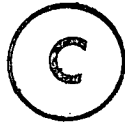


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THE "GOING PRIVATE" TRANSACTION
A GENRE OF MINORITY SHAREHOLDER SQUEEZEOUT

by



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ABSTRACT

The phrase "going private" refers to a transaction in which the controlling shareholders who are instrumental in the management of a "public" company seek to terminate public participation and transform the firm into a private or closely-held entity. Minority shareholders of such companies located in Canada and the United States have described this process as unfair, disgraceful and a perversion of the whole financing process because of the ability of the insiders to time their departure, to dictate the amount of compensation they are to receive and to regulate the amount of disclosure which would otherwise enable them to judge the adequacy of the consideration offered.

Consequently, they have sought to enjoin going private transactions on one of two grounds. On one hand, they have objected to being forced to give up their investment even at the fairest price, claiming, in effect, a vested right to remain as shareholders of the

issuer. Alternatively, when the applicable corporate statute or constating documents of the Company expressly permit shareholder squeezeouts, they have complained of being deprived of the intrinsic or fair value of their shares and denied the procedural safeguards which would better enable them to make informed investment decisions.

This thesis is directed to a study of these criticisms. Following a review of the assorted techniques used in squeezeout transactions and the existing procedural safeguards available to the minority, the claim by minority shareholders that they have a vested right to remain as shareholders of a public company is analyzed and rejected. Instead, it is argued that Canadian courts should only enjoin squeezeout transactions in jurisdictions which have not enacted legal rules designed to assist shareholders in commanding the intrinsic value of their shares. Assuming that an acquiror of minority shares has complied strictly with all corporate and securities procedural requirements, but the price offered for minority shares is less than their intrinsic value, an

injunction should be issued only on the grounds that the opportunity to vote as a separate class, or the controlling shareholders or directors have committed a breach of a fiduciary duty owed to the Company.

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I. Introduction

Over the past four years many shareholders have been compelled to sell their shares in Canadian public or reporting companies at less than adjusted book or going concern value when these companies have "gone private".⁽¹⁾ Going private has consequently been described as "unfair, disgraceful and a perversion of the whole financing process".⁽²⁾

The phrase, "going private", is a recent addition to the vocabulary of the corporate practitioner. It refers to a transaction in which the controlling shareholders⁽³⁾ ("the insiders") who are instrumental in the management of a "public" company ("the issuer") seek to terminate public participation and return the firm to the status of a closely held entity⁽⁴⁾ by providing the minority shareholders with cash or redeemable securities in exchange for their existing shares.

Evidencing their displeasure at the ability of the insiders to time their departure, to dictate the amount of compensation they are to receive and to

regulate the amount of disclosure which would otherwise enable them to judge the adequacy of the price at which each share is to be surrendered, shareholders in Canada⁽⁵⁾ and the United States⁽⁶⁾ have sought to enjoin going private transactions on one of two grounds. On one hand, they have objected to being forced to give up their investment even at the fairest price, claiming in effect a vested right to remain as shareholders of the issuer.⁽⁷⁾ Alternatively, when the applicable corporate statute⁽⁸⁾ or constating documents of the Company⁽⁹⁾ expressly permit squeezeouts, minority shareholders have complained of being deprived of the intrinsic or fair value of their shares and denied the procedural safeguards which would better enable them to make an informed investment decision.

This paper analyzes both these criticisms voiced by minority shareholders. Although the first complaint is rejected as untenable in law and unsound from the point of view of commercial expediency, it is argued that minority shareholders must be given the opportunity to dispose of their shares for an amount

at least equal to their intrinsic value. In the absence of legal rules designed to assist shareholders in commanding intrinsic value, Canadian Courts should enjoin squeezeout transactions only on the grounds that the minority has failed to vote as a separate class, or the controlling shareholders or directors of the issuer have committed a breach of a fiduciary duty owed to the Company or to the other shareholders.

II. The Dynamics of a Going Private Transaction

Controlling shareholders of the issuer initiate going private transactions. Tax⁽¹⁰⁾ or non-tax⁽¹¹⁾ considerations, however, may prompt insiders to use a corporate associate⁽¹²⁾ or affiliate⁽¹³⁾, including the issuer⁽¹⁴⁾, as a vehicle through which to expropriate sufficient minority shares to effect the conversion into a "private company" as defined in corporate⁽¹⁵⁾, securities⁽¹⁶⁾ and tax⁽¹⁷⁾ legislation.

Assuming that the controlling shareholders are unsuccessful in purchasing the desired number of outstanding minority shares on a takeover bid⁽¹⁸⁾ or

in the open market⁽¹⁹⁾, they may be able to acquire the remainder by passing a resolution authorizing

- (1) a statutory amalgamation⁽²⁰⁾ as a result of which minority shareholders of the issuer receive cash or redeemable preference shares of the amalgamated company;
- (2) the reclassification of the minority shares of the issuer as redeemable at the option of the Company⁽²¹⁾;
- (3) the consolidation of the common shares of the issuer⁽²²⁾, leaving the minority with fractional shares which the Company may subsequently repurchase⁽²³⁾; or
- (4) the sale of all the assets⁽²⁴⁾ to a corporate affiliate and the subsequent winding up of the issuer⁽²⁵⁾.

In certain jurisdictions,⁽²⁶⁾ an acquiror⁽²⁷⁾ which owns 9/10 of the issued shares of one class of the issuer following a takeover bid,⁽²⁸⁾

may compel the minority to sell the remainder in proceedings referred to as "compulsory acquisition".(29)

Once successful in taking the company private, the insiders may enjoy significant benefits only available to shareholders of non-reporting or closely held companies. They alone will share in the increased retained earnings of the Company due to the lower rates of tax imposed on certain types of income(30) earned by a private corporation, decreased shareholder servicing costs incurred only by reporting companies which must comply with extensive disclosure requirements(31), enhanced economies of scale(32) and increased corporate flexibility.(33)

The absence of public scrutiny will also enable controlling shareholders to partake of tax advantages involving the use income splitting or estate freezing.(34) Insiders might also choose to use the private company as a holding company for securities purchased with their own funds and as a conduit through which to flow investment income when their personal tax rate is greater than the corporate rate.(35) This

will result in a tax deferral while earnings remain in the company and an eventual small tax savings once the money is paid to shareholders.(36)

III. The Regulation of a Going Private Transaction

A. The Procedural Formalities Affecting An Acquiror

An acquiror which chooses to take an issuer private must observe various requirements in different circumstances.

1. As an Offeror in Takeover Bid, Issuer Bid or Compulsory Acquisition Proceedings

An acquiror must provide offerees with extensive disclosure to enable them to make an informed investment decision about the fairness of the offer. Unless a bid is classified as "exempt"(37), a takeover bid circular which accompanies the offer must disclose, for example, the number of securities held by the offeror or related parties; the market price of the target company shares over the preceding 6 months; the terms of the offer; the particulars of the method and time of payment for shares of the target company; and

the particulars of any arrangement or agreements made or proposed to be made between the offeror and any of the directors or senior officers of the target company⁽³⁸⁾.

To properly evaluate this information without pressure from the offeror to tender their shares, shareholders must also receive the benefit of a certain period of time within which to act. In a takeover or issuer bid, subject to a variation or extension of the offer, any shares deposited may be withdrawn by or on behalf of an offeree at any time until the expiration of seven days from the date of the offer⁽³⁹⁾. Until that period has elapsed, the shares may not be taken up and paid for.⁽⁴⁰⁾

In compulsory acquisition proceedings, an offeror is only entitled to purchase the shares of dissenting offerees once it has acquired 9/10 of the shares it or any related party⁽⁴¹⁾ did not already own, within 4 months of the date of the bid.⁽⁴²⁾ The offeror must then mail the dissenting offerees a

notice of compulsory acquisition within two months after the termination of the bid.⁽⁴³⁾ If a dissenting offeree is not satisfied with the terms of the offer, he must seek judicial redress within a short period of time thereafter or accept the consideration offered on the bid.⁽⁴⁴⁾

There are also a number of statutory provisions relating to the payment of consideration which an offeror must observe. For example, an offeror must pay for shares which have been tendered within 35 days of the date of the bid or a variation or extension thereof.⁽⁴⁵⁾ If the terms of the offer are varied before the termination of the bid, all shareholders who have deposited their shares prior to the date of variation must be permitted to tender their shares on the same terms.⁽⁴⁶⁾ Moreover, in certain jurisdictions, an offeror is required to make a "follow up offer"⁽⁴⁷⁾ to all shareholders of the target company when it has agreed to pay the holders of a control block of shares a premium for their investment⁽⁴⁸⁾.

2. As a Controlling Shareholder of the Issuer

Shareholders of the issuer may only approve an amalgamation,⁽⁴⁹⁾ an arrangement⁽⁵⁰⁾ resulting in a reduction of capital⁽⁵¹⁾, a share reclassification⁽⁵²⁾ or consolidation⁽⁵³⁾ and a sale of assets⁽⁵⁴⁾ and winding up of the Company⁽⁵⁵⁾ by special resolution⁽⁵⁶⁾. Even though controlling shareholders are subject to equitable restraints⁽⁵⁷⁾ when voting their shares in these transactions, shareholders of each legally created class are also entitled to block the passage of a special resolution by separate class vote⁽⁵⁸⁾ or by court application⁽⁵⁹⁾ if the controlling group uses its voting powers in a discriminatory fashion.⁽⁶⁰⁾

In certain jurisdictions, controlling shareholders are required to file reports indicating increased ownership in the equity of the issuer,⁽⁶¹⁾ though the acquisition of minority shares with the aid of material information⁽⁶²⁾ to which the other party to the transaction is not privy, is prohibited.⁽⁶³⁾

3. As a Director of the Issuer

Acquirors⁽⁶⁴⁾ who also serve as directors of the issuer are subject to various obligations. They must not authorize a purchase of the issuer's shares which would contravene statutory restrictions or provisions in the constating documents.⁽⁶⁵⁾ The failure to dissent to such an action will render the director liable to the extent of the amount paid to repurchase the shares.⁽⁶⁶⁾

In addition to approving squeezeout transactions⁽⁶⁷⁾ and providing shareholders with a circular in takeover bid situations⁽⁶⁸⁾, directors must prevent their self-interest from conflicting with their fiduciary duties to the company.⁽⁶⁹⁾ Directors are therefore not permitted to vote on resolutions authorizing transactions in which they have a material interest.⁽⁷⁰⁾ They must also not use their powers for an improper purpose⁽⁷¹⁾ by reacquiring shares in order to strengthen their position as controlling shareholders.

B. Prohibition in the Face of Full Procedural Compliance

Minority shareholders have been successful in enjoining transactions in which they have not been afforded the benefit of these safeguards⁽⁷²⁾, because courts have always insisted on strict compliance with procedural formalities when private property is being expropriated.⁽⁷³⁾

However, they have sought injunctive relief on two additional grounds, even when the acquiror has complied strictly with all statutory requirements.

1. Expropriation in the Absence of Express Statutory Authority

Minority shareholders have argued that insiders should not be permitted to use amalgamations or arrangements as squeezeout mechanisms in the absence of express statutory language permitting the corporate repurchase of shares or compulsory acquisition.⁽⁷⁴⁾

Unfortunately, courts in different jurisdictions have reached apparently opposite conclusions on this issue, leaving companies hoping to go private

uncertain of the chances of a successful suit by disgruntled minority shareholders, and their solicitors unable to provide an unqualified opinion on the state of the law in this area. On one hand, the courts have labelled the work of the Legislature as "redundant"(75) for enacting more than one statutory provision which facilitates a minority squeezeout and have suggested that the principles of statutory construction(76) render compulsory acquisition as the exclusive technique for expropriating minority shares.(77) On the other hand, they have endorsed amalgamations(78) and arrangements(79) as legitimate forceout mechanisms whether or not the companies legislation of the jurisdiction contains a compulsory acquisition provision.

For example, in Ontario, the High Court was prepared to sanction the arrangement in Re Ripley International(80), provided the minority shareholders were given a larger sum of cash for their consolidated shares.(81) However, in Carlton Realty et al v. Maple Leaf Mills et al(82), Steele, J. issued an injunction restraining the controlling shareholders of

Maple Leaf Mills from proceeding with a meeting at which the amalgamation forceout was to be approved.(83)

In response to the claim by the plaintiffs that a transaction which resulted in their receiving redeemable preference shares rather than common shares of the amalgamated corporation was unlawful and contrary to the Ontario Business Corporations Act, the Court commented that:

"The effect of the amalgamation would be to deprive the Applicants of their common shares in a company and replace them with preference shares that could be redeemed at the will of the corporation. There is no power for this Corporation to redeem its common shares directly and there is no section of the Business Corporations Act (Ont.) that specifically provides for the squeezing-out of minority shareholders. There is a power in certain circumstances for a corporation to buy its own shares in the open market, but this denotes a voluntariness on the part of the shareholder to be willing to sell. A person is entitled to retain his property if he so wishes, except where there is a right held by another to forcibly take it. It matters not for this purpose what price the taker is willing to pay. I see no clear right under the Act to permit the taking of the applicants' common shares by the means proposed. It may be that there is such a right by implication under other sections...."(84)

The positions adopted by Courts interpreting the Canada Business Corporations Act are no less confusing. For example, in Neonex International Ltd. v. Kolasa et al.⁽⁸⁵⁾ and Jepson et al. v. The Canadian Salt Company⁽⁸⁶⁾, the Courts expressed their approval of amalgamation squeezeouts. To quote Bouck, J. in Neonex:

"Parliament decided to grant a controlling shareholder an easier way to force out the minority than was perviously the case.... The legality of the amalgamation is not in question. Its morality is for others to assess."⁽⁸⁷⁾

In contrast, in Alexander et al. v. Westeel-Rosco Ltd. et al.⁽⁸⁸⁾ Montgomery, J. enjoined an amalgamation designed to eliminate participation by the minority in the amalgamated company.⁽⁸⁹⁾ He concluded that:

"If the Legislature intended this section to encompass expropriatory powers, they should have said so in clear, unambiguous words. In my view, the section should not be construed to import such powers. They purport to do indirectly what they failed to accomplish directly on the takeover bid."⁽⁹⁰⁾

This too was the decision of the English Court in Re Hellenic and General Trust Ltd.⁽⁹¹⁾ Templeman,

J. held that an arrangement under section 206 of the U.K. Companies Act could not be used to expropriate minority shares when compulsory acquisition pursuant to section 209 was unavailable to the acquiror.⁽⁹²⁾ In reaching this conclusion, the Court rejected the earlier decision of Plowman, J. in Re National Bank Ltd.⁽⁹³⁾ and implicitly indicated that compulsory acquisition is the exclusive statutory technique for expropriating minority shares.⁽⁹⁴⁾

The ambivalence of the courts is understandable. On the one hand, most public shareholders may not deserve protection because they are an uninterested and distant lot of investors who desire the greatest return on their capital and care little about the effective management of the company.⁽⁹⁵⁾ On the other hand, going private transactions may create problems warranting their prohibition.⁽⁹⁶⁾

All freezeout techniques are coercive. On an amalgamation, a sale of assets or an amendment of the constating documents, minority shareholders are bound by "majority rule" to accept cash or debt in exchange for

their common shares. Although it appears that shareholders have the ability to make a rational decision whether they wish to sell their shares voluntarily when shares are purchased pursuant to a tender offer or by way of the open market, the threat of an impending amalgamation or the possibility of material diminution in market liquidity may prompt them to surrender the shares without proper consideration of the fairness of an offer.(97)

Moreover, controlling shareholders can dictate the terms of the freezeout. They can decide the time at which the transaction should take place, the amount of compensation and disclosure minority shareholders are to receive upon surrendering their shares and the manner in which the transaction is to be financed.(98) In effect, the investment expectations of public shareholders are defeated by actions taken by the insiders rather than by their own judgments or the general operation of the market place.

However, in seeking to enjoin a going private transaction, majority shareholders must accept the principle of "majority rule" as the recognized manner of governance in corporate affairs.(99) They have no

vested right to remain as shareholders of the issuer.⁽¹⁰⁰⁾ This principle is expressly acknowledged in new corporate legislation modelled on the Canada Business Corporations Act⁽¹⁰¹⁾ which favours greater flexibility and simplicity in instituting fundamental corporate changes over corporate democracy.⁽¹⁰²⁾ For example, these statutes contain provisions authorizing:

- (a) the compulsory acquisition of shares⁽¹⁰³⁾;
- (b) the corporate repurchase of shares at the behest of either the company⁽¹⁰⁴⁾ or a shareholder who objects to particular changes in the affairs or structure of the Company ("the dissent right")⁽¹⁰⁵⁾; and
- (c) an amalgamation of companies resulting in minority shareholders of the Amalgamating Companies receiving cash rather than shares⁽¹⁰⁶⁾.

They indicate that a shareholder has a right only in the value of his investment and not its form.⁽¹⁰⁷⁾

Contrary to the suggestions by the Courts in Maple Leaf Mills(108) and Westeel(109), it is irrelevant that the forms of consideration given to shareholders of an amalgamated company are different provided that, e.g. the redeemable shares or cash received by one shareholder are equal in value to the common shares given to another.(110)

In addition, minority shareholders may welcome the prospect of a squeezeout. It will provide them with either cash or redeemable securities of the issuer rather than shares which may be no longer marketable because of little or no demand by broker-dealers or institutional investors. Moreover, the acquiror might use a squeezeout technique which furnishes minority shareholders with tax treatment more favourably suited to their marginal rates than they would have received had they disposed of their shares without coercion.(111)

2. The Payment of Less Than Intrinsic Value for Minority Shares

What may damage investor confidence in the operation of the securities markets and impair the ability of companies to raise capital⁽¹¹²⁾ is the temptation for insiders to force minority shareholders to surrender their securities for an amount less than their intrinsic value.⁽¹¹³⁾

If securities markets operated perfectly⁽¹¹⁴⁾ and an investor were able to make fully informed and rational investment decisions, then the price a willing buyer would pay would in all likelihood represent the intrinsic value of his shares.⁽¹¹⁵⁾ Any purchaser wanting to pay less than this amount would not likely succeed in acquiring the shares because of competition from other buyers who might choose to offer more.⁽¹¹⁶⁾

Imperfections in Canadian public securities markets, however, do not enable shareholders of many reporting companies to command the appropriate price for their shares. Market prices are not always indicative

of intrinsic value and in recent years have often lagged behind.(117) This may be caused by failure of the company to pay dividends because of a substantial reduction in retained earnings for the fiscal year; inefficient use of the assets of the company; unawareness of the intrinsic value of the company's assets by the directors; an inefficient corporate capital structure; the existence of substantial tax losses; or little or no demand by institutional investors or broker-dealers for securities of the company distributed to the public.(118)

A purchaser in an active and efficient market may recognize that the shares of a public company are undervalued relative to their intrinsic value and decide to acquire them at a premium in excess of market price. Consequently, minority shareholders who choose to tender their shares in a takeover bid will receive compensation more closely reflecting the intrinsic value of their shares. The size of the premium paid will depend in part on the number of rival bidders in the market place; the intention of the acquiror to liquidate the target company or maintain it as a going concern; the manner in which he will put the assets of the company to use if run as a going concern; and the benefits the acquiror ex-

pects to receive as a result of the transaction.(119)

Public shareholders faced with the prospect of a squeezeout, however, are rarely able to rely on the operation of the market place for assistance. Many companies deciding to go private⁽¹²⁰⁾ do not have a large enough float of securities in the hands of a sufficient number of public shareholders to support a true market. In fact, they often issued shares to the public even though it was unlikely that a reasonable active market would ever exist.⁽¹²¹⁾

In these circumstances, the market place is unable to perform its function and set an appropriate price for minority shares. Moreover, the controlling shareholders will not pay a premium in excess of market price in the absence of competitive bidding; the less money spent on the expropriation of minority shares, the more that will be available for personal use once the issuer has gone private.

The inefficient operation of Canadian securities markets should not enable insiders to use coercion to acquire the property of the minority for less than their intrinsic value, i.e. what a hypothetical purchaser would pay in a fully efficient and liquid market with adequate information.(122)

Where minority shareholders must submit to the will of the majority in corporate affairs, they also must be given the opportunity to contest the unfairness of the terms of the squeezeout and the fact that only insiders may have access to vital information relating to the intrinsic value of their shares.

C. The Path to Intrinsic Value: The Enactment of Rules Creating Artificial Market Conditions

Lawmakers have been continuously concerned with preventing the perpetration of fraud on(123) minority shareholders. Companies legislation contains rules which ensure that the self-interest of corporate management will not dominate concerns for the welfare of the company and its remaining shareholders.(124)

Transactions are only prohibited if

- (1) minority shareholders are unable to look to the operation of Canadian securities markets or existing legal rules for effective relief from the prejudicial conduct of management; and
- (2) the consequent abuse to the minority shareholders is believed to be greater than the resulting socio-economic benefits in which they share.

Going private transactions, therefore, should be permitted in jurisdictions which have enacted rules creating artificial market conditions for minority shareholders, thereby enabling them to command payment of an amount at least approximating the intrinsic value of their expropriated shares. Currently in Canada there are two different approaches to achieving this end.

1. Statutory Remedies

Companies legislation of certain jurisdictions gives shareholders the opportunity to sell their shares for "fair value" in various circumstances. The dissent or appraisal right permits a shareholder who refuses to

participate in a venture beyond its initial contemplation⁽¹²⁵⁾ to dispose of his shares to the issuer for "fair value", even though there is little or no trading done in the company's securities or where the market price of the shares has dropped in reaction to the transaction which the shareholder finds objectionable before he has a chance to sell.⁽¹²⁶⁾

Shareholders⁽¹²⁷⁾ may also use the oppression remedy⁽¹²⁸⁾ to obtain a court order⁽¹²⁹⁾ directing the purchase of their shares by the issuer or its controlling shareholders⁽¹³⁰⁾ when they believe themselves to be suffering from an actual⁽¹³¹⁾ course of conduct by management which is oppressive⁽¹³²⁾ or unfairly prejudicial.⁽¹³³⁾

In certain jurisdictions, courts may be required to approve an amalgamation,⁽¹³⁴⁾ reduction of capital,⁽¹³⁵⁾ or an arrangement⁽¹³⁶⁾ to ensure that minority shareholders are being expropriated on fair terms.

Lastly, shareholders who refuse to tender their shares in compulsory acquisition proceedings for the amount of consideration offered on the preceding takeover bid may petition the court to "order otherwise"(137) or fix the "fair value" of their shares.(138)

(a) The Problems Inherent in Judicial Evaluation

Shareholders may not always receive optimum protection in proceedings which charge the courts with the responsibility of assessing the fairness of a transaction. Courts have scarcely gained the reputation as defenders of dissentients.(139) Too often they have tended to rubber stamp the decisions of the majority without first assessing the fairness of the transaction.(140) To quote Lord Cooper:

"Nothing could be clearer and more reassuring than these formulations of the duties of the Court. Nothing could be more disappointing than the reported instances of their subsequent exercise. Examples abound of the refusal of the Courts to entertain the plea that a scheme was not fair or equitable, but it is very hard to find in recent times any

clear and instructive instance of the acceptance of such an objection." (141).

