STRICT CONSTRUCTION TO PURPOSIVE INTERPRETATION:

100 Years of Corporate Commercial Law Judgments by the British Columbia Court of Appeal

JANIS SARRA[1]

I. INTRODUCTION

CORPORATE AND COMMERCIAL LAW is replete with colourful terminology such as "poison pills," "white knights," and "shirking," all of which are short forms for particular conduct by directors and officers in their oversight of a business.[2] While frequently termed "private law," in reality, corporate and commercial law today is highly codified, and directors, contracting parties, and capital market participants have their activities regulated by a myriad of statutes.[3] Hence, there are strong elements of both public and private law in corporate and commercial relations, and this article discusses the British Columbia Court of Appeal's (BCCA's) contribution to the development of both aspects. There are more than four hundred reported corporate and commercial judgments in the BCCA's history, encompassing many broad areas of law: corporate law, securities regulation, insolvency law, banking law, contract law, secured transactions law, financial regulation, maritime law, debtor and creditor law, and a long list of other areas. This short article can offer only a few broad reflections on the court's overall contribution as it celebrates its centenary.

[1] Dr. Janis Sarra, Professor of Law, University of British Columbia Faculty of Law. My thanks to Catherine Hirbour, UBC Law, for her research assistance in locating judgments.

[2] Poison pills are devices put in place to prevent a hostile takeover; white knights are another defence strategy to a hostile takeover when officers seek an alternative friendly bidder; shirking refers to officers failing to comply with their duties under corporate or commercial law.

[3] *Black's Law Dictionary* defines private law as "all that part of the law that is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in which the right inheres and the person upon whom the obligation is incident are private individuals." See *Black's Law Dictionary,* 5th ed. (Chicago: West Publishing Company, 1979) at 1076.

There are two important and related themes in the BCCA's evolving treatment of corporate commercial cases. First, the court shifted from a strict construction of statutory and contract language to one that adopted a purposive and contextual approach to interpretation.[4] A strict construction approach interprets the words of a statute based solely on the express words in the provision. A strict construction can adopt too narrow a meaning of the statute, can ignore commercial realities, and can create incentives for parties to undermine the purpose of the statute by finding gaps in the language that advance their self-interest, sometimes to the detriment of the public policy underlying the statute. A purposive and contextual approach analyzes the wording of a statute, having regard for the entire document, its objectives, the context in which it operates, commercial realities, and the public policy at which it was aimed. The court will engage in gap filling where the statute is silent on a particular matter. Driedger described this interpretive approach as follows: "[T]he words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[5] A purposive approach advances the public policy goals underlying the statute, which, in turn, advances the development of a coherent framework for corporate and commercial law.

Second, the BCCA has, in recent years, undertaken rigorous analysis of its statutory and common law authority, identifying when it is most appropriate to use statutory, equitable, or inherent jurisdiction. The distinction between these interpretive tools is complex and is the subject of considerable scholarly debate and judicial comment.[6] The language of a statute often does not account for all the issues or disputes that can arise.[7] Such is often the case in corporate or commercial legislation, where

---

[4] In corporate law, this has been referred to as a "black letter law" approach; however, since other areas of the law do not appear to use the term in this manner, I use the term "strict construction." "Black letter law" is defined by *Black's Law Dictionary* as an informal term indicating the basic legal principles and text embodied in statutes in a particular jurisdiction. See *Black's Law Dictionary,* supra note 3 at 154.

[5] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67. See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002).

[6] For an analysis, see Georgina Jackson and Janis Sarra, "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. Sarra, ed., *Annual Review of Insolvency Law, 2007* (Toronto: Carswell, 2008) and the cases cited therein as well as the cases discussed in Part 5 of this article.

[7] Professor Waddams has observed that all legal rules contain elements of uncertainty because the circumstances in which the rules come to be applied cannot be precisely foreseen; thus, many rules are necessarily either very general and "open-textured" in nature or allow for

the aim of the statute is to be facilitative of commercial relationships rather than to codify all rights and obligations. The court, in exercising its authority to interpret a statute, may engage in "gap filling" in making its determination in particular circumstances.[8] Another source of authority is equitable jurisdiction, which arose out of the courts of equity, permitting the courts to administer justice and fairness (authority that was later codified in statute).[9] The inherent jurisdiction of a superior court is derived from its nature as a court of law; and a court may exercise its inherent jurisdiction even with respect to matters that are regulated by statute or by rule of court so long as it can do so without contravening any statutory provision. Inherent jurisdiction of the court may be defined as being a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so.[10] As discussed in Part 5, courts across Canada had begun to blur the distinction between these judicial sources of authority in rendering judgments, creating some confusion for parties with respect to the scope of the court's authority. The BCCA was the first appellate court to begin to draw the courts and parties back to consideration of the source of the court's authority.

From its commencement in 1910, the BCCA was engaged in determining business law disputes, some themes of which continue to resonate in its judgments to date.[11] In some instances, such as ultra vires cases, in which parties allege that corporate decision makers have overstepped the bounds of their authority, subsequent legislation has for the most part eliminated the need for the court's assistance in delineating limits on corporate decision making. In other instances, such as shareholder remedies or the scope of director liability, the court has been continually called on to resolve disputes.

In its early years, all four justices sat on corporate commercial cases, and when they were equally divided in their views, the appeal was dismissed.[12] As the BCCA grew in size to ten justices in 1979 and fifteen in 1995, relatively few of the total seventy judges who served on the court over its tenure have written its corporate and commercial judgments.

---

open-ended exceptions in their interpretation. See Stephen Waddams, "Judicial Discretion," *Oxford University Commonwealth Law Journal* 1 (2001): 58 at 60.

[8] Jackson and Sarra, supra note 6.

[9] 80 *Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.* (1972), 25 D.L.R. (3d) 386 (Ont. C.A.); *Black's Law Dictionary,* supra note 3 at 484.

[10] Jackson and Sarra, supra note 6 and the cases cited therein.

[11] *An Act Constituting a Court of Appeal and Declaring its Jurisdiction*, S.B.C. 1907, c. 10, s. 2. See *R. v. Prasiloski* (1910), 15 B.C.R. 29.

[12] See for example, *Re Baird,* [1937] B.C.J. No. 80 (B.C.C.A.); *Johnson v. Carlin* (1914), 20 B.C.R. 521 (B.C.C.A.); *Northwest Trading Co. v. North West Trading Co.,* [1920] B.C.J. No. 3 (B.C.C.A.).

Business law became more complex, but the judgments reflect the fact that the BCCA acquired considerable bench strength in its later years, developing as a leading appellate court. In 1985, Madam Justice Beverley McLachlin was appointed as the first woman to the court, starting a trend of attracting highly skilled and experienced women jurists – a trend that, by 2006, resulted in eight of the fifteen active judges being women. Given their strength in business law, Madam Justice Mary Newbury, Madam Justice Risa Levine, and others have made significant contributions to the development of the law. The Honourable Allan McEachern, Chief Justice of British Columbia from 1988 to 2001, and Chief Justice Lance Finch, who followed him, have been particularly attuned to the need for strong commercial interest and/or experience within the BCCA. These changes during the court's history are reflected in its judgments.

Few parties in corporate commercial cases can appeal as a matter of right; hence, the BCCA's exercise of authority to hear such appeals is an important consideration. The court has been remarkably consistent in its tests for leave to appeal, limiting appeals to "manifest or overriding error," even where the appellate court may have drawn different conclusions from the BC Supreme Court (BCSC) on the evidence in a commercial matter.[13] In considering whether to grant leave to appeal, the BCCA will consider whether the appeal is of significance to the practice, the point raised is of significance to the action itself, and the appeal is prima facie meritorious.[14]

This article briefly examines five periods in the BCCA's development. Part 2 examines the first two decades, wherein strict statutory interpretation limited the extent to which the court would assess the conduct of commercial parties. Part 3 discusses judgments rendered in the 1930s to 1960s, reflecting both the Depression years and the postwar economic boom. Part 4, covering the next two decades, marks a shift in the court's role in facilitating commercial activity. Parts 5 and 6 explore the court's most recent contributions to the development of corporate and commercial law, in particular, its willingness to expand the scope of

[13] Drawing on the Supreme Court of Canada's direction, *Discovery Enterprises Inc. v. Ebco Industries Ltd.,* [1998] B.C.J. No. 1301 (B.C.C.A.) at para. 7. The court will grant leave to appeal a discretionary order only where serious injustice would occur or where the discretion was exercised on a wrong principle. See *Strata Plan LMS 2019 v. Green,* [2001] B.C.J. No. 741 (B.C.C.A.); *Graybriar Industries Ltd. v. South West Marine Estates Ltd.,* [1998] B.C.J. No. 631 (B.C.C.A.); *Evanton Ltd. v. American Bullion Minerals Ltd.,* [2003] B.C.J. No. 1215 (B.C.C.A.). In granting a stay pending appeal, there must be a serious question to be determined; irreparable harm occasioned if the stay is refused; and, on balance, any inconvenience weighs in favour of the applicant; *Evanton,* ibid.

