All in the Family — Using the Oppression Remedy to Resolve Family Business Disputes

Nina Perfetto and Bonnie Fish[1]

I. INTRODUCTION

Family quarrels are bitter things. They don't go according to any rules. They're not like aches or wounds, they're more like splits in the skin that won't heal because there's not enough material.

F. Scott Fitzgerald

Family businesses have unique qualities and modes of operation that make them particularly susceptible to bitter shareholder disputes. Shareholders of family companies often receive their shareholdings through gift or testamentary disposition rather than investment or contribution. Successor generations may be foisted into roles as employees or managers regardless of their qualifications or their ability to get along with one another. Conversely, family members who have historically been active in the business may be required to account to and work with successor generations of shareholders whom they perceive to be inexperienced and overly entitled. These tensions and emotional dynamics are compounded by the fact that family businesses often operate without a shareholders' agreement or with an informal approach to corporate governance and accounting requirements.

It is hardly surprising that some of the leading oppression and winding-up cases concern family business disputes.[2] Family shareholders often turn to the courts for assistance when the business starts to unravel. While protracted litigation in the family business context can destroy the business and family relationships, the courts are adept at using the broad discretion afforded under the oppression remedy to fashion relief suited to the unique qualities of the

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[1] Nina Perfetto is a partner and Bonnie Fish is a partner and Director of Legal Research at Fogler Rubinoff LLP in Toronto.

[2] See for example *Naneff v. Con-Crete Holdings Ltd.*, (1993), 11 B.L.R. (2d) 218 (Gen. Div. [Commercial List]), additional reasons 1993 CarswellOnt 4303 (Gen. Div. [Commercial List]), additional reasons 1993 CarswellOnt 4387 (Gen. Div. [Commercial List]), reversed in part 1994 CarswellOnt 243 (Div. Ct.), reversed in part 1995 CarswellOnt 1207, 23 O.R. (3d) 481 (C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd* 1991 CarswellOnt 142 (Ont. Gen. Div.), affirmed 1991 CarswellOnt 141 (Ont. Div. Ct.).

family business with the goal of preserving the business in one form or another. Remedies can range from ordering family companies to institute corporate governance formalities, to buyouts of dissatisfied shareholders, to winding up the company where relationships are irrevocably severed and no other remedy is possible.

This paper will first examine the unique characteristics of family businesses identified by the courts including their structure, informal approach to corporate governance, and lack of formal shareholders agreements. The paper will then explore how the broad spectrum of relief under the oppression remedy and winding up provisions have been employed to resolve family business disputes.

II. UNIQUE CHARACTERISTICS OF THE STRUCTURE OF FAMILY BUSINESSES

Family businesses often evolve from one or two family members who founded the business. They tend to be closely held corporations with family members as shareholders and sometimes limited involvement by non-family members. Although the founders of the business envision harmonious relationships between successor generations, relationships in family businesses can quickly deteriorate into bitter disputes as the Ontario Court of Appeal described in *Waxman v. Waxman*[3]:

> By 1988, everything had changed. The love and mutual respect between Chester and Morris were gone, replaced by the powerful animosity that only a bitter lawsuit among family members can generate. The brothers and their sons have spent much of the last fifteen years and many, many millions of dollars trying to prove that each was cheated by the other. The accusations and recriminations run the full gamut from the dishonourable through the dishonest to the downright criminal. Whatever the eventual legal outcome, Isaac's dream that his two sons should "share and share alike" in the business he started has been shattered.[4]

In order to fashion a remedy in disputes between shareholders of a family business the courts have identified certain unique characteristics and dynamics of such businesses.

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[3] 2002 CarswellOnt 2308, 25 B.L.R. (3d) 1 (S.C.J.) at para. 1210, additional reasons 2002 CarswellOnt 3047 (S.C.J.), additional reasons 2003 CarswellOnt 52 (S.C.J.), varied 2004 CarswellOnt 1715, 44 B.L.R. (3d) 165 (C.A.), additional reasons 2004 CarswellOnt 6554 (C.A.), additional reasons 2004 CarswellOnt 3955 (C.A.), additional reasons 2004 CarswellOnt 4941 (C.A.), additional reasons 2004 CarswellOnt 3956 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 291 (S.C.C.).

[4] *Waxman v. Waxman*, 2004 CarswellOnt 1715 (C.A.) at para. 3, additional reasons 2004 CarswellOnt 6554 (C.A.), additional reasons 2004 CarswellOnt 3955 (C.A.), additional reasons 2004 CarswellOnt 4941 (C.A.), additional reasons 2004 CarswellOnt 3956 (C.A.), leave to appeal refused 2005 CarswellOnt 1217 (S.C.C.).

1. Inter-generational Shareholders

In most businesses shareholders share in the profits of the business in proportion with shareholdings acquired through financial or other contributions. In family businesses, shareholdings are more often than not gifted or inherited by testamentary disposition to generations of non-founding family members. Since parents often strive to treat their children equally, succession may result in children who have not contributed equally to the business, holding shareholdings of equal value. In cases where an estate freeze is implemented,[5] family members who were actively involved in the business before the estate freeze may end up sharing interests with family members who have not been involved but have a strong feeling of entitlement to a piece of the family pie. These arrangements may give rise to tensions, suspicions, and resentments among shareholders, and result in disputes that lead to litigation and potentially the acrimonious demise of the business.

Gifting shareholdings in the family business to successor generations was at the heart of the dispute in *Edell v. Sitzer*.[6] In that case the patriarch of the family implemented an estate freeze to delay the imposition of taxes on future capital growth in a family company that he founded and operated with his brother. The tax plan contemplated that shares in the family company would be acquired by his son, who had been actively involved in the business, and that his daughter would acquire other assets. Trusts were established for the son and daughter but only the son's trust received an interest in the family business. Through a series of transfers to even up the trusts the father transferred shares to the daughter's trust which would have resulted in her ultimately receiving an interest in the family company. After the daughter became irreparably estranged from her father, the father determined that it would be detrimental to the financial viability of the family company for the daughter to own shares. He therefore transferred the shares to his son. In an action commenced by the daughter for, amongst other things, breach of trust, the Court held that the father had properly exercised his discretion as trustee because he was motivated by a desire to preserve the family business for the whole family and not by a desire to punish his daughter.[7]

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[5] A succession planning technique where control is left in the hands of the founding members of a business but common shares are often transferred to children or grandchildren.

[6] 2001 CarswellOnt 5020 (S.C.J.), affirmed 2004 CarswellOnt 2241 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 372 (S.C.C.).

[7] *Edell v. Sitzer*, 2001 CarswellOnt 5020 (S.C.J.) at para. 167, affirmed 2004 CarswellOnt 2241 (C.A.), leave to appeal refused 2005 CarswellOnt 96 (S.C.C.); See also *Naneff v. Con-Crete Holdings Ltd.*, 1993 CarswellOnt 157, 11 B.L.R. (2d) 218 (Gen. Div. [Commercial List]), additional reasons 1993 CarswellOnt 4303 (Gen. Div. [Commercial List]), additional reasons 1993 CarswellOnt 4387 (Gen. Div. [Commercial List]),

A similar dynamic can occur when spouses of family members acquire their shareholdings through death or divorce. The remaining shareholders may resent that the non-active, non-contributing former spouse or widow is benefiting from the work of the participating shareholders. For example, in *Pavone Estate v. 603631 Ontario Ltd.*,[8] a family business was owned and operated by five brothers. When one of the brothers died and left his share in the company to his wife, the Court considered the inequity of the widow sharing equally with the other four active shareholders. The brothers brought an oppression proceeding claiming that the widow acted oppressively by drawing dividends without contributing to the company. The Court found that while there was no oppression, the brothers had legitimate reasons to feel resentful of their sister-in-law who was not contributing to the business. Justice Sloan suggested that there are other ways to balance the inequity:

> What is abundantly clear from the material before me is that the defendants do not think it is fair that they must go to work every day and split the net profits of the business equally with Lina. This can hardly be construed as oppressive conduct within the meaning of the Ontario Business Corporations Act.
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> Lina is a shareholder and all shareholders should be treated equally. That is certainly not to say that the remaining brothers who work full-time in the business should not be paid appropriately for their work and perhaps receive bonuses and other perks in addition to their salaries.[9]

2. Automatic Rights to Participate in the Business

In addition to becoming shareholders, family members may be foisted into employee or management roles regardless of their qualifications or ability to get along with one another. Unlike other businesses where people are hired as employees or advance to management roles based on their qualifications and/or performance, in family businesses family members often become employees or managers solely because of their relationship with the founding member. Tensions between family members, who have been active in the business, and the new generation of shareholders, who want to assert their authority,[10] often result in ugly battles for control. For example, *Tracey v. Tracey*,[11] involved a dispute between members of a large family over control of the family's ice cream business.[12] When the successor generation started to participate in running the

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reversed in part 1994 CarswellOnt 243 (Div. Ct.), reversed in part 1995 CarswellOnt 1207, 23 O.R. (3d) 481 (C.A.).

