

**CREDITORS' USE OF THE OPPRESSION REMEDY
AND THE *MAREVA* INJUNCTION TO PROTECT
CORPORATE ASSETS**

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1. INTRODUCTION

A t-shirt printer fulfills an order for 100,000 t-shirts from a promotions company. The promotions company refuses to pay for the t-shirts. The printer sues for breach of contract but before judgment is obtained, the promotions company and its affiliates legitimately undergo a restructuring leaving the promotions company without any assets.

Until the introduction of the oppression remedy, a creditor facing such a corporate debtor was left with little recourse at common law. The contract was with the now judgment proof debtor such that the claim for breach of contract was futile. Also, if the restructuring was done for legitimate business reasons, no claim could be made under the *Fraudulent Conveyances Act*.

The oppression remedy can provide relief in this type of scenario. The Ontario *Business Corporations Act*¹ and the *Canada Business Corporations Act*² offer access to the “oppression remedy” which seeks to address harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. Under the relevant provisions, the court has discretion to fashion a remedy it thinks fit.³

As a preliminary step in an oppression claim, a litigant may seek to preserve the assets shifted from the debtor before further liquidations are carried out. Interim relief to accomplish this freeze is available to the creditor in the form of a *Mareva* injunction. A *Mareva* injunction has the effect of freezing the debtors’ assets. However, to obtain such relief the creditor has to establish a strong *prima facie* case and lead evidence that the debtor is dissipating assets outside the ordinary course of business for the purpose of avoiding judgment. The burden on the creditor to obtain this helpful form of interim relief is therefore quite high.

This paper provides an overview of the oppression remedy and the current law on *Mareva* injunctions. With respect to the oppression remedy, the paper considers its use by

¹ R.S.O. 1990, c. B.16 [*OBCA*].

² R.S.C. 1985, c. C-44 [*CBCA*].

³ The relevant provisions of the *OBCA* are nearly identical to those in the *CBCA*. This paper focuses on the relevant provisions of the *OBCA*.

simple creditors. Simple creditors are those who do not have access to the oppression remedy as of right, but must earn standing with the court by demonstrating that they are a proper person to bring the claim.

2. OVERVIEW OF THE OPPRESSION REMEDY IN THE *OBCA*

The Supreme Court of Canada most recently considered the oppression remedy in the high profile case of *BCE Inc. v. 1976 Debentureholders*.⁴ In that case, the court summarized the oppression remedy this way: “the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. The remedy is available to a wide range of stakeholders – security holders, creditors, directors and officers.”⁵ Using that definition as a guide, an overview of the oppression remedy as found in the *OBCA* can proceed by answering four questions:

- i. Who can bring an application for an oppression remedy?
- ii. What type of conduct forms the basis of a claim?
- iii. When will that conduct amount to oppression?
- iv. What remedies are available?

(a) Who can bring an application for an oppression remedy?

Standing in a claim for oppression is afforded to any “complainant”. The term “complainant” as defined in section 245 includes three groups of corporate stakeholders. Group number one includes registered holders and beneficial holders of corporate securities such as shares, bonds or debentures (“Group One”). Group number two comprises of directors or officers of the corporation or its affiliates (“Group Two”). Group number three is the basket clause made up of other persons whom the court finds to be “proper persons” to make an application (“Proper Persons”).

Litigants falling within Group One and Two have standing in an oppression application as of right. However, those litigants falling outside those two groups must satisfy the court that standing should be afforded to them. Creditors are often afforded status as

⁴ 2008 S.C.C. 69 [*BCE*].

⁵ *Ibid.*, at para. 45.

complainants as Proper Persons. However, there is no bright line test for determining whether a simple creditor should be granted standing.

(b) What type of conduct forms the basis of a claim?

Once granted standing as a complainant, and before demonstrating that certain conduct is oppressive such that a remedy is warranted, the party pursuing a claim under section 248 must demonstrate one of three types of conduct:

1. An act or omission of the corporation that effects a result;
2. Business or affairs of the corporation being conducted; or
3. Powers of the directors of the corporation being exercised.

The first category makes relief available for an act or omission of the corporation so long as it effects a result that is oppressive, unfairly prejudicial to, or that unfairly disregards the interest of the complainant.⁶ Therefore, in *Ford Motor Co. of Canada v. OMERS*,⁷ for example, the complainant had a successful claim for oppression where the complainant *omitted* to renegotiate its transfer pricing system with its American affiliate with the result that the value received by the respondents on a restructuring was significantly reduced.