[14] *Evanton Ltd. v. American Bullion Minerals Ltd.,* [2003] B.C.J. No. 1215 (B.C.C.A.); *Goldman, Sachs & Co. v. Sessions,* [2000] B.C.J. No. 998 (B.C.C.A.).

corporate and commercial law remedies. The court's reasoning during the last century illustrates its significant and growing contribution to the continued development of a viable corporate commercial legal framework in Canada.

II. A NEW ROLE: THE FIRST TWO DECADES

The BCCA's creation in 1910 came on the heels of a fifteen-year period of economic boom and rapid expansion of market demand in other parts of Canada and abroad for the province's abundant lumber, fish, and other natural resources.[15] Shipping and rail facilities rapidly developed to carry people and resources, and fishing and canning expanded to meet the demand for food products.[16] Partisan politics had been introduced in 1902 for the first time, shifting British Columbia from its previous system of coalition politics and, in 1903, resulting in the first Legislative Assembly based on federal political party lines.[17] The first woman was called to the bar in 1912, after a two-year legal and political campaign.[18] The first corporate and commercial cases reflected these political and economic developments.

With the influx of considerable capital, there were legal disputes with respect to its use. Early judgments of the BCCA dealt with a broad range of company-related issues, including officer self-dealing transactions,[19] the scope and limits of shareholder remedies, and the powers of directors to oversee and manage company affairs.[20] These early decisions offered direction based on the commercial norms of the day.

---

[15] Daniel Francis, ed. *Encyclopaedia of British Columbia* (Vancouver: Harbour Publishing, 2000); Pierre Burton, *The Great Klondike Gold Rush* (Calgary: McClelland and Stewart, 1991); Edward Whitcomb, *A Short History of British Columbia* (Ottawa: Dollco Printing, 2006).

[16] Jean Barman, *The West beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991); Whitcomb, *A Short History of British Columbia* at 29.

[17] The Conservative Party passed a motion at its convention in 1902 to form a provincial party based on the platform of the federal Conservative Party and to run candidates in the following election; the Liberal Party followed suit. The 1903 election was the first provincial election in British Columbia fought along organized federal party lines, resulting in a Conservative government. See British Columbia Legislative Library, "Party Leaders in B.C. 1900 to 2000" and "History of British Columbia", http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/37907/electoral_history.pdf.

[18] Mabel Penery French, admitted on 1 April 1912. The BC Supreme Court had concurred with the Law Society in refusing to let her write the bar admission examinations, and the Court of Appeal passed the problem to the legislature to decide. See Jean Mann et al., *Women Lead the Way* (Vancouver: University Womens' Club, 2007) at 18.

[19] *Kendall and Another v. Webster* (1910), 15 B.C.R. 268 (B.C.C.A.).

[20] *Doctor v. The Peoples Trust Company, Limited (No. 2)* (1913), 18 B.C.R. 382 (B.C.C.A.); *C.S. Windsor, Limited v. J.W. Windsor* (1911), 17 B.C.R. 105 (B.C.C.A.); *Merchant's Bank of Canada v. McLeod and Leeson* (1910), 15 B.C.R., 290 (B.C.C.A.).

The BCCA quickly embraced its new role, with more than twenty corporate and commercial judgments in the first decade. The first generation of judges were former politicians or brought military experience to their position, and one can sense precision, and occasionally impatience, in the judgments deciding private commercial disputes.[21] The frequent concurring judgments give the impression of the need to establish a public profile rather than strong differences in the judges' substantive view of the law.

However, there were also a significant number of dissenting judgments in the early years, often by Mr. Justice Albert McPhillips, a former attorney general.[22] Differences appear to have rested on divergent normative conceptions of how one should interpret statutes in relation to commercial realities. McPhillips J.A. would often set the broader context for the commercial dispute before the court, analyzing the law with regard to its "spirit, intention and meaning" and the underlying public policy that advanced commercial activity.[23] The majority preferred a strict construction of the statutory language before them.

The BCCA was reluctant to render judgments that examined what made sense commercially, confining itself to strict construction of the statute's wording. In its first reported corporate law judgment in 1910, *Claudet v. The Golden Giant Mines, Limited,* the court overturned the BC Supreme Court decision, finding that, given the lack of statutory language, directors of a mining company had no power to appoint one of the directors as managing director.[24] Another example involves a case where neither the statute nor the company's memorandum specified that directors of a company must receive notice of directors' meetings; and the court held that the company did not need to give notice to one-third

[21] For example, the Honourable Albert Edward McPhillips, appointed in 1913, served in the 90th Regiment in the Northwest Rebellion in 1885 and was previously a BC MLA and attorney general of British Columbia in 1903. The Honourable J.A. Macdonald, Chief Justice Court of Appeal, 1909-29, served as MLA from 1903 to 1909 and was a leader of the Liberal Party. The Honourable David McEwen Eberts (1917-24) was MLA for Victoria and, later, for Saanich (from 1890 to 1916) and was attorney general from 1895 to 1898 and 1900 to 1903. The Honourable Allan McEachern, "The Court of Appeal for British Columbia: Appeal Judges I Have Known, 1951-2006" at 50 (on file with author).

[22] The Honourable Albert Edward McPhillips sat on the BCCA from 1913 to 1938, serving until his death in 1938. See McEachern, supra note 21 at 50.

[23] See, for example, *Wilson v. The British Columbia Refining Company, Limited* (1914), 21 B.C.R. 414 (B.C.C.A.) at 427.

[24] Gallagher J.A., writing for the majority, held that the directors had no authority under the *Companies Act,* 1897 to appoint a director as a managing director; *Claudet v. The Golden Giant Mines, Limited.* (1910), 15 B.C.R. 13 (B.C.C.A.), at 16.

of its directors of the Board of Directors meeting.[25] While the judgment may have reflected 1914 reality with respect to the difficulty of giving notice overseas to directors located in British Columbia and the United Kingdom, the notion that a directors' meeting could be called without notice to all the directors would be unheard of in many jurisdictions, then or now, regardless of whether or not a statute was silent.

The BCCA's approach to interpretation of corporate law diverged considerably from that of appellate courts in Ontario and elsewhere, which adopted a more purposive and contextual analysis of corporate law based on underlying public policy. Yet the BC appellate court's approach must be situated within the legal framework chosen by legislators. British Columbia was one of only two memorandum company law jurisdictions in Canada, meaning that the company's constating documents were viewed as a contract between shareholders of the company.[26] Hence, judgments focused on the contours and limits of the directors' authority vis-à-vis that contractual relationship.[27] The court held that it would interfere with the transactions of a company only where the act complained of was beyond directors' authority, tainted with fraud, or oppressed minority shareholders.[28]

The BCCA's adherence to a strict interpretive approach during this period was not without its tensions. In 1914, Irving J.A., in the context of a shareholder dispute, wrote that it was unfortunate that sections of Ontario companies legislation had been unnecessarily grafted on to comprehensive UK memorandum company statutes when they were introduced in British Columbia, the result being "often a misfit" that gave rise to considerable litigation.[29]

---

[25] *C.S. Windsor, Limited v. J.W. Windsor,* supra note 20 (regarding distinguishing such appointment from their authority to appoint a manager, at 112).

[26] *Doctor v. The Peoples Trust Company, Limited (No. 2),* supra note 20; *in re Federal Mortgage Corporation Limited and Kipp* (1916), 24 B.C.R. 12 (B.C.C.A.); *Carter Dewar Crowe Company v. Columbia Bitulithic Company* (1914), 20 B.C.R. 37 (B.C.C.A.). Shareholders were called members under BC companies' legislation. The second feature of memorandum jurisdictions is that the statute provides for incorporation by registration; hence, once parties seeking incorporation meet the requirements of the statute and pay the required fees, the corporation is formed, without the Crown's making any assessment of the merits of the application. Constating documents are the foundational documents of the corporation, in BC that being memoranda, and in several other Canadian jurisdictions being corporate charters.

[27] *Rose v. British Columbia Refining Co.* [1911] B.C.J. No. 31 (B.C.C.A.); *Scottish Canadian Canning Co. v. Dickie*, [1915] B.C.J. No. 46 (B.C.C.A.); *In re Pacific Coast Coal Mines Limited and Hodges* (1926), 37 B.C.R. 550 (B.C.C.A.).