8 2013 ONSC 5172; See also *Pusateri v. Trozzo*, 2005 CarswellOnt 7484 (S.C.J.).

9 *Ibid.* at paras. 25-28; See also *Pusateri v. Trozzo*, *supra*.

10 *Harris v. Leikin Group Inc.*, 2014 ONCA 479, 120 O.R. (3d) 508 (C.A.) at para. 10; See also *Hui v. Hoa*, 2015 BCCA 128.

11 2009 CarswellOnt 3761 (S.C.J.), affirmed 2012 ONSC 3144 (Div. Ct.).

12 OBCA s. 207.

business, and the founders separated, the conduct of the family members became entirely dysfunctional. One group of shareholders, entered the ice cream plant, turned off the burglar alarm, changed the locks and occupied the premises for three days.[13] On a winding- up application the Court weighed the evidence to choose which party could best manage the business.[14] The unbusinesslike conduct of one family member, which disproportionately contributed to the deadlock in the company, was an important factor in the Court's decision to wind-up the business:

> The court must also consider what shareholder has most contributed to the deadlock now existing in the family business. Like in most disputes the blame is not only one sided. Undoubtedly over the years Mark Tracey has not been easy to work with. It is obvious from the evidence that Mark and Melany's attitude towards other family members can be categorized as being condescending and impatient. Given the history of this business they could have shown more tolerance. Nevertheless Elizabeth Tracey, with the assistance of other family members, has engaged in a course of conduct which was oppressive and prejudicial to Mark Tracey's interests. Much of that conduct has been detailed earlier. Some of it borders on being dysfunctional. The holding of a directors meeting without notice, repeated firing of Mark Tracey and Melany Tracey, cutting off the burglar alarm and changing the locks or occupying the premises with strangers for three days are just some of the more obvious incidents. Elizabeth Tracey has consistently refused to abide by earlier agreement or court orders in refusing to sell her shares. She still maintains that she should have Mark Tracey's 49 shares for nothing. There is no doubt that her conduct with the assistance of family members is mainly responsible for the present deadlock.[15]

Similarly in *Pusateri v. Trozzo*,[16] the family shareholders of a successful family grocery store business became second generation operators of the family business. Although the daughter and daughter-in-law of the founders each ran different aspects of the family business, they were not content to work together and asserted their superior ability to operate the business as a whole. A great deal of time and money was spent litigating whether one side of the family was better able to manage the business than the other. In an application to wind up the business, more fully explored below, six managers of the grocery stores gave affidavit evidence that their staff would quit if the founder's daughter and her husband acquired control. Ultimately the Court found that each side was equally involved in running the business and determining which side would best ensure the continued prosperity of the business would be presumptuous and more intrusive than necessary.[17] Through a court ordered auction process the

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[13] *Ibid.* at para. 18.
[14] *Ibid.*
[15] *Ibid.*
[16] 2005 CarswellOnt 7484 (S.C.J.) [*Pusateri*].
[17] *Ibid.* at para. 17.

daughter-in-law purchased the founder's daughter's shares and took control of the management of the business.

As discussed below, the oppression and winding up remedies have been successfully employed in cases like *Pusateri* and *Tracey* where competing shareholders are vying for control.

3. Mixing Family Issues with the Operation of the Business

Unlike other businesses, family businesses are often used as a weapon in family battles that have nothing to do with the business itself. Parents or siblings may withhold compensation or authority in the business either to punish behaviour of which the family disapproves or as leverage in a family dispute. *Naneff v. Con-Crete Holdings Ltd.*[18] is a prime example of this phenomenon. In *Naneff*, two sons were involved in running the family business and both undertook important responsibilities and worked hard and effectively.[19] When one of the sons began living a questionable lifestyle and keeping company with a woman of whom his parents disapproved, the family removed him as an officer of the family companies, excluded him from management, and stopped paying his income. In the context of an application for an oppression remedy,[20] the Ontario Superior Court considered the inappropriateness of using a family business to right family wrongs.[21] Justice Blair explained that the Naneffs had overlooked their obligations to act in the best interests of the corporation[22] and were using the company as a weapon in the battle to reform their son:

> The desire — understandable and genuine as it may be — to chastise and correct the actual and perceived failing of a son or brother in his personal life, is not a basis for ignoring the duties and obligations which the parent and sibling owe in their corporate capacities to the son and brother in his corporate capacity. In circumstances such as these, the strictures of the OBCA and of corporate law override the family desires. In their corporate capacity as directors they are required to act in good faith and in the best interests of the company and not for some extraneous purpose . . .
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> Here the Naneffs may have felt that their interests as a family in dealing with Alex's perceived failings and the interest of the Rainbow Group in this respect were one and

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[18] (1993), 11 B.L.R. (2d) 218 (Gen. Div. [Commercial List]), additional reasons 1993 CarswellOnt 4303 (Gen. Div. [Commercial List]), additional reasons 1993 CarswellOnt 4387 (Gen. Div. [Commercial List]), reversed in part 1994 CarswellOnt 243 (Div. Ct.), reversed in part 1995 CarswellOnt 1207, 23 O.R. (3d) 481 (C.A.) [*Naneff*].

[19] *Naneff*, at para. 11.

[20] OBCA, s. 248.

[21] Similar allegations were made but not proven in *Edell v. Sitzer*, *supra*.

[22] CBCA s. 122; OBCA s.134(1); *Business Corporations Act*, R.S.A. 2000, c.B-9, s.122; *Business Corporations Act*, S.B.C. 2002, c.57, 142; *Corporations Act*, R.S.M. 1987, c.C225, s.117; *Business Corporations Act*, R.S.N.B. 1981, c.B-9.1, s.79; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 203; *Business Corporations Act*, S.N.W.T. 1996, s.19, s.123; *Business Corporations Act*, R.S.Q. c. S-31.1, s. 119; *Business Corporations Act*, R.S.S. 1978, c. B-10, 117; *Business Corporations Act, R.S.Y. 2002, c. 20, 124*.

> the same. They are not. Alex's personal life had no adverse effect on his business/company life.[23]

The Court in *Naneff* used the oppression remedy to restore the business relationship where family members had converted the family business into a battleground.

4. Fiduciary Obligations to Other Shareholders

Close relationships in a family business may give rise to false expectations that family shareholders will look out for or protect one another's financial interests and therefore that they owe one another fiduciary duties. The courts have, in some cases, found that a close and dependent relationship between family shareholders creates fiduciary obligations. The best example is *Waxman v. Waxman*[24] which involved a bitter dispute between two brothers who were the successors to their father's business. In an action for breach of fiduciary duty and oppression Morris Waxman alleged that his brother, Chester, had breached his fiduciary duty by coercing Morris to forego his 50 per cent interest in the family business and by operating the family business to the exclusion of Morris' interests.[25] The Court of Appeal agreed with the trial judge, that due to their close relationship and dependence on one another, Chester owed Morris fiduciary duties even in the context of a sale of shares:

> The appellants' second argument is that the fiduciary duty does not arise on the sale of shares by one shareholder to another, particularly where there has been no express undertaking by the selling shareholder to act in the other's interest.
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> Again, we do not agree. There is no reason to preclude the existence of a fiduciary duty when one shareholder sells his or her interest to another. It all depends on the relationship between them: see, for example, *Tongue v. Vencap Equities Alberta Ltd.* (1994), 1994 CanLII 8918 (AB QB), 148 A.R. 321 (Q.B.), aff'd (1996), 1996 ABCA 208 (CanLII), 184 A.R. 368 (C.A.); *Dusik v. Newton* (1985), 1985 CanLII 406 (BC CA), 62 B.C.L.R. 1 (C.A.). Although a fiduciary relationship between parties may not always

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[23] *Naneff*, at paras. 116-117. See also *Gartree Investments Ltd. v. Cartree Enterprises Ltd.*, 2002 CarswellOnt 733 (S.C.J.) discussed below.

[24] *Waxman v. Waxman*, (2002), 25 B.L.R. (3d) 1 (S.C.J.) at para. 1210, additional reasons 2002 CarswellOnt 3047 (S.C.J.), additional reasons 2003 CarswellOnt 52 (S.C.J.), varied 2004 CarswellOnt 1715, 44 B.L.R. (3d) 165 (C.A.), additional reasons 2004 CarswellOnt 6554 (C.A.), additional reasons 2004 CarswellOnt 3955 (C.A.), additional reasons 2004 CarswellOnt 4941 (C.A.), additional reasons 2004 CarswellOnt 3956 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 291 (S.C.C.).