The most courts usually have done is ensure that the prescribed formalities have been strictly observed and that decisions have been reached after full and fair disclosure. (142) While paying homage to the "business judgment" rule (143) and acknowledging that the internal affairs of the corporation are within the purview of the majority and outside their jurisdiction, (144) courts have generally refrained from assessing the fairness of a scheme. They have concluded that judicial procedures are ill-suited to assess properly the economic merits of a transaction, to make accounting investigations and to take valuations necessary for reaching a sound judgment. (145)

It is therefore difficult to imagine how a court will reach any precise calculation of intrinsic value. With respect, it is

submitted that judges have neither the expertise nor the staff to make this complex determination properly.⁽¹⁴⁶⁾ The conventional valuation model of securities analysts, both practical and academic⁽¹⁴⁷⁾, operates on the assumption that the enterprise will continue as a going concern⁽¹⁴⁸⁾ and identifies its "value" as the present value of its expected earnings.⁽¹⁴⁹⁾ How might the court reach any accurate conclusions about intrinsic value when there is argument among finance experts about how to define the "earnings" to be capitalized,⁽¹⁵⁰⁾ and how to compute those earnings⁽¹⁵¹⁾ as well as how to take growth and risk into account in translating expected earnings into present value? Furthermore, the calculation of any premium above market value may prove even more complex if the courts must take into account additional imponderables such as: any unfavourable tax consequences suffered by minority shareholders as a result of the

ability of controlling shareholders to dictate the manner in and time at which the squeezeout will occur⁽¹⁵²⁾; any benefits received by controlling shareholders incidental to the ownership of shares in a private company⁽¹⁵³⁾; and any savings accruing to the controlling shareholders from the purchase of minority shares out of the funds of the company in which they represent equity.⁽¹⁵⁴⁾

Assuming that the court will be able to perform the analysis required and compute one true figure for the intrinsic value of minority shares, it may not receive the benefit of all the information it may need. What compounds problems is the adversary process where "truth" is not the focal point of the parties. Whereas the issuer will only put forward information which justifies its valuation and to which it alone has access, it is unlikely that minority shareholders will be able to afford or even be successful in obtaining material about such intangibles as

sales figures, research and development results and cost reductions, which are essential components of the firm's future earnings.⁽¹⁵⁵⁾ Even if the parties reveal all the information available to them,⁽¹⁵⁶⁾ it will indeed be difficult for the Court to conclude which valuation is correct because two or more sets of statements about the past and future worth of the company will be presented by experts of the litigating parties who will differ about the quantity and direction of information and will seek to destroy each other's credibility.⁽¹⁵⁷⁾

Finally, resort to the courts for calculation of the intrinsic value of shares will only be worthwhile for wealthy shareholders or those with a large sum of money at risk. Mounting legal and accounting fees and the lengthy delay in the receipt of funds⁽¹⁵⁸⁾ will not often justify shareholders challenging the fairness of the compensation offered in a squeezeout, in spite of statutory provisions designed to encourage

access to the courts in these circumstances.⁽¹⁵⁹⁾ In addition, the mechanics of the processes intended to facilitate claims for "fair value" by shareholders are complex and technical. For example, shareholders must file properly drawn notices of dissent⁽¹⁶⁰⁾ within short limitations periods or lose the opportunity to dispute the adequacy of any amount offered by the issuer.⁽¹⁶¹⁾ Moreover, the onus of proving the unfairness of the offer is generally thrust on minority shareholders in these proceedings.⁽¹⁶²⁾

(b) The Response of the Courts to date

In spite of these problems, courts over the last five years have demonstrated their willingness to assist shareholders in challenging the inadequacy of any compensation offered in a squeezeout⁽¹⁶³⁾ and obtaining payment of an amount at least equal to the intrinsic value of their shares. For example, shareholders involved in dissent⁽¹⁶⁴⁾,

oppression⁽¹⁶⁵⁾, compulsory acquisition⁽¹⁶⁶⁾ and court approval⁽¹⁶⁷⁾ proceedings have been successful recently in arguing that the market price of publicly listed shares is not always an accurate determinant of value because of thin trading and a relatively low public float. Courts have also recognized that intrinsic value should reflect any increased tax burden for the minority because minority shareholders are often deprived of the opportunity to dispose of their shares in the manner or at a time which would best suit their tax position.⁽¹⁶⁸⁾

One case specifically worthy of mention is Re Whitehorse Copper Mines Ltd.: Hudson Bay Mining and Smelting Co. Limited v. Lueck and Weinstein.⁽¹⁶⁹⁾ After acquiring 90.97% of the Whitehorse shares not already held by it or affiliated companies, Hudson Bay chose to exercise its right to expropriate the outstanding shares by compulsory acquisition pursuant to the provisions of the Canada Business Corporations Act. Rather than accepting the takeover bid price of

\$4.00, 59 shareholders applied to court, seeking a determination of the fair value of their shares.

After considering complex evidence relating to wildly fluctuating market prices of copper and molybdenum and reviewing conflicting valuations of the minority shares presented by the litigating parties, McEachern C.J. challenged the accuracy of the appraisals put forward by two reputable investment houses and concluded that \$6.50 more accurately reflected the intrinsic value of each of the shares.⁽¹⁷⁰⁾

Nonetheless, some courts may have been too zealous in their calculation of "fair value". For example, in Re Ripley International⁽¹⁷¹⁾ Southey, J. refused to approve an arrangement resulting in the expropriation of minority shares because its terms were unfair. He stated that:

"The small shareholders who would not be permitted to continue under the proposed arrangement were invited originally to invest in a public organization. If their shareholdings are now to be eliminated against their wishes in order to permit the applicant - and that means the few continuing shareholders and the applicant - to enjoy tax savings as a private corporation, then the

price to be paid for their shareholdings would not be fair and reasonable, in my judgment, unless it reflected a pro rata participation in the anticipated tax savings. In other words, their shareholdings should be valued as if they would have been able to remain as shareholders in the newly constituted private corporation."(172)

With respect, it is submitted that a determination of the intrinsic value of minority shares should not include an amount equaling any portion of the benefits incidental to the ownership of shares in private company of which controlling shareholders may partake following a going private transaction. The problems caused by the imperfections of the market place are irrelevant in this context. The controlling shareholders or the acquiring company which they control are "special purchasers"(173) who are willing to pay a higher price for minority shares than other purchasers would be. Purchasers in the market place would not benefit from the ownership of any outstanding shares of a reporting company in the same fashion as a controlling shareholder who held all the remaining shares. While the willing purchaser in the market place might pay a premium in excess of market value for minority shares because he has concluded that the shares are a sound

investment given their intrinsic value, it is only the controlling shareholders who would consider paying the minority any amount for private company benefits such as tax advantages.(174)

It therefore seems unreasonable to force insiders to pay the minority shareholders an additional amount for their shares which they would not otherwise command in a fully efficient market. In fact, valuation principles suggest that if there is only one special purchaser for a particular asset, it is assumed that he will pay only slightly more than ordinary purchasers would pay to ensure that he is the successful bidder. The fact that a special purchaser may be willing to pay a substantial amount more is irrelevant in the determination of intrinsic value.(175)

2. The Ontario Proposals(176)

Ontario Policy #3-37, section 163 of the Ontario Securities Act Regulations and section 188 of the Draft Ontario Business Corporations Act (collectively, "the Ontario Proposals") neither cast the responsibility of calculating the intrinsic value of

minority shares on the courts nor set some generalized proxy to be added as a premium to the market price of these shares.(177) They protect the minority by requiring the issuer to provide shareholders with extensive information relating to the intrinsic value of their shares(178) (including a valuation)(179) and any benefits accruing or potentially accruing to the controlling group.(180) Consequently, minority shareholders may obtain equal access to material information about the affairs of the issuer and the conduct of its management, without having to initiate expensive proceedings to acquire this protection.

Furthermore, the Ontario Proposals enable shareholders to make their own investment decisions. They require approval of every transaction by at least a majority(181) of the minority to negate the element of coercion which almost invariably forces a great majority of shareholders and even dissentients(182) to accept an offer made at a premium above market value. The Ontario Securities Commission is therefore not charged with the responsibility of assessing the fairness of every

transaction, even though it is possessed with far greater expertise and administrative capabilities than the courts.(183)

It is not the intention of these provisions to create efficient market conditions where information flows freely, there are many participants and no institutional imperfections or corrupt market practices exist. They merely attempt to ensure that the imperfections of Canadian securities markets often resulting in the lack of an active market for shares do not prevent shareholders from making an informed decision about the sufficiency of the consideration they are offered.

Drafters of the Ontario Proposals, however, were also sensitive to the fact that the application of these rules would not be appropriate in all circumstances. The Ontario Securities Commission is prepared to grant exemptions, specifically where:

1. the costs of valuation would be onerous to the issuer when there are minimal Ontario shareholdings or a minimal minority position

exists and a statutory or contractual appraisal right is available to the minority(184);

2. minority shareholders are persons who are generally contemplated by securities legislators to have "close bonds of association" with the issuer or who have little "need to know" further information about the affairs of the issuer in order to make a rational investment decision(185);
3. the disclosure of the required information to security holders would cause a detriment to the issuer that would outweigh the benefit of information to prospective recipients(186);
4. where the market price of minority shares may be considered a substantial reflection of the intrinsic value because it was arrived at in a genuine arms length transaction (for example, in a takeover bid resulting in control of the corporation changing hands)(187);

5. the issuer has been forced to comply in other jurisdiction with more stringent disclosure requirements than the Ontario Proposals.
(188)

In spite of their providing shareholders with the potential to command the intrinsic value of their shares at no cost, the Ontario Proposals have not escaped criticism. The problems have arisen chiefly in connection with calculation of the "majority" and "minority" groups.(189)

For example, minority shareholders may accept a tender offer even though they may consider it unfair because they fear the likely success of the offer, adverse tax consequences and the possibility of being left holding an illiquid security. It has also been argued that the majority of the minority test ought not to be applied where one large minority shareholder can control the vote of the minority for its own interest(190) or where there are so few minority shareholders that approval by a majority may prove difficult to obtain.

In answer to these criticisms, the Ontario Securities Commission has stated that it will not require approval by a majority of the minority where the controlling shareholder already holds in excess of ninety percent of the outstanding and issued shares and a statutory or contractual appraisal right is available to the minority.(191)

The Commission has also set out the following guidelines to clarify who constitutes a majority or two-thirds of the minority:

1. In a two-stage transaction in which an offer to purchase is followed by a going private reorganization, those who accept the offer at stage one may be included in the calculation of the majority test, if the intention to effect the going private transaction was clearly disclosed at the time of the stage one transaction and a full valuation was also provided at the time of the stage one transaction.(192)

2. If, however, in a two-stage transaction, the income tax consequences to the shareholder differ significantly between the acceptance of the stage one offer and participation in the stage two going private transaction, those who accept the offer at stage one should be included in the calculation of the minority only if the stage one offer is kept open until at least 7 days after the vote on the stage two transaction.(193)

3. The shareholdings of directors and senior officers of the corporation will generally be aggregated with those of the controlling shareholder on the assumption that their respective interests are common. However, where evidence indicates that the directors or senior officers are independent of the controlling shareholder and the transaction has the same consequences for them as for the public shareholders, they will be considered to be minority shareholders for the purposes of this test.(194)

4. A majority or two-thirds of the minority refers to a majority or two-thirds of the minority held shares represented in person or by proxy at the general meeting.(195)
5. Separate majority of the minority tests may be required in the same transaction where the minority is seen to include two distinct interest groups.(196)

The Draft OBCA states that a determination of the total number of votes cast in favour of or against the transaction, for the purposes of the majority of the minority test, should disregard:

- "i. securities held by affiliates of the corporation;
- ii securities, the beneficial owners of which will receive, consequent upon the going private transaction, a per security consideration greater than that available to other holders of affected securities of the same class;
- iii securities the beneficial owners of which, along or in combination with others, affect materially the control of the corporation and who, prior to distribution of the information circular, entered into an understanding that they would support the going private transaction."(197)

D. Enjoining a Going Private Transaction in the
Absence of Rules Creating Artificial Market
Conditions

Provided an acquiror has complied strictly with all statutory procedural requirements, squeezeout transactions should only be prohibited in jurisdictions where the preceding rules creating artificial market conditions are unavailable to minority shareholders. It is only in the Maritimes or Quebec⁽¹⁹⁸⁾, therefore, where shareholders should be successful in obtaining the assistance of a judicial or administrative body to enjoin a transaction if the terms are unfair.

1. Judicial Relief

A court may order the issuance of an injunction rather than the payment of damages⁽¹⁹⁹⁾ when:

- (a) the minority shareholders have not been given the opportunity to vote on a transaction as a separate class ("Majority of the Minority Test");
- (b) the transaction lacks a proper corporate purpose ("the Proper Corporate Purpose Test");

(c) either the controlling shareholders or directors of the issuer have committed a breach of a fiduciary duty owed to the company and to the minority shareholders. ("Fiduciary Duties").

(a) Majority of the Minority Test

The "majority of the minority" test first attracted attention when the decision of Templeman, J. in Re Hellenic & General Trust(200) expressly recognized that all companies are no longer operated as quasi-partnerships and that controlling shareholders do not always have a community of interest with the minority. Based on these commercial principles the Court refused to sanction a scheme of arrangement involving the expropriation of minority shares because a majority of the independent(201) minority shareholders had not approved the transaction - even though the company had only issued one class of common shares.(202)

The Hellenic test has not been adopted by Canadian courts⁽²⁰³⁾ even though there has been opportunity for its application. For example, in Re Simco Ltee⁽²⁰⁴⁾, Dugas J. approved an arrangement involving the elimination of cumulative dividends on the preferred shares of the company provided that the sole dissenting shareholder surrendered his shares for an amount equal to their par value and the accumulated dividends thereon.⁽²⁰⁵⁾

The court chose not to enjoin the transaction on the grounds that the sole dissenting shareholder had no opportunity to vote at the general meeting as a member of a separate class, even though he was the only preference shareholder who was not also a common shareholder and who thereby stood to receive a substantial amount more on liquidation following elimination of the dividends in arrears.⁽²⁰⁶⁾

(b) The Proper Corporate Purpose Test(207)

The "proper corporate purpose" test was formulated by American courts to prevent insiders from engaging in a naked grab for power without further jurisdiction. It implicitly accepts the proposition that a shareholder has a right to continued equity participation which may be abrogated only when there is a proper corporate purpose for a squeezeout transaction.

Unfortunately, there is no judicial consensus as to what constitutes a "proper corporate purpose". The views of American state(208) court judges have differed considerably, resulting in the following list of legitimate business reasons for a squeezeout: substantial savings in housekeeping and shareholder servicing costs(209), the danger of financial collapse(210); elimination of former employees(211); elimination of conflicts of interest(212); operating efficiencies(213); tax savings(214);

and the facilitation of long term debt financing.(215) Some courts however, have decided that the elimination of the minority is not a proper corporate purpose.(216)

There is some indication that Canadian courts may require the demonstration of a proper corporate purpose in squeezeout transactions. In Westeel, Montgomery, J. rejected the argument of the defendants that an affiliate of the acquiror took part in the transaction in order to reduce the tax impact of the transaction on the minority shareholders and concluded that the elimination of publicly held shares was the sole reason for the amalgamation.(217)

In reaching his decision, to enjoin the transaction Montgomery, J. relied on two earlier decisions in which courts refused to permit the compulsory acquisition of minority shares. In Re Bugle Press(218), two shareholders of a publishing company, who each owned 45% of the issued capital, incorporated

a new company in which they each held 50% of the issued shares. The new company subsequently made a takeover bid for all outstanding and issued shares of the publishing company at L 10 per share, a figure based on an independent valuation of the share capital.

Unlike the two controlling shareholders, the person who held the remaining 10% of the issued capital of the offeree company declined the offer and sought a declaration to prevent the new company from acquiring his shares pursuant to the compulsory acquisition provisions contained in section 209 of the U.K. Companies Act.

At Trial, Buckley, J. held that the offeror had failed to discharge the onus of proving that the price at L 10 per share was fair and ordered that the minority shareholder was entitled to the relief he sought. (219)

On appeal, Lord Evershed stated that the minority shareholder had demonstrated that the court should "order otherwise" and not permit the expropriation of his shares. He viewed the transaction as a sham intended solely to eliminate the minority shareholder because there was substantial identity of interest between the controlling shareholders and the offeror.(220) The controlling shareholders had only proposed that their wholly owned associate company expropriate the minority shares of the publishing company because section 209 could not be used by individuals to acquire the outstanding 10% of the shares.(221)

Similarly, in Esso Standard (Inter-Amer) v. J.W. Enterprises Inc.(222), the Supreme Court of Canada upheld the decision of the Ontario Court of Appeal to "order otherwise" in compulsory acquisition proceedings under section 136 of the Canada Corporations Act.(223)

The facts of the decision resemble those in Bugle Press. Esso, a wholly owned subsidiary of Standard Oil ("Standard") made a takeover bid for all the outstanding shares of International Petroleum Corporation Limited (International) which was incorporated under the Canada Corporations Act. Esso expected to compulsorily acquire any outstanding minority shares of International following the takeover bid because Standard, which was also the owner of 90 per cent of the issued share capital of International, indicated its intention to the accept the offer.

A number of dissenting shareholders sought a declaration that Esso was not entitled to acquire the remaining shares because holders of less than 90 per cent of the shares, otherwise held by Standard, had accepted the offer.

Judson, J. held that the whole proceeding was a sham intended solely for the purpose of

expropriating minority shares on terms set by the majority because of the substantial identity of interest between Standard and Esso.(224)

With respect, it is submitted that Canadian courts should not adopt the "proper corporate purpose" test for a number of reasons:

1. The motives for a squeezeout are irrelevant so long as shareholders are adequately compensated for their shares. Contrary to the decision in Singer v. Magnavox(225), a shareholder's right is exclusively in the value of his investment and not its form.
2. The investing public is rarely concerned with the economic justifications of going private transactions. At the risk of sounding cynical, it is submitted that most public shareholders are merely interested in the greatest return on their

investment and do not care whether they have obtained their yield from the ownership of shares in one company rather than another.(226)

3. Commonwealth courts have already imposed equitable restraints on the voting powers of controlling shareholders. For example, amendments to the corporate constitution must be made "bona fide in the best interests of the company".(227) To require controlling shareholders to demonstrate a proper corporate purpose is redundant.
4. Minority shareholders have criticized going private transactions because the actions taken by controlling shareholders deprive them of their ability to make investment decisions. It is no less objectionable that courts will be able to make investment decisions on behalf of the minority in determining whether a transaction has a proper corporate

purpose. Minority shareholders may welcome the purchase of their shares when there is little or no market for them.

5. The adoption of a "proper corporate purpose" test will lead to the creation of a large body of case law defining that phrase and will force Canadian courts to make a case by case determination of the economic merits of many squeezeout transactions. In the past, Canadian courts have tended not to scrutinize the validity of decisions made by directors of the company because they have assumed that management can better assess what transactions are in the best interests of the company.(228)

6. The Bugle Press and Esso Standard decisions do not stand for the legal principle that squeezeouts may not take place in the absence of a proper corporate purpose. In reaching his conclusion in

Esso Standard to "order otherwise", Judson, J. stated that the transaction was not a "true takeover⁽²²⁹⁾ because Esso had not acquired 90 per cent of the independently held shares and not because the transaction lacked a business purpose. Many statutes which contain compulsory acquisition provisions now expressly state that 90% of the shares must be held by persons other than the offeror or parties dealing at non-arm's length with the offeror.⁽²³⁰⁾

(c) Fiduciary Duties

(i) Directors' Duties

Directors owe fiduciary duties to the company alone and not to the individual members or to a person who has not yet become a member, such as a potential purchaser of shares.⁽²³¹⁾ The breach of such a duty entitles the shareholders or, in certain jurisdictions, a wider

class of persons,(232) to sue derivatively(233) on behalf of the company. Access to court for aggrieved parties is far easier and less costly now thanks to the statutory simplification of the "procedural thicket"(234) surrounding the rule in Foss v. Harbottle(235) and the equitable jurisdiction of the Court to indemnify a plaintiff against the costs of a derivative action.(236)

Minority shareholders who are forced to surrender their shares for less than intrinsic value without the benefit of sufficient disclosure may attempt to enjoin a going private transaction because the controlling shareholders, in their capacity as directors, have violated a number of statutory and common law rules designed to prevent management from diverting corporate opportunities to themselves.

(A) Duty to Act Honestly and In
Good Faith

A number of jurisdictions contain statutory provisions which require directors to act honestly and in good faith with a view to the best interests of the company.(237) Even though the established case law focuses on profit maximization as what constitutes the "best interests of the company", (238) directors are also required to consider the interests of all the shareholders who have elected them. Consequently, while the directors may authorize a going private transaction to eliminate shareholder servicing costs, they must also endeavour to fix a "fair price" for any minority shares which will be expropriated.

