FURTHER REFLECTIONS ON "GOING PRIVATE" — TOWARDS A RATIONAL SCHEME OF REGULATING MINORITY SQUEEZE-OUT TRANSACTIONS

*Edwin Grant Kroft**

* Of the British Columbia Bar, Vancouver.

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]

In a going private transaction, the controlling shareholders[3] ("the insiders"), who are instrumental in the management of a "public"

---

[1] V. ALBOINI, ONTARIO SECURITIES LAW 631-47 (1980); Kroft, *The "Going Private" Transaction: Some Income Tax and Corporate Aspects of a Public Company Becoming Private*, 12 OTTAWA L. REV. 49 (1980) and in CORPORATE STRUCTURE, FINANCE AND OPERATIONS, at 211 (L. Sarna ed.) [hereafter cited as SARNA]; Alain, *Le droit des valeurs mobilières et le retour des compagnies publiques au statut de compagnie privée*, 20 CAHIERS 539 (1979); Taves, *Corporate Buy-Backs*, in PRAIRIE PROVINCES TAX CONFERENCE 93 (1979); Lange, *Freeze Out Amalgamations: The Federal and Ontario Positions*, 27 CHITTY'S L.J. 217 (1979); Glover & Schwartz, *Going Private in Canada*, 3 CAN. BUS. L.J. 3 (1978-79); Glover & Schwartz, *"Going Private" Fever Cools Off*, Financial Post, 11 Nov. 1978, at 40, col. 1; Pitch, *Going Private: The Silent Minority is No Longer Silent*, 3 CAN. LAWYER 1, at 12 (Feb. 1979); Campbell & Steele, *What Price Minority Shares?*, 111 C.A. MAGAZINE, Oct. 1978, at 28; Potter, *Acquisition of Minority Held Shares Through Arrangements*, in L.E.S.A. BANFF CONFERENCE PAPERS (1977); Hansen, *Minority Squeeze-Outs*, in REPORT OF THE THIRTIETH TAX CONFERENCE 408 (1980) [hereafter cited as [year] CONFERENCE REPORT]; Dey, *Protecting Minority Shareholders in Public Corporations*, CAN. B. ASS'N UPDATE '79, at 1 (1979); Palmer, *Amalgamations and Winding Up*, in 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; Ward, *Arm's Length Acquisitions Relating to Shares in a Public Corporation*, in CORPORATE MANAGEMENT TAX CONFERENCE 1978, at 108 (C. Frost ed.); Baillie, *Developments in Securities Regulations Affecting Corporate Acquisitions*, in CORPORATE MANAGEMENT TAX CONFERENCE 1978, at 177 (C. Frost ed.).

[2] A. Sommer, Going Private: A Lesson in Corporate Responsibility, Law Advisory Council Lecture, Notre Dame Law School, 14 Nov. 1974; Sommer, Further Thoughts on "Going Private," Second Annual Securities Seminar, Detroit Institute for Continuing Legal Education, 14 Mar. 1975; Baillie, *supra* note 1; Securities and Exchange Commission [hereafter 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., 17 May 1978), & Notice: "Going Private" Transactions, including Comments as to Other Issuer Bids and Insider Bids, [Aug. 1978] BULL. O.S.C. 214.

[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 controller" or "controlling group"). The Draft Ontario Business Corporations Act, Bill 6, 1st reading 24 April 1981, s. 188 [hereafter cited as Draft OBCA], s. 163 of the regulations under The Securities Act, 1978, S.O. 1978, c. 47 [hereafter cited as OSA], & SEC, "Going Private" Rule 13e-3, 42 Fed. Reg. 60,090 (1977) (adopted by Release 33-6100, 6 Aug. 1979) contain definitions of a "going

company ("the issuer"), rely on the advice of corporate and tax planners to formulate means of terminating public participation in the firm.[1] Essentially all the squeeze-out techniques result in the receipt of cash or

---

private transaction" which outline some of its objectionable features. S. 163 of the OSA Regulations states that a

> "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 . . . .

[1] S. 188(1)(*b*) of the Draft OBCA states that a

> "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;

S. 188(1)(*c*) of the Draft OBCA states that a

> "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 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, s. 13e-3(*a*)(4) describes 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 103] or Regulation 14C [ss. 240.14c-1 to 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 issue involving the purchase of fractional interests.

redeemable securities by minority shareholders in exchange for their existing shares.

Minority shareholders generally have refrained from complaining about the "fairness" of a squeeze-out. Faced with the exorbitant legal and/or accounting fees involved in contesting the fairness of the consideration offered for their shares, minority shareholders have chosen to accept cash or redeemable securities.

Recently, however, minority shareholders have begun to fight back. Showing 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 the 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

---

[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 Prop. Invs. Ltd., 11 B.C.L.R. 253, [1979] 3 W.W.R. 609 (C.A.); Nasgovitz v. Canadian Merrill Ltd., [1980] C.S. 375 (1979); Jepson v. Canadian Salt Co., 17 A.R. 460, [1979] 4 W.W.R. 35 (S.C.); *In re* Canadian Hidrogas Resources Ltd., 8 Bus. L.R. 104, [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 (Ont. H.C. 1977); *In re* The Matter of the Application of Domglas Inc. Pursuant to Section 184(15) of the Canada Business Corporations Act (not yet reported, Que. C.S., 18 Jul. 1980) (citations hereafter refer to page numbers of the reasons for judgment).

[6] Most particularly, *see* Singer v. Magnavox, 380 A. 2d 969 (Del. 1977). For a review of the case law on the subject, *see* Borden & Messmar, *Going Private. A Review of Relevant Considerations*, in ELEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 427-550 (1979).

[7] In *Maple Leaf Mills*, *supra* note 5, at 205, 4 Bus. L.R. at 309, 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 forceably 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* text accompanying notes 97-107 *infra*, 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); Johnson, *Delaware Reverses its Trend in Going Private Transactions: The Forgotten Majority*, 11 LOY. L.A. 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 take-over bid in order to prevent "oppression of the majority by the minority." *See* text accompanying notes 30-35, 137-40 *infra*. Note that the definitions of "going private transaction,"

squeeze-outs, minority shareholders have complained of being deprived of the intrinsic (what a hypothetical purchaser would pay in a fully efficient and liquid market with adequate information), 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 of these minority shareholder objections. Although the first is rejected as untenable in law and commercially unsound, 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 squeeze-out 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. The paper reflects the law as of 1 July 1981.

II. THE DYNAMICS OF A "GOING PRIVATE" TRANSACTION

Controlling shareholders of the issuer initiate going private transactions. Tax[10] or other[11] considerations, however, may prompt insiders to

---

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. Ltd., 116 L.T. 290 (C.A. 1917). The shareholders have no cause to complain about expropriation in this case because they accept the terms of the share contract upon purchasing the share. To quote Middleton J.A. in *Re* Jury Gold Mine Dev. Co., 10 C.B.R. 303, at 305, [1928] 4 D.L.R. 735, at 736 (Ont. C.A.): "He is a minority shareholder and must endure the unpleasantness incident to that situation. If he choose 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, redemption or acquisitions required by the instrument creating or governing the class of securities."

[10] *E.g.*,

(a) 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 squeeze-out.

(b) 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.

(c) 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 a dividend upon redemption.

For further details, *see* Kroft, *supra* note 1, at 111-14; SARNA at 255-56, 282-85.

[11] *E.g.*,

(a) Certain jurisdictions only permit an "acquiring company" to participate in compulsory acquisition proceedings. Notes 27 & 221 *infra*.

use a corporate associate[12] or affiliate,[13] including the issuer,[14] as a

(b) A corporate associate will have a greater number of acquisition techniques such as amalgamation or share reclassification at its disposal than individual controlling shareholders.
(c) Insiders who are individuals may not have sufficient funds or the security required to borrow such funds in order to purchase minority shares.
(d) 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 [hereafter cited as OBCA]; The Companies Act, R.S.A. 1970, c. 60, s. 14, *as amended* [hereafter cited as ACA]; The Business Corporations Act, S.A. 1981, Bill 43, awaiting proclamation, s. 42 [hereafter cited as ABCA]; The Company Act, R.S.B.C. 1979, c. 59, s. 127 [hereafter cited as BCCA]; Canada Business Corporations Act, S.C. 1974-75-76, c. 33, s. 42, *as amended* [hereafter cited as CBCA]; The Business Corporations Act, 1977, R.S.S. 1978, c. B-10, s. 42, *as amended* [hereafter cited as SBCA]; The Corporations Act, S.M. 1976, c. 40, s. 42, *as amended* [hereafter cited as MCA]; Companies Act, R.S.N.B. 1973, c. C-13, s. 38, *as amended* [hereafter cited as NBCA]; Draft OBCA, s. 20; Companies Act, R.S.P.E.I. 1974, c. C-15, s. 69, *as amended* [hereafter cited as PEICA]; Companies Act, R.S.Q. 1977, c. C-38, s. 110, *as amended* [hereafter cited as QCA]; The Companies Act, R.S.N. 1970, c. 54, s. 16, *as amended* [hereafter 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 as defined in (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*); ABCA, s. 1(*c*); Securities Act, R.S.B.C. 1979, c. 380, s. 1(1), *as amended* [hereafter cited as BCSA]; The Securities Act, R.S.A. 1970, c. 333, s. 2(1)(1)2 [hereafter cited as ASA]; The Securities Act, 1981 (Alberta) Bill 44, s. 1(*a*.1) (awaiting proclamation) [hereafter cited as Bill 44]; The Securities Act, R.S.S. 1978, c. S-42, s. 2(1)(*a*), *as amended* [hereafter cited as SSA]; The Securities Act, R.S.M. 1970, c. S50, s. 1(1)1, *as amended* [hereafter cited as MSA]; The Securities Act, S.M. 1980, c. 50, s. 1(1)2, *as amended* [hereafter cited as MSA, 1980]; OSA s. 1(1)2.

[13] Definitions of "affiliate" are drafted in a complex manner to catch transactions which would otherwise circumvent provisions of companies and securities legislation by the use of a network of companies. A 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, s. 2(1)-(5); BCCA, s. 1(1)-(4); ACA, s. 2(4)-(5); ABCA, s. 2(1); SBCA, s. 2(1)(*b*), (2)-(5); MCA, s. 1(1)(*b*), (2)-(5); OBCA, s. 1(2)-(5); Draft OBCA, s. 1(4)-(5); BCSA, s. 1(1)-(4); ASA, s. 2(2)-(4); MSA, s. 1(2)-(4); MSA, 1980, s. 1(2)-(4); Bill 44, s. 2; OSA, s. 1(1)2, (2)-(4); Securities Act, L.R.Q. 1977, c. V-1, s. 2 [hereafter cited as QSA].

[14] The issuer might conduct a "domestic going private transaction" when:
(a) most of his shareholders are resident in a province whose securities legislation does not contain provisions regulating the conduct of offerors in an issuer bid. *See* notes 38-41 *infra*.

vehicle to expropriate such number of minority shares required for the conversion of the issuer 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, whether

---

(b) most of his shareholders are earning less than approximately $59,000 taxable income and prefer the proceeds of disposition which they will receive for their expropriated shares to be treated as dividend income. *See* note 111 *infra*; Kroft, *supra* note 1, at 80; SARNA at 228-29.

[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, MSA, 1980, Bill 44, OSA, BCSA), "corporation offering its shares to the public" (OBCA, s. 1(9)), "distributing corporation" (CBCA, s. 121(1); ABCA, s. 1(*t*)), "security issuer" (QSA, s. 1(1); Securities Act, R.S.P.E.I. 1974, c. S-4, s. 1(*j*) [hereafter cited as PEISA]; Security Frauds Prevention Act, R.S.N.B. 1973, c. S-6, s. 1 [hereafter cited as NBSFPA]), and "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* Regina v. Piepgrass, 31 C.R. 213, 23 D.L.R. (2d) 220 (Alta. C.A. 1959); 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); V. ALBOINI, *supra* note 1, at 285-301; D. JOHNSTON, CANADIAN SECURITIES REGULATION 148-55 (1977). It may also be necessary for a company to obtain approval of an administrative body or official before "going private." *E.g.*, under ACA, ss. 46 & 47, the conversion of a company from "public" to "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 583 (CCH). *See also* QSA, s. 28 regarding the discretionary powers of the Quebec Securities Commission.