The second category includes conduct not only of the business of the corporation, but also of its affairs. The term “affairs” is defined in section 1 of the *OBCA* to mean the relationships among a corporation, its affiliates and the shareholders, directors and officers of the corporation, excluding the business carried on by it. As a result, this category includes all internal decisions that a corporation and its affiliates might make, not merely those external to the corporation or its business.

The third category involves misconduct of the directors. If the powers of the directors are being conducted in an oppressive, unfairly prejudicial or unfairly disregarding manner, they may also be being conducted in a manner that breaches the director’s duty to the corporation. This may be a basis to assert a derivative action in the name of the corporation.

⁶ As we discuss below.

⁷ (2004) 41 B.L.R. (3d) 74 (Ont. S.C.J.)[*OMERS*].

Regardless of which of the above three categories is referenced, the “act or omission”, “conduct” or “exercise” referred to has to be carried out by either the corporation, its affiliates or its directors. Therefore, in *Thomson v. Quality Mechanical Service Inc.*⁸ the claim was dismissed because the conduct complained of was conducted by the corporation’s bank.

(c) When will that conduct amount to oppression?

After proving one of those three things, the complainant has to demonstrate that the result, conduct or exercise, as the case may be, is either: (1) oppressive to; (2) unfairly prejudicial to; or (3) unfairly disregards the interests of a security holder, creditor or officer or director of the corporation. “Oppressive” is a more rigorous standard than “unfair prejudice” or “unfair disregard”⁹ and the standard for “unfair disregard” is the lowest of the three.¹⁰

Beyond that hierarchy, there is no exhaustive definition of what constitutes any of the impugned conduct, and the indicators of each type of conduct overlap. That said, subject to qualification created by the *BCE* decision discussed below, there are certain things which a complainant need not show in order to succeed on an oppression application. First, a complainant bringing a claim for oppression can succeed without demonstrating that the conduct complained of was carried out in bad faith.¹¹ Second, the complainant need not show that the impugned conduct is in breach of any legal obligation.¹²

It must be noted that the trend in the decisions is to fuse the adjectives “oppressive”, “unfair prejudice” and “unfair disregard” into one all-encompassing concept of a breach of reasonable expectations. The court in *82009 Ontario Inc. v. Harold E. Ballard Ltd.*¹³

⁸ (2001), 56 O.R. (3d) 234 (S.C.J.).

⁹ *Re Mason and Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 at 635 (C.A.).

¹⁰ *Sexsmith v. Intek Inc. et al*, [1993] O.J. No. 711 (Court)(QL).

¹¹ *Brant Investments Ltd. v. KeepRite Inc.*, [1984] O.J. No. 229 (H.C.)(QL).

¹² *OMERS*, *supra* note 7.

¹³ (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.).

adopted the view of one author who wrote that “thwarted shareholder expectation is what the oppression remedy is all about.”¹⁴

What a complainant could have reasonably expected is regularly informed by a number of factors including:

- commercial practice in the corporation’s industry;
- protections that could have been negotiated by the complainant;
- the size of the corporation;
- shareholder agreements;
- past practice of the corporation;
- relationships between the parties involved in the claim;
- representations made by the corporation; and
- the corporation’s knowledge of the complainants expectations

Until the Supreme Court of Canada’s decision in *BCE*, if a complainant demonstrated that his or her reasonable expectations had been breached, an oppression remedy was available. In *BCE* (discussed below), the SCC for the first time adopted a two step test whereby the applicant has to show: 1) a breach of reasonable expectations; and 2) unfairness in that breach.¹⁵ Parties will need clarification from future cases to know what impact, if any, this new test may have on earlier cases that said an applicant was not required to show illegality or bad faith in order to obtain oppression relief.

(d) What remedies are available?

The court’s power to fashion an appropriate remedy where oppression is found is broad. The court may “make any interim or final order it thinks fit.”¹⁶ Several examples, which are not meant to limit the generality of the available remedies, are specifically set out in the statute.¹⁷ Whichever remedy may be granted, the purpose of the remedy is to relieve the

¹⁴ *Ibid.*, at 119 citing B.L. Welling, *Corporation Law in Canada, The Governing Principles*, 2d ed. (Toronto: Butterworths, 1991) at 563.

