

**MAJORITY RULE AND MINORITY PROTECTION IN PRIVATE CORPORATIONS:
A COMPARATIVE APPRAISAL OF THE PROBLEMS AND REMEDIES UNDER THE
CANADIAN AND NIGERIAN JURISDICTIONS**

by

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Abstract

This thesis examines, in comparative terms, Canadian and Nigerian laws relating to the concept of corporate majority rule and minority protection from majority opportunism and oppression in private corporations. The key shareholder remedies of derivative actions and oppression are comparatively discussed, with highlights of the similarities and differences in both remedies under Canadian and Nigerian laws.

From theoretical perspectives, this thesis examines the theory that considers the corporation a nexus for a set of contracting relationships among parties. It also considers the proprietary conceptualisation of the corporation. Another theory sees the corporation as an agency relationship between two individuals with differing goals and interests. Lastly, the legal personality theory of the corporation, which considers the corporation a legal person capable of acquiring rights and assuming obligations, is discussed. Understanding of these theories gives better insights into reasons why conflicts arise amongst corporate stakeholders.

A comparative appraisal of the key minority shareholder remedies of oppression and derivative actions under Canadian and Nigerian corporate laws reveals certain areas of convergence and other areas of uniqueness. This work demonstrates that the shareholder remedies available in the two jurisdictions are very similar in nature and, in most cases, known by the same names. However, there are some differences bordering on, among others, proper parties to commence shareholder litigations, length of pre-action notice, and the codification of common law rules into the corporate statute. For instance, while Nigeria statutorily incorporates the common law rule in *Foss v. Harbottle*

and its exceptions into its corporate law, Canada only utilises the rule for historical and analytical purposes.

This thesis advocates a reconsideration of the minority shareholder remedy of derivative actions with regard to close corporations, and the absence of a principled test for determination of liability under the oppression remedy. The attitude of the courts has always been to treat each case according to its peculiar facts. It is further suggested that the courts could, in the exercise of their discretion, liberally interpret the provisions of current corporate statutes to include discretionary, non-traditional corporate stakeholders, such as the environment, as beneficiaries of the dynamic remedy of oppression.

Preface

This thesis is the original, unpublished and independent intellectual work of the author, Charles Eluromma.

The documents, cases and literature cited in this work are all publicly available. No literature or document cited in this thesis required prior approval or consent of any person or authority for its use.

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Dedication

To God Almighty for making my dream a reality!

Chapter 1: INTRODUCTION

1.1 Overview

The corporation forms part of the major economic institutions in every society. For this reason, it is run on the same fundamental principles of political democracy, one of which is majority rule. The majority decision or vote on any corporate question carries the day, the same way that the majority votes win in any referendum where citizens are invited to make a decision on any question by means of popular ballot. As with political democracy, where only citizens are allowed to cast their ballot on a referendum, only members of the corporation are, generally speaking, permitted to vote in the determination of any corporate question. Therefore, where any wrong has been done to the corporation, notwithstanding that this wrong may inevitably affect the individual rights of the members of the corporation, it is only the corporation that may decide whether or not to take any action to redress this wrong, and as the corporation takes decisions by the will of majority of its members, whatever decision the majority shareholders take, i.e. whether or not to take legal steps to redress the wrong done to the corporation, stands as the decision of the corporation, no matter whose interest is hurt by that inaction. This is the principle laid down by the English court in the classic case of *Foss v Harbottle*.¹

The rule in *Foss v Harbottle* has come a long way in historical terms, but one point that deserves mention is that this rule was borne out of the English Chancellor's reluctance

¹ [1843] 2 KB 461; 2 Hare 461; 67 ER 189 [*Foss v Harbottle*]

to interfere in the internal disputes of a partnership except with a view to its dissolution. This was as a result of the presumed sanctity of the bond that tied parties to a partnership.² The second reason the court abstained from interference in the internal squabbles of shareholders was its deference to the separate legal personality status of the corporation, which is to the effect that the corporation is a separate person from the individuals that constitute it.³ Therefore, the corporation, having an independent legal personality, must resolve its disputes or sue for remedy, where a wrong has been done to it, in accordance with the procedures laid out in its internal constitution. Since the predominant procedure in corporate constitutions is that the majority decision on any question is final, the majority may decide not to pursue a particular cause of action to remedy any wrong done to the corporation. Furthermore, the majority may decide to ratify any wrong done to the corporation no matter whose interest is affected by that very act.

The Chancellor's attitude towards disputes arising within the corporation, however, began to change in the early part of the nineteenth century. The Chancellor would grant equitable reliefs, without insisting upon dissolution of the partnership, where abstinence would reward the wrongdoer.⁴ Thus began the recognition accorded by the court of equity first to joint stock companies and then later to incorporated companies. Considering the need to protect minority shareholders from the harsh effect of the strict

² AJ Boyle, *Minority Shareholder Remedies* (Cambridge: Cambridge University Press, 2002) 2.

³ *Salomon v Salomon & Co*, [1897] AC 22 [**Salomon**].

⁴ Boyle, *supra* note 2.

application of the principle of majority rule on every corporate question, which had the consequence of barring minority shareholders from bringing an action for any wrong done to the corporation, measures were developed by the court for abating the consequences of unrestrained application of this principle. These measures developed at common law were meant to grant standing to minority shareholders to bring personal actions, where any of the requisite conditions is present. These measures were clearly highlighted by Jenkins LJ in *Edwards v Halliwell*.⁵ These include:

- where the impugned act constituted a fraud on the minority; for instance where the directors, who were majority shareholders, diverted to themselves a contract procured in the name of the company and later purported to ratify their act at a general meeting.⁶ Furthermore, in *Parke v Daily News*,⁷ for instance, the court held that it was fraud on the minority where the directors and the controlling shareholders of a company made an ill-motivated gift of company property to others;
- where the impugned act involves an illegal act, or an act ultra vires the corporation; for instance, where the shareholders at a general meeting resolved to spend part of the proceeds of sale of the company in compensation of

⁵ [1950] 2 All ER 1064.

⁶ *Cook v Deeks*, [1916] 1 AC 554 PC.

⁷ [1962] Ch 927.

employees and part in remuneration for past services of directors, when a company being wound up had no power to make such a payment.⁸

- where the impugned act gave rise to personal right of action on the part of the individual plaintiff; such as an act by the majority that affects a shareholder's right to attend a general meeting of the company to cast his ballot on a proposed resolution. In *Pender v Lushington*,⁹ for instance, the chairman of a general meeting refused to take the votes of certain shareholders into account. The members were able to bring an action to have their votes counted. A shareholder generally has a personal right to have his votes counted; and
- where the impugned act was not one that could be sanctioned by a simple majority of the company's members, but required the approval of some special majority vote.¹⁰ In *Edwards v Halliwell*,¹¹ two members of a trade union successfully restrained an attempt to increase the members' contributions without obtaining the two-thirds majority required under the rules of the union.

Once any of the above listed exceptions is determined to be present in a particular case, the court will grant standing to an individual shareholder to bring a personal action

⁸ *Hutton v West Cork Railway Corporation*, [1883] 23 ChD 654.

⁹ [1877] 6 ChD 70

¹⁰ See Christopher C Nicholls, *Corporate Law* (Toronto: Emond Montgomery Publications Limited, 2005) at 396-7 [Nicholls] for a detailed discussion of these exceptions.

¹¹ [1950] 2 All ER 1064.

in his name to remedy the wrong, regardless of whether the will of the majority shareholders goes the opposite direction.

It has been argued by some scholars¹² that only one of these four conditions (the fraud on the minority exception) under which the court would relax the rule that deems the corporation the only proper person to bring an action to enforce a legal right due it, is indeed an exception to that common law rule developed in *Foss v Harbottle*. He argues that where any member or officer of a corporation does any act that is illegal or *ultra vires* the corporation, or where any person purports to do, by a simple majority of votes, an act that could only be sanctioned by a supermajority votes of directors or shareholders, the question of whether any individual member may bring a personal, rather than a derivative, action to rectify the wrong does not arise because the act is invalid *ab initio* and not a wrong done to the corporation but one done in violation of the corporate constitution and *ipso facto* affects individual shareholder rights and therefore gives right to private action.¹³

The *Foss v Harbottle* principle and these so-called four exceptions highlighted above now form part of the corporate statute of Nigeria.¹⁴ Canada has no such *Foss v Harbottle* rules and exceptions enacted in its statute, but its courts deal with similar

¹² Nicholls, *supra* note 10 at 397 (referring to Wedderburn & Maloney, "Wither the Statutory Derivative Act?" (1986) 64 Can Bar Rev 309 at 311).

¹³ Nicholls, *supra* note 10 at 397.

¹⁴ See ss 299 & 300 of the *Companies and Allied Matters' Act* (cap C20 LFN 2004) [**CAMA**]

irregularities under derivative actions¹⁵ and the broad ambit of the oppression remedy.¹⁶ We shall give detailed consideration to the specific provisions of these statutes, and the statutory remedies they now offer for the protection of minority shareholders, in chapters three and four of this thesis.

1.1.1 Competing Interests of Stakeholders in the Corporation

If it is agreed that the corporation¹⁷ is a nexus of complex contractual relationships between a diversity of inputs that produce a combination of goods and services, such as where managers contract with suppliers of raw materials to enable the corporation produce finished goods, or where managers bargain with lenders for finance, then it becomes much clearer that there are competing interests in the corporation.¹⁸ The larger the business of the corporation is, the more likely it is that the list of potential claimants in the corporate enterprise will be longer. In the words of Jensen and Meckling,¹⁹ the 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.”

¹⁵ s 239, *Canada Business Corporations Act*, RSC 1985, c C-44 [**CBCA**].

¹⁶ See s 241 *CBCA*.

¹⁷ Note that the “corporation” and the “firm” are in this context used interchangeably.

¹⁸ Michael C Jensen & William H Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” (1976) Vol 3, No 4, *Journal of Financial Economics* 305.

¹⁹ *Ibid* at 9.

According to these scholars, shareholders are the residual claimants to the corporation's assets, but unfortunately are also the parties that are least able to contract to protect their inputs into the corporation.²⁰ A good understanding of this argument gives better clarity on the reasons why equity shareholders can only partake in the corporate assets after preferred debts and secured creditors' claims have been settled upon the insolvency of the corporation. The simple explanation to this pitiable situation of the shareholder is that ranking last in the order of priority is the best bargain he could get under this hypothetical corporate contract.

1.1.2 Resolution of Competing Interests in the Corporation

It is now an indisputable fact that the modern day corporation has many stakeholders beyond that originally conceived as involving only the shareholders and managers. These groups include shareholders, employees, suppliers, creditors, consumers, governments and the environment.²¹ Conflicts often arise between the interests of

²⁰ See Robert Yalden *et al*, *Business Organizations: Principles, Policies and Practice* (Toronto: Emond Montgomery Publications Limited, 2005).

²¹ See the Supreme Court of Canada's decision in *BCE Inc v 1976 Debentureholders*, [2008] 3 SCR; (2008) SCC 69 [**Re BCE**], where the court stated that in resolution of conflicting interests in the corporation, deciding what is in the best interest of the corporation, and acting fairly and responsibly, the directors must have regard to the interest of these groups of stakeholders. The court also on this occasion referred to, with approval, its earlier decision in *Peoples Department Stores v Wise* [2004] 3 SCR, 461at para 42 [**Peoples**]. The OECD Principles on Corporate Governance (1999) regards future generations as part of the stakeholders in the corporation. Explaining the meaning of future generations as corporate stakeholders, Olivier Fremont, in his paper titled "The Role of Stakeholders", explains that sustainable development is at the center of the stakeholder debate and this suggests a responsibility to future generations -- those who will one day be reliant upon the physical environment as a stakeholder group.

corporate stakeholders *inter se* and between stakeholders and the corporation. Where this conflict occurs, the directors of the corporation have a duty to act always in the best interest of the corporation.²² In deciding what the best interest of the corporation is, the directors must treat all interests fairly because, in the words of the Supreme Court of Canada, “fair treatment, the central theme running through the oppression jurisprudence, is most fundamentally what stakeholders are entitled to “reasonably expect.”²³ Once the directors of a corporation are adjudged to have fairly considered the interests of the corporate stakeholders, courts are enjoined to appropriate deference to the business judgment of directors.²⁴

The above analysis is a modest illustration of how corporate jurisprudence has invented legal mechanisms for resolution of conflict of interests within the corporation.

1.2 Justification for Research

The Nigerian economy has recently witnessed improved investor confidence and hence the influx of foreign capital into the country. In most cases, the foreign investor is the minority shareholder, especially in lucrative private corporations²⁵. For instance, by virtue of the *Nigerian Oil and Gas Industry Content Development Act, 2010* [Local Content Act]:

²² s 279(3) *CAMA*; s 122(1) (a) *CBCA*; and *Re BCE*, *supra* note 21.

²³ *Re BCE*, *supra* note 21) at para 64.

²⁴ *Ibid* at para 40.

²⁵ “Private corporations” in this sense is used interchangeably with “closely held corporations”.

Nigerian independent operators shall be given first consideration in the award of oil blocks, oil field licences and oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of such conditions as may be specified by the Minister.²⁶

And it is provided in s 3 (2) of the Act that:

There shall be exclusive consideration to the Nigerian indigenous service companies which demonstrate ownership of equipment, Nigerian personnel and capacity to execute such work to bid on land and swamp operating areas of the Nigerian oil and gas industry, for contracts and services contained in the schedule to this Act.

A “Nigerian Company” is defined in the Act as:

a company formed and registered in Nigeria under the provisions of the Companies and Allied matters’ Act with not less than 51% of the equity shares held by Nigerians.²⁷

This law, theoretically, gives Nigerian contractors and bidders first-ranking considerations in all transactions in the Nigerian oil and gas industry. The general convention by which contracts are awarded to the lowest bidder does not apply to a bid for a contract involving foreign and Nigerian companies, if the bid price submitted by the non-Nigerian bidder is not more than 10% less than the financial bid offered by a Nigerian company²⁸. In effect, the law favours local companies above non-Nigerian companies.

Faced with this peculiarity in the Nigerian oil and gas sector, a foreign investor desirous of doing business in this sector will seek legal advice on the safest and most cost-

²⁶ s 3 (1) Local Content Act.

²⁷ *Ibid* s 106.

²⁸ *Ibid* s 16.

effective mechanism to avoid the risk of not winning contracts or oil exploration and mining licences, and the possibility of not being able to do business in the oil and gas sector in Nigeria, even where it has the technology and resources to execute projects in the sector. The most common legal advice that foreign investors get from lawyers, in these circumstances, is to assume a minority shareholder status in a special purpose company formed and incorporated in Nigeria, with Nigerian citizens as majority shareholders holding at least 51% of the shares of such companies. There are risks associated with this mechanism even though, in practice, it is the most cost-effective approach to scale the hurdle. There is the risk that where the relationship between the shareholders go sour, the local majority shareholders may take advantage of this legal deficiency on the part of the foreign investor to attempt to squeeze him or her out. This was the situation that played out at the Supreme Court of Nigeria in the case of *Oil Field Supply Ltd v Joseph Lloyd Johnson*,²⁹ where local shareholders nominated by an Australian investor, unsuccessfully attempted to squeeze him out of the company after it received compensation from the federal government following a compulsory acquisition of certain of the assets of the company. In a suit for winding-up brought by the foreign investor against the company, the local shareholders' argument that the business permit of the foreign investor had expired and that he had travelled back to Australia at the time the company received the compensation was fortunately struck down by the court.

Besides situations where shareholder relations get sour, and an attempt is made to squeeze out a foreign investor who has contributed more to the formation of the

²⁹ [1987] 2 NWLR (pt 58) 625.

company, or who beneficially owns more of the equity shares in a company, every foreign investor would be concerned about the safety of his investment and will seek legal advice on the fundamental protections afforded by existing corporate law to minority shareholders against illegal, oppressive and unfairly prejudicial conducts of the majority shareholders.

As one commentator has noted, “the law must deal with the more outrageous examples of majority opportunism, if those responsible for company law wish to encourage investors to place their monies in the shares of companies which are controlled by one or a small group of majority shareholders.”³⁰ Therefore, for reasons highlighted in the immediately below paragraph, especially with regards to the relationship between Canada and Nigeria, and the common origin of both legal systems, it will be worth the while to undertake a comparative examination of the question of majority rule, minority protection and the remedies provided by corporate laws of these jurisdictions for resolving competing claims of corporate stakeholders. The ultimate goal is to have a work product that may perhaps serve as a quick reference material for the academia, foreign investors, corporate and legal advisors in both Canada and Nigeria.

1.3 Reasons for Choice of Canada as Comparative Jurisdiction

This research work is a comparative legal research on Canadian and Nigerian corporate laws because the two jurisdictions share certain features in common. First, the legal systems of both countries have a common origin in the English common law

³⁰ Paul L Davies, *Gower and Davies’ Principles of Modern Company Law*, 7th ed (London: Sweet & Maxwell, 2003) at 481.

system.³¹ Secondly, both jurisdictions operate the federal system of government and share bilateral economic and investment agreements.³² Furthermore, the economies of both Canada and Nigeria are largely natural resource reliant and therefore attract large droves of foreign investments particularly in their energy sectors.

1.4 Research Question

The seminal question that this research project seeks to unravel is to what extent Canadian and Nigerian corporate laws have each resolved the hypothetical conflicts that arise in the corporation *vis-a-vis* the theory of corporate democracy and minority shareholder rights' protection. This question will be examined in the context of the Canadian and Nigerian legal remedies developed for settlement of the ever-competing interests of corporate stakeholders to arrive at a just and equitable result for all stakeholders. After identifying these corporate civil remedies, the inquiry will focus deeply on the two key remedies of derivative actions and oppression in both Canada and Nigeria, and then consider the possibility of extending the oppression remedy, which is about the most litigated corporate civil remedy in Canadian corporate law, to non-contractual discretionary complainants such the environmentally oppressed people in the Nigerian Niger-Delta region.

³¹ The only exception, in the case of Canada, is the Province of Quebec where the civil law system is practised in civil matters.

³² See, for instance, the recently signed Canada-Nigeria Foreign Investment Promotion and Protection Agreement (FIPA) - "Canada-Nigeria Foreign Investment Promotion and Protection Agreement", online: Prime Minister of Canada < <http://pm.gc.ca/eng/news>>.

1.5 Scope of Research

This research work is a comparative appraisal of the concept of majority rule and minority protection under Canadian and Nigerian corporate laws. Canada operates a federal system of government which comprises 10 provinces and 3 territories.³³ The various provincial and territorial governments in Canada have their independent parliaments with powers to enact provincial legislation, including statutes relating to the incorporation and subsequent operation of business corporations within the provincial or territorial jurisdictions.³⁴ These provincial corporate statutes essentially mirror the federal template - the *CBCA*. Nigeria operates a federal presidential system of government comprising 36 states and the Federal Capital Territory, Abuja. Although the legislatures of these component states of Nigeria have powers to make laws applicable within their state territories, there are certain legislative subjects over which only the federal legislature is empowered by the constitution to legislate. One of such matters is incorporation and regulation of business corporations. Unlike Canada, there is only one corporate statute in Nigeria with nationwide application – *CAMA*. Matters relating to incorporation, regulation and winding up of companies fall within the “Exclusive Legislative List”, over which only the federal government can legislate³⁵.

³³ The 10 provinces are: (1) Alberta; British Columbia; (3) Manitoba; (4) New Brunswick; (5) Newfoundland and Labrador; (6) Nova Scotia; (7) Ontario; (8) Prince Edward Island; (9) Quebec; and (10) Saskatchewan. The three territories are: (1) Northwest Territories; (2) Nunavut; and (3) Yukon.

³⁴ Fasken Martineau Dumoulin LLP, *Canada Business Corporations Act & Commentary*, 2008/9 ed (Markham: LexisNexis Canada Inc, 2008) at 10.

³⁵ Part A, Schedule II to the *Constitution of the Federal Republic of Nigeria*, 1999.

Given the limited time and space available for this research work, it is impossible to compare the minority rights protections available under CAMA to those provided under each and every provincial and territorial corporate statute in Canada. Therefore, since the CBCA has nationwide application, where a business corporation is incorporated under the federal legislation, the CBCA will be used as the classic Canadian corporation statute for purposes of comparative analysis in this research work. Consequently, references to Nigerian corporation statute refer to CAMA whereas references to Canadian corporation statute relate to the CBCA.³⁶ Furthermore, while theories and the general nature of the corporation analysed in this thesis relate to both private and public corporations, and the minority shareholder protections discussed here are applicable to private and public corporations in both Canada and Nigeria, the remedies comparatively examined here are analysed as they apply only in the context of private corporations. The comparisons of these minority shareholder remedies are not extended to public corporations, whose shares are usually widely held and traded on the stock exchange. This is because minority shareholder remedy litigation is more common with, and the problems associated with shareholder disputes are particularly more complicated in the case of, closely held corporations.³⁷ Consequently, the courts have never shown any pretence about their unwillingness to extend the oppression jurisprudence liberally to

³⁶ Minor variations exist between the *CBCA* and the various provincial corporation statutes. But it is not within the purview of this research work to analyse these variations.

³⁷ According to Kevin P McGuinness, *Canadian Business Corporations Law*, 2nd ed (LexisNexis Canada Inc, 2007) [McGuinness], “[e]mpirical studies suggest that in the UK, 96.6% of cases where the oppression remedy was being prayed involved private companies; 70.4% of those cases were brought by minority shareholders and 24% by 50% shareholders; 64.4% of such claims alleged exclusion from management, well ahead of the proportion for any other particular type of claim”.

publicly held corporations for justifiable reasons. Since the management of a public corporation rests with a large board of directors with varied interests, the “reasonable expectation” ingredient, which is the lifeblood of the oppression remedy, would almost certainly be considered by the court to be non-existent.³⁸ The central issue that the courts tend to focus on in dealing with oppression litigation is the existence of reasonable shareholder expectations and understandings that cannot be found in the corporate constitution or other contractual documentation.³⁹ Furthermore, the statutes regulating securities adequately provide comfortable exit strategies for any oppressed minority in a public corporation.⁴⁰ The position is the same under Nigerian law, where the cases in which the oppression remedy have been successfully litigated relate to loss of reasonable expectations by the minority in closely held corporations.⁴¹

This research work will also examine in detail the two broadest remedies available to an aggrieved minority shareholder in these jurisdictions namely, the “oppression” remedy and the remedy of “derivative actions.” The analysis of these remedies will be limited to oppression and right to derivative suits because these two remedies are very far-reaching, especially in Canada, where due to the extensive analysis given to the

³⁸ See, for instance, the decision of the Supreme Court of Canada in *Re BCE*, *supra* note 21, and the Ontario Court of Appeal in *Ferguson v Imax Systems Corp*, [1983] 43 OR 2d 128 at 137, where statements to the effect that the oppression remedy is aimed more at close corporations than other business organisations were made.

³⁹ Brian R Cheffins, *Company Law: Theory, Structure and Operation* (Oxford: Clarendon Press, 1997) at 464.

⁴⁰ *Ibid.* at 466. See also Stephanie Ben-Ishai, “The Promise of the Oppression Remedy: a Review of Markus Koehnen’s Oppression and Related Remedies” (2005) 42 Can Bus LJ 450 at 455.

⁴¹ *Edokpolor & Co Limited v Sem-Edo Wire Industries Limited*, [1984] 7 SC 119.

oppression remedy by the courts in the course of resolving disputes relating to the rights of the various corporate stakeholders, as seen in recent case law,⁴² this remedy is now considered the most pervasive remedy, both in terms of scope of protection that it provides and the extent to which it has come to dominate corporate litigation.⁴³

Nigerian corporate law also considers the oppression remedy as very far-reaching. However, relief from oppression is recognised only as one of the remedies available to minority shareholders.⁴⁴ In this connection, this research work will examine the provisions of *CAMA* relating to minority rights protection within the context of the remedies of oppression and derivative suits. It will also consider the provisions of the *CBCA* relating to minority rights protection and the oppression remedy and a

⁴² *Re BCE*, *supra* note 21; and *Peoples*, *supra* note 21.

⁴³ See McGuinness, *supra* note 37 at 1230. Other minority shareholder remedies available under Canadian corporate law include: (a) dissent and appraisal rights; (b) shareholder proposals; (c) application for dissolution under s 214 *CBCA*.

⁴⁴ Apart from relief from oppression and derivative actions, other minority shareholder remedies provided under Nigerian corporate law include the following: (1) weighted votes: *CAMA* grants preferred shareholders (usually minority shareholders) the statutory right to more than one vote in the following circumstances, (a) where rights attached to preference shares are proposed to be varied by resolution; (b) upon any resolution by which it is proposed that an auditor of the company be removed and another be appointed in his stead; and (c) upon any resolution by which it is proposed that the company be wound up; (2) appointment of inspectors for the purpose of investigation of the affairs of a company, where the court is of the opinion that the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some part of its members. The parties entitled to apply for this remedy are either the companies' house (CAC), the company itself or members holding not less than one-quarter of the class of issued shares of the company. This remedy is therefore not a minority shareholder remedy in the strict sense. It is in *CAMA* - ss 314 and 315 *CAMA* - but has never, to my knowledge at the time of writing this thesis, been granted in any court in Nigeria.

complainant's right to derivative action. Judicial decisions from the Canadian and Nigerian courts will be employed in the analysis of these remedies provided under the Canadian and Nigerian jurisdictions. Secondary legal materials in the form of monographs, scholarly articles from these jurisdictions and other relevant common law jurisdictions such as, the United Kingdom and the United States will also be used for this proposed research project.

1.5.1 Jurisdiction in Shareholder Litigation

Before a discussion of the courts vested with jurisdiction to entertain questions relating to shareholder disputes, it will be prudent to give a brief introduction into the nature and sources of Nigerian law and the structure of the judicial systems in Nigeria and Canada. Having fairly good background knowledge of the legal system and structure of the judiciary in a particular jurisdiction will afford a clearer picture of shareholder dispute resolution mechanism in that jurisdiction.

1.5.2 Nigerian Legal and Judicial Systems

Nigeria is a former British colony and thus has a legal system that is rooted in English legal traditions. The sources of Nigerian law are categorised as follows:

1. English law
 - a. English enactments extended to Nigeria prior to independence in 1960 which were preserved subject to the Nigerian constitution.⁴⁵
 - b. Received English law

⁴⁵ See, for instance, s 3 (1) of the *Nigerian (Constitution) Order-in-Council*, 1960, which preserved existing laws.

- I. The principles of common law;
 - II. The doctrines of equity;
 - III. Statutes of general application in force in England on the 1st day of January 1900.⁴⁶
2. Nigerian legislation;
 3. Nigerian case law;
 4. Nigerian customary law and Islamic law⁴⁷; and
 5. International law⁴⁸

The following are the superior courts of record, in a hierarchical order, which may exercise civil jurisdiction in cases involving a corporation in Nigeria:⁴⁹

1. The **Supreme Court of Nigeria**⁵⁰ - This court, situated in the Federal Capital Territory, Abuja, is the highest court and a court of final appeal in both civil and criminal matters. It entertains appeals from the Court of Appeal.⁵¹

⁴⁶ The import of this is that all statutes that applied to all parts of England on January 1, 1900 were automatically deemed to be law in Nigeria. Statutes that had no nationwide application in England on that date, or those made after that date have no application in Nigeria.

⁴⁷ These are primarily private and property laws, which deal with questions such as succession and inheritance of property of deceased persons, divorce, custodianship and guardianship of children etc., where persons involved were married under customary law or Islamic law.

⁴⁸ Osita Nnamani Ogbu, *Modern Nigerian Legal System* (Enugu, Nigeria: CIDJAP Press, 2002) at 40-41.

⁴⁹ Courts which do not have general civil jurisdiction, or without any connection with a corporation or shareholder litigation are not discussed in this thesis. Superior courts in this category include the Customary Courts of Appeal, the Sharia Courts of Appeal, Courts Martial and other tribunals.

⁵⁰ s 230 *Constitution of the Federal Republic of Nigeria, 1999* [the **Constitution**].

⁵¹ This court, in exceptional cases, exercises original jurisdiction, especially in relation to certain constitutional questions involving the component states and the Federal Government of Nigeria.

2. The **Court of Appeal** – headquartered in Abuja with 9 divisions spread across major cities in Nigeria. It entertains appeals from, among others,⁵² the Federal High Court; the High Court of the Federal Capital Territory, Abuja; and the State High Courts.⁵³
3. The **Federal High Court** and the **State High Courts**: These courts are courts of co-ordinate jurisdiction in that appeal from one does not go to the other but to the Court of Appeal. Each of the 36 states and the Federal Capital Territory has a high court established by law of its House of Assembly and an act of the National Assembly respectively. The Federal High Court is headquartered in Abuja with divisions in almost all states of the federation. While the State High Courts and the High Court of the Federal Capital Territory have unlimited civil and criminal jurisdiction over causes and matters arising within their political region, with the exception of those matters over which the Federal High Court has exclusive jurisdiction,⁵⁴ the Federal High Court is a special court with specifically defined jurisdiction. This court, which was originally created as the Federal Revenue Court⁵⁵, has exclusive jurisdiction to entertain any cause or matter challenging

⁵² This court also entertains appeals from the Sharia Court of Appeal of the Federal capital Territory; the Customary Court of Appeal of the Federal Capital Territory; the Sharia Court of Appeal of a State; the Customary Court of Appeal of a State; Court Martials or other tribunals as may be prescribed by an Act of the National Assembly. These other courts, though superior courts of record are not discussed here because they have no general jurisdiction; their jurisdictions are limited to specific matters.

⁵³ s 240 *Constitution*

⁵⁴ *Ibid* at s 272.

⁵⁵ s 1 *Federal Revenue Court Decree, 1973*.

the activities of the Federal Government of Nigeria or any of its agencies.⁵⁶ Furthermore, by virtue of section 251 (1) (e) of the *Constitution*, the Federal High Court has and exercises exclusive original jurisdiction over any civil matter arising from the operation of *CAMA* or any regulation relating to the operation of companies incorporated under *CAMA*. In practical terms therefore, where a dispute arises between two corporations or between a corporation and an individual on the subject of tort or contract, for instance, such a matter will be brought before the high court of the state in which the cause of action arose. However, where the dispute relates to the acts or omissions of anyone in relation to the running of a corporation or the application of *CAMA* to a corporation (including shareholder litigation), the court of first instance is the Federal High Court. The State High Court has no jurisdiction in such matters.⁵⁷

1.5.3 Canadian Legal and Judicial Systems

Canada operates a federal parliamentary system of government with the seat of government in Ottawa.⁵⁸ The sources of Canadian law include the following:⁵⁹

I. Legislation⁶⁰

⁵⁶ s 251, *Constitution*

⁵⁷ s 251 (1) (e) *Constitution*, 1999.

⁵⁸ "Canada's System of Government", online: Parliament of Canada <<http://www.parl.gc.ca>>.

⁵⁹ "The Judicial Structure: How the Courts are Organized", online: Department of Justice <<http://www.justice.gc.ca>>.

⁶⁰ This includes the Canadian Charter of Rights and Freedoms, which occupies a paramount position in the body of civil and political rights and freedoms enshrined in the *Canadian Constitution Act*, 1982.

- II. The common law; and
- III. The civil law in the province of Quebec

Below is the structure of Canadian judicial system:⁶¹

A. Federal Courts

- (i) The **Supreme Court of Canada** – headquartered in Ottawa, this court is the highest court in Canada, and is vested with powers to hear appeals from decisions of the appeal courts in all the provinces and territories, as well as from the Federal Court of Appeal. Supreme Court judgments are final.
- (ii) The **Federal Court**, the **Federal Court of Appeal**, and the **Tax Court**: The Federal Court deals with issues such as intellectual property and maritime law and federal-provincial disputes, while the Tax Court specializes in tax cases. The Federal Court of Appeal reviews decisions of both these courts, as well as federally appointed administrative tribunals such as the Immigration Appeal Board and the National Parole Board.⁶²

B. Provincial/Territorial Courts: The names of these courts are not uniform in all provinces. However, the court system is almost the same across all provinces and territories in Canada. There are two levels of courts in Canadian provinces and territories – (a) the superior courts and (b) the provincial courts.

⁶¹ Note that there are other courts with jurisdiction that are not relevant to this analysis and therefore not discussed in this thesis.

⁶² “The Judicial Structure: How the Courts are Organized”, online: Department of Justice <<http://www.justice.gc.ca>>.

- (i) **The Superior Courts:** Superior courts are divided into trial level and appeal level courts.
- a. **The Provincial appeal court:** This superior appeal level court hears civil and criminal appeals from the superior trial court of the province or territory where it is situated. It is commonly called the Court of Appeal in most provinces.
 - b. **Provincial trial court:** This superior trial level court has wide jurisdiction to hear civil and criminal cases. It is called various names, depending on the province where it is situated. It is called the “Superior Court” in Quebec and the “Superior Court of Justice” in Ontario, but is known as the “Court of Queen's Bench” in Alberta, Manitoba, New Brunswick and Saskatchewan, and as the “Court of Justice” in Nunavut. In all other provinces and territories, it is called the “Supreme Court”. Rulings made by judges of this trial court may be appealed to the appellate level, either called the “Court of Appeal” or the “Appeal Division”⁶³, which is the highest court within the province or territory.
- (ii) **Provincial Courts**⁶⁴: These courts try most criminal offences and, in some provinces, civil cases involving small amounts of money. Provincial courts may also include specialized courts, such as youth courts, family courts and small claims court.

⁶³ The terms, “trial division” and “appeal division” are used where a single superior court called the Supreme Court exists in a province or territory, with both trial and appellate jurisdictions exercised in two different divisions of the court.