(B) Duty to Exercise Power for a
Proper Purpose (239)

A common law incident of a director's fiduciary duty is the requirement that he must exercise his powers only for those purposes for which they were conferred. (240)

Directors, therefore, must not authorize a reduction of capital or an amalgamation primarily to increase their equity participation in the issuer, even though they believe that such transactions are in the best interests of the company. (241)

Unfortunately, minority shareholders will be hard pressed to prove that the motives of the directors were improper. The case law illustrates that the actions of the directors will not be impugned, notwithstanding that the court may

suspect that the directors have abused their powers, unless it can be shown that the directors have in fact acted for an improper purpose.(242)

(C) Duty of Loyalty

Directors must not put themselves in a position where their personal interests conflict with a duty of loyalty to the company.(243) Moreover, they must not profit from their position as fiduciaries.(244) Directors of the issuer, therefore, must refrain from authorizing an amalgamation squeezeout between the issuer and a company of which they are also the directors. As fiduciaries of the shareholders of the issuer, the directors must endeavour to secure the most profitable share-cash/debt

exchange ratio for the minority. However, these same directors must also maximize the profit of the other amalgamating company and offer as little as possible to those persons whose shares of the issuer will be expropriated.(245) In fact, there is recent case law which suggests that directors must not sit on the boards of interlocking companies, let alone exercise their voting powers in these circumstances.(246)

(ii) The Majority-Minority Duty

It has long been recognized as an equitable principle in American corporate law that controlling shareholders stand in the position of absolute dominance over the interests of the minority and are required to demonstrate good faith and fairness when exercise their voting rights.(247) While Commonwealth

courts permit minority shareholders to sue the insiders or the directors of the issuer personally for the infringement of their rights as members⁽²⁴⁸⁾, they have never accepted the notion that the controlling shareholders owe a fiduciary duty to the Company.⁽²⁴⁹⁾ Although they have imposed equitable restraints on the right of insiders to vote their shares with abandon at the general meeting,⁽²⁵⁰⁾ the Courts have insisted that a share is an item of property which shareholders may use to maximize their own interests.⁽²⁵¹⁾

Recent decisions, however, indicate that courts are beginning to acknowledge the absence of any community of interest among shareholders of a public company and the need to restrict insiders from authorizing transactions from which they will benefit personally to the detriment of the Company or the minority shareholders. For example, in Goldex

Mines Ltd. v. Revill⁽²⁵²⁾, the Ontario Court of Appeal held that directors owe a fiduciary duty to shareholders of a company not to furnish false information in a disclosure document and stated that "it has long been the law that the minority may sue personally in respect of an oppressive and unjust exercise of power".⁽²⁵³⁾ In Farnham v. Fingold⁽²⁵⁴⁾, the plaintiff sued for damages alleging that he should share in the premium paid to the defendants on the sale of their control block of shares. Morand, J. stated that the action was premised on the existence of a fiduciary obligation in the control group towards the minority, and dismissed a motion brought by the defendants who argued that the plaintiff had no cause of action.⁽²⁵⁵⁾

Recognition of a fiduciary duty owed by controlling shareholders to minority

shareholders is potentially ripe for development in squeezeout transactions because the lack of any community of interest between shareholders is quite apparent. Insiders can use their voting power to determine the length of time minority shareholders may remain as investors in the issuer's securities. They can dictate the amount of consideration offered to the minority and often use corporate funds to indirectly increase their ownership in the issuer. It is therefore hardly surprising that the courts in both Maple Leaf Mills⁽²⁵⁶⁾ and Westeel⁽²⁵⁷⁾ queried whether "the majority shareholders in promoting and approving the scheme "were committing a breach of a fiduciary duty owed to the minority."⁽²⁵⁸⁾

2. Administrative Relief

Minority shareholders may petition an administrative body rather than the courts to enjoin a

squeezeout transaction because their application will be processed with greater efficiency and expertise and at less expense. In addition, to their other enforcement powers, (259) provincial securities regulatory agencies have the authority to issue a cease trading order (260) or deny an issuer exemptions from registration or prospectus requirements (261), while a Stock Exchange may suspend the trading in listed securities through its facilities. (262)

(a) The Cease Trading Order (263)

The cease trading order is a "blunt instrument" which may inflict great harm. (264) It may damage the reputation of the issuer and depress the price of its securities even though the reason for the cessation of trading has no connection with any event, which objectively considered, would reduce the price of the stock. (265)

Moreover, the cease trading order prevents many investors who hold securities of the issuer from disposing of them, even though the

order is intended to restrain the activities of a few.

Recognizing the seriousness of this remedy⁽²⁶⁶⁾, the Ontario Securities Commission has indicated in a policy statement⁽²⁶⁷⁾ and two recent decisions⁽²⁶⁸⁾ that it will only order the securities of an issuer going private to cease trading when the terms of a squeezeout transaction which involves significant violations of securities legislation are manifestly unfair and there is no other sufficient remedy available to protect shareholders.⁽²⁶⁹⁾

(b) The Denial of Exemptions⁽²⁷⁰⁾

An issuer which distributes its redeemable securities to minority shareholders in exchange for their common shares on a takeover bid⁽²⁷¹⁾, an amalgamation⁽²⁷²⁾, share reclassification⁽²⁷³⁾ or consolidation⁽²⁷⁴⁾ squeezeout is not required to

comply with registration⁽²⁷⁵⁾ and prospectus⁽²⁷⁶⁾ provisions contained in provincial securities legislation.

Securities regulatory bodies, however, may deny such exemptions to any person or company if, in its opinion, such action is in the public interest⁽²⁷⁷⁾, thereby prohibiting these parties from trading their securities anywhere in the Province. For example, the Ontario Securities Commission has exercised its discretion to deny prospectus, takeover bid or issuer bid exemptions⁽²⁷⁸⁾ in circumstances where they concluded that there has been an abuse of exemptions⁽²⁷⁹⁾, contravention of securities legislation, regulations or policy-statements⁽²⁸⁰⁾, contravention of an Exchange's requirements⁽²⁸¹⁾, or the commission of a breach of other statutes.⁽²⁸²⁾

Although there are no reported decisions of any denial of the exemptions otherwise

available to an issuer in any squeezeout transaction, the broad and sweeping language in the Loebex⁽²⁸³⁾ and Cable-casting⁽²⁸⁴⁾ decision, regarding what constitutes "prejudicial to the public interest" may signal a movement by securities agencies in this direction.⁽²⁸⁵⁾

IV. Conclusion: Towards a Rational Scheme of Regulating Going Private Transactions

A. The Regulatory Framework Proposed for Canada ⁽²⁸⁶⁾

Insiders should be permitted to expropriate minority shares using any squeezeout technique regardless of whether a statutory compulsory acquisition right exists, provided that the minority shareholders are given the opportunity to command payment of an amount at least equal to the intrinsic value of their shares.

Residents of Ontario who are shareholders of "offering corporations"⁽²⁸⁷⁾ incorporated in the province are protected in two ways.⁽²⁸⁸⁾ They may

either make their own decisions about the fairness of an offer after first reviewing extensive information provided by the acquiror about the affairs of the Company or they may obtain a judicial determination of the intrinsic value of their shares in dissent, oppression or compulsory acquisition proceedings, as do shareholders of federal⁽²⁸⁹⁾, Manitoba, Saskatchewan or British Columbia companies. Minority shareholders of Alberta companies may seek the protection of the Court following arrangement, amalgamation, reduction of capital or compulsory acquisition proceedings.

It is only in the Maritimes or Quebec that shareholders should be successful in enjoining a going private transaction when they consider the consideration offered to be unfair⁽²⁹⁰⁾ i.e. less than intrinsic value. Courts in these jurisdictions should then only order the issuance of an injunction assuming strict compliance with statutory procedural formalities on the grounds that the directors or controlling shareholders of the issuer have committed a breach of fiduciary obligations to the company or the minority has failed to vote as a separate class, even though the company has

authorized and issued only one class of shares.

B. A Similar Alternative: The Brudney-Chirelstein Analysis

The foregoing analysis differs slightly from the classification of freezeouts suggested by Professors Brudney and Chirelstein.⁽²⁹¹⁾ They argue that all freezeouts are not alike and that shareholders require varying degrees of protection in (1) the two-step merger; (2) the pure going private transaction; and (3) the merger of long held affiliates.

The "two step merger" involves an integrated squeezeout plan carried out by an arm's length acquiror. Following a tender offer for all the minority shares, an amalgamation is used to eliminate any outstanding shares of those persons who failed to accept the terms of the takeover bid. Brudney and Chirelstein have concluded that the extensive negotiations which take place in an arm's length transaction and the operation of the market place will ensure that the takeover bid price will reflect the intrinsic value of minority shares and that

shareholders in this transaction only require protection from "whipsaw".(292) To prevent shareholders rushing to accept a tender offer because they fear being frozen out at a lower price on the amalgamation if the bid for control succeeds, the authors propose that tender offerors who contemplate a second step merger be required to announce their future intentions at the time the takeover bid is made and offer to pay a price for shares equal to the amount offered on the initial tender.(293)

Brudney and Chirelstein, however, argue for the prohibition of the pure going private transaction in which controlling shareholders use an associate or affiliate to expropriate minority shares often at less than their intrinsic value, in order to partake of those benefits only available to shareholders of a private company.(294) "The absence of social benefit, the strength of fiduciary obligation [owed by the controlling shareholders to the minority] and the danger of unpoliceable abuse"(295) in the transaction form the basis of their conclusions.

A proposed merger between a parent and subsidiary it has controlled for an extended period of time is to be distinguished from a "pure going private transaction" because of the "private and social benefits" it offers. Quite often, the fact that an amalgamation of two companies can result in a larger overall value for the two firms than the sum of their value as separate entities makes it difficult to deny that a business purpose for the transaction does exist.⁽²⁹⁶⁾ To forestall self-dealing by controlling shareholders, however, the authors propose that this transaction should be subject to a rigorous "fairness" test which dictates that the recipients of receive common stock of the parent or sufficiently valuable consideration to enable them to reacquire the same proportionate interest in the parent that they would have possessed had the consideration received been common stock alone.⁽²⁹⁷⁾

There is considerable merit to the Brudney-Chirelstein analysis. It seeks to isolate and weight the socio-economic benefits present in each type of transaction against the costs of regulation and

acknowledges that motive is generally an irrelevant consideration in the determination of the degree of regulation required. Moreover, it recognizes that squeezeout transactions should not be prohibited when minority shareholders are given the opportunity to command payment of at least an amount approximating the intrinsic value of their shares.

However, in spite of its merits, this analytical framework should not be adopted in Canada. Brudney & Chirelstein base their argument for prohibition of pure going private transactions on the inability of controlling shareholders to determine the intrinsic value of minority shares and the consequent inability to compensate the minority fairly for its investments:

"If taking the firm private increases its value by reducing accounting and legal fees and the cost of relating to public shareholders, determining the displaced shareholders' fair share of the increment thus expected to result from their displacement presents intractable problems. To quantify the benefits embodied in the explicit justifications offered for going private would be difficult enough. But if account must also be taken of the unspoken benefits, such as tax advantages and other perquisites that would accrue to the controlling shareholders as a result of being

freed of public accountability, the problem of implementing a fairness standard becomes close to being insurmountable." (298)

With respect, in spite of the valuation problems reviewed earlier in this paper, it is submitted that the complex calculation of intrinsic value will not be as difficult for the courts as the authors suggest because "fair value" should not include any valuation of the "unspoken benefits" available to insiders following a going private transaction. (299) More importantly, to prohibit pure going private transactions would deny many minority shareholders the chance to gladly surrender their shares in an otherwise illiquid market and to reinvest the proceeds in an investment promising a greater yield. At least the two Canadian alternatives which create artificial market conditions provide the shareholders with this opportunity.

C. The Prospect of Successful Regulation

Once it is apparent to controlling shareholders that the minority is effectively protected, going private transactions on unfair terms should abate. Insiders will then be quick to ensure that minority shareholders receive consideration at least equal in

value to the intrinsic worth of their shares or sufficient information to make an informed investment decision.(300)

A going private transaction, however, constitutes only one example of techniques enabling the majority to act contrary to the best interest of the minority. As the community of interests between shareholders has decreased, the ingenuity of controlling shareholders in using their voting strength to their own advantage has grown. Unfortunately, judicial, legislative and administrative bodies have not responded very quickly to the calls by minority shareholders for assistance.(301) It is hoped that the abuses suffered by the minority in going private transactions will prompt lawmakers to be more vigilant of minority rights in future and to legislate against potential conflicts of interest before any further problems arise.

FOOTNOTES

1. Alboini, Ontario Securities Law (Toronto: Richard DeBoo, 1980) at 631-646; Kroft, "The Going Private Transaction: Some Corporate and Income Tax Consequences of a Public Company Becoming Private", 12 Ottawa L. Rev. 49 (1980); Alain, "Le droit des valeurs mobilières et le retour des compagnies publiques au statut de compagnie privée," 20 Les Cahiers de Droit 539 (1979); Hansen & Iacobucci, "Acquisition of Minority Shares Under the CBCA", 4 Can. Bus. L.J. (1980) [forthcoming]; Taves, "Corporate Buy-Backs", in Prairie Provinces Tax Conference 93 (1979); Lange, "Freeze Out Amalgamations: The Federal and Ontario Positions", 27 Chitty's Law Journal 217 (1979); Glover & Schwartz, "Going Private in Canada", 3 Can. Bus. L.J. 3 (1978); Glover & Schwartz, "Going Private" Fever Cools Off," Financial Post, November 11, 1978, at 40, col. 1; Pitch, "Going Private: The Silent Minority is No Longer Silent," 3 Can. Lawyer 1 (February, 1979) at 12; Campbell & Steele, "What Price Minority Shares?," 111 CA Magazine, Oct. 1978 at 28; Potter, "Acquisition of Minority Held Shares Through Arrangements," L.E.S.A. Banff Conference Papers (1977); Hansen, "Minority Squeeze-outs", in Report

of the Thirtieth Tax Conference 408 (1980) [hereinafter cited as [year] Conference Report]; Dey, "Protecting Minority Shareholders in Public Corporations," Can. B. Assoc. Update '79, 1 (1979); Palmer, "Amalgamations - Winding Up," 1978 Conference Report 469; Magnet, "Shareholders' Appraisal Rights in Canada", 11 Ottawa L. Rev. 98 (1979); Coleman, "Securities Legislation -- Where We have Been and Where We are Going", in New Securities Legislation 237 (1979); Scace, "Going Private and Deconglomeration", 1977 Conference Report 569 (1978); Ward, "Arm's Length Acquisitions Relating to Shares in a Public Corporation", in 1978 Corporate Management Tax Conference 108 (C. Frost ed. 1978); Baillie, "Developments in Securities Regulation Affecting Corporate Acquisitions", in 1978 Corporate Management Tax Conference 1978 at 177 (C. Frost ed. 1978).

2. A. Sommer, "Going Private: A Lesson in Corporate Responsibility" Law Advisory Council Lecture, Notre Dame Law School, November 14, 1974; Sommer, "Further Thoughts on 'Going Private'", "Second Annual Securities Seminar", Detroit Institute for Continuing Legal Education, March 14, 1975; Baillie, supra note 1; Securities and Exchange Commission

[hereinafter cited as SEC], Matter of Beneficial Ownership, Takeovers and Acquisitions by Foreign and Domestic Persons, 39 Fed. Reg. 33,385 (1974) as amended by 39 Fed. Reg. 41,223 (1974). See also Salter, "Going Private" Issuer Bids -- Insider Bids -- Squeeze-Outs (memorandum to O.S.C. May 17, 1978) and "Notice: 'Going Private' Transactions, including Comments as to Other Issuer Bids and Insider Bids" Bull O.S.C. 149 (July, 1978).

3. Shareholders who control the company may hold either greater than 50% of the voting equity or have de facto control through control of the proxy machinery of the Company. The Draft Ontario Business Corporations Act, s. 188 [hereinafter cited as Draft OBCA], s. 163 of the Regulations under The Securities Act, 1978, S.O. 1978, c. 47 as amended [hereinafter cited as OSA], and SEC, "Going Private" Rule 13e-3 (42 Fed. Reg. 60,090 (1977) (now adopted by Release 33-6100, August 6, 1979) all contain definitions of a "going private transaction". Section 163 of the OSA Regulations states that:

"going private transaction" means an amalgamation, arrangement, consolidation or other transaction proposed to be carried out by an insider of an issuer as a consequence of which the interest of the holder of a participating security of the issuer in that

security may be terminated without the consent of that holder and without the substitution therefor of an interest of equivalent value in a participating security of the issuer or of a successor to the business of that issuer or of another issuer that controls the issuer but does not include the purchase of participating securities pursuant to a statutory right of acquisition;"

Section 188(1)(b) of the Draft OBCA states that a

- "(b) 'going private transaction' means an amalgamation, arrangement, consolidation or other transaction carried out under this Act by a corporation that would cause any participating security of the corporation to be an affected security, but does not include a redemption, or other compulsory termination of the interest of the holder in a security, if the security is redeemed or otherwise acquired,
- (i) in accordance with the terms and conditions attaching thereto, or
 - (ii) under a requirement of the articles relating to the class of securities or of this Act;"

Section 188(1)(c) of the Draft OBCA states that a

- "(c) 'participating security' means a security issued by a corporation other than a security that is, in all circumstances, limited in the extent of its participation in earnings and includes,
- (i) a security currently convertible into such a security, and
 - (ii) currently exercisable options and rights issued by the corporation and entitling the holder to acquire such a security or such a convertible security."

An "affected security" is defined in s. 188(1)(a) as

"(a) a participating security of a corporation in which the interest of the holder would be terminated by reason of a proposed transaction without the consent of the holder other than an acquisition under section 186, and without the substitution therefor of an interest of equivalent value in a security that is,

- (i) a participating security and has no restrictions on its participation rights, and
- (ii) issued by the corporation, an affiliate of the corporation or a successor corporation;"

SEC Rule, s. 13e-3(a)(4) terms the "going private transaction" as a "Rule 13e-3 transaction which has a reasonable likelihood or a purpose of producing, either directly or indirectly, such effects as the delisting of shares from a National Exchange or termination of the registration of the issuer...". For a list of the effects, see s. 13e-3(a)(4)

(ii). The specified transactions are: (a) a purchase of any equity security by the issuer of such security or by an affiliate of such issuer; (b) a tender offer or request or invitation for tenders of any equity security made by the issuer of such class of securities or by an affiliate of such issuer; or (c) a solicitation or distribution subject to Regulation 14A [ss. 240.14a-1 to 240.14a-103] or

Regulation 14C [ss. 240.14c-1 to 14c-101] in connection with certain corporate events. The corporate events include a merger, consolidation, reclassification, recapitalization, reorganization or similar corporate transaction by an issuer or between an issuer (or its subsidiaries) and its affiliates; a sale by the issuer of substantially all of its assets to its affiliate; or a reverse stock split of any class of equity securities of the issuer involving the purchase of fractional interests.

5. See Carlton Realty Ltd. v. Maple Leaf Mills, 22 O.R. (2d) 198, 4 Bus. L.R. 300 (H.C. 1978); Alexander v. Westeel-Rosco Ltd., 22 O.R. (2d) 211, 4 Bus. L.R. 313 (H.C. 1978); Neonex Int'l Ltd. v. Kolasa, 3 Bus. L.R. 1, 84 D.L.R. (3d) 446 (B.C.S.C. 1978); In the Matter of Cablecasting Ltd., [Feb., 1978] Bull, O.S.C. 37; In Re The Acquisition of Quegroup Inv. Ltd. of all the common shares of Queenswear (Canada) Ltd.; Quegroup Inv. Ltd. and Robert S. Vineberg, [1976] C.S. 1458; Gregory v. Canadian Allied Property 11 B.C.L.R. 253, [1979] 3 W.W.R. 612; Nasgovitz v. Canadian Merrill Ltd. (unreported, Que. S.C., Dec. 1979); Jepson v. The Canadian Salt Co., 17 A.R. 460, [1979] 4 W.W.R. 35 (S.C.); Re Canadian Hidrogas Resources Ltd.; [1979] 6

W.W.R. 705 (B.C.S.C.); Ruskin v. All Canada News Radio, 7 Bus. L.R. 142 (Ont. H.C. 1979); Re Ripley Int'l Ltd., 1 Bus. L.R. 269 (H.C. 1977); In Re The Matter of the Application of Domglas Inc. Pursuant to Section 184(15) of the Canada Business Corporations Act (Que. S.C. July 18, 1980).

6. Specifically, see Singer v. Magnavox 380 A.2d 969 (Del 1977). For a review of the case law on the subject, see Borden and Messmar, "Going Private: A Review of Relevant Considerations" in Eleventh Annual Institute on Securities Regulation (Practicing Law Institute, 1979) at 427 - 550.
7. In Maple Leaf Mills, supra, note 5, at 205 Steele, J. suggested that shareholders are entitled to retain their property, if they so wish except where there is a right held by another to forcibly take it: "It matters not for this purpose what price the taker is willing to pay". The "vested rights" theory is not now recognized, in Canadian corporate law as evidenced for example, by the need for approval of corporate transactions by special resolution and not by unanimity. See infra, text at 16-17 and the comments of Greenberg, J. in Domglas, supra, Note 5 at 26.

For further discussion, see Gibson, "How Fixed are Class Shareholder Rights?" 23 Law & Contemp. Prob. 283 (1958) and Johnson, "Delaware Reverses its Trend in Going Private Transactions: The Forgotten Majority", 11 Loyola of Los Angeles L. Rev. 567 at 601 (1978).

8. Companies legislation may contain a provision authorizing compulsory acquisition of less than 10% of the shares of a class outstanding following a takeover bid in order to prevent "oppression of the majority by the minority". See infra, text, at 5 and 25. Note that the definitions of "going private transaction", supra, note 4 do not include "the purchase of participating securities pursuant to a statutory right of acquisition."
9. The constating documents may expressly provide for the expropriation of minority shares. See Phillips v. Manufacturers Sec. 116 L.T. 290 (1917). If so, the shareholders should not be permitted to complain about expropriation because it is assumed that they have accepted all terms of the share "contract" when purchasing their shares. To quote Middleton, J.A. in Re Jury Gold Mine Development Co., [1928] 4 D.L.R. 735 at 736:

"He is a minority shareholder and must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority."

The definitions of "going private transaction", supra, note 4 do not therefore include "purchases, redemptions or acquisitions required by the instrument creating or governing the class of securities".

10. For example:

1. A corporate associate/affiliate may strip the issuer of its retained earnings without tax liability. These funds may then be used to pay off loans to institutions which financed the squeezeout.
2. A corporate associate/affiliate may be able to make better use of the interest expense incurred when borrowing funds to finance the transaction than the controlling shareholders.
3. A corporate associate/affiliate may be better able to provide alternate and more favourable tax treatment to

minority shareholders who are squeezed out than controlling shareholders. Assuming the insiders are individuals, only a corporate associate may issue shares with a high or low paid up capital to the minority shareholders, whose proceeds of disposition will be treated as a capital gain or dividend upon redemption.

For further details, see Kroft, supra, Note 1 at 111-114.

11. For example:

1. Certain jurisdictions only permit an "acquiring company" to participate in compulsory acquisition proceedings. Infra, Notes 27 and 221.
2. A corporate associate will have a greater number of acquisition techniques such as amalgamation or share reclassification at its disposal than controlling shareholders who are individuals.

3. Insiders who are individuals may not have sufficient funds or the security required to borrow money in order to purchase minority shares.
4. An issuer is prohibited from providing indirect or direct financial assistance to its shareholders. See The Business Corporations Act R.S.O. 1970 c. 53, s. 17 [hereinafter cited as OBCA]; The Companies Act R.S.A. 1970, c.60, s.14 [hereinafter cited as ACA]; The Company Act, R.S.B.C. 1979 c.59, s.127 [hereinafter cited as the BCCA]; The Canada Business Corporations Act S.C. 1974-75, c.33, s.42 [hereinafter cited as CBCA]; The Business Corporations Act, 1977, R.S.S. 1978, c. C-23, s.42 [hereinafter cited as the SBICA]; The Corporations Act, S.M. 1976, c.40, s.42 [hereinafter cited as the MCA]; The Companies Act, R.S.N.B. 1973, c. 13, s.38 [hereinafter cited as NBCA]; Draft OBCA s.20; The Companies Act, R.S.P.E.I. 1974, c. C-15, s.69 [hereinafter cited as the PEICA]; Loi Sur les compagnies, R.S.Q. 1964 c.C-38, s.110 [hereinafter cited as QCA]; The Companies Act R.S.N. 1970 c.54 s.16 [hereinafter cited as NCA]

However, financial assistance may be given to or for the benefit of a wholly-owned subsidiary by its holding company.