[16] *See* authorities cited in note 15 *id*. An offeror will not be required to comply with various disclosure requirements if it makes an issuer or take-over bid for shares of a "private company." This term is defined as a company with: (a) fewer than 50 shareholders; and (b) 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); MSA, 1980, s. 1(1)(33); Bill 44, s. 1 (p. 1); NBSFPA, s. 1; Securities Act, R.S.N.S. 1967, c. 280, s. 1(1)(*t*) [hereafter cited as NSSA]; QSA, s. 1(13).

[17] The Income Tax Act, S.C. 1970-71-72, c. 63, s. 89(1)(*f*), (*g*) [hereafter 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. In addition, it cannot be controlled directly or indirectly by a public corporation.

on a take-over bid[18] or on the open market,[19] they may be able to acquire the remainder by passing a resolution authorizing either: (1) a statutory amalgamation[20] under 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

---

[18] On the take-over bid, the offeror formally requests shareholders to tender their shares for consideration in the form of cash or redeemable securities. Whereas the term "take-over 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 take-over bid, would exceed 20% of the issued voting shares of the target company. *See* BCSA, s. 79; ASA, s. 80(*g*); Bill 44, s. 131(1)(*j*); SSA, s. 87(*g*); MSA, s. 80(*g*); MSA, 1980, s. 89; OSA, s. 88(1)(*k*); QSA, s. 131(*g*). The CBCA, s. 187 only requires something in excess of 10%.

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, ss. 187, 37(1), (5); BCCA, ss. 259-61; ACA, s. 41.1; ABCA, s. 32; SBCA, ss. 37(5), 187; MCA, ss. 37(5), 187; OBCA, s. 39(2); Draft OBCA, s. 30; QCA, s. 58; NBCA, ss. 59(2)-(3), 60(1)-(2); NSCA, ss. 47(1)(*f*), (4), 48; NCA, s. 101. The actual term "issuer bid" is used in MSA, 1980, s. 89, Bill 44, s. 131(1)(*c*), 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. 175-80; BCCA, ss. 271-75; ACA, s. 156; ABCA, ss. 175-80.1; SBCA, ss. 175-80; MCA, ss. 175-80; OBCA, ss. 196-97; Draft OBCA, ss. 172-77; QCA, s. 18; NBCA, s. 31; PEICA, s. 77; NCA, s. 30; Companies Act, R.S.N.S. 1967, c. 42, s. 120 [hereafter cited as NSCA]. The PEICA, NBCA and NCA only permit the amalgamation of companies with the same or similar objects.

Examples of amalgamation squeeze-outs include *Maple Leaf Mills*, *Westeel-Rosco*, *Canadian Salt*, *Ruskin v. All-Canada News Radio*, *Neonex*, *Canadian Merrill* 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*); ABCA, ss. 167(1)(*e*),(*f*), 37(4); SBCA, s. 167(1)(*f*); Draft OBCA, s. 166(1)(*f*); QCA, s. 48(5)-(8); NBCA, ss. 62(3), 65; PEICA, ss. 34(6), 86; NCA, ss. 39-40, 131(2); NSCA, s. 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. *E.g.*, 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 redemption 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. *See*, *e.g.*, *Cablecasting Ltd.*, *supra* note 5; *Canadian Hidrogas*, *supra* note 5; *Re* Ferguson and Imax Systems Corp., 4 A.C.W.S. (2d) 236 (Ont. H.C. 1980).

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 ninety per cent of the issued shares of one class of the issuer following a take-over bid[28] may compel the minority to sell the remaining shares of the class in proceedings referred to as "compulsory acquisition."[29]

---

[22] Shares are said to be "consolidated" when they are replaced by a lesser number of shares of the same class in the same proportion for all shareholders. *E.g.*, an issuer may consolidate its shares in the ratio of one to 500. A shareholder is then entitled to 1/500 of a share if he owns just one share. *See* CBCA, s. 167(1)(*g*); BCCA, s. 255(1)(*c*); ACA, s. 38(1)(*a*)(*i*); ABCA, s. 167(1)(*f*); SBCA, s. 167(1)(*g*); MCA, s. 167(1)(*f*); OBCA, s. 189(1)(*f*); QCA, s. 55(2); NBCA, s. 62(1); PEICA, s. 34(1), NCA, s. 131(2); NSCA, s. 42(1)(*b*). 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 CHI.-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 squeeze-out include *Re Ripley Int'l 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, s. 33(1)(*b*); BCCA, s. 265(2); ABCA, s. 33(1)(*b*); SBCA, s. 33(1)(*b*); MCA, s. 33(1)(*b*); OBCA, s. 39(1); Draft OBCA, s. 31(1)(*b*); QCA, s. 55(3); NBCA, s. 62(2).

[24] CBCA, s. 183; BCCA, s. 150; ABCA, s. 183; SBCA, s. 183(2)-(9); MCA, s. 183(2)-(7); OBCA, ss. 15(2), 17; Draft OBCA, s. 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; ABCA, s. 204(3); SBCA, s. 204(3); MCA, s. 204(3); OBCA, s. 203(1); Draft OBCA, s. 191(1); Winding Up Act, R.S.Q. 1977, c. L-4, s. 3; Winding-up Act, R.S.N.B. 1973, c. W-10, s. 3(*a*); Winding Up Act, R.S.P.E.I. 1974, c. W-7, s. 4(1)(*b*); NCA, s. 244(*b*); Winding Up Act, R.S.N.S. 1967, ss. 3(*b*), 1(*e*). Examples of the sale of the assets-winding up squeeze-out include *Re* United Fuel Invs. Ltd., [1962] O.R. 162, 31 D.L.R. (2d) 331 (C.A. 1961); Ritchie v. Vermillion Mining Co., 4 O.L.R. 588, 1 O.W.R. 624 (C.A. 1902); Costello v. London Gen. Omnibus Co., 107 L.T. 575 (C.A. 1912).

[26] CBCA, s. 199(2); BCCA, s. 279(1); ACA, s. 153(1); ABCA, ss. 187-99; SBCA, s. 188; QCA, s. 51; NSCA, s. 119(1); Draft OBCA, ss. 185-87.

[27] In certain jurisdictions an "offeror" includes two or more persons who, directly, make take-over bids jointly or in concert, *or* intend to exercise jointly or in concert voting rights attached to shares for which a take-over bid is made. *See* CBCA, s. 187; BCSA, s. 79; ASA, s. 80(*e*); SSA, s. 88(*e*); MSA, 1980, s. 88(1)(*h*); OSA, s. 88(1)(*h*); QSA, s. 131(*e*), Bill 44, s. 131(2). *Cf.* Blue Metal Indus. Ltd. v. R.W. Dilley, [1969] 3 All E.R. 437, [1969] 3 W.L.R. 357 (P.C.), *aff'g* 116 C.L.R. 445 (Aust. H.C. 1967). *See also* note 221 *infra*, which discusses whether an offeror may be an individual as well as an "acquiring company."

[28] *E.g.*, the BCCA refers to a "scheme or contract" and not a "takeover bid." For a definition of this phrase, *see Canadian Allied Prop.*, *supra* note 5 and Rathie v. Montreal Trust Co., [1953] 2 S.C.R. 204, [1953] 4 D.L.R. 289.

[29] An acquiring company may compel the remaining minority shareholders to surrender their shares within five months after the date of a take-over bid for the same consideration. For details of the dissent process available to the minority shareholders *see* notes 47-49, 139-40 and accompanying text *infra*. *See also* Halperin, *The Statutory*

Once successful in taking the company private, the insiders may enjoy benefits available only to shareholders of non-reporting or closely-held companies. They 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 enable controlling shareholders to benefit from tax advantages involving the use of income splitting or estate freezing.[34] Insiders might also choose to use the private company

---

Elimination of Minority Shareholders in Canada, in SARNA at 1; McNamara, *Note on Compulsory Acquisition of Shares*, 10 WESTERN ONT. 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; P. ANISMAN, TAKEOVER BID LEGISLATION IN CANADA (1974); M. WEINBERG & M. BLANK, TAKEOVERS AND MERGERS ch. 14 (4th ed. 1979).

[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; SARNA at 226-27.

[31] The requirements include the provision 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 still be required to make public filings even if it has gone private. *E.g.*, CBCA, s. 154 requires corporations whose gross revenues exceed 10 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), MSA, 1980, s. 1(1) 40(*v*), OSA, s. 1(1) 38(*v*) and Bill 44, s. 1(*t.1*)(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; MSA, 1980, s. 79; OSA, s. 79; Bill 44, s. 125. *See also* note 37 *infra*, concerning exemptions from take-over bid or issuer bid requirements.

[32] Economies of scale could result from the administrative savings associated with shareholder servicing costs. *See* M. WEINBERG & M. 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 insistance 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] *E.g.*, in an income split, a spouse may receive salary or dividends but will choose remuneration in the form of dividends because he or she may receive up to approximately $36,000 in 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*, in 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.

as a holding company for securities purchased with their own funds and as a conduit for 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 Take-over Bid, Issuer Bid or Compulsory Acquisition Proceedings*

An acquiror must provide offerees with extensive disclosure to enable them to make an informed investment decision on the fairness of the offer. Unless a bid is classified as "exempt",[37] a take-over bid

---

[35] This is due to the imperfections in the Canadian income 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*, in 1977 Conference Report 141.

[36] *See* Graham, *Incorporation and Taxation of a Private Corporation*, in 1980 British Columbia Tax Conference Report (1980).

[37] A take-over 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*); ASA, s. 80(*b*)(ii); MSA, s. 80(*b*)(ii); MSA, 1980, s. 88(2)(*a*); OSA, s. 88(2)(*a*); Bill 44, s. 132 (1)(*a*).

(b) an offer is made to purchase shares in a "private company": BCSA, s. 79(*c*); ASA, s. 80(*b*)(iii); SSA, s. 87(*b*)(iii); MSA, s. 80(1)(*b*)(iii), MSA, 1980, s. 88(2)(*b*); OSA, s. 88(2)(*b*); QSA, s. 131(*f*)(iii).

(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); MSA, 1980, s. 88(2)(*c*); Bill 44, s. 132(1)(*c*); OSA, s. 88(2)(*c*); QSA, s. 131(*f*)(i).

(d) it involves the acquisition of not more than five per cent of the voting shares of the target company within any period of 12 consecutive months: OSA, s. 88(2)(*d*); MSA, 1980, s. 88(2)(*d*); Bill 44, s. 132(1)(*d*).

(e) an offer is made by the holder of a control block of shares: OSA, s. 88(2)(*e*); Bill 44, s. 132(1)(*e*); MSA, 1980, 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); SSA, s. 96 (court); MSA, s. 89 (commission); MSA, 1980, s. 99 (commission); OSA, s. 99 (commission); QSA, s. 154 (commission); Bill 44, s. 145 (commission).

An issuer bid will be classified as an "exempt bid" under OSA, s. 88(3), Bill 44, s. 133(1) and MSA, 1980, s. 88(3) when:

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 six 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 agreement made, or proposed to be made between the offeror and any of the directors or senior officers of the target company.[38]

To evaluate this information without pressure from the offeror to tender their shares, shareholders must also be given the benefit of a certain period of time within which to act. Subject to a variation or extension of the offer, in a take-over or issuer bid, 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]

(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 bylaws, regulations or policies of the Stock Exchange;
(d) following the publication of a notice of intention in the form and 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 12 consecutive months shall not exceed five per cent of the securities of the class sought outstanding at the commencement of the period; or
(e) the issuer bid is made by a private company.

[38] CBCA, ss. 187-89 and part VIII of the regulations; BCSA, s. 89; ASA, s. 90; SSA, s. 97: MSA. ss. 85(4), 90; MSA, 1980, s. 94; OSA, s. 94 and regs. Form 31; QSA, s. 143 and ss. 35-36 of the regulations (Division V); Bill 44, s. 139.

When a stock exchange take-over 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, [Nov. 1977] BULL. O.S.C. 268, which regulates issuer and insider bids, as well as the disclosure requirements prescribed by the exchanges when a stock market take-over bid is made. *See* Toronto Stock Exchange Bylaws, Part XXIII, in CAN. SEC. L. REP. 17,281-27 (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, 7 Nov. 1979, in CAN. SEC. L. REP. 70,123 (CCH).