¹⁵ *BCE supra* note 4 at para. 56.

¹⁶ *OBCA, supra* note 1, s. 248(3).

¹⁷ *Ibid.*

complainant from the oppression complained of, and not to punish the oppressor. Indeed, the explicit power of the court is merely to “make an order to rectify the matters complained of.”¹⁸

In *Naneff v. Con-Crete Holdings Ltd.*,¹⁹ for example, the trial judge ordered that the corporation be sold as a going concern with the applicant having an equal opportunity to purchase it. The Ontario Court of Appeal ruled that such a remedy punished the corporation’s founder who had developed the business over the course of forty years. The complainant was not entitled to a remedy that would give him something he could not have reasonably expected; in this case a chance to control the company while the founder was still alive.²⁰ The court ruled that the oppression could be rectified by forcing the other shareholders of the company to buy out the complainant’s shares at fair market value.²¹

3. SIMPLE CREDITORS’ RIGHT TO STANDING

(a) The Definition of “Complainant”

In *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.*²² Justice Blair wrote that it is well established that a creditor has status to bring an application as a complainant pursuant to s. 245(c). But on what basis can that statement be made? Part (a) of the definition of “complainant” affords standing to, among others, registered holders of security in a corporation. The term “security” is defined in s. 1 of the *OBCA* as a share or a debt obligation of a body corporate. The term “debt obligation” is expanded further as the *OBCA* provides (also in section 1) that “debt obligation” means a bond, debenture, note or other similar obligation or guarantee of such an obligation of a body corporate, whether secured or unsecured.

Therefore, a simple reading of part (a) of the definition of “complainant” would suggest that any creditor, whether secured or unsecured, would have standing as of right in an oppression claim. However, because this part of the definition of “complainant” refers to

¹⁸ *OBCA*, *supra* note 1, s. 248(2).

¹⁹ 1995 CarswellOnt 1207 (C.A.).

²⁰ *Ibid.*, at para. 33.

²¹ *Ibid.*, at para. 39; but see *Safarik v. Ocean Fisheries Ltd.* (1995), 22 B.L.R. (2d) 1 (B.C. C.A.).

²² (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div.).

“registered” security holders, only those holders of securities which are capable of being registered in a corporation’s securities register may qualify as complainants.²³

The oppression provision in the *OBCA* also supports the interpretation that some creditors may not be “security holders” for the purposes of an oppression claim. Recall that the court can rectify conduct that is oppressive, unfairly prejudicial or unfairly disregards the interests of, among others, any security holder or *creditor*. Since the provision expressly provides for “creditor” in addition to “security holder”, and since words in statutes are not to be interpreted as redundant,²⁴ it is apparent that not all creditors will be security holders.

Therefore, creditors who are not holders of typical securities such as bonds or debentures (“simple creditors”) have to look to part (c) of the definition of “complainant” to earn standing for an oppression claim.²⁵ Part (c) affords standing to persons who are “proper persons” in the discretion of the court. Since, as we have seen, a claim for oppression can seek to rectify behaviour that unfairly disregards the interests of, among others, creditors, it makes sense that creditors should fall within the ambit of a “proper person” to be afforded standing. As the court in *R. v. Sands Motor Hotel Ltd.*²⁶ wrote “if the applicant [(a simple creditor)] cannot be a complainant then I fail to see who is to complain on her behalf.”²⁷ Of course in *Sands Motel* one must assume that in making that comment the court had already concluded that there was conduct worth complaining about. Courts have a tendency to make that determination before making what should be a preliminary determination of standing.

(b) Simple Creditors Who Are Proper Persons

If a simple creditor is to be afforded status as a complainant for an oppression remedy it must satisfy the Court that it is a “proper person” under part (c) of the definition of

²³ Koehnen, *Oppression and Related Remedies*, (Toronto: Thomson Carswell, 2004) at 16; Welling, *The Law of Corporations in Canada*, (Scribblers, 2008) at 504; *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*, 40 B.L.R. 28 at para. 47 (Alta. Q.B.)[*First Edmonton*].

²⁴ *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715 at paras. 45-46.

²⁵ *Marciano v. Landa*, [2005] S.J. No. 72 at para. 25 (Q.B.)(QL).

²⁶ [1985] 1 W.W.R. 59 (Q.B.)[*Sands Motel*].

²⁷ *Ibid.*, at 63-64.