12. An "associate" is generally defined as:

- (a) any company in which a person beneficially owns, directly or indirectly shares carrying more than 10% of the voting rights attached to all outstanding and exercisable voting shares of the Company;
- (b) a partner of that person;
- (c) a trust or estate in which that person has a substantial beneficial interest or for which that person serves as a trustee or in a similar capacity;
- (d) a spouse, son or daughter of that person; or
- (e) a relative of that person or of his spouse, other than a relative referred to in paragraph (d) who has the same home as that person.

See CBCA s.2(1); BCCA s.1(1); SBCA s.2(1)(d); MCA s.1(1)(d); Draft OBCA s.1(1)(4); ACA s.81(1)(b); Securities Act, R.S.B.C. 1979 c.380 s.1(1) [hereinafter cited as BCSA]; Securities Act R.S.A. 1970 c.333 s.2(1)(1)1 [hereinafter cited as ASA]; Securities Act, 1978 (Alberta, Bill 76, November 1, 1978 1st reading) s.1(1)(a.1) [hereinafter cited as Bill 76]; Securities Act, 1967, R.S.S. 1978 c. S-42, s.2(1)(a) [hereinafter cited as SSA]; Securities Act. R.S.M. 1970, c.250 s.1(1)1 [hereinafter cited as MSA]; The Securities Act, 1979 (Manitoba Bill 72, 1st reading May 29, 1980) s.1(1)2 [hereinafter cited as Bill 72]; Securities Act, S.O. 1978 c.47 s.1(1)2 [hereinafter cited as OSA].

13. Definitions of "Affiliate" are drafted in a complex manner to catch transactions which would otherwise circumvent provisions of companies and securities legislation through the use of a network of companies. One company is deemed to be affiliated with another if one of them is the subsidiary of the other, both are subsidiaries of the same company or if each is controlled by the same person. See

CBCA ss. 2(1) - 2(5); BCCA ss. 1(1) - 1(4); ACA ss. 2(4) - 2(5); SBCA ss. 2(1)(b), 2(2) - 2(5); MCA ss. 1(1)(b), 1(2) - (5); OBCA ss. 1(2) - (5); Draft OBCA ss. 1(4) - 1(5); BCSCA s.1(1) - 1(4); ASA s.2(2) - 2(4); MSA ss.1(2) - 1(4); Bill 72 ss. 1(2) - 1(4); Bill 76 ss. 1(2) - 1(4); OSA ss.1 (1)2, 1(2) - (4); Securities Act L.R.Q. 1964 c.V-1 as amended [hereinafter cited as QSA] ss. 2.2, 2.3, 2.6.

14. The issuer might conduct a "domestic going private transaction" when":

1. Most of its shareholders are resident in a province whose securities legislation does not contain provisions regulating the conduct of offerors in an issuer bid. Infra, notes 38-41 and text at 7.
2. Most of its shareholders are earning less than approximately \$59,000 of taxable income and prefer the proceeds of disposition which they will receive for their expropriated shares to be treated as dividend income. See infra, Note 111 and Kroft, supra, Note 1 at 80.

15. Very few statutes use the terms "public" or "private" company. See ACA s.2(1)(26), (28); PEICA s.1(e), (f); NBCA s.38(2); NCA s.265(h). Other terms for a "public" company include a "reporting company" (BCCA s.1(1); Bill 72, Bill 76, OSA s.1(1)38; BCSA s.1(1)); "corporation offering its shares to the public" (OBCA s.1(9)); "distributing corporation" (CBCA s.121(1)); "security issuer" (QSA s.1(1)); Securities Act RSPEI 1974, c.S-4 s.1(j), [hereinafter cited as PEISA]; Security Frauds Prevention Act RSNB 1973 c.S-6 s.1 [hereinafter cited as NBSPFPA]); "offering corporation" (Draft OBCA s. 1(1)(26)). No matter what term is used, a company ceases to be "public" when its securities are no longer held by shareholders who have no "close bonds of association" with the issuer or who have so little knowledge of the operating affairs of the issuer that they are unable to make an informed investment decision about the securities of the issuer. For a discussion of who constitutes the "public", see R. v. Piepgrass (1959), 29 W.W.R. 218; Nash v. Lynde [1929] A.C. 158; 98 L.J.K.B. 127 (H.L. 1928). See also L. Loss Securities Regulation 655-56 (2d ed.1961, Supp. 1969); Alboini, supra, Note 1 at 285-301; Johnston, Canadian

Securities Regulation (Toronto: Canada Law Book, 1977) at 148-55. It may also be necessary for a company to obtain approval of an administrative body or official before "going private". For example, under ACA ss. 46, 47, the conversion of a company from "public" or "private" occurs when the Registrar issues the appropriate certificate and not upon the filing of the conversion resolution. Under BCCA s.1(1) the Registrar of Companies may designate a company as a "reporting company" according to the guidelines set out in B.C. Corp. L. Guide (CCH) 583. See also QSA s.20(i) regarding the discretionary powers of the Quebec Securities Commission.

16. Id. An offeror will not be required to comply with various disclosure requirements if it makes an issuer or takeover bid for shares of a "private company". This term is defined as a company, with (1) fewer than 50 shareholders, and (2) share transfer restrictions in its constating documents, which does not invite the public to subscribe for its securities. See OSA s.1(1) 31, SSA s.2(1)(p); MSA s.1(1)17; Bill 72 s.1(1)34; Bill 76 s.1(1)(0.1); NBSFPA, s.1; Securities Act RSNS 1967 c.280, s.1(1)i.

17. The Income Tax Act S.C. 1970-71-72, c.63, ss.89(1)(f) and (g) [hereinafter cited as ITA] and Part XLVIII of the Regulations thereto define the terms "private corporation" and "public corporation". A "public corporation" must be resident in Canada and have a class or classes of shares listed on a prescribed stock exchange in Canada. A corporation continues to be a public corporation until it elects to be otherwise by complying with provisions of the Regulations. The Minister of National Revenue may also designate a corporation "not to be public" if he first gives at least 30 days written notice to the corporation and the corporation meets those conditions prescribed by the Regulations.

A "private corporation" is a Canadian resident corporation which is not a public corporation. It cannot also be controlled directly or indirectly by a public corporation.

18. On the takeover bid, the offeror formally requests shareholders to tender their shares for consideration in form of cash or redeemable securities. Whereas the term "takeover bid" implies that the acquisition of shares will provide an offeror with control of the target company, it

generally refers to an offer made by an offeror to shareholders at approximately the same time to acquire voting shares, that, if combined with the voting shares already beneficially owned or controlled, directly or indirectly, by the offeror or an affiliate or associate of the offeror, on the date of the takeover bid, would exceed 20% of the issued voting shares of the target company. See BCSA s.79; ASA s.80(g); Bill 76 s.86; SSA s.87(g); MSA s.80(g); Bill 72 s.89; OSA s.88(1)(k). The CBCA s.187 states that only greater than 10% is required.

Provided that the issuer has the power pursuant to statute and its constating documents to repurchase its own shares, it may make an "issuer bid". See CBCA s.187, 37(1), (5); BCCA ss. 259-261; ACA s.41.1; SBCA s.37(5), 187; MCA ss. 37(5) 187; OBCA s.39(2); Draft OBCA s.30; QCA ss.48, 58; NBCA ss. 59(2)-(3); 60(1)-(2); NSCA ss.47(1)(f), 47(4) and 48; NCA s.101. The actual term "issuer bid" is used in Bill 72, s.89; Bill 76, s.87 and OSA s.88(1)(d).

19. An associate or affiliate may acquire minority shares in the manner they would normally be purchased by any member of the public instead of by tender offer. While the most

common forum for the open market purchase is the stock exchange, it may also be transacted in the over the counter market provided there is an independent middleman who acts between two parties unknown to each other.

20. CBCA ss.175-180; BCCA ss.271-275; ACA s.156; SBCA ss.175-180; MCA ss.175-180; OBCA ss.196-197; Draft OBCA ss.172-177; QCA s.18; NBCA s.31; PEICA s. 77; NCA s.30; Companies Act R.S.N.S. 1967 c.42 s.120 [hereinafter cited as NSCA]. The PEICA, NBCA and NCA only permit the amalgamation of companies with the same or similar objects.

Examples of amalgamation squeezeouts include Maple Leaf Mills, supra, Note 5; Westeel, supra, Note 5; Jepson v. Canadian Salt, supra, Note 5; Ruskin v. All-Canada News Radio, supra, Note 5; Neonex International, supra, Note 5; Canadian Merrill, supra, Note 5; and Domglas, supra, Note 5.

21. Share reclassification requires the alteration of the attributes of the issuer's shares. See CBCA ss.37(4), (7), 167(1)(f); BCCA ss.249, 255; ACA s.38(1)(a); SBCA ss.167(1)(f), Draft OBCA s.166(1)(f); QCA ss.48(5)-(8);

NBCA ss.62(3), 65; PEICA ss.34(6), 86; NCA ss.39-40, 131(2), NSCA ss.47(1)(c), (g), (j).

To ensure that all minority shares are acquired, controlling shareholders sometimes employ schemes more elaborate than simply passing a resolution which appends the attribute of redeemability to the shares. For example, Company X has an existing class of shares (Class A). The shareholders of the Company first authorize the creation of a new class of shares (Class B) and then pass a resolution providing for the redeemability of the existing class by the issuer at any time. Afterwards, the controlling shareholders exercise the conversion right while most of the minority shareholders do not. Subsequently, the issuer redeems the Class A minority shares. If any of the minority convert to Class B to escape redemption, the insiders convert back to Class A and reclassify the shares of the new class as redeemable. Before the minority can convert back to Class A, its shares are redeemed by the issuer. For example, see Re Cablecasting Ltd., supra, Note 5; Re Canadian Hidrogas Resources Ltd., supra, Note 5; and Ferguson v. Imax Systems Corporation (July 28, 1980 Ont. S.C.).

22. Shares are said to be consolidated when they are replaced by a lesser number of shares in the same class in the same proportion for all shareholders. For example, an issuer may consolidate its shares in the ratio of 1 to 5,000. A shareholder is then entitled to 1/500 of a share if he owns just one share.

See CBCA s.167(1)(g); MCA s.167(1)(f); SBCA s.167(1)(g); OBCA s.189(1)(f); QCA s.55(2); NBCA s.62(1); PEICA s.34; NCA s.131(2); NSCA s.42(1)(b); ACA s.38(1)(a)(i); BCCA s.255(1)(d). Note that QCA s.55(2) and NBCA s.62(1) permit consolidation only when the par value of the existing shares is less than \$100 each and no share is consolidated over a par value of \$100.

For further discussion of the consolidation or "reverse stock split" process, see Dykstra, "The Reserve Stock Split-That Other Means of Going Private" 53 Chicago-Kent L. Rev. 1 (1976); Lawson, "Reverse Stock Splits: The Fiduciary's Obligation Under State Law" 63 Calif. L. Rev. 1226 (1975); Magnet, supra, Note 1 at 157.

Examples of a consolidation squeezeout include Re Ripley International Ltd., supra, Note 5 and Re P.L. Robertson Mfg. Co., 7 O.R. (2d) 98, 54 D.L.R. (3d) 354 (H.C. 1974)

23. CBCA 33(1)(b); MCA s.33(1)(b); SBCA s.33(1)(b); BCCA s.265(2); OBCA s.39(1); Draft OBCA s.31(1)(b); QCA s.52(3); NBCA s.62(2).
24. CBCA s.183; BCCA s.150; SBCA s.183(2)-(9); MCA s.183(2)-(7); OBCA ss.15(2), 17; Draft OBCA 182(7)-(8); NCA s.131(4). Generally, the sale of assets is made to a related party which is usually a wholly owned corporate affiliate or associate of the insiders.
25. CBCA s.204(3); BCCA s.291, ACA s.237; SBCA s.204(3); MCA s.204(3); OBCA s.203(1); Draft OBCA s.191(1); Winding Up Act R.S.Q. 1964 c.281 s.3; Winding-up Act RSNB 1973 c.W-10 s.3(a); Winding Up Act RSPEI 1974 c.W-7 s.4(1)(b); NCA s.244(b); Winding Up Act RSNS 1967 ss.3(b), 1(e).

Examples of the sale of the assets-winding up squeezeout include Costello v. London General Omnibus Co. Ltd. (1912), 107 L.T. 575 (C.A.); Ritchie v. Vermillion Mining Co. (1902), 4 O.L.R. 588 (C.A.); and Re United Fuel Investments Ltd. [1962] O.R. 162 (Ont. C.A.).

26. CBCA s.199(2); BCCA s.279(1); SBCA s.188; ACA s.153; QCA s.48; NSCA s.119; Draft OBCA ss. 185-187.
27. In certain jurisdictions an "offeror" includes two or more persons who, directly, make takeover bids jointly or in concert, or intend to exercise jointly or in concert voting rights attached to shares for which a takeover bid is made". See CBCA s.187; OSA s.88(1)(h); Bill 72 s.88(1)(h); Bill 76 s.86(1)(h); ASA s.80(e); SSA s.88(e); MSA 80(e); QSA s.113(e); BCSA s.79. Cf. Blue Metal Industries v. Dilley, [1969] 3 W.L.R. 357.

See also note 221, infra which discusses whether an offeror may be an individual as well as an "acquiring company".

28. The BCCA, for example, refers to a "scheme or contract" and not a "takeover bid". For a definition of this phrase, see

Gregory v. Canadian Allied Property, supra, Note 5 and Rathie v. Montreal Trust, [1953] 2 S.C.R. 204.

29. An acquiring company may compel the remaining minority shareholders to surrender their shares within 5 months after the date of takeover bid for the same consideration. For details of the dissent process available to the minority shareholders see text and notes 47-49, 139-140 infra; See also Halperin, "The Statutory Elimination of Minority Shareholders in Canada" in Advanced Corporate Law Studies (forthcoming) (L. Sarna, ed.,) (Toronto: Carswell Co. Ltd., 1980); McNamara, "Note on Compulsory Acquisition of Shares" 10 U.W.O.L. Rev. 141 (1971); Flisfeder, "Compulsory Acquisition of the Interest of a Dissenting Minority Shareholder" 11 Alta. L. Rev. 87 (1973); English, "Corporate Acquisitions - General Considerations", in Studies in Canadian Company Law, 603 (J. Ziegel ed. 1967); Hansen, supra, Note 1; Anisman, Takeover Bid Legislation in Canada (Toronto: CCH Canadian Ltd., 1974) Note 108; Weinberg and Blank, Takeovers and Mergers (4th ed.) (London: Sweet and Maxwell, 1979) Chapter 14.

30. Whereas public corporations may be taxed at a combined federal - provincial rate of up to 51% on all types of income earned, the "active business income" and investment income of a "Canadian controlled private corporation" will be taxed at a substantially lower rate, assuming the qualifications for certain tax credits are met. For further discussion, see Kroft, supra, Note 1 at 62-63.
31. The requirements include the provisions of a prospectus to prospective investors; information circulars, proxies and audited financial statements to shareholders; and insider trading reports to securities regulatory authorities.

An issuer may be still required to make public filings even if it has gone private. For example, CBCA s.154 requires corporations whose gross revenues exceed ten million dollars or whose assets exceed five million dollars to send copies of their financial statements to the Director. In addition, the amalgamation of a "private" company with a "public" company does not enable the latter to shirk its statutory obligations to disclose material information. BCCA s.1(1), BCSA s.1(1), OSA s.1(1)38(v), Bill 72, s.1(1) 41(v), and Bill 76 s.1(1)(t)(iv) state that a "reporting

issuer" includes companies continuing from a statutory amalgamation, provided one of the amalgamating companies has been a "reporting issuer" for at least 12 months.

Companies may, however, obtain exemptions from these disclosure requirements. See CBCA s.154(2) and Regulation 50; OSA s.79; Bill 72 s.79; Bill 76 s.77. See also Note 34, infra, concerning exemptions from takeover bid or issuer bid requirements.

32. Economies of scale could result from the administrative savings associated with shareholder servicing costs. See Weinberg - Blank, supra, Note 29 at 35-37.
33. The private corporation is able to make business decisions on the basis of long range objectives and opportunities without concern for the possible adverse effect on the trading price of its shares. Its officers and directors are able to manage without fear of sanctions imposed at the instance of minority shareholders over conflicts of interest. Certain corporate formalities such as the appointment of auditors, the election of a minimum number

of directors and the use of a trust indenture are not required.

34. For example, in an income split, a spouse may receive salary or dividends but will choose remuneration in the form of dividends because he/she may receive up to approximately \$33,000 of dividends tax free (if earning no other income) as a result of the operation of the dividend tax credit. See Eddy, "The Incorporation of Business Income and the 1977 Budget Changes, 1977 Conference Report 114. In an estate freeze, any future growth in the value of the shares of the company might be passed on to family members by means of a reorganization of capital.
35. This is due to the imperfections in the present tax system resulting primarily from the application of provincial tax rates to the operation of the dividend tax credit. See Fenwick, "Incorporation of Investment Income", 1977 Conference Report 141.

36. See Levine & Graham, "Incorporation and Taxation of a Private Corporation" 1980 British Columbia Tax Conference Report (Canadian Tax Foundation, forthcoming).
37. A takeover bid is classified as an "exempt bid" when
- (a) an offer is made through the facilities of the stock exchange or in the over the counter market. CBCA s.187(b); BCSA s.79(b); Bill 72, s.88(2)(a); Bill 76 s.86(2)(a); OSA s.88(2)(a); ASA s.80(b)(ii); MSA s.80(b)(ii).
 - (b) an offer is made to purchase shares in "private company". OSA s.88(2)(b); BCSA s.79(c); MSA s.80(1)(b)(iii); QSA s.113(1)(f)(iii); SSA s.87(b)(iii); ASA s.80(b)(iii); Bill 76 s.88(2)(b); Bill 72 s.88(2)(b).
 - (c) an offer is made to purchase shares by private agreement with individual shareholders and is not made to shareholders generally. CBCA s.187(a); BCSA s.79(a); ASA s.80(b)(i); SSA s.88(b)(i); MSA s.80(1)(i); Bill 72 s.88(2)(c); Bill 76 s.86(2)(c); OSA s.88(2)(c); QSA s.113(1)(f).

- (d) it involves the acquisition of not more than 5 percent of the voting shares of the target company within any period of 12 consecutive months; OSA s.88(2)(d); Bill 72 s.88(2)(d), Bill 76 s.86(2)(d).
- (e) an offer is made by the holder of a control block of shares. OSA s.88(2)(e); Bill 76 s.86(2)(e); Bill 72 s.88(2)(e).
- (f) an exemption order is made by a court or a securities regulatory agency. CBCA s.187 (court); BCSA s.88 (court); ASA s.89 (securities commission); Bill 76 s.97 (securities commission); SSA s. 96 (court); MSA s.89 (securities commission) Bill 72 s.99 (securities commission); OSA s.99 (commission); QSA s.136 (Commission).

An issuer bid will be classified as an "exempt bid" under OSA s.88(3) Bill 76 s.86(3), Bill 72 s.88(3) when:

- (a) the securities are purchased, redeemed or otherwise acquired in accordance with the terms and conditions agreed to at the time they were issued or subsequently varied by amendment of the documents setting out those

terms and conditions, or are acquired to meet sinking fund requirements or from an employee of the issuer or an employee of an affiliate;

- (b) the purchases, redemptions or other acquisitions are required by the instrument creating or governing the class of securities or by the statute under which the issuer was incorporated or organized;
- (c) the issuer bid is made through the facilities of a stock exchange recognized by the Commission for the purpose of this Part according to the by-laws, regulations or policies of the stock exchange;
- (d) following the publication of a notice of intention in the form and in the manner prescribed by the regulations, the issuer purchases securities of the issuer, but the aggregate number, or in the case of convertible debt securities, the aggregate principal amount, of securities purchased by the issuer in reliance on the exemption provided by this clause during any period of twelve consecutive months shall

not exceed 5 per cent of the securities of the class sought outstanding at the commencement of the period; or

(e) the issuer is made by a private company.

38. CBCA s.187-189 and Part VIII of the Regulations; OSA s.94 and Regs. Form 31; BCSA s.89; ASA s.90; Bill 76 s.92; MSA s.85(4), s.90; Bill 72, s. 94; SSA s. 97; QSA s.125 and ss. 35-36 of Regulations (Division V).

When a Stock Exchange takeover bid is being made, the circular must disclose significant information concerning the affairs of the company whose securities are being offered in exchange for the shares of the target company.

See also Ontario Policy 3-37, O.S.C. Weekly Summary, Week Ending December 2, 1977 at 1, which regulates issuer and insider bids, as well as the disclosure requirements prescribed by the Exchanges when a stock market takeover bid is made:

See Toronto Stock Exchange By-laws, Part XXIII in Can. Sec. L. Rep. 17,181-27 (CCH); Vancouver Stock Exchange Rule 975, in Can. Sec. L. Rep. 17,737 (CCH); Montreal Stock Exchange Rule VIII, in Can. Sec. L. Rep. 16,825(CCH). See also "Re: Current Procedure for Take-Over Bids, Issuer Bids and Insider Bids through the Facilities of the Toronto Stock Exchange", TSE Notice to Members No. 1999, November 7, 1979, in Can. Sec. L. Rep. 70,123(CCH).

39. BCSA s.80(c); ASA s.81(c); MSA s.81(4); SSA s.88(c); QSA s.116. In OSA s.89(1)4, CBCA s.190(a); Bill 72 s.89(1)4 and Bill 76 s.87(1)4, the rescission period is ten days.
40. BCSA s.80(b); ASA s.81(b); MSA s.81(3); SSA s.88(b); QSA s.115. In OSA s.89(1)3; Bill 76 s.87(1)3, and Bill 72 s.89(1)3, the period is 10 days. CBCA s.190(b) allows 14 days.
41. The shares of an associate or affiliate of the offeror must not be included in the computation of the 90%. The BCCA s.279 makes no reference to the term "associate" but uses the word "nominee". For a discussion of the term, see Sammel v. President Brand Gold Mining Co. [1969] 3 S.A.

629; Gregory v. Canadian Allied Property Inv., supra, Note 5 and Jefferson v. Omnitron Inv. 18 B.C.L.R. 188 (S.C. 1979). See also, infra, Note 230.

42. BCCA s.279(1); ACA s.153(1); QCA s.48(1); CBCA s.199(2); SBCA s.188; NSCA s.119(1); Draft OBCA s.186(1). The CBCA, Draft OBCA and SBCA use the phrase "120 days" rather than 4 months.
43. BCCA s.279(2); ACA s.153(1); QCA s.48(2); CBCA s.199(3); SBCA s.189; NSCA s.119(1); Draft OBCA s.186(2). The CBCA, Draft OBCA and SBCA state that the notice must be mailed within 180 days after the day of the takeover bid. Under the B.C. legislation, notice must be given during the month immediately following the expiry of the offer ("within 5 months of the making of the offer"), while in Nova Scotia, the notice may be given during the four months following the expiry of the four months after the offer.
44. BCCA s.279(3) (the court must make an order otherwise within 2 months from the day of the Notice); QCA s.48(2) (6 months from the making of the Offer); ACA s.153(1) (1 month from the date of the Notice); NSCA s.119(2) (1 month from

the date of the Notice); CBCA s.199(9)-(10) (within 20 days after receipt of the Notice); SBCA ss. 189(c)(ii) and 195 (within 20 days after receipt of the Notice); Draft OBCA s.186(4)-(5) (within 20 days after receipt of the Notice).