[28] Ibid. at 554. The court distinguished an earlier judgment, *Pacific Coast Coal Mines,* on the basis that an agreement was ultra vires of the company and could only have been given validity by the performance of a condition, which the Privy Council held had not been performed. See *Pacific Coast Coal Mines, Limited v. Arbuthnot* (1917), 86 L.J., P.C. 172.

[29] *Wilson v. The British Columbia Refining Company,* supra note 23 at 422.

The early judgments also addressed the relationship between private parties and companies; here again, cases were decided on a strict interpretation of the statutes and constating corporate documents.[30] In some cases, the BCCA was called on to interpret private *Acts of the Legislature*, such as one that sanctioned the reduction of capital through the cancelling of shares and the issuing of debentures in replacement.[31] Such statutes are extremely rare now because comprehensive corporate and securities laws are aimed at enabling corporate and capital market activities, thus providing a framework for many corporate transactions.

The economic boom of the turn of the century ended around 1913, and for several years British Columbia struggled economically, a state of affairs exacerbated by the First World War, which reduced capital flow into the province. During this period, the BCCA rendered nine judgments on the winding up of companies in financial distress, adjudicating the contours of a relatively new statute, the *Winding Up Act*, 1909, including the scope of shareholder liability for contributions on winding up.[32] The court refused to interfere with the statutory duties of a liquidator, even where an order would expedite proceedings.[33] It held that it was idle to speak of "inherent jurisdiction" of the court where the statute clearly set out the officer's authority.[34] That issue of statutory authority and inherent jurisdiction was to become a major issue before Canadian courts from the late 1990s onward.

The tensions among members of the court were both procedural and substantive. One extraordinary example involves *Pioneer Lumber Co.*, where four judges were evenly divided on a question of whether a lawyer could appear as counsel on contested evidence in an affidavit that he had sworn.[35] To prevent the case from proceeding, Martin and McPhillips

---

[30] *Rose v. British Columbia Refining Co.* [1911] B.C.J. No. 31 (B.C.C.A.); *Colonial Development Co. v. Beech* [1914] 16 D.L.R. 738 (B.C.C.A.); *Fitzherbert v. Dominion Bed Manufacturing Co.*, [1915] B.C.J. No. 33 (B.C.C.A.); *Vancouver Life Insurance Co. v. Richards* [1919] B.C.J. No. 107 (B.C.C.A.).

[31] *Pacific Coast Coal Mines, Limited v. Arbuthnot* (1916), 23 B.C.R. 267 (B.C.C.A.), (1917), 86 L.J., P.C. 172, where a reorganization scheme was validated by an *Act of the Legislative Assembly of British Columbia*, BC Stats. 1911, chap. 25.

[32] *Winding Up Act*, R.S.C. 1906. *Marston v. Minnekahda Land Co.* [1918] B.C.J. No. 93 (B.C.C.A.); *Re Acadia Ltd.* [1919] B.C.J. No. 20 (B.C.C.A.); *Vancouver Life Insurance Co. v. Richards* [1919] B.C.J. No. 107 (B.C.C.A.); *Bankers Trust Corp. (Liquidators of) v. Okell* [1916] B.C.J. No. 12 (B.C.C.A.), the court's affirming its reasoning in *Re Bankers Trust and Barnsley* (1915), 21 B.C.L.R. 130 (B.C.C.A.).

[33] *Re Dominion Trust Co.* [1916] B.C.J. No. 52 (B.C.C.A.). See also *Harper v. Dominion Trust Co. (Liquidator of)*, [1915] B.C.J. No. 123 (B.C.C.A.); *British Columbia General Contract Co. (Liquidator of) v. Webster*, [1910] B.C.J. No. 39 (B.C.C.A.).

[34] Ibid. at para. 3, Martin J.A. dissenting.

[35] *Pioneer Lumber Co. v. Alberta Lumber Co.* (1923) 32 B.C.R. 321 (B.C.C.A.).

J.J.A. pushed their chairs back, out of alignment with those of the other judges, to show that the court no longer had a quorum, and they refused to hear the lawyer presenting his evidence. While the motion was pending, the fifth judge who had been ill arrived.[36] The lawyer then went to the chief justice in chambers and received the order sought. On appeal of that decision to the full court, Martin and McPhillips J.J.A. again dissented. The majority concluded, on the strict wording of the *Court of Appeal Act*,[37] that a single judge could make a decision incidental to an appeal, and thus dismissed the appeal. The dissenting justices found that the lawyer's conduct was contrary to the court's rules and previous judgments, as well as to the British Columbia Law Society and Canadian Bar Association rules on practice and good ethics, and that it interfered with the court's proceedings. Both Martin and McPhillips J.J.A. wrote strongly worded judgments about the protection of the public interest and the administration of justice.[38] All five justices gave written reasons, revealing the tensions inherent in the court at the time. Those reasons essentially divided along the same interpretive lines as did those in substantive commercial law cases.

By 1916, there was an economic upturn because of wartime demand for supplies and equipment. Politically and socially, the province favoured the interests of capital, setting the stage for economic growth in the 1920s.[39] In contract law, the BCCA differed from its counterparts across Canada by awarding higher nominal damages, both then and subsequently.[40] The decade ended with the collapse of capital markets, setting the backdrop for the decade of judgments that would follow.

---

[36] Section 11 of the *Court of Appeal Act* requires at least three judges to constitute a quorum. *An Act Constituting a Court of Appeal and Declaring its Jurisdiction*, S.B.C. 1907, c. 10.

[37] Ibid. at s. 10.

[38] The lawyer had retained counsel at the chambers motion and at the appeal hearing, and Martin J.A. queried why, if the court's objections had been met, the motion was not simply allowed to proceed before the court with carriage of the motion. There was no further reported judgment on the merits of the case.

[39] Whitcomb, supra note 8 at 38. During this period there was also a profound struggle between labour and capital. See ibid. at 41, 42.

[40] *McGee v. Clarke*, [1927] 1 W.W.R. 593 (B.C.C.A.), awarding fifty dollars. Nominal damages are granted where a legal right has been harmed but damage not proven. See also *State Vacuum Stores of Canada Ltd. v. Phillips,* [1954] 3 D.L.R. 621 (B.C.C.A.); *MacKay v. Southam Co. Ltd.* (1955), 1 D.L.R. (2d) (B.C.C.A.).

III. 1930-60: FINANCIAL HARDSHIP TO ECONOMIC BOOM

In the Great Depression years, British Columbia suffered the effects of negligible capital investment, protectionist import/export measures, and profound poverty, with more than 100,000 residents unemployed by 1933.[41] These economic conditions were mirrored in the BCCA's judgments deciding a series of cases about the control of capital.[42] The court adjudicated disputes on timing of orders for sale, particularly in the period around the 1929 US stock market crash, both before, when stocks were hotly traded and gave rise to market timing disputes, and after, when investors were scrambling to salvage value from their investments.[43] During this decade, many of the court's judgments also dealt with privately or closely held companies, particularly disputes about directors' conduct.[44]

McPhillips J.A. continued to dissent in a number of commercial cases.[45] For example, *Vancouver Breweries* involved the reasonableness of a restraint of trade agreement pursuant to sale of a sake manufacturing business.[46] Restraint of trade deals with contractual agreements that specify that the person selling a business may not immediately set up in competition with that business. The majority of the BCCA upheld a fifteen-year ban on the seller engaging in beer brewing as an enforceable part of the sale contract for the sake business, finding that, while contractual covenants must be not so far reaching as to create a pernicious monopoly, here, no monopoly had been created.[47] The majority judgment does not shed light on how beer brewing would unfairly compete

[41] Whitcomb, supra note 15 at 43.

[42] *British Columbia (Attorney General) v. Royal Bank of Canada*, [1936] B.C.J. No. 34 (B.C.C.A.); *Patterson v. Vulcan Iron Works* (1930) 42 B.C.R. 300 (B.C.C.A.).

[43] *Clay and Clay v. S.P. Powell & Company, Limited, and Powell,* [1931] 44 B.C.R. 124 (B.C.C.A.).

[44] "Closely held" and "privately held" are often used interchangeably to refer to companies, but they are not exactly the same. Privately held companies generally have fewer than fifty shareholders, restrictions on the right to transfer shares, and no ability to publicly subscribe for shares (see, for example, securities legislation for a definition). A privately held corporation is always closely held, in the sense that only a few shareholders control the company. However, a closely held corporation can be publicly traded, usually in debt securities and/or non-voting equity securities.

