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Minority Shareholders' Protections under Nigerian and Canadian Corporate Law: A Comparative Analysis

Oluwabukola Fadahunsi, *The University of Western Ontario*

Supervisor: Nicholls, Christopher, *The University of Western Ontario*

A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

This thesis first examines the underlying theories of the statutory models of Nigerian and Canadian company law, in order to determine the impact of these differing models on minority shareholders' protection in each jurisdiction. From a practical perspective, this thesis then undertakes a comparative analysis of minority shareholders' protections in the respective corporate statutes along with the judicial interpretations provided by the Nigerian and Canadian courts, with particular reference to the derivative action and oppression remedy. The similarities and differences between the derivative action and oppression remedy action available in each jurisdiction are highlighted, thereby revealing certain areas of convergence and other areas of jurisdictional uniqueness.

Minority shareholders may be more willing to invest in jurisdictions where their status as minority shareholders will not place them in a precarious situation. Consequently, this thesis examines the extent to which minority shareholders' protection can influence dispersed investments in a developing economy like Nigeria. Concluding that there is a plausible link between minority shareholders' protection and dispersed investments, this thesis recommends more adequate provisions and mechanisms to protect minority shareholders so as to improve the extent of investments especially in a developing country like Nigeria.

Keywords: corporation, company, majority rule, corporate legal personality, derivative action, oppression remedy, shareholder, complainant, applicant.

Lay Summary

This thesis conducts a comparative analysis of minority shareholders' protection available under Nigerian and Canadian corporate law. It specifically addresses the statutory provisions provided to remedy wrongs done to the corporations and to individual shareholders under both jurisdictions. It argues that although the Canadian and Nigerian corporate law evolved majorly from the English Acts, the Canadian statutory provisions and interpretations provided by the Canadian courts have evolved to a higher level of sophistication by providing more detail and flexibility that gives more adequate protection for shareholders compared to the Nigerian corporate legal system. It also highlights the different enforcement patterns in Nigeria that may negatively impact minority shareholders in Nigerian corporations.

This thesis further draws the link between minority shareholders' protection and dispersed investments and argues that strong minority shareholders' protection facilitates dispersed investments which could help in economic development. Therefore, this thesis recommends more adequate provisions and mechanisms to protect minority shareholders so as to improve the extent of investments especially in a developing country like Nigeria.

ACKNOWLEDGEMENTS

I am grateful and thankful to my thesis supervisor, Professor Christopher Nicholls, for his guidance, advice, and dedication towards the success of my thesis.

I would like to thank Western University for the opportunity and for financial support. Also deserving of my gratitude is my second reader, Professor Colin Campbell whose comments and advice made this thesis a success. I thank Professor Margaret Martin for her guidance and support throughout my journey at Western University.

I am also very grateful to my amazing parents – Mr. Oluyemi and Mrs. Adero Henrietta Fadahunsi, wonderful siblings – Oluwatomisin, Oluwayinka, and Oluwaseyi for their support. To my sweet fiancée – Mayowa Adelusi, I appreciate your love, support, and assistance with proofreading my thesis.

To my friends – Mariam Momodu, Deborah, Adetola, Doyin Adelawon, and Temitope Giwa, I say a huge thank you for your encouragement and taking out time to help with my thesis at points when I felt overwhelmed.

Above all, my appreciation goes to God Almighty for his unconditional love. I will never be able to thank you enough for how far you have brought me and your grace upon my life.

Table of Contents

Abstract i

Lay Summary ii

ACKNOWLEDGEMENTS iii

INTRODUCTION 1

Chapter 1: Distinction between Company and Corporation 6

1. IntroductionS 6

1.1. Company vs. Corporation 6

1.2. Contractarian and Division of Powers Models in the context of Minority Shareholders' Protection 8

1.3. Brief Background of Minority Shareholders' Protection 12

1.3.1. Corporate Legal Personality of the Corporation 12

1.3.2. The Rule in *Foss v Harbottle* 14

1.4. The Relevance of the Rule 15

Conclusion 22

Chapter 2: Comparative Analysis of the Derivative Action under Nigerian and Canadian Corporate Law 23

Introduction 23

2. Derivative Actions under the Nigerian Corporate Law 25

2.1. Introduction 25

2.1.2. Who may bring a Derivative Action? 28

2.1.3. Application to Court for Leave to Initiate a Derivative Action under CAMA 31

2.1.4. Powers of the Court 35

2.1.5. The Shortcomings of the Nigerian Derivative Action 37

2.2. Derivative Action under Canadian Corporate Law 38

2.2.1. Introduction 38

2.2.2. Proper Party to Initiate Derivative Action 39

2.2.3. Application to Court for Leave to Initiate a Derivative Action under *CBCA* 40

2.2.4. Powers of the Court hearing a Derivative Action 45

2.3. Comparison of Minority Shareholder Remedy of Derivative Action under Nigerian and Canadian Corporate Law 46

2.3.1 The Mode of Commencement 46

2.3.2. Proper Parties to Initiate a Derivative Action 47
2.3.3. Notice to Directors before Commencing Derivative Action 48
Conclusion 50
Chapter 3: Comparative Analysis of the Oppression Remedy under Nigerian and Canadian Corporate Law 52
Introduction 52
3. Remedy for Oppressive or Unfairly Prejudicial Conduct under Nigerian Company Law ... 52
3.1. Introduction 52
3.1.1. Persons Entitled to bring an Application under Section 310-312 *CAMA* 53
3.1.2. Grounds for Application 54
3.1.3. Definition of Oppressive or Unfairly Prejudicial Conduct 56
3.2. Relief by the court 59
3.3. The Oppression Remedy under Canadian Corporate Law 60
3.3.1. Who may bring an Oppression Action? 62
3.3.2. Grounds under which Oppression Remedy may be sought 62
3.3.3. Interests protected by the Oppression Remedy 63
3.4. Remedies of the Court 72
3.5. Comparative Analysis of the Nigerian and Canadian Oppression Remedy 74
3.5.1. Proper Parties to Seek the Oppression Remedy 74
3.5.2. Anticipatory Oppression Suits 75
3.5.3. The Reasonable Expectation Rule 76
Conclusion 78
Chapter 4: Solving the Predicament 80
Introduction 80
4.1. Derivative Action under Nigerian and Canadian Corporate law 81
4.1.1. Recommendations relating to the Nigerian derivative action 82
4.2. Oppression Remedy under Nigerian and Canadian Corporate Law 84
4.2.1. Recommendation for Nigerian Oppression Remedy 85
4.3. Policy Implications 86
4.3.1. Corporate Law Theory 87
4.3.2. Enforcement as a substitute for weak minority shareholders' protection 90
4.3.3. Practical Enforcement Obstacles 92

Conclusion 96
Chapter 5: Conclusion 98
BIBLOGRAPHY 100
Curriculum Vitae 107

INTRODUCTION

Democratic principles[1] have become entrenched in many institutions across the world and the corporate environment is not an exception. These democratic principles have been embedded into the corporate environment in most jurisdictions through the principle of "majority rule".[2] Further to these democratic principles, corporations are ordinarily governed in accordance with the will of the majority shareholders of the company or of the majority of members of the board of directors as the case may be.[3] Although democracy in politics, i.e. one person- one vote and representatives elected by majority vote, is still not a perfect system, it is one of the least problematic and most preferred modes of governance.[4] However, when one transplants the ideals of democracy into the corporate environment, unfortunately, it takes on a different hue.

The sacrosanct one person, one vote principle does not ordinarily apply in a corporate environment. What applies in most instances where a decision is to be taken by the shareholders is a voting system dependent on the number of shares an individual or organization owns,[5]i.e. one share one vote. It is not uncommon to see situations where the majority of the votes are concentrated in the hands of a few shareholders. In such situations, the few shareholders, though they do not constitute the "majority" in number, nevertheless may be the dominant shareholders based on the number of shares they hold in the corporation. This creates an interesting paradox as the physical majority could be the

[1]Democratic principles prescribe that decision-making is undertaken by the majority of persons in any given group.

[2]Majority rule is also known as the principle of shareholder democracy. This rule was established in *Foss v Harbottle* [1843] 67 ER 189, which provides that where a wrong is done to a corporation, the proper plaintiff is the corporation itself, and where such wrong can be ratified by the majority of shareholders in a general meeting, the court will not interfere.

[3] Generally, all powers of a company are to be exercised by one or other of its own organs: the shareholders in the general meetings or the board of directors.

[4]Larry Diamond, "The Democratic Rollback – The Resurgence of the Predatory State" (2008) 87:2 Foreign Aff. 39 at 41.

[5]Cumulative voting may be used in arriving at certain decisions. See Section 107 of the *Canada Business Corporations Act*, RSC 1985, c. C-44 and Section 224 of *the Companies and Allied Matters Act,* Laws of the Federation of Nigeria, 2004.

minority shareholders while the physical minority could be the dominant shareholders in a company - the very antithesis of political democracy.[6]

While this situation itself is not an absurdity, where for instance both the objectives of the holders of the majority and minority shares in the company are aligned, completely different dynamics are manifest when there is a misalignment of objectives between these shareholders, particularly in situations where the dominant shareholders are acting in their own interests but not necessarily in the best interests of the company. It even becomes more complicated where an alleged wrong to the company or the majority (in number, though not in voting rights) of the shareholders is an act which the dominant shareholders are legally entitled to do or at least, entitled to ratify.[7] In such situations, the shareholders with a minority of voting rights could be helpless and the only viable remedy may be to exit the company. Consequently, majority rule in the corporate context was identical with the Wall Street rule that shareholders who are dissatisfied with the policies of the corporation should sell their shares.[8] In order to remedy this helplessness, minority shareholders' protection laws have been enacted in many jurisdictions across the world.

Minority shareholders' protections are mechanisms put in place to shield or remedy shareholders from abuse of their rights, especially as they do not hold enough shares to exercise control over the decisions made by the corporation that could have resulted in such abuse. While there are many mechanisms that can be put in place to protect the interests of minority shareholders ranging from social to economic to political or legal, this thesis will focus on legal protections available under Canadian[9] and Nigerian corporate law, specifically the derivative action and oppression remedy. It is important to note that the application and scope of the derivative action and oppression remedy are influenced greatly by the nature of the corporation and the closeness of the relationships between the stakeholders of the corporation. In other words, these remedies are likely to be particularly

[6]"Physical majority" and "physical minority" in this sense, refers to the number of the shareholders as opposed to the number of shares held by the shareholders.
[7] SH Goo, *Minority Shareholders Protection* (London: Cavendish Publishing Limited, 1994) at 2.
[8]Brett McDonnel, "Setting Optimal Rules for Shareholder Proxy Access" (2011) 43 Ariz.St. L.J 67 at 75.
[9] This thesis will focus on the federal business corporation act, i.e. the *CBCA*. Further reference to "Canadian corporate law", unless specified otherwise, means the *CBCA*.

important in circumstances where shareholders cannot effectively monitor the operations of the directors and management of the corporation.

The primary law regulating companies and shareholders protection in Nigeria is the *Companies and Allied Matters Act* ("***CAMA***").[10] Due to the colonial history of Nigeria and Britain, the substantive provisions of the *CAMA* are derived largely from the *UK Companies Act of 1948* and principles from a number of English judicial decisions. Canadian corporate law, on the other hand, is governed by the federal statute –the *Canada Business Corporations Act* ("***CBCA***")[11] and other corporate law statutes which regulate corporate law in each province and territory of Canada.[12]Although the English Common Law is the common foundation of both Nigeria and Canada, Canadian company law has evolved and has over the years reached a much higher level of sophistication compared to Nigerian company law and practice, which will be highlighted in this thesis.

This thesis aims to provide an insightful and comparative perspective on the extent to which minority shareholders' protection under Canadian and Nigerian company law really does protect minority shareholders. This thesis will carve out the restrictions placed on some of these minority shareholder protection provisions, which may be obstacles to the adequate protection for minority shareholders of the corporation. It will further identify research highlighting the extent to which minority shareholders' protection can facilitate dispersed investments in an economy. This thesis will then provide recommendations in relation to legislative amendments, as well as the institutional expertise required to implement these "legislative amendments" which may, in turn, promote investments in Nigeria.

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[10] Cap C20, Laws of the Federation of Nigeria 2004.

[11]RSC 1985, c. C-44

[12] These provincial and territorial statutes are – Ontario *Business Corporations Act* 1982 SO c4, Manitoba *Corporations Act* SM 1976 c40, Saskatchewan *Business Corporations Act* RSS 1978 CB10, Alberta *Business Corporations Act* 1981 cB15, New Brunswick *Business Corporations* Act SNB 1981 Cb9.1, Yukon *Business Corporations Act* RSY 1986 c15, British *Columbia Business Corporations Act* RSBC 1996, Quebec, *Business Corporations Act* 2011, Prince Edward Island *Business Corporations Act* 2018, Nova Scotia *Companies Act* 1989 R.S, c. 101, s.1, Northwest Territories *Business Corporations Ac*t 1996, c.19, Nunavut *Business Corporations Act*,1998 SI 005-98, and Newfoundland *Corporations Act* SN 1986 c12.

This thesis is set out in five chapters:

Chapter 1: Distinction between Company and Corporation and Historical Development of Nigerian and Canadian corporate law. Under the Nigerian corporate legal system, the term "corporation" is frequently associated with government enterprises rather than private sector entities while under the *CBCA* this is not the case. This chapter points out that the term "corporation" as used under the *CBCA* and the term "company" as commonly used in Nigeria have the same conventional meaning. Chapter 1 identifies the legislative models underlying Canadian and Nigerian corporate law and concludes that both models have similar impact within the context of minority shareholders protection in their respective jurisdictions. Chapter 1 further sets out a brief background of the principles of corporate legal personality and majority rule, in order to appreciate the importance of minority shareholders' protection in both jurisdictions.

Chapter 2: Comparative Analysis of Derivative Action under Nigerian and Canadian Company Law. This chapter provides a detailed comparison between the derivative action provisions available under the *CAMA* and the *CBCA*. This chapter further examines the attitude of the Nigerian and Canadian courts in interpreting derivative action provisions.

Chapter 3: Comparative Analysis of the Oppression Remedy under Nigerian and Canadian Company Law. This chapter identifies the oppression remedy as one of the strongest tools for minority shareholders in modern corporate law practice. It sets out a comparative analysis of the oppression remedy provisions available under Nigerian and Canadian law as well as the tests that have been pronounced and used by the Canadian courts, which are not available under the Nigerian corporate legal system.

Chapter 4: Solving the Predicament. This chapter summarizes the differences between the *CAMA* and *CBCA* derivative action and oppression remedy provisions. It reveals that there are not many significant differences, and argues that the Nigerian minority shareholders nevertheless enjoy lesser protection than Canadian minority shareholders because of the lack of adequate enforcement. This chapter highlights the various enforcement patterns in Nigeria that may hinder adequate protection of minority shareholders' rights in Nigerian

corporations. This chapter further highlights the correlation between strong investor protection and dispersed shareholdings in an economy.

Chapter 5: Conclusion.

Chapter 1: Distinction between Company and Corporation

1. Introduction

The words "company" and "corporation" are used interchangeably in different parts of the world.[13]In some jurisdictions, corporate statutes specifically use the term "company", while others use the term "corporation". For instance, Nigeria's corporate law statute uses the term "company" while Canada's federal corporate law statute, the *CBCA*,[14] uses the term "corporation". However, in Nigeria, the term "corporation" is frequently associated with government-owned entities, while in Canada, the term "corporation" as used in the *CBCA* has the same conventional meaning as "company" under the *CAMA*, i.e., an incorporated entity set up by individuals for the purpose of carrying on business. This chapter identifies that the Nigerian company law statute operates under a contractarian model, while the *CBCA* operates under a division of powers model. This chapter further highlights the fundamental attributes of the contractarian and division of powers models, in order to determine whether the underlying theories of these models have an effect on minority shareholders' protections. Chapter 1 further reveals that there is not a significant practical difference between both models such as to render a comparison between them unrealistic.

