

May 25, 2022

## Fairness and The Corporate Oppression Remedy: What is the Difference Between “Prejudice” and “Unfair Prejudice”?

By: Jassmine Girgis

**Paper Commented On:** “Fairness in The Oppression Remedy: How Does Harm Become Unfair?”, 19<sup>th</sup> *Annual Review of Insolvency Law*, [2021 CanLIIDocs13557](#)

[The National Judicial Institute (NJI) recently held its civil law seminar in Calgary, Alberta, where I participated in a panel on director and officer liability. The following blog captures some of my remarks during that panel, as well as excerpts from a recent paper that formed the basis of those remarks]

People have a strong intuitive sense of fairness – even children sense when an adult has treated them unfairly. Perhaps for this reason, in the context of the corporate oppression remedy, which has fairness as its foundation, spotting oppression in a set of facts can be relatively straightforward. The problem, however, is that while unfairness (and oppression) can be easy to see, *why* something is unfair or oppressive can be much more difficult to explain. Indeed, oppression remedy jurisprudence often fails on this point – prejudice or harm may be plainly evident on the facts (Kevin P McGuinness, *Canadian Business Corporations Law*, 3rd ed, vol 3 (Toronto: LexisNexis Canada Inc, 2017) at §21.135), but without guidance the fairness test can seem obscure, and courts sometimes struggle with it. They get the results right, and they give some reasons, but these reasons often do not provide a clear articulation as to what fairness means.

### The Oppression Remedy & BCE

The oppression remedy applies when a complainant satisfies the court that the corporation, its shareholders, or its directors acted in a way that was oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, a security holder, creditor, director, or officer (*Canada Business Corporations Act*, [RSC 1985, c C-44](#) at s 241 [CBCA]). The two-part test for the oppression remedy was set out in *BCE Inc v 1976 Debentureholders* ([2008 SCC 69 \(CanLII\)](#) [BCE]) and includes two broad equitable concepts: reasonable expectations and unfairness. Under the first prong, the court laid out seven factors to determine whether a complainant’s expectations are reasonable (BCE at paras 61, 72-82).

In the second part of the test, the court said that not every breach of reasonable expectations suffered by the complainant would meet one or more of the oppression tests, and that these tests “...are really adjectives that try to describe inappropriate conduct” (BCE at para 67, citing Markus Koehnen, *Oppression and Related Remedies*, 1st ed (Toronto: Thomson Carswell, 2004)). It defined oppression as conduct that is “burdensome, harsh and wrongful” (*Scottish Co-operative*

*Wholesale Society v Meyer* (1958), [1959] AC 324 at 342 (HL (Eng))), or “coercive or abusive” (*Hawkins v TSCC 1696*, [2019 ONSC 2560 \(CanLII\)](#) at para 23 [*Hawkins*]) but not illegal, and for unfairness, it gave examples of conduct that might be construed as unfair (*BCE* at para 89).

What the court did not do in the second part, unlike what it did in part one, was lay out the factors to be considered when determining when conduct ought to be judged as unfair. It also did not prescribe standards on how to discharge that duty of fairness. Failure to do this makes it quite difficult to articulate when and how that duty has been breached.

By failing to explain fairness or develop a framework for analyzing all aspects of fairness in corporate oppression, the SCC has burdened judges by not giving them the tools needed to make these decisions. As a result, the fairness analysis in most decisions is incomplete. While judges do largely explain and articulate the *indicia* of procedural fairness, they struggle to discuss substantive unfairness when assessing whether oppression has been made out. This creates ongoing problems for the legal system, and for persons operating within the scope of corporate law. When judges do not state why actions are unfair, or at which point they become unfair, their decisions simply provide conclusions without explanation thereby denying parties a clear understanding of precisely what they did wrong, preventing the development of principles and jurisprudence on what fairness means in a corporate context, and risking inconsistency in judicial decision-making.