[39] BCSA, s. 80(*c*); ASA, s. 81(*c*); SSA, s. 88(*c*); MSA, s. 81(4); QSA, s. 134. In OSA, s. 89(1)4, CBCA, s. 190(*a*), MSA, 1980, s. 89(1)4 and Bill 44, s. 134, the rescission period is nine days.

[40] BCSA, s. 80(*b*); ASA, s. 81(*b*); SSA, s. 88(*b*); MSA, s. 81(3); QSA, s. 115. In OSA, s. 89(1)3, Bill 44, s. 134, and MSA, 1980, s. 89(1)3, the period is 10 days. CBCA, s. 190(*b*) allows 14 days.

In compulsory acquisition proceedings, an offeror is only entitled to purchase the shares of dissenting offerees once it has acquired ninety per cent of the shares it or any related party[41] did not already own, within four months of the date of the bid.[42] The offeror must then mail the dissenting offerees a notice of compulsory acquisition within two months of the termination of the bid.[43] If an 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 thiry-five 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

---

[41] The shares of an associate or affiliate of the offeror must not be included in the computation of the 90%. BCCA, s. 279 makes no reference to the term "associate" but uses the word "nominee." For a discussion of the term, *see Canadian Allied Prop.*, *supra* note 5; Jefferson v. Omnitron Invs. Ltd., 18 B.C.L.R. 188 (S.C. 1979). *See also* note 230 *infra*.

[42] CBCA, s. 199(2); BCCA, s. 279(1); ACA, s. 153(1); ABCA, s. 188(2); SBCA s. 188; QCA, s. 51; NSCA, s. 119(1); Draft OBCA, s. 186(1). The CBCA, Draft OBCA, ABCA and SBCA use the phrase "120 days" rather than four months.

[43] CBCA, s. 199(3); BCCA, s. 279(2); ACA, s. 153(1); ABCA, s. 189; SBCA, s. 189; QCA, s. 51; NSCA, s. 119(1); Draft OBCA, s. 186(2). The CBCA, Draft OBCA, ABCA and SBCA state that the notice must be mailed within 180 days after the date of the take-over bid. Under the BCCA notice must be given during the month immediately following the expiry of the offer ("within five months of the making of the offer"), while under the NSCA, 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 two months from the day of the notice); QCA, s. 51 (six months from the making of the offer); ACA, s. 153(1) (one month from the date of the notice); NSCA, s. 119(2) (one 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), 195 (within 20 days after receipt of the notice); Draft OBCA, s. 186(4)-(5) (within 20 days after receipt of the notice); ABCA, s. 190 (within 20 days after receipt of the notice). Under the latter four 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 take-over bid. If a dissenting offeree has elected to demand the fair value of his shares, an application to the 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 futher details, *see* Halperin, *supra* note 29.

[45] *See, e.g.*, CBCA, s. 188(*a*) (60 days); OSA, s. 89(1) 13.

[46] CBCA, s. 190(*d*); BCSA, s. 82; ASA, s. 83, SSA, s. 90; MSA, s. 83, MSA, 1980, s. 90; OSA, s. 90; QSA, s. 139; Bill 44, s. 135.

[47] OSA, s. 91; Bill 49, s. 91; and Bill 44, s. 136 which states that all holders of the same class of securities shall be offered the same consideration. For further details, *see* V. ALBOINI, *supra* note 1, at 715-32.

agreed to pay the holder of a block of shares an amount for his investment in excess of the amount of consideration offered to all other security holders.[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

---

[48] The Ontario Securities Commission has issued guidelines in Ontario Policy 3-41, [Sep. 1979] BULL. O.S.C. 232, at 237, indicating that it "will be favourably disposed to granting an exemption from the follow-up offer obligation" in certain circumstances.

[49] CBCA, s. 177(5); BCCA, s. 271; ACA, s. 156(4); ABCA, s. 177(5); SBCA, s. 177(5); MCA, s. 177(5); OBCA, s. 196(4); Draft OBCA, s. 174(4); QCA, s. 18(4); NBCA, s. 31(3); NSCA, s. 120(4); PEICA, s. 77(3); NCA, s. 30(3).

[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 the 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; ABCA, s. 186; 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*); ABCA, s. 36(1); SBCA, s. 36(1); MCA, s. 36(1); OBCA, ss. 189(1)(*d*), (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 squeeze-out is In the Matter of Campeau Corp., ONTARIO CORPORATION LAW GUIDE CCH REP. para. 50-014 (H.C. 1972). *See also Ex parte* Westburn Sugar Refineries Ltd., [1951] S.C. 190, *rev'd* [1951] A.C. 625 (H.L.); British & American Trustee Corp. v. Couper, [1894] A.C. 399, 63 L.J. Ch. 425 (H.L.); *Cf. Re* Holders Inv. Trust Ltd., [1971] 2 All E.R. 289, [1971] 1 W.L.R. 583 (Ch. 1970); *Re* Saltdean Estate Co., [1968] 3 All E.R. 829, [1968] 1 W.L.R. 1844 (Ch.); In the matter of Fowlers Vacola Mfg. Co., [1966] V.R. 97 (S.C. 1965); *Re* Fraser, [1951] S.C. 394 (Ct. Sess.).

[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), ABCA, s. 1(*y*), SBCA, s. 2(1)(*ff*), MCA, s. 1(1)(*gg*),

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 either by separate class vote[58] or by court application[59] where the controlling group has used its voting powers in a discriminatory fashion.[60]

In certain jurisdictions, all shareholders, including the controlling group, who are considered "insiders" of the issuer, are required to file reports indicating initial and increased ownership in the equity of the issuer.[61] The acquisition of minority shares by these "insiders" with the aid of material information[62] to which the other party to the transaction is not privy, is prohibited.[63]

OBCA, s. 1(1) 27 and Draft OBCA, s. 1(1) 42 require the favourable vote of not less than a two-thirds majority of shareholders who voted in respect of the resolution. QCA, ss. 18(4), 60 require two-thirds in value. Other jurisdictions require three-quarters 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* Greenhalgh v. Arderne Cinemas Ltd., [1951] Ch. 286, [1950] 2 All E.R. 1120 (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.); Allen v. Gold Reefs of W. Africa Ltd., [1900] 1 Ch. 656, [1900-03] All E.R. Rep. 746 (C.A.); Rights & Issues Inv. Trust v. Stylo Shoes, [1964] 3 All E.R. 628, [1964] 3 W.L.R. 1077 (Ch.); Brown v. British Abrasive Wheel Co., [1919] 1 Ch. 390, [1918-19] All E.R. Rep. 308; Peter's American Delicacy Co. v. Heath, 61 C.L.R. 457 (Aust. H.C.). For further discussion, *see* L. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 620-30 (4th ed. 1979); M. WEINBERG & M. BLANK, *supra* note 29, at 112-14.

[58] *Amalgamation: see, e.g.*, CBCA, s. 177(4); ABCA, s. 177(4); BCCA, s. 273(4); OBCA, s. 196(5). *Amendment of the Corporate Constitution see, e.g.*, CBCA, s. 170; BCCA, s. 250; OBCA, s. 189(4). *Sale of Assets*, CBCA, s. 183(6); SBCA, s. 183(6); MCA, s. 183(6); Draft OBCA, s. 182(7). *Winding Up*, CBCA, s. 204(3); ABCA, s. 204(3); SBCA, s. 204(3); MCA, s. 204(3).

[59] *See, e.g.*, BCCA, s. 251.

[60] *See, e.g., Re* Trend Management, 3 B.C.L.R. 186 (S.C. 1977). *See generally* concerning the variation or abrogation of class rights, Rice, *Class Rights and their Variation in Company Law*, [1958] J. BUS. L. 29; Baxt, *The Variation of Class Rights*, 41 AUST. L.J. 490 (1968); Trebilcock, *The Effect of Alterations to Articles of Association*, 31 CONV. (N.S.) 95 (1967).

[61] CBCA, s. 122-22.1; BCSA, s. 108; ASA, s. 82; SSA, s. 117; MSA, s. 109-09.1 MSA, 1980, ss. 102-03; OSA, ss. 102-03; QSA, s. 159; Bill 44, s. 147.

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; ABCA, ss. 121-23; SBCA, s. 121(1)(*b*); MSA, s. 108(1)(*c*); MSA, 1980, s. 1(1)17(iv); OSA, 1(1)17(iv); Draft OBCA, s. 137(1)(*b*)(i); Bill 44, s. 1(*i*); SSA, s. 116(1)(*c*); ASA, s. 81. There is no requirement for filing under the BCCA, ABCA, 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, [Jun. 1976] BULL. O.S.C. 149. Note that OSA, s. 131, MSA, 1980, s. 131, and Bill 44, s. 171, 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

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 violate 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 squeeze-out transactions[67] and providing shareholders with a circular in take-over bid situations,[68] directors must prevent their self-interest from conflicting with their fiduciary duties to the company.[69] Directors, therefore, are not permitted to vote on resolutions authorizing transactions in which they have a material interest.[70] They must also not use their powers for such an improper purpose[71] as re-acquiring shares in order to strengthen their position as controlling shareholders.

MEREDITH MEMORIAL LECTURES 151 (1975); F. IACOBUCCI, M. PILKINGTON & J. PRICHARD, CANADIAN BUSINESS CORPORATIONS 341 (1977); Yontef, *Insider Trading*, in 3 PROPOSALS FOR A SECURITIES LAW FOR CANADA 625 (1979); V. ALBOINI, *supra* note 1, ch. XX.

[63] CBCA, s. 125(5); BCCA, s. 153; ACA, s. 85; ABCA, s. 125; SBCA, s. 124; MCA, s. 125(5); Draft OBCA, s. 139(5); BCSA, s. 112; SSA, s. 121; MSA, s. 111; ASA, s. 112; QSA, s. 169. *See also* note 62 *supra*.

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

[65] *E.g.*, the purchase or redemption of shares must not render the issuer insolvent. *See, e.g.*, CBCA, ss. 32(2), 33(3), 34(2), 36(3); BCCA, s. 260; OBCA, s. 39(3).

[66] CBCA, s. 113(2)(*a*); BCCA, s. 151(1)(*a*); ACA, s. 41.21(1); ABCA, s. 113(2); SBCA, s. 113(2)(*a*); MCA, s. 113(2)(*a*); OBCA, s. 135(1); Draft OBCA, s. 129(2)(*a*).

[67] *Amalgamations: see, e.g.*, CBCA, s. 177(1); BCCA, s. 140; QCA, s. 88. *Amendment of the Corporate Constitution:* CBCA, s. 169; BCCA, s. 140; ACA, Table A; ABCA, s. 169; SBCA, s. 169; MCA, s. 169; OBCA, s. 189(3); Draft OBCA, s. 170; QCA, ss. 88, 52-54; NBCA, ss. 58, 62-64; PEICA, ss. 32-33; NSCA, Table A, ss. 56, 128; NCA, Table A, paras. 26, 55. *Sale of Assets: see, e.g.*, BCCA, s. 140; QCA, s. 88; PEICA, s. 28. *Winding Up: see, e.g.*, CBCA, s. 204; BCCA, s. 289; Que. Winding Up Act, ss. 2-3.

[68] BCSA, ss. 85, 94; ASA, ss. 86(4), 88(2), 95; SSA, ss. 93, 102; MSA, ss. 86, 95; MSA, 1980, s. 96; Bill 44, s. 134; OSA, s. 96 and Form 32 in Regs.; QSA, s. 150 and Regs. s. 38; CBCA, ss. 194, 196 and Regs. s. 68. For a discussion of these, *see* V. ALBOINI, *supra* note 1, at 743-47. Shareholders, of course, also receive information circulars with their notice of meeting and proxy prior to their convocation for purposes of discussion and voting on a proposed reorganization.

[69] *See* F. IACOBUCCI, M. PILKINGTON & J. PRICHARD, *supra* note 62, at 286-318 and text accompanying notes 237-46 *infra*.

[70] CBCA, s. 115; BCCA, s. 144; ACA, s. 78; ABCA, s. 115; 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 in the absence of fraud and oppressive conduct. *See* North W. Trans. Co. v. Beatty, 12 App. Cas. 589, 56 L.J.P.C. 102 (1887) (Can.). For further discussion, *see* text accompanying notes 237-46 *infra*.