Finally, chapter 1 examines the background of corporate legal personality and majority rule, in order to appreciate the importance of minority shareholders' protection under both jurisdictions

1.1. Company vs. Corporation

As highlighted in the introductory section, the Nigerian corporate legal system is an offshoot of the English Common law,[15] and its corporate legislation also uses the term "company" just as in the United Kingdom. Under the English common law, the word

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[13]Christopher C Nicholls, *Corporate law* (Toronto: Emond Montgomery, 2005) [Nicholls] at 5.
[14] By "Canadian statute", I mean the *CBCA*. The reason this thesis will be focusing on the *CBCA* will be discussed later in this chapter.
[15]Although most Canadian corporate statutes no longer refer to their incorporated business organizations as "companies", the Nova Scotia statute is still called the Companies Act and was largely based on an early version of the English *Companies Act*.

"company" has no strict legal meaning.[16] Historically, the word connotes an association of persons who come together for a common purpose or objective.[17] In the conventional sense, the word "company" is used when referring to a group of people associated together for the purpose of obtaining an economic benefit like carrying on a business for profit.[18] In recent times, these "groups of people" would typically solidify their relationship by incorporating a company under the Act for the purpose of carrying on a business, and in order to identify the specific duties and powers of members of the company.

Under the Nigerian legal system, the term "corporation" is frequently associated with government-owned enterprises rather than private sector entities. Although there is no legal reason why the term "corporation" is frequently ascribed to government enterprises, the correlation may have arisen from the fact that the names of some government-owned enterprises usually end with the term "corporation".[19] However, this is not the case under the *CBCA* where the term "corporation" is used for all for-profit bodies corporate that are incorporated under the statute. The term "corporation" is used more generally to connote a body that may be incorporated for-profit, non-profit, ecclesiastical or charitable purposes.[20] Just like the word "company", the word "corporation" is frequently used in a conventional sense to mean "one particular species of a body corporate that exists to earn profits: the business corporation".[21] It is pertinent to note that the terms "company" as used under *CAMA* and "corporation" as used under the *CBCA* have the same functional meaning as they both refer to business organizations incorporated by one or more incorporators. [22]

Having established the terms "corporation" and "company" are used to connote business organizations and are not materially different especially in their usage in recent times, the following sub-section will identify the legislative models underlying Nigerian and

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[16] *Re Stanley* [1906] 1 Ch. 131 at 134, Buckley J.
[17] PL Davies, Daniel Prentice & LCB Gower, *Gower's principles of modern company law*, 6th ed (London: Sweet & Maxwell, 1997) at 3.
[18] *Ibid*.
[19] For example, the Nigerian National Petroleum Corporation, Nigerian Railway Corporation, etc.[19]
[20] Nicholls, *supra* note 13 at 2.
[21] *Ibid* at 6. Citing Frank Evans, "What is a Company?" (1910) 26 Law Quarterly Review 259 at 260.
[22] For the purpose of consistency, the term "corporation" will be used throughout this thesis.

Canadian corporate law in the context of minority shareholders' protection in order to also determine whether further comparison between both provisions in the statutes is realistic.

1.2. Contractarian and Division of Powers Models in the context of Minority Shareholders' Protection

A contractarian company is generally known as an "English Model Company" or "Memorandum and Articles of Association" company".[23] This is the model of companies that characterizes the UK *Companies Act, CAMA* and the Canadian corporate statutes that were originally based on the UK model.[24] The contractarian model is premised on the theory that the company's constitutional documents constitute a contract between the company and its members and between the members and officers of the company.[25] This contractual relationship is established by specific provisions in the corporate statutes regulating companies in these contractarian jurisdictions.[26]The current corporate statute in Nigeria - *CAMA*[27]- still retains the position that the Memorandum and Articles of Association is the governing document for this type of company and forms a contract between the company and its members and between the members and officers themselves.[28]

Furthermore, contractarian companies may be in various forms. *CAMA* provides that a contractarian company could be an unlimited company, a company limited by guarantee or a company limited by shares,[29] which may be public or private in nature. This thesis will focus on companies limited by shares because it is the most usual form of company under *CAMA*[30] that attracts the most investors because of its limited liability feature.[31]In other words, the liability of the shareholders does not fluctuate but is limited to the extent of the

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[23]Bruce Welling, *Corporate law in Canada* (London: Scribblers Pub, 2006) at 114.
[24]Nicholls, *supra* note 13 at 10.
[25]*Ibid*.
[26]For example, Section 41 of the *Companies and Allied Matters Act*, C20, Laws of the Federation of Nigeria 2004 sets out this contractual orientation.
[27] Cap C20, Laws of the Federation of Nigeria, 2004.
[28] Section 41 of the *CAMA*.
[29] Section 21 of *CAMA*.
[30] Alfred F Topham & E R Hardy Ivamy, *Topham and Ivamy's Company law* (London: Butterworth, 1978) at 3.
[31]Manjeet Sahu, *Classification of Companies*, (2012) SSRN Scholarly Paper ID 2191869, Social Science Research Network at 3.

unpaid value of their respective shares.[32] During the existence of the company or in the event of winding up, a member can be called upon to pay the amount remaining unpaid on the shares subscribed by the shareholder.[33]

In view of the shareholding structure and limited liability feature, the company limited by shares is best suited for the assessment of shareholders protection, particularly minority shareholders, as investors are more willing to make investments in companies where their liability is limited. The *CBCA*, on the other hand, operates under the Division of Powers model which is the most common type of corporation under Canadian corporate law.[34]Just as the name suggests, the division of power statutes expressly divide powers between the shareholders and management of the corporation,[35] subject in certain cases, to the provisions of a statutorily recognized agreement called a unanimous shareholder agreement.[36]

There are two fundamental attributes of both models that will likely have an impact on minority shareholders' protection. First, a division of powers model clearly sets out the powers and obligations of directors, officers, shareholders and perhaps creditors in the incorporating statute. For instance, a division of powers statute usually has a section empowering the directors to manage or supervise the management of the affairs and business of the corporation, subject to any unanimous shareholder agreement.[37] While the "division of powers" attribute is not one originally found in the contractarian model, many contractarian corporate statutes have adopted this feature as a "default" position and have now set out powers and obligations of directors and shareholders in the incorporating statute. For example, Section 63 of the *CAMA*[38] statutorily empowers directors of a company to manage the business of the company, subject to the provisions of the articles of association of the company.

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[32]*Ibid*.
[33] Section 27 (3) (b) of *CAMA*.
[34]Nicholls, *supra* note 13 at 40.
[35] See section 102 (1) *CBCA*.
[36] See section 102 (1) *CBCA*.
[37] See section 102 (1) *CBCA*.
[38] Cap C20, Laws of the Federation of Nigeria 2004.

Second, a division of powers model takes on a remedy-oriented approach while the contractarian model takes on a contractual and rights-oriented approach.[39]This means that the division of powers model clearly provides for the status of key individuals in the corporation like the shareholders, and sets out remedies for shareholders where their rights have been abused. All the remedies under a division of powers model are statutory, while the contractarian model is historically associated with contractual remedies whereby shareholders can sue for breach of contract where their rights have been abused. In recent times, many contractarian models have also adopted statutory remedies similar to those provided in the division of powers model in order to protect minority shareholders from any breach resulting from an abuse of power granted to persons under the statute.[40]

It is pertinent to note that majority rule is the fundamental principle upon which the division of powers statutes operate[41] whereby the statutory powers outlined in the statutes are expected to be performed by the majority of each body in the corporation – the board of directors and shareholders as the case may be.[42] However, the statute attempts to address the excesses that the application of the majority rule may cause by creating extensive remedies for minority shareholders and other complainants[43]. Thus, the division of powers model makes provision for statutory remedies in the event that the statutory powers provided in the constitution have been misused in some way. The importance attached to minority shareholders protection in this type of corporate constitution can be seen, for example in Section 247 of the *CBCA* which provides that a "complainant"[44] or creditor of the corporation may apply to the court for an order directing a person to comply with, or restrain from committing future breaches of the Act, regulations, articles, by-laws, or a

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[39]Welling, *supra* note 23 at 59.
[40] For example, the *CAMA* sets out minority shareholders' protection which will be assessed in chapter 2& 3 of this thesis.
[41]Welling, *supra* note 23 at 62.
[42] Although, there are some instances in which a two-third majority vote of shareholders is required rather than merely a simple majority.
[43]Welling, *supra* note 23 at 62.
[44]For the purposes of section 247 of the *CBCA*, a "complainant" is a shareholder or former shareholder of the company, or any of its affiliates, a director or an officer or former director or officer of the company, or any of its affiliates, the *CBCA* Director or any other person who, in the discretion of a court is a proper party.

unanimous shareholder agreement. This statutory provision provides shareholders with access to judicial remedies wherever a breach of the corporate constitution occurs without regard to the seriousness of the alleged breach.[45]

A unique feature of the contractarian model is that the statute invariably establishes a contractual relationship among the shareholders, and between the company and each shareholder.[46]This simply implies that any breach of the corporate constitution, i.e. the Memorandum and Articles of Association, can be redressed by an action instituted for breach of contract in the courts.[47] Thus, in addition to the statutory minority protections, the contractarian model also provides for contractual remedies where the provisions of the Memorandum and Articles have been breached. While this may appear to suggest that the contractarian model affords minority shareholders a plethora of remedies – statutory and contractual - the contractual remedy may not necessarily be adequate protection for minority shareholders in the company. This is because a voting process is usually required to amend and set out the contractual terms in the Memorandum and Articles of the company, and depending on the corporate constitution, the shares may be divided into distinct classes, with each class conferring different powers and rights to the shareholders. Some shares may carry voting rights, while others may not.[48] A few individuals may hold enough "voting" shares to cast sufficient votes to determine the provisions of the Memorandum and Articles of Association and how the corporation will be run.[49]Consequently, an action for a breach of contract will more likely be geared towards protecting the rights of the "majority" whose "voting shares" influenced the provisions of the corporate constitution rather than the rights of minority shareholders. Where the votes of the minority shareholders and majority shareholders are aligned with regard to the provisions of the Memorandum and Articles, an action for a breach of contract may then protect the rights of the minority shareholders.

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[45]Welling, *supra* note 23 at 64.
[46]*Ibid* at 65.
[47]*Ibid*.
[48]*Ibid* at 61.
[49]*Ibid*.

From the above, it is clear that both models have their distinctive features; however, the *CAMA* has adopted many of the distinct features of the division of powers models, and so has similar provisions with the *CBCA*, which is a division of powers model. The only distinct feature of the contractarian statutes, i.e., the contractual relationship between the members of the corporation and officers of the company incorporated under *CAMA*, has no significant impact per se on minority shareholders' protection in a corporation. Therefore, a comparative analysis of the statutory provisions of the *CAMA* and the *CBCA* is appropriate and useful, especially because the underlying structure of each statute is very similar and as such, any recommendations for improvement may be easily effected in both jurisdictions.

1.3. Brief Background of Minority Shareholders' Protection

As noted in the introductory section of this thesis, the need for remedies for minority shareholders protection arose to mitigate the effects of the strict application of the corporate legal personality principle and majority rule. This section will give a brief background of minority shareholders' protection, i.e. the corporate legal personality rule and rule in *Foss v Harbottle*, as well as examine the relevance of the rule in modern corporate practice within the respective jurisdictions, so as to underscore the importance of minority shareholder protection.

1.3.1. Corporate Legal Personality of the Corporation

It is almost impossible to discuss majority rule without first reflecting on the cardinal principle of company law, that is, the corporate legal personality rules. No doubt, the relevance of the separate legal personality principle in company law and practice as laid out in the locus classicus case of *Salomon v Salomon and Co Ltd*[50]cannot be overemphasized. The case of *Salomon v Salomon & Co Ltd* has been famously described by Lord Templeman as the "unyielding rock of English company law"[51] while others have

[50] [1897] AC 22.
[51]Lord Templeman, "Company law lecture – forty years on" (1990) 11:1Company Lawyer 10 at 10.

described it as a key principle of company law,[52] and have hailed it as making possible "the industrial and commercial developments which have occurred throughout the world".[53]

The legal personality principle is simply to the effect that the moment a company is incorporated it assumes the status of a legal person capable of carrying out actions and taking decisions in its own name as a natural person would. This theory is codified in both the *CBCA* and *CAMA*[54]and has been reiterated by the Nigerian and Canadian courts in a number of cases.[55]

A clear understanding of the legal personality principle of the corporation and the implications of a company assuming the status of incorporation is a prerequisite for an adequate grasp of the principle established in the English case of *Foss v Harbottle*[56] which forms part of the Nigerian corporate jurisprudence.[57] The rule in *Foss v Harbottle* is said to have arisen "inevitably from the doctrine of separate legal personality",[58] as suggested by the Supreme Court of Canada,[59]citing a passage from the English Court of Appeal's judgment in *Prudential Assurance co. v Newman Industries Ltd*,[60] in which the court declared the *Foss v Harbottle* rule to be "the consequence of the fact that a corporation is a separate legal entity".[61] More recently, the Ontario Court of Appeal[62] expressly linked the logic underlying the rule in *Foss v Harbottle* with that of the celebrated *Salomon* principle:

> The rule in *Foss v. Harbottle* provides simply that a shareholder of a corporation – even a controlling shareholder or the sole shareholder – does not have a personal cause of action for a wrong done to the corporation. The

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[52] Lord Cooke of Thorndon, *A Real Thing in Turning Points of the Common Law* (London: Sweet & Maxwell, 1997) at 8.
[53] *Ibid* at 11.
[54] See Section 15 of the *CBCA* and Section 37 of *CAMA*.
[55] See *Emenite Ltd v Oleke* [2005] 6 NWLR (Pt. 921) 350; *Kosmopoulous v Constitution Insurance Co. of Canada* [1987] 1 S.C.R 2.
[56][1843] 2 Hare 461.
[57]Charles Onyehinim Eluromma, *Majority rule and minority protection in private corporations : a comparative appraisal of the problems and remedies under the Canadian and Nigerian jurisdictions* University of British Columbia, 2014) at 42.
[58]Nicholls, *supra* note 13 at 391.
[59]*Hercules Management Ltd v. Ernst & Young* [1997] 2 SCR 165 at 211-212.
[60] [1982] 1 ALL ER 354 at 367.
[61]*Ibid*.
[62]*Meditrust Healthcare Inc. v Shoppers Drug Mart* (2002) 61 OR (3d) 786at 790 (CA).

> rule respects a basic principle of corporate law: a corporation has a legal existence separate from that of its shareholders.

1.3.2. The Rule in *Foss v Harbottle*

The rule in *Foss v Harbottle*, an elementary principle of corporate law[63] laid down in the case of *Foss v Harbottle*, propounds that the court will not interfere with the internal management of companies acting within their powers, and in fact, has no jurisdiction to do so. As companies enjoy legal personality, they can assert rights of their own and could institute an action to redress any wrong to recover moneys or damages alleged to be due to the company, and such actions should prima facie be brought by the company itself.[64]

In the case *Edwards v Halliwell*,[65] the Court provided a comprehensive list of exceptions to the Rule in *Foss v Harbottle*:

i. where the action involved an illegal act or an act ultra vires the corporation;
ii. where the action was not one that could be sanctioned by a simple majority of the company's members, but required, instead, the approval of some special majority vote;
iii. where the act gave rise to a personal right of action on the part of the individual plaintiff; and
iv. where the act constituted a fraud on the minority.[66]

These exceptions suggest that the shareholder can obtain redress for a wrong in certain circumstances. However, Wedderburn asserts that the exceptions are not real exceptions, except for in cases of fraud,[67] as they appear to be applicable only in situations in which there is no chance of confirmation by the majority, and in such cases, the Rule cannot apply in any event.[68]

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[63] *Burland v Earle* [1902] AC 83 at para 10, Lord Davey.
[64] KW Wedderburn, "Shareholders' Rights and the Rule in Foss v. Harbottle" (1957) 15:2 The Cambridge Law Journal 194 at 195.
[65] [1950] 2 ALL ER 1064 (CA).
[66] *Ibid* at 1067.
[67] Wedderburn, *supra* note 64 at 208.
[68] *Ibid*.