[45] *Carlton Hotel Company Limited v. Gardiner,* [1934] B.C.J. No. 93 (B.C.C.A.); *Vancouver Breweries Ltd. v. Vancouver Malt & Sake Brewing Co.,* [1933] B.C.J. No. 49 (B.C.C.A.); *Lloyd-Owen v. Bull,* [1936] B.C.J. No. 67 (B.C.C.A.).

[46] *Vancouver Breweries Ltd. v. Vancouver Malt & Sake Brewing Co.,* [1933] B.C.J. No. 49 (B.C.C.A.).

[47] Ibid. at paras. 38 to 41. It held that one ought to be permitted to realize on any property rights acquired through freedom of contract; and restrictive covenants allow the full enjoyment of such property.

with Japanese wine making as it focuses on strict interpretation of the contract's wording. In dissent, McPhillips J.A. found the contract was against public policy, was unduly in restraint of trade, and should have been declared unenforceable. He thus adopted a broad public policy approach to fostering commercial activity and protecting the ability to earn a livelihood.[48] The case illustrates the tension between the justices' normative views of strict versus purposive contract interpretation and whether the court should interfere in commercial matters or leave parties to their private bargains.

The Judicial Committee of the Privy Council in the United Kingdom continued to be the final appellate court during this period, and there was sometimes disagreement within the BCCA regarding directions it had received from the Privy Council.[49] One example is *Lloyd-Owen v. Bull,* where the liquidator of a gold mine petitioned for an order allowing it to take action against the officers and shareholders to recover assets wrongfully acquired by them and unaccounted for to the company.[50] The BCCA dismissed the petition on the basis that a similar action had proved unsuccessful before the Privy Council. A strongly worded dissent by McPhillips J.A. reasoned that the Privy Council had not determined the previous case on the merits and that it was unthinkable that its judgment be construed as a final determination that shareholders were without any possibility of relief. He observed that the Privy Council had taken great pains to indicate the steps required to commence proceedings under the British Columbia *Companies Act* and that the matter should be adjudicated such that no miscarriage of justice would take place.[51]

The Second World War years were economically positive for British Columbia, with investment pouring into forestry, mining, fishing, agriculture, and wartime manufacturing. This economic shift is reflected in litigation before the BCCA, in that shareholder rights disputes resurfaced when there were profits to be shared. Another shift involved the development of technology with regard to transportation and the movement of goods as well as the diversification of manufacturing in

---

[48] Ibid. He adopted the UK courts' definition of public policy, that the legislature's objective is to "give the greatest happiness to the greatest number of the members of the State; and it was violated by privileged persons wrongly obtaining profits for themselves to the detriment of the social community," at para. 5 of the dissenting judgment, citing *Sykes v. Bridges, Routh and Co.* (1919), 35 T.L.R. 464. McPhillips J.A. did concur on the indoor management rule part of the judgment, at para. 2.

[49] *Ferguson v. Walbridge* (1933), 47 B.C.R. 518, (B.C.C.A.).

[50] *Lloyd-Owen v. Bull,* [1936] B.C.J. No. 67 (B.C.C.A.).

[51] Ibid., dissenting judgment of McPhillips J.A. at para. 3; British Columbia *Companies Act,* R.S.B.C. 1924, Chap. 38.

the postwar period. The cases before the court reflect these innovations in terms of the types of companies and the nature of issues, involving the development of dams, electricity, manufacturing, pipelines, natural resources, and the consequent issues with respect to contract law and commercial relationships.[52]

The first cases under the *Securities Act,* 1936, appeared, requiring the BCCA to determine the interaction of capital markets with company law.[53] Issues before the court reflected increased amalgamations and mergers,[54] businesses operating in multiple jurisdictions,[55] and issues with respect to shareholder rights and remedies.[56] One may observe a continued strict construction interpretive approach during this period. There were fewer dissents, and fewer overturned lower court judgments, and the court was more settled in its approach.[57] McPhillips J.A. died in 1938, and, with his death, the court lost a strong voice for interpreting corporate and commercial law from a contextual and commercial perspective.

In several cases, the BCCA grappled with the scope of the common law rule in *Foss v. Harbottle*, which specifies that shareholders cannot interfere with the internal management of a company where officers are acting within their powers. Hence, any lawsuit on behalf of the corporation must be brought by the corporation itself, not by individual shareholders.[58] There are exceptions to the rule, and the justices differed on the test required to come within the exceptions.[59] For example, in *Burrows v. Becker*, the court held that, where a transaction is attacked on the basis of fraud or ultra vires, the court may grant shareholders the right to bring an action for the benefit of the company only if shareholders at a meeting have refused to bring the action or the evidence

[52] *British American Timber Co. v. Jones,* [1941] B.C.J. No. 2 (B.C.C.A.); *Keystone Shingles and Lumber Ltd.* v. *Moody Shingles Ltd,* [1942] B.C.J. No. 65 (B.C.C.A.); *British American Timber Co. v. Jones,* [1941] B.C.J. No. 2 (B.C.C.A.); *Levi v. MacDougall, Trites and Pacific Coast Distillers Ltd.,* [1941] B.C.J. No. 29 (B.C.C.A.).

[53] *Campbell v. Prudential Trust Co.,* [1944] 3 W.W.R. 456 (B.C.C.A.). *Securities Act,* R.S.C. 1936, ch. 254; *R. v. Santiago Mines Ltd.,* [1946] B.C.J. No. 56 (B.C.C.A.); *Born v. Premier Investments (Victoria) Ltd.* [1947] B.C.J. No. 95 (B.C.C.A.).

[54] *Rathie v. Montreal Trust Co.*, [1952] 4 D.L.R. 448 (B.C.C.A.).

[55] *McNeil v. Morrison-Knudsen Co.* (1953), 10 W.W.R. (N.S.) 354 (B.C.C.A.); *Royal Trust Co. v. Penny Spruce Mills Ltd.*, (judgment dated 6 October 1959) (B.C.C.A.).

[56] *In re Champion & White Limited and In re Ajax Holdings Limited* (1943), 58 B.C.R. 536 (B.C.C.A.); *Levi v. MacDougall, Trites and Pacific Coast Distillers Ltd.,* [1941] B.C.J. No. 29 (B.C.C.A.).

[57] See, for example, *H & H Logging Co. v. Random Services Corporation* (15 June 1967) (B.C.C.A.).

[58] *Foss v. Harbottle,* (1843) 2 Hare 461, 67 E.R. 189. However, if the persons against whom the relief is sought themselves control the company and will not permit an action to be brought in its name, the court may allow shareholders to bring an action. See *Rose v. B.C. Refining Co.* (1911), 16 B.C.R. 215 (B.C.C.A.) at 220.

[59] *Burrows v. Becker et al.* (5 June 1967) (B.C.C.A.).

demonstrated that it would be futile to have a shareholder vote.[60] The case involved impugned actions of a company set up to construct and manage an apartment building project before condominium/strata legislation was enacted in 1966 and the ability of tenant-shareholders to bring a common law derivative claim. The court held that an underlying rationale for the exception to the rule was that it would be "intolerable to permit a wrongdoer to escape the consequences of his wrongful acts" by virtue of holding or controlling so many shares of the company that seeking shareholder approval would be futile.[61] However, the court held that the doctrine of futility should be applied with great caution; and, on the facts, it concluded that the respondents should have sought a meeting as there were uncommitted shareholders who should have been canvassed.[62] Norris J.A., in dissent, would have deferred to the findings of the trial judge with respect to the case falling within the exception to the rule.[63] During this period, there were a number of cases in which the BCCA was divided in both the degree of deference to the trial judge and the application of the language to the particular circumstances.

IV. 1970s AND 1980s: PRIORITIES, PROXIES, AND PROTRACTED LITIGATION

In the 1970s, the BCCA continued its tendency to read the statutory language strictly.[64] However, comprehensive reform of corporate law provincially and federally gave rise to new issues of interpretation, and, in this period, one can begin to see the court's consideration of the commercial realities underlying the statutory purpose. As the discussion of judgments below illustrates, notions of fairness and equity, commercial reality, and public interest enter the court's express reasoning in corporate and commercial cases. A purposive interpretative approach had already been the norm in other provinces, particularly Ontario, and in judgments rendered by the Supreme Court of Canada, which likely also influenced the BCCA's interpretive approach.

The codification of particular rights, such as dissent rights in going private transactions, required the BCCA to balance individual shareholder

---

[60] *Strata Titles Act*, B.C.S. 1966, Chap. 46. The company was a private company under the *Companies Act*, 1948, R.S.B.C. Chap. 58, and then the *Companies Act*, 1960, R.S.B.C., Chap. 67. *Burrows v. Becker*, ibid. at para. 109.

[61] Ibid.

[62] Ibid. at paras. 122, 123.

