred on the auditor, the CBCA confers a right on a minority shareholder to examine the financial statements of a corporation. First, the

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570 See Chapter 2, section 2.2.3 and section 2.2.6.
571 CBCA, s. 169(1).
572 CBCA, s. 170(1).
corporation shall send a copy of the annual financial statements of the corporation to each shareholder not less than 21 days before each annual meeting or before the signing of a resolution in lieu of the annual meeting.\textsuperscript{573} Second, the corporation shall keep at its registered office a copy of the financial statements of each of its subsidiary bodies corporate and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.\textsuperscript{574} A minority shareholder and its personal representatives may on request examine such statements during the usual business hours of the corporation and may make extracts free of charge.\textsuperscript{575}

If the corporation bars a minority shareholder from examining the financial statements mentioned above without reason, it will be subject to relevant punishments. For example, a corporation is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars if it fails to send a copy of the annual financial statements of the corporation to each shareholder without reasonable cause.\textsuperscript{576} Of course, a fine sometimes does not solve the issue at all that a minority shareholder has no access to the financial statements of the corporation.

In order to solve this issue thoroughly, the \textit{CBCA} further specifies more severe measures.

\textsuperscript{573} \textit{CBCA}, s. 159(1). Pursuant to subsection 155(1) of the \textit{CBCA}, the annual financial statements include (a) comparative financial statements as prescribed relating separately to (i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and (ii) the immediately preceding financial year; (b) the report of the auditor, if any; and (c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

\textsuperscript{574} \textit{CBCA}, s. 157(1).

\textsuperscript{575} \textit{CBCA}, s. 157(2).

\textsuperscript{576} \textit{CBCA}, s. 159(2).
against the corporation’s failure to produce the required financial statements. In the three grounds for dissolving a corporation under the *CBCA*, two of them relates to the right to information or examination of financial statements. Specifically, in the event that a corporation fails to comply with the relevant provisions of the *CBCA* to hold the annual meetings of shareholders for two or more consecutive years, a minority shareholder may apply to a court for an order dissolving the corporation. This remedy obviously indicates that participation by a minority shareholder of an annual meeting of shareholders of a corporation constitutes an extremely important component of the right to information for a minority shareholder. Furthermore, if a corporation fails to send a copy of its annual financial statements to each shareholder or unreasonably bars a minority shareholder to examine the financial statements referred to in subsection 157(1) of the *CBCA*, a minority shareholder may also apply to a court for an order dissolving the corporation.

The legislative art of associating the right to information and examination of financial statements closely with the dissolution of a corporation adequately demonstrates the strong determination of Canada to solve the thorny issue regarding asymmetric information and no access of a minority shareholder to financial statements of the corporation, as well as the great importance Canada accords to the protection of minority shareholders.

While conferring on a minority shareholder the right to examine the financial statements of a

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577 Pursuant to subsection 213(1) of the *CBCA*, the Director or any interested person may apply to a court for an order dissolving a corporation if the corporation has (a) failed for two or more consecutive years to comply with the requirements of the *CBCA* with respect to the holding of annual meetings of shareholders; (b) contravened subsection 16(2) or section 21, 157 or 159; or (c) procured any certificate under the *CBCA* by misrepresentation.
corporation, the *CBCA* also provides for check and balance measures to prevent a minority shareholder from abusing his or her rights. If the examination by a minority shareholder of such statements would be detrimental to the corporation or a subsidiary body corporate, the corporation may, within 15 days of a request from the minority shareholder, apply to a court for an order barring the right to so examine.\(^{578}\) In the meantime, the corporation shall give the Director and the minority shareholder notice of the application in order to allow them to appear and be heard in person or by counsel.\(^{579}\) On an application, the court may bar such right and make any further order it thinks fit once it is satisfied that such examination would be detrimental to the corporation or a subsidiary body corporate.\(^{580}\)

4.2.12 Rectification of Records

In the real world, the name of a person is sometimes wrongly entered or retained in, or wrongly deleted or mitted from, the registers or other records of a corporation intentionally or unintentionally. Rectification of records is an effective remedy under the *CBCA*, which is available to a minority shareholder to rectify the mistakes in registers or other records. It is a reflection of the corporation’s legal institutions.\(^{581}\)

The *CBCA* specifies that the corporation, a security holder of the corporation and any

\(^{578}\) *CBCA*, s. 157(3).
\(^{579}\) *CBCA*, s. 157(4).
\(^{580}\) *CBCA*, s. 157(3).
\(^{581}\) See Chapter 2, section 2.2.2.
aggrieved person shall have the standing to invoke this remedy.\textsuperscript{582} The grounds for this remedy is that the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or mitted from, the registers or other records of a corporation.\textsuperscript{583} As this remedy focuses on the rectification of records, an applicant shall give the Director notice of application and the latter is entitled to appear and be heard in person or by counsel.\textsuperscript{584}

On an application, a court may make four types of relief, namely (a) an order requiring the registers or other records of the corporation to be rectified; (b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend before such rectification; (c) an order determining the right of a party to the proceedings to have their name entered or retained in, or deleted or omitted from, the registers or records of the corporation; and (d) an order compensating a party who has incurred a loss.\textsuperscript{585}

Besides, the \textit{CBCA} not only puts the wording “including, without limiting the generality of the foregoing”\textsuperscript{586} before the four types of relief mentioned above, but also empowers a court to “make any order it thinks fit.”\textsuperscript{587} This clearly indicates that the four types of relief set out in section 243(3) of the \textit{CBCA} are not exhaustive, and that a court may make a novel order depending on a particular case.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{582} \textit{CBCA}, s. 243(1).
\item \textsuperscript{583} \textit{Ibid.}
\item \textsuperscript{584} \textit{CBCA}, s. 243(2).
\item \textsuperscript{585} \textit{CBCA}, s. 243(3).
\item \textsuperscript{586} \textit{Ibid.}
\item \textsuperscript{587} \textit{Ibid.}
\end{itemize}
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As it does in the oppression remedy and other remedies, the *CBCA* specifies similar provisions in this remedy to solve the inherent defects of the Majority Rule and the financial predicament of a minority shareholder in bringing an action.\textsuperscript{588}

It is important to note that this remedy not only focuses on the rectification of wrong registers or records, but also involves the indemnification of losses. If a minority shareholder suffers losses from the wrong registers or records, it may claim indemnity while applying for rectification of the wrong registers or records. However, if a minority shareholder abuses its right under this remedy and causes losses of any other person, it shall be liable to compensate the aggrieved person for such losses. This exactly reflects the balanced protection of a minority shareholder.

### 4.3 Summary

This chapter articulates twelve remedies available to a minority shareholder under the *CBCA*. The oppression remedy is considered to be the most comprehensive and open-ended remedy while the others are also of equal importance in ensuring equality and justice of law. Case law and statutes constitute a complete and sound corporate legal framework in providing general and specific, individual and comprehensive protection towards an aggrieved minority shareholder. In the meantime, Canada attaches great importance to the balanced protection in

\textsuperscript{588} *CBCA*, ss. 242(1), 242(3) and 242(4).
these remedies, namely to prevent the legitimate rights and interests of a minority shareholder while preventing him or her from abusing his or her right. Based on the relevant corporate theories, these remedies have evolved to be the advanced and perfect protections designed to be responsive to the changing corporate world. As part of the second stage of the comparative study, this chapter has laid down a foundation for the comparison and analysis in the following chapter.
CHAPTER 5

COMPARISON AND ANALYSIS
FROM CANADIAN AND CHINESE PERSPECTIVES

5.1 Introduction

Lawrence Friedman, the legal historian, analyzed a legal system into three kinds of components: structural, substantive and cultural. Legal structures and substantive law concentrate on the institutions and rules, and legal culture informs “the whole social life of which various laws are a part.” It is impossible to understand a legal system without knowing the institutions and rules. However, what is more important is to look at some aspects of the legal culture behind these rules and institutions. As Lawrence noted,

589 “The institutions themselves, the forms they take, the processes they perform: these are structure. Structure includes the number and type of courts, presence or absence of a constitution, presence and absence of federalism or pluralism, division of powers between judges, legislators, governors, kings, juries, administrative officers; modes of procedure in various institutions; and the like.” Lawrence Friedman, “Legal Culture and Social Development” (1969-1970) 4 Law & Soc’y Rev. 29 at 34.

590 “This is the output side of the legal system. There are the laws themselves—the rules, doctrines, statutes, and decrees, to the extent they are actually used by the rules and the ruled; and, in addition, all other rules and decisions which govern, whatever their formal status.” Lawrence Friedman, ibid, at 34.

591 “These are the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole.” “… legal culture is the term we apply to those values and attitudes in society which determines what structures are used and why; which rules work and which do not, and why.” Lawrence Friedman, supra note 589, at 34-35.

592 Lawrence Friedman, supra note 589, at 34.

593 John O. Brew, One Hundred Years of Anthropology (Cambridge, Mass.: Harvard University Press, 1968) at 129.

594 “The concept of law as culture emphasizes that law is more than just a set of rules or concepts. It is also a social practice within a legal community. It is this social practice which is determining the actual meaning of the rules and concepts, their weight, their implementation and their role in society.” Mark Hoecke and Mark Warrington, “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards A New Model for Comparative Law” (July 1998) 47 International and Comparative Law Quarterly 495 at 498.
“[t]hese aspects of law—the legal culture— influence all of the legal system. But they are particularly important as the source of demands made on the system. It is the legal culture, that is, the network of values and attitudes relating to law, which determines when and why and where people turn to law or government, or turn away.”595

Based on the discussion of minority shareholder protections in China and Canada in Chapters 3 and 4, this chapter makes a comparative study of the similarities and differences of these protections not only from the structural and substantive perspectives, but also from certain legal cultural perspectives.

Before commencing a comparative study, it is important to classify the minority shareholder protections of the two countries into two categories, namely the ones of same name, and the others of different names. The comparative study in this chapter hence consists of two approaches: normative comparison and functional comparison.596 Normative comparison focuses on four minority shareholder protections of same name in China and Canada. Functional comparison concentrates on other protections of different name that are applied to solve similar issues relating to the minority shareholder protection in the two countries.

While the similarities and differences are compared and analyzed through these two comparative approaches, they are further compared and analyzed in this chapter from certain legal cultural perspectives, in order to better understand the underlying similarities and differences of the minority shareholder protections between China and Canada.

595 Lawrence Friedman, supra note 589, at 34.
596 See Chapter 2, section 2.1.1 and section 2.1.2.
5.2 Normative Comparison

Both China and Canada attach great importance to the protection of minority shareholder and set out a series of effective rights and remedies to protect the legitimate rights and interests of minority shareholders in their corporate statutes. The common corporate theories discussed in section 2.2 of Chapter 2 form the legal basis whereby the two countries specify and apply their minority shareholder protections. Among all the protections, it can be seen that four of them have same names in the two countries. These four similar protections are derivative action,\(^{597}\) dissolution,\(^{598}\) right to information,\(^{599}\) and right to dissent.\(^{600}\)

As discussed in section 2.1.1 of Chapter 2, normative comparison is “to compare the legal systems and legal rules of same name in different countries.”\(^{601}\) This section compares and analyzes the similarities and differences of these four protections, which forms part of the whole comparative study in this thesis.

5.2.1 Comparison on Derivative Action

As discussed in the former chapters, derivative action is a minority shareholder protection in

\(^{597}\) See Chapter 3, section 3.4.10 and Chapter 4, section 4.2.2.

\(^{598}\) See Chapter 3, section 3.4.9 and Chapter 4, section 4.2.9.

\(^{599}\) See Chapter 3, section 3.4.6 and Chapter 4, section 4.2.11.

\(^{600}\) See Chapter 3, section 3.4.8 and Chapter 4, section 4.2.3.

\(^{601}\) Xianyi Zeng and Liming Wang, supra note 37, at 26.
the Canadian Business Corporation Act (the “CBCA”), and in the Company Law of the People’s Republic of China (the “CLC”). The remedy is named a “derivative action” in Canada while the right is called a “shareholder’s derivative action” in China.

A derivation action in both Canada and China serves the same purposes. It first “ensures that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so.” It also “helps to guarantee some degree of accountability and to ensure that control exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company.”

However, there are significant procedural and substantive differences in the derivative action between China and Canada. First, the scope of persons who have the standing to bring a derivative action is different. In China, the complainant for a derivative action is only confined to a registered shareholder of the corporation. Pursuant to Article 152 of the CLC, persons other than a registered shareholder of the corporation are precluded from bringing a derivative action.

In Canada, the CBCA sets out a broad definition for the term “complainant” who has the

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602 CBCA, R.S.C. 1985, c. C-44.
603 The Company Law of the People’s Republic of China was amended and adopted at the 18th session of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China on October 27, 2005, and became effective as of January 1, 2006.
604 See CBCA, s. 239, and CLC, Article 152.
606 Ibid.
607 See CLC, Article 152.
standing to invoke a derivation action.  

Complainants in a derivative action in Canada are defined to not only include a present shareholder of the corporation, but also a former shareholder of the corporation. In addition to a shareholder of the corporation, the term is extended to cover a present or former shareholder of any of the corporation’s affiliates. Furthermore, the term is further defined to include (i) a present or former director or officer of the corporation or any of its affiliates, (ii) Director, and (iii) any other person who, in the discretion of a court, is a proper person to make an application for a derivation action.

Apparently, the legislation in Canada confers on a court “broad power to do justice and equity in the circumstances of a particular case, where a person, who otherwise would not be a ‘complainant’, ought to be permitted to bring” a derivative action. In First Edmonton Place Ltd. v. 315888 Alberta Ltd., McDonald J. described two circumstances in which justice and equity would entitle a creditor to be regarded as “a proper person”: the first is where the act or conduct of the directors or management of the corporation, which is complained of, constitutes using the corporation as a vehicle for committing a fraud on the applicant; and the second is if the act or conduct of the directors or management of the

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608 See CBCA, s. 238.
609 CBCA, s. 238(a).
610 Ibid.
611 CBCA, s. 238(b).
612 CBCA, s. 238(c).
613 CBCA, s. 238(d).
615 First Edmonton Place Ltd. v. 315888 Alberta Ltd., ibid.

Based on the above comparison, it is evident that the scope of complainants in Canada’s derivative action is far broader than that in shareholder’s derivative action of China. To this end, Canada’s derivative action offer more effective protection as compared to that in China.

Second, the scope of protection in a derivative action is different between the two countries. In China, the protection is rendered towards the corporation only.\footnote{CLC, Article 152.} In Canada, the protection is not only to cover the interests of the corporation, but also is extended to cover those of any of its subsidiaries.\footnote{CBCA, s. 239.} As Paul Martel noted, a derivation action may be taken in the name and on behalf of a subsidiary (which includes a subsidiary of a subsidiary) of the corporation.\footnote{Paul Martel, supra note 299, at 31-36.} He also observed that this remedy “is available to a complainant even if he has no direct interest in the subsidiary.”\footnote{Ibid.} This legislative skill has effectively solves the problems arising from the connected transactions or insider trading. In this respect, the derivative action in Canada offers wider protection as compared to that in China.

Third, the conditions precedent for a derivative action are different in China and Canada. In
China, the *CLC* contains two prerequisites. The first perquisite is that the action should be brought in the interests of the corporation.\(^{621}\) The second refers to (i) a written notice from a shareholder requesting the board of director or the board of supervisors (as the case may be) to bring an action, and (ii) a written reply from the board of director or the board of supervisors (as the case may be) rejecting the shareholder’s request or the failure by the board of director or the board of supervisors (as the case may be) to bring an action within the prescribed period.\(^{622}\) Meanwhile, the *CLC* specifies an exception to the prerequisite, entitling a shareholder to directly file a lawsuit in the People’s Court in its own name for the interests of the corporation if, in case of an emergency, the failure to file a lawsuit will immediately cause irrevocable damages to the interests of the corporation.\(^{623}\) However, the term “an emergency” is neither defined in the *CLC* nor in the judicial interpretations relating to the *CLC*. Due to the absence of a clearly-defined scope of emergent events, this exception appears to be hardly workable for a minority shareholder.