⁶⁴ This court has inferior status compared to the other courts.

For practical purposes, it is important that one understands the court properly bestowed with original jurisdiction to entertain suits among corporate shareholders. The trial level superior court in a province⁶⁵ has original jurisdiction to entertain shareholder litigation. Appeals go to the Court of Appeal of the province or territory and further appeal from the decision of the provincial appeal court goes to the Supreme Court of Canada.⁶⁶

1.6 Thesis Structure

This thesis consists of six chapters. Chapter 1 is the introduction, which gives a general overview of the issues to be examined in the body of the thesis, and emphasises that the scope of this research is limited to closely held corporations in Canada and Nigeria. It also briefly highlights the legal systems and the structure of the judicial systems of the two jurisdictions under comparison, only as they may affect corporate minority shareholder litigation.

Chapter 2 deals with the methodology adopted in this comparative appraisal of minority rights problems and remedies under the two comparative jurisdictions, which include normative comparison of rules under Nigerian corporate law with similar rules relating to shareholder remedies under Canadian law. This chapter also contains the theoretical framework on which the corporate form stands. Questions considered, for example, include to what extent the laws of the comparative jurisdictions conceptualise the

⁶⁵ It is called the “Supreme Court” in the province of British Columbia, for instance.

⁶⁶ See Patrick Macklem *et al*, *Canadian Constitutional Law* 4th ed (Toronto: Emond Montgomery Publications, 2010) at 506 -7; Neil Craik *et al*, *Public law – Cases, Materials and Commentary*, 2nd ed (Toronto: Emond Montgomery Publications, 2011).

corporate form as a nexus of contracts. The corporation's theory of association and the theory of corporate management, and some other theories as espoused by the courts and legal scholars, are examined here. The extent to which these theories illuminate our path to understanding the causes of shareholder conflicts are also considered in this chapter.

Chapter 3 examines the specific minority shareholder protections and remedies provided for under Nigerian corporate law. It discusses the principle of corporate majority rule, its affirmation in the *Foss v Harbottle* decision, and how this principle has been formally incorporated into Nigerian corporation statute. This chapter also discusses the minority shareholder remedy of derivative action, the basis for use of this remedy, the conditions precedent to bringing a derivative action; the proper parties granted standing to make application to court, the powers of the court and the reliefs available in court.

Chapter 4 will examine the protection of minority shareholder rights under Canadian corporate law. First, the minority shareholder remedy of derivative action under Canadian law will be discussed. The proper parties endowed with standing to bring derivative actions, the basis upon which a complainant may bring a derivative action, the conditions precedent to bringing such action and the reliefs that may be granted to a complainant under Canadian corporate law will also be analysed in this chapter. Secondly, the oppression remedy, described as the "Charter of Rights and Freedoms of

Canadian corporate law⁶⁷, will also be a subject of discussion in this chapter. The statutory elements of oppression, the reasonable expectation test, proper parties entitled to sue, the need to balance the interest of those claiming rights from the corporation *vis-à-vis* the business judgment rule all form the subject of discussions in this chapter.

Chapter 5 is the major comparative chapter of this thesis. The first part of it compares the provisions of the *CBCA* regarding minority shareholder protections to those of *CAMA* and makes, among others, the following findings: (1) that the proper parties with standing to initiate oppression litigation under the *CBCA* and *CAMA* differ slightly, and that *CAMA* is more generous in this regard in that it expressly lists creditors as parties who may bring an oppression action whereas the *CBCA* does not, even though creditors have been constructively included by the Canadian courts; (2) that the Canadian oppression remedy is more far-reaching than it is in Nigeria in the sense that it affects not only acts or omissions relating to a corporation, but also to those concerning its affiliates; (3) that there are procedural differences in both jurisdictions with regard to pre-action notice to directors before commencing a derivative suit; (4) that the Nigerian corporate law accommodates anticipatory oppression suits, whereas the *CBCA* has no provisions for suits based on anticipatory oppressive conducts⁶⁸; and

⁶⁷ Dennis H Peterson & Matthew J Cumming, *Shareholder Remedies in Canada*, 2nd ed (Markham: LexisNexis, 2009) at 17-1. [**Peterson & Cumming**].

⁶⁸ It is worthy of note, however, that some provincial business corporation statutes in Canada have provisions for anticipatory oppression suits.

(5) that the reasonable expectations test finds more application in the Canadian court than its Nigerian counterpart.

The second part of this chapter examines the deficiencies inherent in both the Canadian and Nigerian minority shareholder remedies. First, it identifies the requirement by the courts in these jurisdictions, that every wrong done to a corporation gives rise only to a derivative action, even in small close corporations, is a major weakness that needs to be addressed. It suggests granting minority shareholders the right to bring personal actions for substantive relief from oppression in close corporations of a small number of, say, not more than seven shareholders, in order to avoid the procedural bottlenecks of derivative actions. The lack of objective and predictable yardstick for measuring “oppression” is another weak point in both systems. The lack of clear and unambiguous definition of the “creditor” who can initiate oppression litigation is another source of worry discussed in this chapter. This chapter offers suggestions for better standards and ends by suggesting that the flexibility and dynamism of the oppression remedy be exploited to extend the right to bring oppression claims against corporations to the environmentally oppressed corporate stakeholders - communities that directly suffer the adverse effects of commercial and industrial activities of corporations - such as those in the highly polluted Niger-Delta region of Nigeria. The argument is that, given the fact that the environment has been recognised as part of corporate stakeholders, the interests of which must at all times be considered by the directors of the corporation, the environmentally oppressed communities, by virtue of their collective right and that of future generations to the environment, should be granted standing as “complainants” by the courts to initiate oppression suits against oppressive activities of culpable

corporations, as the torts of negligence and nuisance have failed to provide them with the much needed remedy.

Chapter 6, the concluding chapter, attempts to connect the research questions to the findings and conclusions reached in the preceding chapters. It summarises the current state of corporate law relating to minority shareholder protections in Canada and Nigeria, and re-affirms the deficiencies inherent in the current state of the law on minority shareholder protection. Furthermore, this chapter re-emphasises the need for governments to take the issue of minority rights protection very seriously, if they desire to attract foreign investments to their economies. This Chapter also advocates further research on this subject by building on the foundation laid by this thesis.

Chapter 2: METHODOLOGY AND THEORETICAL FRAMEWORK

This chapter discusses the methodology applied in the comparative analysis of fundamental protections afforded minority shareholders in the two jurisdictions under review. This thesis adopts two of the most commonly used methodologies in comparative law namely, normative comparisons and functional comparisons.

This chapter also discusses the various hypothetical framework offered by various legal scholars in corporate law as to the nature of the institution called the corporation and how these ideas lead to the fundamental protections available to minority shareholders in Canada and Nigeria.

2.1 Comparative Methodology

The methodology adopted in this research work is comparative. Comparative methodology is a research methodology that aims to make comparisons across different countries or cultures. In other words, it is the act of comparing two or more different cultures with a view to discovering something about one or all of the things being compared. However, this thesis only indulges in micro-comparison which is the comparison of particular object within each system (corporate minority rights protection) rather than comparing two legal systems.⁶⁹ When narrowed down to law, comparative legal study is a method, a way of looking at legal problems, legal institutions, and entire legal systems. It is a study dedicated to the study of the “other”. By the use of this

⁶⁹ Geoffrey Samuel, “Comparative Law and its Methodologies” in *Research Methods in Law*, Dawn Watkins and Mandy Burton ed (New York: Routledge, 2013) at 103.

method it becomes possible to make observations and to gain insights, which would be denied to any researcher who limits his study to the law of a single jurisdiction.⁷⁰ Two kinds of comparative approach are identified and applied in micro-comparison of corporate minority rights protection in Canada and Nigeria.

2.1.1 Normative Approach

The normative approach is used to identify and compare laws based on their efficacy or suitability to a given situation or problem. This approach attempts to identify and select policy goals through analysis and provide a prescriptive statement as to what the law should be.⁷¹

Perhaps the best way to understand the normative approach to comparison applied in this thesis is to examine those remedies prescribed by the corporate laws of both Canada and Nigeria for the protection of the interests of corporate minority shareholders in both jurisdictions. Canada and Nigeria have very similar remedies, both in terms of the names by which they are known and the conditions precedent to obtaining those remedies. Areas of similarities between the normative remedies prescribed for the protection of minority shareholders include derivative actions, oppression and unfair prejudice, dissolution of company by the court, investigation of the affairs of a company. Comparison of these normative prescriptions for minority shareholder remedies forms the subject of Chapter five of this thesis.

⁷⁰ “Comparative Law & Legal Definitions”, online: USLEGAL <<http://www.definitions.uslegal.com>>.

⁷¹ Pier Giuseppe Monateri, *Methods of Comparative Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2012) at 307-8.

2.1.2 Functional Approach

The functional approach takes a look at rules and legal institutions and examines how these rules work within that institution. In other words, functional approach adopts a methodology that examines the socio-legal function of rules within a particular legal system. Under the functional approach, the comparatist tries to find in a foreign system the norms, which are functionally comparable to those other rules or principles that have been taken into comparison from the other systems. The utmost question is: what socio-legal purpose does the norm under study fulfil in its own societal context?⁷²

Placing this theory in the context of our present research work, applying the functional approach to comparative methodology means that we have identified specific problems related to minority shareholding in corporations for instance, majority opportunism or fraud on the minority concept, under Canadian law as also similar to those under Nigerian corporate law, and then probed into how the Canadian legal system has been able to solve this problem through the instrumentality of legal norms and then try to suggest the remedial measures to the Nigerian system. This is the nuts and bolts of the functional approach to comparative methodology.

2.2 Theoretical Framework

Having considered the comparative methodology applied in this research work, it is now time to consider the various perspectives from which scholars have examined the

⁷² Jaakko Husa, "About the Methodology of Comparative Law – Some Comments Concerning the Wonderland..." Maastricht Faculty of Law Working Paper Series, 2007 available on the SSRN at: <<http://www.ssrn.com/abstract>>.

nature of the corporation. A good understanding of the nature of theories projected around the corporation will enhance one's understanding of certain behaviours by corporate actors and why stakeholders in corporate litigation make certain claims in court. Furthermore, examining the various theoretical assumptions around which the corporation has been conceptualised by various scholars enables the reader to draw a comparative evaluation of these theories, form an independent opinion on each, and, if necessary, make a leaning towards the theory of the corporation that most appeals to reason. All of these will leave the reader with a clearer understanding of the competing interests of the various corporate stakeholders and the continual conflict between the majority and minority shareholders in a corporation. This, perhaps, would equip a potential litigant to make better argument regarding his rights and obligations *vis-à-vis* the corporation and its other stakeholders in corporate litigation.

There are various theories of the corporation as there are scholars who have attempted to study the corporate form, and some of these theories sometimes overlap with each other, thereby making it unnecessary or repetitive to discuss every of those theories. A handful of them are considered below.

2.2.1 The Contractarian Theory of the Corporation

There is a contractual relationship between the various corporate actors, as “the corporation is a nexus of complex contractual relationships between a variety of inputs that produce an aggregate of goods and services, such as managers contracting with

trade suppliers for raw materials or financial institutions for working capital.”⁷³ This was the perspective offered by Meckling and Jensen⁷⁴ regarding the nature of the firm. These scholars, from an economic perspective, redefine the firm⁷⁵ completely in functional, rather than institutional, terms by arguing that the firm is nothing but a nexus for a set of contracting relationships among individuals, that exists and allows the participants in that contract a platform for combination of resources in the corporate enterprise.⁷⁶ This view of the corporation denies the existence of any separate legal entity called the corporation, and argues that the corporation is not a thing all.⁷⁷ Regarding the enquiry as to what the key subjects of the negotiation between parties to these corporate contracts are, William Klein⁷⁸ pinpoints four fundamental topics of this hypothetical contractual negotiation among corporate participants as (a) allocation of risk, (b) allocation of return, (c) allocation of control, and (d) duration of the relationship.

In the “nexus of contracts” conception of the corporation, the place of shareholders as owners of the corporation is downplayed, though they are part of the corporate contractors, a group that also includes managers, employees, creditors, suppliers, customers, and so on. Proponents of this theory argue that the shareholders are not

⁷³ See Yalden *et al*, *supra* note 20 (citing Jensen and Meckling).

⁷⁴ Michael C Jensen & William H Meckling, “Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure” (1976) Vol 3, No 4, JFE 305.

⁷⁵ The “firm” and the “corporation” are for the present purpose used interchangeably.

⁷⁶ Nicholls, *supra* note 10 at 31.

⁷⁷ *Ibid*.

⁷⁸ William A Klein, “The Modern Business Organisation: Bargaining under Constraints” (1982) 91 Yale LJ at 1521 (cited in Nicholls, *supra* note 10 at 31).

owners because the corporation is not a thing that is capable of being owned. However, shareholders hold residual economic interests in the corporation in the sense that whatever wealth is made by the corporation will be applied first to the satisfaction of the claims of fixed claimants in the corporate assets such as, creditors, employees and government revenue agencies. The shareholders only receive value if there is surplus after settlement of those prior ranking fixed claims.⁷⁹

This contractual conception of the corporation is today firmly reflected in our formal corporate legislation. For instance, *CAMA* provides that:

[T]he memorandum and articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and article⁸⁰

This contractual conception of the memorandum and articles of association of a corporation was reaffirmed in *NIB Investments (West-Africa) v Omisore*,⁸¹ where the court emphasised that the memorandum and articles of association of a company constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other shareholder of the company. Consequently, the *CBCA* as well as *CAMA* have provisions that suggest that most corporate transactions between shareholders and managers are characterised by freedom of the parties to enter into contractual agreements besides regulatory

⁷⁹ See Nicholls, *supra* note 10 at 31 for a fuller analysis of the contractarian conception of the corporation.

⁸⁰ s 41 *CAMA*.

⁸¹ [2006] 4 NWLR (pt 969) 172 at 200.

provisions contained in the corporation statute. This analogy is exemplified in provisions such as section 25(1) *CBCA*, which provides as follows:

Subject to the articles, the by-laws and any unanimous shareholder agreement...

And section 103(1):

Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide...⁸².

A corporation is indeed a contract of some sort between the shareholders and the company, on the one hand, and amongst the company, its officers and shareholders, on the other hand. It is an agreement entered into by the shareholders and managers through consultation and by consensus *ad idem*. This argument is demonstrated in the statutory permission of the use of shareholder agreements in private corporations in both Canada and Nigeria. For instance, the *CBCA* in section 145.1 permits shareholders to enter into a pooling agreement whereby they agree to exercise the voting rights attached to their shares in a particular manner. The *CBCA* also legitimizes unanimous shareholder agreements whereby shareholders, amongst themselves, or shareholders and non-shareholders, enter into an agreement to restrict directors' powers to manage or supervise the management of the business and affairs of the corporation.⁸³ Consequently, the theory that sees the corporation as nothing but a nexus of contracts has a great deal of verifiable truths in it.

⁸² s 103(1) *CBCA*

⁸³ s 146 (1) *CBCA*. *CAMA* also recognises unanimous shareholder agreements or special resolutions passed under special circumstances under s 237(4) (c).

2.2.2 The Proprietary Theory of the Corporation

Contrary to the contractarian theory of the corporation, which assumes that the corporation is a legal fiction that is incapable of being owned, the proprietary theory considers the corporation as property capable of being owned. This theory appeals more to logic because there is an intersection between contract and property. If the corporation is a contract, then the subject matter of that contract must be something of value or capable of being owned. This proprietary interest comes in the form of the invested funds and the returns on investment. Somewhat in alignment with this philosophy, *CAMA*, for instance, provides that “the shares or other interests of a member in a company shall be property transferable in the manner provided in articles of association of the company”.⁸⁴ If “shares” and “other interests” (assets etc.) constitute the company, then beneficial holders of the shares and other assets could be deemed the owners of the company.

The most cited proponents of this theory are Adolf Berle and Gardiner Means who, in their famous book, the *Modern Corporation and Private Property*⁸⁵, attempted to explain the shifting relationship between property ownership and control by isolating three functions that are performed by groups of individuals in any economic pursuit as follows: (a) those holding proprietary interests in the enterprise; (b) those exercising power over

⁸⁴ Section 115

⁸⁵ Adolf A Berle & Gardiner C Means, “The Divergence of Interest Between Ownership and Control” in *The Modern Corporation and Private Property* Revised ed. 1956, Book 1, Cap 6.

the enterprise; and (c) those acting with respect to the enterprise.⁸⁶ Berle and Means examined the two-tier management structure of the corporation i.e. the board of directors and the general meeting, and concluded that the “owner-worker” (shareholders) had lost control of the corporation over which he exercised the above mentioned three functions before the industrial revolution:

In examining the breakup of the old concept that was property and the old unity that was private enterprise, it is therefore evident that we are dealing not only with distinct but often with opposing groups, ownership on the one side, control on the other - a control which tends to move further and further away from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own position.⁸⁷

Berle and Means’ classic work succinctly captures the ills plaguing relationships amongst corporate shareholders today, from directors’ conflict of interest to fraud committed on the minority shareholders, diversion of corporate opportunity by directors, insider trading, and so on. No doubt, this theory has had significant influence in the way in which investors think about the corporation – whether management has not usurped power which properly belongs to the owners of the corporation. There is no better expression of the Berle and Means’ statement quoted above than the current structure of corporate governance in most common law jurisdictions, where corporate governance structures are largely dictated by corporation legislation. For instance, on division of powers between shareholders and the board of directors, *CAMA* provides as follows:

⁸⁶ *Ibid* at 119.

⁸⁷ *Ibid* at p.124

Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in general meeting; provided that the directors acted in good faith and with due diligence.⁸⁸

The reality of the modern corporation is that the managers have more control over the corporation than the owners do. Nevertheless, sound and compelling as the Berle and Means theory is, it appears to be only true of large, widely held public corporations where managers are, more often than not, different from shareholders. In most closely held corporations, the shareholders take part in the day-to-day management of the business. Even in large public corporations, the use of employee stock options scheme to attract and motivate managers to good performance seems to negate the theme of the Berle and Means findings and their criticism of the split-up of management from ownership. One advantage of the structure of the “modern corporation” is that it reduces the cost of decision making in that people who are knowledgeable about the management of business enterprises are appointed as directors and executives, and by so doing the corporation is able to minimise the cost of having shareholders make every management decision themselves. However, the downside to this arrangement is that there is high probability that these appointed managers will deviate from the objectives of the corporation to seek self-interest. The ultimate result is that more costs are incurred in the process of monitoring management to ensure they act according to the objectives of the corporation. This was precisely captured in the argument of David

⁸⁸ S. 63(4) *CAMA*

Wishart⁸⁹ when he remarked that: “The costs of negotiating and enforcing for each and every structure the restrictions on the conduct of decision-making bodies necessary to ensure reasonable compatibility with the decision of the association might be greater than having a structure available for adoption as a whole.”

In summary, conceptualising the corporation as property capable of being owned, and a proper understanding of the divergence of interests between the “owners” and the “managers,” as demonstrated in the Berle and Means theory, would enlighten one’s path to understanding the reasons there are shareholder squabbles (including minority-majority disputes) within the present day corporation.

2.2.3 The Agency Cost Theory of the Corporation

The agency cost theory of the corporation looks at the corporation from the governance perspective. It seeks to understand the nature of an economic relationship in which one person known as the agent enjoys key control over the assets of another person known as the principal, who has residual economic interest in those assets.⁹⁰ Analysing this within the context of the relationship between the actors in a corporation, the managers (officers and directors) are the “agents” while the shareholders represent the “principals”. It should, however, be noted that the terms, “agent” and “principal” are used by these scholars strictly in the economic sense of those words, and not in the legal sense because, strictly speaking, corporate law does not recognise directors as agents

⁸⁹ David Wishart, “A Fresh Approach to Section 320” (1987) 17 Western Australian Law Review 91 at 122.

⁹⁰ Nicholls, *supra* note 10.

of the shareholders with authority to enter into contracts binding on the shareholders.⁹¹ The chief proponents of this theory were Michael Jensen and William Meckling.⁹² These scholars argue that if the “managers” of the firm are not entitled to keep all of the firm’s profits, as they are not owners of the firm, there will be an incentive not to act in the best interest of the firm. They might decide not to put in their best in terms of effort in management of the firm to get good results and, ultimately, good return on investment for the “owners”. Alternatively, managers may decide to use the firm’s resources for their personal benefit, for instance, providing themselves unjustifiably high remunerations.⁹³

According to Jensen and Meckling, the “owners”, whose interest in the firm is share value maximisation and good return on investment, being aware of the risk of shirking by managers, would devise means to check dishonesty on the part of the managers by monitoring the activities of the managers through measures including, but not limited to, requesting managers to prepare audited financial statements, management policy objectives or demanding pre-set targets by management.⁹⁴ The owners would try to align the interest of the managers with theirs through such mechanisms as profit-

⁹¹ Deborah A. DeMott, “Shareholders as Principals” in *Key Developments in Corporate Law and Equity: Essays in Honour of Professor Harold Ford* (Durham: Duke Law School, 2002) 105-129.

⁹² *Supra* note 64.

⁹³ Nicholls, *supra* note 10 at 29.

⁹⁴ See, for instance, ss 155 – 7 *CBCA* and ss 331 - 4 *CAMA*, which impose obligations on directors of every company and the company itself to prepare and keep audited financial statements. These audited financial statements are by statute, and sometimes by the articles of companies in both jurisdictions, required to be laid before the general meeting for approval.

sharing arrangements, managers' stock option schemes and attractive compensations. But all these measures aimed at aligning the interest of the managers with that of the owners come at a cost to the firm, which cost is described by Jensen and Meckling as "monitoring costs".

On the other hand, the managers may go out of their way to demonstrate their loyalty and commitment in the firm to the owners. This also comes at a cost to the firm in the form of money spent by managers to prepare financial statements and external auditors' fees, and loss of management time. This sort of cost, according to Jensen and Meckling is "bonding costs".

The monitoring costs and the bonding costs are part of what is referred to as the "agency costs" of the firm. A clear understanding of the agency cost theory of the firm gives better insights into the intrigues that take place in the present-day corporation generally, and particularly in closely held corporations namely, divergence of interests between managers and shareholders, majority shareholder opportunism, directors' conflict of interests in dealing with corporate assets and opportunities, and so on. These corporate vices significantly play out in the jurisprudence arising from Canadian and Nigerian courts⁹⁵, which will be considered in chapters three and four of this thesis.

⁹⁵ In *Ijale Properties Ltd v Omololu-Mulele*, [2000] FWLR (Pt 5) 709, one of the few cases where relief based on section 311 (relief from oppression and unfair prejudice) was successfully obtained, the minority shareholders alleged that years after the company was incorporated, they had not held any company meeting, not filed any annual returns with the CAC, no auditors or company secretary was appointed, and the company was being run by the majority shareholder leaving the minority shareholders in the dark as regards the affairs and financial success of the company. The court held that this was a clear case where section 311 of *CAMA* could be called into action.

2.2.4 Legal Personality Theory of the Corporation

The legal personality theory of the corporation is to the effect that the moment a company is incorporated⁹⁶ it assumes the status of a legal person capable of carrying out actions and taking decisions in its own name as a natural person would. This is the most remarkable difference between the corporation and other business formations. Section 15 of the *CBCA* provides that: “*a corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person.*” Similarly, *CAMA* provides that:

As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.⁹⁷

The Nigerian court, following the principle of law laid down in the landmark decision of the House of Lords in the English case of *Salomon*,⁹⁸ held that where a company is registered under *CAMA* or under any other previous statute, it retains its status of a legal entity distinct from its members.⁹⁹ In the *Salomon* decision, Lord Macnaghten laid out the rule of law as follows:

⁹⁶ In most jurisdictions, a company is said to be incorporated on the date stated on its certificate of incorporation prepared and issued by the companies' registry. See s 9 *CBCA* and s 36 (6) *CAMA*.

⁹⁷ S.37 *CAMA*

⁹⁸ *Supra*, note 3.

⁹⁹ *Union Bank (Nigeria) Ltd v Penny-Mart Ltd*, [1992] 5 NWLR (pt 240) 228 at 237.

The company is at law a different person altogether from the subscribers to the memorandum; and, although it may be that after incorporation the business is precisely the same as before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.¹⁰⁰

The independent legal personality of the corporation is ultimate to the entire conduct of business operations through companies. This legal personality impacts the structure of the corporation, its existence, capacity, power, rights and liabilities.¹⁰¹ This principle is inviolable save in exceptional cases where to uphold it would, for instance, amount to non-prosecution of a criminal offence, or will lead to evasion of tax obligations.¹⁰²

This legal personality theory of the corporation has an intersection with the proprietary theory to the extent that it concerns property ownership. However, unlike the proprietary theory, it posits that the corporation owns its assets and lives an independent life from its shareholders, with power to assume binding contractual obligations in its own name. A clear understanding of the legal personality principle of the corporation, and the implications of a company assuming the status of incorporation, is a prerequisite for vivid appreciation of reasons the seemingly harsh principle inherited from the case of *Foss v Harbottle*¹⁰³ still forms part of our corporate jurisprudence; and in particular, legal reasons why private individual members of a corporation are generally barred from

¹⁰⁰ *Salomon*, *supra* note 10 at 51.

¹⁰¹ Olakunle Orojo, *Company Law and Practice in Nigeria*, 5th ed (Cape Town: LexisNexis, 2008) at 82.

¹⁰² See, for instance, the Nigerian Court of Appeal decision in *Adeniji v The State*, [1992] 4 NWLR (pt 234) 248.

¹⁰³ *Supra*, note 1.

enforcing any right due the corporation, or intervening in any cause to which the corporation is party.¹⁰⁴

2.2.5 The Corporation's Theory of Association

Incorporation confers upon the members of a company the privilege of acting together in concert as a collective body.¹⁰⁵ According to Kevin McGuinness, "A corporation is a group of persons and series of holders of an office, who are deemed in law to constitute collectively a single, separate legal entity."¹⁰⁶ And as a consequence of share ownership, a shareholder acquires four basic rights: (1) the right to vote on matters to be decided by shareholders as matters of the corporation; (2) the rights to participate in the profits of the corporation when distributions of profits are made; (3) the right to participate in the distribution of the assets of the corporation when the corporation is wound up, after the creditors are paid; and (4) the right to transfer his or her shares to some other persons.¹⁰⁷ And for a shareholder in a closely-held corporation, he or she may be entitled to the right to participate in the management of the corporation¹⁰⁸.

In their attempt to explain the reason for shareholders being part of this corporate association, Professors Margaret Blair and Lynn Stout¹⁰⁹ argue that the board of

¹⁰⁴ See s 299 *CAMA* and s 239 *CBCA*.

¹⁰⁵ McGuinness, *supra* note 37 at 183.

¹⁰⁶ *Ibid* at 19

¹⁰⁷ *Ibid* at 1104

¹⁰⁸ *Ebrahimi v Westbourne Galleries Ltd*, [1973] AC 360.

¹⁰⁹ "A Team Production Theory of Corporate Law" (1999) 85 *Va Law Rev* 247-65.

directors of a public corporation functions as a "mediating hierarchy" that allows various actors to entrust inputs to a corporation in situations in which the prospect of gain from collective action exceeds the return that one would expect from retaining control over one's own inputs. In other words, because investors distrust one another, to some extent, they all agree to give up control to a neutral third party. The various actors are willing to give up control over their own contributions and form an association with one another because the corporate form serves (1) to streamline information gathering and decision making, (2) to control shirking – abandonment of duty, which is part of agency cost, and (3) to resolve disputes among various constituencies. In relation to the last function, these scholars suggest that the board of directors acts more like an umpire - sorting out the claims of various corporate constituencies - than it acts as a principal. They argue that this communitarian approach to investment is worth the loss of control, even though it increases their agency cost.¹¹⁰

A good grasp of the corporation's theory association gives a clearer picture of the implications of a shareholder subscribing to the articles of association of the corporation. Moreover, good understanding this theory could serve as a mirror to the shareholders for determining whether or not it is good decision, worth the while, to pursue shareholder litigation individually or collectively.

¹¹⁰ *Ibid.*

2.2.6 The Shareholder Primacy Norm of the Corporation

The shareholder primacy norm in corporate law is, strictly speaking, not a theory of the corporation but an offshoot of the corporate governance conception in the Berle and Means thesis. It is one of the most forcefully articulated theories of corporate governance.¹¹¹ This theory attempts to look at the proprietary interests of the various stakeholders in the corporation and advocates the pre-eminence of the interest of shareholders in the corporate enterprise; corporate directors are bound to make decisions in the best interest of the shareholders.

Tracing the roots of the shareholder primacy norm, Professor D. Gordon Smith¹¹² noted that the shareholder primacy norm had been developed in the context of closely held corporations, but is today being restricted by scholars to publicly traded corporations, where the only significant “horizontal conflicts” that arise are between shareholders and non-shareholders. A more significant “horizontal conflict” of interest in closely held corporations is the conflict between majority and minority shareholders. According to this scholar, although shareholder primacy is manifest throughout the structure of corporate law, it is within the law relating to fiduciary duties that the shareholder primacy finds its most direct expression.¹¹³ According to this historical analysis, the nineteenth century courts, apparently realising that strict prohibition of managerial self-interest in closely held corporations would be counter-productive, invented the shareholder

¹¹¹ See for instance *Re BCE*, *supra* note 21.

¹¹² D. Gordon Smith, “The Shareholder Privacy Norm”, (1998) 23 *University of Iowa Journal of Corporation Law*, (No 2) 277-323.

¹¹³ *Ibid* at 278

primacy norm requiring managers to act in the interest of all shareholders. As far as closely held corporations are concerned today, he argues, the shareholder primacy norm has given way to the more specifically tailored remedy of minority oppression¹¹⁴

The veracity of this assertion by Professor Smith may be determined against the backdrop of the paper written by Henry Hansmann and Reinier Kraakman¹¹⁵ two years after Smith. In this paper titled: “The End of History for Corporate Law”,¹¹⁶ these scholars argue that the basic law of the corporate form has already achieved a high degree of uniformity. The ideology of shareholder primacy is likely to press all major jurisdictions toward similar rules of corporate law and practice. According to these scholars:

A principal reason for convergence is a widespread normative consensus that corporate managers should act exclusively in the economic interests of shareholders, including non-controlling shareholders. The ideology of shareholder primacy is likely to press all major jurisdictions toward similar rules of corporate law and practice. Since the dominant corporate ideology of shareholder primacy is unlikely to be undone, its success represents the end of history for corporate law.¹¹⁷

The above cited assertion may be true of American business corporation law, but as far as Canadian jurisprudence is concerned, emphasis is moving away from this once hallowed principle of corporate law to the nascent principle of “good corporate

¹¹⁴ *Ibid.*

¹¹⁵ Of Yale and Harvard law schools respectively.

¹¹⁶ Discussion Paper No. 280, The Center for Law, Economics, and Business, Harvard Law School; available at http://www.law.harvard.edu/programs/olin_center

¹¹⁷ *Ibid.*

citizenship". In *Re BCE*,¹¹⁸ the Supreme Court of Canada, reaffirming its dictum in the earlier decision in *Peoples*¹¹⁹, stated that "Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a 'good corporate citizen'"¹²⁰

The justification for the recent approach adopted by the Supreme Court for consideration of relationship of corporate stakeholders has been questioned in some quarters of the legal community.¹²¹ According to Professor Ben-Ishai,¹²² prior to *Re BCE*, "widespread thinking in the Canadian legal community supported the view that *Peoples* was an unjustified departure from Canadian corporate law's principal-agent and shareholder primacy understanding."¹²³ And unfortunately, *Re BCE* also failed to establish firmly a preferred choice between the traditional shareholder primacy norm, which lawyers and investors are used to, and the nascent concept of good corporate citizenship.

¹¹⁸ *Supra*, note 21.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at para 66.

¹²¹ Jeffrey Bone, "The Supreme Court Revisiting Corporate Accountability: BCE Inc in Search of a Legal Construct known as the "Good Corporate Citizen" (2010) *Alta L Rev*.

¹²² Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006-2007) 44 *Alta L Rev* at 299 [cited in Bone, *supra* note 121].

¹²³ Bone, *supra* note 121.

This chapter is a modest attempt to explain the various perspectives from which law and economics scholars and corporate lawyers have examined the nature of the corporation and the network of competing interests that run through the corporate form. While some see the corporation as all about contract between different interested parties, others see it as consisting of struggle for property rights; corporate governance; association among people; profit-making venture solely for the benefits of shareholders, and so on. The seminal idea in all of this analysis is that appreciation of the myriad of disputes that arise between stakeholders in the corporation begins with good understanding of the very nature of the corporation itself. This is what we achieve by examining the theoretical framework of the corporate form, as offered by various scholars from different backgrounds and orientations.

Chapter 3: PROTECTION OF MINORITY SHAREHOLDER RIGHTS UNDER NIGERIAN CORPORATE LAW

3.1 Introduction

Nigeria, a former British Colony, has a legal system that is heavily influenced by English law, both in terms of the case law developed in its courts by judges and in the manner in which nuances in English case law have influenced the contents of its corporate legislation. It may also be of interest to a reader of this work to know that *CAMA*, which came into effect on December 31, 1990¹²⁴ is a statute substantially modelled after the UK Companies Act of 1985 as much as local circumstances permitted at the time of its enactment. Apart from substantially mirroring the defunct UK corporation statute, it re-enacts, as substantive provisions, several well established principles of common law and doctrines of equity. Some of these can be found in the provisions relating to majority rule and minority protection of shareholders in a corporation.¹²⁵

Further background information worth having about Nigerian corporation statute and case law relating to corporate majority rule and minority protection is that they apply not only to corporations but also to other forms of business organisations such as partnerships, trade or labour unions, social and religious organisations, where such organisations are formally organised and have adopted a written constitution.¹²⁶ This

¹²⁴ Note that this law initially came into effect on January 2, 1990, but was later amended by the *Companies and Allied Matters (Amendment) Decree No 32 of 1999*.