## **Fairness**

It is easy to spot unfairness in the context of the corporate oppression remedy, but articulating *why* something is unfair, or when or how it became unfair, can be more challenging.

In the legislation, fairness appears alongside prejudice and disregard, which are also undefined but are, in and of themselves, relatively easy to conceptualize; prejudice means “limiting or injuring a complainant’s rights or interests” and disregard means “ignoring interests” (*Niedermeier v York Condominium Corp No 50*, [2006 CanLII 21788 \(ON SC\)](#) at paras 7-8 [*Niedermeier*]). Since the prejudice and disregard must be unfair, that must mean that unfairness is something other than, or in addition to, prejudice or disregard.

Fairness has two elements: a procedural element (the process leading up to a decision) and a substantive element (the fairness of the decision itself). The substantive part also has two elements: the conduct itself (or motive) and the effect of the conduct. The two elements of substantive fairness are mentioned in both the statute and in the *BCE* decision. The statute says that the conduct must “effect [...] a result that is unfair”, or that “the business... of the corporation... have been... conducted in a manner” that is unfair (*CBCA* at s 241(2)). *BCE* referred to both the wrongfulness of the conduct and the nature of its effects when discussing when oppression occurs. It said that the oppression remedy is an equitable action requiring “wrongful conduct, causation and compensable injury”, and also, that a claimant must show both “unfair conduct and prejudicial consequences” (*BCE* at para 89).

But *BCE* only identified the elements of substantive fairness, not how to meet them. It said that unfairness requires a “less culpable state of mind” than bad faith, but it did not go further. In other words, it did not delve into the type of wrongful conduct required to produce unfairness. What we

needed was a more rigorous analysis discussing questions such as: What mental elements are necessary? If the mental element is a “less culpable state of mind” than bad faith, then we are in the realm of wilful blindness, recklessness, indifference, and perhaps carelessness. How does the mental element and the effect of the conduct work together? What does a wrongful course of conduct that would satisfy the unfairness tests, look like?

## The Study

Despite *BCE* not providing tools or framework within which to have these fairness discussions, judges have fared well. They intuitively know if unfairness has occurred, which is reflected in the outcomes of their decisions. They extensively discuss and apply procedural fairness. Under substantive fairness, they discuss the effect of the conduct, but the discussion is much less explicit about the type of wrong that was involved.

To see how fairness has played out in the case law, I conducted a small study of cases in the last 4 years. Though too small to be comprehensively representative, it provided a bottom-up way of giving meaning to fairness by offering a glimpse of how courts approach it in oppression claims. I found several fairness factors in the analysis, some of which were explicitly discussed and others that were simply implied.

First, proper procedure is important. Courts regularly note the procedure used in making decisions, including whether parties acted consistently with legal advice, whether complainants were allowed to participate in the process, whether speakers could present their case, and the amount of time they received relative to other speakers. Courts also looked at basic procedures related to maintaining records, holding meetings, and issuing financial statements on time. (See for example, *Saunders v 360373 Alberta Ltd*, [2020 ABQB 300 \(CanLII\)](#); *Lauder v The Owners: Condominium Plan No 932 1565*, [2021 ABQB 145 \(CanLII\)](#) [*Lauder*]; *Kumar v Toronto Standard Condominium Corporation No 24*, [2020 ONSC 956 \(CanLII\)](#) [*Kumar*]; *Kunzler v The Owners, Strata Plan EPS 1433*, [2020 BCSC 576 \(CanLII\)](#); and *Simon Fraser University Foundation v The Owners, Strata Plan BCS 1345*, [2021 BCSC 360 \(CanLII\)](#).)

Second, a lack of transparency, which involves consistently applying and enforcing rules, taking the same approach to similar cases, and being forthcoming, tended to indicate other substantially unfair behaviour. (See, for example, *Marchand v 7104383 Canada Inc et al*, [2021 ONSC 734 \(CanLII\)](#), *Cosentino v Alilovic*, [2020 ONSC 1050 \(CanLII\)](#); and *Kumar*.)