[25] *Waxman v. Waxman*, (2004), 44 B.L.R. (3d) 165 (C.A.) at para. 8, additional reasons 2004 CarswellOnt 6554 (C.A.), additional reasons 2004 CarswellOnt 3955 (C.A.), additional reasons 2004 CarswellOnt 4941 (C.A.), additional reasons 2004 CarswellOnt 3956 (C.A.), leave to appeal refused 2005 CarswellOnt 1217 (S.C.C.).

extend to a share sale between them, the evidence that it does so in this case is again overwhelming. We repeat the trial judge's findings that make this clear:

> They had a special and close personal relationship as brothers. They had a special and close business relationship as 50/50 partners, who had built IWS together. In the financial and legal sphere, Morris was dependent on Chester both in relation to IWS and personally. By his conduct, Chester represented to Morris that their personal and business interests were common, identical and without conflict. Morris relied absolutely and completely on Chester in legal and financial matters. Chester was fully aware of the trust and confidence that Morris reposed in him and of Morris' vulnerability (para. 1262).

Nor is it necessary that there be an express undertaking concerning the specific transaction. The focus must be on the relationship and the mutual understanding of trust and loyalty that goes with it. As the trial judge found, the lifelong relationship between the brothers led Morris to the reasonable expectation that he could completely trust Chester to look after his interest in IWS. In effect, Chester represented this to Morris by the course of his conduct throughout their relationship. He did not need to make any express representation to Morris about this transaction in order for a fiduciary duty to be found in connection with it.[26]

By contrast, in *Harris v. Leikin Group Inc.*,[27] the Ontario Court of Appeal found that family shareholders did not owe one another fiduciary duties in the context of a buy-out process. The Leikin Group was a group of real estate and development companies founded by the patriarch of the family. His daughters held equal preferred shareholdings and his grandchildren held equal common shareholdings. When some of the daughters decided to step down from the board and allow their children to take their place, relationships between the sisters and their children became fractious and the board became polarized.[28] Consequently eight of the eleven grandchildren decided to sell their shares and the remaining four decided to carry on and grow the business.

The negotiations to buy out the eight selling shareholders were "characterized by bitterness and distrust".[29] A key point of contention in the negotiations was the value to be attributed to the principal real estate asset. After buying out the selling shareholders, the non-selling shareholders sold a 50 per cent interest in the principal asset to a third party at a much higher attributed value. In an action by the selling shareholders seeking damages for breach of fiduciary duty, oppression, misuse of confidential information and unjust enrichment against the non-selling shareholders, the Ontario Superior Court held that selling and

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[26] *Ibid.* at paras. 510-512.
[27] 2014 ONCA 479.
[28] *Harris v. Leikin Group*, *supra*, at paras. 10-11.
[29] *Ibid.* at para. 12. One of the sisters deposed that "it was impossible for the selling shareholders to rely on the non-selling shareholders to look out for their interests because of the level of discord between them."

non-selling shareholders did not owe one another fiduciary duties. The Ontario Court of Appeal agreed with the trial judge. Unlike *Waxman v. Waxman*, both sides in *Harris v. Leikin Group* were negotiating in their own interests and the selling shareholders could not expect the non-selling shareholders to protect their interests in the negotiations:

> In my view, the trial judge correctly held that on the evidence the appellants were not expecting the selling shareholders to protect their interests in the negotiations. As he put it, at para. 448, "the dependent, special and close personal relationship" that can give rise to an ad hoc fiduciary relationship in some family business arrangements is "a far cry from the factious, conflicted, self-interested and untrusting relationship amongst the two sets of cousins in the present case."[30]

5. Inadequacy or Lack of Shareholder Agreements

Different personalities, expectations, cultural norms, and generational divides, contribute to the dynamics of the family business. Shareholder agreements[31] can help clarify the roles, expectations and vision of family members, prescribe procedures for resolving shareholder disputes, set out corporate governance requirements, and generally put family relationships on a business footing. Although a well-crafted shareholders agreement may have a stabilizing effect, many family businesses operate without one. The ideal of family harmony, the allure of making agreements "on a handshake", the informal way in which family businesses operate, and the legal costs associated with formal documents, often make a shareholders agreement unpalatable to family members. The very suggestion that a shareholders' agreement should be drafted, especially when it comes from a new generation of shareholders, may itself ignite a dispute. However, without a formal shareholders' agreement, the courts are forced to sort through divergent recollections, promises, and expectations to resolve disputes and rely on legislation to navigate the dispute and craft the appropriate remedy.[32]

Shareholder agreements are particularly important to address succession, buy-out, withdrawal or death of a shareholder, and to eliminate expectations that the parties will look out for one another's interests or owe one another

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[30] *Harris v. Leikin Group*, *supra*, at paras. 10-11. See also *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96.

[31] Most Canadian corporate statutes provide for shareholders to enter into a unanimous shareholders agreement. See for example s. 146(1) of the CBCA.

[32] OBCA, s. 248; CBCA, s. 241; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 242; *Business Corporations Act*, S.B.C. 2002, c. 57, s. 227; *Corporations Act*, R.S.M. 1987 c. C225, s. 234; *Business Corporations Act*, R.S.N.B. 1981, c. B-9.1, s. 166; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 371; *Companies Act*, R.S.N.S. 1989, c. 81, Third Sched., s. 5; *Business Corporations Act*, S.N.W.T. 1996, c.19, s. 243; *Business Corporations Act*, R.S.Q., c. S-31.1, c. 450; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 234; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 243.

fiduciary duties in a buy-out process.[33] In the absence of a formal shareholders agreement, the parties are subject to court-imposed remedies. In *Di Felice v. 1095195 Ontario Ltd.*,[34] three siblings jointly invested in property and operated the family business without a shareholders' agreement. When there was a breakdown of the trust and co-operation necessary for the proper governance and operation of the business,[35] the shareholders brought opposing applications under the oppression and winding-up provisions of the OBCA and the *Partition Act*,[36] for the sale of the properties and the distribution of the sale proceeds. In the context of these proceedings one part of the family alleged that there was a "fundamental understanding" amongst the family members as to how the properties would be operated and sold, which included giving family members a first right to purchase the properties in the event of a sale.[37] Although Justice Brown carefully considered the possibility of a "fundamental understanding" concerning the sale of family assets[38] he found that there was no clear evidence of an agreement and that the trust and confidence required for the proper governance and operation of a closely-held family corporation had broken down.[39] Consequently the Court used the OBCA oppression remedy provisions[40] and the *Partition Act*[41] to order a court-supervised sale of the properties in issue. The absence of a shareholders' agreement in this case resulted in the family losing control of long-standing family assets.

Cholakis v. Cholakis,[42] discussed more fully below, is another case where the absence of a shareholders' agreement in a family business resulted in an oppression proceeding and necessitated the court's intervention to dispose of family property.[43]

6. Informal Approach to Corporate Governance

The problems created by successive generations of shareholders and the lack of a shareholders' agreement, are compounded by the fact that family businesses tend to take a less formal approach to corporate governance than do businesses which are owned and operated by unrelated management. Family members may believe that governance protocols are unnecessary in the family context or that emotional family dynamics may overshadow or replace corporate

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[33] See *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96.
[34] 2013 ONSC 1, additional reasons 2013 CarswellOnt 2847 (S.C.J. [Commercial List]).
[35] *Ibid.* at para. 149.
[36] *Partition Act*, R.S.O. 1990, c. P.4.
[37] *Ibid.* at para. 18.
[38] *Di Felice v. 1095195 Ontario Limited*, *supra*, at paras. 114-126.
[39] *Ibid.* at paras. 134, 149.
[40] *Ibid.* at paras. 142, 154.
[41] *Ibid.* at paras. 142, 156.
[42] 2007 MBCA 156.
[43] *Ibid.* at para. 10.

governance. The failure to observe standard corporate governance protocols results in a lack of transparency and idiosyncratic decision making which causes suspicion and resentment among family shareholders and often oppressive behaviour requiring court intervention.