1.4. The Relevance of the Rule

Under Nigerian company law, the Rule and its exceptions have been codified in Section 299 and 300 of the *CAMA* respectively. Section 299 provides as follows:

> Subject to the provisions of this Act, where an irregularity has been committed in the course of the company's affairs or any wrong done to the company, only the company can sue to remedy that wrong and only the company can rectify the irregular conduct.

In addition to the above exceptions set out in *Edwards v Halliwell*,[69] *CAMA* also provides for other instances where the Rule will not apply. For instance, the rule will not apply where a company meeting cannot be called in time[70] or where the directors are likely to derive a profit or benefit or have profited or benefited from their negligence or from their breach of duty.[71] Both sections 299 and 300 of *CAMA* have been re-affirmed by the Nigerian courts on many occasions.[72] The Rule has been applied not only to incorporated bodies but also to unincorporated associations.[73] It was applied to trade unions in *Cotter v National Union of Seamen*[74] and *Mbene v Ofili*,[75] on the ground that a union was a body possessing a constitution or a set of rules prescribing the grievance procedure and also entitling it to sue and be sued as a legal entity.

In *Elufioye v Halilu*[76] concerns were raised as to whether a rule of law such as that in *Foss v Harbottle*, which technically strips the court of jurisdiction to grant remedies, and bars minority shareholders of a corporation or association from addressing wrongs done to the company and enforcing their rights were not contrary to the provisions of section 6(6) (b) of the Constitution of the Federal Republic of Nigeria, 1979.[77] The Constitution provides that the judicial powers vested in the courts by section 6 (6) (b):

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[69] [1950] 2 ALL ER 1064 (CA).
[70] Section 300 (e) *CAMA*.
[71] Section 300 (f) *CAMA*.
[72] *Adenuga v Odumeru* [2002] 8 NWLR 163 at p. 169.
[73] The Nigerian courts have followed the decision in the case of *Edwards v Halliwell.* In this case, the courts applied the rule in *Foss v Harbottle* in disputes arising in a trade organisation.
[74] [1929] 2 Ch. 58.
[75] [1968] NCLR 293.
[76] [1993] 6 NWLR 570.
[77] *Ibid* at 599.

> shall extend to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

That is to say, one of the questions for determination before the court was whether a ruling preventing the court from interfering with the affairs of the company where the action to redress the wrong is brought by minority members and the wrong is ratifiable by a simple majority of members, would not be contrary to the provisions of Section 6(6) (b) of the constitution that empowers the court to decide on all matters relating to the civil rights and obligations of persons in Nigeria. The Supreme Court[78]clarified this by stating that the rule in *Foss v Harbottle* will not apply to exclude a person who can establish a personal right that is distinct from that of the business of the association or company. In other words, the court will not exclude a person from bringing an application for an injunction or declaration with respect to any act or omission affecting the applicant's individual rights as a member or an action to obtain an oppression remedy.[79] The implication of this is that where an individual membership right is alleged to be violated, the court will, pursuant to its general jurisdiction conferred upon it by section 6(6) (b) of the Constitution, intervene to grant appropriate remedies at the instance of the minority shareholder, whereas in cases where the alleged act is done to the company, such acts being capable of ratification by a simple majority of members, the court will, in accordance with the rule in *Foss v Harbottle*, decline assistance to the minority shareholder.[80]

The court's policy of not interfering in the internal affairs of the corporation to grant relief to minority shareholders, where the alleged wrong is one affecting the corporate membership rights and not shareholders' personal rights is a fundamental problem for minority shareholders' protection under Nigerian law for two reasons. First, there is a thin line between personal rights and corporate rights of a minority shareholder in a company. Personal rights are attached to the status of membership in a corporation and are usually

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[78]*Ibid* at 599 at para E.
[79] This is in line with the third exception set out in the case of *Edwards v Halliwell* [1950] 2 All ER 1064, which is now also codified in section 300 (C) of the *CAMA*.
[80]Eluromma, *supra* note 57 at 57.

provided in the articles or statute,[81] while corporate membership rights are rights exercised by a number of individual members acting in co-operation for instance, by resolution.[82] There is a possibility that some corporate membership rights affect the personal rights of the shareholders, and the court's refusal to intervene may be prejudicial to such individual rights. The Supreme Court of Nigeria has identified the difficulty in effectively drawing a clear distinction between a personal and a corporate right of a shareholder. In *Globe Fishing Industries Ltd v Coker*,[83] the Supreme Court, *per Olatawura JSC*, remarked as follows:

> The dividing line between personal and corporate right is very hard to draw, and perhaps the most that can be said is that the court will incline to treat a provision in the Memorandum or Articles as conferring a personal right on a member only if he has an interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution.

Second, the basis upon which the rule in *Foss v Harbottle* was decided does not occur in modern-day corporate law practice. In *Foss v Harbottle* where the court pronounced the majority rule, it is pertinent to note that the corporate constitution (that is, the special act of Parliament) of the Victoria Park Company in that case, empowered the shareholders in a general meeting to decide whether to commence legal proceedings[84] and this power ascribed to the shareholders was the basis upon which the decision in *Foss v Harbottle* was reached.[85] But typically in modern corporations, it is usually the responsibility of the directors and not the shareholders to decide whether or not a corporation should pursue legal action (although under Canadian law, a unanimous shareholders agreement could be put in place to vest the directors' managerial powers in the shareholders).[86] Thus, unlike the situation in *Foss v Harbottle*, "there is no means whereby a majority of the shareholders in a modern corporation can authorize an action in the corporate name on behalf of the

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[81] J Olakunle Orojo, *Company Law and Practice in Nigeria* (Johannesburg: LexisNexis, 2008) at 82.
[82] Eluromma, *supra* note 57 at 52.
[83] [1990] 7 NWLR (pt. 162) at 265.
[84] Nicholls, *supra* note 13 at 396.
[85] *Ibid*.
[86] See Section 102 of the *CBCA*. The ability to limit the powers of the directors through a unanimous agreement is not available under the Nigerian company law. Under *CAMA*, some powers of the directors are statutory based, while some are usually set out in the articles of association. Shareholders can only interfere by amending the articles.

company against the wishes of the board of directors”.[87] In other words, since the shareholders are not the body empowered to decide whether a legal action is brought in the name of the company, it is then predictable that minority shareholders will turn to the court for a remedy especially where the directors do not institute the action. Where the courts then refuse on the basis that it is the company that should sue (which is in reality a decision made by the directors), this may lead to prejudice to the rights of the minority shareholder.

It can, however, be argued that since Section 299 is made subject to other provisions of the *CAMA*, which set out instances where a member of a company can institute legal action on behalf of the company, it renders the Rule irrelevant and questions its applicability in modern-day corporations. The question that arises is – why is the rule still retained in the *CAMA* considering its irrelevance in modern-day corporations, and in view of the other provisions of the *CAMA*? Specifically, the *CAMA* provides for a derivative action which allows a member to institute or defend an action on behalf of a company to remedy a wrong done to the company, subject to obtaining leave from the court.

With respect to the application of the Rule under Canadian company law, the Supreme Court in *Hercules Management Ltd v Ernst & Young*[88] averted to the Rule in *Foss v Harbottle* stating that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.[89] Despite the above judicial pronouncement, Professor Nicholls[90] argues that there seems to be a diminished significance of the Rule under the Canadian modern statutory derivative action regime and should have become a historical relic if not for the occasional references to *Foss v Harbottle* by Canadian judges. Unlike Nigerian corporate law, the rule in *Foss v Harbottle* is not codified under Canadian company law and as such, it can be said that it is the corporate legislation, and not the “antique common law rule in *Foss v Harbottle* that determines when an action can or cannot be brought in the corporate

[87]Interim Report of the Select Committee on Company Law, Ontario, 1967 [Lawrence report] at para. 7.3.5.
[88] (1997) 2 SCR 165 at 211-212.
[89]*Ibid* at 211.
[90]Nicholls, *supra* note 13 at 398.

name".[91]It can be argued that the insertion of the words "subject to other provisions of *CAMA*" set out in *CAMA* renders the application of the Rule irrelevant. Also, the fact that the circumstances under which the Rule was decided no longer apply in modern corporate law practice questions the relevance of the Rule.

Commenting on the potential difficulty and confusion that the coexistence of both the statutory derivative action provisions and the rule in *Foss v Harbottle* and its exceptions, could pose, Beck had this to say:

> On balance, however it seems clear that the section was intended to be a code for the expansion and control of the derivative suit ... It would only lead to confusion to allow both common law and statutory actions. A more orderly development of the law would result from one point of access to a derivative action and would allow for a body of experience and precedent to be built up to guide shareholders.[92]

This is not to suggest that there are not very good reasons for the courts to prevent individual shareholders in the normal course from instituting legal action, for instance where the action is based on the alleged diminution in value of their shares.[93] Such limitations are generally advantageous to corporations, the judiciary and the economy at large. For companies, it facilitates collective action,[94] allows management to focus on the daily running of the company business[95] and encourages corporate financing which is decisively important for corporations.[96]As regards the judiciary, it saves the courts' time and the public budget.[97] To the economy, the rule helps companies to prosper and the more companies prosper, the better it is for the economy overall.[98]This is because if this rule did not exist, shareholders and other stakeholders would probably institute actions in the name of the company at any slight opportunity, thereby diverting the funds of the company for

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[91]*Ibid*.
[92] SM Beck, "The Shareholders' Derivative Action" (1974) 52 Can Bar Rev159 at 207.
[93]*Groupe d'action d'investisseurs dans Biosyntech c. Tsang* [2016] QCCA 1923.
[94]Mark Hager, "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory", (1989) 50 U.Pitt.L.Rev. 575 at p. 633.
[95]Stephen Griffin, *Company law: Fundamental Principles* 2nd ed., (London: Pitman, 1996) at pp 299-300.
[96]Bernard Black, "Is Corporate Law Trivial? A Political and Economic Analysis"(1990) 84:2 North-Western University Law Reviewat 552.
[97]*Mac Dougall v. Gardiner* (1875), 1 Ch. D. p 13, per Melish L. J.
[98]LainMacNeil, "Company Law Rules: An Assessment from the Perspective of Incomplete Contract Theory" (2001) 1:1 J.C.L.S 107 at p 117.

legal costs. However, with this rule in place, the company is not made to incur legal costs as a result of potentially trivial or unmeritorious actions brought by stakeholders in the company.

Despite the wavering relevance of the Rule, one factor that is certain is that the great difficulties of this Rule gave rise to the current minority shareholders protection we have under many corporate statutes today, most especially derivative actions. A derivative action is a remedy devised to address the harm done to the company, rather than the harm done to an individual shareholder. At a theoretical level, it may appear as though the difference between a derivative action and personal action is very clear. However, in practice, it can be difficult to distinguish one from the other especially when personal and derivative actions are interrelated[99], such as in the case of the payment of excessive remuneration to directors.[100] While payment of excessive remuneration is traditionally characterized as a wrong to the corporation, it could also be characterized as a wrong to shareholders as it may result in a depreciation of the value of their investments. The fact remains that it is almost inevitable that wrong to a corporation will adversely affect the value of shareholders' investments in the corporation.[101] The Ontario Court of Appeal in *Goldex Mines Ltd v. Revill*[102] recognized the difficulty of this interrelationship and confirmed that the same wrongful act can be both a wrong to the company and to each shareholder. The Court further provided some guidance in the determination of whether the wrong gave rise to a personal or derivative action. The Court quoted with approval from the judgment of Traynor C.J. in the California case of *Jones v. H.F. Ahmanson & Co*.[103] wherein Traynor C.J. refers to *Shaw v. Empire Savings & Loan Assoc*:[104]

> the court [in Shaw] noted the "well established general rule that a stockholder of a corporation has no personal or individual right of action against third persons, including the corporation's officers and directors, for a wrong or injury to the corporation which results in the destruction or depreciation of the value of his stock, since the wrong suffered by the stockholder is merely

[99]M. Patrick Baxter, "The Derivative Action under the Ontario Business Corporations Act: A review of Section 97" (1982) 27:3 McGill LJ 27 453 [Baxter] at 456.
[100]Dan Prentice, *Comment* (1976) 15 U.W.O. L. Rev. 225 at 2312.
[101]*Ibid*.
[102][1974]7 O.R. (2d) 216 (C.A.)
[103]460 P.2d 464 (Cal. 1969)
[104] 186 Cal. App. 2d 401 (Dist. Ct App. 1960).

> incidental to the wrong suffered by the corporation and affects all stockholders alike." From this the court reasoned that a minority shareholder could not maintain an individual action unless he could demonstrate the injury was somehow different from that suffered by other minority shareholders. In so concluding the court erred. The individual wrong necessary to support a suit by a shareholder need not be unique to that plaintiff. The same injury may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists.

The Court of Appeal interpreted Traynor C.J. to mean that a personal action would not arise "simply because the corporation itself has been damaged and as a consequence of the damage to it, its shareholders have been injured".[105]In other words, such wrong done to the shareholder must exist on its own circumstance and not be incidental to a wrong done to the corporation for a personal action to exist. This test has been criticized on the ground that the Court provided no clarity on what constitutes incidental injury and no reason why an incidental injury should not be treated as a personal wrong if it actually affects the personal rights of the shareholder.[106] Irrespective of the test employed by the Court, there will always be grey areas that are not easy to categorize.[107]Practically, all shareholder suits cannot be "arbitrarily placed in one category to the exclusion of others".[108] In view of the above, this thesis will focus on the adequacy of minority shareholders' protections for both personal injury and injury done to the corporation, that is, both derivative action and oppression remedy. Thus, the remedies of "derivative actions" and "oppression remedies" under both Nigerian and Canadian law will be considered in detail in the following chapter in order to access how these provisions adequately protect minority shareholders, which may, in turn, encourage capital market investments.

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[105] Baxter, *supra* note 99 at 456.
[106]*Ibid.*
[107]*Ibid.*
[108]*Ibid.*

Conclusion

In view of the fact that the *CBCA* operates under a division of powers model, while the Nigerian corporate statute is based on a contractarian model, this chapter highlights the features of both models in order to determine whether the two jurisdictions are extremely different such that a comparison between them will be totally unrealistic. This chapter notes that many contractarian corporate statutes model like the *CAMA* have adopted most of the distinct features of the division of power model and as such, the remaining practical differences between the two are not significant, such that they may be meaningfully compared.

This chapter also sets out a brief background of the corporate law concept of majority rule and assesses the relevance of the Rule in *Foss v Harbottle* under each jurisdiction. It reveals that the rigid application of the corporate legal personality and majority rule created a need for minority shareholders' protection such as the derivative action which allows a shareholder to obtain a remedy on behalf of the corporation for harm done to the corporation. It further highlights the difficulty the courts face in distinguishing between a wrong done to the corporation and one done to the shareholders as sometimes an act could be both a wrong done to the corporation, as well as to the shareholder.

The following chapter will examine more closely the derivative action, i.e., the minority shareholders' protection that addresses wrongs done to the corporation under Canadian and Nigerian corporate law.