[71] *See* text accompanying notes 240-42 *infra*.

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 a private property is being expropriated.[73]

However, they have also sought injunctive relief on two other grounds, even where 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 squeeze-out mechanisms in the absence of express statutory language permitting the corporate repurchase of shares or compulsory acquisition.[74]

---

[72] *Amalgamations:* Norcan Oils Ltd. v. Fogler, [1965] S.C.R. 36, 46 D.L.R. (2d) 630 (1964); *Westeel-Rosco*, *supra* note 5. *Cf. Re* Ardiem Holdings Ltd., 67 D.L.R. (3d) 253 (B.C.C.A. 1976), *rev'g* 61 D.L.R. (3d) 725 (S.C. 1975). *Arrangements: In re* Dorman Long & Co., [1934] Ch. 635, 103 L.J. Ch. 316 (1933). *Re* Upper Canada Resources Ltd., 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. & Lucky Lager Breweries Ltd., 29 W.W.R. 323, 20 D.L.R. (2d) 159, (B.C.S.C. 1959). *Rathie v. Montreal Trust*, *supra* note 28. *Cf.* Mofmac Invs. Ltd. v. Andrés Wines Ltd. (not yet reported, N.S.S.C., 30 May 1980). *See generally* Halperin, *supra* note 29.

[73] A shareholder may enforce his rights as a member and obtain injunctive relief by means of a personal action (note 248 *infra*) or a derivative action (note 233 *infra*) 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 (note 231 *infra*) 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; ABCA, ss. 198, 240; Bill 44, s. 164; SBCA, s. 240; SSA, s. 150; MCA, s. 240; MSA, s. 147; MSA, 1980, s. 122; OBCA, s. 261; Draft OBCA, s. 251; OSA, s. 122.

For discussion of the limitations of the compliance remedy, *see Re* Goldhar & Quebec Manitou Mines Ltd., 9 O.R. (2d) 740, 61 D.L.R. (3d) 612 (H.C. 1975), 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 a commentary on this point, *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 take-over bid or proxy materials. *See, e.g.*, ASA, s. 140.1; OSA, s. 127; Bill 44, s. 169. *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); Leigh, *Securities Regulation Problems in Relation to Sanctions*, in 3 PROPOSALS FOR A SECURITIES MARKET LAW FOR CANADA 510 (1978).

[74] *Maple Leaf Mills*, *supra* note 5.

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 dissatisfied minority shareholders. Sometimes, the courts have labelled the product of the legislature as "redundant"[75] owing to the enactment of more than one statutory provision which facilitates a minority squeeze-out, and have suggested that the principles of statutory construction[76] render compulsory acquisition the exclusive technique for expropriating minority shares.[77] Other times, they have endorsed amalgamations[78] and arrangements[79] as legitimate force-out mechanisms whether or not the legislation of the jurisdiction contains a compulsory acquisition provision.

---

[75] *See* the comments of Bouck J. in *Neonex*, *supra* note 5. *See also* Laycraft J. in *Canadian Salt*, *supra* note 5, at 466-67, [1979] 4 W.W.R. at 41:

> [T]he use of the amalgamation provisions of the *Canada Business Corporations Act* as a "force-out" mechanism against minority shareholders has made virtually redundant the sections of the Act designed to cover the "force-out" situation. Section 199 of the Act provides a much more elaborate procedure to safeguard the minority than does section 184 governing amalgamations. For example, the "force-out" procedure in Section 199 requires that the take-over 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 the independently held shares.

[76] *Expressio unius est exclusio alterius* is the canon of statutory construction referred to. *See* E. DRIEDGER, THE CONSTRUCTION OF STATUTES 95 (1974).

[77] *See In re* Hellenic & Gen. Trust Ltd., [1975] 3 All E.R. 382, [1976] 1 W.L.R. 123 (Ch.) (Templeman J.); *Westeel-Rosco*, *supra* note 5. The catchphrase which the courts use is: "You cannot do something indirectly which you failed to accomplish directly." *See also* L. GOWER, *supra* note 57, at 622-23; 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, 89 L.J. Ch. 113 (C.A. 1919), and permit the use of the alteration of the constating documents as a squeeze-out 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*, *supra* note 5; *Canadian Salt*, *supra* note 5; *All-Canada News Radio*, *supra* note 5; *Domglas*, *supra* note 5. *In Jurisdictions Without Compulsory Acquisition Provisions:* OBCA: Wingold v. Minister of Consumer and Commercial Relations, [1979] 2 A.C.W.S. 503 (Ont. H.C.); MCA: Triad Oil Holdings Ltd. v. Provincial Secretary for Manitoba, 59 W.W.R. 1 (C.A. 1967). For commentary on this point, *see* Lange, *supra* note 1.

[79] *In Jurisdictions with a Compulsory Acquisition Provision: U.K. Companies Act: In re* National Bank Ltd., [1966] 1 All E.R. 1006, [1966] 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. AFR. L.J. 329 (1978); Pliner, *Arranging a Take-Over — A Scheme Around the Code?*, 7 AUST. BUS. L.J. 51 (1979).

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 v. Maple Leaf Mills*,[82] Steele J. issued an injunction restraining the controlling shareholders of Maple Leaf Mills from proceeding with a meeting at which the amalgamation force-out 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 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 (Ontario) that specifically provides for the squeezing out of minority shareholders. There is power under 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 forceably [*sic*] 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 the courts interpreting the Canada Business Corporations Act are no less confusing. For example, in *Neonex International Ltd. v. Kolasa*[85] and *Jepson v. Canadian Salt Co.*,[86] the courts expressed their approval of amalgamation squeeze-outs. To quote Bouck J. in *Neonex*:

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

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

---

[80] *Supra* note 5.

[81] *Id.* at 273-74.

[82] *Supra* note 5.

[83] *Id.* at 207, 4 Bus. L.R. at 311.

[84] *Id.* at 204-05, 4 Bus. L.R. at 309.

[85] *Supra* note 5.

[86] *Supra* note 5.

[87] *Neonex*, *supra* note 5, at 11, 84 D.L.R. (3d) at 451. This too was the conclusion of Greenberg J. in *Domglas*, *supra* note 5, at 70.

[88] *Supra* note 5.

[89] *Id.* at 223, 4 Bus. L.R. at 328. In short, the facts were as follows: after failing to obtain the requisite 90% to exercise its right to compulsory acquisition following a

> 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 take-over bid.[90]

This too was the substance of the decision of the English court in *Re Hellenic & General Trust Ltd.*[91] In that case, 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 implied 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 investors desiring the greatest return on their capital while caring little about the effective management of the company.[95] On the other hand,

---

take-over 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, 4 Bus. L.R. at 323.

[91] *Supra* note 77.

[92] *Id.* at 387, [1976] 1 W.L.R. at 127.

[93] *Supra* note 79.

[94] *Id.* at 1013, [1966] 1 W.L.R. at 829-30:

> 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 section 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, sections 206 and 209, involve quite different considerations and different approaches. Under section 206 an arrangement can only be sanctioned if the question of its fairness has first of all been submitted to the court. Under section 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 unfairness of the scheme. There are, therefore, good reasons for requiring a smaller majority in favour of a scheme under section 206 than the majority which is required under section 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 Prerogatives and the Unproductive Debate: Still the Classical Economics and the Entrepreneur's Lot*, 14 U.B.C. L. REV. 75, at 113 (1979), where the author refers to a New Zealand study on investments and states that:

> 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

going private transactions may create problems warranting their prohibition.[96]

All freeze-out techniques are coercive. In 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 in the open market, the threat of an impending amalgamation or the possibility of material diminution in market liquidity may persuade them to surrender the shares without proper consideration of the fairness of the offer.[97]

Moreover, controlling shareholders can dictate the terms of the freeze-out. 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

---

> portfolio, is a member of the group contributing the greatest portion of capital, and "neither expects nor has an incentive to participate in 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. (footnotes omitted)

See also PETERSON, CANADIAN DIRECTORATE PRACTICES: A CRITICAL SELF-EXAMINATION 116 (1977); 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); RUBNER, THE ENSNARED SHAREHOLDER (1965); Manning, *The Shareholder's 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. 903 (1975); Borden, *Going Private — Old Tort — New Tort or No Tort?*, 49 N.Y.U. L. REV. 987 (1974); Salter, *supra* note 2.

[97] Former SEC Commissioner Sommer, in his Law Advisory Council Lecture, *supra* note 2, wondered how real is the choice of the shareholder confronting the offer of management to acquire his shares when faced with the prospect of a merger or a market reduced to "glacial activity and the liquidity of the Mojave Desert."

[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 loaning funds, guaranteeing a loan or providing security to a lending institution for funds borrowed or passing on retained earnings in the form of tax-free or taxable dividends.

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

(a) Whether the method of financing assistance will violate any statutory provisions. *Supra* note 11.

public shareholders are defeated by the actions taken by insiders rather than by their own judgment or the general operation of the market place.

However, in seeking to enjoin a going private transaction, minority shareholders must accept the principle of "majority rule" 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 offers greater flexibility and simplicity in instituting fundamental corporate changes over corporate democracy.[102] For example, these statutes contain provisions authorizing: (1) the compulsory acquisition of shares;[103] (2) 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 (3) an amalgamation of companies resulting in minority shareholders of the

---

(b) Whether the issuer or the controlling shareholders are better able to deduct any interest expense incurred.

(c) Whether the payment of dividends would violate any statutory solvency provisions.

(d) 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 111-14; SARNA at 282-85.

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 MODERN L. REV. 471 (1977); Hetherington, *Financing an Insider Take-Over*, 4 AUST. BUS. L. REV. 220 (1976); Hansen, *Annual Survey of Canadian Law: 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*, in STUDIES IN CANADIAN COMPANY LAW ch. XVIII, at 548-52 (J. Ziegel ed. 1967).

[100] *Supra* note 7. In *Re* Ferguson, *supra* note 21, Hollingworth J. rejected the argument put forth by counsel for the plaintiff that a shareholder has a subsisting or inalienable right to remain a shareholder.

[101] The ABCA, SBCA, MCA and Draft OBCA.

[102] *E.g.*, the CBCA, s. 185.1 now permits an arrangement without automatic shareholder consideration of a scheme prior to court approval and s. 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 accompanying notes 137-40 *infra*.

[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; ABCA, s. 184; SBCA, s. 184; MCA, s. 184; OBCA, s. 100; Draft OBCA, s. 183. For further details, *see* text accompanying notes 126-36 *infra*. *See also* Magnet, *supra* note 1; Manning, *supra* note 95; Bruun & Lansky, *The Appraisal Remedy for Dissenting Shareholders in Canada: Is It Effective?*, 8 MAN. L.J. 683 (1978); and Théberge, Le droit de dissidence en vertu de l'article 184 de la loi sur les sociétés commerciales canadiennes: soupape ou pis-aller? in SARNA at 85.

amalgamating companies receiving cash rather than shares.[106] They indicate that the shareholder's right is in the value of his investment, not its form.[107] Contrary to the suggestions by the courts in *Maple Leaf Mills*[108] and *Westeel-Rosco*,[109] it is irrelevant that the forms of consideration given to shareholders of an amalgamated company are different, provided, however, that 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 squeeze-out. It provides them with either cash or redeemable securities of the issuer rather than shares which may be no longer marketable as a result of a lack of demand by broker-dealers or institutional investors. Moreover, the acquiror might use a squeeze-out 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]

---

[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), SBCA, s. 176(1), ABCA, s. 176(1), MCA, s. 176(1) and Draft OBCA, s. 173(1) permit the use of cash or redeemable preference shares in the exchange.

[107] *See, e.g.*, the comments of the courts in *Magnavox*, *supra* note 6; *Canadian Allied Prop.*, *supra* note 5, at 264, [1979] 3 W.W.R. at 620; *Canadian Salt*, *supra* note 5, at 469, [1979] 4 W.W.R. at 43-44.

[108] *Supra* note 7.

[109] *Westeel-Rosco*, *supra* note 5, at 218, 4 Bus. L.R. at 323:

> 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 take-over bid. At common law the majority could not expropriate the minority.

[110] To quote Evershed M.R. in *Greenhalgh*, *supra* note 57, at 291, [1950] 2 All E.R. at 1126:

> [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 subject to the application of anti-avoidance provisions in the Income Tax Act. *See* Kroft, *supra* note 1.