“complainant”. Claiming to be owed money by a corporation does not, by itself, entitle a person to standing in an action for oppression. Indeed, in *Royal Trust Corporation of Canada v. Hordo*,²⁸ the court commented that debt actions should not routinely be turned into oppression actions.²⁹

There is no agreed upon set of criteria used by courts to decide which creditors qualify and which do not qualify as “proper persons”. However, certain criteria have been accepted as providing some guidance.

In *Hordo* the court denied standing to the defendant who asserted a counter-claim founded in oppression in response to Royal Trust’s claim for amounts due on a promissory note. Hordo alleged that Royal Trust was obliged to offer him support for a business venture and its failure to do so was a breach of Royal Trust’s fiduciary duty and was oppressive. The court considered the following criteria when it denied standing to Hordo as a complainant:

- the defendant was not a creditor when the oppression occurred;
- the creditor’s interest in the affairs of the corporation was remote;
- the complaints of the creditor was unrelated to the circumstances giving rise to the debt
- the creditor was not in a position analogous to that of a minority shareholder; and
- the creditor had no particular legitimate interest in the manner in which the affairs of the company are managed.³⁰

The first factor listed by the court in *Hordo* raises a fundamental issue: who is a “creditor” for the purposes of oppression claims? In *Hordo*, after listing the above factors the court wrote:

As well it is clear that a person who may have a contingent interest in an uncertain claim for unliquidated damages is not a creditor. That person holds a speculative claim to become a creditor in the future which will materialize only if the legal action is successful and judgment is obtained.³¹

²⁸ [1993] O.J. No. 1560 (Ct. J. (Gen. Div.))[*Hordo*].

²⁹ *Ibid.*, at para. 14.

³⁰ *Hordo*, *supra* note 28, at para. 14.

³¹ *Ibid.*, at para. 15.

In some reported cases, plaintiffs have obtained standing as creditors after obtaining a judgment against the debtor as contemplated by Justice Farley in *Hordo*. For example, in *Prime Computer of Canada Ltd. v. Jeffrey*³² the applicant sold computer components to the corporate respondent of which the individual respondent was a director. The struggling corporation became indebted to the applicant for over \$100,000 and then started making extra salary payments to the individual respondent. The effect was to liquidate the corporation of its assets making it unable to pay the applicant for the goods sold.

The applicant sued the corporation and obtained judgment on the debt. With respect to the plaintiff's standing, the court wrote:

...as an unpaid judgment creditor with virtually no hope of realizing on its judgment with the present financial position of the judgment debtor company, I find the applicant is a "complainant" within the meaning of the [Act].³³

However, what is the status of a simple creditor who does not yet have judgment? If the *Hordo* analysis is applied, one merchant who supplies goods to another would have no relief under the oppression remedy for a trade debt so long as the debtor liquidates the corporation before a judgment is obtained.

This issue was indirectly addressed by the Ontario Court of Appeal in *Downtown Eatery (1993) Ltd. v. Ontario*.³⁴ In that case, a former employee of the respondent restaurant brought a claim for oppression complaining of a corporate restructuring which occurred before the applicant was awarded judgment on a claim for wrongful dismissal. The restructuring had the effect of denying the employee any recovery on the subsequent judgment.

The court, though aware that the corporate restructuring occurred before the respondent became a judgment creditor, nevertheless allowed the claim to proceed. The court ruled that the respondent's conduct "effected a result that was unfairly prejudicial to, or that

³² 1991 CarswellOnt 1067 (Ct. J. (Gen. Div.)).

³³ *Ibid.*, at para. 8.

³⁴ 2001 CarswellOnt 1680 (C.A.) [*Downtown Eatery*].

unfairly disregarded the interests of [the wrongfully terminated employee] as a person who stood to obtain a judgment against [the respondent].”³⁵

According to the decision in *Downtown Eatery* then, so long as a litigant is a person who “stands to obtain a judgment”, standing should be granted as a complainant in an action for oppression. Considering this decision and *Hordo* together, there is clearly some confusion in the case law on whether simple creditors who do not yet have judgment are “proper persons”. More recent case law, however, shows a trend to towards broadening the meaning of the term “creditor” for the purposes of gaining standing in an action for oppression.