Chapter 2: Comparative Analysis of the Derivative Action under Nigerian and Canadian Corporate Law

Introduction

In line with the objectives of this thesis, this chapter highlights one of the key minority shareholders' protections available under Nigerian and Canadian corporate law. Specifically, this chapter reviews the statutory provisions relating to the derivative action under both jurisdictions, in order to examine the extent to which the remedy adequately protects minority shareholders today under Nigerian law. This chapter reveals certain areas of convergence and other areas of uniqueness with respect to the derivative action under Nigerian and Canadian corporate law. It also reveals how certain prerequisites to commencing a derivative action provided in the statutes and the judicial interpretations of these prerequisites may hinder the full protection of minority shareholders in a corporation. This then buttresses the hypothesis that there is room for improvement of this provision under Nigerian corporate law, to enable minority shareholders to feel adequately protected and, in turn, more prepared to invest in Nigerian companies and so benefit the Nigerian economy.

This chapter will focus on the derivative action because it is one of the two principal means under the corporate law statutes through which minority shareholders may seek to address harms. From the shareholders' perspective, corporate wrongs can be done in two forms – to the corporation or directly to the shareholders of the corporation. The derivative action is usually instituted to remedy wrongs done to the corporation;[109] while the oppression remedy is instituted to correct an oppressive or unfairly prejudicial act or an act that unfairly disregards the interests of shareholders and certain other stakeholders in the corporation.[110] However, as highlighted in chapter 2, some wrongs done to the corporation may affect the rights or interests of the shareholders in the long run. Thus focusing on the derivative action means assessing one of the two significant prongs under corporate law,

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[109] Although, in a derivative suit, the court may direct that an amount be paid to the complainant in whole or in part, the remedy is nevertheless used to remedy wrongs done to the corporation.
[110] This remedy will be discussed in the following chapter.

through which minority shareholders' rights may be protected whether directly or indirectly, as the case may be.

Furthermore, emphasis will be placed on minority shareholders in a corporation because their relationship with directors, members of the management (especially senior management) and other majority shareholders may place them in a vulnerable position. In modern-day corporations, directors are said to be the most powerful organ in the corporation because of the wide range of powers they have.[111]Directors are usually empowered to manage or supervise the management of the corporation's business and affairs (by delegating some of their functions to officers of the corporation), except in cases where the matter is specifically assigned to the shareholders in a general meeting. Because the directors have a wide range of powers, and shareholders are in a vulnerable position with respect to the directors, the statutes usually provide that directors exercise these powers in a fiduciary manner.[112] However, there are instances where the directors or their delegates engage in forms of self-dealing and insider trading which may result in managerial consumption of privileges to the detriment of other stakeholders in the corporation.[113]

The shareholders, on the other hand, are empowered to make certain decisions, for example, the decision to elect or remove directors. In most instances, corporate matters are decided by a voting system dependent on the number of shares a shareholder holds in the corporation, thereby enabling dominant shareholders to use their voting powers to the detriment of the corporation. For instance, dominant shareholders in a corporation may vote in favour of a certain transaction to be undertaken by the corporation even when it is not likely that the corporation may be successful in that venture, but simply because the dominant shareholder (s) may benefit from that business.

[111]Martin Getter, "Why do Shareholder Derivative Suits Remain Rare in Continental Europe" (2012) 37:3 Brook.J.Int'l L 884 at 847.
[112]Michael Jensen & William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) SSRN Scholarly Paper ID 94043, Social Science Research Network.
[113]See section 279(7)*CAMA* and 122 (1) *CBCA*.

With the provisions of a derivative action in place, minority shareholders are able to correct wrongs done to the corporation by the directors, dominant shareholder (s) or even outsiders which could subsequently affect their interests.

2. Derivative Actions under the Nigerian Corporate Law

2.1. Introduction

As discussed in the previous chapter, the rule in *Foss v Harbottle* provides that only the corporation can bring a suit when a wrong has been done to it, and, where such wrong can be ratified by the majority of shareholders in a general meeting, the court will not interfere. Section 299 of the *CAMA* codifies this common-law rule by providing that subject to certain exceptions, “where an irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy the wrong and only the company can ratify the irregular conduct”. A strict application of this general rule may restrict the access of minority shareholders to remedy a corporate wrong, despite the fact that the basis upon which the decision was reached in *Foss v Harbottle* does not apply in modern business corporations.[114]

The implication of this is that shareholders who want to remedy a wrong done to the corporation can only do so if either the company itself (i.e., as determined by the directors) decides to institute an action or if they fall under the exceptions to the rule in *Foss v Harbottle*, now codified in the *CAMA*. A plethora of Nigerian cases have continued to reiterate this principle.[115] In *Tanimola & Ors v Surveys and Mapping Geodata*,[116] the minority shareholders holding 6% of the company shares brought an action against the directors on the ground that they had carried out some acts that were contrary to the corporate constitution of the company. The court held that the operation of a company is

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[114] As noted in Chapter 1, the rule in *Foss v Harbottle* was decided on the basis that the corporate documents provided that the power to institute legal proceedings was vested in the shareholders in a general meeting – which is not the case in modern day corporations.

[115] *NIB Investment (West Africa) v. Chief Omisore* (2005) LPELR -7527 (CA); *Elufioye & Ors v. Halilu & Ors* (1993) LPELR -1120 (SC); *PDP v. Abubakar* (2007) 3 NWLR (Pt. 10220 515 at 552.

[116] 1995) 6 NWLR (Pt.403) 617.

principally by the will of the majority shareholders and "where there is litigation in respect of the affairs of the company, the principle as to the competence of such action is generally governed by what has become known as the rule in *Foss v. Harbottle*".[117]Clearly, the directors had breached the corporate constitution, however, the courts refused to interfere with the affairs of the company on the basis of the rule in *Foss v Harbottle* as codified in Section 299 of *CAMA*.

Although the common law rule as codified in Section 299 of the *CAMA* helps to curb a number of frivolous actions that may be instituted by shareholders or other stakeholders, and also ensures that the court is not interfering with the affairs of the corporation at the slightest chance,[118] nevertheless it may also serve as a hindrance to the protection of shareholders' rights. This is because a restriction to bring an action to remedy a wrong done to the corporation could as well be a restriction to bring an action to enforce the shareholders' rights. For instance, where the directors of the company are mismanaging its profits and acting against their fiduciary duties, a shareholder who wants to bring an action to remedy this wrong may be prevented on the ground that such wrong is one done to the company and so should be brought by the company itself and not the shareholder. While on the surface of things it is true that the wrong is one done to the company, it should be noted that such mismanagement by the directors could result in shareholders not obtaining the expected returns on their investments, or in the worst case, no returns on their investments. This is the underlying concern of most shareholders.

In response to these difficulties arising from the common-law rule, the Nigerian Law Reform Commission[119]recommended the introduction of the statutory derivative action to strike a balance between the risk of unreasonable interference in the affairs of the company on one hand and judicial recourse for the shareholders on the other hand.[120] The derivative remedy available under Nigerian corporate law is embodied in Sections 303 – 309 of the *CAMA*. It is a statutory representative action instituted or defended by a shareholder on

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[117](1843) 67 ER 189.
[118]*Mac Dougall v. Gardiner* [1875], 1 Ch. D. p 13, per Melish L. J.
[119] Nigerian Law Reform Commission Report on Reform of Nigerian Company Law, Vol. 1, 2 and 3.
[120]A Reisberg, *Derivative Actions and Corporate Governance: Theory and Operation* (London: Oxford University Press, 2007) at 186.

behalf of a company, in order to remedy a wrong done to a company in circumstances where the directors are unwilling to institute an action on behalf of the corporation.[121]In the case of *Agip (Nigeria) Limited v. Agip Petrol Int'l*[122], the Court defined a derivative action as follows:

> A derivative action also known as a shareholder derivative suit is a lawsuit brought by a shareholder on behalf of a company against a third party. Often the third party is an insider of the corporation such as the directors or executive officers.

In most derivative suits instituted in Nigerian courts, the defendants are usually the directors or executive officers, who are normally statutorily empowered to decide whether or not to institute an action on behalf of the corporation. Because it is the directors who are empowered to manage the business of the company, and where it is directors themselves who are at fault, it is very unlikely that they will institute an action on behalf of the company to remedy their own wrong.[123] In order to protect the interests of the company and its shareholders while avoiding unreasonable interference with the management of the company, the law allows stakeholders to initiate a derivative action against the directors or any other wrongdoers provided those shareholders have fulfilled all statutory requirements under the derivative remedy provision. Apart from protecting shareholders' rights, derivative action provisions also have deterrent objectives, i.e. the existence of the remedy prevents managerial misconduct by imposing the threat of action by shareholders, which may lead to personal liability of the directors or other wrongdoers as the case may be.[124]

Even though this remedy plays a fundamental role in protecting shareholders' rights and interests, this remedy is not available in every circumstance. Just like many jurisdictions across the world, the *CAMA* clearly states the circumstances under which this remedy will

[121]Eluromma, *supra* note 57 at 68.
[122][2010] All FWLR (PT. 520) 1198 S.C at page 1230, Para D-G.
[123]Kunle Aina, "Current Developments in the Law on Derivative Action in Nigerian Company Law", SSRN Scholarly Paper ID 2617480, Social Science Research Network, 2014) at 2 [Aina]. Practically, such a director will rather rectify the wrong or quietly cover such wrong (if it is one that can be covered) than institute an action to remedy the wrong and thereby expose their wrong doings.
[124]KM Choo, "The Statutory Derivative Action in Singapore – A Critical Examination" (2001) 13:1 BondLaw Rw 64 at 68.

be available and also sets out the procedural requirements that a shareholder will need to comply with before instituting a derivative action. These requirements are discussed below.

2.1.2. Who may bring a Derivative Action?

Section 309 of the *CAMA* lists the categories of persons that may bring an application for a derivative action. These are:

a) a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company;

b) a director or an officer or a former director or officer of a company;

c) the Corporate Affairs Commission; or

d) any other person who in the discretion of the court, is a proper person to make an application under Section 303, i.e., the derivative action provision in *CAMA*.

Emphasis will be laid on subsection (a) because the focus of this thesis is on the legal protection available to minority shareholders and this sub-section empowers a registered holder or beneficial owner or former registered or beneficial owner of a security of a company to bring an application for a derivative action. A registered holder of a security of a company is a holder of record that has shares directly with the company. Beneficial ownership includes ownership of shares through any trustee, legal representative, agent or other intermediaries.

Clearly, section 309 of the *CAMA* specifies the categories of persons authorized to bring an application for a derivative action and also empowers the Nigerian court to use its discretion in permitting a person to bring an application for a derivative action. With respect to the latter, it appears that the intention of the legislature is to allow a broader number of persons not expressly mentioned under the section to be able to bring an action, subject to the discretion of the courts. However, it appears as though the courts are not very willing to use this discretion. In the case of *Chief Akintola Williams & ors v Edu*[125] the

[125] (2002) 3 NWLR (Pt 754) 400.

Court of Appeal in Nigeria was of the view that a non-member of a company cannot institute a derivative action under the section. The court noted as follows:

> section 303 (1) of the *CAMA* allows a shareholder to commence derivative action under certain circumstances set out therein. I am of the view that none of those circumstances can arise. The plaintiff herein is not shown to be the shareholder of the 7th defendant company. It is for the foregoing reason that claims 2, 3, and 4 of the respondent ought to be struck out for want of *locus standi*.[126]

While the court correctly confirmed that the plaintiff was not a shareholder, the court did not acknowledge that it had the discretionary power to allow a plaintiff to institute this action if it thought the plaintiff was a proper person. Instead, the court refused to allow the plaintiff on the basis that he was not a shareholder and did not have *locus standi* in the reliefs sought. The test adopted by the court to determine whether the plaintiff was a proper party is the "*locus standi*" test. One may assume that the court will apply this *locus standi* principle in exercising its discretion in allowing a proper person to sue. Surprisingly, the courts have continued to apply this principle in generally deciding whether or not to accept a derivative application, even where the plaintiff is a member of the association or company as the case may be and has been clearly given the "standing" to bring an application for a derivative action by virtue of the provisions of the *CAMA*. In other words, the Nigerian courts have denied members of a council (the decision-making body) of a body corporate (equivalent to the directors in a corporation) from bringing a derivative action on the basis of lack of *locus standi* even though the derivative action provision allows directors of the corporation to bring an application for leave to commence such an action.

In the case *Adenuga v Odumeru*,[127]the Supreme Court reiterated this position where it held that even though the plaintiffs were financial members of the body corporate and were instituting an action against the defendants on behalf of the council,[128] i.e., the decision

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[126] *Ibid* at 414.

[127] (2002) FNWDR (pt 821) 163. Although this was not a company but an association, section 299 of the *CAMA* and the derivative action provision apply.

[128] The council was the decision-making body of the association and exercised power to institute actions on behalf of the association just like directors of a corporation.

making body of the association, they did not have the *locus standi*[129] to institute such an action. The court emphasized the sufficient interest rule:

> The mere fact that appellants are financial members of the eighth defendant has not conferred on them *Locus Standi* because that alone would not disclose sufficient interest for them to bring this action. Looking at the statement of claim, the appellants have not disclosed sufficient interest to justify their bringing this action. A party must in his statement of claim aver enough facts to indicate what his interests are in the matter and how those interests stand threatened if the action was not brought. It is not enough to blandly state that he has an interest; there must be an averment that the interest is threatened.[130]

In other words, apart from ensuring that an individual (s) falls within the categories of persons listed under the *CAMA* or is permitted by virtue of the exercise of discretion of the courts, the courts usually examine whether the plaintiff has sufficient interest and such interest must be real, expressly set out on its statement of claim and not merely imaginary.[131] The question that then arises is - whether the express authorization of certain stakeholders under the statute to bring an application for leave to commence a derivative action is not enough to confer on them *locus standi?* Why do the plaintiff's personal sufficient interests matter? This extraneous condition adopted by the courts is quite restrictive as the Act expressly sets out the categories of persons that may apply for leave to institute a derivative action and makes no mention of other factors. This is not to say that the courts should permit every person to bring a derivative action but such judgment should be decided solely by adhering to the provisions of the statute (which sets out the persons who can bring an application for leave to commence a derivative action) and not by introducing some extraneous test – "sufficient interests"- so as not to frustrate the intentions of the legislature which is clearly to accommodate the persons specified in the section to seek redress on behalf of the company.[132]

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[129]*Locus standi* is the right or ability to bring a legal action to a court of law, or to appear in a court.
[130] [2002] 8 NWLR (pt. 821) 163.
[131]*Adenuga v Odumeru* [2002] 3 NWLR (Pt 754) 400.
[132]Aina, *supra* note 123 at 13.