¹²⁵ Sections 299 – 330.

¹²⁶ *Abubakri v Smith*, [1973] 5 SC 31; *Elufioye v Halilu* [1993] 6 NWLR 570 at 590 & 597-598 [*Elufioye v Halilu*].

explains why the statute is titled “Companies and Allied Matters’ Act”, which contains provisions relating to corporations in Part A, rules regulating sole proprietorships and partnerships in Part B, and provisions relating to the appointment, registration and regulation of trustees of unions or other organised associations in Part C of the Act.

With this background information regarding the influence of the principles of common law and the doctrines of equity on Nigerian corporation statute and the scope of application of *CAMA*, it would be no surprise that when it comes to corporate decision making, the default position of the law in Nigeria is that the decision of the majority prevails over that of the minority. But the law attempts to strike a balance between corporate majority rule and the need to protect the interest of vulnerable minority shareholders. It is in recognition of the need for proper balancing of the competing interests of corporate shareholders that Nigerian corporate law provides several remedies for the protection of corporate minority interests. Apart from the exceptions to the rule in *Foss v Harbottle*,¹²⁷ which is the bedrock to shareholder minority rights protection in Nigeria, the two most important of these remedies are discussed in this research project, while passing references are made to the other remedies not discussed for reasons already given in Chapter One.

3.2 Membership Rights under Nigerian Corporate Law

Shareholding in a corporation confers certain rights on the members of that corporation and in return subjects them to certain obligations. Before taking a look at the protections

¹²⁷ [1843] 2 Hare at 461.

provided for corporate shareholders in Nigeria, it is apposite to briefly highlight those rights that constitute rights that are capable of enforcement in court either as individual membership rights or corporate membership rights. Whether a shareholder right is individual or corporate will determine the remedy available to a claimant and the mode of enforcing his right to obtain the remedy.

3.2.1 Individual Membership Rights

Individual rights are rights attached to the status of membership of a corporation. These rights are protected by law, and neither the corporation nor any group of members can lawfully deprive a shareholder of the enjoyment of those rights which, in most cases, are entrenched in statute or in the articles of association.¹²⁸ These rights include the right to vote prior to the company taking certain decisions¹²⁹, the right to receive dividends once declared, and the right to receive notice of general meetings. Upon breach of any of these rights, the shareholder affected may bring a personal action in his personal capacity because injury was done to him in an individual or personal capacity.¹³⁰

3.2.2 Corporate Membership Rights

Corporate membership rights are membership rights that may not be exercised by a single individual but by a number of individual members acting in co-operation, for

¹²⁸ Olakunle Orojo, *Company Law and Practice in Nigeria*, 5th ed (Cape Town: LexisNexis, 2008) 82 [Orojo].

¹²⁹ Note that all shares in a company in Nigeria carry the right to vote when the occasion to do so arises because *CAMA* has abolished the issuance of non-voting shares by any company in Nigeria - s16 *CAMA*.

¹³⁰ *Pan Atlantic and Forwarding Agencies Ltd v Aleyidieno*, [CAL/106/84 of January 15, 1985 (unreported)].

instance, by a resolution. Regarding these rights, a shareholder is bound by the decisions of the majority on any matter for which *CAMA* or the articles of the company has conferred power to so act on the majority. The individual member has the right to take part in decision-making process in accordance with the rights attached to the shares. However, his decision or opinion is subject to that of the majority or controlling shareholders. The right of the majority shareholders to have their opinion prevail over that of the minority is the legal consequence of holding majority shares in a company. This right of the majority occupies no fiduciary relationship to the other shareholders.¹³¹ Shareholders in a general meeting are entitled to consider their own interests and to vote in any way they honestly believe proper in the interest of the corporation. At the general meeting of the corporation, the majority have the opportunity of having their way while giving the minority the opportunity to have their say on any decision the company may take.¹³² Where directors also double as controlling or majority shareholders in the corporation, there is greater danger of minority interests being marginalised by the use of their legitimate power as shareholders.¹³³ To address this danger, Nigerian public company shareholders now belong to pressure groups specially dedicated to the protection of the rights of minority shareholders in public companies.¹³⁴ But the

¹³¹ Orojo, *supra* note 128 at 206.

¹³² *Ibid.*

¹³³ *Ibid* at 207.

¹³⁴ Some of these pressure groups, most of whom are formally registered with the companies registry, include, the Nigerian Shareholders Solidarity Association (NISSA); Independent Shareholders Association of Nigeria (ISAN); Zonal Shareholder Association of Nigeria (ZSAN); Progressive Shareholders Association of Nigeria; Professional Shareholders Association of Nigeria (PSAN) etc.

shareholders in small private corporations still bear the brunt of cases of majority opportunism and oppression.

Notwithstanding this lopsided balance of powers in favour of the majority to have their way, especially regarding corporate membership rights, the courts have always warned that there must be some limit to the power of the majority to pass resolutions which they believe to be in the best interest of the company, however unjust it may be and however much it may harm shareholders, and yet remain immune from interference by the courts.¹³⁵

The first limb of the principle of corporate majority rule derives from the decision in *Edwards v Halliwell*,¹³⁶ where the court held that if the alleged wrong against the corporation is a transaction which might be made binding on the corporation and all its members by a simple majority, then no action will lie. The second leg to the principle of majority rule derives from the decision in *Foss v Harbottle*, where it was held that the proper plaintiff in an action for a wrong done to the corporation is the corporation itself. As stated earlier in Chapter One, the decision in *Foss v Harbottle* was given its most detailed analysis in *Edwards v Halliwell*, where Jenkins LJ not only elucidated the purport of this rule by delineating its two main limbs, but also espoused the exceptions to the rule. The *Foss v Harbottle* rule in English corporate law along with the conditions precedent to its application and the exceptions thereto, has been codified into Nigerian law in sections 299 and 300 of *CAMA*. However, these two sections of *CAMA* and

¹³⁵ *Estmanco (Kilner House) Ltd v Greater London Council*, [1982] 1 All ER 437.

¹³⁶ [1950] 2 All ER 1064.

others, which safeguard the good governance of the corporation by the majority and the protection of minority shareholders, are garnished with equitable considerations more suitable for modern day businesses than those laid down by the court in *Foss v Harbottle* and the judicial precedents that came thereafter. These equitable considerations are more visible in the provisions relating to the powers of the court to grant reliefs in cases bordering on minority protection.¹³⁷

3.3 The Rule in *Foss v Harbottle* under Nigerian Corporate Law

As noted earlier in this chapter, the provisions in the Nigerian corporation statute codify the rule in *Foss v Harbottle*, but provide more comprehensive procedures for the application of that rule and its exceptions. Section 299 of *CAMA* provides as follows:

Subject to the provisions of this Act, where an irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.

The Nigerian courts on many occasions have re-affirmed the purport of this rule and emphasized the basis and scope of application of this rule which is still a fundamental principle of Nigerian corporate law. In *Adenuga v Odumeru*,¹³⁸ the Supreme Court of Nigeria explained the basis of the *Foss v Harbottle* principle as follows:

The rule established in the case of *Foss v Harbottle* (1843) 2 Hare 461 is simply that when a decision has been regularly taken on behalf of the company, it will be futile for minority shareholders to take legal steps to oppose it since, if it is a decision that the company or the corporation can take, the majority shareholders can easily ratify it. The basis of the rule is that it is a waste of time to seek to get the court to set aside what may be

¹³⁷ See, for instance, Sections 300, 301 and 304 *CAMA*.

¹³⁸ [2002] 8 NWLR 163 at p. 169.

ratified by a majority of the members once it is within their power to do so. The rule has been given effect under section 299 of the Companies and Allied Matters' Act 1990 with the known exceptions to the rule also provided in section 300.

As already stated above, the *Foss v Harbottle* rule applies to corporations as well as to association of persons such as, trade unions, clubs and social organisations, where such association of persons has adopted a written constitution or been registered under a statute. Reaffirming the basis for the court's extension of this rule to registered associations, the Court of Appeal citing the *Voluntary Association (Registration) Law No 4 of 1988 of Benue State of Nigeria*,¹³⁹ stated in *Ejikeme v Amaechi*¹⁴⁰ that:

The registration of an association shall render it a body corporate by the name under which it is registered with perpetual succession and a common seal and with power to hold moveable and immovable property of any description, to enter with [sic] contracts, to sue and be sued in its corporate name and to do all things necessary for the purpose of its constitution.

Generally speaking, the rationale for the rule in *Foss v Harbottle*, as applied under Nigerian law, is that since the rectification of the wrong or irregularity is within the powers of the company or association, which can ratify the act complained of by the majority of members who have the powers to do so, it is an idle exercise for the court to interfere in the running of the internal affairs of the company. The ultimate authority

¹³⁹ Apart from Benue State, which is one of the component states of Nigeria located in North-Central region of Nigeria, most other states of Nigeria have equivalent legislation granting legal personality to an association of persons once registered.

¹⁴⁰ [1998] 3 NWLR 456 at 469, para E. A complementary provision is found in s.596 (1) of *CAMA*, which provides that from the date of registration, the trustee or trustees of an association of persons shall become a body corporate by the name described in the certificate of registration and shall have perpetual succession and a common seal and power to sue and be sued in its corporate name.

being the decision of the majority, it can always get its wishes done. Hence in such actions concerning wrong done to the company, the company, and no other person, is the proper plaintiff to institute an action to seek redress of the wrong.¹⁴¹

Concerns were raised as to whether a rule of law such as that in *Foss v Harbottle*, which technically strips the court of jurisdiction to grant remedies, and bars minority shareholders of a corporation or association from enforcing their rights, was not contrary to the provisions of section 6(6) (b) of the *Constitution of the Federal Republic of Nigeria, 1979*.¹⁴² The Constitution provides that the judicial powers vested in the courts by section 6 (6) (b):

shall extend to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.¹⁴³

In other words, one of the questions before the court in this case was whether a ruling upholding the argument that the court is robbed of jurisdiction to interfere in the affairs of a body corporate or association of persons, where the wrong complained of by minority members of that body corporate or association is that which is ratifiable by a simple majority of members, would not be contrary to the provisions of Section 6(6) (b), which gives the court the jurisdiction to entertain any matter relating to the determination of any question as to the civil rights and obligations of any person in Nigeria. In answer

¹⁴¹ *Elufioye v Halilu*, *supra* note 126 at 597, paras G-H.

¹⁴² This provision is today reference to Section 6 (6) (b) of the 1999 Constitution. Nigeria adopted a new constitution in 1999, which has similar provisions as the 1979 version. The numbering and contents in this section of the 1999 Constitution remain unchanged from that of the 1979 edition.

¹⁴³ *Ibid* at 599.

to this question, the Supreme Court¹⁴⁴ emphasised that the rule in *Foss v Harbottle* will not apply to exclude a person who can establish a personal right as distinct from that of the business association. According to the court, the rule is *ad idem* with section 6(6) (b) of the Constitution where there is *locus standi*, if the determination of the civil rights and obligations of the plaintiff is involved. The implication of this is that where an individual membership right is alleged to be violated, the court will, pursuant to its general jurisdiction conferred upon it by section 6(6) (b) of the Constitution, intervene to grant appropriate remedies at the instance of the minority shareholder, whereas in cases where the alleged infringement borders on breach of corporate membership rights capable of being ratified by a simple majority of members¹⁴⁵, the court will, in accordance with the rule in *Foss v Harbottle*, decline assistance to the minority shareholder.

The dilemma of the court's policy of not interfering in the internal affairs of the corporation to grant reliefs to minority shareholders, where the alleged wrong is a wrong affecting the corporate membership rights of minority shareholders, should be of concern to minority shareholders in a Nigerian company. The Supreme Court of Nigeria has identified the difficulty in effectively drawing a clear distinction between an individual

¹⁴⁴ *Ibid* at 599, para E.

¹⁴⁵ It is worthy of note that where the majority shareholders or members of an association have taken any step which would require the amendment of the constitution of the company or association, or have taken any steps that violate the constitution of the association, the Nigerian courts have held this as violating individual membership right because the constitution is a contract between members of the association, and any violation thereof would be seen as a breach of contract that would justify intervention by the court. See, for instance, *Abubakri v Smith*, *supra* note 126; *Elufioye v. Halilu*, *supra* note 126 at 599.

right of a member and the corporate right of a shareholder.¹⁴⁶ The line is blurred, especially in closely held corporations, where the shareholders invest a large percentage of their wealth expecting to acquire in return almost an automatic right to be part of management of the company. In *Globe Fishing Industries Ltd v Coker*,¹⁴⁷ the Supreme Court, *per Olatawura JSC*, remarked as follows:

The dividing line between personal and corporate right is very hard to draw, and perhaps the most that can be said is that the court will incline to treat a provision in the Memorandum or Articles as conferring a personal right on a member only if he has an interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution¹⁴⁸

The task of delineating what is individual right from corporate membership right requires treating each case according to its peculiar circumstances. This is because a right that may qualify as corporate membership right in a public company or a large private company may very well, in fact, be personal to shareholders in a closed corporation. Therefore, the court is left to exercise a great deal of discretion to determine what and what does not call for its intervention to grant reliefs on behalf of a minority shareholder.

3.4 Statutory Minority Shareholder Remedies under Nigerian Corporate Law

As mentioned in chapter one of this thesis - scope of research - only two of the minority shareholder remedies available under Canadian and Nigerian corporate legislation – “derivative actions” and “oppression” - will be comprehensively discussed in this thesis. However, in the case of Nigeria, where exceptions to the rule in *Foss v Harbottle* are

¹⁴⁶ *Globe Fishing Industries Ltd v Coker* [1990] 7 NWLR (pt 162) 265.

¹⁴⁷ *Ibid* at 280.

¹⁴⁸ Quoting, with approval, Pennington's *Company Law*, 4th ed at 588.

recognised as cardinal minority shareholder remedies, and are, in fact, codified as substantive provisions of *CAMA* dealing with corporate minority rights protection, the starting point to understanding any minority shareholder protection is the rule in *Foss v Harbottle*, as everything else, as far as corporate minority shareholder protection is concerned, revolves around them.

3.4.1 Exceptions to the Rule in *Foss v Harbottle* under Nigerian Corporate Law

Nigerian corporate law firmly recognises the rule in *Foss v Harbottle* as an integral part of its internal corporate governance regime, and the courts have not spared any available opportunity to reaffirm and enforce this rule whenever necessary.¹⁴⁹ In *Agip (Nigeria) Ltd v Agip Petrol International*,¹⁵⁰ the Supreme Court of Nigeria declared that “the rule in *Foss v Harbottle* is now part of our law and embodied in the *Companies and Allied Matters Act*, 1990, particularly in sections 299-303.”

Just as the Nigerian court considers this rule as part of Nigerian law, the exceptions developed at common law for the mitigation of the harsh effects of the rule are also recognised and embodied in *CAMA* as substantive provisions.¹⁵¹ Section 300 of *CAMA* provides for circumstances under which the rule, which bars minority shareholders from instituting an action for a wrong done to the company where the alleged wrong is one that may be ratified by a simple majority of the members of the company, would be inapplicable. In an attempt to clearly define those circumstances under which the

¹⁴⁹ See, for instance, *Adenuga v Odumeru*, [2002] 8 NWLR 163 at 184.

¹⁵⁰ [2010] 5 NWLR 348 at 392, para G [*Agip*].

¹⁵¹ s 300 *CAMA*.

seemingly harsh rule in *Foss v Harbottle* will not apply, CAMA provides that the court, on application of any member, may, by injunction or declaration, restrain the company from doing any of the acts listed in paragraphs (a) to (f) of section 300. These acts constituting exceptions to the rule in *Foss v Harbottle*, all of which are codified in CAMA based on common law principles, include:

(a) **entering into any transaction which is illegal or *ultra vires* the company**¹⁵²; a practical illustration of this provision can be found in the English case of *Hutton v West Cork Railway Co*, where shareholders at a general meeting resolved to spend part of the proceeds of sale of the company in compensating employees and as part remuneration of past services of directors, when the existing law did not permit a company being wound up to make such payments.¹⁵³ The Nigerian Supreme of Nigeria re-affirmed the authenticity of entering into illegal or *ultra vires* acts as one exception to the *Foss v Harbottle* rule in *Okoya v Santilli*¹⁵⁴ where one of the reliefs sought by the appellants, who were minority shareholders, was a declaration that the memorandum and articles of association of the third defendant company, to which the first and second appellants were subscribers, was the only true memorandum and articles of association of the company, the terms of which were contradicted by a resolution allegedly passed at a meeting of the company's board of directors. In response to an appeal to the Supreme Court, the court stated as follows:

¹⁵² s 300 (a) CAMA.

¹⁵³ [1883] 23 ChD 654.

¹⁵⁴ [1990] 2 NWLR 173 at 203.

The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. It goes without saying that for a company to conduct its affairs otherwise than on the basis of its true memorandum and articles of association will be *ultra vires* the company. In view of my analysis of the claims in the action in the matter now before us on appeal, I cannot see any room for the application of the rule in *Foss v Harbottle (supra)* in the action.

This exception was further advanced by the Supreme Court in *Yalaju-Amaye v Associated Registered Engineering Co Ltd (AREC)*¹⁵⁵, where the purported appointment of new directors by the board was held *ultra vires* the board as there was no such power granted in the articles of association. The minority shareholder was therefore allowed to sue.

(b) purporting to do by ordinary resolution an act which by its constitution or the Act is required to be done by special resolution¹⁵⁶; the purpose of this provision being to guard against the risk of majority shareholders ratifying, by a wrong procedure, an act which is in itself wrong. Therefore, being able to effectively deploy this safeguard against irregular and illegitimate procedures for corporate decision-making requires a good knowledge of the provisions of the company's articles as well as the Act.

(c) where any act or omission affects the applicant's individual rights as a member of the company¹⁵⁷; as already discussed in section 3.2.1 above, where the individual membership right of a shareholder is the fact in issue, for instance,

¹⁵⁵ [1986] 3 NWLR (pt 31) 653.

¹⁵⁶ s 300 (b) CAMA.

¹⁵⁷ s 300 (c) CAMA.

where minority shareholders are systematically denied the right to vote at general meetings, or consistently denied the right to receive notice of general meetings of a company, there is no doubt that the court will remove an action instituted at the instance of the minority from the ambit of the *Foss v Harbottle* limitations. For instance, in *Edokpolo & Company Ltd v Sem-Edo Wire Industries Ltd*,¹⁵⁸ the appellant, a minority shareholder holding 40% of the 1st respondent company's shares, alleged collusion between 2nd and 3rd respondents, the result of which was the allotment to the 2nd and 3rd respondents of shares out of the 40% belonging to the appellant. The Supreme Court held that the appellant minority shareholder was entitled to sue in its personal capacity to protect its personal right to the shares held by it.

(d) **committing fraud on either the company or the minority shareholders**; such as where the directors fail to take appropriate action to redress the wrong done.¹⁵⁹ An instance of this will arise where there is expropriation of the company's property by majority shareholders,¹⁶⁰ or where majority shareholders have obtained certain unfair advantages by dealing with the company's property, or an attempt to release the directors' from liability arising from breach of duty of good faith. In *Yalaju-Amaye v AREC*,¹⁶¹ the Supreme Court held that in going on a withdrawal spree from the

¹⁵⁸ [1984] 7 SC 119.

¹⁵⁹ s 300 (d) CAMA.

¹⁶⁰ *Sparks Electrics (Nigeria) Ltd v Ponmile*, [1986] 2 NWLR (pt 23) 516.

¹⁶¹ [1992] 4 NWLR (pt 145) 422 [SC].

bank account of the respondent company and falsifying minutes of meetings to cover up non-existence of a resolution to change the signatories to cheques, the majority had committed fraud on the company.

It is worth mentioning that under this head of the various exceptions to the *Foss v Harbottle* rule, “fraud” is not circumscribed to its common law definition. The Supreme Court in *Yalaju-Amaye* gave a broader definition of “fraud” as “any act which may amount to an infraction of fair dealing, or abuse of confidence or unconscionable conduct, or abuse of power as between a trustee and his shareholders in the management of a company.”

Thus, “fraud” is used in a loose, wider and equitable sense as an abuse or misuse of power and indeed breach of duty on the part of the majority or the controlling directors. Actual fraud, as known in criminal law, need not be proved; it may be presumed from the circumstances surrounding the activities of the defendants.¹⁶² Consequently, the minority shareholder in this case was allowed to sue the wrongdoing majority shareholders, with the company itself as co-defendant, to remedy the wrong done to the company.

What may be imputed as fraud on the company or on the minority shareholders varies from case to case, and the entire circumstances surrounding a particular case would

¹⁶² See PE Oshio, “The True Ambit of Majority Rule under the Companies and Allied Matters’ Act 1990 Revisited” in *Modern Practice Journal of Finance and Investment Law*, Lagos, Vol 7 No 3-4, at 386-403.

usually be examined to determine whether or not they meet the requirements. In *Omisade v Akande*,¹⁶³ the plaintiff and the first defendant were both directors and shareholders in equal proportions in the fourth defendant company. In a contract entered into between the fourth defendant and the third defendant, a US-based airline, it was agreed that in consideration for patronage of the flight services of the third defendant by Muslim pilgrims through facilitation by the fourth defendant, the airline would pay a certain amount of money as commission to the fourth defendant. The plaintiff alleged that the first defendant falsely represented to the US-based airline, with which the fourth defendant had a contract; that the fourth defendant was being wound up, in order to divert the commission due to the jointly owned fourth defendant company to the second defendant company in which the first defendant was principal shareholder. The first defendant raised a preliminary objection to the plaintiff's right to sue to redress a wrong done to the fourth defendant company. It was held, *inter alia*, that the first defendant had clearly committed a breach of his fiduciary duty as a director of the fourth defendant by making false representations about the company in order to divert profit from it, and that this amounted to a fraud on the company for which a minority shareholder, or any other interested shareholder could bring a derivative action, the circumstances of the case having duly qualified as one of the exceptions to the rule in *Foss v Harbottle*.

Thus, in this area of minority shareholder protection, Nigerian courts rely heavily on the various principles established on these issues at common law. To succeed in an action

¹⁶³ [1987] 2 NWLR (pt 55) at 158; [1987] 18 NSCC 486.

in which there is allegation of fraud on the minority or on the company, the plaintiff must prove that the action or proposed action of the defendants constitutes fraud (in its wider equitable sense) and that the wrongdoers are in control of the company, for which cause the company is prevented from bringing the action by itself and in its own name.

(e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders¹⁶⁴; this may arise where the facilities for convening a proper meeting of shareholders or the board are not available, or where urgent action is required, and it will be unreasonable to wait for a formal meeting requiring notice to be convened. The only rational thing to do is to not wait till the irreversible wrong is done to the interest of the company, but to apply to court to abort or nip the wrong in the bud, as holding a meeting is not feasible for that purpose. This *CAMA* provision re-enacts the common law decision in *Hodgson v National & Local Government Officers Association*¹⁶⁵, where the court held that an individual member, contrary to the rule in *Foss v Harbottle*, could bring an action regarding a matter within the control of the majority, that is, a matter that was theoretically ratifiable by the majority, if the circumstances made it impossible for the majority to express their view in time to be of practical importance.

¹⁶⁴ s 300 (e) *CAMA*.

¹⁶⁵ [1972] 1 WLR 130.

- (f) **Where the directors are likely to derive a profit or benefit, or have profited or benefitted from their negligence or from their breach of duty**¹⁶⁶; in this circumstance, a minority member¹⁶⁷ of the company may apply to court for redress, since the directors are in charge of the company and therefore would not take any action against themselves for breach of duty.
- (g) **Where the interest of justice demands:** In its effort to apply equitable principles to corporate relationship for the purpose of minority shareholder protection, the Nigerian Supreme Court, in *Edokpolor & Co Ltd v Sem-Edo Wire Industries Ltd*,¹⁶⁸ recognised a further exception to the rule in *Foss v Harbottle* known as the “interest of justice” exception. This principle is to the effect that where, considering all the circumstances of a case, it is in the interest of justice that the application of the *Foss v Harbottle* rule be suspended, the court has a duty to suspend application of the rule. And this would be possible even where the circumstances of the case do not fall into any of the preceding six categories of exceptions.

A pertinent question that a shareholder, or a prospective shareholder, in a Nigerian company may harbour in his mind is whether parties can by private contract, say a shareholders’ agreement signed by all members of that company, create exceptions or modifications to the applicability of the *Foss v Harbottle* rule. The decision of the

¹⁶⁶ s 300 (f) *CAMA*.

¹⁶⁷ According to s. 302 *CAMA*, “member” includes the personal representative of a deceased member and any person to whom shares have been transferred or transmitted by operation of law.

¹⁶⁸ *Supra*, note 41.

Supreme Court in *Elufioye v Halilu*¹⁶⁹ suggests that this may be possible only where a breach of the corporate constitution affects the civil rights and obligations of the minority member or shareholder. In this case, the plaintiffs, members of a trade union, filed a suit against the trade union, its officers and some banks, seeking a number of declarative reliefs and injunctions. The constitution of the trade union provided in its rule 7(v) that “any member shall have the right to initiate action at his own expense in connection with any breach of the constitution.” An issue for the court to resolve was whether the rule in *Foss v Harbottle* would be applicable to the suit or not. The court ruled, *inter alia*, that rule 7(v) confers a right on every member and empowers them to prosecute breaches of the constitution of the union; that there is a contractual right to protect the constitution of the union; and that the rule alone may confer a right of action.

The rationale for the decision of the court in *Elufioye v. Halilu*, which, at first sight, appears to negative the *Foss v Harbottle* principle, one may argue, is because breach of the constitution or the articles of a corporation (which amounts to illegality or *ultra vires* act in itself at common law) is one of the grounds upon which the majority rule principle in *Foss v Harbottle* would be held to be inapplicable by the court. If the facts of the case or the cause of action were something outside the breach of the constitution, the decision of the court in *Elufioye v. Halilu* might be different. The court, however, appeared to contradict itself when it stated in the same matter that the constitution of a union, being a contract binding on all members of the union, cannot override the

¹⁶⁹ *Supra*, note 126.

common law rule in *Foss v Harbottle*, and that members by agreement cannot confer jurisdiction on the court, where it otherwise has none.¹⁷⁰

The upshot appears to be that where a member can prove that a breach of the corporate constitution affects the personal rights of the individual member, an action may lie at the instance of that member. Otherwise, the theory of law from *Foss v Harbottle* still holds sway, and shareholders may not successfully alter it by their agreement.

3.4.2 Shareholder Derivative Actions

A Shareholder derivative action, also known as a statutory representative action, is a suit instituted or defended by a shareholder on behalf of the company to remedy a wrong done to the company, in circumstances where it is impossible for the company to sue or defend the suit by itself. Shareholder derivative suits are unique because under traditional corporate law the corporation itself (with the instrumentality of the board of directors and management), and nobody else, is responsible for bringing or defending any suit against it.¹⁷¹ Prior to the invention of this equitable remedy, major obstacles that militated against any shareholder instituting a minority shareholder action for any perceived injustice or wrong done to the corporation were twofold. The first was the separate personality principle of the corporation, which is to the effect that the corporation has a legal personality separate from the personalities of its members and

¹⁷⁰ *Ibid* at 621, paras C-D.

¹⁷¹ See the Supreme Court of Nigeria in *Agip*, *supra* note 150 at 392.

managers and therefore should bear its liabilities, commence legal action or defend a suit in its own name.¹⁷² The second obstacle was corporate majority rule developed in *Foss v Harbottle*¹⁷³. The implication of these two principles of corporate law was that even where the majority shareholders or the directors in control of the company committed breaches against the interest of the corporation and its minority shareholders, the minority shareholders could not sue the wrongdoers to remedy the wrong done.¹⁷⁴

The common law courts, in exercising their equitable jurisdiction, have now recognised circumstances under which these barriers to minority shareholder actions will be justifiably brushed aside. Analysing the justification for the remedy of derivative action, *Lord Denning MR (as he then was)* stated as follows:¹⁷⁵

It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company

¹⁷² *Salomon v Salomon*, *supra* note 3.

¹⁷³ Fully discussed in section 3.3 *supra*.

¹⁷⁴ See, for instance, the English House of Lords' decision in *Edwards v Halliwell*, *supra* note 5.

¹⁷⁵ *Wallersteiner v Moir (No 2)* 2 W LR 389 at 395.

should sue themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.

The above quoted dictum of Lord Denning was cited with approval by the Supreme Court of Nigeria in *Omisade v Akande*,¹⁷⁶ where the court said that as the very nature of derivative suits vary the traditional roles of management and shareholders, many jurisdictions, including Nigeria, where the remedy of derivative suits is now part of the corporation statute, have implemented various procedural requirements to instituting a shareholder derivative action.

3.4.3 Application to Court for Leave to Initiate a Derivative Action under CAMA

According to section 303 of *CAMA*, which deals with the prerequisites for instituting a derivative action, an applicant may apply to the court for leave to bring an action in the name or on behalf of the company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.¹⁷⁷ The effect of this is that a minority shareholder, or anyone else, for that matter, who meets the preconditions for bringing or defending an action on behalf of the company, may do so regardless of the rule in *Foss v Harbottle*. However, no such action may be brought and no such intervention may be made unless the court is satisfied that the following conditions are present:

- (a) that the wrongdoers are the directors who are in control, and will not take
necessary action;

¹⁷⁶ *Supra*, page 67.

¹⁷⁷ S. 303 (1) *CAMA*

- (b) that the applicant has given reasonable notice to the directors of the company of his intention to apply to the court if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
- (c) that the applicant is acting in good faith; and
- (d) that it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

These four determinants for instituting or defending a derivative action are considered conjunctively. Therefore, the absence of any one of them deals a deathblow to the suit of the plaintiff. In other words, all four conditions listed above must be satisfied before a derivative action would be allowed by the court.

3.4.3.1 Procedure for Bringing a Derivative Action

In *Agip*¹⁷⁸ the Supreme Court held that a minority shareholder or any shareholder who wants to commence a derivative action on behalf of the corporation must seek the leave of court before bringing such action. The procedure for obtaining leave to institute an action in the name of the corporation is embodied in rule 2 of the *Companies Proceedings Rule*, 1992, which requires that such an application for leave be made by originating summons (on notice to the company involved) and application to court for leave to continue or defend the suit. If the application is filed without notice to the company, this would amount to a breach of the principle of fair hearing. The court noted that the effect of section 303(1) of *CAMA* is to deprive directors of a company of the

¹⁷⁸ *Supra*, note 150 at 393.

power, as duly authorized organ of the company, to authorize the bringing of an action in the name of the company. An order which has the effect of stripping the directors of a company of their statutory right must be one in respect of which they should be given the right to be heard before it is made, as their civil rights and obligations would be affected.¹⁷⁹

3.4.3.2 Proper Party to Make Application

According to *CAMA*¹⁸⁰, the following persons may make application to court in a derivative action:

- (a) a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company;
- (b) a director or an officer or a former director or officer of a company;
- (c) the Corporate Affairs Commission (“**CAC**”); or
- (d) any other person who in the discretion of the court, is a proper person to make an application under section 303 of this Act.

A derivative action would usually have the wrongdoing directors, or the controlling shareholders joined alongside the company as defendants, whereas the minority shareholders, or any one of them initiating the suit, appear as the plaintiffs.¹⁸¹ One unique feature of a derivative suit is that although it is an action in the name of and on

¹⁷⁹ *Ibid*, at 419, paras. C-D

¹⁸⁰ s 309 *CAMA*

¹⁸¹ Orojo, *supra* note 128 at 82.

behalf of the company, the company must be made a defendant to the claim for the technical requirement of ensuring that the company is bound by the judgment given.¹⁸²

3.4.3.3 Powers of the Court Hearing a Derivative Action

A court hearing a derivative action may, at any time during the course of proceedings, make any order or orders as it thinks fit. According to section 304 (2) *CAMA*, the court may, among others, make the following orders:

- (a) authorising the applicant or any other person to control the conduct of the action;
- (b) giving directions for the conduct of the action;
- (c) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of to the company;
- (d) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

3.4.3.4 Costs in Prosecution of Derivative Actions

Unlike some interlocutory applications, an applicant in a derivative action will not be required by the court to give security for costs in any application made or action brought pursuant to the remedy of derivative action.¹⁸³ On the other hand, the court may at any time order the company to pay to the applicant interim costs before the final disposition of the application or action.¹⁸⁴

¹⁸² *Agip*, *supra* note 150 at 393, para H.

¹⁸³ s 307 *CAMA*.

¹⁸⁴ s 308 *CAMA*.

The shareholder remedy of derivative action provided under *CAMA* is clearly more robust than the traditional common law derivative suit in many respects. First, it creates the opportunity of restitution in favour of present or past security holders of the company, who may have suffered losses to their investments before exiting the company and who might not have had the resources, in terms of the wherewithal or evidence, or the cooperation of management and the board to commence a derivative action. Secondly, unlike to the rule in *Foss v Harbottle*, where the fact that an alleged wrong done to a company is one that is ratifiable by a simple majority of members is a bar to any minority suit, reliefs in a statutory derivative suit remedy may be granted even when the alleged breach is capable of being ratified by the majority. Section 305 of *CAMA* provides that an application, action or intervention under section 303 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 company has been or may be approved by the shareholders. But evidence of such approval by the shareholders may be taken into account by the court in making an order. This means that unlike the common law derivative action, which will not lie at the instance of the minority where the breach complained of has been or is capable of being ratified by a simple majority of the members, the shareholders' approval of a wrong is not conclusive of the matter; an action by the minority in respect of breach of a right or duty or abuse of power by the directors or the majority will be entertained by the court whether or not such breach is ratifiable.