As compared to the *CLC*, the *CBCA* sets out three prerequisites that reflect more meticulous protection toward the interests of the corporation and any of its subsidiaries. The first prerequisite is the 14 days’ notice (or notice within a period otherwise ordered by a court) from the complainant to the directors of the corporation or its subsidiaries of the former’s intention of applying the derivative action.\(^{624}\) Compared with the prescribed period (i.e., 30

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\(^{621}\) *CLC*, Article 152.  
\(^{622}\) *CLC*, Article 152.  
\(^{623}\) Ibid.  
\(^{624}\) *CBLC*, s. 239(2)(a). Section 239(2)(a) of the *CBCA* also empowers a court to order other period to be a period of reasonable notice.
days) in the CLC, the combination of the prescribed period (i.e., 14 days) with the discretion of a court under the CBCA is more rational and responsive to the circumstances of a particular case. Besides, the CBCA does not require the directors to reply in writing, which is more rational and makes the procedure more simplified.

In addition to the prerequisite of reasonable notice, the CBCA sets out the second prerequisite, which precludes an action from being “motivated by a ‘private vendetta’” or from being “frivolous or vexatious”. In describing this prerequisite, Gallant J. noted that the complainant is acting in good faith if the proposed action appears not frivolous or vexatious; that self-interest in a derivative action is not in itself evidence of bad faith so long as that interest does not conflict with that of the corporation; and that duplicate oppression and derivative actions in and of themselves, however, do not constitute bad faith. In fact, this prerequisite reflects the corporation’s theory of profitability and plays a very important role in ensuring the balanced protection of the interests of a minority shareholder. However, the CLC does not have a similar provision to prevent a minority shareholder from abusing his or her right.

625 See CBCA, s. 239(2)(a) and CLC, Article 152, Clause 2.
627 CBCA, s. 239(2)(a).
628 The second prerequisite is that “the complainant is acting in good faith.” See CBCA, s. 239(2)(b).
629 Paul Martel, supra note 299, at 31-36.
630 Ibid.
The third prerequisite under the *CBCA* has the same requirements as the first one in the
*CLC*,\(^632\) namely that the action should be brought in the interests of the corporation rather
than for the benefit of the complainant.

Fourth, the requirements for evidence are different in China and Canada. In Canada, the
*CBCA* contains explicit provisions regarding the requirements for evidence.\(^633\) By taking
into account the difficulty of a minority shareholder in obtaining adequate evidence due to its
weak position and asymmetric information in the corporation, the *CBCA* expressly allows a
minority shareholder to submit *prima facie* evidence which appears that a derivation action is
brought, prosecute, defended or discontinued in the interests of the corporation or its
subsidiary.\(^634\) In *Northwest Forest Products Ltd.*,\(^635\) Cashman L.J.S.C. held that:

> “It will be noted that the Legislature has said that it is sufficient to show that the
action sought is *prima facie* in the interests of the company and does not appear to
require that the applicants prove a *prima facie* case. Presumably the authors of that
legislation had in mind that a minority shareholder being in a real sense on the
outside is often not in a position to obtain evidence such as that that the Crown
would be expected to put forward to found a *prima facie* case in a criminal
matter.”\(^636\)

Unlike the *CBCA*, the *CLC* does not specify any provision relating to the requirements for
evidence, not to mention the right of a minority shareholder to submit *prima facie* evidence
in view of its weak position in the corporation (particularly the difficulty in having access to

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\(^{632}\) The third prerequisite is that “it appears to be in the interests of the corporation or its subsidiary that the action be
brought, prosecuted, defended or discontinued.” See *CBCA*, s. 239(2)(c).

\(^{633}\) See *CBCA*, s. 239(2)(c).

\(^{634}\) *Ibid.*


\(^{636}\) *Northwest Forest Products Ltd.*, *ibid*, at para. 61.
information). In the absence of any particular requirements for evidence in the CLC, the
standard of proof adopted in both criminal proceedings and civil proceedings is hence applied
in a derivative action, namely the requirement of objective truth.637 In China, objective truth
of evidence means that the facts of a case are clear and that the evidence is ample and
reliable.638 In view of this standard, it appears not possible for a minority shareholder to
submit *prima facie* evidence in order to invoke this protection. In this regard, it is evident that
China imposes stricter requirements for evidence in a derivative action than in Canada.

Fifth, the burden of proof is different. China adopts the principle that a party who raises his
or her allegations shall have the responsibility to provide evidence in support of his or her
allegations.639 Hence, the burden of proof is always on the side of a complainant in a
derivative action and is onerous in reality. Due to the weak position of a minority shareholder
in the corporation, the burden of proof becomes the obstacle of a minority shareholder in
attempting to invoke a derivative action.

In comparison with China, the burden of proof for getting access to a court hearing is less
onerous for a complainant in Canada. On one hand, a complainant is required to “prove a
*prima facie* case.”640 On the other hand, “the typical approach by the Courts is not to attempt

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637 Yanli Qiao, Qin Zhao and Xu Du, *Lun wo guo min shi su song zheng ming biao zhun* (On Standard of Proof in Civil
Proceedings in Our Country), online: www.chinacourt.org
638 Ibid.
639 See Article 64 of The *Civil Procedure Law of the People’s Republic of China*, adopted on April 9, 1991 at the Fourth
Session of the Seventh National People’s Congress, and revised according to the Decision on Amending the *Civil
Procedure Law of the People’s Republic of China* which was adopted at the 30th Session of the Standing Committee of
the 10th National People’s Congress on October 28, 2007 and became effective as of April 1, 2008.
640 *Northwest Forest Products Ltd.*, supra note 623, at para. 61.
to define good faith but rather to analyse each set of facts for the existence of bad faith on the part of the applicant.”\textsuperscript{641} Kevin P. McGuinness suggested that “[a] better approach would be to presume good faith, unless those who contest the institution of the derivative proceeding can establish reason to believe that the claim is not being pursued in good faith.”\textsuperscript{642} It is, however, important to note that the burden to establish the claim in Canada is the same as in China.

Sixth, the convenience of bringing a derivative action is different in China and Canada. In China, a shareholder shall be entitled to bring a derivation action so long as the two prerequisites are satisfied.\textsuperscript{643} In Canada, it is important to note that all forms of derivative actions purporting to be brought on behalf of and for the benefit of the corporation should not be commenced unless the complainant obtains leave of the court.\textsuperscript{644} As Kevin P. McGuinness noted, “[t]he granting of leave is not automatic, but requires the court to exercise a judicial discretion.”\textsuperscript{645} The purpose of this requirement is “to balance two conflicting policy objectives that are at least in part contradictory.”\textsuperscript{646}

Based on the aforesaid comparison, it is evident that the derivative action in Canada is superior to that in China in many respects, and provides wider, more effective and balanced

\textsuperscript{641} Winfield v. Daniel, supra note 631, at para. 16.
\textsuperscript{642} Kevin P. McGuinness, supra note 5, at 1348.
\textsuperscript{643} CLC, Article 152, Clause 2.
\textsuperscript{645} Kevin P. McGuinness, supra note 5, at 1343.
\textsuperscript{646} Ibid. As for the two conflicting policy objectives, Kevin P. McGuinness noted: “On the one hand, the practical importance of derivative proceedings in maintaining the integrity of the corporate governance process cannot be overstated and has been repeatedly recognized by the courts. Where the directors of a corporation and its controlling shareholders are acting in concert, derivative proceedings and related possibility of an oppression will often be the only viable protection afforded by the law to remedy breaches of duty owed to the corporation.” Kevin P. McGuinness, ibid.
protection of the legitimate rights and interests of minority shareholders than that in China.

5.2.2 Comparison on Dissolution

As discussed in the former chapters, both Canada and China provide for a remedy or right whereby a minority shareholder may apply to a court for an order dissolving the corporation in the event that a corporation experiences serious difficulty in its operation and management and substantially different opinions among the shareholders, and in particular that a corporation is in a difficult position to continue its normal business and operation due to a deadlock in the board of directors or the meeting of shareholders. The remedy is named “dissolution” in Canada while the right is called “motion for dissolving the corporation under special conditions” in China.

Both Canada and China recognize that a court has its judicial discretion to make an order dissolving the corporation, but the remedy or right will be avoided to the fullest possible extent if protection of a minority shareholder could be realized through other channels. In China, this right will not be granted to a minority shareholder unless the problem cannot be solved through other channels. In Canada, “the liquidation remedy is one of last resort.”

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647 See Chapter 4, section 4.2.9.
648 See Chapter 3, section 3.4.9.
649 See CLC, Article 183
Due to the “most drastic form of shareholder relief,” the corporate statutes of both countries explicitly confine the applicants for this remedy or right to shareholders of a corporation. Besides, not all shareholders of a corporation have the standing to bring this motion in China. The CLC imposes a further requirement for the minimum percentage of voting rights held in the corporation by a shareholder intending to bring the motion for dissolving the corporation.

Apart from the similarities, significant differences exist in this remedy or right in Canada and China. First, the grounds for invoking this remedy or right are different. In China, the CLC specifies one general and principled ground, namely that a corporation encounters serious difficulty in its operation and management and its continued existence will cause significant losses to the shareholders’ interests. The Supreme People’s Court of China has subsequently set out four situations for this ground as its official interpretation in the Regulations (Part II) of the Supreme People’s Court on Certain Issues regarding the Application of the Company Law of the People’s Republic of China (the “Judicial Interpretation (II) of the CLC”),. Based on these four situations, it can be seen that the

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651 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. Maclntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 987.
652 See CBCA, s. 214(1) and CLC, Article 183.
653 CLC, Article 183.
654 CLC, Article 183.
655 The Regulations (Part II) of the Supreme People’s Court on Certain Issues regarding the Application of the Company Law of the People’s Republic of China which was published by the Supreme People’s Court of China on May 12, 2008 and became effective as of May 19, 2008.
656 These four situations refer to “(i) the corporation has been unable to convene the meeting of shareholders or the general meeting of shareholders for consecutive two years or more and the corporation has experienced serious difficulty in its operation and management; (ii) the votes by shareholders have not satisfied the requirements of the statutory percentage
ground for dissolving a corporation in China is only limited to the deadlock of the corporation. Unless this condition is satisfied, a minority shareholder may not apply to a court for an order dissolving the corporation.

In Canada, the grounds specified in the CBCA appear to be broader in scope because they include the grounds similar to those for invoking an oppression remedy. However, in judicial practice, the scope of grounds is only limited to two scenarios. One is the deadlock of a corporation. In Kelly v. Condon, the Newfoundland Supreme Court made an order winding up the defendant company where the plaintiff, as a principal and equal shareholder, was unable to receive a just return on her investment, and one defendant who was in de facto control of the company consistently refused to provide information to the plaintiff as to the various assets of the company. The other scenario is the “justifiable loss of confidence in the way the corporation’s business or affairs are being conducted.” Reznick v. Bilecki is a typical case. In that case, the company had had two equal shareholders, one of whom died. The remaining shareholder, the appellant, had disposed of company property and carried on its business without advising or consulting the other’s beneficiary, his widow. The widow lost all confidence in his ability to administer the company’s affairs. The Saskatchewan Court of

or the percentage prescribed in the articles, and no valid resolutions have been adopted by the meeting of shareholders or the general meeting of shareholders for consecutive two years or more, and the corporation has experienced serious difficulty in its operation and management; (iii) long-lasting conflicts have existed between and among directors and such conflicts could not be settled through the meeting of shareholders or the general meeting of shareholders, and the corporation has experienced serious difficulty in its operation and management; (iv) other serious difficulties have occurred in the operation and management, and the continuance of the corporation would cause material damages to the interests of shareholders.” See the Judicial Interpretation (II) of the CLC, Article 1, Clause 1.

CBCA, s. 214(1)(a).

“The term ‘deadlock’ describes a situation in which the general decision-making process within the corporation has broken down and there is no realistic prospect of it being repaired.” Kevin P. McGuinness, supra note 5, at 1556.


Kevin P. McGuinness, supra note 5, at 1559.

Appeal held that (i) the order appealed from (i.e., the dissolution and liquidation order) was just and equitable in the circumstances, and (ii) the appellant’s actions justified the widow’s lack of trust and confidence and such actions had persisted after the liquidation order.

Second, the check and balance measures are different. In China, the check and balance measures are simply worded by “such a situation cannot be solved through other channels”. Neither the CLC nor the Judicial Interpretations of the CLC sets out any express provisions relating to the definition and scope of “other channels”. Besides, the CLC does not contain any check and balance measures to prevent a minority shareholder from abusing his or her right under this protection.

In comparison with China, the CBCA specifies more meticulous check and balance measures for this remedy. When ordered by a court, the corporation or any interested party in Canada may file its submission that the corporation should not be liquidated and dissolved. The court is entitled to examine all material information of the corporation. Public notice of an order should be made at least once a week. Furthermore, the just and equitable rule most applied in judicial practice plays a very important role in ensuring the balanced protection of a minority shareholder. In Re R.J. Jowsey Mining Co. Ltd., Laskin J.A. held that:

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662 CLC, Article 183.
663 CBCA, s. 216(2).
664 CBCA, s. 216(3).
665 CBCA, s. 216(4)(a).
666 One of the grounds for this remedy is that “it is just and equitable that the corporation should be liquidated and dissolved.” See CBCA, s. 214(1)(b)(ii).
“The ‘just and equitable’ power of the Court connotes a broad discretion which I do not think is limited to required proof of actual wrongdoing. The formula is not one that can be easily translated into any set of principles; rather, it fixes a standard whose application must always be an anxious matter on particular facts. … When is it “just and equitable” for the Court to order a company to be wound up? The remedy is drastic, and hence must be addressed to a serious condition affecting the proper conduct or management of the company’s affairs.”668

Apparently, this rule assures “an equitable basis for granting the relief sought, particularly where others interested in the corporation oppose the application for winding up.”669 In Baxted v. Warkentin Estate,670 McCawley J. held that “a person seeking relief must come to court with clean hands.”671

Third, the powers of a court are different. In Canada, on an application, the court may order the directors and officers of the corporation to produce all material information that are relevant to the dispute before the court.672 It may also make an order requiring the corporation and any interested person to show cause why the corporation should not be liquidated and dissolved.673 Depending on the circumstances of a particular case, a court may make the liquidation and dissolution order under this remedy or grant a relief under an oppression remedy as it thinks fit.674 In China, the People’s Court has jurisdiction exclusively over the matters complained of and may not make any order beyond the matters

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668 Re R.J. Jowsey Mining Co. Ltd., ibid, at paras. 6 and 7.
669 Kevin P. McGuinness, supra note 5, at 1554.
672 CBCA, s. 216(3).
673 CBCA. s. 216(2).
674 CBCA, s. 214(2).
complained of. Hence, the People’s Court faces two choices: either to make an order dissolving the corporation or to dismiss the application. In no event may the People’s Court make any other order it thinks fit.

Besides, the just and equitable rule mentioned above is very important for a court in Canada in making an order dissolving the corporation. This rule ensures that the dissolution remedy will be used in a prudent manner, with a view to arriving at the balanced protection of a minority shareholder. However, there is no such a rule to be followed by a Chinese court in making its order dissolving the corporation.

Furthermore, a Canadian court provides higher quality services to the corporation and its minority shareholders than a Chinese court. In order to minimize the adverse effect of dissolution on a corporation, the court in Canada will, on one hand, request the corporation and any interested person to submit any reason that the corporation should not be liquidated and dissolved, and on the other hand possess more adequate information in order to determine whether the corporation should be liquidated and dissolved or not. Moreover, the CBCA also requests a court to make an order directing a public notice of its order published at least once in each week before the time appointed for the hearing in a newspaper.

675 “The parties shall be entitled to deal with their own civil rights and litigation rights in the way they prefer within the scope stipulated by law.” See Article 13 of The Civil Procedure Law of the People’s Republic of China, adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, and revised according to the Decision on Amending the Civil Procedure Law of the People’s Republic of China which was adopted at the 30th Session of the Standing Committee of the 10th National People’s Congress on October 28, 2007 and became effective as of April 1, 2008.
676 CBCA, s. 216(2).
677 CBCA, s. 216(3).
published or distributed in the place where the corporation has its registered office.\textsuperscript{678}

However, the \textit{CLC} does not specify such meticulous provisions for a Chinese court to that effect.