[112] There is no empirical data which suggests that squeeze-outs have dampened investor confidence. However, many shareholders may feel the same as Mr. Kolasa whose comments were quoted by Bouck J. in *Neonex*, *supra* note 5, at 11, 84 D.L.R. (3d) at 451:

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 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.[116]

Imperfections in Canadian public securities markets, however, preclude shareholders of many reporting companies from commanding 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 can be the result of a failure by the company to pay dividends because of substantial reduction in retained earnings for the fiscal year, the inefficient use of the assets of the company, an 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

---

> 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 squeeze-out price. Many companies now going private attracted capital in the late sixties when "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 (1979); 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, 6 Jun. 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 J. CORP. L. 63 (1978).

[115] To quote Brudney, *id.* 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 for Shares — A Reply to Chairman Cohen*, [1967] DUKE L.J. 231.

[117] *See* Campbell & Steele, *supra* note 1 and Salter, *supra* note 2 for examples. In *Re Quegroup*, *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.

broker-dealers for the 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 and decide to acquire them at a premium. Consequently, minority shareholders who choose to tender their shares in a take-over bid may well receive compensation more closely reflecting the intrinsic value of their shares. The amount 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 it is to be run as a going concern, and the benefits the acquiror expects to receive as a result of the transaction.[119]

However, public shareholders faced with the prospect of a squeeze-out rarely can 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 issue shares to the public even though it is unlikely that a reasonably active market will ever exist.[121]

In such circumstances, the market place is unable to perform its function and set an appropriate price for minority shares. In the absence of competitive bidding, the controlling shareholders will generally not pay a premium in excess of the market price.

The inefficiency of Canadian securities markets should not enable insiders to use coercion to acquire the shares of the minority for less than

---

[118] M. WEINBERG & M. BLANK, *supra* note 29, ch. 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 ch. 5; Chazen, *Acquisition Premiums and Liquidation Values How Do they Affect the Fairness of the Financial Terms of an Acquisition?*, in ELEVENTH ANNUAL INSTITUTE OF SEC. REG., *supra* note 6, at 377.

[120] *E.g.*, Neonex, Hidrogas, Maple Leaf Mills, The Keg (B.C. Bus. Week, 9 May 1979, at 38) and Reed Paper Ltd. (Vancouver Sun, 10 Jul. 1980, at D-7). *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 119-20 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.

their intrinsic value.[122] Where minority shareholders must submit to the will of the majority in corporate affairs, they must also be given the opportunity to contest the unfairness of the terms of the squeeze-out 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[123] on 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 of 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 such artificial market conditions for minority shareholders that enable 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

---

[123] To quote L. 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." (footnotes omitted)

[124] *E.g.*, 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.

participate in a venture beyond its initial contemplation[125] to sell his shares to the issuer for "fair value", even where there is little or no trading done in the company's securities or 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

---

[125] Changes which may trigger a dissent application include: the 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 jurisdiction so one must examine the pertinent legislation. *See supra* note 105. In McConnell v. Newco Financial Corp., 8 Bus. L.R. 180 (B.C.S.C. 1979) 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 CBCA, s. 184.

[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, ABCA, SBCA, MCA and Draft OBCA, a "complainant" may make an application for relief. "Complainant" is defined in CBCA, s. 231, ABCA, 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*, in CAN. SEC. L. REP. 12699-3 (CCH).

[128] CBCA, s. 234; BCCA, s. 224; ABCA, s 234; SBCA, s. 234; MCA, s. 234; Draft OBCA, s. 246; Draft Federal Securities Act, s. 13.11 (Proposals for a Securities Market Law for Canada, 1979). For commentary on the sections, *see* F. IACOBUCCI, M. PILKINGTON & J. PRICHARD, *supra* note 62; Ravinsky, *The Statutory Protection Against Oppression*, in SARNA at 51.

[129] An interim or final order.

[130] Other orders a court may make include: restraining improper conduct; appointing a receiver manager; amending the constating documents; directing an issue or exchange of securities; directing changes in directors; varying or setting aside a transaction to which the corporation is a party and compensating any other parties; directing payment to a securityholder; directing production of any financial statement or accounting; compensating any aggrieved person; directing rectification of the corporate records or registry; liquidating or dissolving the corporation; directing an investigation; or requiring any trial of the matter.

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 having their shares expropriated on fair terms.

Lastly, shareholders who refuse to tender their shares in compulsory acquisition proceedings for the amount of consideration offered on the

---

[131] BCCA, s. 234 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 Coop. Wholesale Soc'y Ltd. v. Meyer, [1959] A.C. 324, [1958] 3 W.L.R. 404 (H.L.); "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, [1952] S.C. 49, at 60. *See also* O'Neill v. Dunsmuir Holdings Ltd., 2 A.C.W.S. (2d) 127 (B.C.S.C. 1980); *Re* Sabex Int'l Ltée, 6 Bus. L.R. 65 (Que. S.C. 1979); *Re* Van-Tel T.V. Ltd., 44 D.L.R. (3d) 146 (B.C.S.C. 1974); *Re* National Bldg. Maintenance Ltd., [1971] 1 W.W.R. 8 (B.C.S.C. 1970); *Re* B.C. Aircraft Propeller & Engine Co., 63 W.W.R. 80, 66 D.L.R. (2d) 628 (B.C.S.C. 1968).

[133] In Diligenti v. RWMD Operations, 1 B.C.L.R. 36 (S.C. 1976) (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* Redekop v. Robco Constr. Ltd., 5 Bus. L.R. 58 (B.C.S.C. 1978); Jackman v. Jackets Enterprises Ltd., 4 B.C.L.R. 358 (S.C. 1977).

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 All-Canada News Radio*, *supra* note 5; *Westeel-Rosco*, *supra* note 5; N.I.R. Oil Ltd. v. Canadian Hidrogas Resources Ltd. (not yet reported, B.C.S.C., Feb. 1979) (Legg J.). Extensive discussion of Rule 10b-5 and its limited use in squeeze-outs may be found in Roberts, *Rule 10b-5 and Corporate Mismanagement: Problems with Shareholders' Oppression*, 8 MEMPHIS STATE U.L. REV. 501 (1978); 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). Under NCA, s. 30(4) and NSCA, s. 120(5), the amalgamating companies may apply for a court order. In some acts such as OBCA, ss. 196-97, 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. *Cf.* CBCA, s. 179 and ABCA, s. 179 which state 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. [emphasis added] For a discussion of the guidelines used by the court, *see Triad Oil*, *supra* note 78; *Norcan Oils*, *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 squeeze-out eliminates 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; rule 912 of the Vancouver Stock Exchange; Alberta Stock Exchange Bylaws, s. 19.16; Montreal Stock Exchange Rules, s. 9155.

preceding take-over 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 for 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:

---

[137] If a shareholder is a member of a Nova Scotia, Alberta (under the ACA), Quebec or British Columbia 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 take-over bid was made. He may be successful if the court agrees that:

(a) The company has failed to comply strictly with all statutory procedural requirements. *See supra* note 72.

(b) The 90% required consisted of shares held by parties related to the offeror. Esso Standard Inc. v. J.W. Enterprises Inc., [1963] S.C.R. 144, 37 D.L.R. (2d) 598 (1962); *In re* Bugle Press Ltd., [1961] Ch. 270, [1960] 1 All E.R. 766; *supra* note 41.

(c) There has been insufficient or inaccurate disclosure of material facts. *See Re* Press Caps Ltd., [1949] Ch. 434, [1949] 1 All E.R. 1013 (C.A.), *Re* Evertite Locknuts Ltd., [1945] Ch. 220, [1945] 1 All E.R. 401; *Re* Hoare & Co., [1933] All E.R. Rep. 105, 150 L.T. 374 (Ch.); *Rathie*, *supra* note 28; *Re John Labatt*, *supra* note 72; *Canadian Allied Prop.*, *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.

(d) The price offered was unfair. *See Re Quegroup*, *supra* note 5; *Re* Grierson, Oldham & Adams Ltd., [1968] Ch. 17, [1967] 1 All E.R. 192 (1966); *Re* Sussex Brick Co., [1961] Ch. 289, [1960] 1 All E.R. 772 (1959), *Re* Western Mfg. Ltd., [1956] Ch. 436, [1955] 3 All E.R. 733; *Re Press Caps*, *id.*; *Re Evertite Locknuts*, *id.*; *Re Hoare*, *id.* For the British Columbia position, *see* note 138 *infra*.

[138] Shareholders of a federal, British Columbia, Alberta (under the ABCA), Saskatchewan, Manitoba 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 the 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 take-over 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; U.K. Companies Act, s. 209(2).

[139] *See* L. GOWER, *supra* note 57, at 208-18; Beck, *supra* note 99; MacKinnon, *The Protection of Dissenting Shareholders*, in STUDIES IN CANADIAN COMPANY LAW 507 (J. Ziegel ed. 1967); Gold, *Preference Shareholders in the Reconstruction of English Companies*, 5 U. TORONTO L.J. 282 (1943).

[140] *Id.*

> 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 that the 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 generally have refrained from assessing the fairness of a scheme. They have concluded that judicial procedures are ill-suited to properly assess 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

---

[141] Scottish Ins. Corp. v. Wilsons & Clydes Coal Co., [1948] S.C. 360, at 376, *aff'd* [1949] A.C. 462 (H.L.).

[142] *Supra* notes 72, 139.

[143] To quote Huberman, *Winding Up Business Corporations*, in 2 STUDIES IN CANADIAN COMPANY LAW 283 (J. 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 a corporation is entitled to govern the corporation as it, and not the court, sees fit and the majority will 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, at 556-60, discussed "non-interference in internal affairs." 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. *See, e.g.*, Brown v. Duby, 28 O.R. (2d) 745, 111 D.L.R. (3d) 418 (H.C. 1980).

[145] L. GOWER, *supra* note 57, at 717.

[146] *See, e.g.*, Diligenti v. RWMD Operations Ltd. (No. 2), 4 B.C.L.R. 134 (S.C. 1977).

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 Re* VCS Holdings Ltd., [1978] 5 W.W.R. 559 (B.C.S.C.) for a decision in which the court accepted a referee's determination of "fair value."

Quaere whether a specialized "Companies Court" should be established to deal with similarly complex corporate problems. *See* L. GOWER, *supra* note 57, at 718; MacKinnon, *supra* note 139, at 543; ONTARIO SELECT COMMITTEE ON COMPANY LAW 115-16 (1967).

[147] Brudney, *supra* note 114, at n. 56.

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 can the courts 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 such additional imponderables 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 squeeze-out will occur;[152] any benefits received by controlling shareholders incidental to the ownership of shares in a private company;[153] and,

---

[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 n. 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 Earnings per Share*, in CANADIAN INSTITUTE OF CHARTERED ACCOUNTANTS HANDBOOK, s. 3500.

[152] The ability of the controlling shareholders to set the terms of a squeeze-out deprives minority shareholders of the opportunity to dispose of their shares in the manner or at the time which would best suit their tax position. *E.g.*, 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 dividends: *supra* note 118. On an amalgamation squeeze-out, 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 may not want the inclusion of any further amounts in his income as a result of the redemption of the shares in that year. Given 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 were lower.

Calculation of "fair value" should take into account the increased tax burden of minority shareholders resulting from a squeeze-out. 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 the International Land Corporation (5 Oct. 1978 circular), enable shareholders to choose the time at which the expropriation of shares will take place and the tax treatment the proceeds of disposition will assume. *E.g.*, the squeeze-out might be structured so that each step of the transaction consisting of a take-over 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; SARNA at 254-58.

[153] The wording in the dissent provisions appears broad enough to enable a court charged with fixing "fair value" to take into account the "private company benefits"

any saving 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 courts will be able to perform the analysis required and compute one true figure for the intrinsic value of minority shares, they may not receive the benefit of all the information they 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

---

enjoyed by insiders of the issuer. The BCCA, s. 231 requires consideration of any appreciation or depreciation in anticipation of the vote upon the resolution. Until Mar. 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."

Diligenti (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 accompanying notes 170-71 *infra*. *See also* Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 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. 548 (1978); Chirelstein, Sargeant & Lipton, *'Fairness' in Mergers Between Parents and Party-Owned Subsidiaries*, in EIGHT ANNUAL SECURITIES REGULATION CONFERENCE 273 (1977).