[63] Ibid., dissenting judgment of Norris J.A. at para. 27.

[64] See, for example, *Wall & Redekop Corporation v. Kendon Development Corporation* (27 November 1979); *Harvey v. Harvey* [1979] B.C.J. No. 2 (B.C.C.A.).

rights with the authority of corporate managers.[65] Going private transactions involve majority shareholders buying out the shares of minority shareholders and removing the company from the publicly traded market. There are statutory provisions that facilitate such transactions while protecting minority shareholders to ensure that the process is not abusive and that they receive fair value for their shares. In *Gregory v. Canadian Allied Property Investments,* the court reflected on the myriad of developments in corporate and securities law that had imposed detailed regulatory requirements on changes to corporate capital structures, finding that the legislature intended to use particular language in its commercial sense and that, absent abuse, the court was not to second-guess business motives.[66]

One can also observe further demarcation of the authority of corporate officers and court appointed officers.[67] The cases reflect the BCCA's willingness to defer to the business judgments of corporate officers in their determination of the extent of disclosure required on an amalgamation agreement, distinguishing standards where recipients are already familiar with the company and requirements under securities legislation for new market participants.[68] During this period, the court also considered the division of powers between provincial securities regulators and federally incorporated companies, determining the scope of the public interest powers of securities regulators.[69] The court determined that a high degree of deference should be given to decisions of the Securities Commission, setting in place a trend of deference to its specialized expertise that was followed in other Canadian jurisdictions.

As personal property securities legislation was enacted and tested during the economic downturn experienced in British Columbia in the 1980s, the BCCA was called on to address the timing and priority of fixed and floating charges in relation to one another; thus, in a number of cases, tying statutory protections and common law doctrine with notions of equity and the public interest.[70] For example, in *Federal Business*

---

[65] *Gregory v. Canadian Allied Property Investments Ltd.,* [1979] B.C.J. No. 5 (B.C.C.A.).

[66] Ibid. at paras. 17, 22, 29.

[67] *Venrose Holdings Ltd. v. Pacific Press Ltd.* (29 June 1978) (B.C.C.A.); *Re Chimo Structures Ltd.* (11 February 1977) (B.C.C.A.).

[68] *Ardiem Holdings Ltd. v. Non-Management Shareholders,* [1976] B.C.J. No. 3 (B.C.C.A.) at paras. 25–28.

[69] *Re Chromex Nickel Mines Ltd.* (1970), 16 D.L.R. (3d) 273 (B.C.C.A.), leave to appeal to S.C.C. denied, [1971] S.C.J. No. 94. The court also dealt with the scope of obligations of stockbrokers in their contracts with investors. See *George v. Dominick Corp. of Canada,* [1970] B.C.J. No. 1 (B.C.C.A.).

[70] *Savin Canada Inc. v. Protech Office Electronics Ltd.,* [1984] B.C.J. No. 1626 (B.C.C.A.). It also determined whether an equitable assignment of insurance first in time is intended to stand in

Development Bank, McLachlin J.A. explored the difference between title to property and equitable charges on property.[71] The concept of a floating charge, which emerged in Canada in the nineteenth century, and which, parenthetically, does not exist in many jurisdictions in the world, permitted companies to raise capital by charging their entire undertaking, while at the same time being permitted to continue dealing with encumbered assets in the ordinary course of business.[72] The claim to pay on the debt was floating in the sense that it hovered over all the assets but allowed the debtor to continue to deal with its property.[73] The court held that such a charge does not give the chargeholder priority over third parties' acquiring rights in the ordinary course of business.[74] The judgment drew on commercial expectations and public interest in finding a need for certainty for third parties in their dealings with debtor companies that have encumbered assets.

In 1978, the BCCA rendered a benchmark judgment in *Harry v. Kreutziger* on the unconscionability doctrine in contract law.[75] In order to establish that a bargain is unconscionable, the court held that the plaintiff must show that there was an inequality in the position of the parties due to ignorance, need, or distress of the weaker party, which would leave him or her in the power of a stronger party, coupled with proof of substantial unfairness in the bargain.[76] Lambert J.A., writing a concurring judgment, held that "the single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded."[77] The judgment marked one of the turning points in the court's interpretive approach, whereby contract doctrine was developed based on a contextual

---

the place of property in a priority contest between floating and fixed charges. See *Canadian Commercial Bank v. Canadian Imperial Bank of Commerce,* [1988] B.C.J. No. 220, 47 D.L.R. (4th) 632 (B.C.C.A.); and, regarding the issue of the priority of possessory loans with respect to goods also subject to a floating charge under a debenture, see *Lloyds Bank of Canada v. Lumberton Mills Ltd.*, [1988] B.C.J. No. 2062, 32 B.C.L.R. (2d) 67 (B.C.C.A.).

71 *The Queen in Right of British Columbia v. Federal Business Development Bank* (1987), 43 D.L.R. (4th) 188 (B.C.C.A.) at para. 22.

72 Ibid. at para. 25.

73 Including a statutory lien for sales tax. See ibid.

74 *The Queen in Right of British Columbia v. Federal Business Development Bank,* supra note 71. The court held that it would be unfair and inconsistent to permit a debenture holder to grant to a debtor the right to carry on business, while insulating it from the usual legal incidents of doing business (such as seizure and sale by creditors and liens incidental to the business imposed by statute). See ibid. at paras. 45, 46. See also *Stave Falls Lumber Co. et al. v. Westminster Trust Co.*, [1940] 4 D.L.R. 382 (B.C.C.A.).

75 *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 321 (B.C.C.A.).

76 Ibid. at 237, citing *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) at 713.

77 Ibid. at 241.

approach with regard to commercial standards. Lambert J.A.'s reasoning has been widely adopted by other Canadian courts as the appropriate approach.

The court made a number of significant rulings in contract law during this period, including some dealing with politically sensitive issues, as illustrated by *K.R.M. Construction Ltd. v. British Columbia Railway Co.*[78] In 1969, the provincial government announced plans to extend the railway northward towards the Yukon, a promise made in the heat of an election year without any analysis of the resources needed for such a project. It directed British Columbia Railway (BCR) to call for tenders for construction. Two contractors were awarded contracts to build the line near Skeena Pass; however, after construction commenced, it became apparent that the BCR had misrepresented the cost specifications in its tender documents and during subsequent negotiations. The contractors had to shut down because of the exorbitant costs.[79] After a lengthy fifty-five-day trial, the BCR was found liable in fraud for inducing the contractors to enter into the contract, and $11 million was awarded in damages.[80] On appeal, the BCCA held that the BCR was liable, and the principle for awarding damages was that plaintiffs were entitled to be put in the position they would have been in but for the fraudulent misrepresentation, the court agreeing with the trial judge's assessment of operating losses due to the fraud.[81] However, the appellate court disagreed on damages for profits lost due to the contractors' inability to bid on other contracts.[82] The court held that the principle is that the loss is recoverable if it flows directly from the fraudulent inducement and is not too remote as a consequential loss.[83] Making assumptions of loss based on industry averages was too tenuous and would have been tantamount to the BCR's underwriting profits for the contractors for a

[78] *K.R.M. Construction Ltd. v. British Columbia Railway Co.*, [1982] B.C.J. No. 2049 (B.C.C.A.).

[79] Ibid. at para. 5.

[80] Ibid. at para. 11.

[81] Ibid. at paras. 15, 61, 62, 98. There were nineteen grounds of appeal raised by BCR, only four of which were questions of law. The court held that the trial judge was correct in holding that BCR representatives did not have an honest belief that the quantities estimated were "approximate" in the sense of being accurate within 20 percent; and, while an owner is entitled to rely on the saving provisions in contract documents, as to the accuracy of the quantities in breach of contract cases, an owner who makes fraudulent misrepresentations as to the accuracy of the quantities cannot invoke the saving provisions in the contract as a defence to a charge of deceit (at para. 39).

[82] It concluded that the trial judge erred in accepting expert evidence on the amount of lost profits as the judgment was based on unwarranted assumptions using different industry averages. See ibid. at paras. 109, 112.

[83] Ibid. at para. 107.

number of years; hence, the court reduced the damages to $4 million.[84] The case was significant for the BCCA's treatment of damages for profits lost from the forgone ability to bid on other contracts.