5.2.3 Comparison on Right to Information

As articulated in Chapter Two, a corporation has its nature of association, and a shareholder enjoys its membership rights.\textsuperscript{679} Right to information is one of the fundamental rights which a shareholder enjoys as the membership rights. It would not be possible for a shareholder to participate in deciding on major issues of the corporation or assume accountability towards the corporation without knowing the actual operations and other related information of the corporation.

Both Canada and China take a clear stand to protect the minority shareholder’s right to information and expressly specify the right of a minority shareholder to examine the financial statements of the corporation. In Canada, the remedy conferred on a minority shareholder is commonly known as the “right to information and examination of financial statements”.\textsuperscript{680} In China, the right conferred on a minority shareholder is generally called the “right to information”.\textsuperscript{681}

\textsuperscript{678} \textit{CBCA}, s. 216(4).
\textsuperscript{679} See Chapter 2, section 2.2.3.
\textsuperscript{680} See Chapter 4, section 4.2.11.
\textsuperscript{681} See Chapter 3, section 2.4.6.
However, the protection offered by the remedy in Canada and the right in China is different in many aspects. First, the information within the scope of this remedy and right is significantly different. In China, a minority shareholder is entitled to review and copy very limited information of the corporation, such as the articles, minutes of the meetings of shareholders, resolutions of the meetings of the board of directors, resolutions of the meetings of the board of supervisors, and financial reports of the corporation. The minority shareholder may also examine accounting books of the corporation, but he or she shall obtain the prior consent of the corporation. However, the CLC does not expressly authorize a minority shareholder to examine the original accounting evidence of the corporation (e.g., the original accounting vouchers and documents) when he or she finds that the accounting books could not adequately reflect the true financial condition or information of the corporation.

As compared to that in China, the information covered by this remedy in Canada is broader in scope. On one hand, the auditor of a corporation has the right to request the present or former directors, officers, employees or agents of the corporation to furnish all necessary information and explanations, and provide access to all required records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries. On the other hand, a minority shareholder is entitled to examine the relevant financial statements of the corporation, the report of the auditor and any further information respecting the financial

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682 CLC, Article 34, Clause 1.
683 CLC, Article 34, Clause 2.
684 CBCA, s. 170(1).
position of the corporation and the results of its operations required by the articles, the
by-laws or any unanimous shareholder agreement.\textsuperscript{685} It is important to note that the \textit{CBCA}
does not impose any limitation or restriction on the scope of “any further information”
mentioned above.\textsuperscript{686} Furthermore, the \textit{CBCA} has extended right to information from the
information of a corporation to that of its subsidiaries.\textsuperscript{687} Such a legislative skill makes this
remedy more powerful and effective to prevent from or fight against the improper connected
transactions and insider trading.

Second, before a minority shareholder brings an action with respect to its right to information,
the channels for him or her to have access to the operating and financial information of the
corporation are different. There is only one channel in China, namely that a minority
shareholder shall request the management of the corporation to produce the relevant
information for examination.\textsuperscript{688} Canada has two channels: one is the auditing by the
auditor,\textsuperscript{689} and the other is that a minority shareholder shall request the management of the
corporation for examination of relevant financial statements.\textsuperscript{690} Besides, the \textit{CBCA} specifies
a fine to be imposed on a corporation if it fails to send a copy of the annual financial
statements of the corporation to each shareholder without reasonable cause.\textsuperscript{691} However,

\textsuperscript{685} \textit{CBCA}, s. 155(1).
\textsuperscript{686} \textit{CBCA}, s. 155(1)(c).
\textsuperscript{687} See \textit{CBCA}, ss. 157(1) and 170(1).
\textsuperscript{688} See \textit{CBCA}, ss. 157(1) and 170(1).
\textsuperscript{689} See \textit{CBCA}, s. 169(1).
\textsuperscript{690} See \textit{CBCA}, s. 157(2).
\textsuperscript{691} See \textit{CBCA}, s. 159(2).
China does not have such a provision in the *CLC*.

Third, the procedures requesting for information are different. In China, a minority shareholder shall first submit its request in writing to the corporation if it intends to examine the accounting books of the corporation. On receipt of the written request, the corporation may reject the request on the grounds that the minority shareholder has its improper purpose thereof and that its examination may damage the interests of the corporation. In the event that the corporation refuses to produce the relevant information for examination, a minority shareholder may then apply to the People’s Court for an order directing the corporation to provide such information. As discussed in the former section, China adopts the principle that a party who raises his or her allegations shall have the responsibility to provide evidence in support of his or her allegations. Hence, the burden of proof is on the side of a minority shareholder rather than the corporation when he or she intends to exercise his or her right to information. Obviously, these procedures are time-consuming and often cause disputes between a minority shareholder and the corporation.

In comparison with the procedures of China, the procedures in Canada are specified in a more efficient and effective manner. Under the *CBCA*, the corporation may directly apply to a court for an order barring the right of a minority shareholder to examine the relevant

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692 See *CLC*, Article 34, Clause 2.
693 Ibid.
694 Ibid.
695 See Article 64 of *The Civil Procedure Law of the People’s Republic of China*, adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, and revised according to the Decision on Amending the *Civil Procedure Law of the People’s Republic of China* which was adopted at the 30th Session of the Standing Committee of the 10th National People’s Congress on October 28, 2007 and became effective as of April 1, 2008.
information after it receives a request from the minority shareholder and believes that such examination would be detrimental to the corporation or a subsidiary body corporate.\textsuperscript{696} This procedure would avoid endless disputes between the corporation and the minority shareholder. Besides, it is fair and equitable that the corporation assumes the burden of proof because it possesses all necessary information.

Fourth, protection given by a court under the right to information is different. In China, on an application by a minority shareholder with respect to the right to information, the People’s Court will make an order exclusively determining whether the minority shareholder has the justifiable grounds to examine the accounting books of the corporation.\textsuperscript{697} There are still many outstanding issues in practice after such an order is made: whether a minority shareholder could, after obtaining a favourable order, really get the exact information he or she needs simply by examining the accounting books of the corporation; what about if the minority shareholder needs to further examine the original accounting evidence of the corporation (e.g., the original accounting vouchers and documents); etc. Regretfully, there are no provisions in the \textit{CLC} addressing these issues.

Compared to that in China, protection under the right to information is more powerful and effective in Canada because it is closely interrelated with the other two remedies, namely the investigation\textsuperscript{698} and the dissolution.\textsuperscript{699} As investigation under the \textit{CBCA} is an important

\textsuperscript{696} See \textit{CBCA}, s. 157(3).
\textsuperscript{697} See \textit{CLC}, Article 34, Clause 2.
\textsuperscript{698} See Chapter 4, section4.2.8.
remedy for a minority shareholder to solve the asymmetric information and the burden of proof,\textsuperscript{700} it could be applied as an effective remedy against the corporation in addition to the fine in the event that the corporation fails to comply with the relevant provisions of the \textit{CBCA} to send a copy of the financial statements to its shareholders.\textsuperscript{701} To certain extent, the right to information is realized by means of the remedy of investigation which focuses on investigating facts rather than determining rights.\textsuperscript{702} Since a court has broad discretion under the investigation, it may direct investigation over a wide range of matters.\textsuperscript{703} Besides, this remedy is also closely interrelated with the dissolution of a corporation in Canada, because the contravention of section 159 of the \textit{CBCA} constitutes the grounds for dissolution of the corporation.\textsuperscript{704} All these arrangements adequately indicate the great importance that Canada accords to the protection of minority shareholders in terms of the right to information.

Sixth, the counter balance measures are different in preventing a minority shareholder from abusing its right and disturbing the normal operation and business of the corporation. In China, a corporation may reject the request of a minority shareholder to examine the accounting books of the corporation if it has its justifiable reason to believe that the request arises from malice and the examination would be harmful to the interests of the corporation.\textsuperscript{705} When an application is made by the minority shareholder to the People’s Court, the corporation will be in a position to defend the action. Apart from this, the \textit{CLC} has

\textsuperscript{699} See Chapter 4, section 4.2.9.
\textsuperscript{700} See \textit{CBCA}, s. 229.
\textsuperscript{701} See \textit{CBCA}, s. 229(2)(b).
\textsuperscript{702} See \textit{CBCA}, s. 230.
\textsuperscript{703} See \textit{CBCA}, s. 213(1)(b).
\textsuperscript{704} See \textit{CBCA}, s. 213(1)(b).
\textsuperscript{705} \textit{CLC}, Article 34, Clause 2.
no other measures to restrain a minority shareholder from abusing its right.

In comparison with the simple measure in China, the counter balance measures in Canada are well designed to arrive at the balanced protection of a minority shareholder. In Canada, a corporation may directly apply to the court for an order barring any person to examine the financial statements of the corporation.\footnote{CBCA, s. 157(3).} Meanwhile, in order to ensure that the corporation is acting in good faith, the \textit{CBCA} requires the corporation to give notice of its application to the Director and any person requesting for such examination.\footnote{CBCA, s. 157(4).} If the court is satisfied that the examination would be detrimental to the corporation or a subsidiary body corporate, it may bar such examination and make any further order it thinks fit.\footnote{CBCA, s. 157(3).}

5.2.4 \textbf{Comparison on Right to Dissent and Compulsory Acquisitions}

Material changes are sooner or later required for a corporation in the process of its operation and business. There are also some situations in which the reasonable expectations of a minority shareholder inevitably come to nothing. Under these circumstances, it is very important for a minority shareholder to have an exit mechanism to withdraw from the corporation. In order to solve the exit problem, the \textit{CLC} specifies the right of a dissenting shareholder to withdraw from the corporation,\footnote{See Chapter 3, section 2.4.8.} while the \textit{CBCA} provides for the right to

\footnote{CBCA, s. 157(3).}\footnote{CBCA, s. 157(4).}\footnote{CBCA, s. 157(3).}\footnote{See Chapter 3, section 2.4.8.}
dissent and compulsory acquisitions.  

As discussed in Chapters 3 and 4, both Canada and China recognize that a solution shall be made available to a minority shareholder in withdrawing from the corporation in the event that the corporation is to make fundamental changes, so as to prevent the minority shareholder from being forced into the predicament and becoming the prisoner of its investment due to the closed nature of a corporation.

Based on the common conception, both the CLC and the CBCA specify that a minority shareholder may be the subject of applying for this right or remedy.  

Apart from these similarities, there are significant differences in the right to dissent between Canada and China. First, the focus of legislation is different. The CLC has its focus on determining whether a corporation is obligated to purchase the equity of a dissenting shareholder. The CLC does not provide for any provision regarding how to fix a fair price for the corporation to effect such purchase.

However, in Canada, the focus of an action is only limited to the calculation and fixing of a

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710 See Chapter 4, section 4.2.3 and section 4.2.5.
711 See CLC, Article 75; CBCA, s. 190.
712 See CLC, Article 75, Clause 1; CBCA, s. 190(1).
713 See CLC, Article 75.
fair value for the shares of any dissenting shareholder.\textsuperscript{714} This provision apparently precludes endless disputes arising from other issues, minimizes litigation costs and avoids any possible waste of judicial resources. As the core of purchasing the shares of any dissenting shareholder is the purchase price, it is evident that the focus of the \textit{CBCA} makes the right to dissent more effective, efficient and practical in the protection of minority shareholders.

Second, the grounds for invoking this right or remedy are different in some aspects. In China, the grounds are relatively narrower in scope. A minority shareholder in China may request the corporation to purchase its equity only under the three circumstances, namely (i) where the business term provided in the articles expires or any other reason for dissolution provided in the articles occurs, the meeting of shareholder makes the corporation continue by adopting its resolutions to amend the articles; (ii) the corporation has not distributed any profit to its shareholders for five consecutive years, though it has made profits for five consecutive years and meets the conditions of profit distribution as prescribed in the \textit{CLC}; and (iii) the merger, division and transfer of the major assets of the corporation.\textsuperscript{715}

In contrast to those of China, the grounds in Canada are much broader in scope and more meticulous in content. Under the \textit{CBCA}, a minority shareholder may exercise its right to dissent when the corporation carries out the fundamental changes.\textsuperscript{716} The scope of fundamental changes in the context of this remedy are broad enough to cover (i) to amend the

\textsuperscript{714} See \textit{CBCA}, s. 190(12), (15), (16).
\textsuperscript{715} \textit{CLC}, Article 75, Clause 1.
\textsuperscript{716} \textit{CBCA}, s. 190(1).
articles under sections 173 or 174 of the *CBCA* to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class;\(^{717}\) (ii) to amend the articles under section 173 of the *CBCA* to add, change or remove any restriction on the business or businesses that the corporation may carry on;\(^{718}\) (iii) to amalgamate otherwise than under section 184 of the *CBCA*;\(^{719}\) (iv) to be continued under section 188 of the *CBCA*;\(^{720}\) (v) to sell, lease or exchange all or substantially all the assets of the corporation under section 189(3) of the *CBCA*;\(^{721}\) and (vi) to carry out a going-private transaction or a squeeze-out transaction.\(^{722}\) Furthermore, a minority shareholder may request the offeror to purchase its shares under compulsory and compelled acquisitions. Obviously, all these provisions offer wider protection to a minority shareholder as compared to those in the *CLC*.

Third, the scope of subjects for invoking this right is different. In China, the applicant is only confined to a dissenting shareholder.\(^{723}\) This is because, pursuant to the relevant provisions of the *Civil Procedure Law of the People’s Republic of China*, the dissenting shareholder assumes the burden of proof in the court hearing while the corporation enjoys the right to defend the action and rebut the evidence.\(^{724}\)

\(^{717}\) *CBCA*, s. 190(1)(a).

\(^{718}\) *CBCA*, s. 190(1)(b).

\(^{719}\) *CBCA*, s. 190(1)(c).

\(^{720}\) *CBCA*, s. 190(1)(d).

\(^{721}\) *CBCA*, s. 190(1)(e).

\(^{722}\) *CBCA*, s. 190(1)(f).

\(^{723}\) *CLC*, Article 75, Clause 1.

\(^{724}\) As discussed in the former section, China adopts the principle that a party who raises his or her allegations shall have the responsibility to provide evidence in support of his or her allegations. See Article 64 of *The Civil Procedure Law of the People’s Republic of China*, adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, and revised according to the Decision on Amending the *Civil Procedure Law of the People’s Republic of China* which was adopted at the 30th Session of the Standing Committee of the 10th National People’s Congress on October 28, 2007.
In Canada, both the dissenting shareholder and the corporation have the standing to invoke the right to dissent,\textsuperscript{725} while the dissenting offeree and the offeror have the standing to seek the remedy under compulsory acquisitions.\textsuperscript{726} Furthermore, application of the corporation and of the offeror precedes that of the dissenting shareholder and of the dissenting offeree under the \textit{CBCA}.\textsuperscript{727} In other words, the dissenting shareholder or offeree may not apply to a court for the relevant remedy unless the corporation or the offeror fails to do so within the prescribed period. Such provisions produce two advantages for a minority shareholder. One is that they have solved the issue of asymmetric information because the corporation or offeror is in a better position to possess adequate and sufficient information to assume the burden of proof in the action, as compared to the dissenting shareholder or offeree. The other is to procure the corporation or the offeror to offer a fair price in purchasing the shares of dissenting shareholder or offeree, because they would lose the case and bear the litigation cost if the price offered was not fair.

Fourth, the procedures prior to litigation are different. The wording for the procedures is too general and principled in China.\textsuperscript{728} The \textit{CLC} simply specifies that the dissenting shareholder may negotiate the equity purchase agreement with the corporation within 60 days after the date of the relevant resolutions adopted at the meeting of shareholders,\textsuperscript{729} but does not

\textsuperscript{725} \textit{CBCA}, s. 190(15), (16).
\textsuperscript{726} \textit{CBCA}, s. 206(9), (10).
\textsuperscript{727} \textit{CBCA}, ss. 190(15), (16) and 206(9), (10).
\textsuperscript{728} See \textit{CLC}, Article 75 Clause 2.
\textsuperscript{729} \textit{Ibid.}
provide for the detailed procedures for such negotiation or the obligations of the corporation to offer the purchase price and give explanations thereof. It is evident that such principled procedures are difficult to implement without detailed provisions to specify the rights and obligations of both the dissenting shareholder and the corporation.