In *Pillar Sausages & Delicatessens Ltd. V. Cobb International Corp.*³⁶ the applicant ordered a sterilizing machine from the respondent and paid the purchase price up front, even though it had not yet received the sterilizing machine. The respondent failed to deliver the machine and refused to return the purchase price. The applicant sued and obtained a judgment, but discovered on a subsequent examination in aid of execution that the respondent had stripped itself of assets prior to the judgment rendering it judgment proof. On the oppression application, Pillar Sausages sought to recover the purchase price from those to whom the respondent’s assets had been transferred.

On the issue of standing, the court observed that the definition of “complainant” included “creditors”. The court then ruled that “[a] debtor/creditor relationship as between a purchaser and vendor is established as soon as the purchase price has been paid.”³⁷ This test is even less stringent than the “stands to obtain judgment” test suggested by *Downtown Eatery*. Under *Pillar Sausage*, a purchaser who has paid the purchase price to the vendor qualifies as a complainant even before delivery of the equipment is due.

It now clear that the strict rule espoused in *Hordo* no longer applies. The term “creditor” is not limited to “judgment creditor” for the purposes of being a “complainant” in an

³⁵ *Ibid.*, at para. 60.

³⁶ [2003] O.J. No. 2647 (S.C.J.)[*Pillar Sausage*].

³⁷ *Ibid.*, at para. 14.

action for oppression.³⁸ However, confusion remains in the case law on how certain the claim for a debt must be for a party to obtain standing as a “proper person”. This point is not lost on one author who writes:

The contradictory results of the cases that require a complainant to be a creditor when the oppression occurs can be reconciled only on the merits of the oppression claims. In those cases where the court found that the oppression claim had merit, standing was granted. In those cases where the court found the oppression claim had no merit, standing was denied.³⁹

This “results oriented approach” was adopted in a recent case. In *Manufacturers Life Insurance Co. v. AFG Industries Ltd.*⁴⁰ the plaintiff sued for the recovery of costs associated with an environmental clean-up resulting from the defendant’s use of the plaintiff’s property. Before the claim was adjudicated, the defendant’s American affiliate caused the defendant to divest itself of all its assets making it judgment proof. The plaintiff’s sought to amend its claim to seek an oppression remedy from the American affiliate.

On a motion to strike out the oppression claim, the American affiliate argued that the plaintiff was not a “proper person” since it would only become a creditor if successful on its claim against the Canadian defendant. In response, the court wrote: “[t]he question of whether the court will exercise its discretion to grant standing to a creditor in accordance with s. 238(d) of the *CBCA*⁴¹ involves a consideration by the court of the conduct involved in light of the reasonable expectations of the creditor.”⁴² In other words, the plaintiff’s status as a complainant was dependent on whether the conduct complained of was oppressive. The court, therefore, decided that at the early stages of the action, it could not be said whether the plaintiff would qualify as a complainant.⁴³ The motion to strike out the oppression claim was dismissed.

³⁸ *Apotex Inc. v. Laboratoires Fournier S.A.*, [2006] O.J. No. 4555 at para. 38 (S.C.J.).

³⁹ Koehnen, *supra* note 23 at 28.

⁴⁰ [2008] O.J. No. 149 (S.C.J.) [*Manufacturers Life Insurance*].

⁴¹ Identical to s. 245(c) of the *OBCA*.

⁴² *Manufacturers Life Insurance*, *supra* note 40 at para. 31.

⁴³ *Ibid.*, at para. 32.

Since the merits of a claim for oppression are clearly a major consideration in determining which creditors can and cannot proceed with a claim for oppression, we turn next to the type of conduct for which an oppression remedy is available.

4. AVAILABILITY OF OPPRESSION RELIEF FOR CREDITORS

Oppression cases are fact driven. What constitutes oppression in one case might not constitute oppression on a slightly different set of facts.⁴⁴ As mentioned above, the statute provides that a remedy is available for certain acts or omissions, conduct or exercises which are “oppressive”, “unfairly prejudicial” or “unfairly disregard” the interests of corporate stakeholders. However, the trend in the case law is to merge these three concepts together and to focus on the corporate stakeholders’ reasonable expectations.