Another noteworthy judgment on damages may be found in *Dusik v. Gooderam,* which involved a director who was a 90 percent shareholder of a meat-processing company. He had convinced the minority 10 percent shareholder, who was under financial pressure, to sell his interest at a low price, without informing him that there was a higher bidder to whom he himself sold.[85] The BCCA held that the director had failed to act in good faith and had unfairly taken advantage of the financial pressures faced by the minority shareholder.[86] Shareholders can sue, even where there is a clear wrong to the company, where there has been an oppressive and unjust exercise of the power of majority shareholders for advantage to themselves to the detriment of the minority.[87] The court also found the purchaser liable for an unconscionable bargain, given that the latter also had pressured the minority shareholder to sell at a fraction of the shares' real worth by threatening to deal directly with his bank and close the sale on a date that would result in negative tax consequences.[88] The judgment extended the circumstances in which damages would be awarded, the court finding that, where rescission is unavailable, it would be inequitable for the defendant to retain the benefits of an unconscionable bargain.[89]

Yet, while the court's jurisprudence in contract law was shifting to a more textured analysis, its statutory interpretive approach to corporate and related areas of law became less predictable, waffling somewhat between its traditional approach of strict construction and a more purposive analysis.[90] *B.C. Preeco* illustrates the former, showing the court reluctant to interfere with the separate legal personality of the corporation

---

[84] Ibid. at para. 111. The court also upheld the trial judge's finding that it could award interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1979, c. 76, which it held was intra vires the powers of the province on the basis that, while the *Act* affects the matter of interest, it is in "pith and substance" valid legislation affecting property and civil rights and the administration of justice (at para. 124).

[85] *Dusik v. Gooderam,* [1985] B.C.J. No. 18 (B.C.C.A.). They also breached the insider trading provisions of the *Company Act*.

[86] Ibid. at paras. 46-49. The appeal with respect to tortious intimidation against the solicitor Gooderam failed, however, and the lower court decision on that point was overturned.

[87] Ibid. at 36, citing *Goldex Mines Ltd. v. Revill* (1975), 54 D.L.R. (3d) 672 (Ont. C.A.).

[88] Ibid. at paras. 86-88.

[89] Ibid. at paras. 103, 110. Rescission refers to the unmaking of a contract, to the process of rendering it non-existent, thus relieving parties of all obligations under it.

[90] See for example, *Oakley v. McDougall,* [1987] B.C.J. No. 1226 (B.C.C.A.); *Grouse Mountain Resorts Ltd. v. Holders of the Common Shares of Grouse Mountain Resorts Ltd.,* [1989] B.C.J. No. 579 (B.C.C.A.); *Trans Mountain Pipe Line Co. v. Inland Natural Gas Co.,* [1983] B.C.J. No. 1622 (B.C.C.A.); and *U.S. Gold Corp. v. Atlanta Gold Corp.,* [1989] B.C.J. No. 2237 (B.C.C.A.).

and declining to "draw aside the corporate veil." The case involved a vendor that had entered into a contract to sell land to a company that turned out to be a shell corporation with no assets.[91] The vendor had originally dealt with a company with the same name, undertaking its due diligence to ensure the purchasing company had substantial assets. The principals of both companies then switched names of the companies, deceiving the vendor. The BCCA refused to draw aside the corporate veil to find the company with the assets liable; however, it did find the principals liable for fraudulent misrepresentation. The court expressly rejected the US "Deep Rock Doctrine," which permits a corporate veil to be lifted where to do otherwise would not be fair, finding that recognition of such a doctrine would go against the fundamental corporate law principle of the separate legal personality.[92] The court held that the use of a company as a means to avoid business losses did not warrant drawing aside the veil, but improper conduct by the principals warranted an award of damages against them personally for their fraud.[93] While the individuals were held liable, the "deep pockets" were in the corporation with the assets; yet, the court was reluctant to draw aside the corporate veil, even where fraud was involved. It is unclear from the judgment whether the individuals had any personal wealth or were insured such that the remedy granted would have been effective.

An example of a move towards purposive interpretation may be found in *Bellman v. Western Approaches*, where the BCCA held for the first time that it is possible for both a personal and a derivative action to proceed on the same set of facts where an arguable case is shown.[94] Previously in Canada, plaintiffs had to choose whether the remedies sought were personal or derivative in nature, based on whether a wrong was committed against a plaintiff in his or her personal capacity or was "derived," or suffered, as a consequence of a wrong committed against the corporation. In *Bellman,* the court held that, even if shareholders ratify an alleged breach of duty by corporate directors, that alone would no longer provide a reason to dismiss an application for leave to proceed with a derivative action.[95] *Bellman* has been widely endorsed by courts across

[91] *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.,* [1989] B.C.J. No. 1032 (B.C.C.A.).

[92] Ibid. at 6, citing *Salomon v. Salomon & Co.,* [1897] A.C. 22 (H.L.).

[93] Ibid. at 7.

[94] *Re Bellman and Western Approaches Ltd.* (1981), 33 B.C.L.R. 45 (B.C.C.A.) at 53-54, noting that this is quite different from the rules established at common law.

[95] Ibid. at 203. Here, damages for beach of fiduciary obligation were not sought or available under the personal action but were sought under the derivative action.

Canada.[96] The judgment set the stage for more fundamental challenges under these statutory provisions in the decade to follow.

V. THE 1990s: EXPANDING THE SCOPE OF CORPORATE LAW REMEDIES

In the 1990s, the BCCA added considerably to its strength in the corporate commercial area, these justices dealing with complex and nuanced issues. Significant was the more fulsome shift to a contextual and purposive analysis of corporate and commercial law. There were numerous judgments on the availability of oppression remedies,[97] shareholder voting rights,[98] shareholder meetings,[99] and unanimous shareholder agreements.[100] In *Safarik v. Ocean Fisheries*, the court held that, while the starting place for analysis of shareholder remedies must be legal rights, a shareholder can also hold equitable rights, breach of which may ground a request for relief.[101] Equitable rights are based on notions of justice and fairness, in contrast with legal rights, which are granted pursuant to a statute or contract.

Of particular note were judgments delineating the scope of claims arising out of alleged corporate misconduct. The BCCA allowed oppression and derivative claims to be heard together if the dual nature of the injury did not preclude litigation by a shareholder as an individual where the personal harm is particularized, building on its earlier reasoning in *Bellman*.[102] The court observed that a derivative proceeding is often the only effective discipline that a minority shareholder has against the majority, or directing mind, for wrongs committed against the company.

---

[96] See, for example, *Intercontinental Precious Metals Inc.,* supra note 23 at para. 44.

[97] See, for example, *Liu v. Sung,* [1997] B.C.J. No. 1516; *Lee v. International Consort Industries Inc.,* [1992] B.C.J. No. 106 (B.C.C.A.); *Woloshuk v. Woloshuk,* [1998] B.C.J. No. 2377 (B.C.C.A.); *Safarik v. Ocean Fisheries Ltd.,* [1995] B.C.J. No. 1979 (B.C.C.A.).

[98] *Fama Holdings Ltd. v. Powertech Industries Inc.,* [1997] B.C.J. No. 994 (B.C.C.A.); *Saunders v. Cathton Holdings Ltd.,* [1997] B.C.J. No. 667 (B.C.C.A.).

[99] *Richards v. Westall Resources Ltd.,* [1994] B.C.J. No. 788 (B.C.C.A.).

[100] *Lyall v.* 147250 *Canada Ltd.,* [1993] B.C.J. No. 874 (B.C.C.A.).

[101] *Safarik v. Ocean Fisheries Ltd.,* [1996] B.C.J. 76 (B.C.C.A.); *Safarik v. Ocean Fisheries Ltd.,* [1996] B.C.J. No. 2520 (B.C.C.A.). There were several commercial law cases with respect to the scope of set-off and other creditor remedies. See *Royal Bank of Canada v. Lions Gate Fisheries Ltd.,* [1991] B.C.J. No. 5 (B.C.C.A.); *Cam-Net Communications v. Vancouver Telephone Co.,* [1999] B.C.J. No. 2855 (B.C.C.A.).

[102] *Drove v. Mansvelt,* [1999] B.C.J. No. 2150 (B.C.C.A.); *Lomak Industries Corp. v. Bull, Housser & Tupper,* [1995] B.C.J. No. 1494 (B.C.C.A.). The courts have granted leave to pursue alleged negligence and breach of fiduciary obligations by directors and officers. See *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* [1995] B.C.J No. 2262 (B.C.S.C.) [In Chambers], affirm'd [1996] B.C.J. No. 2309 (B.C.C.A.), leave to appeal to S.C.C. dismissed [1998] S.C.C.A. No. 4.