In contrast to the CLC, the CBCA specifies much more detailed procedures. Under the right to dissent, the consultation and negotiation are divided into six procedures embodied in the first 14 subsections of section 190 of the CBCA, which are so meticulous to contain respective obligations on both the corporation and the dissenting shareholder to conduct the consultation and negotiation with regard to the withdrawal from the corporation. Likewise, detailed procedures are set out under compulsory and compelled acquisitions in the CBCA. It is, therefore, possible for both the dissenting shareholder and the corporation or the dissenting offeree and the offeror to reach an agreement through the well-designed procedures mentioned above. If consultation and negotiation are successful in the end, there is no longer any need for either the corporation, the offeror or the dissenting shareholder, dissenting offeree to apply to a court for judicial relief. This will, no doubt, minimize the utilization of judicial resources and avoid the waste of litigation cost.

Fifth, China and Canada attach different importance to the protection of a dissenting shareholder under compulsory acquisitions. In China, the CLC simply includes the term

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730 See Chapter 4, section 4.2.3.  
731 CBCA, s. 206.
“merger” in the grounds of entitling a dissenting shareholder to request for withdrawing from the corporation.\footnote{CLC, Article 75, Clause 1, sub-paragraph (2).} Apart from that, the CLC does not provide for any further provisions regarding the definition of this term and the rights and obligations of the dissenting shareholder and the corporation in the merger. This indicates that China does not pay any particular attention to the rights of a minority shareholder under an acquisition transaction to which the corporation is a target company.

In contrast to China, the CBCA sets out an independent part to deal with compulsory and compelled acquisitions.\footnote{See CBCA, PART XVII (Compulsory and Compelled Acquisitions).} In particular, a remedy is available to a minority shareholder thereunder in order to ensure its shares to be purchased at a fair value.\footnote{See CBCA, s. 206(9).} This fully demonstrates the greater importance which Canada has attached to the protection of dissenting shareholders in those acquisitions which are a foregone conclusion. It is, therefore, evident that this protection in Canada is more powerful and effective than that in China.

Sixth, safety of a transaction is not considered in the CLC while the CBCA puts the transaction safety in the first place. The CBCA attaches great importance to the transaction safety at all times, whether in the internal remedial process within the corporation or in the process of judicial relief. For example, in the event that the dissenting offeree has accepted the take-over bid, the offeror shall pay or transfer to the offeree corporation the amount of money or other consideration payable to the dissenting offeree, and the offeree corporation is
deemed to hold such money or consideration in trust for the dissenting offeree and shall further deposit the money or place the consideration in a prescribed bank or other body corporate.735 Furthermore, in the event that the dissenting offeree disagrees to the take-over bid and that the offeror wishes to apply to a court for an order fixing the fair value of the shares of a dissenting offeree, the offeror must first pay the money or the other consideration in accordance with the above-mentioned requirements and then make its application to the court within twenty days after such payment.736 Apparently, all these provisions are set out to ensure the safety of a transaction.

Seventh, the court of Canada plays a more important role in granting relief under the right to dissent and the compulsory acquisitions while the role of the People’s Court in China is very limited. There are three reasons for this argument. The first relates to the utilization of judicial resources. In Canada, a court will first determine whether there is any other dissenting shareholder or offeree who should be joined as a party before fixing a fair value for the shares of all dissenting shareholders or offerees.737 These provisions not only materially reduce the litigation cost, but also economize the judicial resources to bring all the dissenting shareholders or offerees into the action and have the final order of the court legally binding on all of them. Regretfully, the CLC does not have any provision to that effect.

The second reason involves the discretionary power of a court. As discussed in section 5.2.2

735 See CBCA, s. 206(7).
736 See CBCA, s. 206(9).
737 CBCA, ss. 190(20) and 206(14).
above, the decision of the People’s Court is only limited to the matters complained of by a dissenting shareholder, and the People’s Court is not allowed to make any judgment beyond such matters.\footnote{“The parties shall be entitled to deal with their own civil rights and litigation rights in the way they prefer within the scope stipulated by law.” See Article 13 of The Civil Procedure Law of the People’s Republic of China, adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, and revised according to the Decision on Amending the Civil Procedure Law of the People’s Republic of China which was adopted at the 30th Session of the Standing Committee of the 10th National People’s Congress on October 28, 2007 and became effective as of April 1, 2008.} As compared to the People’s Court in China, a court in Canada is given by the \textit{CBCA} broader discretion,\footnote{See \textit{CBCA}, ss. 190(20), (21), (22), (23); 192(4)(d) and 206(15), (16), (17), (18).} and may make any order it thinks fit, in addition to the order fixing the fair value of the shares of a dissenting shareholder or offeree.\footnote{See \textit{CBCA}, ss.192(4) and 206(18).} One important feature is that the court may allow a reasonable rate of interest on the amount payable to each dissenting shareholder or offeree.\footnote{See \textit{CBCA}, ss. 190(23) and 206(18)(c).}

The third reason deals with the restraining of a minority shareholder from abusing his or her right. In Canada, the decision of a court to fix a fair value of the shares of a dissenting shareholder or offeree has dual role: one is to protect the legitimate rights of the dissenting shareholder or offeree, and the other is to restrain the dissenting shareholder or offeree from abusing his or her right in bringing an action. If the dissenting shareholder or offeree rejects the reasonable offer from the corporation or offeror at will or willfully, it may face a situation in which the fair value of its shares fixed by a court is lower than the price originally offered by the corporation or offeror. There might also be the possibility that the court would not support the claim for a rate of interest on the amount payable to the dissenting shareholder or
offeree due to the latter’s abuse in bringing an action and waste of judicial resources.\textsuperscript{742} However, the \textit{CLC} does not have any similar provision authorizing the People’s Court to fix the fair value of the dissenting shareholder or offeree.

Eighth, the counter balance measures in preventing a minority shareholder from abusing his or her right are different under the right to dissent. In Canada, the \textit{CBCA} meticulously specifies the limitations and exemptions with regard to the right to dissent. As for the limitations, the corporation will be exempted from making payment to a dissenting shareholder under the prescribed situations.\textsuperscript{743} With regard to the exemptions, a dissenting shareholder may not claim with regard to part of its shares,\textsuperscript{744} or dissent if an amendment to the articles of incorporation is effected under section 191 of the \textit{CBCA}.\textsuperscript{745} Apparently, there provisions are the preventive and effective measures in restraining a minority shareholder from abusing his or her right in this remedy. Regretfully, the \textit{CLC} does not have similar provisions to that effect.

\textbf{5.3 Functional Comparison}

As discussed in section 2.1.2 of Chapter 2, functional comparison focuses on issues. There are many similar issues that arise from corporate life and concern the minority shareholder

\textsuperscript{742} See the discussion in Chapter 4, section 4.2.3. Also see \textit{Smeenk v. Dexleigh Corp.}, \textit{supra} note 428.
\textsuperscript{743} See \textit{CBCA}, s. 190(26).
\textsuperscript{744} See \textit{CBCA}, s. 190(4).
\textsuperscript{745} See \textit{CBCA}, s. 191(7).
protection in both Canada and China. Based on the common corporate theories, the two countries specify different protections to deal with these similar issues. This section makes a comparative study on the similar issues including (i) the participation by a minority shareholder in the operation and management of the corporation, (ii) the voting rights of a minority shareholder, (iii) the breach by persons inside and outside the corporation of their duties towards the corporation, and (iv) the broad, comprehensive and open-ended shareholder remedy.

5.3.1 Comparison on a Minority Shareholder’s Participation in the Operation and Management of the Corporation

Chapter 2 has discussed about the corporation’s theory of association. As a member of the corporation, a shareholder is entitled to exercise his or her rights to make various resolutions in accordance with the corporate law and the articles and also assume his or her accountability towards the corporation. However, in the real world, the weak position of a minority shareholder makes it very difficult for him or her to incorporate in the articles or the rules of procedures of the meeting of shareholders or of the board of directors some provisions that are favourable to the participation of a minority shareholder in the operation and management of the corporation. Consequently, there are many cases in which the membership rights of a minority shareholder to participate in the operation and management of the corporation are infringed in different ways.

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746 See Chapter 2, section 2.2.
747 See Chapter Two, section 2.2.3.
748 A distinct example is that the controlling shareholder makes all means to appoint its own persons to take charge of
The theory of corporate governance is also important in protecting the right of a minority shareholder to participate in the operation and management of the corporation by improving the governance structure of the corporation. In *Gramophone and Typewriter, Ltd v. Stanley*, Buckley LJ noted that,

“The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals, they are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.”

In dealing with the infringement by the controlling shareholder on a minority shareholder, both Canada and China provides for mandatory provisions in their corporate legislation. These provisions are based on the two theories mentioned above and aimed at normalizing the rules of procedures of the meeting of shareholders and of the board of directors of the corporation relating to the participation by a minority shareholder in the operation and management of the corporation.

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749 See Chapter Two, section 2.2.6.
750 *The Gramophone and Typewriter, Limited v. Stanley*, [1908] 2 KB 89 (Court of Appeal).
However, the rights and remedies available to a minority shareholder in this respect are different in Canada and China. First, the name and nature of such rights and remedies are different. In Canada, the *CBCA* specifies a remedy for a minority shareholder to submit a proposal, which breaks through the limited protection offered by case law to a minority shareholder in this respect.\(^{752}\) In essence, protection under this remedy of proposal not only covers the right of a minority shareholder to submit its proposal and discuss the matters raised in the proposal relating to the operation and management of the corporation, but also imposes the accountability of a shareholder towards the corporation.

In China, the *CLC* confers on a minority shareholder a right to request, convene and preside a meeting of shareholders, aiming at ensuring the meetings of shareholder to be convened from time to time.\(^{753}\) This provision has effectively solved the issue that many corporations in China could not convene valid meetings of shareholders prior to the promulgation of the *CLC*.

Second, the procedures regarding this right or remedy are different, although both Canada and China focus the procedures on the core rights of submitting proposals and convening a meeting of shareholders. In Canada, the *CBCA* specifies detailed provisions regarding the standing of a minority shareholder to invoke the remedy of proposal. They include not only the requirements for the time length of holding the shares by a minority shareholder, but also

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\(^{752}\) See the discussion in Chapter 4, section 4.2.4.  
\(^{753}\) See the discussion in Chapter 3, section 3.4.3.
the minimum quantity of shares held by such shareholder.\textsuperscript{754} Besides, a minority shareholder is required to provide relevant information supporting its standing to the corporation for examination.\textsuperscript{755} The \textit{CBCA} further imposes strict requirements on the content and number of words of the proposal and the statement attached to the proposal,\textsuperscript{756} and specifies five exemptions regarding this remedy.\textsuperscript{757} Furthermore, a minority shareholder may apply to the court for an order restraining the holding of the meeting of shareholders only after it receives the notice of refusal from the corporation.\textsuperscript{758}

In China, the key issue of holding a valid meeting of shareholders is whether there is a legitimate person to call and preside the meeting. In this respect, the \textit{CLC} provides for the minimum requirement for a minority shareholder to have the standing of requesting, convening and presiding a meeting of shareholders, namely the minimum voting rights held by a minority shareholder who intends to convene and preside over a meeting of shareholders.\textsuperscript{759} Besides, the \textit{CLC} provides for detailed provisions limiting the convening and presiding by a minority shareholder of a meeting of shareholders on their own initiative.\textsuperscript{760} Specifically, a minority shareholder may not convene or preside a meeting of shareholder unless the chairperson, vice chairperson, directors, supervisors fails or refuses to convene and preside the meeting in proper sequence.\textsuperscript{761}

\textsuperscript{754} See \textit{CBCA}, s. 137(1.1).
\textsuperscript{755} See \textit{CBCA}, s. 137(1.2).
\textsuperscript{756} See \textit{CBCA}, s. 137(3).
\textsuperscript{757} See \textit{CBCA}, s. 137(5).
\textsuperscript{758} See \textit{CBCA}, s. 137(8).
\textsuperscript{759} See \textit{CLC}, Article 41, Clause 3.
\textsuperscript{760} \textit{Ibid.}
\textsuperscript{761} \textit{Ibid.}
Third, the counter balance measures are different in preventing a minority shareholder from abusing his or her right. In Canada, in addition to the procedures mentioned above, the "CBCA" allows the corporation or any person claiming to be aggrieved by a proposal to apply to a court for an order permitting the corporation to omit the proposal from the management proxy circular, in order to preclude the improper interference of a minority shareholder in the holding of the meeting of shareholders to which the proposal relates. 762 In order for a court to discover the facts, the "CBCA" further requires an applicant in an action (whether the corporation, the person submitting the proposal or the person claiming to be aggrieved by the proposal) to give notice of the application to the Director so that the latter is entitled to appear and be heard in person or by counsel. 763

In China, the right to request, convene and preside a meeting of shareholders is not a right in an action. 764 As long as the statutory requirements are satisfied, a minority shareholder may convene and preside over a meeting of shareholders on their own initiative, without the need to seek any order from the People’s Court. 765 In this connection, the procedures mentioned above are not sufficient to prevent a minority shareholder from abusing his or her right. When the corporation has the grounds to believe that a minority shareholder is abusing his or her right, it may apply to the People’s Court in accordance with the "Civil Procedure Law of the People’s Republic of China" for an order restraining the holding of the meeting of

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762 "CBCA", s. 137(9).
763 See "CBCA", s. 137(10).
764 See "CLC", Article 41.
765 Ibid.
shareholders.  

Fourth, the legislative skill is different. In Canada, the CBCA uses many terms such as “prescribed period”, “prescribed minimum amount”, “prescribed maximum word”, “prescribed minimum number”. For example, to ensure the seriousness and representation of a proposal, the CBCA specifies in subsection 137(1.1) the requirements for the standing of a person to submit a proposal that “… (a) must be, for at least the prescribed period, …; or (b) must have the support of persons who, …, at least the prescribed number of outstanding shares of the corporation.” These phrases are a good policy choice to leave in regulations for ease of continually defining to meet the changes. Such legislative art has effectively avoided the complicated formalities required for frequent amendment to the CBCA, and in the meantime solved the hysteresis of statutory provisions by amending the Canada Business Corporations Regulations from time to time.

In China, the CLC simply provides for the minimum voting rights with regard to the standing of a minority shareholder to exercise the right to request, convene and preside over a meeting of shareholders. Nevertheless, the CLC does not impose any requirements on the percentage of equity or number of shares and the time length of holding such equity or shares by the shareholder. Moreover, the CLC does not provide for a time period of consultation

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766 The Civil Procedure Law of the People’s Republic of China, adopted on April 9, 1991 at the Fourth Session of the Seventh National People’s Congress, and revised according to the Decision on Amending the Civil Procedure Law of the People’s Republic of China which was adopted at the 30th Session of the Standing Committee of the 10th National People’s Congress on October 28, 2007 and became effective as of April 1, 2008.

767 See CBCA, s. 137(1.1), (1.3), (3), (5)(a), (5)(d), (5.1), (7).


769 See CLC, Article 41, Clause 3.
between the minority shareholder and the legal convener and presider (e.g., chairperson, vice chairperson and supervisor). If the CLC set out such requirements, the corporation would then have a reasonable time to anticipate the holding of a meeting of shareholders by the minority shareholder on their own initiative, and the minority shareholder would also have a reasonable time to anticipate when the meeting of shareholders could be possibly held. Of course, these requirements may be principled phrased in the CLC while such phrases could be defined in the implementing regulations of the CLC or interpreted in the judicial interpretations of the Supreme People’s Court of China relating to the CLC. In these connections, it is evident that the legislative skill of Canada should be studied and used by China for reference.

5.3.2 Comparison on Voting Rights of Minority Shareholders

“Corporate law of various countries or regions generally confers core rights on a shareholder in a corporation, e.g., voting rights, the right to information and the right to bring an action, etc.”