2.1.3. Application to Court for Leave to Initiate a Derivative Action under CAMA

Further to Section 303 (1) of the *CAMA*, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company. The rationale for making an applicant apply for leave is to help reduce the amount of trivial or malicious actions brought before the courts, and the costs the company will bear in defending the numerous suits especially if the financial effect on the company may outweigh its benefits even if the claim has merit.[133]More so, "uncontrolled access to the remedy could also result in potential directors feeling so vulnerable to suit that they decline such positions and companies and their directors facing underserved reputational and financial damage due to a proliferation of spurious actions".[134]

While the *CAMA* provides the requirement of the application for leave to commence a derivative action, it does not set out the procedure required to be adopted in applying for the leave from the courts. In *Agip (Nigeria) Ltd v Agip Petroleum International & Ors,*[135]the minority shareholders commenced an action by filing a Writ of Summons and also filed an ex parte application for leave to commence the derivative action in the name of the company. With respect to the mode of commencing the action, the court held that "by the community reading of sections 303 of the *Companies and Allied Matters Act* and Rules 2 (1) and (2) of the *Companies Proceedings Rules*, an application for leave to prosecute a derivative action is to be commenced by an originating summons and not otherwise."[136] The court went further to note that where any proceedings are begun other than as provided in the Rules, such proceedings are incompetent. And once there is a defect in competence, it is fatal and the proceedings are a nullity.[137] In other words, the court

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[133]"Berkahn, Matthew, "The Derivative Action in Australia in New Zealand: Will the Statutory Provision Improve Shareholders'' Enforcement Rights?" [1998] 10:1 BondLawRw 5.
[134]*Ibid* at para 102.
[135][2010] LPELR 250 (SC).
[136]*Ibid.*
[137] See also *Ajao v Alao* [1986] 5 NWLR Pt. 45 at Pg. 802; *Asore v Lemanu* [1994)] 7 NWLR Pt. 356 Pg. 284; *Udene v Ugwu* [1997] 3 NWLR Pt. 491 Pg. 57.

refused to overlook the wrongful commencement mode -Writ of Summons - and treat it as a mere irregularity.[138]

The decision of the courts is not surprising as Rules 2 (1) and (2) of the Companies Proceedings Rules provide that "every application under the Act **shall** be made by originating summons" and perhaps the use of the word "shall" in Rule 2, which connotes a mandatory requirement, was the basis upon which the court insisted on that mode and refused to treat it as a mere irregularity. The issue is that adherence to technicality does more harm than good to our corporate legal system. A Writ of Summons clearly states the parties, issues, and reliefs of the applicant, in the same way as an Originating Summons; so long as both documents show proof of the conditions to be satisfied as provided under *CAMA*, why then should a mere technicality be the basis upon which the courts refuse to grant such leave? More so, the trial court in the above-reported case had noted that the basis upon which he had granted the leave in the first place was because he had examined the documents which led him to the conclusion that the applicants had a prima facie case. This is not to say that the provisions of the Rules should be disregarded. However, in the absence of legislative amendment, the court should adopt a more flexible approach such that where the non-compliance is one that relates to the form and not substance of the application, then the court should apply the principles of equity and not outrightly declare it a nullity.

The strict adherence to technicalities as displayed in the *Agip* case may have amounted to injustice to the minority shareholders who were not able to obtain a remedy partly because they commenced the action with the wrong mode. Even though the application will still have been dismissed on the ground that the defendants did not receive notice of the motion filed by the plaintiff which is against the cardinal principle of fair hearing, the express declaration by the court that the action was a nullity on the ground that the applicants commenced the action with the wrong mode implies that the court would have made the same decision even if the fair hearing principle was not violated.

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[138] *Obasanjo v. Yusuf* [2004] 9 NWLR pt.877 at pg. 221.

In practice, once this leave is granted to a minority shareholder, such shareholder is then empowered to institute an action on behalf of the company regardless of the rule in *Foss v Harbottle*. The court must, however, be satisfied that the following conditions stipulated in *CAMA*[139] are present before a leave for a derivative action can be granted:

a) the wrongdoers are the directors who are in control, and will not take necessary action;
b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court for leave for a derivative action, if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
c) the applicant is acting in good faith; and
d) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.[140]

Further emphasis will be laid on two conditions provided in subsection (b) and (c) that appear to have vague interpretations.

2.1.3.1 Reasonable Notice to the Directors

Section 303 (2) (b) of *CAMA* requires the applicant to give reasonable notice to the directors of the corporation of his intention to apply for leave for a derivative action. This is very important because Section 303 ordinarily strips the directors of their statutory power to authorize bringing an action in the name of the company, and therefore, it is only fair that the directors are given notice of the proposed action to be instituted by the shareholder.[141]It is also possible that the directors may not have directed their minds to this course of action and such notice will then give them the first opportunity to exercise their statutory powers by instituting the action to redress the wrong.[142] If the directors fail to authorize the action after a reasonable amount of time, then the applicant may proceed to file the application.

The challenge with this provision is that it does not stipulate the specific number of days, weeks or months that will be deemed to be "reasonable notice" to the directors, in order

[139] Section 303 (2) of the *CAMA*.
[140]*Ibid.*
[141]Aina, *supra* note 123 at 13.
[142]*Ibid.*

for the court to grant leave for a derivative action.[143]Thus, this provision may then be used as a tool by the directors to delay such derivative action on the ground that the company is not ready to take action and will require more time since there is no specific time stipulated in *CAMA*.[144] It also does not provide any exceptions to the pre-action notice; neither does it give the court liberty to decide whether to do away with this provision, especially in the event that it would not be expedient to do so. The specific content of the notice is also not set out; perhaps, such notice should contain sufficient details to enable directors to know the specific actions to remedy. Where the directors take action by filing the action on behalf of the company, a derivative action will not be necessary. However, this is usually not the case because where the directors are the wrongdoers in control (which is a condition precedent for bringing the action) it is not likely that they will bring an action against themselves.[145] Dr. Aina is of the view that the requirement of notice to directors is superfluous and unnecessary and may serve as an opportunity for directors to organize their affairs or cover up their misdeeds.[146] It is however arguable that removing this provision may go against the principle of fairness, bearing in mind that the *CAMA* ordinarily empowers directors to authorize bringing an action on behalf of the company, and proceeding to do so without informing the directors may violate their statutory powers.

2.1.3.2 Good Faith

Section 303 (2) (c) of the *CAMA* provides that the applicant must show that the application was filed in good faith. The essence of this provision is to ensure that derivative actions are not brought out of personal vendettas against the directors of the corporation or do not turn to vexatious actions.[147] Since *CAMA* does not provide a definition or guidance regarding what constitutes good faith or bad faith, the Nigerian courts have looked at the English cases to determine what the phrase "good faith" means. In *Shodeinde & Ors v Reg. Trustees of Ahmadiyya*,[148] the court defined "good faith" as the absence of bad faith. The

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[143]*Ibid*.
[144]*Ibid* at 14.
[145]Aina, *supra* note 123 at 13.
[146] *Ibid* at 14.
[147]Aina, *supra* note 123 at 18.
[148] [1983] LPELR - 3064 (SC)

court further noted that "a thing is done in good faith or bona fide where it is in fact done honestly whether it is done negligently or not."[149] The issue that arises with this definition is how to determine "honesty". In practice, what the applicant does is to simply declare on the face of the application that the application is meritorious and supportable.[150]

The disadvantage of this provision is that it may be somewhat difficult to prove because where the directors, who normally have the responsibility of deciding what is in the corporation's best interests, have decided not to take action, it could be argued that any action taken by any shareholder was brought in bad faith.[151] This provision also gives the court wide discretion to shut out applications that may have been meritorious on the ground that in the opinion of the court, it was not brought in good faith despite that the phrase is not defined in *CAMA*.[152]

It is worthy to note that the above listed 4 conditions must all be satisfied before the court can grant leave for instituting a derivative action. Therefore, the absence of any of the above conditions will result in the court refusing to grant the leave to institute a derivative action.

2.1.4. Powers of the Court

Further to Section 304 of the *CAMA*, a court hearing a derivative suit may at any time make any order or orders as it deems fit. The court is also specifically authorized to make one or more of the following orders:

a) authorizing the applicant or any other person to control the conduct of the action;
b) giving directions for the conduct of the action;
c) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of to the company;

[149] *Ibid* at 53&54.
[150] Aina, *supra* note 123 at 18.
[151] *Ibid*.
[152] *Ibid*.

d) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.[153]

Unlike the rule in *Foss v Harbottle*, where the court pronounced the importance of judicial non-interference with any act that can be ratified by the majority, *CAMA* provides that the court has no power to stay or dismiss an application merely because it is shown that an alleged breach of right or duty owed to the company has been or may be approved by the shareholders of such company.[154] However, the evidence of approval by the shareholders may be taken into account by the court in making an order under Section 304 of the *CAMA*. In other words, the issue of ratification is not a factor the court considers in granting leave, however, the directors can show that the act has been ratified by the company and it is not willing to take further action on the matter and such evidence may be considered by the court in making orders.

Section 306 of *CAMA* also provides for instances where the parties agree to withdraw or settle the matter out of court. The court must approve such discontinuance, settlement or dismissal, and if the court is of the view that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the applicant. This provision is very essential to the interests of a minority shareholder who may be an applicant, because it prevents collusive settlements between the other parties for their benefit, at the expense of the company or minority shareholder.[155]If the court believes that the discontinuance or withdrawal will be detrimental to the rights of the applicant or company, the court may refuse to approve such withdrawal or discontinuance and appoint an independent person or inform the Corporate Affairs Commission to continue the matter.[156]

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[153]Section 304 of the *CAMA*.
[154] See Section 305 of the *CAMA*.
[155]Aina, *supra* note 123 at 21.
[156]*Ibid*.

2.1.5. The Shortcomings of the Nigerian Derivative Action

No doubt, the derivative action provisions available under Nigerian law to a large extent mitigate the hardship arising from the common law rule; however, the provisions are not without shortcomings. The vagueness in the derivative action provision and the strict interpretation adopted by the courts may have a significant impact on the protection of minority shareholders' rights. For instance, the pre-action notice required to be provided by the applicant does not stipulate the number of days, weeks or months required. Also, the rigid interpretation and rules of the courts in including the "*locus standi*" test and insisting upon a particular procedural mode of commencement of the action can frustrate the use of the derivative action as a remedial tool for minority shareholders' protection. Also, the lengthy proceeding arising from the tactical delays orchestrated by the directors or their counsel as a result of the vague statutory provisions could be burdensome for minority shareholders who do not want to incur legal costs chasing a matter for which they are not certain to a reasonably probable degree that they will obtain a remedy. The situation is even worse where the legal costs to be incurred over a long span of time are enormous and unreasonable compared to the minority shareholders' returns on investments unless the court gives an order for the company to pay the interim costs of the applicant.[157]In the absence of such an order for interim costs, the best business decision for the aggrieved minority shareholders will then be to discontinue the matter, or not institute the action in the first place having calculated the estimated time span of the action, legal costs and the chances of not obtaining a remedy.

The following section will examine the derivative remedy under Canadian corporate law to determine whether its provisions have similar shortcomings or if it adequately protects the interests of minority shareholders.

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[157] Section 308 of the *CAMA*.

2.2. Derivative Action under Canadian Corporate Law

2.2.1. Introduction

Under Canadian law, a derivative action is a remedy provided to a "complainant" that enables him to bring an action in the name or on behalf of the corporation or any of its subsidiaries in order to assert or defend the rights of the corporation or subsidiary.[158] It has been described as the "minority shareholder's sword to the majority's twin shields of corporate personality and majority rule".[159]In other words, this remedy allows complainants the opportunity to challenge any misuse of managerial power on behalf of directors or managers of the corporation, irrespective of the rule in *Foss v Harbottle* and the corporate legal personality principle. Without this remedy, a minority shareholder will only be able to rectify a wrong done to the corporation or to his rights or overcome the difficulties that may arise from corporate personality and majority rule by persuading the majority shareholders to agree with his point of view or to use their "majority rule" power to replace the incumbent board of directors who have the power to cause the corporation to sue.[160]

Just as under Nigerian law, the majority rule in *Foss v Harbottle* worked great hardship on minority shareholders most especially because of the limited exceptions that were available under the common law. Due to the hardship arising from the strict application of this rule, it became imperative for Canadian legislators to create statutory remedies that could adequately protect minority shareholders in a corporation.[161]As highlighted in Chapter 1, the Ontario government set up a committee in 1967 to make proposals for corporate law reform, including provisions relating to minority shareholders' protection. The product of this committee was the Lawrence Report which made recommendations for the derivative action remedy and other statutory remedies.[162] The model reform that was recommended by the Lawrence Report for Ontario was later adopted at the federal level in the Dickerson

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[158]Kevin Patrick McGuinness, *Canadian Corporations Law* (Toronto: LexisNexis Canada Inc, 2017) at 1332.
[159]Welling, *supra* note 23 at 509.
[160]*Ibid*.
[161]*Ibid* at 55.
[162]*Interim Report of the Select Committee on Company Law* (Toronto: Ontario Queen's Printer, 1967).

Report for the *CBCA*. This resulted in the enactment of sections 239[163] and 240[164] of the *CBCA*.

It is important to note that the Canadian derivative action is very similar to the derivative action provisions available under Nigerian corporate law. Just like the Nigerian legislators who adopted section 210 of the *U.K Companies Act of 1948*, while also considering the recommendations made by the Jenkins Committee of 1959,[165]the Dickerson Committee[166]recommended the adoption of the *OBCA* provisions which were also influenced primarily by the recommendations made by the Jenkins Committee. However, as will be highlighted below, certain aspects of the Canadian derivative action provisions have been amended to provide more clarity and address the current realities of corporate law practice.

2.2.2. Proper Party to Initiate Derivative Action

The *CBCA* permits the same group of persons to bring an application for a derivative action as under the Nigerian derivative action provision. However, the *CBCA* expands this list to include a registered or beneficial owner or former registered or beneficial owner of any of the affiliates of the corporation.[167]Just as under the Nigerian derivative action provision which permits the CAC to bring a derivative action, the *CBCA* permits the *CBCA* Director to bring a derivative action.[168]The *CBCA* also has a blanket phrase that allows the courts to permit any other person who in the discretion of the court is a proper person to make the application. In deciding whether a person is a proper person, the Canadian courts have noted that the purpose of the derivative action should be borne in mind, which is for minority shareholders' protection and ensuring accountability. For instance, in the case of

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[163] Procedure for initiating derivative actions and conditions precedent to initiating such actions.
[164] Powers of the court to make orders in derivative action proceedings.
[165]The Jenkins Committee on Company Law was a Company Law Committee, chaired by Lord Jenkins to review and report upon the provisions and workings of the U.K *Companies Act of 1948*.
[166] R. Dickerson, J. Howard & L. Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971) at 157.
[167]Section 238 (a) of the *CBCA*.
[168]This is an administrative official appointed by the Minister with responsibility for the *CBCA*, to carry out the duties and exercise the powers of the Director under the Act.

a creditor[169] who claims to be a proper person, the question is whether he would be a person who would reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking the remedy to right the wrong allegedly done to the corporation.[170] If the answer is in the affirmative, then the creditor might be pronounced to be a proper person by the courts.

As highlighted above, the derivative action provision under the *CBCA* permits a registered or beneficial or former registered or beneficial owner of a security to initiate a derivative action not only in respect of the corporation itself but also in respect of a wrong done to an affiliate of the corporation. Companies that are in any of the following types of relationship are regarded as affiliates: holding company and subsidiary company; two or more subsidiaries of a common holding company; two or more companies controlled by the same person.[171] This is a great tool in protecting minority shareholders in the sense that the directors of an affiliate cannot hide under the corporate personality rule asserting that the minority shareholder has no basis to sue since he is not a shareholder in the affiliate of the corporation. The effect of this is that, if for instance a director of a thriving subsidiary mismanaged profits or breached their fiduciary duties as a director, shareholders of a parent company will be allowed to bring a derivative action on behalf of the affiliate.[172]

2.2.3. Application to Court for Leave to Initiate a Derivative Action under *CBCA*

Section 239 (1) of the *CBCA* provides as follows:

> A complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate. [Emphasis added].

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[169] A creditor is not listed in Section 238 of the *CBCA* as a person empowered to institute a derivative action unless by the exercise of the discretion of the court.
[170] See *First Edmonton Place Ltd v 315888 Alberta Ltd* (1988) 40 BLR 28 at 63 (Alta QB).
[171] See Section 2(2) (3), *CBCA* for the specific definitions given to the terms “control” and “subsidiary”.
[172] Eluromma, *supra* note 57 at 148.