Cholakis v. Cholakis,[44] is an example of a case involving a family business which was operated in a very informal way that invited oppression. In *Cholakis* five brothers were shareholders. One brother was solely responsible for operating the business. His refusal to respond to a request by one of his brothers for disclosure of financial information resulted in acrimony among the shareholders and an oppression proceeding. In granting the oppression remedy the trial judge found that the brother who ran the company was paternalistic and domineering towards his brothers. This led to a number of corporate governance failures including, failure to hold annual shareholders' meetings, unilateral decisions about the distribution of dividends, and payment of management and other fees without proper disclosure to the other shareholders.[45] In fashioning a remedy that would ensure the survival of the business while protecting the interest of the parties, the trial judge ordered the brother operating the business to buy out the brother who had been denied financial disclosure. One of the grounds of appeal to the Manitoba Court of Appeal was that the trial judge failed to "appreciate the difference between a closely held family corporation and a public one".[46] The appeal was dismissed and the Court of Appeal found that the trial judge looked at "the big picture" when she concluded that the brother operating the business misused the informality of the family business to benefit himself:

> Given the informal manner in which the family businesses were operated, some of these acts alone would not have breached the reasonable expectations of the shareholders; however, Leo breached the trust that he said his brothers had in him when he misused that informality to pay himself an excessive proportion of the corporate profits without the knowledge or approval of the other directors or shareholders. These acts taken together were oppressive, unfairly prejudicial and unfairly disregarded the interests of the directors and shareholders, including Harry.[47]

7. Accounting Irregularities

The informal way in which family businesses operate may lead to lax accounting controls and financial irregularities. For example, where the family puts their trust in one or more family members to operate the business for the benefit of the entire family, the operating shareholders may feel entitled to compensate themselves for their efforts in ways not anticipated or sanctioned by

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[44] 2007 MBCA 156 [*Cholakis*].
[45] *Ibid*. at para. 9.
[46] *Cholakis*, *supra*, at para. 22.
[47] *Ibid*. at para. 28.

other family members. In Cholakis, above, the operating shareholder helped himself to fees and expenses without accounting to other family members. Similarly in *1162740 Ontario Ltd. v. Pingue*,[48] the operating shareholder misallocated corporate funds to his own use. In Pingue one family member managed the family business on behalf of his brother and cousin. The managing shareholder had effective control of the banking and financial records and operated without oversight. Without authorization, he used company funds for his own personal use numerous times. The managing shareholder's brother and cousin successfully sued him and the family corporation for breach of fiduciary duty, theft, fraud and misappropriation of funds.[49] The Court found that the brother treated the business as his "own piggy bank" to do with as he saw fit.

III. REMEDIES WHEN THINGS FALL APART

The unique qualities and modes of operation of family businesses, outlined above, necessitate a unique approach to fashioning remedies. The courts are sensitive to the human and relational issues which characterize family businesses and which ignite disputes. This section explores the remedies available to the courts and how they have been used to fashion relief to resolve family business disputes.

1. Oppression Remedy

When family business relationships begin to deteriorate, the corporation may become a battlefield. Corporate governance requirements, if they were ever honoured, may be ignored leaving one or more family members feeling isolated and excluded and making the business particularly vulnerable to attack. The oppression remedy[50] is used in the context of a family business to protect the legitimate expectations of shareholders in these circumstances.[51] In fact much of the evolution and elucidation of the principles governing oppression has

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[48] 2014 ONSC 7418, additional reasons 2015 CarswellOnt 2855 (S.C.J.); See also *Cholakis*, *supra*, at para. 9.

[49] *1162740 Ontario limited v. Pingue*, *supra*, at para. 240-241; see also *Cholakis*, *supra*, at para. 28.

[50] *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 241; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 242; *Business Corporations Act*, S.B.C. 2002, c. 57, s. 227; *Corporations Act*, R.S.M. 1987 c. C225, s. 234; *Business Corporations Act*, R.S.N.B. 1981, c. B-9.1, s. 166; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 371; *Companies Act*, R.S.N.S. 1989, c. 81,Third Sched., s. 5; *Business Corporations Act*, S.N.W.T. 1996, c. 19, s. 243; *Business Corporations Act*, R.S.Q. c. S-31.1, s. 450; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 234; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 243.

[51] Morritt, The Oppression Remedy (Toronto: Canada Law Book) (loose-leaf revision 17) at para. 5:90.10.

occurred in the context of minority shareholder litigation in closely held family companies.[52]

Justice Blair recently described the oppression remedy in *Rea v. Wildeboer*[53] as a personal claim,[54] designed to provide a complainant with the right to apply to the court, without obtaining leave, to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant.[55] The Ontario Court of Appeal stressed in *Wildeboer* that oppression actions are appropriate where the conduct complained of "harms the complainant personally, not just the body corporate i.e. the collectivity of the shareholders as a whole."[56]

The oppression provisions of the Ontario *Business Corporation Act* provide:

> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
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> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
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> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
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> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
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> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).

If the court determines that there is oppression, the court may "make any interim or final order it thinks fit" including, but not limited to, a laundry list of possible remedies.[57] The broad discretion given to the Court under the oppression remedy makes it a "very powerful tool in the hands of shareholders".[58]

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[52] *Ibid.* at para. 5:90.10; *Mason v. Intercity Properties Ltd.*, (1987), 59 O.R. (2d) 631 (C.A.) at 635, leave to appeal refused (1987), 87 N.R. 73 (note), [1987] S.C.C.A. No. 402 (S.C.C.).

[53] 2015 ONCA 373 [*Wildeboer*].

[54] In comparison with the derivative action which is an action on behalf of the corporation.

[55] 2015 ONCA 373 at para. 19.

[56] *Wildeboer*, *supra*, at para. 33.

[57] OBCA, s. 248(3) CBCA, s.241(3); *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 242(3); *Business Corporations Act*, S.B.C. 2002, c. 57, s. 227(3); *Corporations Act*, R.S.M. 1987 c. C225, s. 234(3); *Business Corporations Act*, R.S.N.B. 1981, c. B-9.1, s. 166(3); *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 371(3); *Companies Act*, R.S.N.S. 1989, c. 81, Third Sched. s. 5(3); *Business Corporations Act*, S.N.W.T. 1996, c.19, s. 243(3); *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 234(3); *Business Corporations Act*, R.S.Q., c. S-31.1, s. 451; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 243(3).

In *Re BCE Inc. v. 1976 Debentures*,[59] the Supreme Court of Canada held that in determining whether the test for oppression has been met, the Court must consider whether the evidence supports the reasonable expectation asserted by the claimant and whether that expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of the relevant interest.[60] The Court also set out the factors to consider in determining whether the complainant's reasonable expectation should be met. As one commentator indicated, four of these factors are particularly relevant in the family business context:

1. *Nature of the corporation* — courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.
2. *Relationships* — reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. The relationship between shareholders based on ties of family or friendship may be governed by different standards than the relationship between arm's length shareholders in a widely held corporation.
3. *Past practice* — past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance.
4. *Representations and agreements* — shareholder agreements may be viewed as reflecting the reasonable expectations of the parties.[61]

In the family business context the concept of reasonable expectations can become difficult to disentangle from the emotional needs and dynamics of the family. Family shareholders may be seeking vengeance rather than a reasonable resolution of corporate issues. As Justice Farley explained in *820099 Ontario Inc. v. Harold E. Ballard Ltd.*,[62] which involved a bitter dispute in the Ballard family, reasonable expectations are not a static matter:

> In my view, one cannot regard expectations as a static matter. Expectations may well evolve from the situation of the shareholder going into the corporation (by way of setting up the corporation or by way of gift – or by way of purchasing previously

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[58] Danielle Joel, "The Classic Shareholder Remedy: Using the Oppression Action in Family Business Disputes" in *The Family Business: Administration and Litigation of Trusts and Estates Holding Business Assets* (Toronto: Ontario Bar Association, September 29, 2015) p. 2.

[59] 2008 SCC 69.

[60] *Ibid.* at para. 68.

[61] Danielle Joel, "The Classic Shareholder Remedy: Using the Oppression Action in Family Business Disputes" in *The Family Business: Administration and Litigation of Trusts and Estates Holding Business Assets* (Toronto: Ontario Bar Association, September 29, 2015) p. 8.

[62] 1991 CarswellOnt 142 (Ont. Gen. Div.), affirmed 1991 CarswellOnt 141 (Ont. Div. Ct.) [*Ballard*].

> issued shares). Certainly these original expectations may strongly influence the evolutionary process. As well, in a closely held corporation, it will be much easier to consider the "factual" expectations of the shareholders; in a widely held corporation, these expectations will have to be assumed or proxied if they are to be discerned at all. I would think that the expectations that count are those that are reasonable and which are in existence as the directors make their decisions from time to time.[63]

Although Justice Farley found that Harold Ballard and other directors of Harold E Ballard Limited acted in an oppressive manner toward one of Harold Ballard's sons, Farley J. was not prepared to transfer control of the corporation to the son. He explained that the court ought not to interfere with the affairs of a corporation lightly. "Where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe;" the court may even up the balance but not tip it in favour of the injured party.[64] He ordered that the son be given representation on the board of directors and that some of the oppressive transactions be set aside. Ballard illustrates that relevant expectations in the family context include the interests of all shareholders, not just the minority, as well as relationships between the shareholders.[65]

Another issue addressed in Ballard was whether the reasonable expectations of shareholders whose shares were gifted to them should be given the same weight as the expectations of other shareholders or the expectation of the donor. Justice Farley found that receipt of shares as a gift or by bequest does not deprive a shareholder of the protection of the oppression remedy or free directors of the duties generally owed to shareholders:

> One would normally expect the recipient of a gift to be grateful. One might well expect the recipient to overlook small peccadillos of the donor. But I do not see that there is any obligation on the part of the recipient to do so. It may well be that the courts in reviewing gift situations will be somewhat more tolerant of minor sins. I do not see that the donor would ever be given a carte blanche to run roughshod. On a practical basis, the donor who expects perpetual gratitude from a recipient is usually disappointed, and usually sooner than later.[66]

However in *Animal House Investments Inc. et al. v. Lisgar Development*,[67] discussed below, the Court held that where a shareholder in a family company

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[63] *Ibid.* at para. 135.