Under the latter 3 statutes, the offeror is obliged to pay or give the offeree corporation, within the 20 days, money or other consideration sufficient to discharge the claims of all dissenting offerees had they elected to transfer their shares on the terms contained in the takeover bid. If a dissenting offeree has elected to demand the fair value of his shares, an application to Court to fix the fair value may be made by the offeror within 20 days after this date. Failing this, the dissenting offeree has a further 20 days to seek judicial redress.

For further details, see Halperin, supra, Note 29.

45. CBCA s.188(a)(60 days); BCSA; ASA; Bill 76 s.86(1)13; SSA; Bill 72 s.89(1)13; MSA s.81(3); OSA s.89(1) 13; QSA s.117.
46. CBCA s.190(d); BCSA s.82; ASA s.83; Bill 76 s.88; SSA s.90; MSA s.83; Bill 72 s.90; OSA s.90; QSA s.121.

47. OSA s.91; Bill 49 s.91; Bill 76 s.89. For further details, see Alboini, supra, Note 1 715-732.
48. The Ontario Securities Commission has issued guidelines in Ontario Policy 3-41 O.S.C. Weekly Summary, Week Ending August 17, 1979, Supplement C, indicating that it "will be favourably disposed to granting an exemption from the "follow-up" obligation in certain circumstances.
49. CBCA s.177(5); SBICA s.177(5); MCA s.177(5); OBICA s.196(4); Draft OBICA s.174(4); QCA s.18(4); ACA s.156(4); NBICA s.31(3); NSICA s.120(4); PEICA s.77(3); NCA s.30(3); BICA s.271.
50. An arrangement is a scheme through which the rights of shareholders may be adjusted or modified. It is used primarily under extraordinary circumstances; e.g., it may be used either where the capital structure of the corporation is inconvenient, or where new capital is required and is only obtainable on condition that the existing rights of the shareholders are modified or their interest in the corporation reduced. The procedure for affecting an arrangement involves the submission of a

scheme at the meeting of the shareholders, or, where the holders of more than one class are affected, at separate meetings of the classes of shareholders concerned. Once shareholder approval is obtained, the court must determine whether the scheme was fair and equitable to the shareholders and whether the position of the creditors has been adequately considered. When the court has approved a scheme, the corporation must deliver documents evidencing amendments to the constating documents to a governmental regulatory agency which issues a certificate, the effect of which is to amend the constating documents in accordance with the provisions of the arrangement. See: CBCA, s.185.1; BCCA, ss. 276-78; ACA, s.154; SBCA, s.186; MCA, s.185.1; Draft OBCA, ss. 180-81; QCA, ss. 49-50; NBCA s.48; NSCA, ss. 117-18; NCA, ss. 131-33.

51. The companies legislation of most jurisdictions in Canada permits the reduction of a company's issued capital by special resolution, CBCA s.36(1); BCCA s.257; ACA s.38(1)(b); SBCA s.36(1); MCA s.36(1); OBCA, ss. 189(1)(d), 189(2); Draft OBCA s.34(1); QCA s.63; NCA s.86; NBCA s.65; NSCA s.52(1); PEICA s.34(1).

One example of a reduction of capital squeezeout is In the Matter of Campeau Corporation Limited, Ontario Corporations Law Guide CCH Reporter Para 50-014 (H.C. 1972). See also British & American Trustee Corp. v. Couper, [1894] A.C. 399, 63 L.J. Ch. 425 (H.L.); Re Fraser, [1951] S.C. 394 (Ct. Sess.); Ex parte Westburn Sugar Refineries Ltd., [1951] S.C. 190, rev'd [1951] A.C. 625; In re Saltdean Estate Co., [1968] 3 All E.R. 829, [1968] 1 W.L.R. 1844 (Ch. D.); In re Fowlers Vacola Mfg. Co., [1966] V.R. 97 (S.C. 1965); Cf. In re Holders Inv. Trust Ltd., [1971] 2 All E.R. 289, [1971] 1 W.L.R. 583 (Ch. D. 1970).

52. Supra, Note 21.

53. Supra, Note 22.

54. Supra, Note 24.

55. Supra, Note 25.

56. The requirements for the passage of a special resolution vary from jurisdiction to jurisdiction. CBCA s.2(1), SBCA s.2(1)(ff), MCA s.1(1)(gg), OBCA s.1(1) 27; and Draft OBCA

s.1(1)42 require the favourable vote of not less than two-thirds majority of shareholders who voted in respect of the resolution. QCA ss.18(4), 60 require 2/3 in value.

Other jurisdiction require 3/4 of the votes cast: NBCA ss. 31(3); 48(3); NSCA s.75; PEICA s.77(3); NCA s.111; BCCA s.1(1).

57. See: Brown v. British Abrasive Wheel Co., [1919] 1 Ch. 390, [1918-19] All E.R. Rep. 309 (Ch. D.); Greenhalgh v. Arderne Cinemas Ltd., [1951] Ch. 286, [1950] 2 All E.R. 1120 (C.A.); Allen v. Gold Reefs of West Africa Ltd., [1900] 1 Ch. 656, [1900-03] All E.R. Rep. 746 (C.A.); Shuttlesworth v. Cox Bros., [1927] 2 K.B. 9, [1926] All E.R. Rep. 498 (C.A.); Dafen Tinplate Co. v. Llanelly Steel Co., [1920] 2 Ch. 124, 89 L.J. Ch. 113 (C.A.); Peter's American Delicacy Co. Ltd. v. Heath (1938-39), 61 C.L.R. 457 (Aust. H.C.) and Rights and Issues Investment Trust v. Stylo Shoes, [1964] 3 All E.R. 628 (Ch. D.). For further discussion, see Gower, The Principles of Modern Company Law (4th ed. 1979) at 620-630; Weinberg, supra, Note 29 at 112-114.

58. Amalgamation

CBCA s. 177(4); BCCA s.273(4); ACA; SBCA s.177(4); MCA s.177(4); OBCA s.196(5); QCA; NBCA; NCA; NBCA; PEICA; Draft OBCA s. 174(3).

Amendment of the Corporate Constitution

CBCA s.170; BCCA s.250; ACA ss. 38, 69; SBCA s.170; MCA s.170; OBCA s.189(4); Draft OBCA s.168; QCA; NBCA s.48(3); NCA s.131; PEICA; NSCA.

Sale of Assets

CBCA s.183(6); SBCA s.183(6); MCA s.183(6); Draft OBCA s.183(7).

Winding Up

CBCA s.204(3); MCA s.204(3); SBCA s.204(3).

59. For example, see section 251 of the BCCA.
60. For example, see Re Trend Management, 3 B.C.L.R. 186 (H.C. 1977); See generally concerning the variation or abrogation of class rights, Rice, "Class Rights and Their Variation in Company" J. Bus. L. 39 (1960); Baxt, "The Variation of Class Rights", 41 Aust. L.J. 290 (1968); Trebilcock, "The Effect of Alterations to Articles of Association", 31 Conv. 95 (1967).
61. CBCA s.122-122.1; BCSA s.108; ASA s.82; SSA s.117; MSA ss.109-109.1; OSA ss.102-103; Bill 76 ss.100-101; Bill 72 ss.102-103; QSA s.141.

An issuer may also be an insider of itself. For a definition of "insider", see CBCA, s.121(1); BCSA, s.107(1); ACA, s.41.31; SBCA, s.121(1)(b); MSA, s.108(1)(c); Bill 72, s.1(1)18(v); OSA, 1(1)17(iv); Draft OBCA, s.137(1)(b)(i); Bill 76, s.1(1)(h.1)(iv); SSA s.116(1)(c); ASA s.81. There is no requirement for filing under the BCCA, MCA, SBCA or Draft OBCA. Under these acts an issuer, who is deemed to be an insider of itself, will

be liable for damages only if it misuses inside information.

62. The term used in many statutes is "specific confidential information". For discussion of the phrase, see Green v. Charterhouse Group Canada Ltd., 12 O.R. (2d) 280, 68 D.L.R. (3d) 592 (C.A. 1976); In the Matter of Harold P. Connor, [June 1976] Bull O.S.C. 149. Note that OSA, s. 131, Bill 72, s. 131, and Bill 76, s.129, use the phrase "knowledge of a material fact...that has not been generally disclosed". See Buckley, "How to do Things with Inside Information", 2 Can. Bus. L.J. 343 (1977). See also Anisman, "Insider Trading Under the Canadian Business Corporations Act", in Meredith Memorial Lectures 151 (1975); Iacobucci, Pilkington & Prichard, Canadian Business Corporations (Toronto: Canada Law Book, 1977), at 341 et seq., Yontef, "Insider Trading", in Proposals for a Securities Law for Canada Vol. 3, 625 (1979); Alboini, supra, Note 1 at Chapter XX.
63. CBCA, s.125(5); BCCA, s.153; ACA, s.85; SBICA, s.124; MCA, s.125(5); Draft OBCA, s.139(5); BCSA, s.112; SSA, s.120; MSA, s.111; ASA, s.112; QSA, s.169.

64. This assumes that the acquiror is an individual and may well include the individual controlling shareholders of a corporate acquiror.

For example, the purchase or redemption of shares must not render the issuer insolvent. See CBCA ss.32(2), 33(3), 34(2), 36(3); BCCA s.260; MCA ss.32(2), 33(3), 34(2), 36(3); OBCA s.39(3); Draft OBCA s.30(2), 31(3), 32(2), 34(4); QCA; NBCA; PEICA; NCA; NSCA;

66. CBCA, s.113(2)(a); BCCA, s.151(1)(a); ACA, s.41.21(1); SBICA, s.113(2)(a); MCA, s.113(2)(a); OBCA, s.135(1); Draft OBCA, s.129(2)(a).

67. Amalgamations

CBCA s.177(1); SBICA s.177(1); Draft OBCA s.174(1); BCCA s.140; OBCA; QCA s.88; ACA Table A; MCA s.177(1); NBCA s.96; PEICA s.28; NSCA Table A s.128; NCA Table A para.55.

Amendment of the Corporate Constitution

CBCA s.169; SBCA s.169; Draft OBCA s.170; BCCA s.140; OBCA s.189(3); QCA s.88 ss.52-4; ACA Table A; MCA s.169; NBCA ss.58; 62-64; PEICA ss.32-33; NSCA Table A ss.56, 128; NCA Table A, para. 26, 55.

Sale of Assets

CBCA; SBCA; Draft OBCA; BCCA s.140; OBCA; QCA s.88; ACA Table A; MCA; NBCA s.96; PEICA s.28; NSCA Table A s.28; NCA Table A para. 55

Winding Up

CBCA s.204; SBCA s.204; Draft OBCA; BCCA s.289; OBCA; Que Winding Up Act ss. 2-3; ACA; MCA s.204; N.B. Winding Up Act; PEI Winding Up Act; NSCA Table A s.128; NCA Table A para 5.

68. BCSA ss.85 and 94; ASA ss. 86(4), 88(2), 95; SSA ss. 93 and 102; MSA ss. 86 and 95; Bill 76 s.94; Bill 72, s.96; OSA s.96 and Form 32 in the Regulations; QSA s.132 and Regs.

s.38; CBCA ss.194, 196 and Regs. s.68. For discussion, see Alboini, supra, Note 1 at 743-747.

69. See Iacobucci, Pilkington and Prichard, supra, Note 62 at 286-318 and infra text, at 54-58.
70. CBCA, s.115; BCCA, s.144; ACA, s.78; SBCA, s.115; MCA, s.115; OBCA, s.134; Draft OBCA, s.131; QCA (no provision); NBCA (no provision); NSCA (no provision); NCA, Table A, s.57. Even if the directors do commit a breach of a fiduciary duty, they are permitted to ratify the wrong in their capacity as shareholders absent fraud and oppressive conduct. See North W. Trans. Co. v. Beatty, 12 App. Cas. 589, 56 L.J.P.C. 102 (P.C. 1887). For further discussion, see text, infra at 55-58.
71. See infra, text at 56-57.
72. Amalgamations

Norcan Oils Ltd. and Gridoil Freehold Leases v. Fogler
[1965] S.C.R. 36; Westeel, supra, Note 5. Cf. Re Ardiem

Holdings, 67 D.L.R. (3d) 253 (S.C.C.) Rev'g (1976), 61 D.L.R. (3d) 725.

Arrangements

Re Dorman Long & Co. [1934] Ch. 635, 103 L.J. Ch. 316 (Ch.); Re Upper Canada Resources, 20 O.R. (2d) 100 (H.C. 1978); Re N. Slayer Co. [1947] 2 D.L.R. 311 (Ont. H.C.).

Compulsory Acquisition

Re John Labatt Ltd. v. Lucky Lager Breweries Ltd. (1959), 20 D.L.R. (2d) 159 (BCSC); Rathie v. Montreal Trust supra, Note 28. cf. Mofmac Investments Ltd. v. Andres Wines Ltd. et al. (N.S.S.C. May 30, 1980) Generally, see Halperin, supra, Note 29.

73. A shareholder may enforce his rights as a member and obtain injunctive relief by means of a personal action (infra, Note 248) or a derivative action (infra, Note 233) when directors have committed a breach of a duty owed to the company, and the company has chosen not to sue for relief. The companies and securities legislation of certain

jurisdictions also permit a shareholder or a wider class of persons (infra, Note 231) to seek compliance by the corporation or a director or officer of the corporation with statutory provisions or the constating documents of the Company. See CBCA ss.198, 240; ASA s.147; Bill 76, s.120; SBCA s.240; SSA s.150; MCA s.240; MSA s.147; Bill 72 s.122; OBCA s.261; Draft OBCA s.251; OSA s.122;

For discussion of the limitations of the compliance remedy, see Re Goldhar and Quebec Manitou Mines, 9 O.R. (2d) 740, 61 D.L.R. (3d) 612, (H.C. 1976), in which Reid, J. held that the obligations enforceable under OBCA s.261 must be owed directly to the shareholders, and consequently, s.261 cannot be used as a vehicle for enforcing derivative rights. For commentary, see Campbell, "Summary Enforcement of Directors' Duties: Re Goldhar and Quebec Manitou Mines Ltd." 2 Can. Bus. L.J. 92 (1977).

Shareholders also have recourse to sue for damages pursuant to the civil liability provisions in the securities legislation of certain jurisdictions if they can prove that they have been misled by misrepresentations in takeover bid or proxy materials. See ASA s.140.1; Bill 76 s.125; SSA;

MSA s.141.1; Bill 72 s.127; QSA s.137; OSA s.127. See also Paterson, "A Role for Civil Liability in Canadian Securities Regulation? - Remedies for Breach of The Takeover Bid Disclosure Requirements of the Securities Act 1967" 12 U.B.C. L. Rev. 32 (1978) and Leigh, Securities Regulation Problems in Relation to Sanctions" Volume 3 Proposals for a Securities Market Law for Canada 510 (1978).

74. Maple Leaf Mills, supra, Note 5.

75. See the comments of Bouck J. in Neonex International, supra, Note 5 and Laycraft, J. in Jepson v. Canadian Salt, supra, Note 5 at 42 (W.W.R. cite followed):

"the use of the Amalgamation provisions of the Canada Business Corporations Act as a "forceout" mechanism against minority shareholders has made virtually redundant the sections of the Act designed to cover the "forceout" situation. Section 199 of the Act provides a much more elaborate procedure to safeguard the minority than does section 184 governing amalgamation, for example, the "forceout" procedure in s.199 requires that the takeover offer be accepted by holders of 90 per cent of the shares apart from those owned by the offeror, while an amalgamation may be achieved by a two-thirds majority without any requirement that the majority comes from independently held shares."

76. "Expressions Unius Est Inclusio Alterius" is the canon of statutory construction referred to. See Driedger, The Construction of Statutes (Toronto: Butterworths, 1974) at 95.
77. See Re Hellenic and General Trust Ltd [1975] 3 All E.R. 382, [1976] 1 W.L.R. 123 (Ch. D) (per Templeman, J.); Westeel, supra, Note 5. The catch phrase which the courts use is "you cannot do something indirectly which you failed to accomplish directly." See also Gower, supra, Note 57 at 622-623 and Pitch, supra, Note 1 at 13. Gower suggests that compulsory acquisition is now the appropriate means of expropriating minority shares, and that U.K. Courts will follow the decision of the English Court of Appeal in Sidebottom v. Kershaw Lease & Co. [1920] 1 Ch. 154 and permit the use of the alteration of the constating documents as a squeezeout technique only in circumstances which are prima facie beneficial to the Company as a whole.
78. In Jurisdictions with a Compulsory Acquisition Provision:
CBCA: Neonex International, supra, Note 5; Canadian Salt,

supra, Note 5; Ruskin v. All-Canada News Radio, supra, Note 5 and Domglas, supra, Note 5.

In Jurisdictions Without Compulsory Acquisition Provisions:

OBCA: Wingold v. The Minister of Consumer and Commercial Relations (Ontario) (Ont. H.C. July 9, 1979)

MCA: Triad Oil Holdings Ltd. v. The Provincial Secretary for Manitoba, 59 W.W.R. 1 (Man C.A. 1967).

For Commentary, see Lange, supra, Note 1.

79. In Jurisdictions with a Compulsory Acquisition Provision
U.K. Companies Act: Re National Bank Ltd. [1960] 1 All E.R. 1006; [1960] 1 W.L.R. 819 (Ch.).

In Jurisdictions without a Compulsory Acquisition Provision

OBCA: Re P.L. Robertson Mfg. Co., supra, Note 19.

Some jurisdictions outside Canada are faced with eliminating the problem of having corporations circumvent take-over bid rules by means of capital reorganization techniques in order to eliminate shareholders. For

discussion of the situation in Australia and South Africa respectively, see Macgregor, "Take-overs Revisited", 95 S. Af. L.J. 329 (1978); Pliner, "Arranging a Take-over -- A Scheme Around the Code?" 7 Aust. Bus. L.J. 51 (1979).

80. Supra, Note 5.

81. Id. at 273-274.

82. Supra, Note 5 (The Ontario Reports citation will be followed).

83. Id. at 207.

84. Id. at 204-205.

85. Supra, Note 5.

86. Supra, Note 5.

87. Neonex International, supra, Note 5 at 451 (D.L.R.). This too was the conclusion of Greenberg, J. in Domglas at 70.

88. Supra, Note 5.

89. Id at 223. In short, the facts are as follows: After failing to obtain the requisite 90% to exercise its right to compulsory acquisition following a takeover bid for Westeel shares, Jannock caused Westeel to propose an amalgamation among itself and two Jannock wholly-owned subsidiaries. As a result of the amalgamation Jannock was to receive common shares of the amalgamated corporation, whereas the minority shareholders of Westeel were to be given non-voting preference shares which the amalgamated corporation would redeem for cash immediately following the transaction.

90. Id at 218.

91. Supra, Note 77. (The All E.R. citation will be followed).

92. Id at 387.

93. Supra, Note 79.

94. Id at 829:

"...I cannot accede to that proposition. In the first place it seems to me to involve imposing a limitation or qualification either on the generality of the word "arrangement" in s.206 or else on the discretion of the court under that section. The legislature has not seen fit to impose any such limitation in terms and I see no reason for implying any. Moreover, the two sections, s.206 and s.209, involve quite different considerations and different approaches. Under s.206 an arrangement can only be sanctioned if the question of its fairness has first of all been submitted to the court. Under s.209, on the other hand, the matter may never come to the court at all. If it does come to the court then the onus is cast on the dissenting minority to demonstrate the fairness of the scheme. There are, therefore, good reasons for requiring a smaller majority in favour of a scheme under s. 206 than the majority which is required under s.209 if the minority is to be expropriated."

95. For a discussion of the characteristics of the "typical shareholder", see Joseph, "Management's Labour Relations Perogatives and the Unproductive Debate: Still the Classical Economics and the Entrepreneur's Lot" 14 U.B.C. L. Rev. 75 (1980). The author refers to a New Zealand study on investments and states that: (footnotes omitted)

"Although non-financial motives such as sheer interest in business affairs may be of some importance in explaining the widespread interest in the share market, it remains true that the basic motive is the desire to make a monetary return on accumulated funds.

This motive alternated between the expectation to receive dividends on the shares and a capital gain on share appreciation, seventy-three per cent of the sample indicating the latter to be more important. On this survey then, the "typical shareholder" has a small portfolio, is a member of the group contributing the greatest portion of capital, and "neither expects nor has an incentive to participate in the management of the firm." His membership in the company is purely financial. His legal status as stockholder, correlated by the duty in management to conduct the enterprise in the best interests of the owners as a group, is an indefinite one. If his expectations arising from membership in the company are frustrated, whether as a result of economic cycles, the state of the industry or the malpractice of management, it is not to any legal mechanism that the shareholder looks. It is to the public market that he looks both for an appraisal of his ownership interest and the chance to realize that interest."

See also Peterson, Canadian Directorate Practices: A Critical Self-Examination (1977) at 116; Berle & Means, The Modern Corporation and Private Property (1932); Eisenberg, "The Legal Roles of Shareholders and Management in Modern Corporate Decision Making", 57 Calif. L. Rev 1 [1969] Manning, Rubner, The Enshared Shareholder (1965); The Shareholder Appraisal Remedy, An Essay for Frank Coker" 72 Yale L.J. 223 (1962).

96. For a review of the critical features of a going private transaction, see Brudney & Chirelstein, "A Restatement of Corporate Freezeouts", 87 Yale L.J. 1354 (1978); Brudney,

"A Note on Going Private," 61 Va. L. Rev. 1019 (1975);
Note, "Going Private", 84 Yale L.J. 703 (1975); Borden,
"Going Private - Old Tort, New Tort or No Tort", 49 N.Y.U.
L. Rev. 987 (1974); Salter, supra, note 2.

97. To quote former SEC Commissioner Sommer in Notre Dame,
supra, Note 2:

"Faced with the prospect of a merger or a market
reduced to "glacial activity and the liquidity of the
Mojave Desert, how real is the choice of the
shareholder confronting the offer of Management to
acquire his shares?'"

98. Minority shareholders have argued that the controlling
shareholders should not be permitted to acquire their
shares using the liquid resources of the company in which
their shares represent equity. The issuer may provide
insiders with direct or indirect financial assistance by

1. Loaning funds;
2. Guaranteeing a loan or providing security to a lending
institution for funds borrowed;
3. Passing on retained earnings in the form of tax-free
or taxable dividends.