It is, therefore, evident that voting rights are one of the core rights of a shareholder.

With the deepening research on the legal theory of modern corporate governance, some scholar raised the idea of control-derived gains and excessive control-derived gains of the controlling shareholder. Based on such conception, gains from excessive control are the

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770 Xudong Zhao, supra note 68, at 301.
771 According to Ming Yang, Professor of the Law School of Peking University, “control-derived gains are defined to be the compensation for the control cost incurred by the controlling shareholder. With the obtaining of the control-derived gains
improper and illegal gains seized by the controlling shareholder to empty the corporation and pillage the interests of a minority shareholder through its excessive control over the corporation. It is, therefore, evident that the excessive control-derived gains result from the abuse by the controlling shareholder of the Majority Rule. Under such circumstance, minority shareholders are most likely deprived of their voting rights in the corporation and further of their right of participation in the operation and management of the corporation.

Based on the foregoing, to protect the legitimate rights of a minority shareholder is first to protect his or her voting rights under special conditions. In other words, corporate statutes may, by way of mandatory provisions, enhance the voting rights of a minority shareholder under special situations and preclude the voting rights of any interested shareholder from any improper gain or benefit derived from the corporation, with a view to rectifying the problems caused by the inherent deficiency of the Majority Rule.

Both Canada and China specify different remedies or rights to deal with the similar issues arising from the voting rights of a minority shareholder in the corporation. In Canada, the CBCA specifies the cumulative voting, the voting right under a squeeze-out transaction and the class vote. In China, the CLC provides for the exclusion of voting rights of a

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772 See the discussion in Chapter 4, section 4.2.6.
shareholder for whom the corporation issues a guarantee.\footnote{773}{See the discussion in Chapter 3, section 3.4.2.}

Both the \textit{CBCA} and the \textit{CLC} set out mandatory provisions to exclude the voting rights of any benefited shareholder and, in particular, provide for some mandatory rules of procedures to remedy the voting rights of a minority shareholder in specific situations. For example, a squeeze-out transaction in Canada must be approved by ordinary resolution of the holders of each class of shares that affected by the transaction, voting separately, whether or not the shares otherwise carry the right to vote, in addition to any approval by holders of shareholder required by or under the \textit{CBCA} or the articles.\footnote{774}{\textit{CBCA}, s. 194.} In order to arrive at the balanced protection, the \textit{CBCA} further precludes two categories of persons from such voting rights.\footnote{775}{The two categories of persons are (a) affiliates of the corporation; and (b) holders of shares that would, following the squeeze-out transaction, be entitled to consideration of greater value or to superior rights or privileges than those available to other holders of shares of the same class. See \textit{CBCA}, s. 194.} Under the \textit{CLC}, if a company intends to issue a guarantee in favour of the debt obligations of a shareholder or \textit{de facto} controller of the company, the issuance of the guarantee must be resolved by the meeting of shareholders.\footnote{776}{\textit{CLC}, Article 16, Clause 2.}

In addition to the common features mentioned above, the rights or remedies in the \textit{CLC} and the \textit{CBCA} have significant differences with regard to the voting rights of a minority shareholder.

First, the scope of exclusion of the voting rights of any benefited shareholder is obviously
narrower in China than in Canada. The exclusion under the CLC is only limited to the issuance by the corporation of a guarantee in favour of the debt obligations of its shareholder.\footnote{See CLC, Article 16.} Under the CBCA, the exclusion not only covers all aspects of a minority shareholder under a squeeze-out transaction, but also applies to the eight circumstances in which the rights and interests of the holders of shares of a class will be adversely affected by the amendments to the articles.\footnote{See CBCA, s. 176(1).} Of course, the CBCA further specifies a limitation and an exception to arrive at the balanced protection.\footnote{See CBCA, s. 176(2), (4).}

There also exists a phenomenon where a minority shareholder is shunted aside and ultimately squeezed out in China. Senior management persons of a corporation in China are, in general, the controlling shareholder and/or the person(s) appointed by the controlling shareholder.\footnote{See Peizhong Gan, supra note 748.} The controlling shareholder may either earn profits through profit distribution, or select to seek gains from remunerations. In order to avoid double taxation and grab gains from the corporation, the controlling shareholder may obtain all the anticipated gains by way of remunerations. Such oppressive conduct obviously constitutes an infringement of the rights and interests of a minority shareholder, which would lead to an inevitable situation where the reasonable expectations of a minority shareholder come to nothing. Regrettfully, the protection under the CLC does not provide for the voting rights of a minority shareholder to deal with these issues including a squeeze-out transaction.
Second, the protections relating to the participation in the operation and management of a corporation are different. In order to overcome the weakness of a minority shareholder in participating in the operation and management of the corporation, the *CBCA* expressly specifies the cumulative voting rights with regard to the election of directors so as to allow minority shareholders to assemble their votes to cast in favour of the director(s) who will represent their interests.\(^{781}\) In China, cumulative voting is provided for a joint stock limited company only.\(^{782}\) As the *CLC* does not provide for cumulative voting for a limited liability company, shareholders of such company cannot but exercise the self-governing right under the articles. In other words, there are no mandatory provisions in the *CLC* relating to the cumulative voting for a limited liability company. What a minority shareholder of such company can do is to negotiate with the controlling shareholder cumulative voting right to be incorporated in the articles. However, in the real world, the attempts of a minority shareholder to incorporate the cumulative voting in the articles are futile due to his or her weak position in the corporation. Hence, the protection in the *CLC* is far from perfection, and the provisions of the *CBCA* should be studied and used for reference in the *CLC*.

Third, the provisions regarding voting rights are more meticulous under the *CBCA* than those under the *CLC*. For example, the *CBCA* specifies mandatory provisions to offer protection to a minority shareholder under the class vote and the squeeze-out transaction even if it does not carry the right to vote.\(^{783}\) Besides, the *CBCA* further specifies in the cumulative voting the

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781 *CBCA*, s. 107.
782 *CLC*, Article 106.
783 *CBCA*, ss. 176(5) and 194.
elimination of the candidates nominated for directors as well as the removal of a director.\textsuperscript{784}

Furthermore, the \textit{CBCA} specifies the limitation and exception under the class vote and the exception under the squeeze-out transaction in order to arrive at the balanced protection.\textsuperscript{785}

However, the \textit{CLC} does not have similar provisions. The relevant provisions of the \textit{CBCA} lay a very good example for China to use for reference in the \textit{CLC}.

5.3.3 \textbf{Comparison on Rights and Remedies Against Violation of Laws, Regulations and the Articles by Bodies and Persons inside and outside the Corporation}

Pursuant to the corporation’s theory of legal person,\textsuperscript{786} the business and activities of a corporation are carried out by persons inside the corporation (e.g., directors, officers, employees, etc.) and outside the corporation (e.g., agent, auditor, trustee, receiver, receiver-manager, liquidator, etc.). Although such persons are required by the corporate statutes and the articles to perform their fiduciary duties in good faith, non-compliance by these persons inside and outside a corporation with the laws, regulations or the constituting documents of a corporation are disclosed or reported from time to time.

Both Canada and China have recognized the necessity to mandatorily repudiate and rescind any conduct of such persons that is in violation of the laws or the articles, and set out mandatory provisions in their respective corporate statutes to prevent and regulate such wrongdoings. In China, the \textit{CLC} specifies the motion for invalidating or reversing

\textsuperscript{784} \textit{CBCA}, s. 107(e).

\textsuperscript{785} \textit{CBCA}, ss. 176(2), (4) and 194.

\textsuperscript{786} See the discussion in Chapter 2, section 2.2.5.
corporation’s resolutions, \(^\text{787}\) while the \textit{CBCA} provides for compliance or restraining orders in Canada.\(^\text{788}\)

Due to the different angles of regulation, the protections in Canada and China in this respect are significantly different. First, the scope of protection in the two countries is different. In China, the motion for invalidating or reversing corporation’s resolutions is applicable to the defective resolutions only, \(^\text{789}\) and the protection is very narrow in scope and limited in nature. In Canada, a minority shareholder may apply to a court for a compliance or restraining order as long as a corporation or any director, officer, employee, agent, trustee, receiver, receiver-manager or liquidator of a corporation does not comply with the \textit{CBCA}, the regulations, articles, by-laws, or a unanimous shareholder agreement.\(^\text{790}\) Obviously, the remedy in Canada is broad enough to cover not only the application for an order invalidating or reversing the defective resolutions of a corporation, but also many other aspects of such persons’ improper and illegal conduct.

Second, the scope of applicant is different. In China, the applicant is only limited to the registered shareholders of a corporations.\(^\text{791}\) However, the scope of applicant is broader in Canada. Pursuant to the \textit{CBCA}, the applicant may be a registered holder or beneficial owner of a security of a corporation, a director or an officer of a corporation, the Director and any

\(^{787}\) See Chapter 3, section 3.4.7.  
\(^{788}\) See Chapter 4, section 4.2.7.  
\(^{789}\) \textit{CLC}, Article 22.  
\(^{790}\) \textit{CBCA}, s. 247.  
\(^{791}\) \textit{CLC}, Article 22, Clause 2.
other person who, in the discretion of a court, is a proper person; and may also be a former registered holder or beneficial owner of a security of a corporation, a former director or officer of a corporation; and may further be a registered holder or beneficial owner of a security of a corporation’s affiliates, a director or an officer of a corporation’s affiliates. In view of the closed nature of a private corporation and the time length required to discover the improper or illegal conduct of those persons inside or outside a corporation, the CBCA includes in the scope of applicant the former registered holder or beneficial owner of a corporation’s affiliates and the former director or officer of a corporation’s affiliates. Furthermore, the CBCA extends the scope of applicant to cover a creditor of the corporation so that the creditor may have the standing to invoke this remedy to protect its legitimate rights and interests. Apparently, such broader scope of applicant has its rationality and legitimacy. The remedy of compliance or restraining order under the CBCA hence becomes one of the broadest and most effective remedies, which protects the legitimate rights and interests of a minority shareholder to the greatest extent.

Third, the powers of a court are different. In Canada, the court is given wide powers to rectify the wrongdoings. On an application, a court may make an order directing any such person to comply with, or restraining any such person from acting in breach of, any provision of the CBCA, the regulations, articles, by-laws, or a unanimous shareholder agreement. In

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792 CBCA, s. 238.
793 Ibid.
794 Ibid.
795 Douglas Harris, Ronald J. Daniels, Edward M. Iacobucci, Ian B. Lee, Jeffrey G. MacIntosh, Poonam Puri and Jacob S. Ziegel, supra note 12, at 959.
796 CBCA, s. 247.
addition, the court may, on such application, make any further order it thinks fit under this remedy.\textsuperscript{797}

In contrast to Canada, the powers of the People’s Court are very specific and limited.\textsuperscript{798} As discussed in the foregoing sections, the matters heard and adjudged by a Chinese judge are only limited to the matters complained of, and the judge may not adjudge on any matter beyond that scope, not to mention any novel order by a judge or the creation of law by a judge.

Fourth, the relationship of this right or remedy with other rights or remedies is different. In Canada, the \textit{CBCA} expressly sets out the logical relationship between the compliance or restraining order and other remedies available to a minority shareholder. The phrase “in addition to any other right they have” in section 247 of the \textit{CBCA} explicitly indicates that a minority shareholder may also exercise its other right while invoking this remedy.\textsuperscript{799}

However, in China, there is no such expression or definition in the \textit{CLC} regarding the logical relationship between this motion for invalidating or reversing corporation’s resolutions and other protections available to a minority shareholder. It is, therefore, unclear or uncertain as to whether a minority shareholder in China may also apply for other protections in addition to the motion for invalidating or reversing corporation’s resolutions.

\textsuperscript{797} \textit{Ibid.}

\textsuperscript{798} Pursuant to Article 22 of the \textit{CLC}, the powers of the People’s Court are limited to invalidate or reverse the resolutions of the meeting of shareholder and/or of the board of directors of a corporation.

\textsuperscript{799} \textit{CBCA}, s. 247.
Fifth, the convenience for bringing an action is different. As compared to China, Canada has provided more convenience for a minority shareholder to bring an action, which is embodied in many provisions of this remedy under the \textit{CBCA}. For example, the court in Canada may, on an application, order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, although the complainant may be held accountable for such interim costs on final disposition of the application or action.\textsuperscript{800} China does not have similar provisions in the \textit{CLC}. Besides, the \textit{CBCA} does not require a minority shareholder to give security for costs in an application made or action brought or intervened in under this remedy.\textsuperscript{801} Different from the \textit{CBCA}, the \textit{CLC} requires the plaintiff shareholder to give security under this protection.\textsuperscript{802}

5.3.4 Comparison on the Broadest, Comprehensive and Open-ended Protection

All protections in China and Canada (except the oppression remedy under the \textit{CBCA}) are provided against a particular wrongdoing, and hence become quite isolated from each other. Although they are important remedies to rectify such particular wrongdoing, they might not be applicable to certain material and complicated conduct which is oppressive or unfairly prejudicial to or unfairly disregards the interests of a minority shareholder. It is, therefore, especially important and imperative to have a broad, comprehensive and open-ended remedy against unfairness and oppression towards a minority shareholder. Such a remedy is applied

\textsuperscript{800} \textit{CBCA}, s. 242(4).
\textsuperscript{801} \textit{CBCA}, s. 242(3).
\textsuperscript{802} \textit{CLC}, Article 22, Clause 3.
not only to fill the gap between and among these protections, but also to join other protections to offer a more effective and fundamental relief which may protect the legitimate rights and interests of a minority shareholder to the greatest extent.

As discussed in section 4.2.1 of Chapter 4, the oppression remedy under the CBCA is, no doubt, the broadest and the most effective, comprehensive and open-ended shareholder remedy in the common law world. In commenting on the oppression remedy, Dr. Janis Sarra, Canadian scholar, noted that,

“This broad statutory protection against unfairness is accompanied by an equally robust remedial jurisdiction. The court’s general power to rectify oppressive and unfair consequences by any order it thinks fit is bolstered by a lengthy list of specific remedial powers the court can exercise, from enjoining the corporation to ordering its dissolution and liquidation.”

In BCE Inc. v. 1976 Debentureholders, the Supreme Court of Canada held that:

“… oppression is an equitable remedy. It seeks to ensure fairness - what is ‘just and equitable’. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair… It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.”

The judicial practice in Canada over the past decades has demonstrated that the court has been willing to carry out the mission conferred by the legislature, namely to grant all kinds of relief to an aggrieved shareholder.

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803 See Chapter 4, section 4.2.1.
806 BCE Inc. v. 1976 Debentureholders, ibid, at para. 58.
As compared to Canada, China does not have such a broad, comprehensive and open-ended remedy in the *CLC*. This does not necessarily mean that oppression towards a minority shareholder does not exist in China. On the contrary, oppressive conduct of the controlling shareholder towards a minority shareholder is frequently seen in private corporations of China. Although the *CLC* provides for many protections to a minority shareholder, there are still big gaps in which these protections could not afford a right or remedy to a minority shareholder when its legitimate rights and interests are encroached.

Judge Wenyan Zhao, the judge from Beijing Second Intermediate People’s Court of China introduced the following case in his article entitled “You xian ze ren gong si de gu dong kun jing ji qi fa lǔ jiù ji” (Shareholder’s Predicament in and Legal Remedies for a Limited Liability Company):

“A cable factory (its organization form is a company with limited liability) has its fixed assets with a value of RMB100,000,000, in which the controlling shareholder accounts for 51%, the second biggest shareholder owns 40% and the remaining shareholders have 9%. In the operation of the company, the controlling shareholder united with the shareholders accounting for 9% to push aside the second biggest shareholder and to preclude the latter’s voting rights from the board of directors. Consequently, the second biggest shareholder did not have a say in the affairs of the company. Meanwhile, despite the fact that the company made a great deal of profit, the second shareholder was distributed an annual dividend of around RMB30,000 only. In view of this situation, the second shareholder intended to transfer its equity. Other shareholders of the company expressed no objection to the proposed equity transfer and gave up their right of first refusal. However, in the process of negotiating with a third party, the potential purchaser gained some understanding of the actual conditions of the company, and was concerned about similar predicament it would encounter after the transfer. The transfer was not successful in the end. Consequently, the second biggest shareholder had to bring an
In analyzing this case, it is seen that the rights of the aggrieved shareholder to profit and information were blatantly encroached in view of the fact that it received only a small amount of dividend while the company made a big profit. Pursuant to the relevant provisions of the CLC, the aggrieved shareholder was entitled to apply to the People’s Court for an order directing the company to produce relevant information. However, the CLC does not have any express provision to grant a remedy to the aggrieved shareholder with regard to his or her right to profit.