[64] *Ibid.* at para. 140.

[65] Danielle Joel, "The Classic Shareholder Remedy: Using the Oppression Action in Family Business Disputes" in *The Family Business: Administration and Litigation of Trusts and Estates Holding Business Assets* (Toronto, Ontario Bar Association, September 29, 2015), pp. 11-12.

[66] *Ballard*, *supra*, at para. 137. Farley J. relied on *H.R. Harmer Ltd., Re*, [1958] 3 All E.R. 689 (C.A.) and *Miller v. F. Mendel Holdings Ltd.*, [1984] 2 W.W.R. 683 (Q.B.).

[67] *Animal House Investments Inc. v. Lisgar Development Ltd.*, (2007), 87 O.R. (3d) 529 (S.C.J.) at para. 7, additional reasons 2008 CarswellOnt 839 (S.C.J.), affirmed 2008 CarswellOnt 3306 (Div. Ct.); see also *Cohen v. Jonco Holdings Ltd.*, 2005 MBCA 48, 192

has acquired his or her shares by gift, rather than by way of investment, the reasonable expectations of the donor of the shares are also relevant.

The courts will consider the reasonable expectations of shareholders not only to determine whether the test for oppression has been met,[68] but also to fashion the appropriate remedy to address oppressive conduct. *Naneff v. Con-Crete Holdings Ltd.*[69] concerned a thriving family concrete block business started by the patriarch of the family in Ontario. Mr. Naneff implemented an estate freeze making his two sons equal owners of the common shares and giving Mr. Naneff redeemable voting special or preference shares with absolute control over the business. Both sons joined the business and undertook important responsibilities but Mr. Naneff remained the ultimate decision maker.[70] When one son began living a lifestyle of which his parents disapproved, he was thrown out of the family home, told to stay away from the business premises, excluded from management and his income from the business was cut off. Justice Blair found that the family had behaved in an oppressive way towards the prodigal son. He ordered that the business be sold publicly as a going concern with each of the father and the sons being entitled to purchase it. Justice Blair also ordered that certain changes in corporate structure made after the son was ejected be set aside.

On appeal, the Ontario Court of Appeal agreed with the trial judge's finding of oppression but held that ordering the public sale of the business was an error in principle and unjust to Mr. Naneff. Galligan J.A. noted that the dynamics of the relationship between principals in a family business are very different from those between principals in a normal business relationship. He concluded that this difference bears upon the expectations of the principals and therefore the fashioning of a remedy:

> At the outset I think it is important to keep in mind that this is not a normal commercial operation where partners make contributions and share the equity according to their contributions or where persons invest in a business by the purchase of shares. This is a family business where the dynamics of the relationship between the principals are very different from those between the principals in a normal commercial business. As the courts below have correctly held, the fact that this is a family business cannot oust the provisions of the s.248 of the OBCA. Nevertheless, I am convinced that the fact that this is a family matter must be kept very much in mind when fashioning a remedy under s. 248(3) as it bears directly upon the reasonable expectations of the principals.[71]

Man. R. (2d) 252, [2005] M.J. No. 126 (C.A.) at page 550 paras. 36 and 45; and *Cholakis v. Cholakis*, 2006 MBQB 91, 2006 CarswellMan 128, [2006] M.J. No. 151 (Q.B.) at para. 58, affirmed 2007 CarswellMan 506 (C.A.).

68 *BCE Inc., Re*, 2008 SCC 69 at para. 68.

69 1995 CarswellOnt 1207 (C.A.).

70 *Naneff*, *supra*, at para. 11.

Galligan J.A. held that the remedy awarded by Blair J. was fashioned without due regard to the reasonable expectations of Mr. Naneff and his sons.[72] While the son who behaved badly expected to be an equal co-owner of the business, this expectation had to be interpreted in light of his understanding that Mr. Naneff would retain ultimate control until death or retirement and that this was a family business built by his father:

> The order of Blair J. gave Alex something which he knew he could never have while his father was alive and active – the opportunity to obtain full control of the family business. A remedy that rectifies cannot be a remedy which gives a shareholder something that even he never could have reasonably expected.
>
> Moreover, I am unable to view the remedy as anything other than a punitive one towards Mr. Naneff. There was never any doubt among the three men that Mr. Naneff would exercise ultimate control of the family business until he died or retired. Mr. Naneff solidified his right of complete control by the corporate arrangements he put in place at the time of the estate freeze and which he kept in place to the knowledge of his sons throughout the time that the three of them worked together. It is not the task of the court of law to judge the family dispute or to rule upon the justice of the expulsion of Alex from the family. However, I am unable to accept as anything other than punitive, a remedy which puts at risk the very condition upon which Mr. Naneff exercised his bounty in favour of his sons, – his total control of the business during his active life. The OBCA authorizes a court to rectify oppression; it does not authorize the court to punish for it.
>
> The second error in this remedy is that it attempts to protect Alex's interest in the family business as a son and family member, in addition to protecting his interest as shareholder as such. As I mentioned above, it is my view that Alex's expectation of ultimately obtaining an equal share of the control of the business with Boris was based upon his expectation of being the continuing object of his father's bounty. That in turn depended upon him remaining in his father's favour and remain in his father's eyes a member of the family. The remedy of public sale, which gives Alex the opportunity to buy the company, enable him to obtain that control while out of his father's favour. This appears to protect much more than his interest as a shareholder as such; it protects indeed it advances, his interest as a son.[73]

The Court of Appeal ordered that the son's shares be purchased by his father and brother at fair market value, without minority discount. The effect of this remedy was to put the son in the position he would have been in had he not been ejected from the family company, but maintain the father's right to control the company.

As previously discussed, one of the defining characteristics of a family business, is the failure to operate the company with the requisite respect for its

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71 *Naneff*, *supra*, at para. 19.
72 *Ibid*. at para. 29.
73 *Naneff*, *supra*, at paras. 33-35.

separate identity and ownership of assets coupled with a lack of proper record keeping and compliance with corporate governance requirements.[74] As the Supreme Court of Canada observed in *BCE Inc.*, in the context of an oppression remedy application, the courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.[75] The court will assess the degree to which the failure to meet technical requirements caused harm to the corporation and affected the interests of the other shareholders and whether it is sufficient to ground an oppression claim.[76]

In a number of cases the Ontario courts have applied the principle that "mere irregularities and lack of formalities, in the absence of unfair prejudice or unfair disregard are not sufficient to establish [an oppression] claim."[77] Similarly in *Cholakis* the Manitoba Court of Appeal held that the informal manner in which the family business was operated did not, *in and of itself*, constitute oppression.[78] However, when the informality was misused to misappropriate corporate funds, oppression was established.[79] However, in *Krulc v. Krulc*,[80] the Alberta Court of Queen's Bench held that the failure to deliver appropriate financial statements and other information, and to hold annual shareholders meetings, *in and of itself*, constituted oppression. Even though the actual decisions made by the family members running the company were not oppressive, their lack of transparency in running the business raised legitimate concerns which were contrary to the shareholder expectations:

> While the Applicants' expectations as to outcome do not attract an oppression remedy, the Applicants raise legitimate concerns about the process falling short of expectations. They are vulnerable given the combination of the officers answering to themselves, not providing financial statements within the times required and not holding any annual meeting at which dissident shareholders might pursue information, explanations or course changes or, failing satisfaction, vote in different directors.
>
> [83] In my view this combination of circumstances unfairly disregarded the Applicants' interests in KHI, constituting oppression. In the context of this closely held, private company in which shareholders did not have opportunity to enter any agreement to protect their interests at the time of owning the investment, a higher

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74 Morritt, *supra*, at para. 5:100.30, as noted by the authors this can be a characteristic of closely held companies generally, not just family corporations.

75 *Re BCE Inc. v. 1976 Debentures*, at para. 74.