3.4.4 Remedy for Oppressive or Unfairly Prejudicial Conduct

3.4.4.1 Introduction

The current oppression remedy under Nigerian corporate law (ss 310 - 312 *CAMA*) was introduced into *CAMA* to address the difficulties inherent in section 201 of Nigeria's defunct *Companies Act*, 1968, under which an oppressed minority shareholder was required to make application to court by petition "for such order as the court thinks fit". This vague provision proved less effective than was expected by the lawmakers, hence the introduction in 1990 of the current provisions considered as more comprehensive and more explicit in terms of which party may seek this remedy and the ambit of what may be asked of the court.¹⁸⁵

Section 311(1) *CAMA* provides that "an application for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner may be made to the court by petition".

3.4.4.2 Persons Entitled to Make Application

Any of the following persons may file a petition in court for relief on the grounds that the affairs of a company are being conducted in an illegal or oppressive manner: (a) a member of the company; (b) a director or officer or former director or officer of the company; (c) a creditor; (d) the CAC; or (e) any other person who, in the discretion of the court, is the proper person to make an application

¹⁸⁵ See Orojo, *supra* note 128 at 215.

3.4.4.3 Grounds for Application¹⁸⁶

By a member of the company;

- (a) that the affairs of the company are being conducted in a manner that is oppressive, or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in disregard of the interests of a member or the members as a whole; or
- (b) that an act or omission or a proposed act or omission, by or on behalf of the company, or a resolution or proposed resolution of a class or members, was or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner in disregard of the interests of a member or the members as a whole.

For the purposes of this remedy, the word “member” is defined to include the personal representative of a deceased member of the company and any person to whom shares have been transferred or transmitted by operation of law.¹⁸⁷

By a director or officer or former director or officer; a creditor or any other person, who alleges:

- (a) that the affairs of the company are being conducted in a manner oppressive or unfairly prejudicial to or discriminatory against or which is in a manner in disregard of the interests of that person; or

¹⁸⁶ s 311 *CAMA*

¹⁸⁷ s 310 (2) *CAMA*

(b) that an act or omission, or a proposed act or omission was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or which is in a manner in disregard of the interests of that person.

In *Aero Bell Nig Ltd v Fidelity Union Merchant Bank Ltd*,¹⁸⁸ one of the issues before the court was whether the plaintiffs had the *locus standi* to bring an action praying the court to order payment of accrued but unpaid dividends after they had made an outright sale of their shares to a subsidiary company of the defendant bank. The company's profits and dividends, which were merely speculative, had been declared internally by the board. At a later date, the management of the company and some majority directors issued a financial statement declaring a lower profit. The court ruled that the plaintiffs had *locus standi* and were entitled to bring an action for relief from oppressive and unfairly prejudicial conduct of the majority shareholders and directors of the company, as former officers, creditors and directors of the company regardless of the fact that they had sold their shares to the 1st defendant bank. This was because the unpaid dividend had accrued before the sale of their shares was consummated.

By the CAC:

Where it appears to it in the exercise of its statutory powers;

(a) that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in a manner which is in disregard of the public interest; or

¹⁸⁸ [2005] Law Pavilion Electronic Law Report 11339 (CA) [*Aero Bell*].

(b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which is in disregard of the public interests.

The power of the CAC to bring an application for relief from oppression and unfair prejudice is intended to protect members of the company as well as public interests. By way of illustration, an oppressed minority, instead of bringing an action in court against the wrongdoing majority by itself, could request the CAC to exercise its section-311 powers by commencing an action for relief from oppression on behalf of oppressed minority shareholders or for the sake of public interests. CAC may also commence such action on its own volition. What is however unclear about the likelihood of this power being called into action by CAC is that the term “public interests” in the context of corporate law is not defined anywhere in *CAMA*. Therefore, the term is largely vague. The question one may ask is whether a party to a suit, such as CAC, can commence an oppression action against a company, for instance, for its failure to abide by environmental laws and regulations or for causing persistent air, soil or water pollution contrary to the public interest of keeping its business activities and operations environmentally safe. A literal reading of the provisions of subsection 311(2)(c)(i) of *CAMA* would suggest that CAC’s power to commence an oppression suit is as wide as to accommodate such liberal interpretation. However, as comprehensive and laudable as this provision may appear, it remains to be seen how this power might be exercised by the CAC. There is no known case where this apparently broad power of the CAC regarding oppression litigation has been called into action. This power exists in the

statute but has largely remained unutilised by CAC. In the cases where reliefs from oppression have been pleaded, they were so pleaded at the instance of the minority shareholders, and not the CAC.¹⁸⁹

3.4.4.4 Meaning of Oppressive or Unfairly Prejudicial Conduct

CAMA does not have a definition of what amounts to oppressive or unfairly prejudicial conduct. Therefore, attention must be turned to the jurisprudence emanating from the courts. And in this regard, Nigerian courts rely heavily on the judicial interpretation by English courts of the terms, “oppression” and “unfair prejudice” in the corresponding provisions of section 210 of the *English Companies Act* of 1948. For instance, the English Court of Appeal definition of “oppression” in *Re Jermyn Street Turkish Baths Ltd*¹⁹⁰ is still valid persuasive authority in Nigeria.¹⁹¹ In that case, the court stated that:

Oppression occurs when shareholders having a dominant position in a company, either (i) exercise that power to procure that something is done or not done in the conduct of the company’s affairs or (ii) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company’s affairs, and when such conduct is unfair, burdensome, harsh and wrongful to the other members of the company or some of them, and lacks the degree of probity which they are entitled to expect in the conduct of the company’s affairs.

Thus, in *Ogunade v Mobile Films (WA) Ltd*,¹⁹² Karibi-Whyte, J (as he then was) attempting to define oppression stated that “the oppression or fraudulent conduct of the

¹⁸⁹ *Ijale Properties Ltd v Omololu-Mulele*, *supra* note 95; and *Aero Bell*, *supra* note 188.

¹⁹⁰ [1971] 1 WLR 1042 at 1059-1600

¹⁹¹ Orojo, *supra* p.217

¹⁹² [1976] 2 FRCR 10.

majority must be harsh, burdensome and wrongful¹⁹³ and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time”.¹⁹⁴ However, in *Solanke v Ogenmefun*,¹⁹⁵ it was stated that it is not enough merely to allege that a conduct is unfairly prejudicial or illegal; the circumstances of the oppression or illegality must be disclosed in the petition for relief.

In *Ijale Properties Ltd v Omololu-Mulele*,¹⁹⁶ one of the few cases where relief based on section 311 (relief from oppression and unfair prejudice) was successfully obtained, the minority shareholders alleged that years after the company was incorporated, they had not held any company meeting, not filed any annual returns with the CAC, no auditors or company secretary was appointed, and the company was being run by the majority shareholder leaving the minority shareholders in the dark as regards the affairs and financial success of the company. The court held that this was a clear case where section 311 of *CAMA* could be invoked as a basis of action.

3.4.4.5 Form of Application

The form of application prescribed by *CAMA* for the remedy of oppression or unfair prejudice is petition, which must be brought under the *Companies Proceedings Rules*,

¹⁹³ Citing the English case of *Re HR Harmer Ltd* [1958] 2 All ER 689.

¹⁹⁴ Orojo *supra*, note 128 at 217.

¹⁹⁵ Suit No. FHC/L/M/137/81 of August 11, 1983 (unreported), cited in Orojo, *supra* note 128 at 218.

¹⁹⁶ *Supra*, note 95.

1992. All shareholders are made parties to the petition so that whatever decision the court makes is binding on both the company and all its shareholders.¹⁹⁷

3.4.4.6 Relief by the Court

In a petition brought under section 311, if the court is satisfied that the petition is well founded, it may make such order or orders as it thinks fit to bring relief in respect of the matter complained of. These may include one or more of the following orders:¹⁹⁸

- (a) that the company be wound up;
- (b) for regulating the conduct of the affairs of the company in future;
- (c) for the purchase of the shares of any member by other members of the company;
- (d) for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital;
- (e) directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorising a member or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company;
- (f) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;
- (g) directing an investigation to be made by the Commission;
- (h) appointing a receiver or a receiver and manager of property of the company;

¹⁹⁷ Orojo, *supra*, note 128 at 218.

¹⁹⁸ s 312 (2) CAMA.

- (i) restraining a person from engaging in specific conduct or from doing a specific act or thing; or
- (j) requiring a person to do a specific act or thing.

Perhaps what remains to be said of the oppression or unfairly prejudicial conduct remedy is that the cases reviewed for this writing show that relief from oppression is rarely pleaded as a standalone remedy. They were usually embedded in pleadings as part of the many reliefs sought in corporate shareholder litigations. The situation is different from other remedies such as the exceptions to the rule in *Foss v Harbottle* and statutory derivative actions, either of which could be the sole cause of action or issue for determination in a shareholder litigation in Nigerian courts. One possible explanation for this disparity in the use of the oppression remedy as a standalone remedy, when compared to derivative actions and the exceptions to the *Foss v Harbottle* rule, may perhaps be because of its controversial past. The oppression provisions in Nigerian company law before 1968 was same as that in section 210 of the UK *Companies Act*, 1948, which was linked with liquidation of the company at the instance of an oppressed minority. This provision made success towards minority shareholder protection more difficult than was anticipated because it was not in the best interests of the minority shareholder that the company for which he had laboured so hard to build be liquidated rather unceremoniously. Another possible reason for this disparity in use of the remedies may also lie in the restrictive construction given to oppression under English corporate law, which strict construction is replicated in Nigeria wholesale.

In summary, Nigerian corporate law relating to minority protection is a modified and well-improved version of the rules at common law. Major improvements relate to expansion of the exceptions to the *Foss v Harbottle* rule from the traditional four to six, with the Supreme Court in *Edokpolor & Co Ltd v Sem-Edo Wire Industries Ltd*¹⁹⁹ adding the “interest of justice” exception to the statutorily recognised exceptions. Another major improvement in this area of the law is the ability of the court to order restitution in favour of former and present securityholders of a company in a derivative action. Furthermore, the power of the court to order that reasonable legal fees incurred by a minority shareholder in a derivative action be paid from the coffers of the company only enhances the ability of minority shareholders to prosecute derivative actions against powerful wrongdoing directors or majority interest blocks. And lastly, but most importantly, the expansion of the list of parties entitled to make application for relief from oppression and unfair prejudice to include officers or former officers of the company, creditors, the CAC, and any other person, subject to the discretion of the court, is a remarkable improvement on the minority shareholder protection regime in Nigeria.

¹⁹⁹ *Supra*, note 41.

Chapter 4: PROTECTION OF MINORITY SHAREHOLDER RIGHTS UNDER CANADIAN CORPORATE LAW

4.1 Introduction

The focus of this chapter is to examine the nature and scope of Canadian law relating to the protection of minority shareholder interests in Canadian corporations. As has been mentioned in Chapter One, because of the devolution of governmental powers in Canada, both the federal government and each of the provinces and territories have legislative powers to make laws, and business corporations law is not exempted. In other words, apart from the *CBCA*, which only applies to federally incorporated companies, the various provinces and territories have their respective business corporations statutes that essentially mirror the federal template, with minor variations that should not constitute a source of worry for any investor contemplating on whether to incorporate provincially or federally. Just as with the *CBCA* and federally incorporated business organisations, the provincial and territorial business corporations statutes apply only to business organisations set up under the corporate statutes of those provinces or territories, as the case may be, and to those business organisations that

are incorporated extra-provincially but are carrying on business within the relevant province or territory.²⁰⁰

The body of laws relating to corporate minority rights protection in Canada originated from the English common law, but is currently predominantly rooted in the corporate legislation of Canada, which include the *CBCA* and the corporation statutes made by the various provincial and territorial governments of the Canadian federation²⁰¹. Corporate minority rights protection in Canada is particularly enhanced by the innovative jurisprudence emanating from Canadian courts based on their progressive application of traditional common law principles, where necessary, and incisive interpretation of the legislation relating to questions of incorporation, administration and winding-up of the corporation.

Canadian corporate law recognises and provides special corporate civil remedies for the protection of shareholder rights generally and, in particular, the rights of minority shareholders. It is now a notorious fact that the most popular effort by the courts in the common law world to delineate the right of the minority shareholders to be protected,

²⁰⁰ For the purposes of this thesis, references to Canadian corporate law are references only to the provisions of the *CBCA*, but including judicial decisions of courts from all provinces and territories and those of the Supreme Court of Canada. As far as shareholder remedies are concerned, the *CBCA* is a model for the various provincial and territorial business corporations statutes, even though the provisions of some of these provincial statutes are generally more elaborate than the *CBCA*. However, it is important to verify the jurisdiction in which a business enterprise was established to be able to determine what variations might exist between the provisions of the corporations statute of that jurisdiction and those of the *CBCA*, to which this thesis relates.

²⁰¹ As already mentioned in chapter one, please note that Quebec applies the civil law system but has a corporations statute – the *Quebec Business Corporations Act*, 2011, which essentially has similarities to the federal template and those from the other provinces.

and the right of the majority or the control group of shareholders to have their will prevail in corporate governance, *vis-à-vis* the separate legal personality principle of the corporation, was that made in the case of *Foss v Harbottle*²⁰² and the line of cases that followed.²⁰³ All other principles of law relating to right to sue for corporate civil remedies for wrongs done against the corporation find expression in the *Foss v Harbottle* rule. Canada, being a jurisdiction with legal historical connection with the English common law, has developed a set of civil corporate remedies dealing with shareholder rights to sue for wrongs done to the corporation and the right of the individual minority shareholder to bring personal actions, where necessary. Some aspects of this set of remedies are woven around the basic principles derived from the *Foss v Harbottle* rule, with significant modifications.²⁰⁴ Thus, before a discussion of the civil corporate remedies available to shareholders under Canadian corporate law, it is only prudent to begin the discussion from the *Foss v Harbottle* principle to appreciate to what extent it has influenced corporate law relating to minority shareholder rights in Canada.

4.2 The Rule in *Foss v Harbottle* under Canadian Corporate Law

By virtue of the common origin of Canadian and Nigerian legal systems, and in particular, their corporate laws – the English common law, the rule in *Foss v Harbottle* under Canadian law is not significantly different from that applicable under Nigerian law, which was given extensive discussion in the immediately preceding chapter. However, it

²⁰² *Supra* note 1.

²⁰³ *Edwards v Halliwell supra* note 5; *Prudential Assurance Co v Newman Industries Ltd (No 2)*, [1982] 1 All ER 354 etc.

²⁰⁴ Remedy of derivative actions, for instance.

should be noted that the slight difference in the rule and its exceptions, as applicable in both jurisdictions, is that under Nigerian corporate law, the rule and its exceptions have been given statutory recognition in sections 299 and 300 of *CAMA* respectively. Canadian corporate law has no such statutory enactment of the *Foss v Harbottle* rule; the rule is only interpreted and applied in judicial analysis and justification of case law. Another point of divergence to note is that, in their analysis of case law, Canadian courts maintain the four traditionally recognised exceptions to the *Foss v Harbottle* rule in the common law world²⁰⁵ whereas six exceptions are recognised under *CAMA*. Having highlighted the two points of divergence in the status of the rule under Canadian and Nigerian corporate laws, it would be unnecessary to take further steps to discuss the *Foss v Harbottle* rule under Canadian corporate law. It is noteworthy, however, that the first four exceptions to the rule applicable under Nigerian law are the ones recognised by Canadian corporate law.²⁰⁶

4.2.1 Influence of the Rule in *Foss v Harbottle* on Canadian Corporate Law

Canadian corporate law recognises the impact of the old common law rule of *Foss v Harbottle* on the development of its corporate remedies jurisprudence. For instance,

²⁰⁵ *Edwards v. Halliwell*, *supra* note 5. See also *Nicholls*, *supra* note 10 at 397.

²⁰⁶ The *Foss v Harbottle* rule will not apply under Canadian law where:

- (i) the impugned action involved an illegal act, or an act *ultra vires* the corporation;
- (ii) the impugned act was not one that could be sanctioned by a simple majority of the company's members, but required, instead, the approval of some special majority vote;
- (iii) the impugned act gave rise to a personal right of action on the part of the individual plaintiff; and
- (iv) the impugned act constituted a fraud on the minority.

although the rules governing derivative actions in Canadian corporate law are now typically prescribed by the *CBCA* and its provincial and territorial equivalents, to understand the current statutory regime relating to derivative proceedings, it is useful to refer to the older common law relating to derivative actions (i.e. the *Foss v Harbottle* rule) in order to gain a firm grasp of the rationale underlying specific areas of the typical Canadian statutory derivative action provisions.²⁰⁷ In doing this, however, caution must be exercised in order not to have a situation where a litigant brings a derivative action, based on the old common law rule, in total neglect of the procedures and preconditions set out in the statute. This is particularly important because the *CBCA* does not expressly repudiate the *Foss v Harbottle* rule and its exceptions so that they might become history. Unlike Nigeria, where the courts have repeatedly affirmed that *Foss v Harbottle* and its exceptions remain integral part of Nigerian corporate law because they have been re-enacted in *CAMA*,²⁰⁸ it remains to be seen where the Canadian courts have affirmatively pronounced the common law rule and its exceptions extant and therefore part of Canadian corporate law, in the face of express and unambiguous provisions of the *CBCA* dealing with derivative actions, for instance. Neither have the Canadian courts categorically announced the death of the *Foss v Harbottle* rule under Canadian corporate law.

²⁰⁷ See C.C. Nicholls, *supra*

²⁰⁸ See *Adenuga and Odumeru* [2002] 8 NWLR 163 at p. 169.

Commenting on the potential confusion that simultaneous existence of both the statutory derivative action provisions and the rule in *Foss v Harbottle* and its exceptions, could pose, one writer had this to say:

On balance, however it seems clear that the section was intended to be a code for the expansion and control of the derivative suit ... It would only lead to confusion to allow both common law and statutory actions. A more orderly development of the law would result from one point of access to a derivative action and would allow for a body of experience and precedent to be built up to guide shareholders.²⁰⁹

Consequently, it has been argued that it would not be out of place to state that, as far as Canadian corporate law relating to the shareholder remedy of derivative action is concerned, the common law rule in *Foss v Harbottle* has now become a “historical relic”, as Canadian corporate statutes now characteristically provide specific derivative action provisions.²¹⁰ Thus, for this reason, it is corporate legislation, rather than the old common law rule in *Foss v Harbottle*, that should determine when an action can, or cannot, be brought in the name of the corporation. According to Professor Nicholls, this assertion appears to be strengthened by the fact that the Dickerson committee²¹¹ was of the view that the *CBCA* had “[r]elegated the rule in *Foss v Harbottle* to legal limbo

²⁰⁹ SM Beck, "The Shareholders' Derivative Action" (1974) 52 *Can Bar Rev* 159 at 207.

²¹⁰ *Ibid* at 398.

²¹¹ Robert WV Dickerson chaired the “Dickerson committee” commissioned to fashion out proposal for the reform of corporate law in Canada. This committee issued the *Proposals for a New Business Corporations Law for Canada*, Vol1, Commentary (Ottawa: Information Canada, 1971), which eventually led to the enactment of the *CBCA*.

without compunction, convinced that the alternative system recommended is preferable to the uncertainties – and obvious injustice engendered by that infamous doctrine”²¹²

From the above cited secondary sources, it would appear that majority opinion leads to the deduction that the intention of the drafters of the *CBCA* was to prescribe statutory derivative action provisions that were all-encompassing as a comprehensive code that would completely replace the pre-existing common law rules relating to derivative actions.²¹³ This legislative intent seems to have been faithfully recognised and accepted by litigants and the courts. For instance, in *Farnham v Fingold et al.*,²¹⁴ the Ontario Court of Appeal rejected an argument that a derivative action brought under one of the exceptions to the rule in *Foss v Harbottle*, instead of under the express provisions of s.99 of the Ontario Business Corporations Act, could still be maintained in the province of Ontario. Therefore, even though there is no express provision of the Business Corporations Act prohibiting the bringing of a common law derivative action under the exceptions to the *Foss v Harbottle* rule, such an action is prohibited by necessary implication. The court *per* Jessup CA, in rejecting application of the *Foss v Harbottle* model of derivative action and upholding the statutory version, remarked that “the very broad language of s. 99(1) embraces all causes of action under any statute or in law or in equity that a shareholder may sue for on behalf of a corporation. All forms of

²¹² Nicholls, *supra* note 10 at 398.

²¹³ *Ibid.*

²¹⁴ [1973] 2 OR 132-138.

derivative actions purporting to be brought on behalf of and for the benefit of the corporation come within it.”

The purport of this dictum may be construed to mean that in the face of the express provisions of s.99 of the *Ontario Business Corporations Act*, the rule in *Foss v Harbottle* can no longer be the substantive or procedural law upon which a cause of action could be found. Nevertheless, to argue that the rule in *Foss v Harbottle* has become a historical relic in Canadian corporate law may not be entirely correct. As lately as 2008, the British Columbia Court of Appeal in *Everest Canadian Properties Ltd v CIBC World Markets Inc*²¹⁵ held that the old common law rule was applicable to a partnership of persons so that individual partners could not institute individual actions for a wrong done to the partnership. Honourable Madam Justice Newbury, writing the reasons for judgment of the court, remarked as follows:

In my opinion the general principle that comes from *Foss v Harbottle* applies to the claims of the 845 partners against the respondent bank. It is a claim of the partnership. I am satisfied that this is plain and obvious and that a claim by the individual partners other than in a form that shows it to be a claim of the partnership or a representative action where all the partners are before the court cannot succeed.

This court also cited, with approval, the earlier decision of the British Columbia Supreme Court in *Lee v Block Estates Ltd*,²¹⁶ where the court held that the rule in *Foss v Harbottle* applied to deny standing to certain limited partners who were seeking to sue the defendant to compel it to lend certain funds to the firm. This action was brought at the

²¹⁵ [2008] BCCA 276

²¹⁶ [1984] CanLII 679 (BCSC), [1984] 50 BCLR 289.

same time as a suit by the general partner in the name of the limited partnership to compel the defendant to perform that obligation. Furthermore, in *Temple v Canada (Minister of National Revenue - MNR)*,²¹⁷ the plaintiff instituted an action in which he made claims against the Minister of National Revenue for misfeasance in the collection of assessments from plaintiff's bankrupt companies, which he owned and controlled. The plaintiff's claim, made in his capacity as a shareholder and director of the companies, and who was liable for the assessments, was for economic loss, as the owner of the three companies which were unable to carry on business as a result of the misfeasance in assessments. He also claimed for personal stress as a result. In defence of this claim, the defendant relied on the rule in *Foss v Harbottle* to argue that duties owed to a company may be enforced only through an action by the company itself, not by its shareholders. The Federal Court held that the rule in *Foss v Harbottle* applied. The court therefore struck out the part of the plaintiff's claim made in the capacity of a shareholder. However, the plaintiff's other claim relating to his right not to suffer undue personal stress as a result of the defendant's misfeasance was saved by the court because, according to the court, that claim related to the defendant's actions affecting the personal right of the plaintiff, which is one of the exceptions to the rule in *Foss v Harbottle*.

The conclusion that one may attempt to draw from a review of case law and secondary materials is that, as far as the remedy of derivative action in Canadian corporate law is concerned, the common law rule in *Foss v Harbottle* is still very much relevant,

²¹⁷ [2002] 2 FC 458.

especially as a philosophical or jurisprudential tool for the court to justify the rationale for its policy to continually uphold the two principles of corporate majority rule and the separate legal personality of the corporation, which in themselves have advantages and are therefore worth keeping. However, when it comes to the issue of standing to sue or intervene in corporate litigation, it is to the corporate statute, not to the old common law rule, that the court would have recourse to in determining whether or not a “complainant” has standing to initiate or defend a corporate action. Consequently, a litigant who utterly founds an action upon the *Foss v Harbottle* rule in disregard of the more coherent and authoritative procedures provided under the corporate statute does so at his own peril.

4.3 Statutory Minority Shareholder Remedies under Canadian Corporate Law

There are various remedies recognised by the *CBCA* for the protection of minority shareholder rights. Nevertheless, as already mentioned in Chapter One of this thesis, only the remedies of “derivative actions” and “oppression” will attract detailed consideration whereas the other remedies will be briefly highlighted. Some of the most important corporate shareholder remedies available under the *CBCA* include the following:²¹⁸

- (a) **Derivative actions:** Derivative actions are actions initiated by a complainant on behalf of a corporation in cases where a wrong has been done to the corporation, but where, for some reason, the usual corporate decision makers have declined to initiate proceedings on behalf of the corporation against the wrongdoers.²¹⁹

²¹⁸ See, generally, Nicholls, *supra* note 10 at 388-9.

²¹⁹ s 239 *CBCA*.

- (b) **Oppression remedy:** A complainant may make application to court for relief in cases where, among other things, acts or omissions of a corporation, or its affiliates, or the exercise of directors' powers effect a result that is oppressive or unfairly prejudicial or unfairly disregards the interests of any securityholder, creditor, director, or officer.²²⁰
- (c) **Dissent and appraisal rights:** Dissent and appraisal rights are available to dissenting shareholders when certain specified fundamental rearrangements have been undertaken by the corporation; the appraisal remedy results in the dissenting shareholders demanding that the corporation purchase their shares for a fair value.²²¹
- (d) **Compliance orders:** Compliance orders may be obtained in court by a complainant against the corporation, requiring the corporation to comply with the provisions of its fundamental corporate documents such as, its articles, bylaws and shareholder agreements, or the provisions the corporation statute.²²²
- (e) **Liquidation or dissolution:** A disgruntled shareholder may seek the remedy of dissolution of the corporation in situations where an oppression remedy may be obtained in similar circumstances, or where an existing shareholder agreement

²²⁰ s 241 CBCA.

²²¹ s 190 CBCA.

²²² s 247 CBCA.

confers the right to seek dissolution on shareholders, or in situations where it would be just and equitable that the corporation be dissolved.²²³

The statutory remedies highlighted above represent some of the most popular statutory remedies available to minority shareholders in private corporations in Canada. Attention is now turned to the key minority shareholder remedies of derivative actions and oppression.

4.4 Derivative Actions

“A derivative action is an action brought in the name or on behalf of a corporation or any of its subsidiaries, or an intervention in an action brought by or against the corporation or its subsidiary, by a shareholder or other complainant, to assert or defend rights to which the corporation or subsidiary is entitled”²²⁴ “The “derivative” action is so called because the rights of the plaintiff shareholders derive from the primary corporate right to redress the wrongs against it.”²²⁵ In other words, the derivative action remedy affords the complainants, generally, the opportunity to challenge any misuse of managerial power, on behalf of the corporation, without which many wrongs against the corporation would go without redress. Therefore, where a complainant files derivative action after an alleged wrongdoing by the directors or the control group, the action acts as retroactive check on corporate behaviour.

²²³ s 214 CBCA.

²²⁴ McGuinness, *Supra* note 37 at 1332.

²²⁵ *Ibid* (citing a California Appeal case, *Santos v Wood [2005]* Cal App (Unpub) LEXIS 8998 [CA Calif])

4.4.1 Brief History of Derivative Actions Remedy in Canada

The rule in *Foss v Harbottle* worked great difficulties for aggrieved minority shareholders. The exceptions to the rule were few and limited in scope, and minority shareholders remained helpless where the majority refused to take action.²²⁶ Due to failure of the common law courts to find any principled approach to the question of minority shareholder protection, Canadian legislatures embarked upon the task of creating some statutory remedies. As a prelude to legislative efforts towards statutory reforms, a committee was set up in the province of Ontario to make proposals for the reform of corporate law, including those provisions relating to minority shareholder protection. The product of this committee was the *Lawrence Report*,²²⁷ which not only made recommendations for a statutory adoption of derivative action remedy, but also suggested safeguards against undue shareholder interference with management of the corporation at the slightest provocation.²²⁸ The model of reform recommended in the *Lawrence Report* for Ontario was adopted at the federal level in the *Dickerson*

²²⁶ Peterson, *supra* note 67 at para 16.12.

²²⁷ *Interim Report of the Select Committee on Company Law* (Toronto: Ontario Queen's Printer, 1967).

²²⁸ See, generally, Peterson, *supra* note 67 at para 16.13.

Report,²²⁹ which eventually resulted in the enactment of sections 239²³⁰ and 240²³¹ of the *CBCA*.²³²

This legislative adventure into corporate minority rights protection took the form of codifying in the statutes procedural remedies, designed to protect the individual shareholder from the dual problems of managerial power and majority rule, which had been reaffirmed in the infamous decision of *Foss v Harbottle*. The Canadian legislative strategy was to fashion out self-enforcing remedies to protect minority shareholders, rather than creating more shareholder rights, which might, as usual under common law, be marred by the problems of enforcement.²³³

When the *CBCA* came into being in 1975, one of the guiding principles underlying it was to enhance the degree of shareholder control over corporations.²³⁴ The impact of the statute was that it expanded upon the availability of derivative action reliefs at equity, and introduced more predictable procedural and substantive requirements that must be satisfied before the statutory relief would avail a complainant.

²²⁹ *Proposals for a New Business Corporations Law for Canada*, Vol 1, Commentary (Ottawa: Information Canada, 1971).

²³⁰ Procedure for initiating derivative actions and conditions precedent to initiating such actions.

²³¹ Powers of the court to make orders in derivative action proceedings.

²³² Peterson, *supra* note 67 at para 16.13.

²³³ Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed (Markham: LexisNexis Butterworths, 2006) 538.

²³⁴ McGuinness, *supra* note 37 at 1340

4.4.2 Derivative Action under the *CBCA*

The definition of a derivative action given under paragraph 4.4 above is aptly enacted in section 239 (1) of the *CBCA*. It provides as follows:

Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or 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.

4.4.3 Proper Party to Initiate Derivative Actions

Under the *CBCA*, only a “complainant” may commence a derivative action. The term “complainant” is defined as:

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates;
- (b) a director or an officer or a former director or officer of a corporation or any of its affiliates;
- (c) the Director, or
- (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.²³⁵

²³⁵ s 238 *CBCA*.

Registered Holder or Beneficial Owner of Securities as Complainant²³⁶

A registered holder or beneficial owner of the securities in a corporation may bring or defend a derivative action. Beneficial ownership includes ownership through any trustee, legal representative, agent or mandatary, or other intermediary.²³⁷

One important point to note about the right of a registered owner of securities to be statutorily endowed with standing in a derivative action is that traditionally, corporate law recognises only the person whose name appears in the register of members as the shareholder of the corporation. A beneficial owner who is not a shareholder on record has no recognisable status in the management of the affairs of the corporation. Thus, only a shareholder on record is entitled to rights and obligations associated with shareholding; he alone can initiate a derivative action as complainant.²³⁸ However, this customary corporate law would only be applicable without hardship in the case of private corporations, where the members are usually limited in number. Shareholders of Canadian public corporations seldom hold shares in registered form. Their ownership interests are recorded in their securities brokers' books whilst the interest of the broker is in turn entered in the books of a securities depository. In most cases, it is the name of the securities depository that is entered in the register of shareholders of public corporations. Therefore, for equitable considerations and business efficiency, a legislative amendment of the *CBCA* was effected in 2001 to include "beneficial owners"

²³⁶ s 238 (a), *CBCA*.

²³⁷ s 1, *CBCA*.

²³⁸ s 51(1) *CBCA*.

of securities as potential complainants, so that such indirect unregistered securityholders, who beneficially hold securities, whether in public or private corporations, can successfully initiate derivative actions, when necessary.²³⁹

It is also important to note that under s 239 *CBCA*, securityholders entitled to initiate a derivative action include those shareholders, or beneficial share owners, who formerly held the securities of the corporation. This provision which potentially grants standing to former security holders has the effect of availing former security holders the remedy of restitution for any loss suffered by the corporation, which resulted in reflective losses on their investments, even after they have divested themselves of the securities held in the corporation in question.

With regard to the standing of shareholders or security holders of a corporation to bring a derivative action as “complainant”, it should be noted that a derivative action may be initiated by a complainant either in respect of a wrong done to a corporation or any other body corporate affiliated with the corporation. Companies that are in any of the following types of relationships are regarded as affiliates: holding company and subsidiary company; two or more subsidiaries of a common holding company; two or more companies controlled by the same person.²⁴⁰

²³⁹ See Nicholls, *supra* note 10 at 400-401

²⁴⁰ See s 2(2) (3), *CBCA* for the specific definitions given to the terms “control” and “subsidiary”.

Holders of securities, other than shares, as complainants²⁴¹

Holders of securities other than shares are entitled to standing in a derivative action. This conclusion is pursuant to the definition of “security” by the *CBCA*²⁴² as “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.” A “debt obligation” is defined as “a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured.”²⁴³

Consequently, a bondholder, debentureholder, noteholder or holder of a corporate guarantee, whether or not secured, all qualify for standing to bring a derivative action. However, for any of such creditors to be construed as entitled to standing, they must hold security interests evidenced by a debt instrument, or at least in a form that is capable of being registered.²⁴⁴

Directors and officers as complainants²⁴⁵

Directors and former directors of a corporation as well as officers and former officers of the corporation or the corporation’s affiliates are eligible to commence derivative actions where a wrong deserving of redress is done to the corporation. Beside these four

²⁴¹ s 238 (a), *CBCA*

²⁴² s 2(1) *CBCA*

²⁴³ *Ibid.*

²⁴⁴ See *First Edmonton Place Ltd v 315888 Alberta Ltd*, [1989] 40 BLR 28 (Alta QB) [**First Edmonton**]

²⁴⁵ s 238 (b) *CBCA*.

categories of persons, the *CBCA* also opens the gate to the “Director”,²⁴⁶ where appointed by the Minister²⁴⁷ under s 260 of the *CBCA* to perform the duties and exercise the powers of the “Director” under the *CBCA*. The Director may initiate derivative actions on behalf of any corporation, where necessary. It appears that the spirit of this provision is that since the corporation is supposed to be run in the public interest, government should be allowed to step in to initiate a derivative action on behalf of the corporation, where necessary in the public interest.