The mode of financing will depend on a number of factors:

1. Whether the method of financing assistance will violate any statutory provisions. Supra, Note 11.
2. Whether the issuer or the controlling shareholders are better able to deduct any interest expense incurred.
3. Whether the payment of dividends would violate any statutory solvency provisions.
4. Whether the controlling shareholders are earning little or no income and therefore are in a low marginal tax bracket or are companies, each of which holds greater than 10% in value and 10% of the voting rights of the shares of the issuer. See Kroft, supra, Note 1 at 111-114.

For a discussion of what is known as a "leveraged buyout", see Lederman, "Leveraged Buyouts" in Eleventh Annual Institute on Securities Regulation, supra, Note 6 at 405. See also Coleman v. Myers. [1977] 2 N.Z.L.R. 298 (C.A.), rev'g [1977] 2 N.Z.L.R. 225 (S.C. 1976). For commentary on the trial judgment, see Rider, "Percival v. Wright-per

Incuriam", 40 Mod. L. Rev. 471 (1977); Hetherington, "Financing an Insider Take-over", 4 Aust. Bus. L. Rev. 220 (1976); Hansen, "Corporations Law" 11 Ottawa L. Rev. 617 at 671 (1978).

99. For a succinct discussion of "majority rule", see Beck, "An Analysis of Foss v. Harbottle" Studies in Canadian Company Law (J. Ziegel, ed.) Chapter XVIII at 548-552.

100. Supra, Note 7.

101. The MCA, SBCA and Draft OBCA.

102. For example, the CBCA s.185.1 now permits an arrangement without automatic shareholder consideration of a scheme prior to court approval and Section 170 of the CBCA has been amended to permit class voting rights in specific situations only when "the articles do not provide otherwise".

103. Supra, Note 29 and text, infra at 25.

104. Supra, Note 23. See also Phillips, "The Concept of a

Corporation's Purchase of Its Own Shares", 15 Alta. L. Rev. 324 (1977); Getz, "Some Aspects of Corporate Share Repurchases", 9 U.B.C.L. Rev 9 (1974).

105. CBCA, s.184; BCCA, s.231; ACA, s.249; SBCA, s.184; MCA, s.184; OBCA, s.100; Draft OBCA, s.183. For further details, see text, infra at 24. See also Magnet, supra, Note 1; Manning, "The Shareholders' Appraisal Remedy: An Essay for Frank Coker" 72 Yale L.J. 233 (1962-63); Bruun & Lansky, "The Appraisal Remedy for Dissenting Shareholders in Canada: Is It Effective?", 8 Man. L.J. 583 (1978).

106. Whereas in most jurisdictions parties to an amalgamation agreement must detail the manner in which the issued and unissued shares of each amalgamating company will be exchanged for shares in the amalgamated company, CBCA s.176(1), MCA s.176(1); SBCA s.176(1) and Draft OBCA s.173(1) permit the use of cash or redeemable preference shares in the exchange.

107. For example, see the comments of the Courts in Singer v. Magnavox, supra, Note 6; in Gregory v. Canadian Allied

Property, supra, Note 5 at 620 (W.W.R.) and in Jepson v. Canadian Salt, supra, Note 5 at 43-44 (W.W.R.).

108. Supra, Note 7.

109. Westeel, supra, Note 5 at 218 (O.R.):

"If the Legislature intended this section to encompass expropriatory powers, they should have said so in clear, unambiguous words. In my view the section should not be construed to import such powers. They now purport to do indirectly what they failed to accomplish directly on a takeover bid. At common law the majority could not expropriate the minority."

110. To quote Evershed M.R. in Greenhalgh v. Arderne Cinemas Ltd. supra, Note 57 at 291 (Ch. citation):

"A special resolution...would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give the former an advantage of which the latter were deprived."

See also Lange, supra, Note 1 for a discussion of this aspect of the case law.

111. Capital gains treatment is preferable only to investors who earn taxable income in excess of approximately \$59,000 because they will pay a combined federal and provincial tax of only 30% on capital gains as compared to 39% on

dividends they receive. An issuer may therefore structure a transaction so that shareholders have a choice of the form that the proceeds of disposition will assume. See Kroft, supra, Note 1.

112. There is no empirical data which suggests that squeezeouts have dampened investor confidence. However, many shareholders may feel the same as Mr. Kolasa whose comments were quoted by Bouck, J. in Neonex International, supra, Note 5 at 451:

"The leaders of this country have asked us all to invest in Canada as good citizens. My wife and I took our savings and bought shares in Neonex for over \$5.00 each. Now we are told we must sell them for \$3.00. We seem to have little choice. Why is this so?"

113. What also angers minority shareholders is the fact that the price which they paid for their shares was higher than the squeezeout price. Many companies now "going private" attracted capital in the late Sixties by "going public" was in vogue. For statistical details and practical tips about how to "go public", see Berman, Going Public: A Practical Handbook of Procedures and Forms (1974); Robinson & Eppler, Going Public (1971); Israels & Duff, When Corporations Go Public (1979); Going Public -- Advanced Techniques

(Sargent ed. 1979); Going Public Workshop (Sommer & Friedman eds. 1970); Shaw, The Costs of Going Public in Canada, U.W.O. School of Business Administration, June 6, 1974; Address by D.H. Brown, Going Public, OICA, 1970; McQuillan, Going Public in Canada: The Facts and Fads (1971).

114. In such a market, information flows freely, there are many participants and there are no institutional imperfections or corrupt, manipulative influences. See Brudney, "Efficient Markets and Fair Values in Parent Subsidiary Mergers", 4 Journal of Corporation Law 63 (1978).

115. To quote Brudney, supra, Note 114 at 64:

"Competition among the many eager participants in the market ferrets out all relevant information about the prospects of an enterprise and therefore the value of its securities and causes that information to be reflected in the price of the security 'instantaneously'. Each stock is thus 'priced fairly with respect to its value'."

116. See Manne, "Mergers and The Market for Corporate Control" 73 J. Pol. Eco 110 (1965); Manne, "Cash Tender Offers - A Reply to Chairman Cohen" (1967) Duke Law Journal 231.

117. See Campbell & Steele, supra, Note 1; Salter, supra, Note 2 for examples. In Re Quegroup Investments, supra, Note 5, the offering price for minority shares on the issuer bid was less than one half of the price at which they had been distributed to the public.
118. Weinberg & Blank, supra, Note 29, Chapter 3; Salter, supra, Note 2; Notice, supra, Note 2; Brudney, supra, Note 114 at 66. See also the detailed analysis of the Court in Domglas supra, Note 5 regarding these factors.
119. For a discussion of the calculation of the premium, see Campbell, Canada Valuation Service (Toronto: Richard De Boo), Chapter 5; and Chazen, "Acquisition Premiums and Liquidation Values: How Do they Affect the Fairness of the Financial Terms of an Acquisition?" Eleventh Annual Inst. of Sec. Reg., supra, Note 6 at 377.
120. For example, Neonex, Hidrogas, Maple Leaf Mills, the Keg (B.C. Business Week, p.38 May 9/79); Reed Paper Ltd. (Vancouver Sun, July 10, 1980, p.D7). See also Salter, supra, Note 2 and Campbell & Steele, supra, Note 1 for further examples.

121. Notice, supra, Note 2.

122. Cf. the comments of Greenberg, J. in Domglas, supra, Note 5 at 119-120 regarding the differences between 'fair value' and 'fair market value' and the fact that 'intrinsic value' means only 'fair market value'.

Brudney, supra, Note 114 at 79 states that the test for intrinsic value might be "what a bidder would pay for a controlling block of stock", thereby eliminating the need to discount the value of shares because they are held by the minority. It seems proper to discount the value of minority shares, though, because an arm's length purchaser may have a distaste for holding them and will therefore pay less. No discount factor should be applied, however, to reflect the infrequent trading or lack of marketability of shares, because intrinsic value should reflect the price a purchaser would pay in a perfect market. Cf. the analysis of the Court in Domglas supra, Note 5 at 43-45 as to the appropriateness of applying a minority discount.

123. To quote Gower, supra, Note 57 at 616:

"There need not be any actual deceit... 'Fraud' here

connotes an abuse of power analogous to its meaning in a court of equity to describe a misuse of a fiduciary position. Nor is it necessary that those who are injured should be a minority, indeed, the injured party will normally be the company itself, though sometimes those who have really suffered will be a class or section of members, not necessarily a numerical minority who are outvoted by the controllers. It covers certain "acts of a fraudulent character"...of which "familiar examples are when the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate."

124. For example, insiders may trade their shares in a company provided they do not profit financially from their access to material information. Supra, Note 63; Directors must declare their interest in a transaction to which the company is a party and refrain from voting at a meeting during which the merits of the transaction are to be considered. Supra, Note 70.

125. Changes which may trigger a dissent application include sale of all or substantially all the assets of the Company, amalgamation, alteration of any restriction upon the business which may be carried on, continuance by a company into or out of the jurisdiction, alteration or removal of any restriction or constraint on the issue or transfer of shares, amendment of the constating documents to convert a

company with share capital into one without share capital and vice versa; a going private transaction and the provision of financial assistance. The "triggering transactions" are not the same in every jurisdictions, so one must examine the pertinent legislation. See supra, Note 105. In McConnell v. Newco Financial Corp. 8 Bus. L.R. 180 (1980), Esson J. held that a consolidation of shares did not result in "the amendment of the articles to add, change or remove any provisions restricting or constraining the issue or transfer of shares". The shareholder was therefore not entitled to bring a dissent application under s.184 of the CBCA.

126. The mechanics of the appraisal right are discussed in Bruun & Lansky, supra, Note 105 and in the Domglas decision, supra, Note 5 at 11-15. Briefly, following delivery of share certificates and a notice of dissent to the company, shareholders may apply to court for a determination of the fair value of their shares, at which price the Company must purchase them.

127. Under the CBCA, SBCA, MCA and Draft OBCA, a "complainant" may make an application for relief. "Complainant" is

defined in CBCA s.231; MCA s.231; SBCA s.231 and Draft OBCA s.243 as:

- "(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of the 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 the court, is, a proper person to make an application under this Part."

It has been suggested that the Ontario Securities Commission may be considered a "proper person". See Viets, "Interaction of the New Ontario Securities Act with the Canada Business Corporations Act" 3 CCH Securities Law Reporter 12699-3.

128. CBCA s.234; SBCA s.234; MCA s.234; BCCA s.224; Draft OBCA s.246; and s.13.11 of the Draft Federal Securities Act (Proposals for a Securities Market Law for Canada, 1979). For commentary on the sections, see Iacobucci, Pilkington and Prichard, supra, Note 62.

129. An interim or final order.

130. Other orders a court may make include:

1. restraining improper conduct;
2. appointing a receiver manager;
3. amending the constating documents;
4. directing an issue or exchange of securities;
5. directing changes in directors;
6. varying or setting aside a transaction to which the corporation is a party and compensating any other parties;
7. directing payment to a securityholder;
8. directing production of any financial statement or accounting;

9. compensating any aggrieved person;
10. directing rectification of the corporate records or registry;
11. liquidating or dissolving the corporation;
12. directing an investigation; or
13. requiring any trial of the matter.

131. The BCCA s.224 is broader than the other statutes in that it may be used to prevent threatened and not just actual oppressive or unfairly prejudicial conduct.

132. The term "oppressive conduct" has been defined as:

"burdensome, harsh and wrongful" (Scottish Cooperative Wholesale Society Ltd. v. Meyer et al [1959] A.C. 324); "A lack of probity and fair dealing in the affairs of the company to the prejudice of some portion of its members" (Elder v. Elder and Watson [1952] S.C. 49 at 60). See also Re B.C. Aircraft Propeller and Engine Co. Ltd, 66 D.L.R. (2d) 628 (B.C.S.C. 1968); Re National Building Maintenance

Ltd. [1971] 1 W.W.R. 8; Re Van-Tel T.V. Ltd. 44 D.L.R. (3d) B.C.S.C. 1974) 146, Re Sabex International Ltee 6 Bus. L.R. 65 (Que. S.C. 1979); Re British Columbia Electric Company Ltd. 47 D.L.R. (2d) 754 (B.C.S.C. 1964); O'Neill v. Dunsmuir Holdings (New Westminster) Ltd. et al. (B.C.S.C. February 30, 1980).

133. In Diligenti v. RWMD Operations, Kelowna et al, 1 B.C.L.R. 36 (B.C.S.C. 1976 per Fulton, J.), the Court stated that there is unfair prejudice if considerations "make it unjust or inequitable, to insist on legal rights or to exercise them in a particular way". See also Jackman v. Jackets Enterprises Ltd. 4 B.C.L.R. 358 (B.C.S.C. 1977) and Redekop v. Robco Construction 5 Bus. L.R. 58 (B.C.S.C. 1979).

Unlike its American counterpart, Rule 10b-5 of the Securities Exchange Act of 1934, the oppression remedy will also be available to shareholders where fraud or manipulative conduct do not exist. For recent applications of the oppression remedy, see Ruskin v. All Canada News Radio, *supra*, Note 5; Westeel, *supra*, Note 5; N.I.R. Oil Limited v. Canadian Hidrogas Resources Ltd. (unreported,

Feb. 22, 1979 B.C.S.C. per Legg, J. A790417); Extensive discussion of Rule 10b-5 and its limited use in squeezeouts may be found in Roberts, "Rule 10b-5 and Corporate Mismanagement Problems with Shareholders' Oppression" 8 Memphis State U.L. Rev 501 (1979), Jacobs, "How Santa Fe affects 10b-5's Proscriptions Against Corporate Mismanagement" 6 Sec. Reg. L.J. 3 (1978).

134. BCCA s.270; ACA s.156(6), (7). In Newfoundland (NCA s.30(4)) and Nova Scotia (NSCA s.120(5)), the amalgamating companies may apply for a court order. In some acts such as OBCA ss. 196-197, a government official may have the discretion to refuse to issue a certificate of amalgamation when the constating documents of the amalgamated company are filed. However, see Wingold, supra, Note 78 which indicates that the certificate will issue if all documents are in order and that no assessment of the morality of any transaction will be made. Compare section 179 of the CBCA which states that the "Director shall issue a certificate of amalgamation" upon receipt of the articles of amalgamation and once satisfied that the transaction will not prejudice the rights of creditors.

For a discussion of the guidelines used by the Court, see Triad Oil, supra, Note 78 and Norcan v. Fogler, supra, Note 72.

135. BCCA s.257; OBCA s.190(3); ACA s.38(1); NCA s.89; NSCA ss.52-53. See supra, Note 51 for a list of cases outlining the principles followed by the courts.
136. Supra, Note 50. NCA s.39 requires every company that has consolidated its shares to give notice thereof to the Registrar of Companies. If an amalgamation or arrangement squeezeout eliminate sufficient publicly held shares to warrant the delisting of the issuer, any Exchange upon which the shares are traded must also be notified. See Toronto Stock Exchange Bylaws, s.19.16; r.912 of the Vancouver Stock Exchange; Alberta Stock Exchange Bylaws, s.19.16; Montreal Stock Exchange Rules, s.9155.
137. If a shareholder is a member of a Nova Scotia, Alberta, Quebec or B.C. Company, he may petition the court to "order otherwise" and not permit the acquiring company to purchase his shares on the same terms as the takeover bid was made. He may be successful if the court agrees that:

1. The company has failed to comply strictly with all statutory procedural requirements. See supra, Note 72.
2. The 90% required consisted of shares held by parties related to the offeror.

Esso Standard (Inter-Am) v. J.W. Enterprises, [1963] S.C.R. 144. Re Bugle Press, [1960] 1 All E.R. 766. Supra, Note 41.

3. There has been insufficient or inaccurate disclosure of material facts.

See Re Hoare & Co., [1933] 1 All E.R. Rep. 105, 150 L.T. 374 (Ch. D.); Re Evertite Locknuts Ltd., [1945] Ch. 220, [1945] 1 All E.R. 40 (Ch. D.); Re Press Caps Ltd., [1949] Ch. 434, [1949] 1 All E.R. 1013; Rathie v. Montreal Trust Company, supra, Note 28; Re John Labatt Ltd. and Lucky Lager Breweries, supra, Note 72, Gregory v. Canadian Allied Property Investments Ltd., supra, Note 5.

The Canadian cases indicate that an "order otherwise" in these circumstances is only appropriate where the minority can demonstrate that in spite of reasonable attempts to obtain information, it was unable to do so.

4. The price offered was unfair. See Re Hoare, supra, "Re Evertite Locknuts, supra"; Re Press Caps, supra; Re Western Mfg. (Reading) Ltd., [1956] Ch. 436, [1955] 3 All E.R. 733 (Ch. D.); Re Sussex Brick Co., [1961] Ch. 289, [1960] 1 All E.R. 772 (Ch. D.); Re Grierson, Oldham & Adams Ltd., [1968] Ch. 17, [1967] 1 All E.R. 192; Re Quegroup, supra, Note 5. For the B.C. position, see infra, Note 138.

138. Shareholders of a federal, Saskatchewan, Manitoba, British Columbia or Ontario corporation will not be permitted to enjoin compulsory acquisition proceedings because of the inadequacy of the consideration offered. BCCA s.279 allows a court to fix the price and terms of payment, make consequential orders or give directions IN ADDITION TO the power to "order otherwise". The other statutes permit either the corporation or the dissenting offeree to apply

to court to fix the fair value of the shares of that recusant shareholder, once he has elected not to transfer his shares to the corporation on the terms pursuant to which the takeover bid offer was made.

Unlike any other existing Canadian statute, the BCCA (s.279(9)) also enables shareholders to "require the acquiring company to acquire his shares" if they have not been given a notice of compulsory acquisition within one month after the company became entitled to do so. See also Draft OBCA s.187 and U.K. Companies Act s.209(2).

139. See Gower, supra, Note 57 at 708-218; Beck, supra, Note 99; MacKinnon, "The Protection of Dissenting Shareholders" Studies in Canadian Company Law (Ziegel, ed.) (1967) 507; Gold, "Preference Shareholders in the Reconstruction of English Companies" 5 U.T.L.J. (1943-44).

140. Id.

141. Scottish Insurance Corpn. v. Wilsons & Clydes Coal Co. [1948] S.C. 360 at 375; Aff'd [1949] A.C. 462.

142. Supra, Note 72. supra, Note 139.

143. To quote Huberman, in "Winding Up Business Corporations" in Studies in Canadian Company Law, Volume 2 (Ziegel ed., 1973):

"This reluctance to interfere is based on several well-known "rules", variously called the "internal management" rule, the "business judgment" rule and the principle of "majority rule". Simply put, these rules come down to nothing more than this - the courts believe strongly that the majority of the corporation is entitled to govern the corporation as it, and not the court, sees fit and the majority will not be allowed to do so free from court interference, unless its conduct is so gross as to shock the conscience of the Court."

144. Beck, supra, Note 99 discusses "non-interference in internal affairs" at 556-560. Generally speaking, the courts have refused to interfere in such intra-corporate matters as the proper appointment and removal of directors, managing directors and employers and in such inter-shareholder affairs as the making of calls, the payment of dividends, the reduction of capital or the creation of new classes of shares.

145. Gower, supra, Note 57 at 717.

146. For example, see Diligenti v. RWMD Kelowna (No.2) 4 BCLR 134 (B.C.S.C. 1978). See also "The Problem of Determining the Fair Value of GCOS Shares" Financial Times (Aug. 27, 1979); "A Slow Grind for Minority Shareholders" Financial Post (March 22, 1980) p.32 and "Shareholders' Hunt for Value Teaches a Lot About Appraisal". Globe & Mail (Feb. 4/80) p.B2.

In dissent proceedings, the Court does have the power to appoint an appraiser to assist it in determining "fair value". CBCA s.184(21); MCA s.184(21); SBCA s.184(21); Draft OBCA s.183(23). See also In the Matter of VCS Holdings Ltd. et al [1978] 5 W.W.R. 659 (B.C.S.C.) for a decision in which the court accepted a referee's determination of "fair value".

Query whether a specialized "Companies Court" be established to deal with similarly complex corporate problems. See Gower, supra, Note 57 at 718; MacKinnon, supra, Note 130 at 543; Ontario Select Committee on Company Law (The Lawrence Report, 1967) at 115-116.

147. Brudney, supra, Note 114 at fn.56.

148. An enterprise may be worth more in liquidation than as a going concern and any valuation provided to shareholders should express the value of shares on this basis, if it is the intention of the acquiror to liquidate.

149. Brudney, supra, Note 114 at 75.

150. Id. at 75 fn. 58.

151. There is considerable dispute among accountants as to the items to be taken into account in computing the earnings which corporations report in accordance with Generally Accepted Accounting Principles. See Canadian Institute of Chartered Accountants Handbook section 3500 "Earnings Per Share".

152. The ability of the controlling shareholders to set the terms of a squeezeout deprives minority shareholders of the opportunity to dispose of their shares in the manner or at a time which would best suit their tax position. For example, persons who are taxed at high marginal rates would

prefer to receive the proceeds from the disposition of their shares as capital gains rather than as dividends. Supra, Note 118. On an amalgamation squeezeout, however, they may be given preferred shares of the amalgamated company which would immediately exercise the redemption privilege attached to the shares, resulting in dividend treatment for shareholders. Similarly, a shareholder who has earned an extraordinary amount of income in 1980, for example, may not wish the inclusion of any further amounts in his income as a result of the redemption of the shares in that year. Had he the choice, and assuming the market price remained constant, he probably would prefer to sell his shares in a year in which his taxable income was lower.

Calculation of "fair value" should take into account the increased tax burden of minority shareholders resulting from a squeezeout. Had they not been forced to sell their shares, the minority shareholders would have been better able to dispose of their shares whenever and however it suited them. If, as a result of the disposition, they perceived that they would suffer increased tax liability,

they could then have demanded a higher price for their shares in the market place to offset any taxes payable.

To avoid having a court make a determination of the amount of tax liability for which a shareholder should be compensated when calculating "fair value", Companies, such as International Land Corporation (Oct. 5, 1978 circular) enabled shareholders to choose the time at which the expropriation of shares will take place and the tax treatment the proceeds of disposition will assume. For example, the squeezeout might be structured so that each step of the transaction consisting of a takeover bid followed by an amalgamation occurs in a different taxation year. The amalgamation company might then issue two classes of redeemable shares, from which a minority shareholder could elect to receive those providing him with capital gains or dividend treatment. For further details, see Kroft, supra, Note 1 at 91.

153. The wording in the dissent provisions appears broad enough to enable a court charged with fixing "fair value" to take account of the "private company benefits" enjoyed by insiders of the issuer. The British Columbia Companies Act

s.231 requires consideration of any appreciation or depreciation in anticipation of the vote upon the resolution". Until March 1979, the appraisal provisions in the CBCA s.184, MCA s.184 and SBCA s.184 stipulated that "any change in value reasonably attributable to the anticipated adoption of the resolution must be excluded". This phrase has since been removed and a dissentient is entitled to be paid the "fair value of the shares held by him...determined as of the close of business on the day before the resolution was adopted."