The application for leave is fundamental to commencing a derivative suit on behalf of the corporation. Unlike the Nigerian corporate law, the *CBCA* gives an unrestrictive context on the mode of application for leave for a derivative action. Section 248 of the *CBCA* provides that an application by a complainant **may** be made in a summary manner by petition, originating notice of motion or otherwise as the rules of the court provide or subject to any order the court thinks fit. In the case of *Muljadi v. O'brien,*[173]the court examined section 247 of the *OBCA* to determine whether the language makes it mandatory for a party seeking an oppression remedy to go only by way of an application. Section 247 of the *OBCA* provides that "a complainant…..**may** apply to the court for an order under the section". The court held that since the section used the word "may" and not "shall", then it appears the moving party has the power to decide upon the best approach. Furthermore, the court noted that when the legislature intended to take away discretion from counsel, it must say so in plain language and that was not the situation in section 247 of the *OBCA*. Although the above-cited case was made in relation to the oppression remedy provision under the *OBCA*, the case is still significant here in relation to the interpretation provided by the court of the word "may" which is also used in section 248 of the *CBCA*. Applying the same logic to section 248 of the *CBCA*, the section provides that the application "may" be made in a summary manner but also leaves in the discretion of the party seeking the remedy the decision to go by way of an action.[174] This leaves the complainant with options on the manner in which he can apply for leave for a derivative action and helps to simplify the procedure – a feature not present under Nigerian corporate law.

Conflict may arise between the provisions of section 248 *CBCA* and the rules of the court where the mode set out in the rules is different from that provided under section 248.[175] However, in the event that a party chose the wrong form of originating process, the Ontario

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[173] (1990) 75 OR 2d 270 (Ont).
[174]*Ibid* at para 6.
[175] In *Sparling v Royal Trustco Ltd* (1983) 143 DLR 3d 112 (Ont.) the issue was whether the proceeding was improperly commenced by a writ of summons rather than by originating motion in light of section 241 *CBCA* that permitted an action to be commenced "in a summary manner by petition, originating notice of motion, or otherwise as the rules provide" and Rule 4 of the Ontario Rules of Practice which provided that the action be commenced by a writ of summons unless statutes or rules prescribe another mode. The court held that it was commenced in the appropriate mode.

Court of Appeal noted in *Chilian v Augdome Corp*,[176] in compliance with civil procedure rules,[177] that the court will not set aside the originating process on this ground. The court further noted that the current Canadian law does not reflect the attitude underlying the old common law rule where a litigant was non-suited for adopting the wrong form of action.[178]This position was reiterated in the case of *Nuvex Ingredients Inc v. Snack Crafters Inc*.[179] Clearly, the Canadian courts adopt a flexible approach in deciding the appropriate mode of originating process used in applying for leave to commence a derivative action because of the legislative provisions and understand that dismissing an action based on the wrong mode of commencement would imply that the Canadian law is still subject to the unnecessary technicalities underlying the common law regime.

Apart from the procedural issues, there are also substantive requirements the court looks out for when granting leave to commence a derivative action. The court will not grant the application for leave to commence a derivative action unless the following conditions are satisfied:

a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court to initiate or defend a derivative action not less than fourteen (14) days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;
b) the complainant is acting in good faith; and
c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.[180]

The above requirements are conjunctive and not mutually exclusive, and so if all of the requirements are not present, the court will not allow a derivative action to be brought or

[176] (1991) 2 OR 3d 696 (Ont CA).
[177] Rule 2.01 (2) Ontario Civil Procedure Rules provides that the court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.
[178]*Chilian v Augdome Corp* (1991) 2 OR 3d 696 (Ont CA) at para 39.
[179](2005) O.T.C 47 (SC). See also *Schreter v. Gasmac Inc.*(1992) O.J. No. 257.
[180]See section 239 (2) of the *CBCA*.

defended. With respect to the first requirement**,** all that is required is a notification to the directors, which can be accomplished by sending a written request to the board of the corporation or by serving them with the notice of the application.[181] Both methods would clearly show the lapse of time since the notice was given, as the statutory provision requires not less than 14 days' notice. Failure to provide evidence of this statutory notice will usually be fatal to an application for leave to commence a derivative action.[182] However, in some cases, the shareholder may be unable to give the stipulated notice, such as, where the matter is one that requires the urgent attention of the court or where providing such notice will amount to unnecessary delay. In such instances, the court retains the power to dispense with the notice requirement.[183]

The second requirement seeks to ensure that the complainant, i.e. typically a minority shareholder, in this case, is acting in good faith. Unfortunately, the *CBCA* does not give further context or guidelines to determine what "good faith" means. In *Winfield v Daniel,*[184] the Alberta Court of Queen's Bench noted that "good faith" exists where "there is a prima facie reason to believe that the applicant is acting with proper motives, i.e., a reasonable belief in the merits of the claim".[185] Usually, the court expects the applicant to establish clearly on a preponderance of evidence that the application is brought in good faith.[186] In *First Edmonton Place v 315888 Alberta Ltd*,[187] the court held that good faith is shown if the action is not motivated by a personal vendetta, and is not frivolous or vexatious. Furthermore, in *Primex Investments Ltd.* v *Northwest Sports Enterprises Ltd. et al,*[188] the court held that mere self-interest does not constitute bad faith if the interests of the applicant and the corporation simply coincide; there must be other circumstances suggesting that the application is not brought in good faith.

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[181] In *Bellman and Western Approaches Ltd, Re* (1982) 130 DLR 3d 193 (BCCA) at 20, the court held that a letter to the board of directors or their lawyer will suffice.
[182]*Covia Canada Partnership Corp v PWA Corp* [1993] OJ No 1793, 106 DLR (4th) 60 (Gen Div).
[183] See Section 239 (2) (a) of the *CBCA*.
[184] [2004] AJ No 37; 2004 ABQB 40.
[185]*Ibid* at 16.
[186]*Tremblett v SCB Fisheries Ltd* [1993] 116 Nfld & PEIR 139 (Nfld) at 151.
[187] [1988] 60 Alta L.R (2d) 122 (Alta. Q.B).
[188] [1995] 13 B.C.L.R (3d) 300.

Just like the other prerequisites, where the complainant is unable to prove good faith, the court will usually not grant leave to institute a derivative action. In *McAskill v TransAtlantic Petroleum Corp*[189] the minority shareholder opposed the corporate merger of the corporation with another oil and gas corporation. He brought a derivative application on behalf of the corporation alleging that the union of the corporations was improvident and that some of the directors of the corporation were negligent, and had acted in breach of their duties. He had earlier proposed an arrangement which involved a large retainer and use of an airplane for a business owned by him. The court refused to grant leave on the basis that the applicant was not acting in good faith but was motivated by a personal vendetta stating that his inability to give any reason for not bringing action against all directors and his proposed arrangement were all indicative of bad faith.

From the above, it is clear that even the courts have no definitive guidelines to determine what the phrase "good faith" means. In practice, the court examines the circumstances of each case in order to determine whether such an application was brought in "good faith" or not.[190]Professor Welling is of the opinion that this provision is meaningless especially because there are no clear cut rules to determine good faith and the provision, therefore, gives the judiciary the freedom to interpret the requirements as it likes or dismiss the application on the basis that in the opinion of the court, the applicant did not prove his good faith.[191] However, eliminating this provision may open the directors to all sorts of litigation as stakeholders may bring an application for leave to commence a derivative action based on personal vendettas. Perhaps, providing guidelines as to determining what "good faith" connotes will help limit the courts' discretionary power and create certainty for complainants prior to instituting the action to determine whether their matter will be considered as being brought in good faith or not.

Finally, the court must be satisfied that the proposed derivative action is brought in the interests of the corporation or its subsidiary. The court need not be convinced that the proposed action is in fact in the best interest of the corporation but the court must be

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[189] [2003] 5 WWR 178 (Alta).
[190]*Winfield v Daniel* [2004] AJ No 37; 2004 ABQB 40.
[191]Welling, *supra* note 23 at 511.

satisfied that it appears to be in the corporation's interest that the derivative action is initiated.[192] In other words, the question that is to be raised by the court is whether the action has some prima facie merit, rather than whether the application will be successful.[193]

2.2.4. Powers of the Court hearing a Derivative Action

Upon granting leave to institute or defend a derivative action, the court will hear the application of the complainant and the defendants, who are usually the directors or shareholders who oppose the application for leave. The court may at any time during the action make any order it thinks fit including, without limiting the generality of the foregoing, the following:[194]

a) an order authorizing the complainant or any other person to control the conduct of the action;
b) an order giving directions for the conduct of the action;
c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary; and
d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

Just as provided under the Nigerian legislation, the court may at any time order that the corporation or its subsidiary pays the legal fees incurred by a minority shareholder in a derivative suit. An order for interim costs allows the company to fund the expenses of litigation that a complainant may not be able to afford. Thus, a shareholder who is not financially buoyant can also pray the court to make an order directing the company to bear his legal costs. Furthermore, the mere fact that an alleged breach of a right or duty of a corporation has been ratified by the majority of shareholders in the corporation does not mean that the court will automatically dismiss or stay the application for a derivative action

[192]Nicholls, *supra* note 13 at 415–416.
[193]*Marc-Jay Investments v Levy,* [1974] 50 DLR (3d) 45 (Ont. HC).
[194] Section 240 of the *CBCA*.

– which is contrary to the rule laid down in *Foss v Harbottle*. However, the court may take into consideration the evidence of the approval of the shareholders in making an order.[195]

2.3. Comparison of Minority Shareholder Remedy of Derivative Action under Nigerian and Canadian Corporate Law

This section will conduct a comparative analysis of the derivative action available as a minority shareholder protection under Nigerian and Canadian corporate law. Although the statutory provisions and judicial decisions from both jurisdictions are to a large extent similar, there are certain significant areas of differences between both legal systems. This section will also assess the impact these differences have on the protection of minority shareholders under Nigerian and Canadian corporate law respectively. Some of the significant differences in the minority shareholder remedy of derivative actions are set out below:

2.3.1 The Mode of Commencement

The Nigerian Companies Proceedings Rules provides that all applications which include the derivative application should be made by originating summons.[196] The Nigerian courts have dismissed any derivative application not brought in this form. The Canadian corporate law, on the other hand, provides that a derivative action may be made in a summary manner but also leaves in the discretion of the party seeking the remedy to proceed by way of action.[197] Most importantly, the courts have pronounced, in line with civil procedure rules, that they will not set aside the originating process on the ground of wrong mode of commencement.[198] The implication of this is that even where the counsel uses a wrong mode of originating process for a derivative action leave application, the court will not dismiss the application on that basis, and so, minority shareholders or their counsel, as the case may be, do not have to worry about the technicalities involved with filing an application for a derivative action. The legal technicality apparent in the Nigerian corporate

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[195] Section 242 (1) *CBCA*.
[196] Rule 2 (1) & (2) of the *Companies Proceedings Rules 1992*.
[197] Section 248 of the *CBCA*.
[198] *Chilian v Augdome Corp* (1991) 2 OR 3d 696 (Ont CA).

legal system with respect to derivative actions may bar applicants from accessing justice as it increases costs of litigation in terms of time and financial expenses. This is because where an application or a judgment given pursuant to a wrong mode of commencement is nullified,[199] the applicant may be frustrated and decline to apply again having incurred legal cost without obtaining a remedy.

2.3.2. Proper Parties to Initiate a Derivative Action

Nigerian and Canadian corporate law empowers holders of securities of a corporation to initiate or defend an action on behalf of the corporation provided certain requirements are satisfied. While Canadian law recognizes the right of a shareholder to bring derivative actions both in respect of a corporation and any of its affiliates,[200] Nigerian corporate law does not extend such right to the affiliates of the corporation. What occurs under Nigerian corporate law is that a shareholder is only empowered to bring an action on behalf of the corporation in which it has its shareholding, and so, an application for leave to institute a derivative action brought by a shareholder on behalf of an affiliate may be refused on the ground that he lacks the *locus standi* to do so.[201] This may negatively impact minority shareholders' protection. For instance, where the directors of a subsidiary mismanage profits that subsequently affect the profits of the corporation in which the shareholder is a member, the shareholder of the parent company may not be allowed to bring a derivative action against the directors, subject to the discretion of the court. Given the Nigerian judiciary's strict adherence to precedent, it is very unlikely that the courts will be willing to grant such a shareholder a leave to institute a derivative action on behalf of a subsidiary of a corporation in which the applicant is a registered holder of a security.[202]In accordance with the provisions of the *CBCA*, the Canadian courts on the other hand, will allow a shareholder of a parent company to bring a derivative action on behalf of the corporation or any of its affiliates.

[199] This was the case in *Agip (Nigeria) Limited v. Agip Petrol Int'l* [2010)] All FWLR (PT. 520) 1198 S.C.
[200]Section 239 (1) of the *CBCA*.
[201] See, *Adenuga v Odumeru* [2002] FNWDR (pt 821) 163; *Central Bank of Nigeria v Kotoye* [1994] 3NWLR (pt 338) 66*; Gombe v P.W. (Nigeria) Ltd*. [1995] 6WWLR (pt. 402) 402.
[202]Eluromma, *supra* note 57 at 148.

In view of the above prejudice that could arise from this provision, and the need to provide a more suitable legal framework for investors, the 8th Session of the Nigerian National Assembly created the National Assembly Business Environment Roundtable (NASSBER) to ensure that the legal and regulatory framework promotes enterprise, growth and the right environment for investments. The product of the NASSBER was the enactment of the Companies and Allied Matters (Repeal and Re-enactment) Bill which has recently been passed by the Nigerian House of Representatives.[203] The Bill extends the powers of shareholders to bring an action on behalf of a subsidiary of the company. It is the hope that this Bill is passed into law so as to enable shareholders of a corporation to bring an action on behalf of a subsidiary of a corporation in which it is a registered holder of security.[204]

2.3.3. Notice to Directors before Commencing Derivative Action

The *CBCA* requires a complainant to show that he has given a notice of not less than 14 days to the directors of the corporation informing them of his intention of instituting a derivative action or as otherwise ordered by the court. The *CAMA* only requires that the complainant shows that "reasonable notice" of his intention to apply to the court has been given to the directors of the company. The challenge with this provision is that the phrase "reasonable notice" is not defined in the *CAMA* and so the directors can argue that the notice provided was not reasonable. The ultimate decision is then left in the hands of the judge to decide whether such notice is reasonable or not. Thus, reasonable notice maybe 3 or 4 days or weeks or months depending on the circumstances and facts of each given case. The flexibility of this provision is advantageous in emergency circumstances where a notice period of 2-5 days may be deemed appropriate by the courts. The *CBCA* also authorizes the court to make orders that the length of time be abridged or that the notice be discarded.[205] In the absence of such orders, the complainant will have to provide notice to the directors in order to be able to bring a derivative action. It is important to note that prior to 2001, the *CBCA* derivative action provision also required that "reasonable notice" be

[203]Repeal and Re-enactment Bill 2017.
[204]Section 344 of the Repeal and Re-enactment Bill.
[205] See Section 239 (2) (a) of the *CBCA*.

given to the directors. However, this provision was amended in 2001 to include a specific notice, i.e., 14 days' notice.

2.3.4. Conditions Precedent to Bringing Derivative Actions

The *CBCA* sets out three prerequisites that the complainant must satisfy before an application for leave to commence a derivative action will be granted by the court. These include showing that the complainant has given at least 14 days' notice to the directors of the corporation or its affiliates of his intention to bring an action; that he is acting in good faith; and that he is also acting in the best interest of the corporation or its affiliates as the case may be. Nigerian corporate law provides that the applicant must satisfy four prerequisites. In addition to the three prerequisites listed under Canadian corporate law, the Nigerian corporate law provides that the applicant must also show that the wrongdoers are the directors who are in control and will not take the necessary steps.[206] This also means that the directors are the only proper defendants in a Nigerian derivative action, as the applicant has to show that the erring party is the director (s) and not the dominant shareholders. This is not the case under the *CBCA*. Thus, the Nigerian corporate law provides more prerequisites that an applicant must satisfy than the equivalent *CBCA* provision and so leaves the applicant with a more difficult task to face in order to obtain the remedy from the Nigerian courts.

Also, the Nigerian derivative action provision narrows down the proper defendants to only the directors of the company which may be a serious hindrance for the adequate protection for minority shareholders. For instance, if the majority shareholders have voted for a certain decision that the minority shareholders believe is detrimental to the corporation, the minority shareholders may be unable to bring a derivative action on behalf of the corporation, subject to the discretion of the court on the basis that the directors are not the wrongdoers.