76 Morritt, *supra*, at para. 5:100.30, pp. 5-74, 5-78.

77 *Sexsmith v. Intek Inc.*, 1993 CarswellOnt 4049, [1993] O.J. No. 711 (Gen. Div.) at paras. 34 and 37, applied and approved in *Quaglieri v. 374400 Ontario Ltd.*, 1994 CarswellOnt 849, [1994] O.J. No. 668 (Gen. Div. [Commercial List]) and *Dziver v. Marostica-Wing Developments Ltd.*, 2007 CarswellOnt 6881, 287 D.L.R. (4th) 330 (Div. Ct.) at para. 17.

78 *Cholakis*, *supra*, at para. 28.

79 *Ibid.*

80 2015 ABQB 213.

> degree of real-time transparency was warranted, yet there was less. Some time may have been required for the Directors and Officers to get up to speed, but nothing approaching the years taken here. This was a holding company, distinct as the Respondents underscore, from IGI.
>
> [84] Delays in disclosure, limitations on disclosure and non-disclosure fuel suspicion. Not all of the Applicants' informational expectations were reasonable and many were satisfied by KHI following its retention of Stokowski. But the information came too late for the Applicants to have any opportunity to offer any input into KHI's decisions.[81]

Consequently, the Court in *Krulc v. Krulc* denied the applicant's requests to wind-up the family company and to reverse certain business decisions made by management. However the Court ordered that the informational entitlements of the shareholders be met on time, that a shareholders' meetings be held, that financial statements be provided, and that the Board establish and follow a process by which it informs shareholders and elicits their input before making material decisions.[82]

2. Derivative Actions

As Justice Blair explained in *Wildeboer* a derivative action is an action for "corporate relief" in the sense that the goal is to recover for wrongs done to the company itself rather than an individual complainant.[83] The statutory authority and test for leave to bring a derivative claim is set out in section 246 of the OBCA:

> 246. (1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate. R.S.O. 1990, c. B.16, s. 246 (1).
>
> (2) No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days' notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) and the court is satisfied that,
>
> (a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action;
>
> (b) the complainant is acting in good faith; and
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> (c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued. R.S.O. 1990, c. B.16, s. 246 (2).[84]

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[81] *Krulc v. Krulc*, *supra*, at paras. 82-84.
[82] *Ibid.* at para. 85.
[83] *Wildeboer*, *supra*, at paras. 18-19.
[84] CBCA, s. 239; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 240; *Business*

Derivative actions are less common in disputes involving closely-held corporations. As the Court of Appeal noted in *Wildeboer,* in circumstances involving a closely-held corporation there is often overlap between the wrongs done to the corporation and wrongs done to a particular complainant and therefore the oppression and derivative remedies are used interchangeably:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants. And most, if not all, involve small closely-held corporations not public companies.
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> *Waxman* is a good example. The company was a family scrap metal business. Some of the acts complained of, including the wrongful distribution of bonuses, could have been the subject of a derivative action, but it was not disputed on appeal that the complainant "was personally aggrieved by the distribution" and that it "was done at the expense of his interest in the company": para. 526.
>
> *Malata* — a case involving another closely-held company — is also a good example. The misappropriation of funds in that case affected not only the company (and therefore the indirect interests of all shareholders), but the direct interests of the minority shareholder as a creditor of the company.[85]

3. Winding Up and Liquidation

As noted by the Ontario Court of Appeal in *Naneff*, winding up is a drastic remedy for a dispute within a long-standing family business. The courts are reluctant to wind up a family business simply to appease quarelling family members. However, the court may order a winding up where the family dispute is so fractious that the business cannot continue. Section 207 of the OBCA provides:

> 207. (1) A corporation may be wound up by order of the court,
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> (a) where the court is satisfied that in respect of the corporation or any of its affiliates,

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Corporations Act, S.B.C. 2002, c. 57, 232; *Corporations Act*, R.S.M. 1987, c. C225, s. 232; *Business Corporations Act*, R.S.N.B. 1981, c. B-9.1, s. 164; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 369; *Companies Act*, R.S.N.S. 1989, c. 81,Third Sched. s. 4; *Business Corporations Act*, S.N.W.T. 1996, c. 19, s. 241; *Business Corporations Act*, R.S.Q. c. S.31.1, s. 445; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 232; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 241.

[85] *Wildeboer*, *supra*, paras. 29-31; In *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, the Court of Appeal stated at para. 26 that "there is not a bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions." See also *1186708 Ontario Inc. v. Gerstein*, 2016 ONSC 1331.

> (i) any act or omission of the corporation or any of its affiliates effects a result,
> (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer; or
>
> (b) where the court is satisfied that,
>
> (i) a unanimous shareholder agreement entitled a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred,
> (ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,
> (iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue its business and it is advisable to wind it up, or
> (iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or
>
> (c) where the shareholders by special resolution authorize an application to be made to the court to wind up the corporation. R.S.O. 1990, c. B.16, s. 207 (1).
>
> (2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit. R.S.O. 1990, c. B.16, s. 207 (2).

If the court determines that a company should be wound up, the court may make such order under section 248 of the OBCA (the oppression laundry list) as it thinks fit; the court is not limited to the remedy of liquidation which would result in the destruction of the business.[86]

In *Animal House Investments Inc. v. Lisgar Development Ltd.*,[87] Justice Wilton-Siegal refused an application to wind up a family business and delineated the special considerations applicable to these situations. In Animal House a mother, son and daughter held shares in two family corporations. The mother had legal control of the companies but no active role in running them and her grandson looked after day-to-day operations. When the mother began to involve herself to a greater extent in the affairs of the companies, disagreements developed between the son, on the one side, and the mother and daughter, on the other. The issues in dispute included the business plan for the companies, dividend policy, board governance, exit arrangements for the common

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[86] See CBCA s.214; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 215; *Corporations Act*, R.S.M. 1987 c. C225, s. 207; *Business Corporations Act*, R.S.N.B. 1981, c. B-9.1, s. 141; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 343; *Business Corporations Act*, S.N.W.T. 1996, c. 19, s. 216; *Business Corporations Act*, R.S.Q. c. S-31.1, s. 463; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 207; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 216.

[87] 2007 CarswellOnt 6509, 87 O.R. (3d) 529 (S.C.J.), additional reasons 2008 CarswellOnt 839 (S.C.J.), affirmed 2008 CarswellOnt 3306 (Div. Ct.) [*Animal House*].

shareholder, and succession planning. The son brought an application for a winding-up order pursuant to s. 207(1)(b)(iv) of the OBCA. The mother and daughter resisted the application, arguing that the dispute between the parties did not extend beyond differences in business strategy and therefore did not warrant a winding-up. Further, they submitted that irreconcilable conflict was insufficient by itself to support an order under s. 207, and that an order for the winding-up of the companies was only available if the conflict resulted in the frustration of the son's reasonable expectations. The son argued that, in a family business context, irreconcilable differences are sufficient to justify a winding-up order.

Justice Siegel denied the son's application because he found that quarrelling or a breakdown in the personal relationships between family members was insufficient grounds for a winding-up order. The disharmony must result in a state of affairs in which the reasonable expectations of the shareholders are unattainable.[88] He rejected the argument that, in a family business context, irreconcilable differences are sufficient on their own to warrant a "just and equitable" winding-up order or that there was an implied expectation of shareholders in a family business that the business will be wound up if the parties cease to conduct the business on the basis of a mutual trust and confidence:

> First, as mentioned, I am not persuaded that the court's equitable discretion under s. 207(1)(b)(iv) of the Act can be invoked merely to address disharmony among the shareholders in a private corporation. Quarrelling and incompatibility, even to the point of a breakdown in the personal relationships between shareholders of a private company, are not, by themselves, sufficient grounds for an equitable winding-up of the corporation.
>
> All of the cases cited to the court reflect the underlying and unifying principle that a court will only exercise its discretion to order a "just and equitable" winding-up if the disharmony has resulted in a sufficiently serious failure of the reasonable expectations of the parties to warrant such equitable relief. In order to satisfy this test of a serious failure of expectations, an applicant must demonstrate that the parties regarded, or would have regarded if they had turned their minds to it at the time of formation of the business association, the particular circumstances resulting from the disharmony to constitute the termination or repudiation of the business relationship among them. Accordingly, incompatibility is significant only insofar as it has resulted in a state of affairs in which the reasonable expectations of the parties are unattainable and from which the court can reasonably infer that the business arrangement between the parties has been repudiated or terminated.[89]

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[88] *Ibid*. at para. 57.