Third, proper procedures in making decisions tended to reflect on the substantive fairness of the decisions themselves. (See *Dilsoz v Rehim*, [2021 BCSC 497 \(CanLII\)](#); *The Investment Administration Solutions Inc v Pro-Financial Asset Management Inc*, [2018 ONSC 1220 \(CanLII\)](#); and *Dhillon v Sher-A-Punjab Community Centre Corporation*, [2018 BCSC 571 \(CanLII\)](#).)

Fourth, when looking at substantive fairness, courts typically identified the effect of the conduct on complainants, and the cases illustrate that mental state or motive of the actor factored in the decisions but its role was not explicitly identified or discussed. The courts also looked favourably on attempts to balance different stakeholder interests, which goes to motive behind

conduct. (See, for example, *Lauder*; *Gill v 1176520 Alberta Ltd*, [2020 ABQB 274 \(CanLII\)](#); *Zaman v Toronto Condominium Corporation No 1643*, [2020 ONSC 1262 \(CanLII\)](#); *MacDonald v Wentworth Condominium No 96*, [2020 ONSC 1048 \(CanLII\)](#); and *Hawkins*.)

## **A Few Takeaways from the Study**

The first big takeaway from the study is that the cases do not attempt to define fairness. There is no agreed upon definition as to what fairness means in practice, and any meaning attributed to it is typically derived from individual circumstances and determined on a case-by-case basis. However, this does not mean that fairness is incapable of further analysis. The concept of “reasonable expectations” is as vague and contextual as fairness and it does not have a definition, but *BCE* provided a framework through which we can determine whether a complainant’s expectations are reasonable. Judges are applying these factors, and the analysis is clear and methodical. The same can be done for fairness.

The second takeaway is that procedural fairness tended to be the focal point of most fairness assessments. Courts consider the same fairness factors in the context of corporate law as they do for administrative law, factors that include transparency, opportunities for participation, notice, impartiality, and arbitrariness. They looked at how companies or individuals had demonstrably met these factors in each case, and they recognized the flexible nature of the duty of fairness, which allows these factors to be met in different ways in different situations.

Recognizing and identifying procedural fairness protections is important, as it provides companies and directors guidance and allows for broader development of principles on what fairness means in a corporate context.

The final takeaway is that despite *BCE*’s failure to explain unfairness and wrongful conduct, courts are considering both mental state and the effect of the conduct in determining whether it meets the unfairness prong of the oppression remedy. Though there is little explicit analysis of mental state much of the time, the cases do show that it plays a part in the outcomes of decisions. Judges relied on facts that spoke to the mental states of the actors and the cases implied that questions such as the following were being asked: Were the parties trying to right the wrong? What kind of effort was being made? Was it a reasonable effort? Did the parties care about the effect of their conduct?

Judges tended to make decisions in favour of actors who behaved well, who made a good faith attempt to deal with the issue, meaning that a party’s reasons for acting impacted the substantive fairness of the actions. This was the case even if the attempts were lacking and there were prejudicial consequences to the complainant. There was more leeway given to individuals who had virtuous intentions, however deficient the attempts to do the right thing, and there was less tolerance of carelessness, indifference, and willful blindness.

## **Conclusion**

These are the patterns that emerge from the case law, and explicitly referring to these factors makes the jurisprudence clearer. We were not provided with a framework from the Supreme Court, but if

we articulate one ourselves, it could make the second part of the oppression remedy test as straightforward to analyse as the first part.

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This post may be cited as: Jassmine Girgis, “Fairness and The Corporate Oppression Remedy: What is the Difference Between ‘Prejudice’ and ‘Unfair Prejudice’?” (May 25, 2022), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2022/05/Blog\\_JG\\_Corporate\\_Oppression\\_Remedey.pdf](http://ablawg.ca/wp-content/uploads/2022/05/Blog_JG_Corporate_Oppression_Remedey.pdf)

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