The Diligenti case (No. 1)), supra, Note 133 raises the question whether a minority shareholder may obtain any payment reflecting private company benefits in oppression proceedings. Fulton, J. stated that "changes in value occasioned by or as a consequence of oppressive or unfairly prejudicial conduct are to be excluded." For further discussion, see text infra at 32; See, also Brudney & Chirelstein, "Fair Shares in Corporate Takeovers and Mergers", 88 Harv. L. Rev. 297 (1974); Contra, see Lorne, "A Reappraisal of Fair Shares in Controlled Mergers" 126 Penn L. Rev. 955 (1978); Toms, "Compensating Shareholders Frozen Out in Two Step Mergers" 78 Col. L. Rev. 546 (1978);

Chirelstein, Sargeant and Lipton, "'Fairness' In Mergers Between Parents and Party-Owned Subsidiaries" Eighth Annual Securities Regulation Conference (New York: PLI, 1977) 273.

154. Supra, Note 98. Minority shareholders have argued that the "fair value" paid by the controlling shareholders should reflect a portion of the savings obtained by insiders who have not spent any of their own after-tax dollars to enhance the value of their own shareholdings. See infra, text accompanying Note 174 for further discussion.
155. Brudney, supra, Note 114 at 76.
156. An important statutory provision for assisting shareholders to acquire relevant background information is a court-ordered investigation of the company's affairs which is available where the applicant can satisfy the court that there are circumstances suggesting wrong doing. See CBCA s.222; BCCA s.233; ACA s.100; SBCA s.222; MCA s.222; OBCA s.186; Draft OBCA s.159; QCA s.107; NSCA s.101; NBCA ss. 107-109; NCA 116-119; PEICA. The court has the broad discretion to refuse an order to investigate in the absence

of "bona fides". This is to prevent the use of an investigation as a tool to blackmail management because the process is certain to be time-consuming and inconvenient and may generate bad publicity for the company.

Unfortunately, access to and use of the investigation right are hampered by a requirement for percentage ownership and costs. For further details, see Iacobucci, Pilkington & Prichard, supra, Note 62 at 214-26.

Securities regulatory bodies may also assist shareholders in gathering information about an issuer. See BCSA s.21; ASA s.21; NBSFPA s.21; Bill 76 s.11; SSA s.27; NSA s.23; Bill 72 s.10; MSA s.21; NSSA s.22; OSA s.11; QSA ss.36, 82A; PEISA s.16. See also Alboini, supra, Note 1, Chapter VI.

157. For example, see Re Whitehorse Copper Mines; Hudson Bay Mining and Smelting Co. Limited v. Lueck and Weinstein (unreported, July 3, 1980 B.C.S.C. per McEachern, C.J.) infra, text at 31 and Domglas, supra, Note 5 at 111-115.

158. The protracted determination of "fair value" and the possibility of insolvency (CBCA s.184(26); MCA s.184(26); SBCA s.184(26); Draft OBCA s.183(28); BCCA s.257) may delay a payment to recusant shareholders for a lengthy period of time. Moreover, there is no guarantee that the court will exercise its discretion to allow a reasonable rate of interest on an amount payable to each dissentient from the date the action was approved by the resolution until the date of payment.

Even if dissentients choose to exercise their rights in spite of the delay, unfavourable tax consequences and considerable expense may prompt them to elect otherwise. See Kroft, supra, Note 1 at 116 and Vivian, "Monetary Restraints on the Exercise of Rights of Dissenting Shareholders" 9 U.W.O.L. Rev. 101 (1970).

159. For example, in oppression proceedings, (1) the applicant is not required to give security for costs; (2) court approval is required for any stay, discontinuance or dismissal of oppression proceedings; (3) the court may order a company to pay interim costs of an applicant, although the applicant may be accountable for these costs

upon the final disposition of the application; (4) approval of a transaction by a majority of shareholders is but one factor courts will consider when asked to dismiss an application.

See CBCA s.235; SBCA s.235; MCA s.235; Draft OBCA s.246.

160. See Jepson v. Canadian Salt, supra, Note 5, as to what constitutes a proper dissent notice.

161. In Jepson v. Canadian Salt, supra, Note 5, Laycraft J. stated at 42, 43:

"Section 184 of the Canada Business Corporations Act prescribes a remarkably rigid procedure which, moreover, seems to be slanted in favour of the amalgamated corporation and against a dissenting shareholder. In several places in s.184 there is a requirement that specified notices, containing specified information, be sent within specifically limited times. On the face of the sections, failure by the corporation to meet the requirements of the section has no particular penalty. On the other hand, failure by the shareholder to observe some provision of the section can result in the draconian penalty of complete loss of his investment in the corporation. Indeed, in this case, it is urged by the corporation that that is the result.... ...I am left to wonder at the legislative policy which produced this procedural morass..."

See The Manitoba Sec. Comm'n v. Versatile Cornat Corp., [1979] 2 W.W.R. 714, 97 D.L.R. (3d) 45 (Man. Q.B.), where Hewak, J. held that "shareholder" did not mean a shareholder who owned shares as of the date of the triggering transaction but who sold them before he received notice of the resolution advising him of his dissent right. See also Domglas, supra, Note 5 at 18 where Greenberg, J. stated that the strict compliance with procedural requirements is essential to enable a dissatisfied shareholder to qualify as a dissentient.

Query whether the dissent right should be an exclusive remedy for shareholders in view of these problems. See Vorenberg, "Exclusive Ness of the Dissenting Shareholder's Appraisal Rights" 77 Harv. L. Rev. 1189 (1964).

162. It is as yet unsettled whether the company should bear the burden of proof in dissent proceedings. Contrary to this view held by Bouck, J. in Neonex International, supra, Note 5, the Court in Robertson v. Canadian Cannery Ltd. 4 Buss. L.R. 290 (Ont. H.C. 1978) held that neither party is required to prove that an offer represents "fair value".

This view has recently been supported by the Court in Domglas, supra, Note 5. To quote Greenberg, J. at 17:

"If I were to decide otherwise and impose the burden of proof on the corporation, solely because in this instance it is the Petitioner, then all a corporation need do is to refrain from applying subsection 15 [CBCA s.184(15)]. This would impose upon the dissenting shareholders the Obligation to apply pursuant to Subsection 16 thereof, thus shifting the burden of proof to them."

In compulsory acquisition proceedings, the dissenting offence must demonstrate the unfairness of a takeover scheme in spite of management's superior access to material information. See Canadian Allied Property, supra, Note 5 and Re Whitehorse Copper, supra, Note 157.

163. For example, in Re Canadian Hidrogas Resources Ltd., supra, Note 5, the applicant company had approximately 735 shareholders holding 3 million common shares. The company proposed to convert these shares into Class "A" non-voting redeemable shares in the ratio of 5 to 1. The new shares could then be converted within 30 days of the first conversion, to Class "B" voting shares in the ratio of 1 Class "A" share to 5 Class "B" shares. At the general meeting, only two shareholders, representing a majority of

the shares were present and approved the reorganization. Hutcheon, J. held that there were 733 persons who had no knowledge of the proposal and would receive no further information beyond the terms of conversion proposed once the arrangement was approved. He concluded that there "lurked the danger of the unfairness in the arrangement" because it was "obvious that those shareholders who fail to take advantage promptly of the arrangement will see their investment decline in value significantly with the decline reflected as an enhancement in the value of the shares which are altered in accord with the arrangement." Id. at 709.

See also Re Ripley International, supra, Note 5.

164. Re Wall and Redekop [1975] 1 W.W.R. 621, 50 D.L.R. (3d) 733 (B.C.S.C.); Neonex International, supra, Note 5 and See also "Valuation of Dissenters" Stock Under Appraisal Statutes" 79 Harv. L. Rev. 1453 (1966) Contra, see Montgomery et al v. Shell Canada Ltd. (April 25, 1980, Sask. Q.B. unreported) where Estey, J. held that "fair value" was not net asset value so long as the corporation

continued to be a going concern, but was market value (which he concluded was not depressed).

165. Diligenti, supra, Note 146; Stewart v Cowan Office Supplier (Nov. 26, 1979 B.C.S.C., unreported); O'Neill, supra, Note 132.

166. Quegroup, supra, Note 5; Re Whitehorse Copper, supra, Note 157. Jefferson v. Omnitron Investments, supra, Note 41; In the Matter of Pacific Enterprises 18 B.C.L.R. 14 (B.C.S.C. 1979); Redekop v. RobCo. (No. 2) (unreported, B.C.S.C., 1980).

167. See Re Simco Ltee 3 Bus. L.R. 318 (Que. S.C., 1978) and text, infra, at 44; Re Ripley International, supra, Note 5.

168. Re Hellenic, supra, Note 77; Diligenti, supra, notes 133 and 146; Westeel, supra, Note 5.

169. Supra, Note 157.

170. As the date on which "fair value" is to be fixed was

neither set out by legislation nor previously determined by the Court, the Chief Justice set it as the last date on which the dissentients could elect to have the Court determine fair value. See supra, Note 44.

171. Supra, Note 5.

172. Id at 273-274. In Neonex, supra, Note 5, at 452 Bouck, J. was also of the opinion that "fair value" should reflect the benefits available to shareholders of a private company"

"...It is at least arguable the fair value should reflect any benefit the majority might receive by reason of the takeover. However, where a Court is called upon to assess the fair value of a dissenter's shares on an amalgamation such as this, the calculation must be determined at the close of business on the day before the amalgamation resolution was adopted (s. 184(3)). Any change in value reasonably attributable to the anticipated adoption of the resolution must be excluded. This seems to mean that any benefits Pattison gained by the amalgamation cannot be taken into consideration when valuing the dissenter's shares."

173. Canada Valuation Service, supra, Note 119, Chapter V.

174. The same argument holds true for the relationship between "fair value" and the use of corporate funds to repurchase

minority shares, supra, Notes 98 and 154. Whereas intrinsic value should reflect the worth of the Company based on the size of tax free accounts or the amount of retained earnings, it is only the controlling shareholders who would pay a premium for minority shares in order to make use of corporate funds without fear of a derivative action.

175. For a recent application of this principle in a squeezeout transaction, see National System of Baking of Alberta Ltd. v. The Queen [1980] CTC 237, 80 D.T.C. 6178 (FCA). The court held that market price was the best evidence of "fair market value" and it was irrelevant that a substantial number of shareholders held the view that the majority shareholder would seek to acquire minority shares at a price substantially in excess of the quoted price on the exchange. Generally, see Wise, "The V-Day Value of Publicly Traded Shares" 28 Can Tax J. 253 (1980).

176. Whereas Policy 3-37 and OSA Regs. s.163 protect only shareholders resident in Ontario, Draft OBCA s.188 safeguards shareholders of all "offering corporations" incorporated in Ontario. OSA Regs s.163 applies only where

a "going private transaction" as defined, supra, Note 4 is anticipated to follow a takeover bid or issuer bid. The OSC takes the view that certain transactions that are not "going private transactions" are nonetheless subject to Ontario Policy 3-37:

- (1) An issuer or insider takeover bid not followed by a going private transaction;
- (2) a transaction that is designed to eliminate the interest of minority shareholders such as a cash amalgamation squeezeout, but is not preceded by an issuer or takeover bid.

See Alboini, supra, Note 1, 633-639.

There has been some dispute whether the rules contained in Policy 3-37 and OSA s.163 "smack of company law" and should be imposed through corporations Acts. For discussion, see Salter, supra, Note 2; Notice, supra, Note 2; In Re Cablecasting, supra, Note 5; In the Matter of the Securities Act and In the Matter of Loeb and Loebex [Dec. 1978] Bull OSC 333. It does not seem important that the "distinction between corporate law and securities law

...has become increasingly blurred in Canada during the past two decades", because, unlike the U.S., Canada does not have a constitutional structure which only gives the Federal Government the power to create laws governing interstate trade and commerce.

The constitutional framework in the United States has led to the creation of rules by the Securities and Exchange Commission which require extensive disclosure by issuers in going private transactions. See supra, Note 4 (Rule 13e-3) and Stumpf, "SEC Proposed 'Going Private' Rule" 4 Del. J. Corp. L. 184 (1978).

177. In "Minority Freezeouts Under Wisconsin Law" 32 Bus. Law 1501 at 1503-4, Bartell suggests the payment of a "going private" premium over market price equal to the average or median premium paid in contested takeover bids during the prior year. Whereas the use of such a generalized figure avoids the difficulties inherent in the calculation of intrinsic value, this calculation involves different problems. For example, a premium derived by averaging the range of last year's premiums may be a gross distortion for

any particular case this year. For further discussion, see Brudney, supra, Note 114 at 80.

178. 1. A summary of the volume of trading and price range of the shares on any stock exchange within twelve months preceding the date of a squeezeout.
2. Any plans or proposals for material changes in the issuer, including any contract or agreement under negotiation which if successfully completed would be material; and any proposal to liquidate the issuer, to sell, lease or exchange all or substantial part of its assets, to amalgamate it with any other business organization or to make any material changes in its business, corporate structure (debt or equity), management or personnel.
3. The number and designation of any securities of the issuer purchased or sold by the issuer/acquiror during the 12 months preceding the date of the squeezeout including the purchase or sale price.

4. Financial statements of the issuer prepared subsequent to the date of its most recently filed financial statements not previously released or sent to security holders.
5. The offering price per share and the aggregate proceeds received by the issuer when securities have been offered to the public during the 5 years preceding the squeezeout.
6. A general description of the income tax consequences of the squeezeout transaction to the issuer and to security holders.

179. A valuation of the shares of the issuer must be prepared and submitted to the Ontario Securities Commission at least 120 days prior to the announcement of any going private transaction and at least 40 days prior to the date of any meeting at which the transaction will be considered. Once approved, the issuer must forward a summary of the valuation to its shareholders and inform them that a copy of the valuation will be sent upon request for a nominal charge sufficient to cover printing and postage. The

summary should include the basis of computation, the scope of review, the relevant factors and their values and key assumptions on which the valuation is based.

The valuation itself must follow techniques that are appropriate in the circumstances, giving consideration to going concern or liquidation assumptions, or both, and to other relevant factors to arrive at a value or range of values resulting in a per unit value for the securities of the issuer being eliminated or modified. It must not contain a downward adjustment to reflect the fact that the affected securities do not form part of a controlling interest, but must include an estimate of the cash equivalent of the securities offered to minority shareholders which the issuer does not plan to redeem immediately following the going private transaction.

The valuation must also be prepared by an independent party. There is some debate, however, whether auditors or the issuer or investment dealers truly qualify as "independent" because of the apparent conflicts of interest arising from a desire for continued employment with the company. See Campbell & Steele, supra, Note 1; Salter,

supra, Note 2; and Notice, supra, Note 2 for discussion of this issue.

180. 1. The direct or indirect benefits to every senior officer, director, insider, associate of an insider or associate or affiliate of the issuer as a result of the transaction;
2. the details of any contract, arrangement or understanding, formal or informal, between the issuer and any securityholder;
3. the source of cash to be used for payment, and if funds are to be borrowed, the terms of the loan, the circumstances under which it must be repaid and the proposed method of repaying it;
4. the frequency and amount of dividends with respect to the shares of the issuer during the two years preceding the date of the squeezeout transaction, any restrictions on the ability of the issuer to pay dividends and any plan or intention to declare a

dividend or to alter the dividend policy of the issuer.

181. If the consideration offered is other than cash or a security providing an immediate right to cash or is less in amount than the per share price indicated by the valuation, Policy 3-37 and Section 188 of the Draft OBCA require at least 2/3 approval by the independent minority.

182. Supra, Note 97. See also Notice, supra, Note 2 in which the OSC stated the reason for adopting the majority of the minority test:

"But valuations alone are not enough. They might suffice if the minority shareholder had true freedom of choice, but in these transactions that luxury is unavailable. By definition, a going private transaction is so designed as to bind even the dissentient. Even if this were not true, the practicalities of the situation often leave the minority shareholder with no realistic alternative to acceptance. Almost invariably, the offer is at a price significantly in excess of prior market price, and will be accepted by the great majority of the offerees. Accordingly, the dissentient would face the likelihood of an illiquid market after completion of the transaction, with small opportunity to realize as much in the future. It is for this reason that the majority of the minority test was introduced as a common feature of these transactions."

183. Supra, note 146; and Brudney, supra, note 114 at 81. See also supra, note 156 for reference to the broad investigatory powers which the OSC possesses.
184. Policy 3-37, supra, note 38 "Interpretations-Exemptions."
185. Id. For example, employees or former employees.
186. Id. Appendix I; Supplement to OSC Policy 3-37; See also Draft OBCA s.188(6).
187. Id. It is suggested that management certify that no intervening event nor any prior event undisclosed at the time of the initial transaction could reasonably be expected materially to increase the value of the corporation.
188. Id.
189. See Salter, supra, note 2; Notice, supra, note 2.

190. See Loebex, supra, note 176.

191. Policy 3-37, supra, note 38.

192. Id.

193. Id.

194. Id.

195. Id.

196. Id.

197. Draft OBCA s.188(4)

198. While Quebec companies legislation contains a compulsory acquisition right it has no other statutory provisions assisting shareholders to claim fair value. However, the decision in Re Simco Ltee., supra, note 167 indicates that s.46 which requires judicial approval of an arrangement may provide the court with greater powers than anticipated. See text infra, at 44. If so, prohibition may only be

required in amalgamation squeezeouts or classification-consolidation freezeouts by special resolution.

199. The courts in Maple Leaf Mills and Westeel, supra, note 5 did not award damages because they were of the opinion that the actions of the defendant were likely to cause irreparable harm, not compensable through damages. This in itself, suggests that they were of the opinion that shareholders had a right in the form and not the value of their investments.

200. Supra, note 77. See also Prentice, "Corporate Arrangements-Protecting Minority Shareholders" 92 LQR 13 (1977).

201. The facts in Hellenic were as follows:

The scheme involved cancellation of the common shares of Hellenic and the issuance of new shares to a bank (Hambros), following which the existing shareholder would be compensated in cash for the loss of their shares. The actual effect of the scheme was to enable Hambros to purchase all the issued common shares of

Hellenic. MIT, a wholly owned subsidiary of Hambros, owned approximately 53%, while the objector, the National Bank of Greece ("NBG") held 14%.

At a meeting of all the common shareholders called to approve the scheme, the requisite special resolution was passed with the assistance of a favourable vote by MIT.

202. Supra, note 77 at 388 (All E.R. citation).

203. See the comments of the Court in Maple Leaf Mills, supra, note 5 at 201(O.R.) and in Westeel, supra, 5 at 216(O.R.).

204. Supra, note 167.

205. Query why the Court did not inquire into the market value of the shares and use it as a reference for determining a "fair" buy-out figure.

206. The decision not to impose a majority of the minority test would appear to be correct if section 46 of the QCA does give the Court the power to order a minority buy-out when

it is charged with the responsibility of approving an arrangement.

207. See Scott, "Going Private: An Examination of Going Private Transactions Using the Business Purpose Standard" 32 S.W.L.J. 64 (1978) and Borden & Messmar, supra, note 6.
208. In spite of the decision in Marshall v. AFW Fabric Corp. 533 F. 2d 1977 (2d Cir.), vacated and remanded for a determination of mootness, 429 U.S. 881 (1976), the U.S. Supreme Court in Green v. Santa Fe Industries Inc. 533 F. 2d 1283 (2d Cir., 1976), rev'd, 430 U.S. 462 (1977) held that the creation of a proper corporate purpose test is a matter of state and not Federal law. Following this decision, Rule 13e-3, supra, note 4, was amended and the requirement of a proper corporate purpose was deleted.
209. See for example: Jutkowitz v. Bourns, Inc. No. CA-000268 (Cal. Super. Ct. LA Co. Nov. 19, 1975); Kaufman v. Lawrence 386 F. Supp. 12 (SDNY 1974); Tanzer Economic Associates Profit Sharing Plan v. Universal Food Specialties Inc., 87 Misc. 2d 167, 383 NYS 2d 472 (Sup. Ct. 1976)

210. Matteson v. Ziebarth 40 Wash. 2d 286, 242 P. 2d 1025 (1952); Polin v. Conductron 552 F. 2d 797 (8th Cir.), Cert. Denied, 98 S.Ct. 178, 54 L. Ed. 2d 129 (1977).
211. Bryan v. Brock & Blevins Co. 490 F. 2d 563 (5th Cir.), Cert. denied 419 U.S. 844 (1974); Clark v. Pattern Analysis & Recognition Corp. 87 Misc. 2d 385, 384 NYS 2d 660 (Sup. Ct. 1976).
212. Schulwolf v. Cerro Corp. 86 Misc. 2d 292; 380 NYS 2d 957 (Sup. Ct. 1976); Tanzer Economic Associates, supra, note 209; Young v. Valhi 382 (Del. Ch. Feb. 22, 1978). See also Singer v. Magnavox Co. supra, note 6.
213. Grimes v. Donaldson Lufkin & Jenrette Inc. 392 F. Supp. 1393 (ND Fla.) aff'd, 521 F. 2d 812 (5th Cir. 1975); Teschner v. Chicago Title & Trust Co. 322 N.E. 2d 54 (1975); Cole v. Schenley Industries Inc. [1975-1976 Transfer Binder] Fed. Sec L. Rep. (CCH) Section 95,765 (Sony 1976), remanded 563 F. 2d 35 (2d Cir. 1977); Schulwolf v. Cerro Corp., supra, note 212; Tanzer Economic Associates, supra, note 209.

214. Young v. Valhi, supra, note 212; Kemp v. Angel, 381 A. 2d 241 (Del. 1977) Cf. Schulwolf v. Cerro Corp., supra, note 212.
215. Tanzer v. International General Industries 379 A. 2d 1121 (Del. 1977); Tanzer Economic Assoc., supra, note 209.
216. In Singer v. Magnavox, supra, note 6, the Delaware Supreme Court overturned a decision of the Court of Chancery and rejected the contention of the defendants that a merger was "legally unassailable" because of full compliance with procedure. See also Najjar v. Roland Int'l Corp. 387 A. 2d 709 (Del. Ch. 1978); Bryan v. Brock & Blevins Co., supra, note 213; Gabhart v. Gabhart 390 N.E. 2d 346 (Ind. 1977); Berkowitz v. Power Mate Corp. 342 A. 2d 566 (N.J. Ch. 1975); Tanzer Eco. Assocs., supra, note 209; In re Jones & Laughlin Steel Corp. 398 A. 2d. 186 (S.C. Penn., 1979). Note the analysis of the British Columbia Court of Appeal in Canadian Allied Property, supra, Note 7. Carrothers J.A. stated at 620 (W.W.R.):

"We are not to be concerned with the motivation behind the desire to acquire the minority shareholder unless it is abusive of or unfair to the minority. Certainly there is no presumption of abuse to be derived merely from the majority position of the

acquiring company. We must assume, until the contrary be shown, that the objective or motivation of the acquiring company is proper. There are many legitimate reasons for eliminating a minority shareholding and if we are to speculate about that motivation I would prefer to contemplate these. A controlling shareholder can then make business decisions, particularly long-term ones, without concern for conflicts of interest with the minority shareholders and without having to worry about adverse effects on the trading price of shares on the market. To obtain full share control would eliminate the administrative burden and expense of maintaining status as a reporting company with shares listed on stock exchanges. Future financing obtained through the controlling shareholder's resources would be facilitated by that controlling shareholder having all the voting and participating shares in the subject company. Originally the small public shareholding here served as a balancing and leavening influence on the two equal controlling shareholders (who were both well established and renowned as long-term investors but were strangers to this business community) and introduced a local short-term interest to be considered and served by the subject company's directors. That equal control has gone and so perhaps have the other reasons for the minority shareholdings."