Any other person, in the discretion of the court, as complainant²⁴⁸

Any other person may make an application for leave to commence a derivative action, if in the discretion of a court that person is the proper person to make an application. Where the court is of the opinion that there is justification to allow such a person to make an application for leave to commence a derivative suit, the court will so order.

Of particular note in paragraph 238 (d) of the *CBCA* is the fact that it creates an extremely wide discretion for the court to determine whether any person qualifies as “complainant” in a derivative action. With this enlarged judicial discretion, the remedy of derivative action is used to preserve an expansive array of stakeholder interests.²⁴⁹ In other words, the liberality of the provisions of paragraph 238 (d) of the *CBCA* ensures

²⁴⁶ s 238 (c) *CBCA*. Note that this “Director” is not a corporate director, who sits on the board of any corporation, but a person appointed under s 260 to perform executive functions relating to the *CBCA*.

²⁴⁷ This is the minister in the federal cabinet that is in charge of administration of the *CBCA* – Minister of Industry. See http://www.ic.gc.ca/eic/site/icgc.nsf/eng/h_00279.html; last visited on 10-10-2014.

²⁴⁸ s 238 (d) *CBCA*

²⁴⁹ Nicholls, *supra* note 10 at 408.

that the categories of applicants entitled to bring a derivative action are never closed. The court reserves the right to expand the list of complainants, where the interest of the corporation requires it. This, however, does not mean that the court has no objective standard for determining who qualifies as “complainant”. Since the principal object of a derivative action is to remedy wrongs done to the corporation, only the party that may be expected to advance the interests of the corporation, and not merely the interest of the complainant itself, will be held by the court as the “proper person” to initiate such an action.²⁵⁰ In *First Edmonton* a landlord sought leave of court to bring a derivative action against three directors of a corporate tenant, which had entered into a 10-year lease agreement with the landlord but breached the terms of the lease agreement. The landlord had paid a particular sum of money to the corporate tenant as an inducement for the tenant to take up the lease. In addition to this, the landlord granted a number of prized incentives, including an 18-month rent-free moratorium and an allowance for leasehold improvements to the corporate tenant. Soon after the lease agreement was entered into, the directors of the corporate tenant sublet the leased apartment to themselves for their law practice without executing a lease agreement between them and the corporate tenant, nor paying any rent therefor. In addition, they paid over to themselves the cash lease inducement paid by the landlord to the corporate tenant prior to entering into the lease agreement. Three months after the expiration of the rent moratorium period (i.e. after the 21st month), the directors, who had full control of the corporate tenant, abandoned the leased property without causing the corporate tenant

²⁵⁰ *Ibid.*

to pay any rent or to honour the terms of the lease agreement. The corporation was a shelf company that had no assets other than the cash inducement and renovation allowance it had received from the applicant landlord. The landlord's application was for leave to initiate a derivative action, in the name of the corporate tenant, against the three individual directors, with the aim that if judgment is obtained in favour of the corporate tenant against the directors, the landlord, as creditor, would then sue the corporate tenant under the lease agreement to recover damages for breach of the lease agreement. The success or failure of the landlord's application for leave depended on whether or not the landlord was a "complainant" or the "proper person in the discretion of the court", as both terms were defined under section 231 of the *Alberta Business Corporations Act*.²⁵¹ In reaching a conclusion that the applicant landlord could not be a complainant within the meaning of section 231 (as the applicant landlord was not a holder of security or a "creditor" at the time of conversion of the cash inducement money by the three directors), but that in the court's discretion the landlord qualified as the "proper person" to make an application for leave to commence a derivative action, the court had this to say:

In the case of a creditor who claims to be a "proper person" to make a s.232 application, in my view the criterion to be applied would be whether, even if the applicant did not come within s. 231(b) (i) [a registered securityholder] or (ii) [director or officer], he or it would nevertheless be a person who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right the wrong allegedly done to the corporation [the proper person].²⁵²

²⁵¹ The provincial equivalent of s 238 of the *CBCA*.

²⁵² Emphases are mine.

One of the lessons to draw from the decision of the court in this case is that “creditors, and indeed even holders of mere contingent interests, might well be in a position to satisfy the “proper person.”²⁵³ It should be noted that the discretion of the court is crucial in deciding whether or not an applicant’s claim to be “proper person” to bring a derivative suit succeeds. More so, the court’s discretion is, as suggested by the Supreme Court of Canada, sometimes shaped by the financial health of the corporation concerned.²⁵⁴ In *Peoples*,²⁵⁵ the Supreme Court of Canada remarked as follows:

The fact that creditors’ interests increase in relevancy as a corporation’s finances deteriorate is apt to be relevant to, inter alia, the exercise of discretion by a court in granting standing to a party as a “complainant” under s. 238(d) of the CBCA as a “proper person” to bring a derivative action in the name of the corporation under ss. 239 and 240 of the CBCA.

4.4.4 Application to Court for Leave to Initiate a Derivative Action under the CBCA

As pointed out in the immediately preceding section, a person must qualify as “complainant” or “proper person” to be eligible to initiate a derivative action.²⁵⁶ However, qualifying as complainant or proper person is not the only hurdle in the way of a party intending to initiate a derivative suit on behalf of a corporation. Another fundamental procedure that must be undertaken by such complainant is to seek the leave of court to bring such action. Section 239 (1) of the CBCA corroborates this assertion. Section 239 (1) provides as follows:

²⁵³ Nicholls, *supra* note 10 at 410.

²⁵⁴ *Peoples*, *supra* note 21 at para 49.

²⁵⁵ *Ibid.*

²⁵⁶ s 238 CBCA.

Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or 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.

It has been held by the court that until leave is sought and granted to bring a derivative action or to intervene in a derivative action under s 239 (1) of the *CBCA* no action exists for the court to grant the orders contemplated under s 240.²⁵⁷ Consequently, a minority shareholder, or anyone else, who meets the prerequisites for initiating or defending an action on behalf of the corporation, may do so notwithstanding the notorious rule in *Foss v Harbottle*, which has the tendency to favour majority rule to the detriment of the minority. In fact, the court has held that a shareholder holding 50% of the shares of a corporation could institute or defend a derivative action.²⁵⁸ In *Osborne v Bucci*,²⁵⁹ where a 50% shareholder took so much money from the operating corporation and took steps to integrate the corporation's business into its major customer, so as to strip the corporation of its value, the other 50% shareholder was granted leave to bring a derivative action as well as a separate oppression action. It is arguable that even a majority shareholder, that has no control over the affairs of the corporation, owing to some special reasons say, for instance, where voting power is not proportional to percentage of voting shareholding in the corporation, or the right to appoint directors to the board is not commensurate with the percentage of the corporation's voting shares

²⁵⁷ *Silverman v Goldman*, [1995] 20 BLR (2d) (Ont Gen Div).

²⁵⁸ *Osborne v Bucci*, [1998] 82 ACWS (3d) 687 (Ont Gen Div).

²⁵⁹ *Ibid.*

held, may initiate or defend a derivative action on behalf of the corporation provided all conditions precedent to bringing such action are satisfied.

4.4.5 Conditions Precedent to Bringing Derivative Actions

No derivative action may be brought and no intervention in an action may be made on behalf of the corporation unless the court is satisfied that the following conditions are fulfilled:²⁶⁰

- (a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court to initiate a derivative action or defend a derivative action not less than 14 days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
- (b) the complainant is acting in good faith; and
- (c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

The above three prerequisites must be satisfied if an application for leave is to be successful; the above conditions precedent must be construed as conjunctive rather than disjunctive, as all must be satisfied to convince the court that such application deserves leave.²⁶¹ We shall now consider the above requirements in a little more detail.

Notice of claim to directors

Subsection 239(2) of the *CBCA* provides that before a derivative action is initiated by a complainant under the Act, notice must be given to the directors of the corporation at least 14 days before such application, of the complainant's intention to apply to court to

²⁶⁰ s 239 (2) *CBCA*.

²⁶¹ *8th Street Theatre Co v Besenski* [1981] SJ No 1026; 15 Sask R 182 at 185 (QB), per Batten J.

make a claim, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action. The object of this notice requirement is clear and reasonable. Since a derivative action is an action taken on behalf of the corporation to remedy wrongs done to the corporation, it is only reasonable that the corporation itself (acting through its directors) should first be given the opportunity to direct the action. In some provincial jurisdictions within Canada, the court retains the authority to abridge the length of notice or dispense with this requirement of notice, where it is not practicable to provide notice to the directors, for instance, in cases of emergency where providing notice to the directors would occasion unacceptable delay.²⁶² The *CBCA* has no accommodation for waiver of notice to directors prior to a complainant commencing a derivative action. As such, failure to give the requisite notice to directors, so as to allow them to take action in the name of the corporation, will be fatal to an application for leave to commence a derivative action.²⁶³

Complainant acting in good faith

Before the court grants leave to a complainant to bring a derivative action, it must be convinced that the complainant is acting in good faith. In *Winfield v Daniel*,²⁶⁴ the Alberta Court of Queen's Bench stated that "Good faith exists where there is a prima facie reason to believe that the applicant is acting with proper motives, such as

²⁶² See *Gorner v Martin*, [1985] NJ No 107 (a decision from the court in the province of Newfoundland) and s 246(3) of the Ontario Business Corporations Act, which empowers the court to make such order as it considers fit, where the court is of the opinion that it is not expedient to give such notice.

²⁶³ *Covia Canada Partnership Corp v PWA Corp* [1993] OJ No 1793, 106 DLR (4th) 60 (Gen Div).

²⁶⁴ [2004] AJ No 37; 2004 ABQB 40.

reasonable belief in the merits of the claim.” Good faith is a question of fact to be determined on the facts of each case.²⁶⁵ For instance, the complainant’s past conduct may be taken into consideration to determine whether the complainant brought the action in good faith.²⁶⁶ However, animosity between the complainant and the respondent is not, without more, indicative of the absence of good faith.²⁶⁷

The best interests of the corporation

The court must be satisfied that bringing the proposed derivative action appears to be in the best interests of the corporation before granting leave to commence such action. The court need not be convinced that the proposed action is actually, or in fact, in the best interest of the corporation. The line of action for the court is to ask whether the action has some merit *prima facie*, rather than whether it will be successful.²⁶⁸ Therefore, the court has a general attitude to give a narrow construction to the language of this provision, with the reasoning that it requires only that the court be satisfied that it appears to be in the corporation’s interest that the derivative action is initiated.²⁶⁹ According to the British Columbia Court of Appeal in *Bellman v Western Approaches Ltd*,²⁷⁰ “what is sufficient at this stage is that an arguable case be shown to subsist.”

²⁶⁵ *Ibid.*

²⁶⁶ *St-Germain v St-Germain*, [2013] QCCS 4214.

²⁶⁷ See *Valgardson v Valgardson*, [2012] ABCA 124

²⁶⁸ *Marc-Jay Investments v Levy*, [1974] 50 DLR (3d) 45 (Ont HC).

²⁶⁹ See Nicholls, *supra* note 10 at 415-16

²⁷⁰ [1981] 130 DLR (3d)193 at 201.

The wisdom in these provisions of subsection 239(2), *CBCA*, which require a shareholder, who seeks to initiate a derivative proceeding, to first obtain the leave of court before commencing such actions, is that this requirement circumvents many of the procedural barriers surrounding the right to bring a derivative action at common law, and on the other hand minimises the possible abuse of “strike suits” that might otherwise be instituted as a device to blackmail management into costly settlement at the expense of the corporation.²⁷¹

4.4.6 Procedure for Bringing Derivative Action

Since a derivative action is initiated to address wrongs done to a corporation, damages successfully obtained would, generally speaking, be awarded to the corporation. Again, where an action is purely derivative, and the complainant has no reasons to sue in his personal capacity, the procedural steps prescribed by statute must be adhered to.²⁷² However, in certain circumstances, personal and derivative claims may mingle, in which case the rules relating to the case becomes no longer straightforward. A good example of this scenario will play out where, for instance, a minority shareholder in a close corporation, who is by the terms of a shareholder agreement entitled to the right of management of the corporation as one of the directors, but was not given notice of a meeting of the board of directors whereat strategic investment decisions were made. He had no opportunity of voting on whether or not the investment should be made. If the

²⁷¹ See commentary on the *Dickerson Report* cited in Wayne Gray, *The Annotated Canada Business Corporations Act*, 2nd ed [Vol 1] (Toronto: Carswell, 2013) 1-556.

²⁷² See Nicholls, *supra* note 10 at 418.

investment decision proves to be wrong, causing the corporation serious economic loss as a result of the negligence of the directors, the minority shareholder's action would be twofold. The first, a derivative action to remedy the wrong done to the corporation as a result of the negligence of fellow directors; and the second, a personal action for denying the minority shareholder his personal right to receive notice of meetings, the right to vote at meetings, and possibly damages for loss of funds invested in the corporation. Procedurally, the complainant minority shareholder must seek leave of court to commence an action, if reliefs on both remedies are sought in one action.²⁷³ The Dickerson Committee's recommendation on such situations, where an infraction constitutes a wrong against the corporation and also an abuse of minority shareholder rights, such that derivative and personal claims inextricably overlap, is that the aggrieved party ought to be at liberty to choose whatever remedy (derivative action or oppression remedy) is the most suitable for addressing the issues.²⁷⁴

In a derivative action, the other shareholders of the corporation are joined as parties to the suit, either as complainants or as respondents. Typically, the complainant seeks leave to commence a derivative action on behalf of himself, the corporation and all other shareholders with the exception of those who oppose the application for leave and thus are named as defendants.²⁷⁵ The corporate name of the corporation being under the protection of the board of directors of the corporation, the directors are likely to advise

²⁷³ See *NPV Management Ltd v Anthony*, [2003], 231 DLR (4th) 681.

²⁷⁴ See Nicholls, *supra* note 10 at 418-19.

²⁷⁵ Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed (Mudgeeraba, Queensland: Scribblers Publishing, 2006) 521.

that the corporation opposes the complainant's application being brought in the name of the corporation. For this reason, the corporation would be listed as a defendant, its board being in opposition to the action.²⁷⁶

4.4.7 Powers of the Court Hearing a Derivative Action

Where leave is granted to a complainant to bring or intervene in a derivative action, and such action is brought or intervention made, the court may make any order it considers appropriate to the proceedings including the following:²⁷⁷

- (a)** an order authorizing the complainant or any other person (an independent director, for example) to control the conduct of the action; in terms of the procedure, the complainant authorized to control the conduct of a derivative action is only a *de facto* complainant to the suit, and he alone gives instructions to his attorneys, who act on behalf of the corporation.²⁷⁸
- (b)** an order giving directions for the conduct of the action;
- (c)** an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; the remedy provided under this paragraph of section 240 of the *CBCA* seeks to address situations where former securityholders are either not able or available to reap the reward of a derivative action in which the cause of action arose at a time when they

²⁷⁶ *Ibid* at 522.

²⁷⁷ See, generally, s 240 *CBCA*.

²⁷⁸ Paul Martel, *Business Corporations in Canada: Legal and Practical Aspects*, vol 3, [looseleaves] (Toronto: Carswell, 2004) cap 31 at 32.

were security holders and *ipso facto* suffered damages, but a favourable judgment is handed down against the wrongdoers at a time when they had sold their stake in the corporation, in which case subsequent investors would be beneficiaries of a cause for which they suffered no loss,²⁷⁹ and

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action; the importance of this provision being that wrongs against a corporation do not go without redress on account of lack of the wherewithal to prosecute a derivative action by the complainant.

It is important to note that when it comes to the issue of whether or not leave may be granted to a complainant to bring a derivative action under the *CBCA*, the fact that an alleged breach of a right or duty owed to the corporation has been ratified by the majority shareholders in accordance with the articles, is, contrary to the rule in *Foss v Harbottle*, not a conclusive bar to a statutory derivative action.²⁸⁰ However, evidence of approval by the shareholders may influence the court in deciding whether or not the complainant's application for leave to bring a derivative action may be granted.²⁸¹ This provision reaffirms the judicial power to preclude unjust settlement of a derivative suit without which many wrongs against the corporation will pass without remedy, as the wrongdoing directors or control blocks would be very much willing to appease the

²⁷⁹ See, for example, *Regal Hastings v Gulliver et al*, [1942] 1 All ER 378.

²⁸⁰ s. 242 *CBCA*.

²⁸¹ *Ibid.*

complainant either by making offers to purchase his shares at favourable price or by paying him off in bribes to induce him to discontinue the action.

4.4.8 Costs Incurred in Prosecution of Derivative Actions

Unlike some interlocutory applications, a complainant in a derivative action will not be required by the court to give security for costs in any application made or action brought or intervened in.²⁸² On the other hand, the court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for such interim costs on final disposition of the application or action.²⁸³ Provision for interim costs in favour of the complainant is another way in which the law ensures that serious violations of shareholder rights and breaches of directors' duties to the corporation are not left without redress on account of lack of funds to prosecute derivative actions.

The remedy of derivative actions provided under the *CBCA* is very extensive and far more entrenched than the common law derivative action. Of particular importance is the wide judicial discretion assigned to the court for the purpose of dealing with cases where aggrieved complainants seek to avenge wrongs done to the corporation. The court hearing a derivative action is given the powers to make any orders which it deems necessary in the proceedings. More important is that the court is given the powers to grant interim costs to complainants is a remarkable improvement to the derivative

²⁸² s 242 (3) *CBCA*.

²⁸³ s 242 (4) *CBCA*.

actions as known at common law. The possibility of derivative actions not being prosecuted on grounds of lack of financial resources on the part of minority shareholders is near elimination. Lastly, and most importantly, from the standpoint of fairness, it appears equitable that former security holders of the corporation may have the possibility of their losses, occasioned by poor managerial decisions or majority opportunism, being restituted at the cost of a defendant, even where they have disposed of their holdings in the corporation at the time of the court's judgment. The court has the powers to order that any damages adjudged payable by the defendant be paid directly to former and present security holders. This all make the statutory derivative action a very potent tool for corporate minority rights protection.

4.5 The Oppression Remedy

The oppression remedy in corporate law has been described as “an unusual and unprecedented remedy which gives a court almost unlimited powers to redress all sorts of unfair and oppressive actions by corporations and their directors.”²⁸⁴ Because of its flexibility and far-reaching influence in Canadian minority shareholder protection jurisprudence, the remedy has been described by another commentator as the “*Charter of Rights and Freedoms* of corporate law”.²⁸⁵

The oppression remedy is an equitable remedy, which seeks to ensure fairness – what is just and equitable; it is not limited to enforcing lawful conduct, but is suited to

²⁸⁴ Paul Martel, *supra* note 278, 31-38.

²⁸⁵ Peterson, *supra* note 67 para 17-1.

enforcement of fairness and equity.²⁸⁶ It is far-reaching and flexible, allowing any kind of corporate behaviour to be subject to judicial scrutiny.²⁸⁷ However, the intention of the lawmakers regarding the oppression remedy, which is now statutorily embodied in section 241 of the *CBCA*, is not to tilt the pendulum in the contest always in favour of the complainant, but to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner without being constantly intimidated and harassed by every disgruntled complainant.²⁸⁸

Perhaps the most apposite summary of the nuts and bolts of the oppression remedy under Canadian corporate law was that offered by the Supreme Court of Canada in *Re BCE*,²⁸⁹ where the court stated that:

[T]he oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact-specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play.

²⁸⁶ See the Supreme Court of Canada in *Re BCE*.

²⁸⁷ Peterson, *supra* note 67 at para. 17.1.

²⁸⁸ *Ibid* at para 17.1.

²⁸⁹ [2008] 3 SCR; [2008] SCC 69.

4.5.1 Historical Background of the Oppression Remedy under Canadian Corporate Law

The Canadian oppression remedy, which is now found in section 241 of the *CBCA*²⁹⁰ is modelled after section 210 of the UK *Companies Act* of 1948, introduced and modified in accordance with the recommendations in the Dickerson Report.²⁹¹ Section 210 of the UK Act gave a member of a corporation, whose affairs were being run in an oppressive manner towards certain members, including the complainant, a judicial remedy to use the instrumentality of the court to have such oppressive tendencies stopped or reversed. The UK oppression provisions followed the recommendations made by the *Cohen committee* set up in the UK in 1945 to advise on measures to improve corporate minority rights protection that would not necessarily require a complainant to prove that the oppressive conduct complained of would justify winding-up of the corporation on just and equitable grounds, before such complainant could win the intervention of the court, as was hitherto the law.²⁹² This version of the oppression remedy first introduced in the UK did not appear to be popular, as it was tested in a handful of cases.²⁹³ In a very lucid

²⁹⁰ Please note that the various provincial jurisdictions in Canada have their respective oppression provisions embodied in their business corporations statutes, which essentially mirror the *CBCA* template. As at the time of this writing, Prince Edward Island is the only province that is yet to enact the oppression remedy into its corporations statute.

²⁹¹ Report issued by a committee chaired by Robert W.V. Dickerson - "Dickerson Committee" - which was commissioned to make recommendations for the reform of corporate law in Canada. This committee issued the *Proposals for a New Business Corporations Law for Canada*, Vol 1, Commentary (Ottawa: Information Canada, 1971), which eventually led to the enactment of the *CBCA*.

²⁹² Nicholls, *supra* note 10 at 420.

²⁹³ According to Iacobucci *et al*, *Canadian Business Corporations* (Toronto: Canada Law Book, 1977), at 202, as of 1975, (more than 25 years after the provision had been enacted), s 210 had been successfully invoked only twice.

attempt to establish a link between the old UK oppression remedy and the current Canadian oppression legislation, Professor Nicholls remarks as follows:

The various shortcomings of s 210 of the old U.K. Act were identified in the 1962 Report of the Company Law Committee of the Board of Trade²⁹⁴ (the UK Jenkins committee). When the Dickerson Committee undertook its review of Canadian federal corporate law in the 1970s, it had the benefit of the prior work of the Jenkins committee. The Dickerson committee thus proposed a new form of oppression remedy that would address the specific weaknesses that had been identified in the English legislation. The Dickerson committee's proposal for a new oppression remedy was adopted when the CBCA was first enacted in 1975, and was subsequently emulated by many other Canadian provincial statutes.

For historical purposes, it should be mentioned that prior to the introduction of the current oppression remedy into Canadian corporate law through the *CBCA* in 1975, only the province of British Columbia had adopted the UK section 210 remedy, which was re-enacted under the British Columbia Companies Act, 1960.²⁹⁵ This appears to resolve the puzzle surrounding the existence of Canadian case law on the oppression remedy prior to the creation of the remedy in the federal statute in 1975.²⁹⁶

4.5.2 Oppression Remedy under the Canada Business Corporations Act

The oppression remedy provision is found in section 241 of the *CBCA*, which provides as follows:

- 241(1) A complainant may apply to a court for an order under this section.
- (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
- (a) any act or omission of the corporation or any of its affiliates effects a result,

²⁹⁴ *Report of the Company Law Committee* (Cmnd 1749) (London: Her Majesty's Stationery Office, 1962), at para 200ff.

²⁹⁵ RSBC, 1960, c 67, s 185

²⁹⁶ Martel, *supra* note 278 at 31- 40.

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

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

4.5.2.1 Statutory Ingredients of the Oppression Remedy

The oppression remedy provided for in section 241 of the *CBCA* has certain elements, or requirements that must be satisfied before a conclusion can be reached that indeed there is a case of oppression for which the need for relief arises. These statutory elements of the remedy may be grouped into three categories analysed under the three following headings:

4.5.2.2 Parties Entitled to Initiate an Application for Relief under the Oppression Remedy

According to section 241(1), *CBCA* the oppression remedy is available to a complainant. The word, “complainant” is defined in section 238. However, as this term has the same meaning as that considered under derivative actions, wherein it was been given extensive analysis, it is unnecessary to consider the definition in detail here. According to section 238 *CBCA*, a “complainant” means: (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates; (b) a director or an officer or a former director or officer of a corporation or any of its affiliates; (c) the *CBCA* Director; and (d) any other person who, in the discretion of a court, is a proper person to make an application for the oppression remedy.

One grey area, and potentially controversial issue, regarding proper parties entitled to bring an application under the oppression remedy in Canadian corporate law, is the *locus standi* of creditors. Although creditors are not expressly mentioned in the definition of “complainants” under section 238 *CBCA*, the court is enjoined by section 241(2) to grant relief from oppression where the affairs of a corporation or any of its affiliates are being run in a manner that is oppressive to the interests of any creditor, or where the powers of the directors of a corporation or any of its affiliates are being exercised against the interests of any creditor, among other complainants. Nevertheless, section 238 makes express mention of holders of debt securities as potential “complainants” in a derivative action or in an action for relief from oppression. There is a growing body of authority suggesting that a creditor may be a “proper person” entitled to seek relief under the oppression remedy. This stems from the mention in section 241(2), *CBCA* of the interests of any creditor as one of those to be protected from oppression. Accordingly, the Supreme Court of Canada confirmed this line of reasoning in *Re BCE*. The same court remarked in *Peoples*,²⁹⁷ that “the oppression remedy of s 241(2) (c) of the *CBCA* and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction.”²⁹⁸ The court further noted that the open-endedness of the identity of beneficiaries of directors’ duty of care would invariably lead to the decision that creditors are included, so that they may be entitled to bring an action under the oppression remedy to enforce breach of that

²⁹⁷Supra, note 10.

²⁹⁸ The court was citing D Thomson, “Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?” (2000), 58 *UT Fac L Rev* 31 at 48.

duty, where all other ingredients of that remedy are satisfied.²⁹⁹ The Supreme Court also in the *Peoples* decision suggested that given the fact that creditors' interests increase in relevancy as a corporation's finances deteriorates, the court should, in the exercise of its discretion under s 238 (d), *CBCA*, be prepared to endow creditors with standing as "proper persons" to enable them bring an oppression action under s 241.³⁰⁰

One final point to note on proper person to bring an oppression claim is that the courts are generally wary of holding out creditors as "complainants", but would be more readily amenable to proclaiming creditors as "proper persons", in the exercise of their discretion under s 238(d) of the *CBCA*, if, in their opinion, the circumstances of the case permits it.³⁰¹ Such circumstance would, for instance, arise where the conduct of the directors or officers of the debtor corporation set in motion circumstances that made the creditor unable to protect itself in more traditional ways such as taking security for credit granted.³⁰² In *Olympia & York Development Ltd (Trustees of) v Olympia & York Realty Corporation*,³⁰³ Farley J. of the Ontario Superior Court warned against allowing creditors to turn oppression claims into a mechanism for ordinary debt recovery, except where the circumstances of the case permits. According to the court:

²⁹⁹ *Peoples*, *supra* note 21 at 488, para 57

³⁰⁰ *Ibid* at pp 484-5, para 49..

³⁰¹ See, for instance, *Sidaplex Plastic Suppliers Inc v Elta Group Inc et al*, [1998] 40 OR (3d) 563 (CA).

³⁰² See *First Edmonton*, *supra* note 244.

³⁰³ *Olympia & York Development Ltd (Trustees of) v Olympia & York Realty Corporation* [2001] 16 BLR (3d) 74.

While oppression cases should not be used by creditors to facilitate ordinary debt collections, where there is superadded to the equation allegations/facts to support one of the three claims of either (a) "oppression", (b) "unfairly prejudicial" or (c) "unfairly disregards", then creditors have been permitted to be complainants pursuant to s. 245(c)³⁰⁴ as a "proper person".³⁰⁵

4.5.2.3 Scope of Corporate Conduct that may be Impugned under the

Oppression Remedy

The scope of corporate conduct that may be subject to scrutiny by the court for oppression is broad, and is not limited to wrongdoing directors or majority shareholders.

It includes the conduct of affiliates³⁰⁶ of the corporation as well as the conducts of the directors of such affiliates.³⁰⁷

Impugned conduct may be either acts or omissions

The oppression remedy deals with acts or omissions of a corporation or any of its affiliates. This is to say, for instance, that a person may be allowed to bring an oppression claim against a corporation on the grounds that directors of one of its subsidiaries mismanages its funds such that the parent company does not receive its deserved share of profits from the subsidiary. The impugned acts may be isolated acts or acts continued over a period of time. This was the reasoning in *Miller v F Mendel*

³⁰⁴ Ontario equivalent of s.238 (d) of the *CBCA*.

³⁰⁵ *Ibid*, at 11 para 30.

³⁰⁶ According to s 1(2) of the *CBCA*, one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person; and if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other. Therefore, affiliated corporations would include parents and subsidiary corporations, subsidiaries of the same parent, corporations controlled by the same person, and corporations with common affiliates. "Control" is defined in s 2(3), *CBCA* to mean legal control or sufficient voting power to elect the board of directors.

³⁰⁷ s 241, *CBCA*.

Holdings Ltd,³⁰⁸ where the court stated that it “seems clear that the grounds for relief described in section 234(2)³⁰⁹ are to be regarded as mutually exclusive, each applying as well to isolated acts as to a continuing course of conduct.” Failure on the part of a corporation’s directors and officers to take any action to prevent a particular adverse effect from occurring could be construed as an act of oppression.³¹⁰

Impugned conduct must relate to corporation’s business or affairs

The oppression remedy attacks only conducts exhibited in relation to the management of the business or affairs of the corporation or its affiliates. This means that the remedy is only employed to address issues regarding the relationship among the corporation, its affiliates and the shareholders, directors and officers of such bodies corporate, but does not include the business operations carried on by such bodies corporate.³¹¹ Consequently, the oppression remedy cannot be applied to resolving personal disputes between shareholders, or disputes arising from situations where a person acts in a capacity other than as director, officer or shareholder of the corporation. In *Cairney v Golden Key Holdings Ltd (No1)*,³¹² a petitioner, who was both a director and shareholder of a company, foreclosed a mortgage against the company. The grant of the mortgage was facilitated by him to enable the company to pay him his personal wages outstanding at the time of the mortgage. The court was of the opinion that his

³⁰⁸ [1984] SJ No 98.

³⁰⁹ Saskatchewan equivalent of s. 241(2) of the *CBCA*.

³¹⁰ *Sidaplex-Plastic Suppliers Inc v Elta Group Inc*, (*supra*, note 301).

³¹¹ See the definition of “affairs” in s 2(1) of the *CBCA*.

³¹² [1987] BCJ No 1151.

conduct did not come within the oppression remedy dragnet because his action was not an act of the company or the exercise of the powers of a director, but that he acted in his personal capacity as creditor to the company.

What is business or affairs of the corporation can be difficult to determine in certain circumstances, so that each case should turn on its specific facts. For instance, in *Sutherland v Birks*,³¹³ a case involving family shareholders in a corporation set up to ensure financial security for the family, the applicant shareholders sued the corporation and a director for oppression. They claimed that the director paid excessive salaries and benefits. The trial judge ordered the corporation to purchase the respondents' shares, with adjustments. The respondents argued that the court lacked the jurisdiction to apply oppression remedy to a share sale by the complainants to the respondents, as this was a personal transaction in a family company and not a corporate matter to which the oppression remedy would be applicable. The court found that the complainant entered into the share sale transaction because she lacked funds, as a result of the respondent director's oppressive conduct of preventing the company from declaring dividends by paying out a large chunk of profits in excessive wages and benefits to management. The respondents' argument was therefore rejected by the court.

³¹³ [2003] OJ No 2 885, 65 OR (3d) 812 (CA).

Without special circumstances, and barring the existence of oppression, the oppression remedy is not applicable to disputes over shareholder agreements and other contractual dealings³¹⁴

Impugned conduct relates to exercise of directors' powers

The oppression remedy is applicable to exercise of powers by directors of a corporation or its affiliates.³¹⁵ Apart from acts of the directors, the oppressive exercise of power may also be by other officers and management personnel of the corporation to which the directors have acquiesced. This is because any conduct which is directly or indirectly condoned by directors, or of which they expressly approve, will be deemed to be actions of the directors.

Because of the relationship between the exercise of directors' powers and their statutory and fiduciary duties to the corporation, most oppression cases arising from the exercise of directors' powers would naturally result from the breach of directors' duties. For instance, directors who vote for, or consent to, the issuance of shares for a consideration other than cash, will be jointly and severally, or solely, liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.³¹⁶ Section 122 (1), *CBCA* provides that "every director and officer of a corporation in exercising their powers and

³¹⁴ Peterson, *supra* note 67 at 17-19.

³¹⁵ s 241 (2) (c), *CBCA*

³¹⁶ s 118, *CBCA*

discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.” Often times, it is in the exercise of directors’ powers that they breach this duty, which, depending on the circumstances of each case, is a veritable ground for affected parties to found oppression claims.³¹⁷ The smaller the corporation involved, the more likely it is that the court would uphold the existence of oppression, where any of the directors’ duties is breached. This is because the reasonable expectations of an investor in a closely held corporation will quite reasonably be different from those of an investor in a public corporation.