Second, it was not possible for the aggrieved shareholder to ask for the exclusion of the voting rights of the controlling shareholder since no guarantee was issued by the company in favour of the debt obligations of the controlling shareholder. Third, the aggrieved shareholder was unable to apply for the cumulative voting since such voting is specified by the CLC for a joint stock company, not for a limited liability company. Fourth, the potential purchaser was not willing to purchase the equity from the aggrieved shareholder after the former was aware of the latter’s predicament in the company.

In the end, no equity transfer could be made to a third party, which drove the aggrieved shareholder to become the prisoner of its investment. Could the aggrieved shareholder invoke its right to dissent and withdraw from the company under such circumstance? The answer is

807 Wenyan Zhao, “You xian ze ren gong si de gu dong kun jing ji qi fa lû ju ji” (Shareholder’s Predicament in and Legal Remedies for a Limited Liability Company), in Xudong Zhao and Xiaoming Song, Editors-in-Chief, Gong si fa ping lun (Review on Corporation Law), (2008) Volume 1, 1st ed. (Beijing: Court Press, 2009) at 192.
no, because there were no fundamental changes in the company, and the company also made its profit distribution. As these did not constitute the grounds for a dissenting shareholder to request the company to purchase its equity set out in the *CLC*, neither the company nor the controlling shareholder was obligated to purchase the equity from the aggrieved shareholder. Fifth, the aggrieved shareholder was unable to apply to the People’s Court for an order dissolving the company, because the company did not come to a deadlock.

Based on the above analysis, it is evident that none of the judge, counsels and the parties to this case could find a way out under the provisions of the *CLC*. One could imagine how desperate the aggrieved shareholder was in this case since no remedy was available in the end.

Undeniably, China has made active efforts in attempting to protect the legitimate rights and interests of a minority shareholder in a comprehensive, dynamic and all-round manner, as reflected by the legal reforms in the *CLC*. The two protections under the *CLC* are “Duty of Diligence and Duty of Loyalty for Directors, Supervisors and Senior Management Persons” and “No Abuse of Shareholder Rights and Connected Relationship”.808

The *CLC* specifies the duty of diligence and duty of loyalty for director, supervisors and senior management persons of a corporation,809 and prohibits a shareholder from abusing his

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808 See Chapter 3, section 3.4.4 and section 3.4.5.
809 *CLC*, Article 148.
or her shareholder right to harm the interests of the corporation or other shareholders, and further requires the controlling shareholder, *de facto* controller, directors, supervisors and senior management persons of a corporation not to take advantage of their connected relationship to prejudice the interests of the corporation.\(^\text{811}\)

Where any of the aforesaid persons fails to comply with these provisions, the two remedies mentioned above will be available. However, these remedies are narrow in scope. Compared to the *CBCA*, the *CLC* does not incorporate the affiliates and subsidiaries of a corporation in the scope of these remedies.

Besides, the *CLC* does not provide for the definitions of the duty of diligence and the duty of loyalty for a director, supervisor and senior management person. The *CLC* does not contain any provision to define or interpret the scope of abusing the shareholder rights by the controlling shareholder. The *CLC* does not set out counter balance measures in these remedies to prevent a minority shareholder from abusing his or her right.

Furthermore, these remedies are simply in the form of indemnity.\(^\text{812}\) In other words, the People’s Court has no choice but to adjudge that any of the above-mentioned persons to

\(^{810}\) *CLC*, Article 20.

\(^{811}\) *CLC*, Article 21.

\(^{812}\) Article 20 of the *CLC* provides that the shareholder shall assume the liability of indemnity by law for any losses suffered by the corporation and other shareholders from the former’s abusing of his or her shareholder rights. Article 21 of the *CLC* provides that the controlling shareholder, *de facto* controller, director, supervisor and senior management person of the corporation shall assume the liability of indemnity for any losses suffered by the corporation when he or she takes advantage of the connected relationship to harm the interests of the corporation. Article 150 of the *CLC* provides that a director, supervisor and senior management person of a corporation shall assume the liability of indemnity for any losses suffered by the corporation when he or she violates laws, administrative regulations or the articles during the course of performing his or her duties.
assume the liability of indemnity towards a minority shareholder and/or the corporation (as the case may be) under such protections. It is evident that tremendous gap exists between this sole relief and the claims of a minority shareholder, because such relief is far from enough to satisfy or be responsive to a great variety of claims made by various minority shareholders against different types of oppressive conduct in the real world.

Based on the foregoing, China does not have a broad, comprehensive and open-ended protection available to a minority shareholder in CLC. The oppression remedy in the CBCA has laid a very good example for China. Some Canadian scholars summarized the success of the oppression remedy in Canada as follows:

“The introduction of the remedy [oppression remedy] in Canada has led to a significantly heightened awareness of the rights and entitlement of parties who are affected by corporate conduct. Moreover, the oppression remedy has provided a level of protection for their interests that support fair participation in the challenges and rewards of corporate activity.”

It is, therefore, necessary and imperative for China to use the oppression remedy for reference and introduce a similar remedy combined with Chinese characteristics, with a view to advocating the rule of law and intensifying the minority shareholder protection in China.

5.4 Analysis from Legal Cultural Perspectives

The foregoing sections of this chapter have articulated the similarities and differences of the

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813 David S. Morritt, Sonia L. Bjorkquist and Allan D. Coleman, supra note 311, at 1-11.
minority shareholder protections in Canada and China from the structural and substantive perspectives. Although “[c]omparative study could end with a delineation of relevant similarities and differences”, this thesis further considers the broader contrasts between societies and cultures of which the differences of the minority shareholder protections in both Canada and China are a part. Hence, this section analyzes the underlying reasons for the differences of such protections from certain legal cultural perspectives.

5.4.1 Different Development of Commercial Activities

Prior to the founding of the People’s Republic of China in 1949, China stayed in an agrarian society for a long period of time and maintained its traditional culture of “emphasizing agriculture and restraining commerce” for several thousand years. The commodity economy was not well-developed in ancient China. Commercial activities in China started to develop vigorously and rapidly from the late 1970s. Strictly speaking, China has only a history of developing and flourishing its commercial activities for only several decades.

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816 Huang Quanyu, Richard S. Andrulis and Chen Tong, A Guide to Successful Business Relations with the Chinese: Opening the Great Wall’s Gate, online: Books.google.ca <http://books.google.ca/books?id=CFr5DH771CUC&pg=PA166&lpg=PA166&dq=China,+emphasizing+agriculture+and+restraining+business&source=bl&ots=OR2uT3USAr&sig=VPpU3CHD1UXJG4R7cKWM9CUns&hl=zh-CN&ei=AgiTf7bN8rsnQePur0m&sa=X&oi=book_result&ct=result&resnum=2&ved=0CBgQ6AEwAQ#v=onepage&q&f=false>.
Unlike China, Canada has a well developed economy for its commercial activities originated from French colonies, with a history of almost 150 years, as most was in last 100 years. Up to date, Canada has been developing its commercial activities to a level far superior to China.

Due to the different levels of the economies, Canada and China have quite different perceptions of private corporations and the nature of their conduct, and hence set out minority shareholder rights and remedies at different levels. In a developed economy, the CBCA sets out meticulous provisions in each remedy and particularly the counter balance measures to arrive at the balanced protection. Besides, the remedies under the CBCA offer wider and more effective protection towards a minority shareholder by treating a corporation’s affiliates to be the corporation itself and incorporating the affiliates of a corporation in the scope of the grounds of the relevant remedies. In a less developed economy, many of the protections in the CLC are of declaratory nature and do not contain well-designed measures for implementation. Most of them do not contain check and balance provisions to prevent a minority shareholder from abusing his or her rights. Hence, the protections in the CLC are somewhat superficial and offer limited protection to a minority shareholder.

Based on different economies, the protections in the CBCA and CLC are specified in a different way since they are responsive to the different business environment, structure and transactions in the two countries. Obviously, the remedies under the CBCA are found to be
even better designed and more meticulous and advanced, with a view to being adapted to the changing variety of increasingly complex and diversified commercial activities in a well-developed economy. In China, the CLC does not include many protections which are specified in the CBCA. The typical example is the oppression remedy in the CBCA. It is, therefore, evident that all the underlying differences regarding the protections between the CBCA and CLC are closely associated with the commercial activities of private corporations in Canada and China at different levels.

5.4.2 Different Legal Cultures

Canadian conservatism is regarded “as an indicator of legal culture”. Limin Wang, Chinese scholar also noted that “conservatism may be considered to be the ideological foundation of Canadian legal culture.”

“Canada was born out of accommodation, not revolution.” In history, Canada did not have any large-scale revolution or violence, and sought its development with great difficulty under

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817 “A legal culture involves a specific way of in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.” John Bell, “English Law and French Law – Not So Different?” (1995) 48 C.L.P. 63 at 70.
818 Conservatism is a political, social and philosophical term that has the meaning of promoting the maintenance of traditional institutions and opposing rapid change in society. As George noted, conservatism is characteristically inarticulate, unwilling (and indeed usually unable) to translate itself into formulae or maxims, loath to state its purpose or declare its view; becomes conscious only when forced to be so; arises directly from the sense that one belongs to some continuing, and pre-existing social order (e.g., a club, society, class, community, church, regiment or nation, etc.). See George J. Irbe, Classical Liberalism v. Conservatism, online: The Radical Academy <http://www.radicalacademy.com/gegeorgeirbe2.htm>.
821 Graham Parker, supra note 819, at 10.
the influences of western big powers such as France, UK and US. By way of consultation and negotiation, Canada kept to the path of peace and gradual development and ultimately succeeded in its national independence. This prolonged process of peaceful evolution has formed its national characteristics that Canadians are tolerant and magnanimous and good at coordinating disputes and reaching compromise.822

Based on “a respect of lawful authority, tradition and continuity in human affairs”,823 Canadian conservatism “has remained traditional and constitutional, progressive and pragmatic”. It “favour[s] an organic and hierarchical society with due respect for law and order”,824 and pays “special attention to the constitutional artifact known as the “rule of law””.825 Hence, rule of law is another prominent characteristic of Canadian legal culture. The rule of law “was imported into Canada primarily from England and was firmly established by the early twentieth century.”826 “Its essential elements were the equality and autonomy of individuals, a division between the public and private realms, and the paramountcy of common law and courts.”827

These above outstanding characteristics of Canadian legal culture are fully embodied in the minority shareholder protections under the CBCA. On one hand, the CBCA specifies

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824 Ibid.
825 George J. Irbe, supra note 818.
827 Ibid.
meticulous provisions in protecting the legitimate rights and interests of a minority
shareholder. On the other hand, it always sets out counter balance measures to restrain a
minority shareholder from abusing his or her right. The equilibrium between remedy and
restraint demonstrated in the minority shareholder protections under the CBCA is a typical
reflection of Canadian legal culture.

Different from Canada, China has its extensive and profound legal culture with a history of
several thousand years. The Chinese legal culture was greatly influenced by the
Confucianism – “Yi De Zhi Guo”, 828 “De Zhu Xing Fu”829 and “Zhong Yi Qing Li”830. The
legal thought of Confucianism had been dominant in ancient China at all times. As Chengwei
Guo, Chinese scholar, noted, “the principles including ‘De Zhu Xing Fu’, ‘Ming Xing Bi
Jiao’831 and ‘Chu Li Ru Xing’832 had been adopted by the legal thought of Confucianism to

828 “Yi De Zhi Guo” means “to rule the country by virtue”. See Xianjin Zhou, Ru jia de de zhi si xiang he jin tian de yi de
zhi guo (The Confucian Philosophy of Rule by Virtue and The Strategy of Running the Country by Virtue), online:
ch.shvoong.com
<http://ch.shvoong.com/social-sciences/825479-%E5%84%92%E5%AE%B6%E7%9A%84%E5%BE%B7%E6%B2%B
B%E6%80%9D%E6%83%B3%E5%92%8C%E4%BB%A5%E4%A9%97%E9%A8%84%E5%BE%B7
%E6%B2%BB%E5%9B%BD/>. For a further discussion about the Confucian philosophy of rule by virtue, see Zhenge
Gui, Ru jia de zhi si xiang nei han lunwen ji qi shi jian yi yi (The Confucian Philosophy of Rule by Virtue and Its
Practical Significance), online: WWW. STUDA.COM <http://www.studa.net/sixiang/100301/11423987.html>.

829 “De Zhu Xing Fu” means “to rely mainly on virtue while punishment as the supplement”. In ancient China, “Xing”
equals to “Law”. Hence, “De Zhu Xing Fu” also means “to rely mainly on virtue while law as the supplement”. For a
further discussion about “De Zhu Xing Fu”, see Zhonglin Chen, “De Zhu Xing Fu’ gou jian he xie she hui” (On
“Primary Virtue & Accessory Punishment” And Harmonious Society Construction) (2007) 1 Law Science Magazine,
(Beijing: Beijing Law Society). Also see Zhechun Dai and Yaping Shen, “Jie jian ‘De Zhu Xing Fu’ si xiang, wan shan
wo guo zhi guo fang li e” (Using the Thought of ‘De Zhu Xing Fu’ for Reference and Perfecting the Strategy of
Managing State Affairs in Our Country (2001) 2 The Journal of China University of Mining & Technology (Social
Sciences), (Beijing: China University of Mining & Technology).

830 “Zhong Yi Qing Li” means “to value righteousness above material gains”. For a further discussion about “Zhong Yi
Qing Li”, see Ruiling Yang, “Xian qin ru jia ‘Zhong Yi Qing Li’ si xiang xin tan” (New Exploration on Pre-Qin
Confucianist Thought of “Zhong Yi Qing Li”) (2002) 1 The Journal of Liaoning Educational Administration Institute
(Shenyang: Liaoning Educational Administration Institution).

831 “Ming Xing Bi Jiao” means “to integrate punishment with education” or “to impose unambiguous and impartial
penalties to aid the way of instruction”. See Yingjin Chen, “Ming Xing Bi Jiao” si xiang de li lun yu xian shi wei du –
“Ming Xing Bi Jiao” si xiang de yu yan yuan, fa zhan ji qi ying yong (Theory and Practical Dimensions on the Thought of
“Ming Xing Bi Jiao” – Origin, Development and Application of the Thought of “Ming Xing Bi Jiao”), online: www.

832 “Chu Li Ru Xing” means that acts which violate the rites are subject to punishment. Here, “Li” means the rites or ritual,
which is an ideal form of social norms. For a further discussion about “Chu Li Ru Xing”, see Lei Fu, “Cong ‘Chu Li Ru
carry out the convergence of Confucian-Faism Ideology since the Confucian learning was exclusively respected by Emperor Wu of Han Dynasty [from B.C. 156 to B.C. 87]. Such legal thought was aimed at stressing the education of moral culture supplemented by the enforcement of law. As the rulers in ancient China did not focus on the rule of law, the laws in China were underdeveloped for a long, long period of time.

Early in the Western Zhou Dynasty (B.C. 1046 - B.C. 771), the ruler raised the legal thought of “Li Yue Xing Zheng, Zong He Wei Zhi”. Since then, the rulers in ancient China were good at summarizing the pros and cons, success and failure of the previous dynasties. They focused on education and enlightenment of virtue and morality to prevent crimes, and carried out the comprehensive ruling of the society by placing education and enlightenment of virtue and morality as the core and then combining the education of aesthetics, the effective enforcement of criminal laws and the intensification of administrative functions, in order to achieve the goal of long-lasting social and political peace and stability. This legal thought “has influenced China for over 2000 years and become the distinct characteristic of Chinese legal culture.”