[206] Section 203 (2) *CAMA*.

Conclusion

The derivative action remedy is clearly a significant tool used in protecting the interests of minority shareholders in a corporation. By instituting an action on behalf of the corporation, minority shareholders are able to challenge decisions or actions taken by the directors to the detriment of the business or affairs of the company or remedy any wrong done to the corporation, irrespective of the historical rule in *Foss v Harbottle*. Although this remedy is one tailored towards protecting the interests of the company, as highlighted in this chapter, this remedy indirectly protects the rights of minority shareholders as well. In fact, the derivative provisions under both jurisdictions empower the courts to direct that any amount adjudged payable by a defendant in the action be paid wholly or in part to the applicant. The derivative action remedy provisions under Nigerian and Canadian corporate law are to a large extent very similar mainly because both were derived from recommendations made from the Jenkins Committee in relation to section 210 of the UK *Companies Act of 1948*.[207] However, the Canadian corporate statute has broadened the scope of its derivative action provisions and also provided more clarity. For example, the derivative action provision under the *CBCA* explicitly allows a minority shareholder to bring an action on behalf of the affiliate of the corporation in which it is a registered holder of security, while the *CAMA* does not. The mode of application for a derivative action under Canadian corporate law is also more flexible than what is applicable under the Nigerian corporate law, as the Nigerian courts will dismiss any action not brought in a form of an originating summons. The Canadian provision on derivative actions also appears to provide more details as to the period of notice required to be provided to the directors before instituting a derivative action, which is also not provided under the Nigerian corporate law. Furthermore, the *CBCA* also provides fewer prerequisites to instituting a derivative action than the Nigerian legal system, thereby reducing the hurdles that minority shareholders will have to face before instituting a derivative action. The above highlighted are features that the Nigerian policymakers and regulators can glean from Canadian

[207] Jenkins Board of Trade Law Committee Report (London: 1962) at Para. 206.

corporate law in order to provide and enhance an adequate and expedient remedy for minority shareholders who desire to rectify any wrong done to the corporation.

Chapter 3: Comparative Analysis of the Oppression Remedy under Nigerian and Canadian Corporate Law

Introduction

This chapter reviews the oppression remedy available under the Nigerian and Canadian corporate statutes, so as to examine the extent to which the legal provisions adequately protect minority shareholders in a corporation in each jurisdiction. This chapter also highlights the differences between both corporate law regimes and analyses the impact these differences have on minority shareholders' protection in their respective jurisdictions.

The oppression remedy is the most extensive and flexible remedy that is designed to remedy wrongs done to individual shareholders or a class or group of shareholders of a corporation. And so, it is only reasonable to examine its provisions and the interpretation of the courts, in order to get a clear picture of how minority shareholders are protected in a corporation.

3. Remedy for Oppressive or Unfairly Prejudicial Conduct under Nigerian Company Law

3.1. Introduction

The current oppression remedy is embodied in Section 310 – 312 of the *CAMA*. This provision was enacted in response to the inadequacy of the oppression remedy provisions available under the *Nigerian Companies Act of 1968* (the "1968 Act"). Section 408 and 410 enable a shareholder to bring a petition to wind up the company on the ground that it is just and equitable that the company be wound up. However, this is not a remedy that many shareholders are willing to explore especially because it will bring the end to a company that they have invested in, which is not usually their objective.[208] In view of this,

[208] Orojo, *supra* note 81 at 358.

special provisions were made in the Companies Act 1968 to serve as an alternative to the winding-up remedy.

Section 210 of the 1968 Act provided that an oppressed minority shareholder may apply to the court for an order that the "court may deem fit". This provision did not specifically state the orders the court may give in such circumstances. This provision was a replica of the *UK Companies Act of 1948* and surprisingly, was adopted in Nigeria in 1968 when the oppression remedy had already proved inadequate in England as a result of the strict approach and interpretation of the provision by the English judiciary.[209]As a result of the vagueness of the orders the court could make as a remedy, this provision seemed inadequate as it continued to be linked with the liquidation of the company at the instance of the oppressed minority – the very link that the legislators were trying to avoid in the first place.[210]

In 1990, the Nigerian Law Reform Commission acknowledged the inadequacy of this section and recommended a more comprehensive provision that would state the exact powers of the court and accommodate both oppressive and unfairly prejudicial conduct.[211]Hence, section 310 – 312 of *CAMA* 2004 provides for relief that may be made on the ground that the affairs of the company are being conducted in an oppressive or unfairly prejudicial manner or that the interests of the shareholders are unfairly disregarded.

3.1.1. Persons Entitled to bring an Application under Section 310-312 *CAMA*

The *CAMA* empowers the following persons to file a petition in court for relief on the ground that the affairs of the company are being conducted in an illegal or oppressive or unfairly prejudicial manner or in a manner that is unfairly discriminatory against them:[212]

a) A member of the company;

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[209]*Ibid.*
[210]*Ibid.*
[211]See Nigerian Law Reform Commission "Working Papers on the Reform of Nigerian Company Law Vol. I - Review and Recommendations" (Lagos: Nigerian Law Reform Commission, 1989).
[212]Section 310 of the *CAMA*.

b) A director or officer or former director or officer of the company;
c) A creditor;
d) The Corporate Affairs Commission; or
e) Any other person who, in the discretion of the court, is the proper person to make an application.

The *CAMA* defines a "member" of a company limited by shares as a person who has at least one share in the company and who agreed in writing to become a member and has his name entered into the register of members.[213] Thus, a member includes a minority shareholder of a corporation irrespective of the value of shares he has. It is also important to note that for the purpose of this remedy, the word "member" is defined to include the personal representatives of a deceased person and any person to whom shares have been transferred or transmitted by operation of law. In line with the objectives of this thesis, the focus will be on the relief sought by members of the company or by the Corporate Affairs Commission ("CAC") on behalf of members of the company.

3.1.2. Grounds for Application

The grounds for seeking an oppression remedy under *CAMA* are as follows:

i) that the <u>affairs of the company</u> are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member or the members as a whole or any person authorized to bring an action under the section;[214] or
ii) that an <u>act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution,</u> of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or was or would be in a manner which is in disregard of the

[213] Section 79 of the *CAMA*.
[214] Section 311 (2) (a) of the *CAMA* [emphasis added].

> interests of a member or the members as a whole or any person authorized to bring an action under the section.[215]

In view of the voting method that occurs in companies, i.e. the one share - one vote system, this provision is designed to protect minority shareholders whose interests or rights may be violated because they lack the voting power required to direct the resolutions of the company in their favor or to protect their interests. Thus, in such instances where their status as minority shareholders has put them in a precarious position, the law steps in to protect them by empowering them to bring an application under the above-listed grounds.

The CAC may also institute an oppression action on the ground that:

(i) the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in a manner which is in disregard of the public interest; or

(ii) any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which is in disregard of the public interests.[216]

This provision is designed to protect both members of a company and members of the public at large. For instance, an oppressed minority shareholder (s) who does not have the resources to bring an action in court or for any other reason may request the CAC to institute an action on behalf of the oppressed minority shareholders. The CAC may also on its own volition bring an action against a company on the ground that it disregards the interest of the public. However, it is surprising that despite the extremely broad powers of the CAC to seek redress for oppressed minority shareholders and the public, this power has remained unutilized by the CAC.[217] Perhaps, many minority shareholders do not request for such interference as a result of the lack of trust in the expertise of the CAC to adequately

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[215] Section 311 (2 (b) of the *CAMA*.
[216] Section 311 (2) (b) of the *CAMA* [emphasis added].
[217] *Ibid*.

protect their interests. Thus, most cases in which relief for oppression is sought have been instituted at the instance of minority shareholders and not the CAC.[218]

3.1.3. Definition of Oppressive or Unfairly Prejudicial Conduct

The *CAMA* does not define or provide guidance on what will constitute an "oppressive" or "unfairly prejudicial" conduct or an act that will be seen as disregarding the interests of a minority shareholder. Therefore, recourse must be made to the interpretation provided by the Nigerian courts. In this regard, the Nigerian courts have to a large extent relied on the judicial interpretation by English courts of the terms "oppression" and "unfair prejudice" in relation to section 210 of the *UK Companies Act of 1948* which was the section corresponding to section 210 of the *Nigerian Companies Act 1968*.

The English Court of Appeal in *Re Jermyn Street Turkish Baths Ltd*[219] (which is still a valid persuasive authority in Nigeria) defined "oppression" as follows:

> Oppression occurs when shareholders having a dominant position in a company, either (i) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (ii) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs, and when such conduct is unfair, burdensome, harsh and wrongful to the other members of the company or some of them, and lacks the degree of probity which they are entitled to expect in the conduct of the company's affairs.

In line with the above judicial interpretation, in *Ogunade v Mobile Films (WA) Ltd,*[220] Kabiri Whyte J. explained the nature of oppressive acts in contemplation of Section 210 of the Nigerian *Companies Act 1968*. He noted that "the oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful"[221] and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time. The court further stated that negligence in conducting the affairs of a company, or lack of business ability or inefficiency will not be sufficient to make the court grant relief under

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[218] *Ijale Properties Ltd v Omololu-Mulele* [2000] FWLR (Pt 5) 709.
[219] [1971] 1 WLR 1042 at 1059-1600.
[220] [1976] 2 FRCR 10.
[221] Citing the English case of *Re HR Harmer Ltd* [1958] 2 All ER 689.

Section 210 of the Nigerian *Companies Act 1968*.[222] The problem with the explanation ascribed to oppressive acts under Section 210 of the Nigerian *Companies Act 1968* was the need to establish that the oppressive conduct was a continuous pattern of conduct intentionally directed to the oppressed shareholder. Hence, where minority shareholders' rights have been violated by singular conduct, the court may not hold such to be "oppressive" because it was not a continuous act. Therefore, the inclusion of the phrase "unfairly prejudicial" by the legislators in Section 311 of the *CAMA* was a great move from a restrictive to a broader approach, thereby enabling the court to be more flexible in interpreting the term to adequately protect minority shareholders irrespective of whether the act was continuous or singular conduct.[223]

Just like the word "oppression", the *CAMA* also does not provide a definition of the phrase "unfair prejudice" and, as such, recourse is to be made to the judicial interpretation of the phrase. The court held in *Re R.A Noble & Sons (Clothing) Ltd*[224] that the test for unfairness is objective and there is no need to show any conscious knowledge on the part of the controller that it was unfair, or any other evidence of bad faith. The question would be whether a reasonable bystander would regard the act or omission as unfairly prejudicial.[225]An example of where the Nigerian court has granted this remedy was in a circumstance where the minority shareholders alleged that the company had not held any company meeting or filed annual returns with the CAC years after the company was incorporated. The minority shareholders also alleged that the company was being run by the majority shareholders leaving them in the dark as regards the financial status of the company. The court held that this was a clear case where section 311 of *CAMA* could be invoked as a basis of action.[226] The basis upon which the court decided that section 311 applies was not clearly stated, neither was there any analysis as to the factors the courts

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[222] The Nigerian court restated the position of the court in *Re Five Minutes Car Wash Service Ltd* (1966) 1 All W.R 242.

[223]O. C Aduma & C.S Ibekwe, "Protection of Minority Shareholders under Nigerian Company Law" (2019) 8:2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* [Aduma] at 93.

[224] [1983] B.C.L.C 273.

[225]G.Morse, E. Marshall & R. Morris, *Charlesworth's Company Law,* 13th ed. (London: Stevens & Sons Ltd, 1987) at 449

[226]*Ijale Properties Ltd v Omololu-Mulele* [2000] FWLR (Pt 5) 709.

should look out for in deciding whether such act is oppressive, unfairly prejudicial or unfairly disregards the rights of the shareholder.

In *Aero Bell Nig Ltd v Fidelity Union Merchant Bank Ltd*,[227] the court had to decide whether the act of declaring a lower dividend than previously declared by the board amounted to unfair prejudice to the plaintiffs (who were former shareholders). The court held that the plaintiffs were entitled to bring an action for relief from unfairly prejudicial conduct regardless of the fact that they had sold their shares. This was because the unpaid dividend had accrued before the sale of their shares was consummated. Again, the court did not give any analysis or guideline that it followed in reaching this decision. In the words of the court, the petitioners had amply demonstrated that they were entitled to dividends due to them as at the date of the board meeting and not the dividends subsequently pronounced.[228] Perhaps the court based its decision on the reasonable expectation that the former shareholders had that they would receive a certain dividend and then such expectations were dashed by the declaration of another dividend. Even if this were the basis upon which the court decided this case, it was not clearly stated.

The question that arises is whether there is a certain kind of harm or impact of such acts that should be present before the court would apply section 311. Or are the courts more likely to apply section 311 where the act is one that relates to the returns of investments of the shareholders in the company? In the face of the broad statutory language, the Nigerian courts have yet to establish clear cut rules to determine when an oppressive and unfairly prejudicial act has occurred. It appears that prevailing in the case of genuinely "oppressive acts" is easy since "oppression" "connotes harsh and wrongful acts that affect the rights of the shareholders".[229] However, with respect to "unfairly prejudicial" acts, the term comprises a broad range of corporate misconducts which are dependent on whether the court is of the opinion that such acts qualify as "unfair prejudice". This then leads to a situation whereby shareholders who intend to bring an action under section 311 of the *CAMA* are uncertain about the likely decision of the court since there are no judicial

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[227] [2005] LPELR 11339 [*Aero Bell*].
[228] *Ibid.* Salami JCA.
[229] *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] AC 324.

precedents setting out guidelines which the courts follow in reaching such judgments. This uncertainty may operate to discourage minority shareholders to use this right which eventually also decreases the likelihood that dominant shareholders and directors will have appropriate incentives to respect minority shareholders' rights.[230] Perhaps a more specific legislative reform or clear guidelines formulated by the courts will address this problem. However, legislative reform setting out factors to guide the court may still not capture every circumstance especially in view of the broad nature of corporate misconducts; however, guidelines established by the courts may be revised upon reviewing the facts of each case as the need arises.

3.2. Relief by the court

Where the court is satisfied that a petition under Section 310 and 311 of *CAMA* is well-founded, it may make such order or orders as it thinks fit to bring relief in respect of the matter complained of. The court could make an order as serious as one for winding up of the company or directing that the company institute a specific proceeding or that the CAC carries out an investigation on the company. For most minority shareholders, winding up the company or exposing it to investigation by the CAC is not their objective. Rather they wish to obtain a remedy or prevent any breach of their rights that could result in a depreciation of their investments. Some other orders that the court is empowered to make which may be of more interest to minority shareholders are as follows:

a) an order regulating the conduct of the affairs of the company in the future;
b) for the purchase of the shares of any member by other members of the company;
c) for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital;
d) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;

[230] Aduma, *supra* note 223 at 94.

e) restraining a person from engaging in specific conduct or from doing a specific act or thing; or

f) requiring a person to do a specific act or thing.

The wording of the *CAMA* implies that the courts have the discretion to determine what remedies to provide the applicant and hence does not give the applicant the right to a specific remedy.

The oppression remedy is one of the broadest remedies available for minority shareholders under the Nigerian corporate law system. With the inclusion of the words "unfair prejudice, disregard" and "discriminatory" in its provisions, it ensures that minority shareholders can bring an application for this remedy at the slightest violation of their legal rights or interests. Unlike the derivative action, this provision does not set out prerequisites to be fulfilled before instituting an action before the court. Upon assessing the application, the court is empowered to make a wide range of orders, including an order restraining a corporation from engaging in specific conduct or requiring that a corporation does a specific thing in order to remedy a wrong done to the minority shareholders in the company. However, there are no set out guidelines that can help applicants determine how the court will arrive at its conclusion or what specific orders the court will deem fit in any individual case and thus this remedy is to a large extent entirely within the discretion of the court.