[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. For further discussion, *see* text accompanying note 174 *infra*.

[155] Brudney, *supra* note 114, at 76.

[156] An important statutory provision for assisting shareholders in acquiring 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 wrongdoing. *See* CBCA, s. 222; BCCA, s. 233; ACA, s. 100; ABCA, s. 223; SBCA, s. 222; MCA, s. 222; OBCA, s. 186; Draft OBCA, s. 159; QCA, s. 107; NSCA, s. 101; NBCA, ss. 107-09; NCA, ss. 116-19. The court has a 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* F. IACOBUCCI, M. PILKINGTON & J. 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; SSA, s. 27; MSA, s. 21; MSA, 1980, s. 10; OSA, s. 11: QSA, ss. 53, 82A; NBSFPA, s. 21; NSA, s 23; PEISA, s. 16; Bill 44, s. 28. *See also* V. ALBOINI, *supra* note 1, ch. VI.

be difficult for a 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 squeeze-out, 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 limitation 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

---

[157] *See, e.g., Re* Whitehorse Copper Mines; Hudson Bay Mining & Smelting Co. v. Lueck, 10 Bus. L.R. 113 (B.C.S.C. 1980) (McEachern C.J.); text accompanying note 172 *infra*; *Domglas*, *supra* note 5, at 111-15.

[158] The protracted determination of "fair value" and the possibility of insolvency (CBCA, s. 184(26); BCCA, s. 257; ABCA, s. 184(20); SBCA, s. 184(26); MCA, 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. *Cf. Re* Pacific Enterprises Ltd., 18 B.C.L.R. 14 (S.C. 1980); Montgomery v. Shell Canada Ltd., 10 Bus. L.R. 261, 3 A.C.W.S. (2d) 231 (Sask. Q.B. 1980); and Redekop v. Robco Constr. Ltd. (No. 2), 3 A.C.W.S. (2d) 409 (B.C.S.C. 1980).

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; SARNA at 286-87; Vivian, *Monetary Restraints on the Exercise of Rights of Dissenting Shareholders*, 9 WESTERN ONT. L. REV. 101 (1970).

[159] *E.g.*, 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; and (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; ABCA, s. 235; SBCA, s. 235; MCA, s. 235; Draft OBCA, s. 246.

[160] *See Canadian Salt*, *supra* note 5, as to what constitutes a proper dissent notice.

[161] In *Canadian Salt*, *id.* at 468-69, [1979] 4 W.W.R. at 42-43, Laycraft J. stated:

> 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

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 squeeze-out[163] and obtaining payment of an amount at least equal to the intrinsic value of their shares. For example, shareholders involved in dissent,[164] oppres-

---

> 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 Re Manitoba Sec. Comm'n & 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 strict compliance with procedural requirements is essential to enable a dissatisfied shareholder to qualify as a dissentient.

Quaere whether the dissent right should be an exclusive remedy for shareholders in view of these problems. *See* Vorenberg, *Exclusiveness of the Dissenting Shareholder's Appraisal Right*, 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*, *supra* note 5, the court in Robertson v. Canadian Canners Ltd., 4 Bus. 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, at 17. To quote Greenberg J.:

> 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 to 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 offeree must demonstrate the unfairness of a take-over scheme despite management's superior access to material information. *See Canadian Allied Prop.*, *supra* note 5; *Re Whitehorse Copper*, *supra* note 157.

[163] *E.g.*, in *Canadian Hidrogas*, *supra* note 5, the applicant company had approximately 735 shareholders holding three million common shares. The company proposed to convert these shares into Class "A" non-voting redeemable shares in the ratio of five to one. The new shares could then be converted within 30 days of the first conversion, to Class "B" voting shares in the ratio of one Class "A" share to five 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. *See also Re Ripley Int'l*, *supra* note 5.

[164] *Re* Wall & Redekop Corp., [1975] 1 W.W.R. 621, 50 D.L.R. (3d) 733 (B.C.S.C. 1974); *Neonex*, *supra* note 5. *See also Valuation of Dissenters Stock under*

sion,[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. v. Lueck*.[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 take-over bid price of $4.00, fifty-nine shareholders applied to the 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

---

Appraisal Statutes, 79 HARV. L. REV. 1453 (1966). *Contra*, see *Montgomery*, *supra* note 158, 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 Supplies Ltd., 1 A.C.W.S. (2d) 452 (B.C.S.C. 1979); *O'Neill*, *supra* note 132.

[166] *Re Quegroup*, *supra* note 5; *Re Whitehorse Copper*, *supra* note 157; *Omnitron Invs.*, *supra* note 41; *Re* Pacific Enterprises Ltd., 18 B.C.L.R. 14 (S.C. 1979); *Redekop*, *supra* note 158; *Re* Ferguson, *supra* note 21.

[167] *See Re* Simco, 3 Bus. L.R. 318 (Que. S.C. 1977); text accompanying notes 204-05 *infra*; *Re Ripley Int'l*, *supra* note 5.

[168] *Re Hellenic*, *supra* note 77; *Diligenti*, *supra* notes 133, 146; *Westeel-Rosco*, *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.

> corporation. If their shareholdings are now to be eliminated, against their wishes, in order to permit the applicant — and that means the few continuing shareholders of 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 equalling any portion of the benefits incidental to the ownership of shares in a 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 way 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.

---

[172] *Id*. at 273-74. In *Neonex*, *supra* note 5, at 12, 84 D.L.R. (3d) 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 that the fair value should reflect any benefit the majority might receive by reason of the take-over. 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] CAMPBELL, *supra* note 119, ch. 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, 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.

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*

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"[176]) neither cast the responsibility for 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

---

[175] For a recent application of this principle in a squeeze-out transaction, *see* National System of Baking of Alta. Ltd. v. The Queen, [1980] C.T.C. 237, 80 D.T.C. 6178 (F.C.A.). In that case, the court held that market price was the best evidence of "fair market value" and that 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. *See generally* Wise, *The V-Day Value of Publicly Traded Shares*, 28 CAN. TAX J. 253 (1980) and Regulation 4400 and ITAR subsection 26(11) regarding the fair market value of publicly-traded securities for income tax purposes.

[176] Whereas Policy 3-37 and OSA Regs., s. 163 protect only shareholders resident in Ontario, the Draft OBCA, s. 188 safeguards shareholders of all "offering corporations" incorporated in Ontario. OSA Regs., s. 163 applies only where a "going private transaction" is anticipated to follow a take-over 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:

(a) an issuer or insider take-over bid not followed by a going private transaction;
(b) a transaction that is designed to eliminate the interest of minority shareholders such as a cash amalgamation squeeze-out, but is not preceded by an issuer or take-over bid.

See V. ALBOINI, *supra* note 1, at 633-39.

There has been some dispute whether the rules contained in Policy 3-37 and OSA Regs., s. 163 "smack of company law" and should be imposed through corporation acts. For discussion, *see* Salter, *supra* note 2; Notice, *supra* note 2, *Cablecasting*, *supra* note 5; In the Matter of the Securities Act and In the Matter of Loeb and Loebex, [Dec. 1978] BULL. O.S.C. 333. It does not seem important that the distinction between corporate 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 U.S. 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 Stockholder Freezeouts Under Wisconsin Law*, 32 BUS. LAW. 1501, at 1503-04 (1977), Bartell suggests the payment of a "going private" premium over market price equal to the average or median premium paid in contested take-over 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. *E.g.*, 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.

to provide shareholders with extensive information relating to the intrinsic value of their shares[178] (including a valuation)[179] and any real or potential benefits accruing to the controlling group.[180] Consequently,

---

[178] (a) A summary of the volume of trading and price range of the shares on any stock exchange within 12 months preceding the date of a squeeze-out.
(b) 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 a 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.
(c) 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 squeeze-out including the purchase or sale price.
(d) 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.
(e) The offering price per share and the aggregate proceeds received by the issuer when securities have been offered to the public during the five years preceding the squeeze-out.
(f) A general description of the income tax consequences of the squeeze-out transaction to the issuer and to securityholders.

[179] A valuation of the shares of the issuer must be prepared and submitted to the OSC 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. For a discussion of this issue, *see* Campbell & Steele, *supra* note 1; Salter, *supra* note 2; Notice, *supra* note 2.

[180] (a) 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;
(b) The details of any contract, arrangement or understanding, formal or informal, between the issuer and any securityholder;
(c) 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;
(d) The frequency and amount of dividends with respect to the shares of the issuer during the two years preceding the date of the squeeze-out 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.

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 negative the element of coercion which almost invariably forces most shareholders and even dissentients[182] to accept an offer made at a premium. 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 purpose of these provisions to create efficient market conditions where there is already the free flow of information, many participants and no institutional imperfections or corrupt market practices. They merely attempt to ensure that the imperfections of Canadian securities markets that often result 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

---

[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 the Draft OBCA, s. 188 require at least two-thirds 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. *See also* Interim OSC Policy 3-52, [Dec. 1980] BULL. O.S.C. 493, which states that the test will also be applied in complex business combinations not akin to amalgamation where the possibility exists that management or a dominant security holder will be entitled or perceived to be entitled to some benefit or advantage as a result of restructuring.

[183] *Supra* note 146, Brudney, *supra* note 114, at 81. *See also supra* note 156 for reference to the broad investigatory powers which the OSC possesses. In the recent decision of *Re* Denison Mines (not yet reported, Ont. H.C., 21 Apr. 1981), the court stressed that it would not interfere with the denial by the OSC of exemptions from making financial disclosure because "[t]he Act [OSA] confides responsibility to the Commission in a specialized area of expertise."

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) disclosure would cause a detriment to the issuer that would outweigh the benefit of the 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 arm's length transaction (for example, in a take-over bid resulting in control of the corporation changing hands);[187] or (5) the issuer has been forced to comply in other jurisdictions 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 per cent 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

---

[184] Policy 3-37 *Interpretations-Exemptions*, *supra* note 38.

[185] *Id. E.g.*, 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 to increase materially the value of the corporation.

[188] *Id.*

[189] *See* Salter, *supra* note 2; Notice, *supra* note 2.

[190] *See Leobex*, *supra* note 176.

[191] Policy 3-37, *supra* note 38.

the going private transaction was clearly disclosed and a full valuation 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 seven 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 purpose 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, squeeze-out 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, that shareholders of issuers

---

[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] Draft OBCA, s. 188(4).
[198] While the QCA contains a compulsory acquisition right, it has no other provision assisting shareholders to claim fair value. However, the decision in *Re Simco*, *supra* note 167 indicates that s. 49, which requires judicial approval of an arrangement,

incorporated in these jurisdictions 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 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]

---

may provide the courts with greater powers than anticipated. *Cf.* the powers of the court to order an amalgamation squeeze-out pursuant to QCA, s. 18, as interpreted in *Canadian Merrill*, *supra* note 5. *See* text accompanying notes 203-06 *infra*. If so, prohibition may only be required in reclassification-consolidation freeze-outs by special resolution.

[199] The courts in *Maple Leaf Mills* and *Westeel-Rosco*, *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 to the form and not the value of their investments.

[200] *Supra* note 77. *See also* Prentice, *Corporate Arrangements — Protecting Minority Shareholders*, 92 L.Q.R. 13 (1977).

[201] The facts in *Re Hellenic*, *supra* note 77, 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 shareholders 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, [1976] 1 W.L.R. at 129.

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 Ltée.*,[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) *Proper Corporate Purpose Test*

The "proper corporate purpose" test[207] was formulated by American courts to prevent insiders from engaging in a naked grab for power without further justification. 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 squeeze-out transaction.

Unfortunately, there is no judicial consensus as to what constitutes a "proper corporate purpose." The views of American state court judges[208] have differed considerably, resulting in the following list of legitimate business reasons for a squeeze-out: substantial savings in housekeeping and shareholder servicing costs;[209] the danger of financial

---

[203] *See* the comments of the court in *Maple Leaf Mills*, *supra* note 5, at 201, 4 Bus. L.R. at 305 and in *Westeel-Rosco*, *supra* note 5, at 216, 4 Bus. L.R. at 320.

[204] *Supra* note 167.

[205] *Quaere* 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 QCA, s. 49 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 Sw. L.J. 641 (1978); Borden & Messmar, *supra* note 6.