[89] *Ibid*. at paras. 56-57, 62; see also *Gold v. Rose*, 2001 CarswellOnt 5, [2001] O.J. No. 12 (S.C.J. [Commercial List]) at paras. 20-23, additional reasons 2001 CarswellOnt 895, [2001] O.T.C. 4 (S.C.J. [Commercial List]); *Belman v. Belman*, (1995), 26 O.R. (3d) 56 at

Similarly in *Hui v. Hoa*[90] the British Columbia Court of Appeal was reluctant to grant an order to wind up a family company to address quarrelling amongst family members. In *Hui v. Hoa*, two companies were incorporated as a form of estate freeze with the intention of avoiding succession duties. The parent founders intended that the income from the companies be used for the benefit of the family as directed by them and that, upon their deaths, the companies and their assets would go to their son. The corporate structure reflected the parents' expectation. When the relationship between the son and his parents deteriorated the son sought to have the companies wound up. The trial judge denied the son's request to wind-up the company and the B.C. Court of Appeal dismissed the son's appeal from that order. The Court of Appeal found that, although the family relationships were fractured, winding-up the companies amounted to giving the son, during the parents' lifetime, what the estate freeze was established to provide on their death:

> On the evidence, there were differences between Camille and Belinda with respect to the management of E & C. In my view, they did not reach the level of incapacitating the company. Its assets are operated by professional managers. Camille takes exception to the amount of remuneration Belinda derives from E & C, but it is based on accounting advice: what will be acceptable to the income tax authorities. Camille's concern can only be based on the notion that Belinda is not entitled to do with the income of E & C as she sees fit. I do not agree with this proposition.
>
> Both the corporate structure and the reasonable expectations of the parties support recognition of a structure that continues to be an estate freeze, albeit in a slightly different form from the structure created initially. Emile had control of E & C. It was thought that he would pass that control to Camille when Emile died, but he did not do so. Control passed to Belinda and she still has it.
>
> It seems to me that Camille's position is analogous to the unsuccessful positions advanced by the claimants in *Naneff* and *Giroday*. He seeks to obtain now what the estate freeze was established to provide on the death of his parents. I would not accede to his claim for a winding-up.[91]

In *Pusateri*, referred to earlier, the litigants agreed to wind up the family company under section 207 of the Ontario Business Corporations Act but disagreed about the process. Pusateri's Fine Foods began as a simple family run fruit stand on St. Clair Avenue in Toronto and grew, through the hard work of

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80; *Clarfield v. Manley*, 1993 CarswellOnt 167, [1993] O.J. No. 878 (Gen. Div. [Commercial List]), affirmed (December 3, 1993), Moldaver J., O'Brien J., White J. (Ont. Div. Ct.), leave to appeal refused (October 3, 1994), Dubin C.J.O. (Ont. C.A.), leave to appeal refused 1995 CarswellOnt 5452 (S.C.C.), reconsideration / rehearing refused (June 13, 1996), Doc. 24476 (S.C.C.).

90 2015 BCCA 128.

91 *Hui v. Hoa*, *supra*, at paras. 65-67.

the original founders and their son and daughter, into a successful gourmet grocery business. The parties to the dispute were, on one side, the widow of the founders' son, and on the other side, the founder's daughter and her husband. All three worked intensively in the business in different capacities.[92] As the parties agreed to wind up the business, the only issue before the Court was what order was fit in the circumstances. Justice Hoy declined to decide which side would best ensure the continued prosperity of the business and held that the appropriate remedy was a court-supervised auction process in which the parties were the only participants. She distinguished *Liao v. Griffioen*[93] where the actions of one of the shareholders clearly caused the breakdown and amounted to oppression. There was no oppression in the *Pusateri* case.

Justice Hoy found that when fashioning a remedy under s. 207(2) of the Act the reasonable expectations of the principals are relevant. She relied on the words "such remedy as it thinks *fit*" in the winding-up provisions of the OBCA to conclude that the reasonable expectations of the parties should be considered in crafting a remedy under this section.[94] Hoy J. decided that an auction process, in which each of the parties had the ability to decide whether to buy or sell, was consistent with the reasonable expectations of the parties who had a lifetime involvement in the business.[95]

It is noteworthy that the auction process ordered by the Court in *Pusateri* was rejected as a remedy by the Ontario Court of Appeal in the earlier case of *Wittlin v. Bergen*.[96] In *Wittlin*, the applicants were brothers who owned 20 per cent of

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92 *Pusateri*, *supra*, at para. 2.

93 2001 CarswellOnt 4737, [2001] O.J. No. 5490 (S.C.J.), additional reasons 2001 CarswellOnt 4738 (S.C.J.), affirmed 2001 CarswellOnt 4526 (Div. Ct.).

94 OBCA s. 207(2), *Pusateri*, *supra*, para. 20. Hoy J. relied on *Naneff* where Galligan J.A. focused on the meaning of the word "fit" in the oppression provisions of the OBCA as a basis for the principle that the reasonable expectations of the parties should be considered in crafting a remedy under the oppression remedy.

95 *Ibid.* at para. 20. An interesting twist in *Pusateri* was the argument put forward by the Trozzos that they should have been treated as if they were 50% shareholders in the operating company rather than 48% percent shareholders as the share register indicated. While the shares in the company which owned the land and building were issued to the siblings on a 50/50 basis, 52% of the shares were issued to the brother, and 48% to his sister. According to the Trozzos, the difference was to prevent a deadlock in the operation of the business and that Mrs Trozzo always understood that all financial benefits from the store would be divided equally between her and her brother. Each year pre-tax profits were distributed in equal shares between the siblings although after tax income was distributed as dividends with 52% paid to the brother and 48% paid to the sister. The Court found neither an underlying obligation to give the Trozzos 50% of the equity nor a reasonable expectation on their part that they were entitled to 50%. If the intent was to give the brother voting control and only 50% of the equity it could have been achieved by giving him preferred shares or through another structure (paras. 24-31).

96 *Wittlin v. Bergman*, (1995), 25 O.R. (3d) 761 (C.A.).

the shares in a closely held corporation in which the respondent held a 25 per cent interest. The balance of the shares were owned by the applicants' brother-in-law who had a deteriorating mental condition. The parties agreed that the applicant's brother-in-law should be bought out but disagreed about how his interest should be redistributed. Relations between the parties deteriorated to the point where they were irreconcilable and the applicants brought an application for liquidation and dissolution. Justice Farley found that there was no oppression and therefore the oppression provisions of the CBCA[97] did not apply. Instead he found that the corporation should be liquidated under section 214 of the CBCA and ordered that the parties undergo an auction process to buy one another out. On appeal, the Ontario Court of Appeal found neither party was satisfied with the process which Justice Farley had imposed. While the relationship had to be severed the buy-sell ordered by Justice Farley was inappropriate for a number of reasons including the fact that the shareholder most responsible for operating the business and turning its fortunes around could be forced out:

> We are of the view that the trial judge's order was inappropriate, given his findings, for a number of reasons. First, no valuation date was given for establishing the price at which the bidding would be commenced. Depending upon when the procedure were to take place, the appropriate starting price could be substantially higher or substantially lower than that set by him. Second, the starting price set by the trial judge was not based on any independent valuation of the shares. Third, Bergman was the person actually responsible for the operations of the company, and the position of the appellants had become that of shareholders only, albeit very involved and vocal shareholders. It is doubtful whether the appellants could operate the company without his assistance. There is some indication in the evidence that the appellants are not in a position to purchase the shares of the respondents, and the process ordered by the trial judge would, therefore, expose the appellants to the risk of having to sell their shares at a bargain basement price for that reason only. In addition, given their minority position in the company, the possibility of the appellants being able to sell their shares to a third party is almost non-existent. They are effectively locked in. On the other hand, Mr. Bergman was responsible for the turn-around in the company's fortunes, and should not be required to risk losing his interest in the company to the appellants.[98]

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[97] R.S.C. 1985, c. C-44, s. 241; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 242; *Business Corporations Act*, S.B.C. 2002, c. 57, s. 227; *Corporations Act*, R.S.M. 1987 c. C225, s. 234; *Business Corporations Act*, R.S.N.B. 1981, c. B-9.1, s. 166; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 371; *Companies Act*, R.S.N.S. 1989, c. 81, Third Sched., s. 5; *Business Corporations Act*, S.N.W.T. 1996, c. 19, s. 243; *Business Corporations Act*, R.S.Q. c. S-31.1, s. 450; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 234; *Business Corporations Act*, R.S.Y. 2002, c. 20, s. 243.

[98] *Wittlin v. Bergman*, *supra*, at para.10.

The Court of Appeal found that it was more appropriate to order that the corporation purchase the shares of the party who wanted to be bought out either by payment in cash or by cash and a debt secured over the assets of the corporation to be paid out over five years.

4. Partition and Sale

Where families hold real property as joint tenants or tenants in common the parties owning an interest in the property can separate their interests from one another by bringing an application for partition or sale. The courts have applied similar principles to partition or sale proceedings as they do to oppression and winding-up applications. In particular, the courts will deny an application for partition and sale in the context of a family business where a family member is using the remedy for malicious or vexatious purposes.