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Xing’ kan de zhi zai dang dai fa zhi she hui zhong de jia zhi” (Use of “Chu Li Ru Xing” to Look at the Value of Rule by Virtue in the Contemporary Society with Rule of Law) (2009) 17 Legal System and Society 5 (Yunnan Law Society).


835  Chengwei Guo, supra note 129, at 22.

836  Ibid.
In addition, as discussed in the preceding subsection, China stayed in an agricultural society for long. By emphasizing agriculture and restraining commerce, China was economically backward, and the idea of seeking profits by businesspersons was scorned or treated with contempt in such a society. In this connection, “Zhong Yi Qing Li” constituted another major component of Chinese traditional culture.

Influenced by this legal culture, the legislature in China does not specify detailed provisions for commercial activities or does not believe that it is necessary to regulate commercial activities in a meticulous manner. Therefore, the civil and commercial laws in China are now seen to contain too many declaratory provisions as well as very abstract, general and principled provisions.

5.4.3 Different Legal Systems

Canada belongs to the common law family. Common law means “those common writs, forms of action and procedures by which suits were litigated in courts of record, and whose judgments over the course of time formed the substance of the precedents which made common law.”[^837] “[A]s a society changes the law will change to correspond with it through the distinguishing of precedents.”[^838] By relying on case law, the common law system has its


[^838]: Sandra Joireman, “Colonization and the Rule of Law: Comparing the Effectiveness of Common Law and Civil Law
advanced nature that “it can evolve over time in response to changes in the political environment”\textsuperscript{839} as well as social, economic and cultural environments.

Case law and statutes are considered to be the two major sources of Canadian law. Up to date, case law has played a very fundamental role in the Canadian legal system and also functioned as a very important facilitator in the formulation of statutes. “Courts determined disputes, by finding the facts and then selecting and applying the appropriate principle. Even though they changed, the principles were stable enough to enable making these decisions.”\textsuperscript{840} Take the oppression remedy for example, Janis Sarra, the Canadian scholar remarked that “[t]he significance of the case law that emphasizes that the reasonable expectation test is an objective standard is critically important.”\textsuperscript{841}

In Canadian judicial practice, implementation of statutes requires the interpretation and application by a court of the relevant precedent, and the court enjoys broad discretion in making its order under the statutes. To some extent, a court has the function of making the law. A good example is subsection 122(1) of the CB\textsuperscript{842} which specifies general and principled provisions regarding the fiduciary duty of a director and officer of a corporation.\textsuperscript{842} In \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.},\textsuperscript{843} the Court

\textsuperscript{839} Countries” (2004) 15 Constitutional Political Economy 315 at 319.
\textsuperscript{840} \textit{Ibid}, at 318.
\textsuperscript{843} Pursuant to subsection 122(1) of the CB\textsuperscript{CA}, every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b)
held that,

(a) disclosure of a director’s interest does not relieve a director of his or her duty to act honestly and in good faith with a view to the best interests of the corporation, and the director must always place the interests of the corporation ahead of his or her own;\(^{844}\)

(b) as a fiduciary, a director shall perform his or her duty of disclosure, honesty, loyalty, candour, and the duty to favour the corporation’s interest over his or her own;\(^{845}\)

(c) although the \textit{CBCA} does not expressly provide that a director must make sure the corporation is independently represented in negotiating the terms of a transaction, a director is most ill-advised if he does not make every reasonable effort to ensure that the corporation receives independent representation beginning with the negotiation stage of the contract process;\(^{846}\)

(d) the fiduciary duties of a director is not only to act honestly or in good faith, but also to act carefully, diligently and skilfully in the best interests of the corporation;\(^{847}\)

(e) a reasonably prudent director acting in the best interests of a corporation would (i) have provided the board of directors with the opportunity to educate itself about the corporation so as to have a basis to ground an informed business judgment about a contract; (ii) have afforded the board adequate time to retain a compensation consultant, to instruct the consultant and to consider a genuinely independent opinion about his or her own employment contract;\(^{848}\)

(f) where directors make decisions likely to affect shareholder welfare, their decision must be made on an informed and reasoned basis. Specifically, they must make a decision and exercise their judgment in an informed and independent fashion, after a reasonable analysis of the situation and acting on a rational basis with reasonable grounds for believing that their actions will promote and maximize shareholder value;\(^{849}\)

(g) the way that the board of directors protects themselves when conflicts arise is to retain independent legal and financial advisors and to establish independent or special directors’ committees.\(^{850}\) Although the board is entitled, indeed encouraged, to retain advisors, but this does not relieve directors of the obligation to exercise reasonable diligence. The proper exercise of due care by

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\(^{843}\) Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.


\(^{845}\) \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.}, ibid, at para. 117.

\(^{846}\) \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.}, ibid, at para. 120.

\(^{847}\) \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.}, ibid, at para. 122.

\(^{848}\) \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.}, ibid, at para. 125.

\(^{849}\) \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.}, ibid, at para. 117.

\(^{850}\) \textit{UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.}, ibid, at para. 117.
a director in informing himself or herself of material information and in overseeing the outside advice on which he or she might appropriately rely is, of necessity, a pre-condition to performing his or her ultimate duty of acting in good faith to protect the best interests of the corporation.\textsuperscript{851}

It is also important to note that Canada has one province, Québec, that is a civil law jurisdiction. There are harmonization statutes. The \textit{Civil Code of Québec}\textsuperscript{852} has important corporate law remedies (e.g., articles 6, 7, 316, 317, 322, 324, 329, 1375, 1407, 1457, 2138, 2218, etc.). The \textit{Code of Civil Procedure}\textsuperscript{853} in Québec has one general remedy available to a minority shareholder, namely the superintending and reforming power conferred by article 33 on the Superior Court over corporations established within Québec.\textsuperscript{854} Although the \textit{Companies Act}\textsuperscript{855} of Québec does not specify an oppression remedy, a few remedies are available to a minority shareholder in relation to a compulsory acquisition during a take-over bid,\textsuperscript{856} a compromise or arrangement,\textsuperscript{857} investigation,\textsuperscript{858} the right to information,\textsuperscript{859} an amalgamation,\textsuperscript{860} continuance of a corporation,\textsuperscript{861} and correction of articles.\textsuperscript{862} In addition, the \textit{Winding-up Act}\textsuperscript{863} of Québec provides a judicial relief for a minority shareholder to wind

\begin{footnotes}
854 “Excepting the Court of Appeal, the courts within the jurisdiction of the Parliament of Québec, and bodies politic, legal persons established in the public interest or for a private interest within Québec are subject to the superintending and reforming power of the Superior Court in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.” The \textit{Code of Civil Procedure}, article 33.
856 The \textit{Companies Act}, s. 49.
857 The \textit{Companies Act}, s. 51.
858 The \textit{Companies Act}, s. 110.
859 The \textit{Companies Act}, s. 122.
860 The \textit{Companies Act}, ss. 123.122 – 123.130.
861 The \textit{Companies Act}, ss. 123.131 – 123.139.
862 The \textit{Companies Act}, ss. 123.140 – 123.143.
\end{footnotes}
Based on the foregoing, the corporate law in Canada has demonstrated greater adaptability, flexibility and superiority in the protection of minority shareholders, and offered more powerful and effective protection to aggrieved minority shareholders in the changing variety and complexity of corporate world.

In contrast to Canada, China belongs to the civil law family, which has a code-based system of law. The sources of law in China are the normative legal documents formulated by the state including the Constitution, laws, administrative regulations and rules. Although some principles and concepts of legal meaning in China (e.g., principle of rationality, public policy, customs, etc.) constitute the ancillary source of law, but they have not been expressly reflected in the statutory provisions of law. In this context, statutes play an absolutely dominant role in the judicial practice of China.

Clearly, statutes have their hysteretic nature. Statutes come from the demand of social life.

When a new social relationship occurs, existing statutes need to be modified or new statutes

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864 “Upon the petition of a shareholder, the Superior Court may order the winding-up of a company whenever it is of the opinion that, for a reason other than bankruptcy or insolvency, it is just and equitable that the company be wound up.” The Wind-up Act, s. 24.

865 The Constitution of the People’s Republic of China, adopted at the 5th Session of the 5th National People’s Congress on December 4, 1982, with the amendments adapted at the 1st session of the 7th National People’s Congress on April 12, 1988, the amendments adapted at the 1st session of the 8th National People’s Congress on March 29, 1993, the amendments adapted at the 2nd session of the 9th National People’s Congress on March 15, 1999, the amendments adapted at the 2nd session of the 10th National People’s Congress on March 14, 2004.

866 See Article 2 of The Law on Legislation of the People’s Republic of China which was adopted at the 5th Session of the 7th National People’s Congress on March 15, 2000 and became effective as of July 1, 2000. Administrative regulations and rules in China refer to all normative documents formulated by various organs of the State.
are required to regulate such relationship. However, there are generally time-consuming and complicated procedures to modify the existing statutes or to adopt new statutes. When statutes are duly modified or new statutes are duly passed, they have already lagged behind the requirements of social life, and once again become out-of-fashioned and lose their authoritativeness.

As a member of the civil law family, China does not have case law. Under the existing court system, Chinese judges have very limited discretionary power. In the recent years, the Supreme People’s Court of China issued judicial interpretations relating to certain provisions of the statutes from time to time, with an attempt to being responsive to the changing corporate world and solving the hysteresis of the statutes.

Prior to the promulgation of CLC, it was almost impossible for an aggrieved minority shareholder to seek legal protection. In order to walk into a market economy, China did carry out substantial reforms in its corporate legislation and make breakthroughs in the minority shareholder protections thereunder. Nonetheless, there are still plenty of outstanding issues in the implementation of the CLC, which arise partly from the hysteretic nature of the CLC and partly from the existing legal system in China. In this connection, an aggrieved minority shareholder will, as before, encounter many thorny problems in the process of safeguarding its legitimate rights and interests. The case analyzed in the former subsection is a good example to address such outstanding issues.
5.4.4 Different Legal Framework

Protection of minority shareholders requires a sound legal framework which includes not only the corporate law, but also other civil and commercial laws, administrative law and criminal law. In China, individual laws are not interlinked with each other to build up a complete and comprehensive legal framework with regard to a minority shareholder protection. Specifically, other civil and commercial laws, administrative law and criminal law do not contain relevant provisions in response to the minority shareholder protections in the \textit{CLC}. Besides, China did not have its tort law\footnote{The \textit{Tort Law of the People's Republic of China} was adopted at the 12\textsuperscript{th} session of the Standing Committee of the 7\textsuperscript{th} National People's Congress on December 26, 2009 and became effective on July 1, 2010.} when the \textit{CLC} was promulgated. Under such circumstances, the protections under the \textit{CLC} appear to be quite isolated and weak. In the absence of relevant provisions provided in other laws, the \textit{CLC} itself does not contain adequate provisions to cover detailed and comprehensive civil liabilities arising from minority shareholder protection.

Based on the foregoing, the legal framework in China needs further development and improvement. Specifically, the \textit{CLC} and other civil and commercial laws, administrative law and criminal law should be interlinked with each other to deal with civil liability,
administrative liability and criminal liability in connection with the minority shareholder protections. It is, therefore, necessary for China to both enrich the scope and content of liabilities in the *CLC* and intensify the cross protection by other relevant laws in order to create a complete and comprehensive legal framework in the protection of minority shareholders.

In comparison with China, Canada has a much better legal framework in minority shareholder protection. The *CBCA* includes detailed and specific provisions of liabilities. For example, the *CBCA* defines various types of conduct as the offences which shall be subject to fine or other punishment, many of which relate to minority shareholder protection. Meanwhile, the *CBCA* allows a minority shareholder who feels aggrieved by any of the decisions of the Director to bring an action before a court. On an application, the court may make an order requiring the Director to change its decision and may make any order it thinks fit.

Besides, as compared to China, Canada has a longer history of tort law which mainly relies on case law. Precedents provide for express definitions about the rights and obligations of

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868 See *CBCA*, ss. 20(6), 21(10), 22(3), 32(3), 130(4), 149(3), 150(3), 152(4), 153(8), 159(2), 160(3), 168(4), 171(9), 235(4), 250(1), 250(2), etc.
869 *CBCA*, s. 246. The decisions by the Director include (a) to refuse to file in the form submitted any articles or other document required by the *CBCA* to be filed; (b) to give a name, to change or revoke a name, or to refuse to reserve, accept, change or revoke a name under section 12 of the *CBCA*; (c) to grant, or to refuse to grant, an exemption that may be granted under the *CBCA* and the regulations; (d) to refuse under subsection 187(11) of the *CBCA* to permit a continued reference to shares having a nominal or par value; (e) to refuse to issue a certificate of discontinuance under section 188 of the *CBCA* or a certificate attestating that as of a certain date the corporation exists under subsection 263.1(2) of the *CBCA*; (f) to refuse to issue, or to refuse to issue, a certificate of revival under section 209 of the *CBCA*, or the decision with respect to the terms for revival imposed by the Director; (f.1) to correct, or to refuse to correct, articles, a notice, a certificate or other document under section 265 of the *CBCA*; (f.2) to cancel, or to refuse to cancel, the articles and related certificate under section 265.1; or (g) to dissolve a corporation under section 212 of the *CBCA*.
people relating to tort. Canada also has its sound administrative supervision system, which offers effective remedies for aggrieved citizens against improper or illegal administrative conduct. Limin Wang, the Chinese scholar noted that “in the area of administrative law, the administrative supervision system of Canada is, no doubt, one of a very few legal systems which play an exemplary role in the legal development of the world.”\textsuperscript{871} Furthermore, Canada has a longer history of criminal law.\textsuperscript{872} The well-developed case law and substantive law under the \textit{Criminal Code} of Canada intensifies the minority shareholder protections.

Based on the foregoing, it is evident that minority shareholder protection in Canada is not simply specified in the \textit{CBCA}, but also is embodied in the provisions of other relevant laws of Canada. Hence, the \textit{CBCA} and other relevant laws constitute a sound and comprehensive legal framework in creating effective remedies for minority shareholders and providing all-dimensional and multi-level protection towards minority shareholders.

5.4.5 Different Sense of Freedom and Equality for Commercial Subjects

China experienced its feudal society for many centuries. There is an old Chinese saying that

“Pu Tian Zhi Xia Mo Fei Wang Tu, Shuai Tu Zhi Bin Mo Fei Wang Chen.”\textsuperscript{873} This saying is

\textsuperscript{871} Limin Wang, \textit{supra} note 820, at 132.
\textsuperscript{872} The \textit{Criminal Code} of Canada (i.e., \textit{An Act respecting the criminal law}, R.S.C. 1985, c. C-46, as amended) was first enacted in 1892.
\textsuperscript{873} Sourced from \textit{Shi Jing · Xiao Ya · Bei Shan} (Book of Odes · Minor Odes of the Kingdom · The Northern Hills). This old Chinese saying means that all the land in a country belongs to the emperor, and all the people within the country are the emperor’s servants and may be dominated by the emperor. For a further discussion, see anonymous, \textit{Shi Jing · Ya · Xiao Ya · Gu Feng Zhi Shen (yuan wen) (ti jie) (zhu shi) (yi wen) (shang xi)}, online: www.360doc.com <http://www.360doc.com/content/10/0101/15/363181_12441653.shtml>. 

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a typical summarization of Chinese traditional culture in humanism, namely that top priority shall be given to the interests of the state and that the interest of individual must absolutely be subordinated to the interests of the state and of the collective.\textsuperscript{874} For centuries, thought and behavior of Chinese people have been influenced by this culture. In commercial activities, people have little knowledge or sense of freedom and equality. As discussed in section 2.4.1 of Chapter 3, China had utilized the formatted articles and did not accept the contractual conception in its corporate law for many years. A minority shareholder did not know how to negotiate and make use of the provisions of the articles to protect its rights including the voting right, right to information and the right to participate in the operation and management of a corporation.

Under this background, the CLC particularly specifies the self-governing right under the article and advocates freedom of contract and shareholders’ equality, with a view to imparting the legal knowledge of freedom and equality into minority shareholders.