[208] In spite of the decision in Marshel v. AFW Fabric Corp., 533 F. 2d 1309 (2d Cir. 1977), remanded for a determination of mootness: 429 U.S. 881 (1976) — the U.S. Supreme Court in Green v. Santa Fe Indus. Inc., 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, e.g.*, Kaufman v. Lawrence, 386 F. Supp. 12 (S.D.N.Y. 1974), Tanzer Eco. Assoc. Profit Sharing Plan v. Universal Food Specialties Inc., 87 Misc. 2d 167, 383 N.Y.S. 2d 472 (Sup. Ct. 1976).

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 squeeze-out transactions. In *Westeel-Rosco*, Montgomery J. rejected the argument of the defen-

---

[210] Matteson v. Ziebarth, 40 Wash. 2d 286, 242 P. 2d 1025 (1952); Polin v. Conductron, 552 F. 2d 797 (8th Cir. 1977), 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 N.Y.S. 2d 660 (Sup. Ct. 1976).

[212] Schulwolf v. Cerro Corp., 86 Misc. 2d 292; 380 N.Y.S. 2d 957 (Sup. Ct. 1976); *Tanzer Eco.*, *supra* note 209. *See also Magnavox*, *supra* note 6.

[213] Grimes v. Donaldson Lufkin & Jenrette Inc., 392 F. Supp. 1393 (N.D. Fla.), *aff'd* 521 F. 2d 812 (5th Cir. 1975); Teschner v. Chicago Title & Trust Co., 322 N.E. 2d 54 (Ill. 1975); Cole v. Schenley Indus. Inc., [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) s. 95, 765 (Sony 1976), *remanded* 563 F. 2d 35 (2d Cir. 1977); *Schulwolf*, *id.*; *Tanzer Eco.*, *supra* note 209.

[214] Kemp v. Angel, 381 A. 2d 241 (Del. 1977). *Cf. Schulwolf*, *supra* note 212.

[215] Tanzer v. Int'l Gen. Indus., 379 A. 2d 1121 (Del. 1977); *Tanzer Eco.*, *supra* note 209.

[216] In *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); *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.*, *supra* note 209; *In re* Jones & Laughlin Steel Corp., 398 A. 2d 186 (Penn. 1979). Note the analysis of the British Columbia Court of Appeal in *Canadian Allied Prop.*, *supra* note 5. Carrothers J.A. stated at 264-65, [1979] 3 W.W.R. at 620-21:

> We are not to be concerned with the motivation behind the desire to acquire the minority shareholding 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.

dants 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 forty-five per cent of the issued capital, incorporated a new company in which they each held fifty per cent of the issued shares. The new company subsequently made a take-over bid for all outstanding and issued shares of the publishing company at £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 ten per cent 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 of £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 ten per cent of the shares.[221]

Similarly, in *Esso Standard 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]

---

[217] *Westeel-Rosco*, *supra* note 5, at 216, 4 Bus. L.R. at 320.

[218] *Supra* note 137,(b).

[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.*, *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] R.S.C. 1970, c. C-32, s. 136(1):

> 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

The facts of the decision resemble those in *Bugle Press*. Esso, a wholly-owned subsidiary of Standard Oil (Standard) made a take-over 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 take-over bid because Standard, which was also the owner of ninety per cent of the issued share capital of International, indicated its intention to 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 ninety 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 squeeze-out 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, the majority being merely interested in the greatest return on their investment and not caring 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

---

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 here 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,(b), at 151, 37 D.L.R. (2d) at 604.

[225] *Supra* note 6.

[226] *Supra* note 95.

[227] *Supra* note 57.

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 squeeze-out 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 squeeze-outs 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 ninety 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 ninety per cent 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

---

[228] *Supra* notes 139-44.

[229] *Supra* note 137, at 149, 37 D.L.R. (2d) at 604.

[230] The CBCA, ABCA, SBCA and Draft OBCA permit the acquisition of shares if a take-over 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 take-over bid by or on behalf of the offeror or an affiliate or associate of the offeror.*" [emphasis added] 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 Omnitron Invs.*, *supra* note 41, *Canadian Allied Prop.*, *supra* note 5.

[231] Percival v. Wright, [1902] 2 Ch. 421. For discussion of directors' duties, *see* F. IACOBUCCI, M. PILKINGTON & J. PRICHARD, *supra* note 62, at 286-318, Anisman, *supra* note 62, at n. 158; L. GOWER, *supra* note 57, at n. 571; Palmer, *Directors' Powers and Duties*, in STUDIES IN CANADIAN COMPANY LAW ch. 12 (J. Ziegel ed. 1967). In the recent decision of the New Zealand Court of Appeal in Coleman v. Myers, *supra* note 98, (d), 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

entitles the shareholders, or, in certain jurisdictions, a wider class of persons,[232] to sue derivatively[233] on behalf of the company. Access to the courts for aggrieved parties is far easier and less costly now because of 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 when the controlling shareholders, in their capacity as directors, have violated a number of statutory and common law rules designed to prevent management from appropriating corporate opportunities and benefitting from their access to material yet undisclosed corporate information.

(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 constituting the "best interests of the company",[238] directors are also required to consider the interests of all

---

stated that shareholders who surrender their shares on a take-over must be told of all material facts, including the method of financing the transaction. *Cf.* Allan v. Hyatt, 17 D.L.R. 7 (P.C. 1914) (Can.); Anisman, *supra* note 62, at 159.

[232] The "complainant." *See supra* note 127.

[233] CBCA, ss. 232, 233, 235; BCCA, s. 225; ABCA, ss. 232-33; MCA, ss. 232-33, 235; OBCA, s. 99; SBCA, ss. 232-33, 235; Draft OBCA, ss. 244-45. A derivative action is a suit brought by a person in the name, 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. B. REV. 159 (1974); 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, 2 Hare 46, 67 E.R. 189 (V.C. 1843). 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, 85 L.J.P.C. 161; *Cf.* Regal (Hastings) Ltd. v. Gulliver, [1967] 2 A.C. 134, [1942] 1 All E.R. 378 (H.L.).

[235] *Supra* note 233.

[236] Wallersteiner v. Moir (No. 2), [1975] Q.B. 373, [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, ABCA, s. 117, SBCA, s. 117, MCA, 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 Corp. v. Millar, [1973] 2 W.W.R. 385, 33 D.L.R. (3d) 288 (B.C.S.C. 1972); Hall Parke v. Daily News Ltd., [1962] Ch. 927, [1961] 1 All E.R. 695; *Re* Smith & Fawcett Ltd., [1942] Ch. 304, [1942] 1 All E.R. 542. For further discussion of this phrase, *see* L. GOWER, *supra* note 57, at 576-80.

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, may 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 their duty of loyalty to the company.[243] Moreover,

---

[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. & COMP. L.Q. 359 (1975); Birds, *Proper Purposes As a Head of Directors' Duties*, 37 MODERN L. REV. 580 (1974); L. GOWER, *supra* note 57, at 580-82; F. IACOBUCCI, M. PILKINGTON & J. PRICHARD, *supra* note 62, at 297-300.

[240] *See* Fraser v. Whalley, 2 Hem. & M. 10, 71 E.R. 361 (V.C. 1862); Punt v. Symons & Co., [1903] 2 Ch. 506, 72 L.J. Ch. 768; Piercy v. S. Mills & Co., [1920] 1 Ch. 77, [1918-19] All E.R. Rep. 313; Bonisteel v. Collis Leather Co., 45 O.L.R. 195 (H.C. 1919); *Re* Smith & Fawcett, *supra* note 238; Hogg v. Cramphorn Ltd., [1967] Ch. 254, [1966] 3 All E.R. 420; *Teck*, *supra* note 238.

[241] When directors have issued themselves additional shares to retain voting control of the company and defeat a take-over bid, this has been held to be an "improper purpose." *See Hogg*, *supra* note 240; *Teck*, *supra* note 238; Winthrop Invs. Ltd. v. Winns Ltd., [1975] 2 N.S.W.L.R. 666 (C.A.); Bernard v. Valentini, 18 O.R. (2d) 656, 83 D.L.R. (3d) 440 (H.C. 1978). *Quaere* whether the directors may ratify this action in their capacity as controlling shareholders. *See* Bamford v. Bamford, [1970] Ch. 228, [1969] 1 All E.R. 969 (C.A.); *Hogg*, *supra* note 240; *Teck*, *supra* note 238; Prentice, *Comment*, 47 CAN. B. 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 Prop*, *supra* notes 5, 216.

[242] *See* Howard Smith Ltd. v. Ampol Petroleum Ltd., [1974] 1 All E.R. 1126 (P.C.) (N.S.W.). *Cf. Teck*, *supra* note 238.

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

they must not profit from their position as fiduciaries.[244] Directors of the issuer, therefore, must refrain from authorizing an amalgamation squeeze-out 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 such 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 exercising 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

---

[244] Keech v. Sandford, Sel. Cas. T. King 61, 25 E.R. 223 (Ch. 1726). *See also* Beck, *The Saga of Peso Siver Mines: Corporate Opportunity Reconsidered*, 49 CAN. B. REV. 80 (1971); Anderson, *Conflicts of Interest, Efficiency, Fairness and Corporate Structure*, 25 U.C.L.A. L. REV. 738 (1978).

[245] *Quaere* whether the controlling shareholders may ratify such an action. *See* Beck, *supra* note 244, at 114; Canadian Aero Services Ltd. v. O'Malley, [1974] S.C.R. 592, 40 D.L.R. (3d) 371; Beck, *The Quickening of Fiduciary Obligation: Canadian Aero Services v. O'Malley*, 53 CAN. B. REV. 771 (1975).

[246] *Canadian Aero Services*, *id.*; *Scottish Cooperative*, *supra* note 132. *Cf.* Bell v. Lever Bros., [1932] A.C. 161, [1931] All E.R. Rep. 1 (H.L.). *See also* Beck, *supra* note 245, at 787-92.

[247] Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238 (1939); Brown v. Halbert, 76 Cal. Rptr. 781 (1969); Remillard Brick Co. v. Remillard-Dandini, 109 Cal. App. 2d 405, 241 P. 2d 66 (1952); Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P. 2d 464 (1969). *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* L. GOWER, *supra* note 57, at 653-56; Beck, *supra* note 233, at 169-79; Charlebois v. Bienvenu, [1967] 2 O.R. 635, 64 D.L.R. (2d) 683 (H.C.), *rev'd* [1968] 2 O.R. 217, 68 D.L.R. (2d) 578 (C.A.); V. ALBOINI, *supra* note 1, at 609-17.

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 had 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 fitting in squeeze-out transactions because the lack of any community of interest between shareholders is quite apparent. Insiders can use their voting power to determine both the length of time minority shareholders may remain as investors in the issuer's securities and the amount of consideration offered to the minority, and

---

[249] Courts have been willing to accept the proposition that a fiduciary relationship does exist in closely held companies. *E.g.*, in Clemens v. Clemens Bros., [1976] 2 All E.R. 268 (Ch.), 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% to just below 25% 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, so that to exercise it in a particular way could be unjust or inequitable. *Cf.*, *e.g.*, the dictum of Cozens-Hardy M.R. in Phillips v. Manufacturers Sec., *supra* note 9, at 296: "[M]embers 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. Transp.*, *supra* note 70.

[252] 7 O.R. (2d) 216, 54 D.L.R. (3d) 672 (C.A. 1974). For commentary, *see* Slutsky, *Shareholders' Personal Actions — New Horizons*, 39 MODERN L. REV. 331 (1976).

[253] *Id.* at 223, 54 D.L.R. (3d) at 679.

[254] [1972] 3 O.R. 688, 29 D.L.R. (3d) 279 (H.C.).

[255] *Id.* at 695-97, 29 D.L.R. (3d) at 287-89. The Ontario Court of Appeal, [1973] 2 O.R. 132, reversed the decision of Morand J. on the basis that the action, as pleaded, was derivative and not personal.

often use corporate funds to indirectly increase their ownership in the issuer. It is, therefore, hardly surprising that the courts in *Maple Leaf Mills*[256] and *Westeel-Rosco*[257] queried whether "the majority shareholders in promoting and approving the scheme were breaching their duty to the minority."[258]

2. *Administrative Relief*

Minority shareholders may petition an administrative body rather than the courts to enjoin a squeeze-out 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*

The cease-trading order[263] is a "blunt instrument" which may

---

[256] *Maple Leaf Mills*, *supra* note 5, at 205, 4 Bus. L.R. at 309.