4.5.2.4 Standard of Corporate Conduct Abhorred by the Oppression Remedy

Under Canadian corporate law, section 241(2) of the *CBCA* permits a complainant to seek a remedy, and the court to grant such remedy, where the business or affairs of a corporation or any of its affiliates, or actions or conducts of its directors or those of the directors of affiliates of the corporation, are being run in an oppressive manner. Furthermore, where the affairs of a corporation or its affiliates are being run in a manner, or the powers of directors of a corporation are being exercised in a manner, that is short of “oppression”, but that nevertheless is unfairly prejudicial or unfairly disregards the interests of a security holder, creditor, officer or director, the person who qualifies as “complainant”³¹⁸ is entitled to seek remedy, and the court is authorized

³¹⁷ See *Peoples*, *supra* note 21.

³¹⁸ As defined in section 4.5.2.2 above.

under section 241, *CBCA* to grant remedy to such complainant.³¹⁹ Therefore, it is important to note that under Canadian corporate law, the concept of “oppression remedy” for minority shareholder rights protection is so pervasive that the type of conduct that would move the court to grant reliefs to a complainant is not limited to oppressive conducts on the part of the directors or the control group. It includes behaviours that fall short of fairness or equity. The guiding principle for the court in oppression litigations has been identified as resident in the dictum of Lord Cooper in *Elder v Elder & Watson Ltd*³²⁰, where the law lord stated that:

[T]he essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.³²¹

In summary, it may be correct to say that the guiding principle is that any conduct exhibited by the directors of a corporation or the control group, which falls short of fairness and equity towards the weaker stakeholders in the corporation including, creditors, officers and security holders, would provoke the application of the oppression remedy by the court. It is not necessary to show that the conduct was manifestly oppressive. Having said that, it should also be noted that it is not in all cases where a corporation takes a decision that may be perceived by some shareholders to be unfavourable or against their interests that the court would be willing to interfere to grant relief from oppression. The courts generally respect the right and expertise of directors

³¹⁹ See Nicholls, *supra* note 10 at 429.

³²⁰ [1952] Scots Law Times 112 at 113.

³²¹ See Nicholls, *supra* note 10 at 429, [citing the Dickerson Committee Report, *supra* at para 485].

of a corporation to make strategic business decisions in the best interest of the corporation even though the interests of certain groups of shareholders might be adversely affected. Therefore, in determining whether or not the actions of corporate directors are oppressive or unfairly prejudicial to certain disadvantaged interests to warrant judicial intervention, the courts do apply the business judgment rule.

4.5.2.5 The Business Judgment Rule

The business judgment rule is to the effect that, in determining motive for corporate board decisions i.e. to ascertain whether a particular board decision, which has gone awry, was taken in bad faith, which could *ipso facto* amount to oppression of minority shareholders or other weaker stakeholders in the corporation, “the court ought not to substitute its own judgment for that of the board of directors. The rule operates as a presumption to preclude a court from reviewing a transaction unless there is evidence which casts in doubt the honesty, prudence and good faith of directors.”³²²

The “business judgment rule” essentially ensures the deference of courts to directors’ managerial decision making. In other words, the court should have no business reviewing business decisions of the board of directors of a corporation honestly made in good faith and in the best interests of the corporation, even though it may end up ultimately unsuccessful.³²³ The result of Canadian courts’ recognition and application of the business judgment rule is that corporate managers spend less time deciding on a

³²² Peterson, *supra* note 67 at para 17.21.

³²³ See, for instance, the decision of the Supreme Court of Canada in *Peoples* at 492, para 64.

course of action to take at critical moments and corporations spend less time and resources on justificatory documentation and expert opinions before they take action at critical moments. Most importantly, the business judgment rule has the potential to forestall a situation where the courts are clogged with backlog of disputes bordering on claims of oppression and fraud on the minority with every corporate decision taken by the board, no matter how good-intentioned such decisions may be.

4.5.2.6 Interests Protected by the Oppression Remedy

Much as the oppression remedy is applied to protect disadvantaged corporate stakeholders from oppression, unfair prejudice, and unfair disregard of their interests, it is important to note that not all interests are protected by this remedy. To be protected, the interests of the complainant must qualify as “reasonable expectations” from his investment in the corporation.

“The protection of the reasonable expectation of corporate stakeholders has been described as the unifying thread of the oppression remedy”³²⁴The subject of reasonable expectations is very rich for analytical purposes because it offers a normative standard for acceptable corporate conduct. In other words, it is one of the yardsticks for determining whether or not corporate conduct meets basic requirement of “fairness”, which is the bedrock of the oppression remedy.³²⁵

³²⁴ *CanBev Sales & Marketing Inc v Natco Trading Corp*, [1966] OJ No 2981, 30 OR (3d) cited in Peterson at paras 17 – 24.

³²⁵ *Ford Motor Co Ltd v Ontario Municipal Employees Retirement Board*, [2004] OJ No 191.

The Supreme Court of Canada, in *Re BCE*, provided the much needed guiding principles for the resolution of disputes bordering on oppression claims. In *Re BCE*, the cause of action was a plan of arrangement valued at approximately \$52 billion, for the purchase of the shares of BCE, a public company, by way of a leveraged buyout under which BCE would provide approximately \$38.5B, which obligation will be guaranteed by Bell Canada, a wholly owned subsidiary of BCE. The arrangement was opposed by a group comprised mainly of financial institutions that held debentures issued by Bell Canada. The heart of their complaints was that the arrangement would diminish the trading value of their debentures by an average of 20%, while conferring a premium of approximately 40% on the market price of BCE shares. In other words, their contention was that the shareholders of BCE would profit at the expense of securityholders of its subsidiary. The debentureholders, at trial, opposed the arrangement on a number of grounds, including oppression under the provisions of s. 241 of the *CBCA*.

In addressing the questions raised in this case, the Supreme Court developed a two-pronged test for determining whether a claim of oppression is made out by the complainant. The court stated as follows:

In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest?³²⁶

³²⁶ At paras. 68,72,89,95

4.5.2.7 The Reasonable Expectations Test

The nitty-gritty of the reasonable expectations test is that the complainant, who claims oppression against a corporation, its affiliates or directors, must show that the impugned conduct of these parties fall short of his reasonable expectations from his investment in the corporation at the time of making his investment. The expectation must be “reasonable” because, as one court remarked, the oppression remedy does not exist to protect each individual shareholder’s “wish list.”³²⁷ What is reasonable is determined on an objective basis, and whether or not a reasonable expectation has been formed is a matter of fact.³²⁸ Nevertheless, the Supreme Court of Canada, in *Re BCE*, identified some factors (though not hard and fast rules) that may guide a court in determining whether a reasonable expectation has been founded on the facts of any given case. According to the court, these factors include:

(a) **General commercial practice:** subject to contrary understanding between a corporation and its stakeholders, it is fair for stakeholders to expect that a corporation will act in accordance with standard commercial practice. In *Re BCE*, for instance, the court found that by commercial practice and in reality it was not feasible to structure the scheme of arrangement in a way that would sustain the investment grade rating of the debentures, given that each of the competing bids for

³²⁷ *82099 Ontario Inc v Harold E Ballard* [1991] 3 BLR (3d) 113 at 186 (Ont Ct Gen Div), cited in Nicholls, *supra* note 10 at 431.

³²⁸ *Pente Investment Management Ltd v Schneider Corp*, [1998] OJ No 4142, cited in Peterson, *supra* at para 17 – 25.

the company had been heavily leveraged, which structure was acceptable by commercial convention.³²⁹

- (b) **The size, nature and structure of the corporation:** what is reasonable expectation of stakeholders may depend on size of the corporation involved. For instance, whereas it may be reasonable for investors in a small, closely held corporation to expect that apart from receipt of dividends, they are entitled to at least a seat on the board of directors of the corporation, such expectation, will be seen as irrational in the case of investors in a widely held, public corporation.
- (c) **Relationships between the parties:** expectations are built around the relationship between the complainant and other corporate actors. For example, relationships among family and friends in the context of closely held corporations are likely to create different norms of conduct than arm's length relationship in widely held corporations.
- (d) **Past practice:** a corporation's historical practice may give rise to reasonable expectations. For example, a corporation that has in the past 7 years paid huge dividends may be expected by investors persuaded to invest in it to continue with that trend unhindered in the years ahead.
- (e) **Preventive steps:** the court takes into consideration whether or not the complainant had the ability to take steps to prevent the conduct complained of or to otherwise protect itself against such conduct. In *Re BCE*, the court held that the debentureholders had no reasonable expectations that the investment grade rating

³²⁹ *Re BCE*, *supra*, note 21 at paras 96 – 102.

of the debentures would be sustained, given that each of the competing bids for the company had been highly leveraged. According to the court, the reasonableness of the alleged expectation of the complainants was further negated by the fact that, as debentureholders, they could have guarded against the business risks arising from a change of control by negotiating protective contract terms.

- (f) **Existence of shareholder agreements:** the contents of a shareholder agreement will be considered by the court as reflecting the reasonable expectations of the shareholders.
- (g) **Representations:** reasonable expectations may be founded upon representations made to corporate stakeholders or the general public by the corporation or its agents.
- (h) **The fair resolution of conflicting interests between corporate stakeholders:** the fiduciary duty of directors, that requires them to act in the best interest of the corporation, by implication requires them to “treat individual stakeholders affected by corporate actions equitably and fairly”, and in a manner that is “commensurate with the corporation’s duties as a responsible corporate citizen.”³³⁰

“Reasonable expectations” of shareholders and other stakeholders, are more likely to be recognised in small or closely held corporations than in widely held corporations because of the close relationships that usually exist amongst the various stakeholders of the closely held corporations. Sometimes, it is based on the trust in the sponsors of closely held corporations, and faith in the business venture, that investors pool their

³³⁰ *Re BCE* at para 82.

funds into the corporation. Sometimes, these investors stake up to three-quarters of their entire savings in a single investment. Therefore, it is quite natural that the reasonable expectations of investors in such small corporations will be more easily identifiable than in widely held corporations.³³¹

A few of the many instances where the court has found reasonable expectations to have been well founded include the following:³³²

- Shareholders are entitled to expect that directors will fulfil their fiduciary duties and act lawfully;
- Subject to any further agreement to the contrary, it is reasonable for shareholders and creditors to expect that their corporate contractual obligations will be adhered to;
- A 50% shareholder may reasonably expect to partake in the management of the corporation;
- Shareholders have reasonable expectations to be treated equally and share in the profits of the enterprise according to their ownership interests;
- Shareholders have reasonable expectations that the corporation and the directors will abide by the terms of an existing shareholder agreement signed among the shareholders of the corporation.

³³¹ *Diligenti v RWMD Operations Kelowna Ltd*, [1976] BCJ No 38; 1 BCLR 36.

³³² See generally, Peterson, *supra* note 67 at paras 17: 76-76.1.

The second prong of the test developed by the Supreme Court of Canada for determining viability of claim in oppression litigation is to the effect that where the court has found that there were reasonable expectations on the part of the complainant, which have been largely unsatisfied by the corporation, the court should move ahead to determine the nature of conduct or attitude that has resulted in the non-realisation of the complainant's expectations. A case of oppression will be made out if the conduct of the business or affairs of the corporation, which resulted into loss of the complainant's reasonable expectations, are found by the court to be "oppressive" or "unfairly prejudicial" or in "unfair disregard of" the interests of the complainant.³³³ These three elements will now be briefly considered.

Conduct oppressive to the complainant

Under the oppression remedy, it is not enough for the complainant to claim that his expectations, which may be reasonable,³³⁴ are yet unsatisfied. In most cases³³⁴, to make a successful claim, the complainant must go further to show that the conduct of the respondents was either oppressive or unfairly prejudicial to him or unfairly disregards his interests.³³⁵

³³³ s 241(2), *CBCA*. See also the Supreme Court of Canada's judgment in *Re BCE* at para 68.

³³⁴ Note, however, that the Supreme Court of Canada acknowledged in *Re BCE Inc.* that if a complainant successfully proves that his or her reasonable expectations were not satisfied, in most cases, such proof will normally portray conduct that reflects oppression, unfair prejudice or unfair disregard of relevant interests (see Peterson at para 17.53).

³³⁵ Peterson, *supra* note 67 at para 17.53.

“Oppressive” conduct has been described as conduct that is “burdensome, harsh and wrongful.”³³⁶ The definition of “oppressive conduct” that appears to be the most cited in Canadian case law and legal writings³³⁷ is that offered by Lord Cooper in *Elder v Elder & Watson Ltd*,³³⁸ where the law lord said that for the impugned conduct to qualify as “oppressive”, it “should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.” A common shareholder, who invests his funds in a company, would, at the minimum, expect that he would receive notices of meetings of the members of the company; copies of audited financial statements of the company, to keep him in the know as to the financial success or otherwise of the company; he would expect to be able to vote on appropriate resolutions of the shareholders of the company (if he has voting shares); and would also expect to be paid dividends, once declared. Now, where certain controlling shareholders or directors deprive him of these basic rights of holding common shares, he would be considered by the court to be oppressed because the act of denial of these basic rights of shareholding is oppression. Oppressive conduct, in general terms, is the use of overriding power against the will of weaker corporate stakeholders by some violation of legal or equitable rights or discrimination.³³⁹ According to the Supreme Court of

³³⁶ Lord Simmonds in *Scottish Co-Operative Wholesale Society Ltd v Meyer*, [1958] 3 All ER 66

³³⁷ Peterson, *supra* note 67 at para 17.60.

³³⁸ [1952] SC 49 (Scott Sess).

³³⁹ Peterson at para 1766.

Canada, “oppression carries the sense of conduct that is coercive and abusive, and suggests bad faith.”³⁴⁰

Conduct unfairly prejudicial to the interests of the complainant

Conducts falling short of the harsh and abusive behaviour connoted by “oppression” may nevertheless fall within those types of conduct prohibited by s 241.³⁴¹ “Unfair prejudice” is generally seen as involving conduct less offensive than “oppression.”³⁴²

Use of the term “unfairly prejudicial” suggests that the law does allow prejudice, but it must not be unfair.³⁴³ Corporate administration must strike a balance between the interests of corporate stakeholders.

According to the Supreme Court of Canada, examples of unfairly prejudicial conduct include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm.³⁴⁴ One thing that is obvious in these examples of conducts that may amount to “unfair prejudice” is that they are not as objectionable as those that are

³⁴⁰ *Re BCE* at para 67.

³⁴¹ *Ibid* at para 93.

³⁴² *Ibid*.

³⁴³ Peterson at para 17.67.

³⁴⁴ *Re BCE, supra* note 21 at para 93 (Citing Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson/Carswell, 2004), at pp 82-83).

defined as oppressive. Yet, because of the equitable nature of the oppression remedy, which protects not only legal rights, but also equitable interests, the drafters of the *CBCA* thought it desirable that these other less burdensome conducts be included to maintain the liberal nature of equitable rights.

Conduct unfairly in disregard of the interests of the complainant

In its equitable application, the oppression remedy abhors any conduct that unfairly disregards the interests of any of the corporate stakeholders. According to the Supreme Court of Canada in *Re BCE*, “unfair disregard” is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241.³⁴⁵ “The phrase ‘unfairly disregards the interests of’ suggests that interests may be disregarded but not unfairly.”³⁴⁶ In other words, corporate administration must be able to strike a balance between the interests of the various corporate stakeholders. Every corporate stakeholder must be treated fairly, but not necessarily equally. In other words, it is sometimes permissible that corporate managers treat the interests of certain corporate stakeholders with more regard than they accord to the interests of the other group of stakeholders, if doing so is in the best interests of the corporation. For instance, a corporation may require additional funding, which the shareholders cannot provide. Recapitalization may dilute the interests of the shareholders, or subject them to the prior ranking interests of creditors. Similarly, existing creditors’ interests may become second-ranking to the interests of new creditors, who may demand such terms and conditions. Yet, because it

³⁴⁵ That is to say that a conduct amounting to “unfair disregard of interests of” a complainant is less serious than “oppressive conducts” and “unfairly prejudicial conducts”.

³⁴⁶ Peterson, *supra* note 67 at para 17.88.

is in the best interests of the corporation's continued existence that additional capitalization be achieved, the corporation may raise further capital irrespective of the consequences that recapitalization may have on shareholding value for existing members of the corporation.

Canadian courts have attempted to elucidate the statutory meaning of the phrase "unfairly disregards the interests of", which is defined neither in the *CBCA* nor in any of the equivalent provincial jurisdictions. In *Stech v Davies*,³⁴⁷ a case bordering on oppression claimed by one partner against another in the affairs of two companies, in which the two partners were the only shareholders, the Alberta Court of Queen's Bench defined unfair disregard of the interest of a complainant as follows: "In my view, they mean to unjustly or without cause, in the context of Section 234(2),³⁴⁸ pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation."³⁴⁹

In its judicial analysis of the meaning of the phrase, the Supreme Court of Canada in *Re BCE*, drew analogies of conducts that could amount to "unfair disregard" as including "favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant."³⁵⁰

³⁴⁷ [1987] AJ No 618; [1987] WWR 563 (QB) at p 569.

³⁴⁸ The Alberta equivalent of s 241 (2) of the *CBCA*.

³⁴⁹ *Stech v. Davies*, *supra* note 347 at 6.

³⁵⁰ *Supra*, at para 94 (Citing Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson/Carswell, 2004) at 83-84).

4.5.2.8 Reliefs that may be Granted to a Complainant by the Court in Oppression Litigation

The oppression remedy bestows on the court wide latitude of power to order any remedial action to address the wrong of which the complainant complains. However, the purpose of the oppression remedy is to right any wrongs done to the complainant, not to decree punishment against the wrongdoers or the corporation. In the words of Farley J. of the Ontario Court of Justice, “[t]he job for the court is to even up the balance, not tip it in favour of the hurt party.”³⁵¹ Therefore, Canadian corporate law authorises the court to make any interim or final order it thinks fit “to rectify the matters complained of.”³⁵² Subject to any other order that the court may make in corporate oppression litigation, the *CBCA*³⁵³ recommends the following, which are in no way a closed list. The court may make:

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager for the company;
- (c) an order to regulate the corporation’s affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;

³⁵¹ *82099 Ontario Inc v Harold E Ballard*, [1991] 3 BLR (3d) 113 at 186 (Ont Ct Gen Div).

³⁵² s 241 (2) and (3).

³⁵³ s 241 (3).

- (f) an order directing a company or any other person, to purchase securities of a securityholder, provided the company has financial capability and would not, as a consequence of payment for the securities, become insolvent thereafter;
- (g) an order directing a corporation or any other person, to pay a securityholder any part of the monies that the securityholder paid for securities, provided that the company has the financial capability and would not, as a consequence of such payment of monies to a securityholder, become insolvent thereafter;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by the *CBCA* or an accounting in such other form as the court may determine;
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of the corporation;
- (l) an order liquidating and dissolving the corporation;
- (m) an order directing an investigation of the corporation or any of its affiliates to be made;
- (n) an order requiring the trial of any issue.

4.6 Conclusion

Canadian corporate law has extensive network of protections for shareholders generally, and the minority shareholders in particular. As much as the law protects shareholders, it also provides a fair and holistic approach towards the protection of

rights of all stakeholders in the corporation, including minority shareholders who are usually less powerful in the running of the corporation, and creditors, who may have little or no information on the day to day running of the corporation. Amongst the many remedies provided by Canadian corporate law for the protection of minority shareholders, which were briefly highlighted in the beginning of this chapter, the key remedies of derivative actions and oppression are the only ones extensively discussed in this chapter for reasons already given both in Chapter One and in the introductory part of this chapter.

The remedy of derivative actions is very popular under Canadian corporate law as a very useful tool utilised by minority shareholders for the purpose of righting wrongs done to the corporation in circumstances where a minority shareholder would be debarred from suing the wrongdoing directors or control group in his personal capacity, since the position of the law still remains that only the corporation can sue to remedy any wrongs done to it.³⁵⁴ However, a minority shareholder bringing a derivative action must seek leave of court; prove to the court that he has given at least 14 days' prior notice of his impending action to directors of the corporation; demonstrate that he is acting in good faith; and satisfy the court that it appears to be in the best interests of the corporation that such action be brought. These preconditions are put in place by the law to ensure that while the minority shareholder enjoys the procedural remedies designed to protect the individual shareholder from the dual problems of abuse of managerial power and majority rule, the running of the business of the corporation is not frequently interrupted

³⁵⁴ This is the rule in *Foss v Harbottle*, *supra* note 1.

by litigations from every disgruntled minority shareholder challenging every corporate decision taken by the board.

The second remedy considered in this chapter is the statutory oppression remedy, which is one of the most potent weapons in the hands of the minority shareholder and other corporate stakeholder groups in Canada. Given that corporate status bestows limited liability, there is always the risk that the corporation will be used by the majority or the control group in such a manner that the interests of certain stakeholders, especially those in the minority, are unacceptably disadvantaged. The oppression remedy is an equitable remedy that has now been statutorily recognised to address such majority opportunism. Besides, the Canadian oppression remedy is so flexible that it gives a court almost unlimited powers to redress all sorts of unfair and oppressive actions.³⁵⁵ Commenting on the flexibility of this remedy, as far back as in the 1980s, S.M Beck described the Canadian oppression remedy as “*the broadest, most comprehensive and most open-ended shareholder remedy in the common law world.*”³⁵⁶ This broad remedial power of the court is most conspicuous in the provisions of section 241 (3) of the *CBCA*, which authorises the court to make any order as it thinks fit to rectify the matters complained of. The court is not in any way limited to the list of orders suggested in section 241(3) of the *CBCA*, which only serves as guide.

³⁵⁵ Paul Martel, supra note 278, cap 31 at 38.

³⁵⁶ SM Beck, "Minority Shareholders' Rights in the 1980s" in *Corporate Law in the 80s: Special Lectures of the Law Society of Upper Canada* (Don Mills, Ontario: Richard De Boo, 1982).

There is a very large body of case law dealing with the oppression remedy under Canadian law, only a handful of which are cited in this chapter. One requirement that appears common in all of the cases dealing with the oppression remedy under Canadian corporate law is that a complainant claiming oppression must prove that he had legitimate expectations at the time of making investment in the corporation. These expectations can be deduced from documents as well as conduct of the parties involved. Again, the complainant must prove that the legitimate expectations are unsatisfied; that the conduct or decisions of the majority or the directors (as the case may be) leading to the unsatisfied expectations were either “oppressive”, “unfairly prejudicial” or “unfairly disregards the interests of” the complainant.

The basic policy behind the oppression remedy provided under the *CBCA* is that the weaker stakeholders in the corporation need to be protected from abuse of power by the majority, through the instrumentality of the court, which has been granted literally unlimited power to order anything to right a wrong. Nevertheless, the law would not allow the minority shareholders or the weaker corporate stakeholders to indulge in abuse of court process by frequent disruption of the affairs of the corporation through litigation at the slightest opposition to their wishes, hence the requirement to prove certain facts before the oppression remedy can avail such a complainant. The Ontario Court of Appeal has confirmed this policy, when it said that: “[t]he potential protection it [the oppression remedy] offers corporate stakeholders is awesome. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming

rights from the corporation against the ability of management to conduct business in an efficient manner.”³⁵⁷

A unique nature of the statutory remedies of oppression and derivative actions under the *CBCA* is that once any action seeking either of those remedies is commenced, it may not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given on any terms that the court thinks fit.³⁵⁸ The rationale behind this provision is to enable the court preclude unjust settlement of the action. The likelihood is there that the complainant might drop the action for behind-the-scene settlement that could see the complainant accepting payments in the form of bribes to discontinue the action or accept an offer by the respondents to purchase his shares on favourable terms. Given the significance of these remedies, especially the derivative actions, to the health of the corporation, the intention of the lawmaker is to cause a judicial supervision of withdrawal of actions already commenced in order to forestall unconscionable settlement of otherwise necessary actions.

³⁵⁷ *Ford Motors v Ontario Public Employees Retirement Board* (*supra*, note 325).

³⁵⁸ s 242 (2), *CBCA*

Chapter 5: COMPARATIVE APPRAISAL OF KEY MINORITY SHAREHOLDER REMEDIES UNDER CANADIAN AND NIGERIAN CORPORATE LAWS

5.1 Introduction

This chapter draws comparisons between the key minority shareholder remedies discussed in Chapter 3 and those discussed in Chapter 4. In other words, this chapter compares the key shareholder remedies available for the protection of minority shareholders under Nigerian corporate law with the equivalent remedies under Canadian corporate law. Whereas there are several remedies available in both jurisdictions, only the remedies of derivative actions and oppression were discussed in the two immediately preceding chapters of this work for reasons already given in chapter one.

As discussed in Chapter 2,³⁵⁹ two comparison methods will be applied in this thesis, the first being normative comparison and the second, functional comparison. Normative comparison approach adopted here identifies, analyses and compares concepts based on their names, efficacy and suitability to a given situation or problem. The latter part of this chapter, through analysis, attempts to identify these minority shareholder remedies, criticise the remedies and, where necessary, make suggestions as to the right direction in which the law should move. The other comparison method applied in this chapter is the functional comparison, which is identifying specific remedies in both jurisdictions

³⁵⁹ "Methodology and Theoretical Framework"

and comparing the socio-legal purpose that these remedies address in both jurisdictions.

Both Canadian and Nigerian corporate legislation contain extensive provisions for the protection of the rights of minority shareholders. Whereas the statutory provisions and case law from both jurisdictions are, to a large extent, similar in terms of the protection they afford corporate minority shareholders and the recognition they accord the principle of corporate majority rule as enunciated in the *Foss v Harbottle*³⁶⁰ and *Edwards v Halliwell*³⁶¹ cases and those that follow them, there are some areas where differences exist, especially in the scope of parties covered by the remedies for protection of shareholder minority rights, the procedures for enforcement of the remedies, and general judicial attitude towards minority rights protection. Some of the differences in the minority shareholder remedies of derivative actions and oppression are comparatively discussed below.

5.2 Comparison of the Minority Shareholder Remedy of Derivative Action

5.2.1 Proper Parties to Initiate a Derivative Action

Canadian and Nigerian corporate laws both recognise the right of registered holders of securities of a corporation to initiate derivative actions where necessary.³⁶² However, whereas Canadian law recognises the right to bring derivative actions both in respect of a corporation and any of its affiliates, Nigerian corporate law does not extend such right

³⁶⁰ *Supra*, note 1.

³⁶¹ *Supra* note 5.

³⁶² See s 238, *CBCA* and s 303, *CAMA* respectively.

to bring a derivative action in respect of the affiliates of a corporation. The practical effect of this is that if directors of a lucrative operating subsidiary company, for instance, were to mismanage its profits, abuse their offices or breach their fiduciary duty to the corporation, shareholders of the parent company may not be allowed to bring a derivative action against the wrongdoing directors of the subsidiaries under Nigerian law, subject, however, to the court holding such applicant shareholders as “proper persons” (as defined under section 309 of *CAMA*) to bring a derivative action under section 303. Given Nigerian courts’ conservative attitude to legislative interpretation and strict adherence to precedent, it is unlikely that they would be willing to grant applicants standing to bring a derivative action in relation to a subsidiary company of a corporation in which such applicants are registered holders of security.

The second observation regarding proper parties to initiate a derivative action in the two jurisdictions under consideration is that the party who brings an application for leave to commence a derivative action is referred to as “complainant” under Canadian corporate law whereas Nigerian law recognises such a party as the “applicant”. Both jurisdictions regard the parties against whom a remedy is sought as the “respondents”. This discrepancy in the terminologies by which parties, who seek leave to bring derivative actions, are known is of no legal significance. The same remedies that Canadian courts grant complainants will be available to an applicant under Nigerian corporate law, the difference in the name by which they are known notwithstanding.

5.2.2 Corporate Registry as Proper Party to Bring Derivative Action

Under Nigerian corporate law, the Corporate Affairs Commission (CAC) - Nigeria's centralised corporate registry with offices in most states of the federation³⁶³ - may be accorded standing by the court to commence a derivative action on behalf of a corporation, where it is determined by the court that it is in the best interests of the corporation that such action be commenced by the CAC.³⁶⁴ On the other hand, Canadian corporate law does not have provisions for initiation of a derivative action by the corporate registry. However, Canadian law makes provisions for the intervention by the "Director" in the affairs of a corporation by way of derivative action.³⁶⁵ This "Director" is not a corporate director, who sits on the board of any corporation, but a person appointed by the federal Minister of Industry, under s 260 of the *CBCA*, to perform executive functions relating to the *CBCA*. Whereas Canadian corporate law assigns the responsibility to bring a derivative action, where necessary, to the Director who, presumably is a single individual, Nigerian law assigns this role to an agency of government - the CAC. In practical terms, however, it is yet to be seen how the CAC's power to bring a derivative action will be exercised, as there is no known case at the time of this research where this power has been called into action.

The rationale for allowing the CAC and the *CBCA* Director to intervene in corporate affairs in Nigeria and Canada respectively, by bringing a derivative action on behalf of

³⁶³ Nigerian equivalent of Corporations Canada.

³⁶⁴ s 303, *CAMA*

³⁶⁵ s 238 (C), *CBCA*.

the corporation, and an oppression remedy suit on behalf of shareholders, appears to be that where the situation in a corporation threatens the interests of the public at large, or where a weaker group of corporate stakeholders are unacceptably oppressed by the dominant group, it is only morally expedient that the government regulator exercises some level of oversight functions by intervening in the general public good.

5.2.3 Notice to Directors before Commencing Derivative Action

Under the *CBCA*, a complainant must show that he has given notice of his intention to bring an application for leave to the directors of the corporation at least 14 days before bringing such application to court. *CAMA* only requires that the applicant show that “reasonable notice” of his intention to apply to court has been given to the directors of the company without any action from the directors. The difference is that while the *CBCA* specifies a definite period – 14 days, *CAMA* leaves it open – “reasonable notice”. The potential problem with *CAMA*’s provision on length of notice required is that what is “reasonable” is not defined anywhere in the statute. Consequently, the question is left entirely in the hands of a judge who may determine “reasonable notice” according to his or her personal prejudices. Nevertheless, the *CAMA* requirement has its own advantages in that, in determining what is reasonable, the cases would turn on their own facts so that in cases of emergency, where irremediable damage may be done to the corporation if intervention is not made, a notice period of 3 – 5 days, for instance, might be considered appropriate. This obvious advantage of the open-ended notice period specified under *CAMA* appears to be a weakness in the *CBCA*, especially in circumstances where 14 days’ notice to directors may appear unreasonably long. It should be noted, however, that in some provincial jurisdictions within Canada, the court

retains the authority to abridge the length of notice or dispense with this requirement of notice, where it is not practicable to provide notice to the directors, for instance, in cases of emergency, where providing notice to the directors would occasion unacceptable delay.³⁶⁶ Whether the power to abridge notice period or dispense with notice may be exercised, in the face of the explicit statutory provisions of the *CBCA* requiring such notice, is yet uncertain.³⁶⁷

5.2.4 Statutory Enactment of the *Foss v Harbottle* Rule

Nigerian corporate law statutorily recognises the rule in *Foss v Harbottle* as an essential part of its corporate governance regime,³⁶⁸ and this view has been reaffirmed by the Supreme Court of Nigeria.³⁶⁹ Similarly, the exceptions to the rule, as partly developed by Jenkins LJ of the English Court of Appeal in *Edwards v Halliwell*³⁷⁰ for the mitigation of the harsh effects of the rule, enjoy statutory recognition in section 300 of *CAMA*, which enacts two additional exceptions beside the four recognised at common law.

Canadian corporate law has no statutory recognition of the rule in *Foss v Harbottle* and its exceptions as known at common law. Instead, Canadian courts deal with the

³⁶⁶ See *Gorner v Martin*, [1985] NJ No 107 (a decision from the court in the province of Newfoundland) and s 246(3) of the Ontario Business Corporations Act, which empowers the court to make such order as it considers fit, where the court is of the opinion that it is not expedient to give such notice.

³⁶⁷ See Nicholls, *supra*, note 10 at 413.

³⁶⁸ See s 299 of *CAMA*.

³⁶⁹ In *Agip*, the Supreme Court of Nigeria declared that “the rule in *Foss v Harbottle* is now part of our law and embodied in the *Companies and Allied Matters Act*, 1990, particularly in sections 299-303.”

³⁷⁰ *Supra*, note 5.

procedural questions regarding derivative actions as a purely statutory matter because the *CBCA* makes clear, unambiguous provisions relating to them.³⁷¹ In fact, there have been suggestions by both the courts, policymakers and some legal scholars to the effect that, except for historical value, the rule in *Foss v Harbottle* no longer has a place in Canadian corporate law.³⁷²

5.2.5 Nigerian “Interest of Justice” Exception to *Foss v Harbottle*

The Nigerian courts, in their effort to apply equitable principles to the corporate contract for the purpose of minority shareholder protection, have recognised and adopted a further exception to the rule in *Foss v Harbottle* known as the “interest of justice” exception. The rationale for this omnibus theory is to the effect that where, considering all the circumstances of a case, it is in the interest of justice that the application of the *Foss v Harbottle* rule be suspended, even where the circumstances of a case before the court do not relate to any of the six exceptions statutorily recognised as exceptions to the rule, the court has a duty to suspend application of the rule.³⁷³ This is a sort of equitable flexibility that allows the court to engage in constructive manoeuvring of the law to do justice where strict adherence to the letters of the law would not achieve similar results. The Canadian courts have neither proclaimed nor adopted such an

³⁷¹ s 239 (1) and (2), *CBCA*

³⁷² For arguments to this effect from the court, see the dictum of Jessup CA in *Farnham v Fingold et al*, [1973], 33 DLR (3d) 156 (Ont CA); for the perspective of policymakers on this argument, see the Dickerson committee report (*supra*, note 211); and for argument against the subsistence of the *Foss v Harbottle* rule under Canadian law, see SM Beck, "The Shareholders' Derivative Action" (1974) 52 *Can Bar Rev* 159 at 207.

