



Print Page

## The Oppression Remedy in Canada

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### **How Americans Doing Business With Canadian Companies May Have A Right To Relief From Unfair Conduct**

In many jurisdictions in the United States, courts and legislatures provide a remedy for minority shareholders in closely-held corporations when majority shareholders exercise their control improperly or otherwise "oppress" the interests of the minority shareholders by denying them an expected benefit from the company. Where such claims are recognized, a minority shareholder could be entitled to a variety of equitable remedies to relieve the oppressive conduct.

However, in Canada, federal and provincial statutes provide for dramatically broader oppression remedies against Canadian corporations to address a potentially unlimited array of unfair conduct. Oppression claims can be asserted by practically any "stakeholder" for corporate actions that infringe on the stakeholder's legitimate expectations. Because the oppression remedy is so broadly applied in Canada, Americans doing business with Canadian companies could be entitled to assert a claim in a wide variety of circumstances.

#### **1. Any Stakeholder Can Be Entitled To an Oppression Remedy**

Canadian oppression law is based on the notion that corporations have a responsibility to act as good corporate citizens and therefore must take into account the interests of all stakeholders who may be affected by corporate action. As such, when corporate conduct affects the legitimate expectations of those who have an interest in its affairs, those interested parties may be entitled to an equitable remedy to gain relief from the corporation's conduct. Accordingly, the oppression remedy in Canada is available to a wide range of corporate stakeholders, including shareholders, secured and unsecured creditors, debtors, directors, and officers.

For instance, in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, a group of investors that held a series of debentures issued by an affiliate of BCE objected to a leveraged buyout of BCE. They objected on the basis that, as a result of the buyout, the investment rating of its debentures would fall below investment-grade and the short-term trading value of its investments would decline. The debenture holders claimed that, in negotiating the terms of the leveraged buyout, BCE should have taken into account their interest in maintaining an investment-grade rating and that failing to protect the

value of their debentures constituted oppressive conduct. Although the Supreme Court of Canada determined that no oppressive conduct had occurred, there was no question the debenture holders had standing to assert a claim and no question BCE was required to take into account the debenture holders' interests.

## **2. Oppression Occurs When a Stakeholder's Reasonable Expectations Are Not Met**

To assert a claim for oppression, a stakeholder must first show it had a "reasonable expectation" with respect to its business relationship with the defendant. Whether an expectation is reasonable under the circumstances can be based on a variety of factors, such as general commercial practice, the nature of the corporation, the relationship between the parties, past practices, steps the claimant could have taken to protect itself, representations and agreements between the parties, and any conflicting interests between corporate stakeholders. Determining whether a "reasonable expectation" existed is an inherently fact-specific inquiry. However, as long as the expectation is reasonable under the circumstances, an expectation could take many forms, depending on the facts of the case.

Once the claimant has established its reasonable expectation, the claimant must show the failure to meet this expectation caused detrimental consequences that amount to "oppression," "unfair prejudice," or "unfair disregard" of the claimant's interest. There are no hard-and-fast rules that define the boundaries of these terms. However, "oppression" involves conduct that is coercive, abusive, burdensome, harsh, in bad faith, an abuse of power, or some other kind of serious wrong. "Unfair prejudice" involves a less culpable state of mind and includes conduct such as wrongfully squeezing out a minority shareholder, failing to disclose transactions involving a related party, changing corporate structure to drastically alter debt ratios, adopting a poison pill or other action to prevent a takeover bid, paying dividends without a formal declaration, or providing certain shareholders with a disproportionate economic benefit. "Unfair disregard" occurs when the corporation ignores the claimant's interest in a manner that is contrary to the stakeholder's reasonable expectations, such as favoring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant.

However, not all harmful conduct gives rise to a remedy. Because corporations often service a wide range of interests, it would not be unusual for conflicts among various stakeholders to arise. When they occur, although directors must resolve conflicts in accordance with their fiduciary duty to act in the best interests of the corporation, corporations also have a duty to act as a good corporate citizen. Therefore, in resolving the conflict, the corporation must treat individual stakeholders affected by corporate actions equitably and fairly. When they fail to do so, affected parties have the right to seek redress for the harm caused. Although there are no absolute rules, courts have broad powers to assure affected parties have access to an appropriate remedy.

## **3. Oppression Remedies Can Be Asserted Against a Broad Class of Affiliated Entities**

Oppression claims in Canada can be asserted against a corporation or any of its affiliates. Although the term "affiliate" does not appear to have any defined limits, courts generally limit oppression remedies to instances where the activity at issue falls within the ambit of the corporation's activities. In other words, although a stakeholder could assert its reasonable expectations have been oppressed by a director, officer, or employee of the company, the claimant would still have to show the conduct at issue was corporate conduct, as opposed to personal or non-business-related conduct. In

addition, as the Court held in BCE, the claimant must be able to prove the conduct at issue was the legal cause of the alleged harm. Accordingly, although the oppression remedy is extremely broad, it is not entirely unlimited.

## **Conclusion**

The oppression remedy in Canada is a very effective device at the disposal of those with interests in Canadian companies. Practically any party – shareholder, creditor, debtor, director, officer, and others – with an interest in a Canadian company could be entitled to assert a claim if its interest has been negatively affected by corporate conduct. As demonstrated by the BCE case, the ambit of claims that could be asserted is almost unlimited. Oppression claims are intensely fact-specific and the remedies available are broad enough to encompass a wide variety of potential claims. Accordingly, U.S. companies and individuals with interests in Canadian companies should be aware that Canadian oppression laws could provide a remedy in the event their interests are negatively affected.

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