Prior to the Supreme Court of Canada’s decision in *BCE*, courts looked only to the reasonable expectations of the parties to determine if the impugned conduct warranted an oppression remedy. Canadian courts adopted the approach espoused in *Ebrahimi v. Westbourne Galleries Ltd.*⁴⁵ where the House of Lords wrote that:

The words [“just and equitable”] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.⁴⁶

The “expectations” referred to in the above passage from *Ebrahimi* were to be protected by the oppression remedy. Complainants were entitled to rely on expectations provided they were reasonable.⁴⁷ If any of the acts or omissions, conduct or exercises were contrary to the reasonable expectations of the parties, a complainant was entitled to relief through the oppression remedy.

⁴⁴ *Ferguson v. Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.).

⁴⁵ [1973] A.C. 360 (H.L.).

⁴⁶ *Ibid.*, at 379.

⁴⁷ *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.).

The Supreme Court of Canada in *BCE* changed that test. The court wrote that “if a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in s. 241(2) of the *CBCA*.”⁴⁸ This additional requirement is slightly perplexing as the SCC wrote later in the judgement that “fair treatment – the central theme running through the oppressions jurisprudence – is most fundamentally what stakeholders are entitled to “reasonably expect”.⁴⁹ In other words, the SCC’s test for oppression as set out in *BCE* appears to be circular. A complainant must show that his or her reasonable expectations have been breached and also that the conduct complained of is unfair. However, the unfairness of the conduct depends on the complainant’s reasonable expectations; thus the circle is complete.

The SCC’s most recent ruling on the oppression remedy also conflicts with the Alberta Court of Appeal’s decision in *Westfair Foods Ltd. v. Watt*.⁵⁰ In that case the court rejected the contention that the use of the term “unfair disregard” implied that *some* disregarding was fair.⁵¹ Instead, the court decided that provisions require the courts to exercise their duty “broadly and liberally” and that the facts should be assessed on the scales of the reasonable expectations of the complainant to see if that offers a fair solution.⁵²

Sometimes the conduct complained of is so clearly “unfair” that courts do not concern themselves with an analysis of what were the complainant’s reasonable expectations. For example, in *Prime Computer of Canada Ltd. v. Jeffrey*⁵³ the applicant sold computer components to the corporate respondent of which the individual respondent was a director. The struggling corporate respondent became indebted to the applicant for over \$100,000 and then starting making extra salary payments to the individual respondent. The effect was to liquidate the corporation of its assets making it unable to pay the applicant for the goods sold.

⁴⁸ *BCE*, *supra* note 4 at para. 56.

⁴⁹ *Ibid.*, at para. 64.

⁵⁰ 1991 CarswellAlta 63 (C.A.).

⁵¹ *Ibid.*, at para. 19.

⁵² *Ibid.*, at paras. 19, 32.

⁵³ 1991 CarswellOnt 1067 (Ct. J. (Gen. Div.)).

The applicant sued the corporation and obtained judgment on the debt. Seeking to recover from the individual behind the insolvent company, the applicant brought an oppression claim. On the conduct of the debtor company the court simply wrote:

I find that the business of the respondent corporation has been carried on in a manner that is oppressive or unfairly prejudicial to the applicant creditor.⁵⁴

Generally, however, a consideration of the complainant's reasonable expectations is undertaken. For example, in *SCI Systems, Inc. v. Gornitzki Thomson & Little Co.*⁵⁵ the applicant was given a promissory note by the corporate respondent as part of the consideration for a share purchase. Between the time the note was issued and when it was due, the respondent transferred assets out of the company to the company's principals in the form of dividend payments and repayment of loans. When the note came due, the corporations claimed to be insolvent and incapable of honouring the note. The applicant obtained judgment against the corporation, but then sought to recover on that judgment directly from the principals of the corporation in a claim for oppression.

The question was whether the transactions were "unfairly prejudicial to" or showed "unfair disregard for" the applicant. The court relied on the decision in *First Edmonton Place* where the court wrote that:

...the test for unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor.⁵⁶

The court in *SCI Systems* found that the payments under the circumstances were contrary to s.38(3) of the *OBCA* and also of no value to the company.⁵⁷ The complainants' reasonable expectation that the respondent would comply with corporate law was therefore breached and a remedy was available.

⁵⁴ *Ibid.*, at para. 8.

⁵⁵ 1997 CarswellOnt 1769 (Ct. J. (Gen. Div.))[*SCI Systems*].

⁵⁶ *First Edmonton*, *supra* note 23 at 57.

⁵⁷ *SCI*, *supra* note 55 at para. 54.