In contrast to China, Canada is a common law country. “Common law systems have developed with the idea of the protection of individual rights from the state as a primary goal.”\textsuperscript{875} Based on equity and fairness, “[t]he common law was developed as a procedure that if properly followed, would result in a judgment for the plaintiff or defendant.”\textsuperscript{876}

Common law in Canada has “established a stable arena for commerce by the predictability of

\textsuperscript{874} “... civil law systems begin with the idea of the state as supreme and the role of individual in obedience for it.” Sandra Joireman, \textit{supra} note 838, at 317-318.

\textsuperscript{875} Sandra Joireman, \textit{supra} note 838, at 318.

\textsuperscript{876} \textit{Ibid.}
contract enforcement.877

All these indicate that Canada has a better rule of law. In a well developed economy, minority shareholders in Canada possess more legal knowledge or sense of freedom and equality in protecting their legitimate rights and interests. Due to such different legislative background, the Canadian legislature does not focus the CBCA on advocating and imparting the legal knowledge of freedom and equality into minority shareholders, but on designing more effective and meticulous protections for minority shareholders to upheld freedom and equality.

877 Ibid, at 321.
After a comparative study in the former chapter, this chapter consists of two parts: one is to make reassessment of the corporate laws of Canada and China with regard to minority shareholder protection, and the other is to put forward some suggestions for the improvement of their corporate statutes in the area of minority shareholder protection.

6.1 Reassessment of the CBCA With Regard to Minority Shareholder Protection

The *Canada Business Corporations Act* (the *CBCA*) has general and specific, comprehensive and meticulous remedies of advanced nature. Equity and fairness are upheld by and infiltrated through these remedies all the times. While the remedies provide all-dimensional and multi-level protection towards a minority shareholder, counter balance measures have always been designed to prevent a minority shareholder from abusing his or her rights. The foresighted legislation has effectively solved the hysteresis of the corporate statutes.

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First, there is a generality of widespread protection in minority shareholder remedies under the *CBCA*. The typical example is the oppression remedy, which is designed to protect the legitimate rights of a minority shareholder in a fundamental, comprehensive and thorough manner. Under the right to dissent, the *CBCA* bundles three categories of amendments to the articles with other fundamental changes of a corporation and specifies them as the pre-conditions for invoking this remedy. Such an arrangement provides effective protection to a minority shareholder when his or her reasonable expectations come to nothing.

Furthermore, the *CBCA* confers a separate remedy on a minority shareholder under compulsory and compelled acquisitions and gives top priority to the safety of these transactions. All these provisions give rise to very broad and comprehensive protection to an aggrieved minority shareholder.

Second, courts in Canada play a very important role in the protection of minority shareholders. The discretionary power of a court runs through every remedy. The court enjoys widespread power and assumes very heavy responsibility. In order to safeguard the right of a minority shareholder to information, the *CBCA* specifies the investigation remedy, under which a court is empowered with broad discretions and may conduct investigation with regard to a variety of matters. Under the oppression remedy, a court may grant any novel order it thinks fit in addition to the fourteen types of relief itemed in subsection 241(3) of the *CBCA*, which provides an express legal basis for a court to make law. Furthermore, an order of a court is necessary to rectify the registers or other records of a corporation where the
name of a person has been wrongly entered, retained, deleted or omitted. It is, therefore, evident that a court plays a central role in protecting the legitimate rights and interests of a minority shareholder.

Third, the CBCA attaches great importance to the effect of connected transactions on a corporation and its minority shareholders, and extends its coverage from a corporation to its affiliates and subsidiaries, with a view to normalizing not only the conduct of a corporation, but also the conduct of its affiliates and subsidiaries. In many remedies including the oppression remedy, the derivative action, the restraining or compliance order, the CBCA extends its protection to or restraint on a current or former registered holder or beneficial owner of a security of any affiliates of a corporation, and a current or former officer or director of any affiliates of a corporation, equally as the CBCA regulates a registered holder or beneficial owner of a security of a corporation, and a director or officer of a corporation.

Under the right to information, a minority shareholder is entitled to examine not only the financial statements of the corporation, but also the financial information of the corporation’s subsidiaries whose accounts are consolidated in the financial statements of the corporation. All these mandatory provisions are of great significance in normalizing connected transactions and protecting the legitimate rights and interests of minority shareholders.

Fourth, the CBCA takes fully into account the convenience for a minority shareholder to bring an action and provides the initiative mechanism in an action. In almost every judicial
remedy, the *CBCA* does not require a minority shareholder to give security for costs in any application made or action brought or intervened. In many remedies, a court may at any time order the corporation or its subsidiary to pay to the applicant minority shareholder interim costs, including legal fees and disbursements, although the applicant may be held accountable for such interim costs on final disposition of the application or action. In a derivative action, Canada has, based on the law of equity, solved the initiative mechanism, namely that the corporation will bear the legal fees and litigation fees incurred by a minority shareholder and pay such amounts directly to the minority shareholder instead of the corporation.

Fifth, the *CBCA* builds up a logical relationship between and among the minority shareholder remedies. While a minority shareholder invokes an oppression remedy, it may also turn to other remedies based on the same facts of a case, e.g., a derivative action, dissolution of the corporation, etc. However, the *CBCA* further specifies that a minority shareholder will not be entitled to the right to dissent under section 190 of the *CBCA* if an amendment to the articles is effected under the oppression remedy. Under a derivative action, a court may disapprove an application by a minority shareholder for a derivative action if a more specific and appropriate remedy is available to a minority shareholder. This logical relationship is established to interlink various remedies and make them as a whole in the protection of minority shareholders.

879 “The same fact situation can give rise to both oppression and derivative action claims, as the damage can be suffered by both the corporation and the shareholder in his or her personal capacity.” Janis Sarra “The Oppression Remedy: The People’s Choice”, in Janis Sarra Editor-in-Chief, *Annual Review of Insolvency Law, 2005*, (Toronto: Thomson Carswell, 2006) at 147.
Sixth, remedies under the *CBCA* are always accompanied by counter balance measures to prevent a minority shareholder from abusing his or her rights. Remedies for a minority shareholder are not meant to overturn or abrogate the traditional theories of corporate law and the principle of Majority Rule, but to supplement and develop them in a dynamic manner. The *CBCA* carries out the principle of exhausting intra corporate remedies. In the meantime, balanced protection is fully reflected in the remedies of the *CBCA*. As Farley J. held, the job for the court is to even up the balance, not tip it in favour of the hurt party.  

Seventh, the *CBCA* demonstrates the legislative skill of Canada. In some remedies, the *CBCA* uses many terms such as “prescribed period”, “prescribed minimum amount”, “prescribed minimum number”. These terms are, however, left to be defined in *Canada Business Corporations Regulations*, while the definitions are to be interpreted by the courts. Such legislative art has effectively avoided the complicated formalities required for frequent amendment to the *CBCA*, and in the meantime solved the hysteresis of statutory provisions by amending the *Canada Business Corporations Regulations* from time to time.

### 6.2 Suggestion for the Improvement of the *CBCA*

Based on the foregoing comparison, analysis and reassessment, it is important to note that
Canada attaches great importance to the balanced protection in almost all the remedies. Check and balance measures are meticulously specified in the *CBCA* to prevent a minority shareholder from abusing his or her right. They are based on the corporation’s theory of profitability and the theory of modern corporate governance,\(^{882}\) and aimed at ensuring equality and justice of law. This section puts forward one suggestion that relates to the check and balance measures in the investigation remedy under the *CBCA*.

As articulated in Chapter 4, investigation is an effective measure to solve the issues including the asymmetric information and the burden of proof. With its wide coverage and material effect, this remedy has played a very important role in offering powerful protection to a minority shareholder. However, this remedy, unlike other remedies, does not set out relevant provisions to reflect the principle of exhausting corporate remedies\(^{883}\) or contain the check and balance measures to prevent a minority shareholder from abusing his or her rights. Obviously, wide coverage and material effect of this remedy may lead to adverse impact or damages to the corporation or any interested party if improperly applied.

As every remedy is to achieve a balanced protection, it is advisable for Canada to first specify in this remedy some provisions relating to the internal procedures within the corporation, with a view to affording adequate communication between the corporation and a minority shareholder and economizing judicial resources. Meanwhile, it is also advisable for

\(^{882}\) See Chapter 2, section 2.2.4 and section 2.2.6.

\(^{883}\) The principle of exhausting intra corporate remedies is discussed in section 2.2.4 of Chapter 2.
Canada to allow the corporation or any interested party to bring an action barring the investigation as a counter balance measure under this remedy, with a view to ensuring no disturbance or harm in the normal operation of the corporation or any interested party. Finally, it is advisable for Canada to impose a pre-condition on a minority shareholder for invoking this remedy, namely that “the applicant is acting in good faith”.

6.3 Reassessment of the CLC With Regard to Minority Shareholder Protection

As discussed in Chapter 3, the Company Law of the People’s Republic of China (the “CLC”) has made many significant breakthroughs based on the Former Company Law (defined in Chapter 3). Apparently, the Former Company Law did not have any particular provision to protect the legitimate rights and interests of minority shareholders. While learning and using for reference the advanced corporate legal systems of various countries, China has made many innovations in specifying in the CLC a series of protections dealing with the infringement by the controlling shareholder of the rights and interests of a minority shareholder. Meanwhile, the CLC provides for certain provisions with regard to some deep-seated problems by taking into account the actual conditions of China, which includes: how to protect the innocent controlling shareholder; how to prevent a minority shareholder from abusing his or her right while protecting his or her legitimate rights and interests; how to normalize the connected transactions; etc. It is evident that greater improvement has been

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884 The Company Law of the People's Republic of China was amended and adopted at the 18th session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on October 27, 2005, and became effective as of January 1, 2006.
made in the protection of minority shareholders since the promulgation of the CLC in China.

However, almost every protection in the CLC has the weakness, namely the narrow scope of application. Because of this weakness, the CLC offers very limited protection to a minority shareholder. Besides, the legal context of the protections in the CLC is in too broad outline to generate effective protection. All these are closely interrelated with the emergence of the CLC from the womb of the Former Company Law and reflect the conservative tendency of the legislature. That is why many protections are seen to be of declaratory nature in the CLC. Such an approach only solves the protections of with and without in the corporate legislation. The legal provisions of the protections are far from their meticulousness, flexibility and enforceability, not to mention their balanced protection. The broad outline of the protections could in no way be responsive to the demand of a variety of changing commercial activities, but in turn leaves much room in triggering various debates and disputes both in corporate world and judicial practice. Hence, there is a greater gap between the law in the book and in the action.

Furthermore, the CLC imposes too strict conditions for invoking the protections, which would possibly make the protections within sight but beyond reach. For example, the CLC requires a minority shareholder to give security in the motion for invalidating or reversing the corporation’s resolutions. In the real world, a minority shareholder in China is unable to afford the giving of security due to its weak financial position, and has no alternative but lose
the opportunity of seeking legal protection in despair. Besides, the scheduled period specified by the CLC is not reasonably long enough for a minority shareholder to bring an action. In the CLC, the scheduled period for the defective resolutions is 60 days only. In other words, the People’s Court will not accept the application made by a minority shareholder after 60 days from the date of the defective resolutions. But the current situation in China indicates that the controlling shareholder may easily find a hundred ways to get round or bypass such a provision, and take advantage of the scheduled period to prevent a minority shareholder from invoking the protection.

Despite all these outstanding issues, China has taken a significant step in making a series of rights available to a minority shareholder in the CLC. Further reforms are necessary to improve and intensify the minority shareholder protection in China, based on a comparative study between China and other countries including Canada.

### 6.4 Suggestions for the Improvement of the CLC

Based on the foregoing reassessment, this section puts forward the following three suggestions for the improvement of the CLC in terms of minority shareholder protection.

First, China should expand the scope of application of all protections in the CLC and formulate a remedy of general and widespread application like the oppression remedy in
Situations where the rights and interests of a minority shareholder are infringed are of universality and also of actuality in different places of China. As such cases are ubiquitous and become increasingly complicated, there is indeed a big gap in the CLC where legal remedies may not be available to some cases. It is, therefore, necessary and imperative to revisit the provisions of the CLC governing the protection of minority shareholders.

In order to solve the limitations of the protections in the CLC, it is important to expand the scope of application of all protections. The detailed suggestion includes the widening of the grounds of invoking the right to dissent and withdraw from the corporation, the enlarging of the scope of the accessible operation and management information of the corporation under the right to information, and the adoption of a remedy of investigation when the right of a minority shareholder to information is blatantly encroached.

Meanwhile, it is also important for China to consider the formulation of a remedy similar to the oppression remedy in Canada, in order to respond to the changing commercial activities in a dynamic, all-dimensional and multi-level manner and provide widespread, effective and comprehensive protection to an aggrieved minority shareholder. In view of the characteristic of little discretionary power for a judge in civil law countries and the current situation of the judges in China, such a remedy may be formulated in the CLC in a principled way and be
further refined and enriched through definitions in the regulations for the implementation of
the CLC and/or the judicial interpretations of the Supreme People’s Court of China relating to
the CLC.

Second, China should redress and rationalize all protections in the CLC from the angle of
providing convenience to a minority shareholder in bringing an action.

Currently, a minority shareholder in China is apparently in its weak position in many areas
including the voting right, the right to information, the right to participate in operation and
management of the corporation, the right to dividend and the right to bring an action. Under
such circumstances, China should focus its corporate legislation on how to effectively protect
the legitimate rights and interests of a minority shareholder, and provide convenience to a
minority shareholder in bringing an action for judicial relief. In these connections, it is
advisable that China should eliminate the scheduled period and the security to be given by a
minority shareholder in the motion for invalidating or reversing the corporation’s resolutions,
and also reduce the litigation cost for a minority shareholder generally. In general, it is
important for China to build up a sound legal environment convenient for a minority
shareholder to bring an action and safeguard its legitimate rights and interests.

Provision of convenience does not necessarily ignore or overthrow counter balance measures.
Counter balance measures are essential to the balanced protection, but may be designed in
many ways other than the scheduled period, the security and litigation cost. The check and balance measures in the relevant remedies of the *CBCA* are good examples which may be studied and used by China for reference.

Third, China should expressly specify the principle of reasonable expectations and the business judgment rule in the *CLC*, which will provide legal basis for the People’s Court to directly apply them in their judicial practice.

Prior to the promulgation of the *CLC*, many Chinese scholars already agreed to the principle of reasonable expectations and the business judgment rule of Anglo-American law system and put forward many legislative proposals based on them. However, China did not adopt such principle and rule in the *CLC* in the end. Many Chinese scholars continued to articulate and analyze the pros and cons of the *CLC* by applying the principle of reasonable expectations and the business judgment rule after the promulgation of the *CLC*. Currently, the principle of reasonable expectations and the business judgment rule remain to be discussed within the academic circles.

Both the principle and rule are the important legal principles used by the Anglo-American law countries to pinpoint equity, fairness, justice as well as good faith. In fact, they are extremely important criteria in determining whether the controlling shareholder abuses its controlling right, whether directors duly perform their duty of care and duty of loyalty, and
whether a minority shareholder shall be granted a remedy. In these connections, it is important for China to seriously consider how the principle and rule could be effectively used in its corporate legislation for reference.

6.5 Continuing Research

As articulated in Chapter 1, minority shareholder protection is a life-long research topic since it is always not easy to arrive at the equilibrium between the minority and controlling shareholders in the changing world. This thesis is only a start in the lifelong research project in the area of minority shareholder protection. Based on the articulation, comparison and analysis of the minority shareholder protections, this thesis has raised many outstanding issues from both Canadian and Chinese perspectives for future continuing legal research.

While minority shareholder protection is extremely important in private corporations, it is equally important in public corporations as well. In this respect, future research will be continued on the protection of minority shareholders in public corporations under securities law.

As the CBCA and provincial corporate statutes are equally authoritative, future research will also be extended to various provincial corporate statutes of Canada (including common law and civil law systems) in terms of minority shareholder protection.
In conclusion, there is a long way to go towards more adequate and balanced protections in both Canada and China, with an attempt to set an example for the rest of the world.
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