217. Westeel, supra, note 5 at 216 (O.R.)

218. Supra, note 137.

219. Id. at 278.

220. Id. at 283.

221. Unlike the CBCA, SBCA and Draft OBCA, the U.K Act requires an offeror to be an "acquiring company" and not an individual. To quote the Privy Council in Blue Metal Indus. Inc. v. Dilley, supra, note 27:

"It is particularly significant that the power cannot be exercised by an individual or, even on the hypothesis that plural acquisition is possible by a company or companies and an individual or individuals together. This seems strongly to support the indication that the section is a company structure section and not one of concentration of property interests."

222. Supra, note 137.

223. Canada Corporations Act R.S.C. 1970 c. C-32 as amended.

"136. (1) Notice to dissenting shareholder. - Where any contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to any other company (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected, or not less than nine-tenths of each class of shares affected, if more than one class of shares is affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice, in such manner as may be prescribed by the court in the province in which the head office of the transferor company is situated, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee company is, unless on an application made by the dissenting shareholder within one month from the date on which the notice was

given the court thinks fit to order otherwise, entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the transferee company."

224. Supra, note 137 at 151.

225. Supra, note 6.

226. Supra, note 95.

227. Supra, note 57.

228. Supra, notes 139-144.

229. Supra, note 137 at 149.

230. The CBCA, SBCA and Draft OBCA permit the acquisition of shares if a takeover is accepted by holders of not less "than 90 percent of the shares of any class . . . other THAN SHARES HELD AT THE DATE OF THE TAKEOVER BID BY OR ON BEHALF OF THE OFFEROR OR AN AFFILIATE OR ASSOCIATE OF THE OFFEROR." The BCCA refers to "not less than 9/10 of those shares or of the shares of that class other than shares

already held at the date of the offer by, or by a nominee for, the acquiring company or its affiliate." For a discussion of the term "Nominee", see Jefferson v. Omnitron Investments, supra, note 41; Sammell v. President Brand Gold Mining Co. supra, note 41; and Gregory v. Canadian Allied Property, supra, note 5.

231. Percival v. Wright [1902] 2 Ch. 421. For discussions of directors' duties, see Iacobucci, Pilkington & Prichard supra, note 62 at 286-318; Anisman, supra note 62 at 158 ff; Gower, supra, note 57 at 571 ff; Palmer, "Directors' Powers and Duties" Studies in Canadian Company Law, (J. Ziegel ed.) Ch. 12. In the recent decision of the New Zealand Court of Appeal, Coleman v. Myers, supra, note 105, directors engaging in the acquisition of shares were held to be subject to a general duty of disclosure when dealing with prospective purchasers or sellers. The Court stated that Shareholders who surrender their shares on a takeover must be told of all material facts, including the method of financing the transaction. Cf. Allan v. Hyatt (1914), 17 D.L.R. 7 (P.C.) and Anisman, supra, note 62 at 159.

232. The "Complainant." See supra, note 127.

233. CBCA s.232-233,235; BCCA s.225;
MCA s.232-233,235; OBCA s.99;
SBCA s.232-233,235; Draft OBCA ss.244-245;

A derivative action is a suit brought by a person in the name of and on behalf of the corporation to remedy a wrong done to the corporation. It is available only for the enforcement of duties owed to the corporation and is unavailable to enforce the rights of an individual or group of shareholders. However, it may be brought in a representative form. See Beck, "The Shareholders' Derivative Action" 52 Can. Bar Rev. 159 (1974) and Beck, supra, note 99.

In jurisdictions which have not enacted a statutory derivative action, shareholders may bring a derivative action, but its scope will be severely limited by the rule in Foss v. Harbottle (1843) 2 Hare 46; 67 E.R. 189. For discussion, see Beck, supra, note 99.

234. Beck, supra, note 99. Note that the directors in their capacity as controlling shareholders are not permitted to ratify fraudulent actions. See Cook v. Deeks [1916] 1 A.C. 554 (P.C.); Cf. Regal (Hastings) Ltd. v. Gulliver, [1942] 1 All E.R. 378 (H.L.).
235. Supra, note 233.
236. Wallersteiner v. Moir (No. 2), [1975] 1 All E.R. 849 (C.A.).
237. Whereas BCCA s.142 and OBCA s.144 require that a director "act honestly, in good faith and in the best interests of the company", CBCA s.117; MCA s.117, SBCA s.117 and Draft OBCA s.133 are more flexible and use the phrase "with a view to the best interests of the company."
238. Teck Corporation Ltd. v. Millar 33 D.L.R. (3d) 288 (BCSC, 1972); Parke v. Daily News Ltd., [1962] Ch. 927; Re Smith & Fawcett Ltd., [1942] Ch. 304. For further discussion of this phrase, see Gower, supra, note 57 at 576-580.

239. See Farrar, "Abuse of Powers By Directors" 33 Camb. L.J. 221 (1974); Bennun, "Directors' Powers To Issue Shares: Two Contrasting Decisions" 24 Int. and Comp L.Q. 359 (1975); Birds, "Proper Purposes As a Head of Directors' Duties" 37 Mod. L. Rev. 580 (1974); Gower, supra note 57 at 580-582; Iacobicci, Pilkington and Prichard, supra, note 62 at 297-300.
240. See Fraser v. Whalley (1864), 2 H & M 10, 71 E.R. 361; Punt v. Symons & Co. Ltd., [1903] 2 Ch. 506; Piercy & S. Mills & Co. Ltd., [1920] 1 Ch. 77; Bonisteel v. Collis Leather Co. Ltd. 45 O.L.R. 195 (Ont. H.C., 1919); Re Smith & Fawcett, supra, note 238; Hogg v. Cramphorn Ltd. [1967] Ch. 254 and Teck Corporation v. Millar, supra, note 238.
241. When Directors have issued themselves additional shares to retain voting control of the Company and defeat a takeover bid, this has been held to be an "improper purpose." See Hogg v. Cramphorn, supra, note 240; Teck Corporation v. Millar, supra, note 238; Winthrop Investments Ltd. v. Winns Ltd., [1975] 2 N.S.W.L.R. 666 (C.A.), Bernard v. Valentini, 18 O.R. (2d) 656 (4.c.1978). Query whether the directors may ratify this action in their capacity as

controlling shareholders. See Bamford v. Bamford, [1970] Ch. 212; Hogg v. Cramphorn, supra, note 240 and Teck Corp. v. Millar supra, note 238 and Prentice, "COMMENT" 47 Can. Bar Rev. 648 (1969).

The "proper purposes test" is somewhat superfluous because Directors must act bona fide in the best interest of the company. What is the difference between acting "bona fide" and for an "improper purpose"? For a list of suggested "proper corporate purposes", see the comments of Carrothers, J.A. in Canadian Allied Property, supra, notes 5 and 216.

242. See Howard Smith Ltd. v. Ampol Petroleum Ltd. and Others [1974] 1 All E.R. 1126 (H.L.) Cf. Teck Corp. v. Millar, supra, note 238.

243. Phipps v. Boardman, [1967] 2 A.C. 46, [1966] 3 W.L.R. 1009; Regal (Hastings) Ltd. Gulliver supra, note 234. See also, supra, note 70.

244. Keech v. Sandford (1726) Sel Cas. Ch. 61. See also Beck, "The Saga of Peso Silver Mines: Corporate Opportunity

Revisited" 49 Can. Bar Rev. 80 (1971) and Anderson, "Conflicts of Interest, Efficiency, Fairness and the Corporate Structure" 25 UCLA L. Rev. 738 (1978).

245. Query whether the controlling shareholders may ratify such an action. See Beck, supra, note 244 at 114; Canadian Aero Services Ltd. v. O'Malley, Zarzycki et al. (1973), 40 D.L.R. (3d) 371; [1974] S.C.R. 592; and Beck, "The

Quickening of Fiduciary Obligation: Canadian Aero Services v. O'Malley" 53 Can. Bar Rev. 771 (1975).

246. Canadian Aero Services, supra, note 245; Scottish Co-operative Wholesale Society Ltd. V. Meyer, supra, note 132. Cf. Bell v. Lever Bros. [1932] A.C. 161. See also Beck, supra, note 245 at 787-792.

247. Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238; Brown v. Halbert 271 A.C.A. 307, 76 Cal. Rptr. 781; Remillard Brick Co. v. Remillard-Dandini 109 Cal. App. 2d 405, 241 P. 2d 66; Jones v. H.F. Ahmanson & Company 1 Cal. 3d 93, 460 P. 2d 464. See also Gibson, "The Sale of Control in Canadian Company Law" 10 U.B.C. L. Rev. 1 (1976).

248. This is based on the assumption that the constating documents constitute a contract between the company and each member. While this fact is expressly found in Companies legislation in memorandum jurisdictions (e.g., BCCA s.13), it is not clear whether the same holds true for shareholders of letters patent or articles of incorporation companies. See Beck, supra, note 99. See also Gower, supra note 57 at 653-656; Beck, supra, note 233 at 169-179; Charlebois et al. v. Bienvenu et al. [1967] 2 O.R. 635 and Alboini, supra, note 1 at 609-617.
249. Courts have been willing to accept the proposition that a fiduciary relationship does exist in closely held companies. For example, in Clemens v. Clemens Bros. Ltd. [1976] 2 All E.R. 268 (Ch. D.), the controlling shareholders proposed to increase the authorized capital of the company in order to issue further shares to themselves and to an employee trust fund. The effect of this plan would have been to reduce the plaintiff's holdings from 45 percent to slightly below 25 percent of the voting shares, with the result that she could no longer block a special resolution.

Foster, J. set aside the resolution on the grounds that it was passed primarily to deprive the plaintiff of her "negative control." In the opinion of the Court, the right to vote was "subject to equitable considerations . . . which may make it unjust or inequitable . . . to exercise [it] in a particular way."

Cf. for example, the dictum of Cozens-Hardy M.R. in Phillips v. Manufacturers Securities Ltd., supra, note 9:

"Members of a company voting at a general meeting properly convened have no fiduciary obligation either to the company or to the other shareholders."

See Gibson, supra, note 247 for commentary on the case law.

250. Supra, note 57.

251. N.W. Transport v. Beatty, supra, note 70.

252. [1975] 54 D.L.R. (3d) 692 (Ont. C.A.). For commentary, see Slutsky, 39 Mod. L. Rev. 331 (1976).

253. Id. at 679.

254. [1972] 3 O.R. 688 (H.C.).

255. Id. at 695-697. The Ontario Court of Appeal reversed the decision of Morand, J. [1973] 2 O.R. 132 on the basis that the action, as pleaded, was derivative and not personal.

256. Maple Leaf Mills, supra, note 5 at 205.

257. Westeel, supra, note 5 at 219-220.

258. Id. at 219. See also Re Loeb and Provigo Inc. 88 D.L.R. (3d) 139 (Ont. H.C. 1979) in which Steele, J. held that an application to restrain Provigo, the controlling shareholder of Loeb, from diverting any present or future business of Loeb to itself, following a successful takeover bid, should be brought by way of a derivative action.

259. Investigations (supra, note 156); Freezing funds: NSSA no provision; NSA no provision; NBSFPA s.24; PEISA s.19; OSA s.16(1); BCSA s.27; ASA s.26; Bill 76 s.14(1); QSA s.43; MSA s.26; SSA s.32; Bill 72 s.16(1); Appointing a

receiver: OSA s.17; BCSA s.28; ASA s.27; Bill 76 s.15; SSA s.33; MSA s.27; PEISA s.19(3); Bill 72 s.17; OSA s.132, Bill 72 s. 132; Bill 76 s. 129 permit the Securities Commission to apply to a judge for permission to begin or continue a civil action on behalf of a reporting issuer against any insider or associate or affiliate of the insider who has purchased or sold securities with knowledge of a material change or has informed another of the material change.

260. OSA s.123; BCSA s.58; ASA s.143; Bill 76 s.121; MSA s.143; Bill 72 s.123; SSA s.151; QSA s.63; NSSA s.23; NBSFPA s.18; PEISA no provision; NSA s.25.

261. OSA s. 124; BCSA ss.21,55; ASA ss.20,59; Bill 76 s.122; MSA ss.20,59; Bill 72 s.124; SSA ss.21,20(5); QSA s.20; NBSFPA s.22; NSSA ss.4, 20; PEISA s.2(4); NSA ss.6,21 (Attorney-General)

262. Alberta Stock Exchange Bylaws, Part X; Montreal Stock Exchange Rules section 9451; Toronto Stock Exchange Bylaws section 19.01; Vancouver Stock Exchange Rules 380-384; Winnipeg Stock Exchange Bylaw 5, section 4.

263. Such an order may be made on any terms if the securities regulatory authority concludes it is in the "public interest." An issuer must be given the benefit of a hearing, though this right may be abridged for a temporary period if the agency believes that a delay in action would be prejudicial to the "public interest". For discussion of what constitutes the "public interest" see Johnston, supra, note 15 at 360-362; Alboini, supra, note 1 at 824-838.

264. Johnston, supra, note 15 at 361.

265. Id.

266. See Lost River Mining Corporation Limited et al. [Oct. 1979] Bull OSC 290 at 292; See also Alboini, supra, note 1 at 837-838.

267. Notice, supra, note 2.

268. Re Cable Casting, supra, note 5; Loeb and Loebex, supra, note 176. In Maple Leaf Mills, supra, note 5, at 206 Steele, J. noted that the OSC declined to interfere with the trading of the securities of Maple Leaf because there

was no evidence of fraud and extensive disclosure had been made.

269. For commentary, see Alboini, supra, note 1 at 835-837.

270. Supra, note 261. See also Alboini, supra, note 1 at 838-850.

271. BCSA ss.20(1)(i) 55(1); ASA ss. 19(1)(9), 58; Bill 76 ss. 32(1)(p); 69(1)(j) SSA s.20(1)(j), 65; MSA ss.58(1)(b), ss. 19(1)10(iii); Bill 72 ss.34(1)(16); 71(1)(j) OSA s.34(1)16, s.71(1)(j); QSA s.20(e),52.

272. See BCSA, ss.20(1)(i), 55(1); ASA, ss.19(1)9, 58; SSA, ss.20(1)(j), 65; MSA, ss.19(1)10, 58(1)(b); Bill 72 ss. 34(1)15, 71(1)(i); OSA, ss.34(1)15, 71(1)(i); QSA, ss.20,52; NBSFPA, ss.7(h), 12(12); PEISA ss.2(3)(f), 13(a); NSSA, ss.4(f), 19(f); NSA, ss.5(g), 20(g) and Bill 76, ss.32(1)(o) (i), 69(1)(i)(i).

273. Supra, notes 271-272. In order for an issuer to qualify for the exemption in British Columbia, Saskatchewan, Alberta, New Brunswick, Nova Scotia, Newfoundland and

Prince Edward Island, the share reclassification must be considered a "reorganization" which is not defined by the securities legislation of these jurisdictions. In OSA, s.34(1)15(1), and MSA, s.19(3)(1)(b), the share reclassification must be performed by arrangement. Quaere whether exemptions are available in Quebec because of the wording of QSA, s.20(f): "the exchange by one company of securities issued by it for the securities of another company . . . for the purpose of reorganizing one of them."

274. Supra, notes 271-72. Unlike the reclassification, the consolidation is expressly covered by the prospectus and registration exemptions in Saskatchewan, Nova Scotia, PEI, British Columbia, Alberta, New Brunswick and Newfoundland. In Ontario and Manitoba, it is necessary to use an arrangement to obtain an exemption. In Quebec, there is no statutory exemption.

275. BCSA s.6 ; ASA s.6 ; SSA s.6;
Bill 76 s.22; MSA s.6 ; Bill 72 s.24
OSA s.24 ; QSA s.16 ; NBSFPA s.5
PEISA s.2 ; NSSA s.3 ; NSA s.4

276. BCSA s.36 ; ASA s.35 ; SSA s.42
Bill 76 s.50; MSA s.35 ; Bill 72 s.52
OSA s.52 ; QSA ss.50,53; NBSFPA ss.13-14;
PEISA s.8 ; NSSA s.12 (registration statement); NSA s.13
(registration statement).
277. For a discussion of the term, see Alboini, supra, note 1 at
843-850.
278. OSA s.124(2); Bill 72 s.124(2) and Bill 76 s.122(2) also
give the securities commission the power to withdraw any or
all of the takeover bid or issuer bid exemptions. See
supra, note 37.
279. Panacea Mining & Exploration Limited [Oct. 1971] Bull OSC
156.
280. Murray M. Sinclair [July 1975] Bull OSC 187 (failure to
file insider reports); Mercantile Bank and Trust Co. Ltd.
[Oct. 1973] Bull OSC 173; (failure to file insider
reports); Chemalloy Minerals Limited [March, 1974] Bull OSC
60. Cf. National Sea, supra, note 62. For commentary, see
Baillie and Alboini, "The National Sea Decision - Exploring

the Parameters of Administrative Discretion" 2 Can. Bus. L.J. 454 (1978).

281. International Negotiators Limited et al. [Oct. 1965] Bull OSC 2.

282. J. F. Simard Company Limited [Nov. 1961] Bull OSC 1.

283. Supra, note 176. See text accompanying note 268.

284. Supra, note 5. See text accompanying note 268.

285. See Globe and Mail (July 11, 1980) "OSC To Study Westfair Foods Proposals." Westfair proposed to issue junior preferred shares and make its non-redeemable Class A shares (held by the controlling shareholder) redeemable as part of a continuance under the CBCA. The OSC was asked to deny exemptions allowing Westfair to reorganize its capital structure without a prospectus because the plan amounted to a liquidation.

286. See the table in the Appendix.

287. Draft OBCA ss.1(1)26 & 188.

288. But for the creation of Policy 3-37, OSA Reg. s.163 and Draft OBCA s.188, Steele, J. would have been correct in enjoining the transaction in Maple Leaf Mills, because Ontario shareholders had no opportunity to command payment of an amount at least equal to the intrinsic value of their shares. OBCA s.100 and SBCA s.184 are only available to shareholders of "non-distributing" corporations.

289. The decision is Westeel was correct only because there were procedural deficiencies (no amalgamation agreement). However, had there been full procedural compliance with all statutory provisions then it would have been appropriate for Montgomery, J. to instruct the shareholders that recourse to the dissent or oppression remedy was proper in the circumstances.

290. Supra, note 198.

291. Supra, note 96.

292. Id. at 1359.

293. Id. at 1361-1362. The disclosure provisions in the Ontario Proposals require the inclusion of a statement that a "going private transaction" will follow a tender offer.

294. Id. at 1365-66.

295. Id. at 1368-69.

296. Supra, note 32; Id at 1371.

297. Id at 1371. The Ontario Proposals do not require disclosure by an acquiror when it proposes to give minority shareholders "participating securities." See supra, note 4.

298. Id. at 1368.

299. See text, supra, at 32-33.

300. For example, see "Jannock Changes Mind" Financial Times (December 11, 1978) p. 32; "Keg Restaurants Skewers Buy-

Back Plan" B.C. Business Week (May 9, 1979) p. 38; Glover and Schwartz, "Going Private Fever Cools Off", supra, note 1; Slocum, "Westfair Foods Decides Not to Proceed With Proposals" Globe and Mail (July 17, 1980) p. B4.

301. Supra, notes 139-146.

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APPENDIX

THE EXISTING FRAMEWORK FOR REGULATING
MINORITY SQUEEZEOUTS IN CANADA

The following two charts illustrate the degree of flexibility available to management and the amount of protection available to minority shareholders under the laws of each incorporating jurisdiction in Canada.

It is suggested that minority shareholders should be successful in persuading a court to order an injunction, in spite of full procedural compliance by an acquiror of shares, when there are little or no means available to them to challenge the payment of an amount less than the intrinsic value of their shares.

CHART 1: THE JURISDICTIONS WHERE NO INJUNCTION
SHOULD BE GRANTED

	ONT. WITH OBCA	ONT. with Draft OBCA	MAN.	SASK.	ALTA.	B.C.	CBCA
Dissent for Public Company Shareholders	_____	Yes	Yes	_____	_____	Yes	Yes
Compulsory Acquisition	_____	Yes	_____	Yes	Yes	Yes	Yes
Oppression	_____	Yes	Yes	Yes	_____	Yes	Yes
Court Approved Amalgamation	_____	_____	_____	_____	Yes	Yes	_____
Court Approved Arrangement	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Court Approved Reduction of Capital	_____	_____	_____	_____	Yes	Yes	_____
Securities Legislation	Yes	Yes	Yes	Yes	Yes	Yes	*
Class Voting	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Stat. Deri- vative Action	Yes	Yes	Yes	Yes	_____	Yes	Yes
Directors Duties	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Majority- Minority Test	_____	Yes	_____	_____	_____	_____	_____
Corp. Repur- chase of Shares	Limited	Yes	Yes	Yes	Yes	Yes	Yes
Express Cashout Amal- gamation	_____	Yes	Yes	Yes	_____	_____	Yes

* Regulates takeover bids and insider bids.

CHART 2: THE JURISDICTIONS WHERE AN INJUNCTION
SHOULD BE GRANTED

	NFLD.	N.B.	N.S.	P.E.I.	QUE.
Dissent for Public Company Shareholders	_____	_____	_____	_____	_____
Compulsory Acquisition	_____	_____	Yes	_____	Yes
Oppression	_____	_____	_____	_____	_____
Court Approved Amalgamation	**	_____	**	_____	_____
Court Approved Arrangement	Yes	Yes	Yes	_____	Yes***
Court Approved Reduction of Capital	Yes	_____	_____	_____	_____
Securities Legislation	Yes*	Yes*	Yes*	Yes*	Yes
Class Voting	_____	_____	_____	_____	_____
Stat. Derivative Action	_____	_____	_____	_____	_____
Directors Duties	Yes	Yes	Yes	Yes	_____
Majority Minority Test	_____	_____	_____	_____	_____
Corporate Repurchase of Shares	_____	_____	_____	_____	_____
Express Cashout Amalgamation	_____	_____	_____	_____	_____

* No regulation of takeover or issuer bids.

** Optional

*** The Re Simco decision, supra, text at 44 states that the court may order the buyout of shares on an arrangement. If that decision is correct, then it is only an amalgamation, consolidation or reclassification squeezeout by special resolution that shareholders require protection from the expropriation of their shares at less than intrinsic value.