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The Oppression Remedy Versus The Derivative Action

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THE OPPRESSION REMEDY VERSUS THE DERIVATIVE ACTION

INTRODUCTION

The purpose of this paper is to explore the extent to which Alberta law maintains a strict distinction between the oppression remedy under s. 242 of the Alberta *Business Corporations Act* (*ABCA*),[1] on the one hand, and the derivative action under s. 240 of the *ABCA*,[2] on the other. The oppression remedy[3] is classically -- though by no means exclusively -- brought on the following basis: a disgruntled minority shareholder in a closely-held corporation alleges that conduct by officers, directors, the corporation (including affiliates), or a majority shareholder is unfair to that minority shareholder for being contrary to his or her reasonable expectations.[4] The derivative action, by way of contrast, is a statutory means by which a claim belonging to the corporation is advanced on the corporation's behalf by a minority shareholder or other complainant pursuant to s. 240 of the *ABCA*. The s. 240 process is clearly more cumbersome when compared to s. 242 because it requires the complainant to make an application for leave to commence a derivative action according to a three-step statutory test.[5] While such an application may not necessarily be arduous, it is one that counsel

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[1] Pursuant to s. 242 of the *ABCA*, a complainant (as defined in s. 239(b)), may:

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

[2] Section 240(1) of the ABCA provides as follows:

> Subject to subsection (2), a complainant [as defined in s. 239(b)], may apply to the Court for permission to
>
> (a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or
>
> (b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.

[3] For an account of the history of the common law and statutory protections of minority shareholders in Canada, see Shannon O'Byrne and Cindy Schipani, "Feminism(s), Progressive Corporate Law, and the Corporate Oppression Remedy" (2017) 19 Georgetown Journal of Gender and the Law 61 at 80-87 as well as Mohamed Khimji & Jon Viner, "Oppression: Reducing Canadian Corporate Law to a Muddy Default" (2015-2016) 47 Ottawa L Rev 123 at 134-143. Note, too, that the oppression "remedy" is more accurately described as a cause of action. As Khimji & Viner explain, the statutory language of the oppression provisions "sets out a cause of action that can be brought where particular corporate conduct effects a result that is oppressive, unfairly prejudicial, or in unfair disregard of a complainant's interests. This cause of action must be proven before the applicant is entitled to a remedy. Calling the oppression provisions a remedy presupposes that the claimant is entitled to such a remedy" at 127 n. 3.

[4] For an excellent account of what reasonable expectations entail, see Jassmine Girgis, "The Oppression Remedy: Clarifying Part II of the BCE Test" (2018) 93:3 Can Bar Rev 484.

[5] Pursuant to s. 240 of the *ABCA*, the complainant (as defined in s. 239(b)) must seek leave to commence the derivative action by satisfying the court that:

for the complainant would generally prefer to avoid. At issue, therefore, is whether and to what extent a claim that apparently belongs to the corporation – and would therefore ordinarily proceed by way of s. 240 derivative claim– could be advanced by way of a s. 242 oppression action. As this paper will show, application of the rule articulated in the 1843 case of *Foss v Harbottle*[6] -- namely that "individual shareholders have no cause of action in law for any wrongs done to the corporation"[7] -- has wavered in at least one case out of Ontario, but the Alberta courts have consistently stayed the course and applied the rule. On this basis alone, a hard line must be drawn between the oppression remedy and the derivative action in Alberta. However, and even though *Foss v Harbottle* continues to state the law of Alberta such that the division must be maintained, this clarity does not answer the question that survives notwithstanding: do the facts at bar sound in a derivative action, an oppression action, or both? This question is a matter to which the paper returns.

This following paper is divided in several parts. In the context of *Foss v Harbottle*, the first part of the paper distinguishes between the personal action (of which oppression is one) and the derivative action. In particular, it relies on a recent decision from the Supreme Court of Canada[8] to emphasize a two-step test that differentiates them. The paper then goes on to distinguish more specifically between the oppression remedy and derivative action, with a particular emphasis on the nature of the harm that the complainant must establish.[9] It includes an assessment of important appellate case law, including from the Alberta Court of Appeal, and offers some brief conclusions.

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,
(b) the complainant is acting in good faith, and
(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[6] *Foss v Harbottle* (1843) 2 Hare 461 [*Foss v Harbottle*], as quoted in *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165, 1997 CanLII 345 (SCC) at para 59 [Hercules Managements]. For discussion of Foss v Harbottle, see, for example, Black Fluid Inc. v Opulence Clothing Inc., 2014 ABQB 138 (CanLII) at para 23 and *Everest Canadian Properties Ltd v CIBC World Markets Inc* 2008 BCCA 276 as well as JG MacIntosh, "The Oppression Remedy: Personal or Derivative" (1991) 70 Can Bar Rev 29 at 31 and following.

[7] *Hercules Managements Ltd*, ibid.

[8] *Brunette v Legault Joly Thiffault sencrl*, 2018 SCC 55 [*Brunette*].

[9] Authors who also emphasize the nature of harm include MacIntosh, *supra* note 6, Girgis, *supra* note 4, and Jordon Magico, "Oppression or Derivative? Great Clarity through the Requirement for Direct Harm", forthcoming in the Alberta Law Review.