5. THE LAW OF MAREVA INJUNCTIONS

(a) An Overview of *Mareva* Injunctions

There are no recent significant developments in the area of *Mareva* injunctions, but it remains another weapon available to creditors to protect corporate debtor's assets. The *Mareva* injunction is an extraordinary remedy that prevents a defendant from dealing with its assets and, in effect, allows execution, or at least security, prior to judgment.⁵⁸ A party requesting a *Mareva* injunction has the burden of establishing:

- (a) A strong *prima facie* case on the merits;
- (b) That the defendant is either:
 - (i) removing, or there is a real risk that he is about to remove, his assets from the jurisdiction to avoid the possibility of judgment; or
 - (ii) that the defendant is otherwise dissipating his assets in a manner which would render the possibility of future tracing of the assets remote, if not impossible; and⁵⁹
- (c) That the balance of convenience is in its favour.⁶⁰

In the case of a *Mareva* injunction, a “strong *prima facie*” case means the case is one that is “clearly right” in its allegations made against the defendant or one that is “almost certain to succeed in respect of those allegations.”⁶¹

As to the second element, evidence of asset dissipation, in *Sansone v. D'Addario* the court wrote that “the *sine qua non* of a successful *Mareva* application is compelling evidence

⁵⁸ *Popack v. Lipszyc*, [2008] O.J. No. 3380 at para. 36 (S.C.J.)(QL)[*Popack*].

⁵⁹ *Chitel et al. v. Rothbart et al.* (1982), 39 O.R. (2d) 513 at 532-533 (C.A.)(Chitel); *DiMenza v. Richardson Greenshields of Canada Ltd.* (1989), 74 O.R. (2d) 172 (Div. Ct.)(DiMenza).

⁶⁰ *Popack*, *supra* note 58 at para. 36.

⁶¹ *SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)*, [2004] O.J. No. 3290 at para. 14 (S.C.J.)(QL)[*SLMsoft*]; *State Farm Insurance Co. v. Brijlal*, [2007] O.J. No. 2439 at para. 16 (S.C.J.)(QL); *Shonren Holdings Ltd. v. Roadmaster Truck & Trailer Reparis Ltd.*, [2006] O.J. No. 5171 at para. 14 (S.C.J.)(QL).

that the defendant is attempting to move assets out of the jurisdiction, or out of the reach of creditors.”⁶² In that regard, the plaintiff has to show that the defendant is either:

- i. “removing, or there is a real risk that he is about to remove, his assets from the jurisdiction to avoid the possibility of judgment”; or
- ii. “that the defendant is otherwise dissipating his assets in a manner clearly so distinct from his ordinary course of business so as to render the possibility of future tracing of the assets remote, if not impossible.”⁶³

It is not enough to demonstrate the possibility that a judgment will be frustrated by the removal of assets from Ontario rendering judgment nugatory. The plaintiff must convince the court that the purpose for the removal or dissipation of assets is to frustrate a possible judgment.⁶⁴ Where a plaintiff has no personal knowledge that there is a real risk that a defendant is attempting to remove his assets from the jurisdiction, the necessary burden to support a *Mareva* injunction is not met.⁶⁵

(b) ***Mareva* Relief in Oppression Applications**

Subsection 248(3) of the *OBCA* provides that in connection with an application under the section, the court may make an interim or final order it “thinks fit”. *Mareva* type relief is arguably a type of interim order contemplated by the subsection. *Mareva* relief would be sought where a debtor is dissipating assets in an oppressive way, and s. 248(3)(a) provides that a court can make an interim order restraining the conduct complained of (i.e. restraining the dissipation of corporate assets). One might question, however, whether a court would “think fit” to grant *Mareva* type relief without requiring the plaintiff to meet the stringent test set out by the Ontario Court of Appeal in *Chitel*.

⁶² *Sansone v. D’Addario*, [2006] O.J. No. 1434 at para. 34 (S.C.J.)(QL)[*Sansone*].

⁶³ *Chitel*, *supra* note 59 at 532-533; *DiMenza*, *supra* note 59 at 175.

⁶⁴ *DiMenza*, *supra* note 59 at 174.

⁶⁵ *Sansone*, *supra* note 62 at paras. 40-46.