A remedy should not be denied simply because the shareholder has a relatively small stake in the outcome.[103] The court held that it would assess whether the action is being brought in good faith and is in the interests of the company.[104]

The BCCA was one of the first appeal courts in Canada to resolve the problem of compartmentalization of personal and derivative claims, which had previously posed a substantial barrier to such actions. In *Pasnak v. Chura,* the court held that directors' conduct may constitute both a breach of fiduciary obligation, giving rise to a derivative action on behalf of the company, and the basis of an oppressive and unjust exercise of the powers of the majority shareholders for the promotion of an advantage to themselves to the peculiar detriment of the minority, provided that the complainant has also been harmed qua shareholder, in a manner different from the indirect effect on the value of all shareholders' shares generally.[105]

The judgments reveal that a derivative action remedy is sought more frequently with respect to closely held corporations, where the investment of complainants is high, their risk less diversified, and their exit options limited, because value that could accrue to the complainant indirectly through the financial health of the corporation is likely to be higher. Shareholders in large publicly traded companies are less likely to pursue such cases as their investment risk tends to be more diversified, there is a market for their shares if they want out, and the small stake they have in the company may not warrant the costs of litigation.

---

[103] *Discovery Enterprises Inc. v. Ebco Industries Ltd.* [1998] B.C.J. No. 1301 (B.C.C.A.) at para. 5.

[104] Ibid. at paras. 5, 22, 23. The court will also be mindful of the cost and inconvenience of commencing a derivative action if the potential recovery would be small. In bankruptcy, where a trustee refuses to pursue legal proceedings, individual shareholders may be entitled to an order authorizing proceedings in the name of the company as well as to continue personal actions. See *Liu v. Sung* [1991] B.C.J. No. 2291 (B.C.C.A.). The jurisprudence on "the interests of the corporation" under derivative leave applications was uneven for a period due, in part, to differences in statutory language. The pre-2004 BC *Company Act* required that the action be prima facie in the interest of the company, whereas the new BC *Business Corporations Act,* SBC 2002, c. 57, section 233(1)(d) specifies that it must "appear" to be in the interests of the company. Now the complainant must demonstrate an arguable case that is not bound to fail or to show that there is a reasonable chance of success. See *Gartenberg v. Raymond* [2004] B.C.J. No. 2012 (B.C.C.A.) at para. 7.

[105] *Pasnak v. Chura* [2004] B.C.J. No. 790 (B.C.C.A.) at paras. 31-33. The court, endorsing its earlier reasoning, held that minority shareholders can sue, even where there is a clear wrong to the company. The court has a broad discretion to order a remedy for the harm caused. However, there are relatively few Canadian cases that have actually issued a final disposition in a derivative action case, let alone awarded a remedy. For a critique, see William Kaplan and Bruce Elwood, "The Derivative Action: A Shareholder's 'Bleak House?'" *UBC Law Review* 36 (2003): 443.

The BCCA also helpfully delineated the precise contour of the relationship between the complainant and the corporation in the context of a derivative action.[106] In *Discovery Enterprises v. Ebco Industries,* Discovery had obtained leave to bring a derivative action in Ebco's name against its creditors at the same time that it was pursuing an oppression action against Ebco.[107] Newbury J.A., writing for the court, held that derivative claims are brought in the company's name to ensure that the company receives any damages should the action be successful; but the complainant does not acquire a fiduciary obligation when it becomes the representative acting on behalf of the company in the action.[108] The court held that the complainant is not required to represent the interests of the corporation beyond those defined by the pleadings for which leave is granted; the relationship between the parties could not be simultaneously adversarial and fiduciary.[109] This finding differed from earlier Canadian case law, where courts had held that persons with conduct of the action acquired a fiduciary obligation.[110]

The BCCA has, on occasion, been overturned. *Hodgkinson v. Simms* is an example, where the Supreme Court of Canada (SCC) found the appellate court's strict construction of contract obligations to be too narrow.[111] The issue was alleged breach of fiduciary obligation under a contract for investment advice and tax-related financial services. The SCC set aside the BCCA's finding of no breach of fiduciary obligation, holding that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between parties.[112] Rather, such a duty can be imposed where there is scope for the exercise of some discretion or power; that power can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and a peculiar vulnerability to the exercise

---

[106] *Discovery Enterprises Inc. v. Ebco Industries Ltd.,* [1998] B.C.J. No. 2674 (B.C.C.A.).

[107] Ebco sought to enjoin Discovery's law firm from acting in the derivative action as it was already representing Discovery on the oppression application, arguing a conflict of interest (see ibid.).

[108] Ibid. at para. 9. Fiduciary obligation arises where a party has scope for the exercise of some discretion or power, can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests, and the beneficiary is vulnerable to the person holding the discretion or power. Madam Justice Wilson first undertook this analysis in *Frame v. Smith*, [1987] 2 S.C.R. 99 at para. 60, which was subsequently endorsed by the SCC in *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R.574 and other cases.

[109] *Discovery Enterprises Inc.,* supra note 106 at para. 9.

[110] See, for example, *Intercontinental Precious Metals Inc.,* supra note 23 at para. 58.

[111] *Hodgkinson v. Simms*, [1994] S.C.J. No. 84, overturning (1992), 65 B.C.L.R. (2d) 264 (B.C.C.A.). Both the lower court and the BCCA had found a duty of disclosure and breach of contract, which was not an issue on appeal. See ibid. at para. 20.

[112] Ibid.

of that discretion or power is found.[113] The SCC held that commercial interactions between parties at arm's-length derive their social utility from the pursuit of self-interest and that courts will be circumspect in applying fiduciary duties; however, a person should not need to protect him or herself from abuse of power when the very basis of the contract is that the professional advisor is to use special skills on her/his behalf.[114] Where elements of trust, confidence, and reliance on skill and knowledge are present, fiduciary obligations arise.[115]

Of note, however, is the fact that relatively few of the BCCA's extensive judgments in corporate and commercial law over the past hundred years have been challenged either previously before the Privy Council or, more recently, the SCC.

VI. THE COURT'S CENTENARY YEARS: STATUTORY GAP-FILLING AND EQUITABLE JURISDICTION

In this decade, the BCCA's jurisprudence has contributed to a tightening of judicial reasoning and grounds of authority, pulling its own court of first instance and those in other jurisdictions back from vague assertions of inherent jurisdiction to a purposive interpretation of the broad reach of statutory authority.[116] In a sense, therefore, the court is in its renaissance period, with appellate courts across Canada adopting its reasoning and insights as to how courts ought to approach their authority in complex commercial matters that require timely and practical resolution. For example, the court has held that a basic principle of contract interpretation is that an interpretation consistent with commercial reality is to be favoured, thus articulating a contextual approach to contract law.[117]

The BCCA's shift from a strict construction interpretive approach to a contextual approach still has at its basis a deep commitment to finding its authority in the statute. Several insolvency cases are illustrative, where the court exercises a supervisory authority under the *Companies' Creditors Arrangement Act* (*CCAA*). The *CCAA* is skeletal in nature and its

[113] Ibid. at para. 28.

[114] Ibid. at paras. 38, 40.

[115] Ibid. at paras. 44, 54, 55, 70. The BCCA had erred in failing to recognize that a fiduciary obligation was breached by the professional's failure to disclose a pecuniary interest he had with the developers.

[116] In the insolvency law context, restructuring legislation is skeletal in nature and courts have drawn on both equitable and inherent jurisdiction, sometimes lacking clarity in the grounds for their authority. For a discussion, see Jackson and Sarra, supra note 6.

[117] *Kingsway General Insurance Co. v. Loughheed Enterprises Ltd.* 2004 B.C.C.A. 421, 32 B.C.L.R. (4th) 56 (B.C.C.A.).

provisions are broadly aimed at facilitating the restructuring of financially distressed corporations, but there is little codified detail on how this restructuring is to be accomplished. In *Skeena Cellulose Inc.*, rather than invoking inherent jurisdiction, Newbury J.A. marked a preference for statutory interpretation and judicial discretion conferred by the statute.[118] The BCCA observed that, in the exercise of its broad discretion under the *CCAA,* courts may sanction the indefinite or even permanent affecting of contractual rights; however, there are limitations to exercise of that authority.[119] The court held that, in "filling in the gaps" of the *CCAA,* "courts have often purported to rely on their inherent jurisdiction" where the statute confers broad jurisdiction with few specific limitations; however, the court held that the courts have really been exercising a discretion given by the *CCAA* rather than their inherent jurisdiction.[120] When a court approves a *CCAA* plan of arrangement that contemplates that binding contracts will be terminated by the debtor corporation, it is exercising the discretion given to it by the statute.[121] This reasoning has been endorsed by courts across Canada.[122]

In *Agro Pacific Industries,* the BCCA held that a *CCAA* plan of arrangement is, among other things, a compact or a contract between a distressed company and its creditors.[123] The creditors agree to compromise their claims; the company is afforded protection from a multitude of debt proceedings; and realization of corporate assets is for the benefit of creditors in return for the company's being free of debt claims. A public company's assets had been sold and the value, only forty-four cents on the dollar of outstanding claims, was distributed to creditors. The company's registration was continued because the corporate shell had value; and the BCSC subsequently made an order authorizing issuance of shares and releasing the company from all liabilities to creditors. Two years later, the company received $777,000 as settlement proceeds in class action litigation commenced prior to the *CCAA* proceeding.[124] Notwithstanding the release, the court held that the proceeds should be payable to creditors under the plan as it accorded with fairness and

---

[118] *Re Skeena Cellulose Inc.* (2003), [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C.C.A.).