Generally speaking all co-owners of land are subject to having their interest partitioned or sold. Sections 2 and 3(1) of the Ontario *Partition Act*[99] provide:

> 2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.
>
> 3.(1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

In *Garfella Apartments Inc. v. Chouduri*,[100] the Divisional Court summarized the principles governing the partition and sale of land:

> All tenants in common (along with many other categories of co-owners) are subject to having their property partitioned or sold at the behest of another person with an interest in the land. The presumption is in favour of partition, rather than sale. However, a sale will be ordered if the court considers it to be "more advantageous to the parties." A sale has also been found to be appropriate when the land is not suitable for partition. There is a prima facie statutory right for tenants in common to compel either a partition or sale.[101]

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[99] R.S.O. 1990, c. P.4; *Partition of Property Act*, R.S.B.C. 1996, c. 347 ss. 2(1); *Partition Act*, R.S.N.S. 1989, c. 333, s. 4; *Real Property Act*, R.S.P.E.I. 1988, c. R-3, ss. 18-53; *Rules of Court of New Brunswick*, N.B. Reg. 82-73, rule 67.02 under the *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 73; *Law of Property Act*, R.S.M. 1987, c. L.190 (CCSM, c. L.90), ss. 19-25.

[100] 2010 ONSC 3413 (Div. Ct.).

[101] *Ibid.* at paras. 10-11.

Justice Molloy went on to explain that the Court retains a discretion to refuse either partition or sale, but the onus is on the responding party to demonstrate circumstances warranting the refusal of relief. This is only appropriate in circumstances of malice, oppression, or vexatious intent. The Court of Appeal in *Greenbanktree Power Corp. v. Coinamatic Canada Inc.*[102] explained that "oppression" in this context means hardship amounting to oppression:

> Co-tenants should only be deprived of this statutory right in the limited circumstances described above, with this caveat. In our view, "oppression" properly includes hardship, and a judge can refuse partition and sale because hardship to the co-tenant resisting the application would be of such a nature as to amount to oppression.[103]

In exercising its discretion under section 2 of the *Partition Act* a court will also take into account the effect of any agreement between the parties respecting the land in question.[104]

In *Di Felice v. 1095195 Ontario Ltd.*,[105] discussed above, one of the properties in dispute was owned by members of the family as tenants in common. Justice Brown considered whether that property should be subject to partition or sale under the *Partition Act*. As there was no evidence of malice, oppression or vexatious intent, the parties could no longer work together, and none of the parties proposed partition, Justice Brown held that the property would be sold by court-supervised sale. Although the failure of family members to co-operate in managing the property is not a prerequisite to a remedy under the *Partition Act*, it was relevant to Justice Brown's decision to order a sale:

> First, as to Elmwood, it is a tenancy in common and Nina, as a co-tenant, is entitled to a partition or sale of the property unless Carmela shows that some good reason exists to refuse partition. On the evidence filed, Carmela has not shown that Nina or Italo have engaged in some malicious, vexatious or oppressive conduct which would justify a court refusing to grant partition or sale. The simple fact is that some non-business family events in 2006 caused a rift between the two families and that rift resulted in their inability to manage and deal with the Yonge/Elmwood properties in a business-like fashion. The evidence I set out in detail above regarding the events of 2008, 2009, 2010 and 2011 demonstrated the adverse impact the lack of trust between the families — or the feud, as Aldo aptly put it — worked on the operation of those properties. Although the existence of a dispute between co-owners is not a prerequisite to relief under the Partition Act, a dispute and breakdown in their relationship existed between the co-owners of the Elmwood Property.

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[102] 2004 CarswellOnt 5407 (C.A.).
[103] *Ibid.* at para. 2.
[104] *Di Felice v. 1095195 Ontario Ltd.*, 2013 ONSC 1, additional reasons 2013 CarswellOnt 2847 (S.C.J. [Commercial List]).
[105] 2013 ONSC 1, additional reasons 2013 CarswellOnt 2847 (S.C.J. [Commercial List]).

> No party called for the partition of any of the properties at issue in these proceedings; the evidence revealed that partition would not be commercially practicable for any of them. A sale of the properties would be more advantageous to the parties involved.
>
> Nor is the desire of Roger and Carmela to buy-out Italo and Nina a bar to granting a remedy under the Partition Act.[106]

By contrast in *Gartree Investments Ltd. v. Cartree Enterprises Ltd.*[107] the Court refused to order an open market sale of family properties because the remedy was being used by one of three sisters to punish the other two. In that case the sisters, through their companies, held real property. Four properties were held in trust for the parties as tenants in common. Litigation arose from a long-standing dispute which divided the sisters and their families into two groups and resulted in a total loss of trust and confidence between the two groups.[108] Two of the sisters offered to buy out the third sister's interest for 110 per cent of market value. The third sister refused their offer and commenced an application under the *Partition Act* to force an open market sale. Justice Cameron found the third sister's motives vexatious and malicious and ordered her to sell her interest in the properties to the other two:

> I find Ms. Gold's position vexatious and malicious. She is abusing her *prima facie* right to a market sale of her one-third interest under the *Partition Act* to thwart the legitimate concerns of the majority co-owners. Those concerns include the very real fact of income tax on the realized capital gains which will reduce the amount of the net proceeds of sale available for reinvestment and possibly the future income of her sisters. Absent sale of their interests in the CEG Properties the Respondents could postpone that tax payment and maintain their level of income until the death of the beneficial owner. This aspect of the lax consequences of a sale was not mentioned in *G. v. C.* (No. 1). This consequence of the facts before me is an important issue in the exercise of my discretion.
>
> I find Ms. Gold's motives are sufficient to warrant the exercise of my discretion under s. 2 of the *Partition Act* to refuse her application for an open market sale.[109]

5. Mediation and Arbitration

An oppression or winding-up proceeding, with the publicity and ill feeling which it engenders, may result in the demise of both the family business and family relationships. Shareholders' agreements often provide for arbitration as a dispute resolution mechanism. Even without an arbitration clause, families often prefer alternative dispute resolution options because they can choose the arbitrator or mediator whom the parties believe is best suited to resolve the

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[106] *Ibid.* at paras. 128 -130.
[107] 2002 CarswellOnt 733, [2002] O.J. No. 753 (S.C.J.).
[108] *Ibid.* at paras 17-18.
[109] *Gartree Investments Ltd. v. Enterprises Ltd, supra,* paras. 74-75.

dispute and because the proceeding is private. Families are reluctant to air their dirty laundry in public and mediation or arbitration, although often costly, may be more likely to promote reconciliation and restore family ties than a long, drawn out court proceeding. The courts have held that arbitration clauses oust the jurisdiction of the courts[110] and are enforceable even in the context of disputes involving oppression.[111] The courts will consider whether the subject matter of the oppression claim falls within the scope of the arbitration clause or agreement in issue but generally will stay a court proceeding to allow an arbitration to proceed.[112] There are some cases which suggest that an arbitrator does not have the same broad range of remedies as a court to resolve oppression claims.[113] However, depending on the scope of the arbitration clause or arbitration agreement, an arbitrator may be well-positioned to deal with the oppression claims arising in a family dispute and to order the necessary relief to resolve it.[114]

IV. CONCLUSION

The unique way in which family businesses are structured and operated, and the emotional dynamics between intergenerational family members, contribute to family business disputes and to the difficulty in resolving them. Adjudication of these disputes is a fine balance between maintaining the ongoing business concern and managing family relationships. The case law demonstrates two overriding themes. First, that fairness is best achieved by considering the reasonable expectations of the shareholders. Second, that while the courts cannot mend family rifts, they can fashion remedies that promote with the survival and sound operation of the family business.

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[110] *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; See also for example the *Ontario Arbitration Act*, 1991, S.O. 1991, c. 17, ss. 6 and 7.

[111] *U v. Watters Environmental Group Inc.*, 2012 ONSC 7019; *Woolcock v. Bushert*, (2004), 246 D.L.R. (4th) 139 (C.A.) at para. 33.

[112] *Deluce Holdings Inc. v. Air Canada*, (1992), 12 O.R. (3d) 131 (Gen. Div. [Commercial List]); *Kints v. Kints*, 1998 CarswellOnt 3188, [1998] O.J. No. 3244 (Gen. Div.); *Armstrong v. Northern Eyes Inc.*, (2000), 48 O.R. (3d) 442 (Div. Ct.), affirmed 2001 CarswellOnt 1100 (C.A.).

[113] *Armstrong v. Northern Eyes Inc.*, (2000), 48 O.R. (3d) 442 (Div. Ct.), affirmed 2001 CarswellOnt 1100 (C.A.).

[114] *Woolcock v. Bushert*, (2004), 246 D.L.R. (4th) 139 (C.A.) at para. 33.