³⁷³ *Edokpolor & Co. Ltd v. Sem-Edo Wire Industries Ltd* (*supra*, note 41).

omnibus exception to the general rule on the *Foss v Harbottle* principle relating to derivative actions. However, they apply equivalent equitable principles, such as the oppression remedy and the provisions of section 238 (d) of the *CBCA*, to minority shareholder litigation to achieve the same result.³⁷⁴

5.2.6 Scope of the Provisions on Derivative Actions and the *Foss v Harbottle*

Rule

A unique feature of the *Foss v Harbottle* principles relating to majority rule, the exceptions to the rule, and ratification of corporate wrongs under Nigerian corporate law is that it is applied to corporations as well as unincorporated bodies and trade unions, provided such unincorporated body or association of persons has an existing constitution or charter.³⁷⁵ The *CBCA* provisions on procedure regarding derivative actions apply only to corporations and their affiliates, not unincorporated bodies. A “corporation” is defined by the *CBCA* as “a body corporate incorporated or continued under this Act and not discontinued under this Act.”³⁷⁶ Therefore, it is obvious that the provisions of section 238 of the *CBCA* are only applicable to a body corporate, and not to unincorporated association of persons, as is the case at common law and under Nigerian law.

³⁷⁴ See, for instance, *First Edmonton Place Ltd v 315888 Alberta Ltd* (*supra*, note 244).

³⁷⁵ See *Ejikeme v Amaechi* (*supra*, note 140) at 469, para E; *Abubakri v Smith*, [1973] 5 SC 31; *Elufioye v Halilu*, (*supra*, note 126) at 590, 597-598.

³⁷⁶ s 2 (1) *CBCA*.

5.2.7 Conditions Precedent to Bringing Derivative Actions

Under Canadian corporate law, there are three preconditions that must be in place before an application for leave to commence a derivative action will be granted by the court. These include the complainant showing that he has given prior notice to the directors of the corporation involved or its affiliates of his intention to bring such an action at least 14 days before bringing such application; the court needs to be satisfied that the complainant is acting in good faith; and the court also needs to be convinced that it appears to be in the interests of the corporation or its affiliates that the action be brought, prosecuted, defended or discontinued. Nigerian corporate law requires four preconditions to be satisfied before an application for leave to bring a derivative action can be granted. In addition to satisfying the three preconditions mentioned under Canadian law, an applicant bringing an application for leave to commence a derivative action in a Nigerian court must prove that the wrongdoers are the directors who are in control and will not take necessary action.³⁷⁷ It should therefore be noted that an applicant for leave in a Nigerian court has a more arduous task to face before obtaining the desired remedy.

5.2.8 Unique Feature of the Statutory *Foss v Harbottle* Rule under Nigerian Law

The unique feature of the *Foss v Harbottle* principle relating to majority rule and ratification of corporate wrongs, and the exceptions that follow the rule, which have now assumed statutory status under Nigerian corporate law, is that the rule and its exceptions are applicable to corporations as well as unincorporated bodies and trade

³⁷⁷ s 203 (2) (a) of CAMA.

unions, provided the association of persons has an existing constitution or charter.³⁷⁸ This is the position at common law, which the Nigerian lawmakers have not deemed it fit to alter or disturb.³⁷⁹ The same has not, to my knowledge, been formally extended to apply to unincorporated associations under present-day Canadian corporate law, where the rule in *Foss v Harbottle* is of little or no relevance considering the fact that the *CBCA*, which makes comprehensive provisions on derivative actions, and Canadian jurisprudence appear to offer the much needed guidance on derivative actions.

5.3 Comparative Appraisal of the Minority Shareholder Oppression Remedy

5.3.1 Proper Parties to Seek the Oppression Remedy

Under Nigerian law, *CAMA* recognizes and expressly includes “creditors” as part of the category of persons who may apply to court for the oppression remedy.³⁸⁰ Creditors are not so expressly listed by the *CBCA* as potential “complainants” for the purpose of application to court for relief from oppression³⁸¹. However, the Canadian courts, in their progressive interpretation of statutory provisions, have given the provisions of section 238 (d) of the *CBCA* such liberal construction as to give creditors the standing to sue in a derivative action, where the justice of a case demands it.³⁸² Their justification for this

³⁷⁸ *In Elufioye v. Halilu* (*supra*, note 126), the *Foss v Harbottle* principles were applied to a case involving the National Union of Banks, Insurance and Financial Institutions Employees (NUBIFIE) and some of its members, who alleged that the constitution of the labour union had been violated by those in charge of administration of the union. See also *Abubakri v Smith* (*supra*, note 126).

³⁷⁹ See *Cotter v National Union of Seamen*, [1929] 2 Ch 58; [1929] All ER 342.

³⁸⁰ s 310 *CAMA*

³⁸¹ See s 238 *CBCA*.

³⁸² *First Edmonton Place* (*supra*, note 244).

is that even though creditors are not expressly listed as potential complainants, the provisions of section 238 (d) of the *CBCA*, which defines “complainant” to mean, beside the three categories of persons expressly mentioned in section 238 (1) (a) and (b), “any other person who, in the discretion of a court, is a proper person to make an application...”³⁸³ In *First Edmonton Place Ltd v 315888 Alberta Ltd*,³⁸⁴ the court held that a landlord to a corporate tenant was not a “complainant” within meaning of the corporate statute, but was, in the discretion of the court, the “proper person” to bring a derivative action on behalf of the tenant to recover money illegally converted by the directors of the corporate tenant, to repay the tenant’s indebtedness to the landlord.

Again, and more importantly, under section 241 of the *CBCA*, the court is enjoined to grant relief from oppression, unfair prejudice or unfair disregard of interests of a complainant, where any act or omission of a corporation or any of its affiliates, or the business affairs of a corporation or any of its affiliates are being conducted in a manner, or the powers of the directors of a corporation or any of its affiliates are being exercised in a manner, that that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer. The court has been able to construe the provisions of section 241 (2), *CBCA* to the effect that even though “creditors” are not expressly mentioned as potential “complaint[s]” with standing under section 238, creditors should be able to bring oppression actions against the corporation

³⁸³ Emphasis mine.

³⁸⁴ *First Edmonton Place* (*supra*, note 244).

or wrongdoing directors, since creditors' interests are part of the category of interests to be considered by the court before making an order under section 241.³⁸⁵

Notwithstanding the result of this creative interpretation by the Supreme Court of Canada, it remains to be seen how unsecured creditors, or creditors of ordinary trade debts will successfully key in as beneficiaries of the protection accorded under section 241 of the *CBCA*. Absent the court exercising its discretion under section 241 (2) in favour of unregistered or unsecured creditors, whose interests are being oppressively affected by the acts or omissions of a corporation or its directors, or the court exercising such discretion under section 238 (d) of the *CBCA* to hold such unregistered or unsecured creditors as "proper persons" to bring oppression claims, it is very unlikely that such creditors can successfully pursue a claim under the oppression remedy in Canada. This is particularly so considering the courts' disposition towards oppression cases being used by creditors to facilitate ordinary debt collections.³⁸⁶ On the other hand, unsecured or unregistered creditors in Nigeria may not face the difficulty of having to persuade the court to exercise its discretion in their favour, to acquire standing required to bring an oppression claim, because "creditors" are expressly mentioned in Section 310 (1) of *CAMA* as proper parties to commence oppression actions. The *CAMA* does not specify whether or not such creditors must be secured.

³⁸⁵ See *Peoples* (*supra*, note 21).

³⁸⁶ See, for instance, Farley J of the Ontario Superior Court in *Olympia & York Development Ltd (Trustees of) v Olympia & York Realty Corporation*, [2001] 16 BLR (3d) 74.

In comparative terms therefore, it would be easier for a creditor to whom a corporation is indebted, whether such debt is secured or not, to bring an oppression remedy claim in a Nigerian court than it would be in a Canadian court. This assertion will be demonstrated in the challenges that a creditor would have to face in proving that he is a “complainant”, as defined under section 238 of the *CBCA*, given that the definition of this term does not expressly include creditors. The other source of worry for the creditor in Canada is the uncertainty and unpredictability of the discretion of the court.

5.3.2 Anticipatory Oppression Suits

Nigerian courts may grant relief for anticipatory or threatened oppression. *CAMA* accommodates applications for relief from oppression based on proposed acts or omissions of the corporation or its directors such as, where a proposed corporate resolution would effect oppressive results on the applicant’s interests.³⁸⁷ There is no such provision for anticipatory oppression claims under the *CBCA*. However, whether a litigant in Canada can sue for anticipatory oppressive conducts of corporate actors depends on the jurisdiction in which such litigant decides to bring his claim, which will in turn be determined by the jurisdiction where the company was incorporated i.e. whether federal or provincial.³⁸⁸

³⁸⁷ See s 311 (2), *CAMA*

³⁸⁸ This is because some provincial business corporations statutes make provisions for anticipatory oppression.

5.3.3 The Reasonable Expectations Rule

The “reasonable expectations” rule has recently emerged as a veritable tool used by the courts in Canada for the determination of fairness in oppression litigation. According to a legal writer,³⁸⁹ “[t]he protection of the reasonable expectation of corporate stakeholders has been described as the unifying thread of the oppression remedy”³⁹⁰The reasonable expectations rule will be applied by the court where clear bargains or expectations of parties to a corporate contract cannot be found in explicit contract between the parties. This is particularly the case in closely held corporations where the connection between parties is usually premised on personal relationships. This distinctive judicial tool in “reasonable expectations” finds more application in the Canadian court than in its Nigerian counterpart.

5.3.4 Application of Limitation Statutes to Oppression Claims

Another area of divergence between Canada and Nigeria is the application of limitation statutes to the minority shareholder remedy of oppression. The position of the law in Canada regarding the application of provincial limitation statutes on oppression claims founded on section 241 of the *CBCA* has not received an explicit or definitive pronouncement from the courts in Canada.³⁹¹ In *Switzer v. Greenland Properties Ltd*³⁹²,

³⁸⁹ D. H. Peterson & M. J. Cumming, “Shareholder Remedies in Canada”, 2nd ed. (Markham: LexisNexis, 2009) at p. 17 – 24 (loose-leaf).

³⁹⁰ Emphasis mine. See *CanBev Sales & Marketing Inc. v. Natco Trading Corp.*, (*supra*, note 324).

³⁹¹ M Chernos, M Briggs & B Kain, “Recent Watershed Developments in Oppression Remedy and Shareholder Activism” (2006) Annual Review of Civil Litigation 33 – 71.

³⁹² [2002], 309 AR 386, 2002 ABQB 38.

the court held that the plaintiff's claim was not barred under the Limitations Act. However, the Quebec Court of Appeal, in *Gruber v Greenberg*,³⁹³ affirmed a decision of the Quebec Supreme Court that provincial limitation periods apply to *CBCA* oppression actions, in the absence of any federal directions on the question to the contrary. It therefore concurred that the prescription period contained in Art 2922 of the Civil Code of Quebec applied to an oppression claim commenced under s 241 of the *CBCA*. The position in Ontario (the other jurisdiction where a similar question has arisen) is currently not entirely clear. In *Sutherland v Birks*,³⁹⁴ the Ontario Court of Appeal rejected a defence based on the Ontario Limitations Act, against a *CBCA* oppression action, on the ground that the old Ontario Limitations Act did not contain any "basket provision" applicable to oppression litigation. The court, however, did not answer the question of whether the *CBCA* oppression claim could have been validly barred if such a "basket provision" was actually in existence.³⁹⁵ According to Chernos *et al*,³⁹⁶ the decision of the Supreme Court of Canada in *Castillo v Castillo*³⁹⁷ suggests that provincial legislatures may validly enact limitation provisions which claims governed by the substantive law of foreign jurisdictions, provided that the time bar is applicable only within the province enacting such limitations statute. The summary of this debate is that it is yet to be seen

³⁹³ [2003] QJ No 21414 (SC) (QL), affirmed, [2004] JQ No 6567.

³⁹⁴ [2003], 65 OR (3d) 812, [2003] OJ No 2885 at para 22 (QL).

³⁹⁵ M Chernos *et al*, *supra* note 391 at 36.

³⁹⁶ *Supra*, note 391 at 37

³⁹⁷ [2005] 3 S.C.R. 870, 2005 SCC 83

what impact the reasoning in *Re Castillo* will have upon the application of provincial limitation periods to *CBCA* oppression suits.

In contrast with the foregoing argument regarding the position of provincial limitation statutes *vis-à-vis* an oppression action based on the *CBCA* – a federal statute, it is very unlikely that such a debate would arise in Nigeria, where the *CAMA* is the only corporation statute with nationwide application. Furthermore, given the fact that by virtue of section 251 (1) (e) of the Nigerian Constitution of 1999, the Federal High Court has and exercises exclusive original jurisdiction over any civil matter arising from the operation of *CAMA* or any regulation relating to the operation of companies incorporated under *CAMA*, and the fact that matters relating to incorporation, regulation and winding up of companies fall within the “Exclusive Legislative List” over which only the federal government can legislate,³⁹⁸ it is not in doubt that the federal *Limitation Act*³⁹⁹ will be applicable to an oppression litigation, provided there are no other causes of action involved which must be tried before the State High Court.

5.4 Assessment of the Deficiencies Inherent in both the Canadian and Nigerian Remedies for the Protection of Minority Shareholders in Private Corporations

As has emerged from chapters 3 and 4, the corporate minority remedies of derivative actions and oppression are amongst the most popular remedies in both Canada and Nigeria, and the case law from these jurisdictions demonstrate the extent to which these remedies are employed in solving diverse problems associated with investment,

³⁹⁸ Part A, Schedule II to the Constitution of the Federal Republic of Nigeria 1999.

³⁹⁹ CapL12 Laws of the Federation of Nigeria 2004

management and control of corporate resources by corporate stakeholders. While these minority shareholder remedies, among others, which are either formally enacted by lawmakers or creatively invented by the courts, have enabled much progress in the way of conscious and affirmative protection of the interests of the weaker constituencies among corporate stakeholders, there are certain flaws identifiable in the entire legal framework. A few of these weaknesses are considered below.

5.4.1 Flaws in the Derivative Action Remedy

The condition in Canadian and Nigerian corporate laws that requires every wrong done to a corporation by the majority shareholders or the directors, who are in control of the corporation, to be redressed only by means of a derivative action requires some reconsideration, especially in regard to close corporations. It is indisputable that the requirement to commence a derivative action to right a wrong done to the company saves management and the corporation unnecessary distractions from potentially profitable business opportunities and forestalls frequent harassment by every disgruntled minority shareholder. However, in closely held corporations, minority shareholders, rather than being required to bring a derivative action, deserve either of two remedies. Such minority shareholders deserve to be granted standing to bring a personal action because the wrong done to the corporation directly impacts the investment, estate, and sometimes the main source of income of the complainant minority shareholder in a closely held corporation. Secondly, minority shareholders should be allowed to commence an action for substantive relief from oppression (under section 311 of *CAMA* or section 241 of the *CBCA* regarding “oppression”, “unfair prejudice” and unfair disregard of interests) for any breach committed against the

corporation which, ordinarily, would only give the right to derivative suit in the name of the company. This would spare the minority shareholder the procedural bottlenecks associated with derivative suits under s 303 and s 239 of *CAMA* and the *CBCA* respectively. The s 311 and s 241 remedies (*CAMA* and *CBCA* respectively) are far more attractive and convenient remedies for shareholders in closely held corporations, than derivative actions are.

It would not be out of place to limit derivative suits to public corporations with listed securities and large private companies with, say, more than seven shareholders. The reason for this argument is that in close corporations operating like quasi-partnerships such as, the *Ebrahimi v Westbourne Galleries*⁴⁰⁰ category, there is hardly any practical distinction between the shareholders and the corporation itself, the separate legal personality principle notwithstanding.⁴⁰¹ Such closely held corporations tend to be premised on close personal relationships, mutual trust and confidence between the participants for whom the corporation is much more than an investment vehicle for surplus monetary capital; it provides them with employment and participation in the revenues of the corporation through earnings in wages; they expect a meaningful role in management; the larger part of a shareholder's wealth is sometimes invested in such business ventures. Whatever assets are purportedly owned by the closely held corporation are in fact assets of the individual shareholders, who should be allowed to bring personal actions to enforce their property rights. In such corporations, it makes no

⁴⁰⁰ *Supra*, note 108.

⁴⁰¹ Separate legal personality principle as developed in *Salomon v Salomon* (*supra*, note 3).

difference that a relief is obtainable on behalf of the corporation, as the shareholders are, in most cases, also directors.

Granting shareholders of small, closely held corporations of not more than, say, seven members the standing to bring personal actions or oppression claims rather than derivative actions, in those circumstances where the corporation is allegedly wronged, would bring justice within reach of the minority shareholders in such closely held corporations. This reasoning was adopted and effectively applied by the English Court of Appeal in the case of *Clark v Cutland*.⁴⁰² However, to limit the risk of having “strike suits” from members, no shareholder should be allowed by the court to have an indefeasible right under section 311 *CAMA* and section 241 *CBCA* to bring such a claim. The court should take into account the collective position of the shareholders when determining the eligibility of the petitioning shareholder to bring the claim. The court could enlarge and adapt the concept of unfair prejudice so that in relation to claims for corporate relief, the court can assess the issue with reference to all of the shareholders. Striking a balance is what is required of the court at all times.⁴⁰³

5.4.2 Weakness of the Remedy of Derivative Actions in the Face of Information Asymmetry in Closely Held Corporations

Another major challenge faced by a shareholder in a closely held corporation in Canada and Nigeria, who wants to pursue the remedy of derivative actions instead of a personal

⁴⁰² [2003] 4 All ER 733.

⁴⁰³ Jennifer Payne, “Shareholders’ Remedies Reassessed” (2004) *M LR*, Vol 67, No 3 (May at 505).

action, is that such a shareholder will find it extremely difficult to obtain vital information from the company to prosecute his claims against the wrongdoing directors or controlling shareholders who, in most cases, also take active part in management. Unlike in public corporations where documents and financial records are sometimes required by regulators and government agencies to be publicly displayed as part of compliance with transparency requirements, closely held corporations are far less regulated. Therefore, a complainant in a closely held corporation might not have access to vital documents or information to prosecute his claims in derivative actions. This challenge is particularly worse in the case of Nigeria, where as part of preconditions for obtaining leave to commence a derivative action, the court must be satisfied that the wrongdoers are the directors who are in control and will not take necessary action.⁴⁰⁴ It is very unlikely that the wrongdoing directors will cooperate with any litigant who wants to pursue a cause of action against them.

5.4.3 Indeterminacy and Vagueness of the Test for Liability under the Oppression Remedy

Similar to the approach adopted in the *CAMA* by the Nigerian lawmakers, there are generally no distinct or predictable set of guidelines provided in the *CBCA* by the Canadian legislature for the court, whether with respect to the circumstances in which the courts should intervene, where there are intra-corporate disputes, or how they should intervene. The Dickerson committee made some attempts in this regard, but its recommendations fall short of presenting principled guidelines. Regarding the basic

⁴⁰⁴ s 303 (2), *CAMA*.

approach that the courts should take in applying the remedy, the committee simply said that the courts should apply general standards of fairness to decide each case on its merits.⁴⁰⁵ Nevertheless, the courts do intervene, but the result of that intervention without legislative guidance is that, given the flexibility of the oppression remedy, no set of sacrosanct or, at the minimum, predictable rules or guidelines have been developed by the courts in both jurisdictions by which the terms, “oppression”, “unfair prejudice”, or “unfair disregard of the interest of” a complainant might be measured. As noted by one commentator: “[T]he one thing that is clear from the statutory language, both with respect to liability and choice of remedy, is that judges are being encouraged by the legislature – indeed, directed – to take an active role in corporate governance, a role that judges have traditionally eschewed.”⁴⁰⁶

This is not to feign ignorance of the often cited definition of “oppression” offered by Lord Cooper in *Elder v Elder & Watson Ltd*,⁴⁰⁷ or that by Lord Simmonds in *Scottish Co-Operative Wholesale Society Ltd v Meyer*,⁴⁰⁸ or even the two-pronged tests developed by the Supreme Court of Canada in *Re BCE* for determining when the oppression remedy may be deployed for the resolution of a dispute, but the argument is that the rules are still very much fluid and far from being predictable. This creates a big problem

⁴⁰⁵ Brian R Cheffins, “The Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law” (1990) 40 *UTLJ*, 775 at 777.

⁴⁰⁶ James C Tory, “The Oppression Remedy: Reasonable Expectations and the Judicial Role in Corporate Law” (Torys LLP: Toronto, 2006) at 5.

⁴⁰⁷ *Supra*, note 320.

⁴⁰⁸ *Supra*, note 336.

for the corporation, given that the interests in respect of which the remedy may be invoked to protect are not limited to the interests of shareholders but extend to the interests of “any security holder, creditor, director or officer.” Because of the very different nature of these interests in, and claims on, the corporation, they will often collide with each other. Nevertheless, the corporate board will have to make choices routinely in the life of a corporation some of which will benefit some of the varying interests above the other categories of corporate stakeholders; such decisions may even be totally against their interests. When will such preferences reach the threshold before it can be considered oppressive, unfairly prejudicial to, or an unfair disregard of interests which may be less favourably or adversely affected by unavoidable corporate decisions?⁴⁰⁹ The problem that results from this vagueness in the test for liability under the oppression remedy is that the courts would apply their self-invented definitions and guidelines at random, following those guidelines in judicial precedents, where they feel the need to, and departing from same guidelines with reasons, where their sensibilities of justice so dictates. Even the court has acknowledged that “each case turns on its own facts and that what is oppressive or unfairly prejudicial in one case may not be so in a slightly different setting.”⁴¹⁰ The conclusion, therefore, is that the law of the oppression remedy is far from settled.

⁴⁰⁹ See, for instance, *Re BCE* and *Re Peoples* (*supra*, note 21).

⁴¹⁰ *Ferguson v. IMAX Systems Corp* [1983], 43 OR (2d) 128 (CA).

5.4.4 Lack of Distinction between Closely Held and Widely Held Corporations

Another issue that remains largely indeterminate is the evolution of strict and predictable yardsticks for distinguishing oppression, unfair prejudice or unfair disregard in closely held corporations and those only applicable to widely held and listed corporations. Each case is said to be tried on its own facts on a case by case basis.⁴¹¹ Therefore, every court is at liberty to set its own standards for determination of oppressive and unfairly prejudicial conduct, provided such standards will serve the interest of justice. The somewhat unlimited remedial powers granted to the courts in section 241 (3) of the *CBCA* and section 312 of *CAMA* leaves the court in a position in which, subject to observance of the business judgment rule, it will be making determination of right or wrong in highly technical business transactions over which the court may have little or no knowledge. What is proper business decision in a widely held corporation may be blatant oppression in a closely held corporation. Therefore, unless the rules for determining oppression and unfair prejudice in close corporations are authoritatively and strictly delimited from those applicable to widely held corporations, so that there is predictability, and not fluidity of the rules, the court may be found to be too often interfering in internal affairs of the corporation.

⁴¹¹ See, for instance, the dictum of Carthy JA of the Ontario Court of Appeal in *Themadel Foundation v Third Canadian General Investment Trust Ltd*, [1998], 38 OR (3d) 749 (CA).

5.4.5 Lack of Clarity Regarding the Status of a “Creditor” as “Complainant” in Oppression Litigation

Canadian corporate jurisprudence recognises a “creditor” as one of the potential complainants in oppression litigation⁴¹², even though the *CBCA* does not expressly define a “complainant” to include creditors.⁴¹³ Similarly, Nigerian corporate law recognises creditors as potential “applicants” in oppression litigation. This is because creditors are expressly included in the category of parties that may make application as “applicants” under *CAMA*.⁴¹⁴ However, both the *CBCA* and *CAMA* fail to clearly define the category of creditors intended, and the implication of this is that the courts are left to apply their “wisdom” to properly analysing the category of creditors intended by the legislature and fashioning out specific rules for dealing with applications by such creditors, even though the statute is silent on that question. The question, for instance, should be whether “creditors” should be read to include shareholders of the company who may have advanced shareholder loans to the company. What happens if these shareholders are also directors of the corporation who are in control of the corporation and actually part of the wrongdoers? Should they be allowed to sue as creditors? What about employees to whom the company is indebted in unpaid wages? Are they part of the creditors contemplated by statute? Put differently, by “creditors”, does the lawmaker simply mean trade creditors? Again, does the law refer only to secured creditors, or to

⁴¹² See, for instance, *Re BCE*.

⁴¹³ See s 238, *CBCA*.

⁴¹⁴ See s 310, *CAMA*.

both secured and unsecured creditors? The statutes only mention “registered holders or beneficial owners of security of a corporation.” These questions are yet to be given uncontroversial answers by either the Canadian court or its Nigerian counterpart. Yet, they are issues that require clear answers, given the fact that many contracts involving trade creditors, for instance, are conceptually simple and would certainly not involve any corporate governance issues for the court as a loan contract with an equity-holding creditor would. The rhetorical questions posed above require answers because the law treats these categories of creditors differently upon the insolvency of the corporation. The result of this lack of clarity is inconsistency, as the courts are likely to come up with varying answers to these questions.

5.4.6 Failure of Corporate Statutes to Differentiate between “Directors” and “Officers” of Closely Held Companies from those of Widely Held Corporations

The corporate statutes of both Canada and Nigeria generalise the parties that may apply for the oppression remedy as directors or officers of the corporation without a distinction between those of close corporations and those of widely held corporations. The nature of oppression a director or officer in a close corporation suffers is certainly not in the same form and degree as that of a director in a widely held and listed corporation. For instance, a director who is unjustifiably removed from office in a closely held corporation may just have lost his employment and his source of income, whereas there is probability that a director unduly removed from office in a widely held and listed

corporation may not have lost it all.⁴¹⁵ This lack of statutory and judicial distinction between these different categories of directors or officers may have the consequence of leaving the issues surrounding the case of an oppressed director or officer in a close corporation inadequately addressed by law. It may also partially be blamed for the lopsidedness in the oppression case law concerning closely held corporations and those that emanate from the courts in respect of widely held corporations, as the real issues with oppression in both types of organisations are not exactly the same.

Analysts of the oppression remedy from the economic perspective have a unique insight into the question of a complainant's "reasonable expectations" *vis-à-vis* the oppression remedy.⁴¹⁶ From the economic analyst's perspective, the court should not limit its inquiry to the reasonable expectations of the complainant before granting a remedy, where oppression exists, but ought also to match such expectations against agreements reached, whether expressly or impliedly, with other participants in the corporation. In other words, the inquiry should not be focused only on expressly articulated bargains, but also on bargains which the parties, considering all the circumstances of each case, ought to have had.⁴¹⁷ The court's approach of adding equitable flavour to judicial interpretation of agreements so that rights are created,

⁴¹⁵ See in *Re a Company* [1986] BCLC 376 (ChD), - an oppression application under the English Companies Act where one allegation advanced in support of the application was dismissal as managing director. (cited in B Cheffins, *supra* note 405).

⁴¹⁶ See Brian Cheffins *supra* note 405.

⁴¹⁷ *Ibid*, para 4.5.2.5.1.

where there ought to be some, is a widely acceptable practice in the common law world.⁴¹⁸

A critical examination of the above-stated judicial approach to interpretation of contracts would, however, reveal that it creates a situation in which the court finds itself in the uneasy position of restructuring intra-corporate bargains for corporate stakeholders. In other words, when the court grants the oppression remedy, it has the tendency to interfere with the express agreement of parties. Typically, reasonable expectations are not explicitly written down in contracts; courts do infer them from circumstances surrounding each case. Their enforcement through the oppression remedy sometimes conflicts with the parties' freedom of contract.⁴¹⁹ This line of argument is being put up because if "equitable rights" arising out of reasonable expectations are too easily found, the certainty and security of corporate affairs could be seriously undermined.⁴²⁰ One of the judicial decisions that best illustrates this point is *Bury v Bell Gouinlock Ltd.*⁴²¹ In this case, the court granted relief to a shareholder even though the conduct of the respondent corporation was consistent with the provisions of a shareholder agreement.

⁴¹⁸ See para 4.5.2.5.1; *Ebrahimi v Westbourne Galleries Ltd (supra, note 108)* . According to Professor Brian Cheffins, regarding the economic analysis of reasonable expectations in corporate law, "[m]ost of the work has been done in the United States, but a substantial foothold has been established in Canada and other Commonwealth countries."

⁴¹⁹ KS Abraham, "Judge-Made Law and Judge-Made Insurance: Honouring the Reasonable Expectations of the Insured (1981) 67 Va Law Rev 1151 at 1198.

⁴²⁰ Peterson, *supra* note 67 at para 18.100: "The notion that the oppression remedy can apply to a breach of equitable rights held by a corporate stakeholder may affect the balance between the protection of corporate stakeholders and the ability of management to conduct business efficiently."

⁴²¹ [1984] 12 DLR (4th) 451 (Ont H.C.).

The shareholder agreement provided that upon leaving the employ of the corporation, an employee-shareholder of the corporation would transfer his or her shares back to the company. The agreement gave the company six months within which to acquire the shares but also with the right to extend the buy-back period to twelve months. Upon termination of his employment, the complainant sought to sell back the shares to the company immediately, but the company resisted this attempt and instead extended the purchase period to 12 months from the date of termination of his employment. This decision of the company prevented the complainant from being able to take up shares in another corporation, in the same line of business as the respondent corporation in which he had been offered employment, because of a standing rule of the Toronto Stock Exchange which prevented employee-shareholders from holding shares in more than one brokering firm simultaneously. The court held that the conduct of the respondent corporation was unfairly prejudicial to the interests of the complainant.

This decision, when considered exclusively from the oppression remedy standpoint, is sound and respects established principles in that regard because the company had no justification, and never offered one, for extending the buy-back period. However, viewed from an economic perspective, this could be considered as an unnecessary interference by the court into private explicit contracts between corporate participants who were well ahead of the risks before taking them up. The court's decision attacks established and fundamental principles of contract law. Courts should be wary of frequent application of this interventionist powers under the oppression remedy by which they restructure explicit contracts freely entered into by parties. Where an explicit contract between the corporation and the complainant exists, judicial intervention can only be justified if the

contract is determined to be unconscionable, made under duress, or marred by fundamental mistakes. Scholars of the law and economics school argue that, except in extreme cases, where substantive justice demands otherwise, contract law, not oppression remedy, should govern the corporate bargain.⁴²²

5.5 A Case for the Oppression Remedy Aimed at the Environmentally

Oppressed

Apart from shareholders, there are other stakeholders interested in the corporation the interests of whom the directors have to consider in determining whether they are acting with a view to the best interest of the corporation.⁴²³ These stakeholders include employees, suppliers, creditors, consumers, governments and the environment.⁴²⁴ However, the fiduciary duties of the directors are owed only to the corporation.⁴²⁵ This decision of the Supreme Court of Canada was in reaffirmation of its earlier decision in *Peoples*, where the court stated that the directors owe a fiduciary duty only to the corporation, and not to shareholders or any other corporate stakeholder group. To some, this pronouncement by the Supreme Court is regrettable and considered an abdication of the long-held shareholder primacy principle *vis-a-vis* directors' fiduciary duties.⁴²⁶ The shareholder primacy norm had been developed in the context of closely

⁴²² B R Cheffins *supra*, note 39.

⁴²³ *Re BCE*.

⁴²⁴ *Ibid*, at para 39.

⁴²⁵ *Ibid* at para 87.

⁴²⁶ See, Jeffery G MacIntosh, "BCE and the Peoples Corporate Law (2009) 48 Can Bus LJ 255; and Edward Iacobucci: "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties," (2009) 48 *Can Bus LJ* 232.

held corporations, where the only significant horizontal conflict of interests that occurs is the conflict between majority and minority shareholders.⁴²⁷ It has been said that as far as closely held corporations are concerned today, shareholder primacy principle has given way to the more specifically tailored remedy of minority oppression, which has its roots in fiduciary obligations arising from the equitable concept of trust.⁴²⁸

Perhaps the full maturity of the oppression remedy in Canada influenced the Supreme Court's decision to tacitly jettison the shareholder primacy principle in favour of the stakeholder principle in *Re Peoples and in Re BCE*. Section 122 of the *CBCA* obligates corporate directors and officers, in exercising their powers and discharging their duties, to act honestly and in good faith with a view to the best interests of the corporation.

According to the Supreme Court of Canada, "the best interests of the corporation":

comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.⁴²⁹

The Court, citing with approval its earlier decision in *Re Peoples*, proceeded to identify corporate stakeholders as including shareholders, employees, suppliers, creditors, consumers, governments and the environment.⁴³⁰ This decision has been fiercely

⁴²⁷ G Gordon Smith, "The Shareholder Privacy Norm", (1998) 23 *U of Iowa JCL* (No 2) 277-323.

⁴²⁸ *Ibid* at 315.

⁴²⁹ *Re BCE*, *supra* note 21 at para 82.

⁴³⁰ *Ibid* at para 39.

criticised as handing corporate managers a shield for protection from effective monitoring.⁴³¹

Failure of the court to recognise the fiduciary duty of corporate directors to other corporate stakeholders, such as the environment, is certainly not a good one for the persons who live in the communities where the corporation carries on its business activities. In Nigeria, for instance, there are laws and regulations which place obligations on the state and corporations to keep the environment - a stakeholder in the corporate enterprise - healthy and without harm.⁴³² Unfortunately, however, the traditional corporate law is that the fiduciary duties of the directors of a corporation are owed only to the corporation.⁴³³ The implication of this is that communities, who suffer most from the negative impact of the economic activities of corporations, cannot assume the role of stakeholders to bring an oppression claim against corporate directors for breach of fiduciary duty to the environment.