In *Deluce Holdings Inc. v. Air Canada*⁶⁶ the threshold test for the granting of interim relief in connection with an oppression claim was a live issue for Justice Blair. He wrote that the discretion afforded to a judge in the statute:

...must be exercised in accordance with judicial principles, of course, and within the overall parameters of corporate law. None the less, the [oppression] remedy has been described by one early commentator as “beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world...”⁶⁷

In light of the broad nature of the oppression remedy, what “judicial principles” should guide a court in deciding whether to grant *Mareva* type relief when it is sought in connection with an oppression application? In *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*⁶⁸ the court directly addressed this issue. After considering the above passage from the reasons in *Deluce* and the underlying principles of *Mareva* relief, the court ruled that when sought in connection with an oppression application, the normal three-step test associated with injunctive relief “is more appropriate...than the more restrictive test usually associated with *Mareva* injunctions.”⁶⁹

In our view, a less onerous test is particularly appropriate where a simple creditor seeks an interlocutory injunction to stop a debtor from dissipating corporate assets. Recall that a plaintiff must show a strong *prima facie* case and evidence of asset dissipation with the intention to avoid judgment in order to be granted *Mareva* relief. The first element reflects the seriousness of a freeze order which is contrary to a fundamental common law principle that there shall be no execution before judgment. It is appropriate to lower this hurdle in the context of an oppression application since oppression is about reasonable expectations rather than strict legal rights. The second element of the test is not appropriate when a freeze order is sought in connection with an oppression application because the debtor’s conduct may be oppressive even where the assets are being dissipated in the normal course of business without any intention of avoiding judgment.

⁶⁶ (1992), 12 O.R. (3d) 131 (Gen. Div.)[*Deluce*].

⁶⁷ *Ibid.*, at 149-150.

⁶⁸ [1997] S.J. No. 390 (Q.B.)(QL)[*First Choice Capital Fund Ltd.*].

⁶⁹ *Ibid.*, at para. 65.

Notwithstanding the decision in *First Choice Capital Fund Ltd.* and the rationale for a more relaxed threshold outlined above and in *Deluce*, courts have decided in subsequent cases that the threshold test for any interim relief sought in connection with an oppression remedy should be whether the plaintiff can demonstrate a strong *prima facie* case.⁷⁰ However, the jurisprudence in this area is sparse.

6. CONCLUSION

Where one party supplies funds, goods or services to a corporate recipient on credit, the supplier (now creditor) is left with few options at common law to collect payment should the debtor dissipate its assets. Principles of corporate law generally prevent the creditor from obtaining relief from the directing minds of the corporation, and a lawsuit against a judgment proof corporation is not of much help.

However, the oppression remedy may afford such creditors access to an array of relief. The availability of a remedy is contingent upon demonstrating to the court that the simple creditor is a “proper person” to bring the claim. Courts have not definitively ruled on which creditors are “proper persons”. While some courts restrict the term to judgment creditors, other courts have found that persons having claims that have not yet been crystallized by judgment are “proper persons” who should be afforded status to seek relief under the oppression remedy.

In any event, once a litigant gains standing as a complainant in an oppression application, it must demonstrate that specific conduct of one or more of the corporation, its affiliates or its directors is oppressive, unfairly prejudicial or unfairly disregards interests of the complainant. Although some courts have sought to identify conduct that exemplifies each of these types of behaviour, the recent *BCE* Supreme Court of Canada decision suggests that the court must apply a two part test to determine whether a remedy should be ordered: 1) did the relevant act or omission breach the complainant’s reasonable expectation; and 2) if the answer to the first part of the test is yes, did such breach result in unfairness to the complainant.

⁷⁰ See for example, *M. v. H.*, 1993 CarswellOnt 365 (Ct. J. (Gen. Div.)).

Where a claim for oppression is made out, the court has broad discretion to fashion an appropriate remedy that rectifies the matters of complained of. In so doing, it is not appropriate to order relief which has the effect of punishing the wrongdoer.

In connection with an application for oppression, the court may also grant interim relief. The threshold test for obtaining such relief is still developing in the courts. Some cases suggest the threshold should be no different than in regular motions for interlocutory injunctions, while others suggest that the broad nature of the oppression remedy warrants the granting of interim relief based on a less onerous standard.

Apart from interim relief pursuant to the statute, a *Mareva* injunction is another method for maintaining the status quo in the face of an action concerning the dissipation of corporate assets to elude creditors. To obtain such relief, the creditor has the onerous task of demonstrating a strong *prima facie* case and showing that the debtor is dissipating assets outside the normal course of business for the purpose of rendering a judgment nugatory.