[257] *Westeel-Rosco*, *supra* note 5, at 219-20, 4 Bus. L.R. at 325.

[258] *Id.* at 219. *See also Re* Loeb & Provigo Inc., 20 O.R. (2d) 497, 88 D.L.R. (3d) 139 (H.C. 1978), 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 take-over bid, should be brought by way of a derivative action.

[259] Investigations: *supra* note 156; Freezing funds: BCSA, s. 27; ASA, s. 26; SSA, s. 32; MSA, s. 26; MSA, 1980, s. 16(1); OSA, s. 16(1); QSA, s. 60; NBSFPA, s. 24; NSSA (no provision); PEICA, s. 19; NSA (no provision); Bill 44, s. 37; Appointing a receiver: BCSA, s. 28; ASA, s. 27; SSA, s. 33; MSA, s. 27; MSA, 1980, s. 17; OSA, s. 17; PEICA, s. 19(3); Bill 44, s. 38. OSA, s. 132, MSA, 1980, s. 132 and Bill 44, s. 172 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, 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] BCSA, s. 58; ASA, s. 143; SSA, s. 151; MSA, s. 143; MSA, 1980, s. 123; OSA, s. 123; QSA, s. 80; NBSFPA, s. 18; NSSA, s. 23; PEISA (no provision); NSA, s. 25; Bill 44, s. 165.

[261] BCSA, ss. 21, 55; ASA, ss. 20, 59; SSA, ss. 21, 20(5); MSA, ss. 20, 59; MSA, 1980, s. 124; OSA, s. 124; QSA, s. 128; NBSFPA, s. 22; NSSA, ss. 4, 20; PEISA, s. 2(4); NSA, ss. 6, 21 (Attorney-General); Bill 44, s. 166.

[262] Alberta Stock Exchange Bylaws, Part X; Montreal Stock Exchange Rules, s. 9451; Toronto Stock Exchange Bylaws, s. 19.01; Vancouver Stock Exchange Rules, 380-84; Winnipeg Stock Exchange Bylaw 5, s. 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* D. JOHNSTON, *supra* note 15, at 360-62; V. ALBOINI, *supra* note 1, at 824-38.

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] as well as in two recent decisions,[268] that it will only order the securities of an issuer going private to cease trading when the terms of a squeeze-out 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 take-over bid,[271] an amalgamation,[272] share reclassification[273] or consolidation[274]

---

[264] D. JOHNSTON, *id.* at 361.

[265] *Id.*

[266] *See* Lost River Mining Corp., [Oct. 1979] BULL. O.S.C. 290, at 292, *see also* V. ALBOINI, *supra* note 1, at 837-38 and *National Sea*, *supra* note 62.

[267] Notice, *supra* note 2.

[268] *Cablecasting*, *supra* note 5; *Loeb*, *supra* note 176. In *Maple Leaf Mills*, *supra* note 5, at 206, 4 Bus. L.R. at 310, 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* V. ALBOINI, *supra* note 1, at 835-37.

[270] *Supra* note 261. *See also* V. ALBOINI, *supra* note 1, at 838-50.

[271] *See* BCSA, ss. 20(1)(*i*), 55(*l*); ASA, ss. 19(1)(9), 58; SSA, ss. 20(1)(*j*), 65, MSA, ss. 58(1)(*b*), 19(1)10(iii); MSA, 1980, ss. 34(1)(16), 71(1)(*j*); OSA, ss. 34(1)16, 71(1)(*j*); QSA, ss. 28(*e*), 69; Bill 44, ss. 65(1)(*q*), 107(1)(*k*).

[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*); MSA, 1980, ss. 34(1)15, 71(1)(*i*); OSA, ss. 34(1)15, 71(1)(*i*); QSA, ss. 28, 69; 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*).

[273] *Supra* notes 271-72. 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(i), 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. 28(*f*): "[T]he exchange by or on behalf of one company, of securities issued by it for securities of *another* company . . . for the purpose of merging and amalgamating such companies or reorganizing one of them . . . ."

[274] *Id.* Unlike the reclassification, the consolidation is expressly covered by the prospectus and registration exemptions in Saskatchewan, Nova Scotia, Prince Edward Island, 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.

squeeze-out 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, take-over bid or issuer bid exemptions[278] in circumstances where they concluded that there had been an abuse of exemptions,[279] contravention of securities legislation, regulations or policy-statements,[280] contravention of an exchange's requirements,[281] or 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 squeeze-out transaction, the broad and sweeping language in the *Loebex*[283] and *Cablecasting*[284] decisions, regarding what constitutes "prejudicial to the public interest", may signal a movement by securities agencies in this direction.[285]

IV. 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 squeeze-out technique, regardless of whether a statutory compulsory

---

[275] BCSA, s. 6; ASA, s. 6; SSA, s. 6; MSA, s. 6; MSA, 1980, s. 24; OSA, s. 24; QSA, s. 24; NBSFPA, s. 5; PEISA, s. 2; NSSA, s. 3; NSA, s. 4; Bill 44, s. 54.

[276] BCSA, s. 36; ASA, s. 35; SSA, s. 42; MSA, s. 35; MSA, 1980, s. 52; OSA, s. 52; QSA, ss. 67, 70; NBSFPA, ss. 13-14; PEISA, s. 8; NSSA, s. 12 (registration statement); NSA, s. 13 (registration statement); Bill 44, s. 81.

[277] For a discussion of the term, *see* V. Alboini, *supra* note 1, at 843-50.

[278] OSA, s. 124(2), MSA, 1980, s. 124(2) and Bill 44, s. 145 also give the securities commission the power to withdraw any or all of the take-over bid or issuer bid exemptions. *See supra* note 37.

[279] Panacea Mining & Exploration Ltd., [Oct. 1971] Bull. O.S.C. 156.

[280] Murray M. Sinclair, [Jul. 1975] Bull. O.S.C. 187 (failure to file insider reports); Mercantile Bank & Trust Co., [Oct. 1973] Bull. O.S.C. 173 (failure to file insider reports); Chemalloy Minerals Ltd., [Mar. 1974] Bull. O.S.C. 60. *Cf.* National Sea, *supra* note 62. For commentary, *see* Baillie & Alboini, *The National Sea Decision — Exploring the Parameters of Administrative Discretion*, 2 Can. Bus. L.J. 454 (1978).

[281] International Negotiators Ltd., [Oct. 1965] Bull. O.S.C. 2.

[282] J.F. Simard Co., [Nov. 1961] Bull. O.S.C. 1.

[283] *Supra* note 176. *See* text accompanying note 268.

[284] *Supra* note 5. *See* text accompanying note 268.

[285] *See OSC To Study Westfair Foods Proposals*, The Globe & Mail (Toronto), 11 Jul. 1980. 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* tables in the Appendix.

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. Shareholders of federal,[289] Manitoba, Saskatchewan, British Columbia and Alberta companies may do the same. Minority shareholders of Alberta companies subject to the Alberta Companies Act 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] 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 freeze-outs suggested by Professors Brudney and Chirelstein.[291] They argue that all freeze-outs 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.

---

[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 in *Westeel-Rosco* 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. This paper has not considered the provisions of the draft corporate legislation proposed for New Brunswick (Bill 30) and Newfoundland. If the legislation, once enacted, will resemble the CBCA, then squeeze-outs should be permitted in these jurisdictions.

[291] *Supra* note 96.

[292] *Id.* at 1359.

The "two-step merger" involves an integrated squeeze-out 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 take-over 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 take-over 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 from 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 take-over 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 share in those benefits only available to shareholders of a private company.[294] "The absence of social benefit, the strength of fiduciary obligation [owned by the controlling shareholders to the minority] and the danger of unpoliceable abuse"[295] in the transaction form the basis for 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 receive common stock of the parent or sufficiently valuable consideration to enable them to re-acquire 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 weigh the socio-economic benefits present in each type of transaction against the costs of regulation and acknowledges that

---

[293] *Id.* at 1361-62. 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.

motive is generally an irrelevant consideration in the determination of the degree of regulation required. Moreover, it recognizes that squeeze-out 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, it is submitted that this analytical framework should not be adopted in Canada. Brudney and 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 comes 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 re-invest 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.

V. CONCLUSION

Once it is apparent to controlling shareholders that the minority is effectively protected, going private transactions on unfair terms should abate. Insiders may then be quicker to ensure that minority shareholders receive consideration at least equal in value to the intrinsic value of their shares, or sufficient information to make an informed investment decision.[300]

---

[298] *Id.* at 1368.

[299] *See* text accompanying notes 170-73 *supra*.

[300] *See, e.g., Jannock Changes Mind*, Financial Times, 11 Dec. 1978, at 32; *Keg Restaurants Skewers Buy-Back Plan*, B.C. Bus. Week, 9 May 1979, at 38; *"Going Private" Fever Cools Off*, *supra* note 1; Slocum, *Westfair Foods Decides Not to*

A going private transaction, however, constitutes only one example of techniques enabling the majority to act contrary to the best interests 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 or securities administrators to be more vigilant of minority rights in the future, and to guard against potential conflicts of interest before any further problems arise.[302]

APPENDIX

The Existing Framework for Regulating Minority Squeeze-Outs 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.

Proceed With Proposals, The Globe & Mail (Toronto), 17 Jul. 1980, at B-4; and *Merger of Maple Leaf Mills with Norian Unit is Completed*, The Globe & Mail (Toronto), 14 Jan. 1981, at B-7.

[301] *Supra* notes 139-46. *Cf. Re* United Canso Oil & Gas Ltd., 12 Bus. L.R. 130, in which the court struck down a by-law which prevented a shareholder from voting more than 1000 shares of the defendant.

[302] In the past two years the Ontario Securities Commission has attempted to protect investors in an aggressive fashion. Not only has it monitored the steps taken in complex reorganizations (Argus/Hollinger/Norcen) and bitterly contested take-over bids (Campeau/Royal Trust Co and Genstar/First City battle for Canada Permanent), but it has also assessed the adequacy of the disclosure and consideration provided to shareholders. The Commission itself has described its role in the case of *Re* Royal Trustco. Ltd. and Campeau Corp. (No. 2), 11 Bus. L.R. 298, at 309 (O.S.C. 1980):

> The Commission is a business tribunal whose members are drawn from a variety of disciplines and experiences. As such it exercises its discretion in a disciplined way by applying the law to the facts before it in order to carry out the intent expressed through the legislation. The Commission's role is to act, in cases such as this, in the interests of investors generally so that investors, large and small, may move with greater confidence in the securities market place.

See also McNish, *The OSC Flexes New Muscle*, Financial Times, 6 Apr. 1981, at 1.

Table 1: *The Jurisdictions Where No Injunction Should Be Granted*

	ONT. with OBCA	ONT. with Draft OBCA	MAN.	SASK.	ALTA. with ACA	ALTA. with ABCA	B.C.	CBCA
Dissent for Public Company Shareholders	—	Yes	Yes	—	—	Yes	Yes	Yes
Compulsory Acquisition	—	Yes	—	Yes	Yes	Yes	Yes	Yes
Oppression	—	Yes	Yes	Yes	—	Yes	Yes	Yes
Court Approved Amalgamation	—	—	—	—	Yes	No	Yes	—
Court Approved Arrangement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Court Approved Reduction of Capital	—	—	—	—	Yes	No	Yes	—
Securities Legislation	Yes	Yes	Yes	Yes	Yes	Yes*	Yes	**
Class Voting	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Stat. Derivative Action	Yes	Yes	Yes	Yes	—	Yes	Yes	Yes
Directors Duties	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Majority-Minority Test	—	Yes	—	—	—	No	—	—
Corp. Repurchase of Shares	Limited	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Express Cashout Amalgamation	—	Yes	Yes	Yes	—	Yes	—	Yes

* Bill 78.
** Regulates take-over bids and insider bids

Table 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 take-over or issuer bids.

** Optional.

*** The *Re Simco* decision, *supra* text accompanying notes 204-06 *supra*, 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 squeeze-out by special resolution that shareholders require protection from the expropriation of their shares at less than intrinsic value.