[119] Ibid. at para. 40. The court held at para. 42: "It may be unnecessary to add that in cases of direct or express conflict between the *CCAA* itself and a provincial statute, the doctrine of paramountcy would apply and the federal statute would prevail."

[120] Ibid. at para. 45.

[121] Ibid. at para. 46.

[122] See, for example, the Ontario Court of Appeal judgment in *Re Stelco Inc.* [2005] O.J. No. 1171, 75 O.R. (3d) 5, [2005] O.C.J. No. 1188 (Ont. C.A.).

[123] *Re Agro Pacific Industries Ltd.* (2007) 38 C.B.R. (5th) 161 (B.C.C.A.).

[124] It also received a mortgage receivable of $70,000 (see ibid.).

the reasonable expectations of the parties. The funds were realized in a temporal period not far removed from the time during which the plan was under active administration and the supervising court's jurisdiction extended to make such an order.

Most recently, Tysoe J.A., writing for the BCCA, overturned an order extending a stay of proceedings and granting post-commencement financing, which allows companies to keep operating pending a restructuring under the *CCAA*.[125] The court held that the nature and state of a business are simply factors to be taken into account when considering whether it is appropriate to grant a stay; and a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating compromises and arrangements between companies and their creditors. In the absence of an expressed intention to propose a plan to creditors, it was not appropriate for the stay to have been granted as the *CCAA* is not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise on which creditors may vote. The BCCA engaged in a purposive interpretation of the statute, with careful attention to the scope of the court's authority. The judgment is the first in Canada that carefully examines the court's jurisdiction to approve what is referred to as a "liquidating *CCAA*," without resort to the codified procedures under the *Bankruptcy and Insolvency Act*.[126]

The other broad trend of this decade is the court's contribution to determining the scope of director and officer responsibilities, including the appropriateness of poison pills;[127] fiduciary obligations owed to the corporation;[128] conflicts of interest;[129] the revocability of proxies;[130] the issue of retrospective versus retroactive enactment of environmental legislation and corporate liability for remediation;[131] and delineating shareholder rights.[132] Any one of these cases would deserve an article of its own. Of note is that the appellate court has allowed the appeal where

---

[125] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 B.C.C.A. 327 (B.C.C.A.). In Canada, post-commencement financing is called debtor in possession financing.

[126] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (*BIA*).

[127] *Tolko Industries Ltd. v. Riverside Forest Products Ltd.*, [2004] B.C.J. No. 2481 (B.C.C.A.).

[128] *Malcolm v. Transtec Holdings Ltd.*, [2001] B.C.J. No. 413 (B.C.C.A.).

[129] *Canadian Metals Exploration Ltd. v. Wise*, [2007] B.C.J. No. 1231 (B.C.C.A.).

[130] *Re Pacifica Papers Inc.*, [2001] B.C.J. No. 1714 (B.C.C.A.) at para. 15.

[131] *British Columbia (Hydro and Power Authority) v. British Columbia (Environmental Appeal Board)*, [2003] B.C.J. No. 1773 (B.C.C.A.).

[132] *Topgro Greenhouses Ltd. v. Houweling*, [2006] B.C.J. No. 831 (B.C.C.A.); *Rubysea Investments Ltd. v. Montalban*, [2002] B.C.J. No. 2439 (B.C.C.A.); *Urquhart v. Technovision Systems Inc.*, [2003] B.C.J. No. 120 (B.C.C.A.); *ABOP LLC v. Qtrade Canada Inc.*, [2007] B.C.J. No. 1046 (B.C.C.A.).

the BCSC has been too rigid in its interpretation of statutory requirements and has affirmed the latter's decision where it has taken a purposive view of statutory requirements. The judgments mark a clear shift from earlier periods in the BCCA's deliberative history.

One example involves a judgment allowing an oppression claim where the court held that the reasonable expectation of the shareholder was to continue to hold one-third of the shares of a company on a pro rata basis.[133] While consideration of compliance with legal obligations is the necessary starting place, the BCCA held that there is more to the inquiry in an oppression application than strict legal rights. The trial judge had interpreted the test for oppression too narrowly and had failed to consider the nature of the company and the shareholder's reasonable expectations.[134] In a closely held company where three shareholders served as directors together over an extended period, a reasonable expectation was that the shareholder would continue to hold an equal shareholding position in relation to the others.

In a judgment regarding shareholder rights in a going private transaction, the BCCA interpreted the intersection of corporate and securities law provisions.[135] The court held that a shareholder had acted in concert with the acquisition group when he agreed to support a proposed arrangement, with the consequence that his vote should not have been counted for purposes of compliance with special minority votes under securities legislation.[136] Newbury J.A. observed that corporate law provides a means by which minority shareholders may be "squeezed out" involuntarily by majority shareholders and that, while going private transaction requirements are not onerous, they must be observed in order to protect minority shareholders.[137] The court held that securities law ensures that a special minority does not include persons who have already agreed to act in concert with an acquisition group by voting in favour of a proposal.[138]

The BCCA also provided guidance on the scope of public authority and private conduct under securities law. In *Re Cartaway Resources*

---

[133] *Cross v. Mountain High Recreation Ltd.*, [2007] B.C.J. No. 351 (B.C.C.A.) at para. 24.

[134] Ibid. at paras. 25, 33.

[135] *Re Sepp's Gourmet Foods Ltd.*, [2002] B.C.J. No. 289 (B.C.C.A.). A going private transaction occurs when a company is taken out of the publicly traded market through a purchase of shares back from shareholders.

[136] Ibid. at para. 31.

[137] Ibid. at para. 1, observing that the prohibition does not extend to persons who enter lockup agreements after the mailing of a circular, at which time a wider discussion of shareholder interests is likely to take place.

[138] Ibid. at 36.

Corp., the court upheld a Securities Commission decision that found two individuals guilty of offences under the *Securities Act* in their role as control persons and de facto directors in a conflict of interest and breach of the duty to act in the company's best interest.[139] While the court held that the standard of review was one of reasonableness, with deference to the commission as the finder of fact, it reduced the penalty.[140] The court held that the public interest power to impose a penalty can only be exercised where there has been a statutory breach, and here, there was only one infraction, the public was not harmed, no shareholder was hurt, and other brokers engaged in similar conduct had received considerably smaller fines.[141] The BCCA held that the purpose of the commission's public interest jurisdiction is neither remedial nor punitive; rather, it is protective and preventive. It is to be exercised to restrain future conduct that is likely to prejudice the public interest in fair and efficient capital markets.[142] The focus of regulatory law is on the protection of societal interests, not the punishment of an individual's moral faults or past conduct, which is the role of the court.[143]

VII. CONCLUSION

The BCCA has a long and distinguished history. Its judgments have shifted from a strict construction interpretive approach to a contextual and purposive analysis, interpreting statutes and regulatory provisions with a view to their overall objectives and commercial reasonableness. The court's jurisprudence reflects the economic rise and fall of businesses during particular periods. Its contribution to contract law has been most significant in the area of damages, where it has been a leader in delineating when the court ought to intervene in parties' commercial dealings on an equitable basis. In corporate law, the court has been the primary source of memorandum jurisprudence in Canada. While for numerous years there was a disconnect between British Columbia's view of corporate law and those of other Canadian appellate courts, there has now been considerable convergence due, in part, to the sophistication of the BCCA, the shift in statutory language, and the introduction of electronic judgments that allow courts to more easily compare their

[139] *Re Cartaway Resources Corp.*, [2002] B.C.J. No. 2115 (B.C.C.A.).
[140] Ibid. at paras. 22, 115.
[141] Ibid. at paras. 90-94.
[142] Ibid. at para 95, citing the Supreme Court of Canada in a judgment released after the commission's decision, *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission,* [2001] 2 S.C.R. 32.
[143] Ibid.

legal reasoning. Securities law, which was almost non-existent one hundred years ago, has now become an essential component of capital market activity, and its development has benefited from the reasoning of the BCCA. Given the court's current strength in corporate and commercial law, one can expect that it will continue to make a significant contribution in those areas.