Notwithstanding the shortcomings of the *Re Peoples* and the *Re BCE* decisions, however, they suggest some remarkable optimism, given that they identify the

⁴³¹ James C Tory, "A Comment on BCE" (2009) 48 *Can Bus LJ*, 285. According to this writer, "By rejecting the traditional shareholder primacy model in favour of an inherently vague stakeholder approach to determining the best interests of the corporation, there is no meaningful guidance for directors as to what the law expects of them, nor is there a meaningful standard to which directors can be held accountable."

⁴³² See, for instance, *Section 20 of the 1999 Constitution*, which provides that "*the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.*" See also the *National Environmental Standards Regulation Enforcement Agency (Establishment) Act, 2007*; the *Environmental Guidelines and Standards for Petroleum Industry, 2002*; and the *National Oil Spill Detection and Response Agency (Establishment) Act, 2006*.

⁴³³ s 279 CAMA.

environment as a stakeholder in the corporation and thus provide a platform that may perhaps be used to expand the oppression remedy to become applicable to the interests of non-contractual, discretionary complainants such as environmentally oppressed communities, whose farmlands, freshwater and fishponds are perennially polluted by corporate economic activities, to advance their case against corporations that indulge in environmentally harmful economic activities. The suggestion is that the oppression remedy being one of the “the broadest, most comprehensive and most open-ended shareholder remedy in the common law world,”⁴³⁴ might perhaps offer some flexibility to expand the list of applicants to accommodate non-corporate and non-contractual discretionary complainants. This is particularly more compelling as the *CBCA* and *CAMA* both provide that apart from the parties listed in section 238 (a) – (c) and section 310 (1) (e) respectively, as potential complainants, the court is allowed to exercise its discretion to pronounce any other person as “proper person” to bring an oppression claim or a derivative action.⁴³⁵ It would not be out of place to adjudge a stakeholder in the environment to be a complainant for this purpose, even though such a complainant has no contractual connection to the corporation. Remarking on the Dickerson committee’s development of the Canadian oppression remedy as a modification of the UK *Jenkins committee* report,⁴³⁶ a commentator noted that while the oppression remedy was originally introduced for the protection of shareholders only, the

⁴³⁴ SM Beck, *supra* note 356 at 312 (emphasis added).

⁴³⁵ See section 238 (d) of the *CBCA*.

⁴³⁶ *Report of the Company Law Committee (Cmnd 1749)* (London: Her Majesty’s Stationery Office, 1962), at para. 200ff.

Dickerson committee recommended that the grounds for relief be expanded beyond traditional limits so that interested non-shareholder parties, whose interests might be wrongfully affected, could bring complaints against the corporation, even where the impugned conduct is not necessarily “oppressive”.

Admittedly, with the current state of the law, the nature of expansion being suggested here of the oppression remedy may not be easy to come by, given that the primary remedy for persons who have suffered environmental damages from corporate economic activities lies in either of the torts of nuisance or negligence. However, with the ingredients required to prove negligence and the bottlenecks around the tort of nuisance, especially where it enters the realm of public nuisance, the result is that environmentally oppressed people would, in most cases, not get justice with these torts remedies.⁴³⁷

With the staggering revelation that the Niger-Delta region of Nigeria, where most oil and gas exploration and production activities in Nigeria take place, is one of the top ten most polluted spots on earth;⁴³⁸ has the highest gas flaring rates in the world;⁴³⁹ with two-and-a-half billion cubic feet of gas flared daily, and over two million tons of oil spilled

⁴³⁷ See, for instance, *Anthony Atubie v Shell Petroleum Development Company of Nigeria Ltd* (Unreported) UCH/48/73 of 12th November, 1974. Where the a claim for damages arising from defendant’s oil operations which led to the escape of crude oil, gas and other chemicals was dismissed for lack of proof of negligence on the part of the defendants. See also *Chinda v Shell Petroleum Development Company of Nigeria Ltd* (Unreported) 1974.

⁴³⁸ See the 2013 report by Green Cross and Blacksmith Institute, *World’s worst pollution hazards report focuses on 10 most polluted places*, online: Green Cross < <http://www.gcint.org>>.

⁴³⁹ See *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, Robert D Bullard ed (San Francisco: Sierra Club Books, 2005) at 242.

to date,⁴⁴⁰ there is no better time to suggest a review of the law relating to corporate oppression remedy to accommodate non-corporate and non-contractual discretionary complainants such as communities suffering oppression from commercial activities of corporations operating in this region. If the environment is a corporate stakeholder, there is no reason why communities affected by commercial activities of the corporation cannot be granted standing by the court to bring a novel category of oppression litigation against corporate polluters; environmental litigation against corporations under the torts of negligence and nuisance has not yielded any positive results in Nigeria, for instance, due to constitutional barriers⁴⁴¹ and the Nigerian judiciary's conservative attachment to the common law principle of *locus standi*. The oppression remedy, with its flexibility, coupled with judicial willpower to upturn the status quo, may well represent the panacea to environmental oppression which at the moment is not offered by the torts of negligence and nuisance.

5.6 Conclusion

Both Canadian and Nigerian corporate laws make provisions for the protection of corporate stakeholders, and minorities in particular. Theoretically, an investor in any corporation in Canada or in Nigeria should have no cause for worries because the law,

⁴⁴⁰ Theresa O Okenabirhie, "Polluter Pays Principle in the Nigerian Oil and Gas Industry: Rhetorics or Reality?" *Environment and Social Issues in the Energy Industry* (2008/09), online: Centre for Energy, Petroleum and Mineral Law and Policy <<http://www.dundee.ac.uk/>>.

⁴⁴¹ For instance, only the federal government has authority to dictate the use of land and environmental management where such use relates to petroleum activities, since the ownership of oil and management of oil activities is a matter reserved for the federal government in the Exclusive Legislative List found in the *Second Schedule* to the *Constitution of the Federal Republic of Nigeria 1999*.

as it currently is, protects minority shareholder investments against majority opportunism. It is important to note that the shareholder remedies available under Canadian corporate law are very much similar to those obtainable under Nigerian corporate law, and in most cases, they bear the same names. There is no doubt that the factor responsible for this is the common origin of the corporate laws of both jurisdictions in the English common law and the UK *Companies Act* of 1948.

Whereas minority shareholder remedies in both Canada and Nigeria are very similar in names and functions, certain differences exist between them, especially, for instance, in relation to the proper parties who may commence an action to seek a remedy and the length of pre-action notice required to be given to directors of a corporation before bringing a derivative action. It should, however, be noted that whereas some of these differences exist between the Nigerian corporate law remedies and the federal Canadian corporate law remedies, some provincial statutes in Canada contain certain provisions that are *in pari materia* with the Nigerian provisions.⁴⁴² Another area of divergence is the fact that under Nigerian corporate law, the common law principle in *Foss v Harbottle* and the exceptions to it, clearly articulated by Jenkins LJ of the English Court of Appeal in *Edwards v Halliwell*,⁴⁴³ now enjoy statutory status under Nigerian corporate law. There is no such statutory recognition of the rule in Canada. The relative ease or difficulty, as the case may be, with which the minority shareholder remedies

⁴⁴² See, for instance, sections 227 (2) (b) of the British Columbia Business Corporations Act and 248 (2) of the Ontario Business Corporations Act regarding anticipatory oppression remedy which is also present in the Nigerian *CAMA* but not contained in the *CBCA*.

⁴⁴³ *Supra*, note 5.

discussed may be obtained in both Canada and Nigeria was also subject of comparison in this chapter.

Lastly, this chapter identified the weaknesses inherent in the current shareholder remedies of derivative actions and oppression in both Canada and Nigeria, and where necessary, suggested changes that might bring about certainty and predictability of the law. Given the equitable nature and flexibility of the oppression remedy, especially in Canada, where the environment has been unequivocally identified as a corporate stakeholder to be considered by directors in determining what is in the best interests of the corporation, this chapter ended with a suggestion that the oppression remedy be extended to non-contractual discretionary complainants such as those suffering serious effects of environmental damage resulting from economic activities of corporations, with special focus on those in the Niger-Delta region of Nigeria. The argument is that if the court could summon the courage to expand the “proper person” category of complainants under the oppression remedy, by exercising their discretion in that regard, these environmentally oppressed stakeholders might obtain the relief that the torts of negligence and nuisance have for many years failed to provide.

Chapter 6: CONCLUSION

The purpose of this research exercise was to examine, in comparative terms, Canadian and Nigerian laws relating to the concept of corporate majority rule, as established in the notorious *Foss v Harbottle* decision and the right of the minority shareholders of the corporation to have their interests adequately protected from majority opportunism and oppression. The primary sources of law considered in the two jurisdictions were statutes namely, the *CBCA*, applicable only to federally incorporated business organisations in Canada, and *CAMA*, which is applicable to all companies incorporated in Nigeria. Apart from these statutes, the other key source of law examined was case law from Canada, Nigeria, and to a lesser extent, the United Kingdom.

Perhaps one issue that may, at first glance, appear contradictory to a lay person reading this thesis is that whereas the topic suggests that remedies comparatively examined under Canadian and Nigerian corporate laws relate solely to protection of minority shareholder rights, the contents of the various chapters deal with the broader issue of protection of the rights of the less privileged corporate stakeholders against the unfair and oppressive tendencies of corporate directors, who invariably are appointed by the majority shareholders or by the control group. Yes, references are made to some other groups such as creditors, directors, officers, the government, and the environment. The reason for this is that whereas the original purpose of inventing the remedies was to ensure safety of corporate minority shareholder rights, the exigencies of modern day business transactions make it inconceivable to not extend the protection afforded to minority shareholders by these remedies to the other weaker corporate

stakeholder groups who are at the mercy of corporate directors and are also exposed to majority opportunism. Furthermore, the courts have, in unambiguous terms, recognised other corporate stakeholders whose interests deserve protection.⁴⁴⁴ Both the *CBCA* and *CAMA*, to a large extent, treat the rights of shareholders and those of other corporate stakeholders to employ the remedies of derivative action and oppression, in the resolution of their disputes with the corporation, without distinction or discrimination.⁴⁴⁵

The objective of the research was to examine, by drawing comparisons, how Canadian and Nigerian laws settle the ever-present conflict between the majority shareholders, on the one hand, and minority shareholders and other non-shareholder corporate stakeholders, on the other hand. The motive is to re-emphasise that corporate dispute resolution should be one of the priorities of every responsible government because business corporations are the lifeblood of the economy of every nation. In other words, investments in corporations will invariably determine the growth or otherwise of the economy of every nation. To the investor, especially one from a jurisdiction outside that in which the corporation is established, statutory security and safety of investments are paramount, and to ensure that these are provided, the laws relating to business corporations must be clear on applicable mechanisms that may be employed by the

⁴⁴⁴ See Supreme Court of Canada in *Re BCE* (*supra*, note 21 para 39); and in *Re Peoples* (*supra*, note 21) 3 SCR, 461.

⁴⁴⁵The only area where there is little disparity in the recognition accorded to the various minority stakeholders by the courts is in derivative action and the oppression remedy, where creditors are generally omitted in the category of persons considered “complainants”, but have usually been recognised by the courts as “proper persons” to bring derivative actions and to seek relief under the oppression remedy.

courts for the resolution of corporate disputes. To the government, it is vital that these laws protect local and foreign investors, as that is the only way in which growth in the economy will be guaranteed.

In view of the above therefore, this thesis represents a modest attempt to present to prospective investors, the academia and perhaps government agencies responsible for investments policy-making in both jurisdictions, with a glimpse of the fundamental protections afforded by the laws of both countries to corporate investments, especially respecting the interest of minority stakeholders in the corporation. The nuances of the courts from both jurisdictions regarding the protection of corporate minorities also define the state of corporate laws in the two jurisdictions, and this can be found in the cases examined in this thesis.

This thesis also examined the theoretical framework on which the corporate form is conceptualised by various scholars. First, it examined the theoretical perspective that considers the corporation a nexus for a set of contracting relationships among parties. The importance of this theory lies in the fact that if one conceptualises the corporation as a web of contractual relationships, one will visualise reasons why parties to this contract would insist that the terms of the agreement, either as contained in a shareholder agreement or in the corporate statute, be respected, and in the event of breach of the agreed terms, the non-offending parties would go to court to ask for remedies. Examples of this hypothetical contract are found in shareholder agreements, pooling agreements and the corporate constitution.

Another theoretical perspective from which scholars view the corporation, and which was considered in chapter 2 of this thesis, is the proprietary conceptualisation of the corporation. With this, it is believed that the corporation is property capable of being owned. The proprietary interest comes in the form of funds invested in the corporation. The provisions of *CAMA* accord express recognition to this theory. It provides that:

[T]he shares or other interests of a member in a company shall be property transferable in the manner provided in articles of association of the company.⁴⁴⁶

A clear appreciation of this concept provides answers to questions regarding reasons why shareholders or other investors seek the remedy of derivative actions even when their personal interests are not directly hurt by the impugned conduct.

Another corporate theoretical concept considered in this thesis is the theory that sees the corporation as an agency relationship between two individuals with differing goals and interests. The agency cost theory seeks to understand the nature of an economic relationship in which one person known as the agent enjoys key control over the assets of another person known as the principal who has residual economic interest in those assets. Understanding of the agency cost theory of the firm gives better insights into the divergence of interests between managers and shareholders, majority shareholder opportunism and directors' conflict of interests in dealing with corporate assets and opportunities.

⁴⁴⁶ s 115

The last of the corporate theories examined is the legal personality theory of the corporation, which considers the corporation a legal person capable of acquiring rights and assuming obligations like a natural person would. This theory is enacted both in the *CBCA*⁴⁴⁷ and in *CAMA*.⁴⁴⁸ The legal personality of the corporation impacts its structure, existence, capacity, power, rights and liabilities.⁴⁴⁹ If clearly understood, the legal personality principle gives answers to the implications of a company assuming the status of incorporation. It also explains why the apparently tough rule in *Foss v Harbottle*⁴⁵⁰ still forms part of the corporate jurisprudence in most common law jurisdictions, including Canada and Nigeria. The legal personality theory of the corporation also provides legal reasons why private individual members of a corporation are, generally, not allowed to enforce any right properly belonging to the corporation or intervene in any cause to which the corporation is the proper party.⁴⁵¹

6.1 Summary of Research Findings

Researching the corporate laws of Canada and Nigeria in relation to corporate minority rights protection, with a view to a comparative appraisal of the key remedies provided for in the two jurisdictions, reveals certain areas of convergence and other areas of peculiarities in both jurisdictions. These areas of uniqueness within both jurisdictions

⁴⁴⁷ s 15.

⁴⁴⁸ s 37.

⁴⁴⁹ Orojo, *supra* note 128 at 82.

⁴⁵⁰ *Supra*, note 1.

⁴⁵¹ See section 299 *CAMA* and section 239 *CBCA*.

and the areas of similarities have been given comprehensive analysis in chapters 3, 4 and 5. Therefore, only a summary of a few unique features is intended here.

6.1.1 Nigeria – Corporate Minority Rights Protection

Nigerian corporate law relating to minority rights protection is basically founded on English common law principles and equitable doctrines, many of which have now been codified into Nigeria's corporate statute. The *CAMA* also substantially re-enacts the provisions of the UK Companies Acts of 1948 and 1985 respectively, and on the question of corporate majority rule and minority rights protection in Nigeria, the starting point is to understand the rule in *Foss v Harbottle* and its exceptions as enunciated by Jenkins LJ in *Edwards v Halliwell*. However, apart from the four exceptions to the rule as laid out in that case, Nigerian law recognises two additional exceptions namely, that the rule in *Foss v Harbottle* would not be applicable, and therefore the court may intervene at the instance of a member of the company, to restrain the company by injunction or declaration, where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders. Judicial intervention may also be required where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty. The rule and its exceptions play a very important role in corporate derivative actions in Nigeria.

Obtaining corporate derivative actions remedy in Nigeria has four conditions precedent. The applicant must show that the wrongdoers are the directors, who are in control; he must be acting in good faith; reasonable notice of intention to commence an action must

be served on the directors after which no serious effort to prosecute or defend an action is made by the directors; and it must, in the discretion of the court, appear to be in the interest of the company that an action be brought, prosecuted, defended or discontinued.⁴⁵²

In Nigerian derivative actions, the list of parties that may bring such actions include a registered holder or beneficial owner and former registered holder or beneficial owner of a security of a company; a director or an officer or a former director or officer of a company; the companies' house – the CAC - is also eligible to bring derivative actions. And the court may, through its discretionary powers, adjudge any other person as “proper person” to bring application for leave in a derivative action. This power of the court to declare any person as the “proper person” to bring a derivative action brings to bear the equitable nature of the derivative actions remedy under Nigerian law. The court may not allow a derivative action to be withdrawn or stayed or be dismissed by reason only that the breach of the right or duty owed to the company has been or may be approved by majority of the shareholders.

In terms of formalities for bringing derivative actions, Nigerian corporate law is not definitive as to the length of the pre-action notice required to be served on the directors. It is only required that the applicant show that “reasonable notice” of the action has been given to directors before commencement of a derivative action. What is “reasonable notice” is not defined in *CAMA*. Therefore, the question is left exclusively in

⁴⁵² s 300, *CAMA*.

the hands of the court. This situation is admirable in situations where there is urgency surrounding the application, such as where irreparable damage may be done to the interests of the corporation if leave is not granted expeditiously to forestall such occurrence such that the court determines what is reasonable notice based on the facts before it and the circumstances surrounding each case. The disadvantage to the indeterminacy of pre-action notice period for purposes of derivative actions under Nigerian corporate law is that the law is unpredictable and uncertain because the notice period adjudged “reasonable notice” by a court may be held to be unreasonable by another.

Another finding in regard to Nigerian corporate law relating to minority right protection is that creditors are expressly mentioned in *CAMA* as a category of the persons who may seek the oppression remedy. Therefore, unlike Canadian jurisprudence, where it is common for the court to face the question of deciding whether or not a creditor is a proper person to seek the oppression remedy, there is no uncertainty or ambiguity surrounding the ability of creditors in Nigeria to seek the oppression remedy.

Lastly, it is instructive to note that under Nigerian corporate law, anticipatory oppression is actionable. The *CAMA* accommodates applications for relief from oppression based on proposed acts or omissions of the corporation or its directors such as, where a proposed corporate resolution has the tendency to have oppressive consequences on the applicant’s interests.⁴⁵³

⁴⁵³ See section 311 (2), *CAMA*

6.1.2 Canada – Corporate Minority Rights Protection

Canadian law relating to corporate minority rights protection, just like Nigeria, has its origin in English common law. However, through innovative jurisprudence and progressive legislation, Canada has developed a unique corporate minority rights protection regime that is more comprehensive and more far-reaching than the remedies provided for at common law and in most common law jurisdictions.⁴⁵⁴ While Canadian corporate law for the protection of minority rights has historical origin in the English common law, and its derivative actions remedy, in particular, bears some influence of the decision in *Foss v Harbottle*, Canadian corporate law attaches no special importance to *Foss v Harbottle*, but has developed its own rules relating to derivative actions, which are more elaborate in scope than *Foss v Harbottle*. Therefore, unlike in Nigeria, where this old common law rule has been statutorily codified, Canadian courts make reference to *Foss v Harbottle* largely for analytical and historical purposes. The fulcrum of the current elaborate corporate minority shareholder protection regime is the *CBCA* and its provincial equivalents enacted by the various provincial and territorial governments to regulate business corporations operating in or established within their jurisdictions. Furthermore, the creative judicial interpretation of corporate legislation in Canada has contributed in no small measure to the development of its minority rights protection regime.

⁴⁵⁴ See, for instance, SM Beck, *supra* note 356 at 312.

As discussed in chapter 4, Canadian corporate law provides for various remedies for the protection of corporate minority interests. However, only the remedies of derivative actions and oppression were considered in this work, the latter of which, through case law, has proven to be the most popular shareholder remedy under the Canadian jurisdiction, both in terms of the frequency with which it is called into action and the flexibility it offers applicants and the court.⁴⁵⁵ To obtain leave to commence a derivative action under Canadian corporate law, the applicant must show that he falls within the category of persons listed as “complainant”,⁴⁵⁶ or must be a beneficiary of the discretion of the court having adjudged him “proper person” to make that application. With the wide discretionary powers given to the Canadian court under *section 238 (d)* of the *CBCA*, the list of categories of persons that may initiate derivative actions is not closed, subject, however, to the civil litigation rules relating to *locus standi*.

One of the unique points to note about the Canadian derivative action remedy is that a derivative action may be brought, intervened in, defended or discontinued in respect of a wrong done to a corporation or its affiliates.⁴⁵⁷ Again, unlike in Nigeria, where an applicant in a derivative action is required to satisfy the court that “reasonable” notice of his intention to bring an action has been given to the directors of the corporation, the complainant in a Canadian derivative action must satisfy the court that his pre-action

⁴⁵⁵ See, for instance, *S.M. Beck (supra)*, note 362; *D.H. Peterson & M.J. Cumming (supra)*, note 229; and *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004) 3 SCR, 461.

⁴⁵⁶ S. 238 *CBCA*

⁴⁵⁷ S. 239 *CBCA*

notice has been given to the directors of the corporation not less than 14 days⁴⁵⁸ before making an application for leave to commence a derivative action.⁴⁵⁹ The only source of worry associated with this provision of the *CBCA* is that in cases of urgency, where irreparable damage may be done to interests of the corporation if no derivative action is brought, the statutory notice period of 14 days within which pre-action notice must be given to the directors may appear too long.

With regard to research findings about the Canadian oppression remedy, one of the most important points to bear in mind is the question of *locus standi* of creditors to plead the oppression remedy. Although creditors are not specifically mentioned in the definition of “complainants” under *section 238* of the *CBCA*, the court is permitted to grant relief from oppression where the affairs of a corporation or any of its affiliates are being run in a manner that is oppressive to the interests of any creditor, or where the powers of the directors of a corporation or any of its affiliates are being exercised against the interests of any creditor.⁴⁶⁰ Again, the Supreme Court of Canada in *Re BCE*⁴⁶¹ gave the pointers that a creditor may be eligible to seek the oppression remedy, especially as creditors are part of the category of persons whose interests are required to be protected by the oppression remedy under the *CBCA*.⁴⁶² However, if the

⁴⁵⁸ Emphasis is mine.

⁴⁵⁹ s 239 (2), *CBCA*

⁴⁶⁰ s 241(2) *CBCA*

⁴⁶¹ *Supra*, note 15.

⁴⁶² *Ibid.*

circumstances of a case permit, only a creditor considered by the court, in the exercise of its discretion, to be a “proper person” can seek the oppression remedy.⁴⁶³

Another unique feature of the Canadian oppression remedy is the application of the “business judgment rule”. The gravamen of the business judgment rule is to the effect that the court should have no business reviewing business decisions of the board of directors of a corporation honestly made in good faith and in the best interests of the corporation, even though it may end up ultimately unsuccessful.⁴⁶⁴ Canadian courts generally respect the right and expertise of directors of a corporation to make strategic business decisions in the best interest of the corporation. Therefore, in determining whether corporate actions or decisions are oppressive or unfairly prejudicial to certain disadvantaged interests to warrant judicial intervention, Canadian courts do apply the business judgment rule.

The last of the unique features of Canadian law on corporate oppression deserving of mention here is the fact that not all interests are protected by the Canadian oppression remedy. Where a complainant alleges that a corporate conduct is oppressive, unfairly prejudicial to, or unfairly in disregard of his interests in a corporation, he must further demonstrate that the impugned conduct falls short of his reasonable expectation from investment in the corporation because the concept of reasonable expectation is one of

⁴⁶³ See, for instance, *Sidaplex Plastic Suppliers Inc v Elta Group Inc* (*supra*, note 301).

⁴⁶⁴ See *Peoples Department Store v. Wise* (*supra*, note 118) at p. 492, para. 64.

the criteria for determining whether or not corporate conduct meets the basic requirements of equity and fairness - the foundation of the oppression remedy.⁴⁶⁵

6.1.3 Summary

The key objectives of this thesis were to examine how Nigerian and Canadian corporate laws each treat the ever-competing interests of stakeholders in the corporation. These interests include the right of the majority shareholders to either make final corporate decisions or to appoint those who take such decisions, and the right of the minority shareholders and the other weaker stakeholders such as, creditors, to be protected from corporate majority oppression and abuse of power. Conflicts would always arise between these two groups of stakeholders because there is information asymmetry between the two categories of stakeholders, and the majority has the natural tendency to exploit this lack of adequate information on the part of the minority to their advantage. Thus, in order to avoid this ugly situation, both Canadian and Nigerian corporate laws have developed remedies for redressing of unfairness and injustice whenever it occurs in the corporation. Therefore, this thesis, in the preceding chapters, considered, comparatively, the concept of majority rule and the remedies put in place for the resolution of any infraction of the rights of corporate minority stakeholders under Canadian and Nigerian corporate laws. In doing this, the key shareholder remedies of derivative actions and oppression were comparatively discussed in detail. As mentioned in Chapter 1, only these two remedies were discussed for two reasons namely, lack of adequate time and space to exhaustively discuss all remedies, and the fact that there

⁴⁶⁵ *Ford Motor Co Ltd v Ontario Municipal Employees Retirement Board* (*supra*, note 325).

are more case laws on these shareholder remedies than there are on any other shareholder remedies in both jurisdictions. In other words, they are among the most popular.

From the discussion of the remedies in Chapters 3 and 4, it is very clear that the shareholder remedies available in the two jurisdictions are very similar in nature and in most cases known by the same names. This is evidence of the common origin of the corporate laws of both jurisdictions in the English common law and the UK Companies Act of 1948, the language of which was adopted with modifications by both Canada and Nigeria at various times. Notwithstanding the similarities between the laws of these two jurisdictions under comparison, there are minor differences bordering mainly on proper parties to commence shareholder remedy litigations. Another area of divergence is that, unlike Nigeria, Canada has not adopted the common law rule in *Foss v Harbottle* as part of its corporate law, but only utilises the rule for historical and analytical purposes.

6.1.4 Identified Flaws and Suggestions for Reforms

Good and well advanced as the minority shareholder remedies in Canada and Nigeria may appear, there are identifiable flaws in both jurisdictions which require reconsideration. These weaknesses have been identified and discussed in section 5.4 of Chapter 5. Therefore, only a highlight of the main points is intended below.

The minority shareholder remedy of derivative actions requires some modifications in relation to close corporations of a few members of say, seven or less. This is because any wrong done to the interests of the corporation in such close corporations is invariably done to shareholders in person because, in most cases, shareholders of such

corporations invest a large proportion of their wealth in the corporations such that their daily upkeep is dependent on the financial profit of such corporations. Therefore, insisting that every wrong done to the corporation, including such small corporations that could legitimately be classified as quasi-partnerships, must be addressed only by derivative actions serve no good purpose to investors in close corporations. Such investors should be allowed to either bring personal or representative actions or action for substantive relief from oppression, where the interest of the corporation is substantially hurt by the majority or the directors.

Another area of the minority shareholder remedies regime that needs reform is the indeterminacy of the test for liability under the oppression remedy. There appears to be generally no distinct or predictable set of rules provided for in the *CBCA* or *CAMA* for the court to adopt for the purpose of determining whether or not it is justifiable to intervene in intra-corporate disputes. Each court appears to lay down its own rules as the circumstances of each case demand. The result is unpredictability of the law. The Dickerson committee's efforts fall short of principled guidelines. Commenting on the basic approach that the courts should take in applying the remedy, the committee merely said that the courts should apply "general standards of fairness to decide each case on its merits". The legislature needs to establish principled guidelines for the courts to adopt for the purpose of predictability and certainty of corporate law.

Also identifiable as a flaw in current minority shareholder remedy of oppression is the lack of principled and predictable guidelines for distinguishing oppression, unfair prejudice or unfair disregard in close corporations and those applicable to widely held or

listed corporations. The result is that the court enjoys somewhat unlimited remedial powers by which it finds itself sometimes making determination of right or wrong in highly technical business matters in which it may have little or no education.⁴⁶⁶ It is indisputable that the corporate conducts that may qualify as oppressive in close corporations are quite different from those that could amount to oppression in widely held or listed corporations, because both models of business organisation operate on completely different business terrains. Yet, neither the corporate law of Canada nor that of Nigeria provides for any predictable rules for distinguishing both scenarios. It is recommended that clear-cut rules be made distinguishing oppression in close corporations from that in widely held corporations. This would save the court unnecessary interference in internal affairs of corporations and also give minority shareholders in close corporations a clearly defined status.

Lastly, the failure of corporate law, and by extension the court, to recognise the fiduciary duty of corporate directors beyond the corporation is unfortunate. The court in *Re Peoples* and *Re BCE* respectively identified other stakeholders such as, the environment, the interests of which corporate directors must consider when taking decisions as to what is in the best interests of the corporation. Had the court not clung to its traditional position that the directors owe fiduciary duty only to the corporation, perhaps there might have been authority to argue that affected individuals – stakeholders in the environment - could bring corporate oppression claims, rather than the use of the torts of nuisance or negligence, against a corporation and its directors for

⁴⁶⁶ See, for instance, the provisions of section 241 (3) of the *CBCA* and section 312 of *CAMA*.

horrendous violation of the environment – a stakeholder in the corporate enterprise rightly recognised as such by the court – in pursuit of economic gains. Notwithstanding this limitation of current corporate law in both Canada and Nigeria, it is hoped that the provisions of *section 238 (d)* of the *CBCA* and *section 310 (1) (e)* of *CAMA* would be liberally interpreted by the courts by exercising their discretion in favour of expanding the list of “complainants” to include any other person that the court considers the “proper person” to bring an oppression claim or a derivative action.⁴⁶⁷ Should Nigerian courts, for instance, take this bold step, the oppression remedy could come within the reach of non-contractual, discretionary complainants such as environmentally oppressed communities in the Nigerian Niger-Delta, who suffer perennial pollution resulting from corporate economic activities.

6.1.5 Limitations and Qualifications

This research work, which discusses and compares corporate majority rule and minority shareholder remedies under Canadian and Nigerian corporate laws, is obviously not exhaustive. There are some limitations that will be discernible to every researcher in this area of corporate law. Although this research focuses on the two key shareholder remedies of derivative actions and oppression as applicable to corporations generally, it should be noted that the discussions and analyses of these remedies were undertaken in the context of private corporations only. Even though neither the *CBCA* nor *CAMA* has any provisions suggesting that these remedies are limited to private corporations, there are obvious reasons why the hypothesis and analysis projected, and arguments

⁴⁶⁷ See section 238 (d) of the *CBCA*.

and positions taken, in this thesis may not completely hold true with publicly held or listed corporations. The reason for this is that widely held or listed corporations are fully regulated by securities laws in both jurisdictions. Therefore, the argument that shareholders be granted the oppression remedy or right to bring personal action, where a derivative action is otherwise theoretically the appropriate remedy, would not stand a publicly held company test. Furthermore, by reason of the fact that shares of public corporations enjoy transferability without the sort of restrictions that apply to private corporations, it becomes discernible, from the proportion of cases bordering on shareholder remedies in private corporations to those in publicly held corporations, that the courts are reluctant to extend its generosity with corporate minority shareholder remedies to publicly held corporations. This is because shareholders who feel aggrieved by majority opportunism or oppression may sell off their shares and move on. Again, the board of directors of a public corporation is usually large, with the securities commissions exercising some oversight functions on its activities. Therefore, the probability of such corporations breeding the sort of minority oppression that is found in close corporations is very low. The summation of the point here is that hypothesis, analysis and arguments put forward in this thesis are limited only to private corporations in Canada and Nigeria.

It is also important to note that, except where it is stated otherwise, all statutory references and analysis used in this thesis are limited to the federal corporate statute of Canada – the Canada Business Corporations Act. Therefore, the comparisons and criticisms of Canadian corporate law are limited to the *CBCA*. In some cases, provincial

legislation varies from the federal model. If necessary, it is advised that provincial positions be verified before reaching a conclusion.

6.1.6 Potential Application of Research Findings and Suggestions for Further Research

This research work would serve as a quick reference material to foreign investors in Canada and Nigeria. Their financial and legal advisors would also find it a particularly useful basic resource for the understanding of fundamental protections provided by law for foreign investors who, more often than not, invest as minority interest holders, particularly investments in certain highly sensitive areas such as the oil mineral and gas sectors. As mentioned in section 6.1.5 above, this work is by no means exhaustive; only two of the most frequently pleaded minority shareholder remedies provided for under the laws of the two jurisdictions were considered. Therefore, the question is a much broader topic than is represented in this thesis, but this thesis offers a platform for further research in this area of corporate law bordering on majority rule and minority protection.

It is suggested that further research in this area of comparative corporate law should build on the foundation laid here by researching those areas that are either grey, or those questions that were specifically excluded in this thesis. Of particular reference is a comparative research of minority shareholder remedies as applicable to public corporations. It is worth learning how the courts have so far treated shareholder remedies in relation to publicly held corporations.

Lastly, it is recommended that further research in the field of corporate minority shareholder remedies consider the possibility of the court, or perhaps lawmakers, extending the list of parties, who may commence actions for relief from oppression, to include discretionary, non-shareholder stakeholders, who may, for instance, due to their concern and stake in their immediate environment, be able to go through the corporate law route, rather than the tort of nuisance and negligence, to ask the court for relief from oppressive, unfairly prejudicial and unfair disregard of their interests resulting from commercial and economic activities of corporations that care little about the environment and the inhabitants thereof.

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