3.3. The Oppression Remedy under Canadian Corporate Law

The oppression remedy has been described as one of the remedies under Canadian corporate law that gives the court extensive powers to redress all forms of unfair and oppressive actions by corporations and their directors to minority shareholders.[231] It is a "flexible, far-reaching remedy"[232] that allows any form of corporate behavior to be subject to judicial scrutiny.[233]It is an equitable remedy that seeks to ensure fairness to the minority shareholders, irrespective of their shareholding and voting powers in the corporation.[234]In

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[231]DH Peterson, & MJ Cumming, *Shareholder Remedies in Canada*, 2nd ed (Markham: LexisNexis, 2009) [Peterson] at para 17-1.

[232]*Ibid.*

[233]*Ibid* at para. 17.1.

[234]*Ibid.*

examining whether a conduct is oppressive or unfairly prejudicial, or unfairly disregards the interests of the shareholder, the courts may ignore the strict legal or statutory rights of the parties and the limits on those rights, in order to reach a fair judgment.[235] As aptly stated by the Supreme Court of Canada in *Re BCE*:[236]

> The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact-specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play.

The oppression remedy available under the *CBCA* was modeled after Section 210 of the *UK Companies Act 1948* in accordance with the recommendations in the Dickerson Report. However, the members of the Dickerson committee went beyond the original English provision by addressing the weaknesses in the UK oppression remedy that had been identified by the Jenkins Committee.[237]

Section 241 of the *CBCA*, reflecting the features recommended by the Dickerson committee, provides as follows:

> A complainant may apply to a court for an order under the section. If the court is satisfied that in respect of a corporation or any of its affiliates:
>
> (a) any act or omission of the corporation or any of its affiliates effects a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner.
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

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[235] McGuinness, *supra* note 158 at 239.
[236] [2008] 3 SCR; [2008] SCC 69.
[237] For instance, the *CBCA* provides that the oppression remedy will apply to not only conducts or acts of a corporate body but of any of its affiliated corporations.

Simply put, a complainant may seek an oppression remedy on any of the above-listed grounds, which will be examined in the latter part of this chapter.

3.3.1. Who may bring an Oppression Action?

Just as in the case of derivative actions, section 241 of the *CBCA* statutorily empowers a complainant to bring an action seeking this remedy. As noted above, section 238 of the *CBCA* defines a "complainant" to include: (a) a registered or beneficial owner and a former registered holder or beneficial owner, of a security of a corporation and any of its affiliates; (b) a director or an officer or a former director or officer of a corporation or any affiliates; (c) the *CBCA* Director; or (d) any other person who in the discretion of the court is a proper person to make an application under the section.

3.3.2. Grounds under which Oppression Remedy may be sought

a) **"A corporate act or omission effects a result…"**

   Section 241 (2) (a) of the *CBCA* provides that a complainant may bring an action for an oppression remedy where the corporation's act or omission effects a result. Thus, it is not enough to show that the corporation has acted or omitted to do something; the complainant must also show that such acts or omission resulted in an outcome that is oppressive, unfairly prejudicial or unfairly disregards the interests of the complainant.[238]

b) **"The business or affairs of the corporation or any of its affiliates are or have been carried on…"**

   Section 2 (1) of the *CBCA* defines "affairs" as the relationship among a corporation, its affiliates, shareholders, directors, and officers. The wording of Section 241 (2) provides for "business or affairs", which means that a shareholder can seek an oppression remedy relating to all decisions of a corporation whether relating to the business of the corporation or the relationship among the corporation, affiliates, shareholders, and officers. This remedy will not be applicable, however, where for instance, the personal action of a director is not one that relates to the company's

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[238]Welling, *supra* note 23 at 539.

business or affairs or an exercise of his power as a director. In such instances where it relates to the personal action of the directors or where it is outside the scope of the affairs or business of the corporation, the court will not qualify it as a ground to seek an oppression remedy.[239]

c) **"The director's powers are exercised …"**

Section 241 (2) c of the *CBCA* provides that a complainant may institute an action under this provision where the powers of the directors are exercised in a manner that is oppressive or unfairly prejudicial to, or unfairly disregards the interest of, the complainant. It is important to note even though the directors may have complied with their statutory powers, a complainant may still bring an oppression remedy without it affecting the complainant's chance of obtaining the remedy, or precluding the judge from granting the remedy.[240]Most of the oppression cases usually arise from this ground, because of the wide statutory and fiduciary duties directors owe to the corporation.[241]For instance, section 122 of the *CBCA* provides that "every director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances." It is usually in the exercise of the director's powers that they may breach their fiduciary duty, which is a ground for an affected minority shareholder to bring an oppression claim to the courts.[242]

3.3.3. Interests protected by the Oppression Remedy

No doubt the oppression remedy is widely resorted to when seeking protection for minority shareholders who may have been oppressed, unfairly prejudiced or had their interests unfairly disregarded. However, as wide as it may seem, this remedy does not cover every type of interest of the shareholders. In order to be protected by this remedy, a

[239]*Cairney v Golden Key Holdings Ltd* (1987) 40 BLR 263 (BC).
[240] In *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 at 485-486, the Supreme court noted that the oppression remedy will be available even where the directors were acting in line with their fiduciary duties.
[241]Eluromma, *supra* note 57 at 125.
[242] See *Peoples, supra* note 240 at 486.

minority shareholder must show that his affected interests qualify as "reasonable expectations" and that these reasonable expectations were thwarted in a way that constitutes oppression, unfair prejudice or unfair disregard of those interests.[243]

The Supreme Court of Canada in *Re BCE*[244] set out the factors to consider in an oppression suit. In this case, there was a plan of arrangement put in place for the purchase of the shares of BCE Inc. ("BCE") by a consortium of purchasers by way of a leveraged buyout. The arrangement was opposed by a group of debenture holders who complained that the trading value of their debentures would diminish by an average of 20% while conferring a premium of approximately 40% on the market price of BCE shares. In addressing the issues raised in this case, the Supreme Court set out a two-pronged test[245] for determining whether a claim of oppression is made out by the complainant. The court stated as follows:

> In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[246]

The sub-sections below will shed more light on the two-pronged tests carried out by the court to determine whether the oppression remedy will be available to a complainant.

3.3.3.1. The Reasonable Expectations Test

This then leads to the question – what is a reasonable expectations test? Although this phrase is not defined in the *CBCA*, according to the courts, the reasonable expectations test propounds that a complainant who may be a shareholder must show that the conduct being claimed as oppressive falls short of his reasonable expectations in relation to his investments in the corporation.

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[243]Eluromma, *supra* note 57 at 129.
[244]*Supra* note 236 at para 81.
[245]One of the tests was developed by the courts, i.e. the reasonable expectations test, while the other is provided by the statutes.
[246]*Re BCE*, *supra* note 236 at para 68 [emphasis added].

In *Westfair Foods Ltd v Watt*,[247] the court explained what amounts to "reasonable expectations":

> In very general terms, one clear principle that emerges is that we regulate voluntary relationships by regard to the expectations raised in the mind of a party, by the word or deed of the other, and which the first party ordinarily would realize it was encouraging by its words and deeds. This is what we call reasonable expectations, deserving of protection.

This test is in line with the fundamental principles of corporate law that a minority shareholder expects that the directors and officers will comply with their statutory duties which may include maximizing profits and share value in order to meet the expectation of the shareholder.[248] The courts recognize that a corporation is an entity that encompasses various individuals and groups whose rights and interests may conflict[249]and as such, it has been said that the oppression remedy will only avail shareholders where their reasonable expectations are not met and this would not include a "wish list" of the shareholder.[250] These "reasonable expectations" also include expectations that may have been created by the management of the corporation, whether legally binding or not. The court will usually apply an objective test to determine whether a reasonable expectation has been founded on the facts of the particular case.[251]

The Supreme Court in *Re BCE* identified some factors that may guide a court in assessing whether or not a reasonable expectation has been founded on the facts of a given case. Thus, what is a reasonable expectation may depend on the following: (a) standard commercial practice; (b) size, nature and structure of the corporation; (c) relationships between the parties; (d) past practice of the corporation; (e) steps that the claimant could have taken to protect himself or herself; (f) provisions of a shareholders' agreement or other documents.[252]The Court found on the facts in that case that the expectation of the debentureholders that the directors would consider their position while making their decision was reasonable and had been met considering that the Board examined all its

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[247] (1991) 115 A.R. 34 (CA).
[248]*Re BCE, supra* note 236 para 64.
[249]McGuinness, *supra* note 158 at 272.
[250]*82099 Ontario Inc v Harold E Ballard* [1991] 3 BLR (3d) 113 at 186 (Ont Ct Gen Div.)
[251]*Pente Investment Management Ltd v Schneider Corp,* [1998] OJ No 4142.
[252]*Re BCE*, *supra* note 236 at paras 107.

options and acted in what it perceived to be in the best interests of the corporation.[253] The Court noted that the debentureholders were not contending merely for a reasonable expectation that the Board consider their interests, but rather for an expectation that the Board preserve the market value of the debentures. And on this note, the court held that the reasonable expectations that the Board consider their interests were met and asking for anything more than this was outside the confines of the reasonable expectation test. As such, the oppression remedy available under section 241 of the *CBCA* did not apply. It is important to note that the list of factors relating to reasonable expectations referred to by the Supreme Court in *BCE* is not exhaustive, and as such, the scope of the oppression remedy continues to expand within the Canadian corporate law jurisprudence, thereby making it an indispensable tool in the hands of litigators seeking remedies for minority shareholders.[254]

Another case where the court applied the "reasonable expectations" test was *Downtown Eatery (1993) Ltd v Ontario,*[255]where the plaintiff who was an employee of B Inc. had obtained judgment for damages for wrongful dismissal. Several years after the action was commenced there was a major reorganization of B Inc. with another company, D. Ltd. B Inc. and D Ltd. were related companies, and directors of B Inc. were also directors of D Ltd. The directors did not believe the plaintiff had a meritorious claim and claimed they did not reorganize to avoid judgment and so the judgment against B Inc. remained unsatisfied. The plaintiff then sued all of the companies in the group basing his claim, in part on the oppression remedy. At trial, the application was dismissed on the basis that since the amalgamation and reorganization were not undertaken for the purpose of defeating the plaintiff's judgment, the employee was not entitled to an oppression remedy. On appeal, the Court of Appeal overturned the decision of the trial court and held that the intention of depriving the employee of judgment was not a prerequisite for an oppression remedy. The employee had reasonable expectations that the employer's affairs would be

[253]*Ibid* at paras 96, 101.
[254]Nicholls, *supra* note 13 at 432.
[255][2001] O.J. No. 1879, Ont. C.A.

conducted with a view to protecting his interests and the effect of the amalgamation was unfairly prejudicial and unfairly disregarded the employee's interests.[256]

From the above-reported cases, it is clear that the test adopted by the court in determining reasonable expectations is an objective one which also requires a balancing of the competing rights and interests of the stakeholders in the corporation in arriving at a decision. However, proof that reasonable expectations have not been met is not enough to avail a complainant the remedy under section 241. The court will further examine whether the violation of such reasonable expectations results in one of the statutory elements which will be examined below.

3.3.3.2 Oppression, Unfairly prejudicial or Unfairly Disregards interests

The court in *Re BCE* went on to note that the complainant must also show that the breach of the reasonable expectation caused harm in such a way as to meet one of the statutory components in Section 241 (2) of the *CBCA*, that is, oppression, unfair prejudice or unfair disregard. It is important to note that not every breach of reasonable expectations would amount to oppression, unfair disregard or unfair prejudice.[257] While the first step – "reasonable expectations" - appears to be unambiguous in light of the factors listed and the test adopted by the courts in the above-reported cases, questions arise as to the type of harm or kinds of actions that would amount to oppression, unfair prejudice or unfair disregard of the rights of the complainants. Although some judges lump the interpretation or consequences of all three situations together for the sake of convenience, it is clear from the wording of Section 241 that each of these possibilities represents a separate cause of action.[258]It is then important to examine the kinds of behavior that would be characterized as oppressive or unfairly prejudicial conduct or conduct disregarding the interests of minority shareholders in a corporation.

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[256]See also *820099 Ontario Inc. v Harold E. Ballard Ltd* (1991) O.J. No. 266, 3 B.L.R (2d) 113 at 185-187; *Pente Investment Management Ltd v Schneider Corp* (1998) O.J. No. 4142, 42 O.R (3d) 177 (Ont. C.A).
[257]Welling, *supra* note 23 at 543.
[258]*Ibid*.

In the case of *Scottish Cooperative Wholesale Society Ltd v Meyer,*[259]"oppressive" conduct has been defined as "burdensome, harsh or wrongful". The definition of "oppressive conduct" that appears to be most cited by the Canadian courts and in legal writings is that provided by Lord Cooper in *Elder v Elder & Watson Ltd,*[260] where he noted that for a conduct to be qualified as oppressive, it should at the "lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely." A minority shareholder who has invested funds will have certain expectations. For instance, such shareholder will expect to receive notice of meetings of the members of the corporation and be able to vote on resolutions arising from such meetings, amongst other things. Now, where the directors or certain controlling shareholders violate these minority shareholder's basic rights, the court will likely hold such conduct to be oppressive.[261]

The phrase "unfairly prejudicial" has been taken to mean "acts that are unjustly or inequitably detrimental",[262] and is usually viewed as less offensive than oppressive acts. The test for whether a conduct is unfairly prejudicial to the rights of a minority shareholder is an objective test, whereby a reasonable bystander observing the conduct of the controlling shareholders or directors of the corporation would regard the conduct as having unfairly prejudiced the interests of the minority shareholder.[263] Some examples of unfairly prejudicial conduct include squeezing out a minority shareholder, paying dividends without a formal declaration, failing to disclose related party transactions and changing corporate structure to drastically alter debt ratios.[264]

"Unfair disregard" has been viewed as the least serious of the three wrongs referred to in Section 241 of the *CBCA*. This has been interpreted to mean "unjustly without cause, pay no attention to, ignore or treat as of no importance the interests of the shareholder."[265] It is

[259] [1959] AC 324.
[260] [1952] Scots Law Times 112 at 113.
[261] Peterson, *supra* note 231 at para 1766.
[262]*Diligenti v RWMD Operations Kelowna Ltd* [1976] 1 BCLR 36 (BC) at 45.
[263] *Brant Investments Ltd v KeepRite Inc* [1991] 80 DLR 4th 161.
[264]*Re BCE*, *supra* note 236 at para 93 (Citing Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson/Carswell, 2004), at pp 82-83).
[265]*Stech v Davies* [1987] 5 WWR 563 (Alta) at 569; *Waxman v Waxman* [2002] 25 BLR 3d 1.

important to note that such disregard must be "unfair", as a mere disregard of a minority shareholder's rights will not suffice.[266] This is because it is not unusual for corporate directors to treat the interests of one group of shareholders as more important than minority shareholders. But in doing so, they must strike a fair balance between the interests of various shareholders, including the minority shareholders' interests.[267]In the case of *Grigoriu v Ottawa-Carleton Standard Condominium Corp No 706,*[268]a condominium corporation amended its declaration to prohibit the use of parking units by non-residents. The purpose of this amendment was to address security concerns caused by non-residents accessing the parking garage. This change adversely affected the rights of the applicant who owned a parking unit and a residential unit in a neighbouring condominium corporation and was unable to sell his residential condominium unit (in the neighbouring corporation) because he was unable to sell his parking unit along with it. The judge hearing the application found that the amendment to the declaration breached the owner's reasonable expectation of being able to sell his residential unit with his parking unit and that the Board unfairly disregarded the interests of the applicant. It is pertinent to note that these statutory components and interpretations provided by the courts are merely illustrative and should not be regarded as "watertight compartments" as they often "overlap and intermingle".[269]

Unlike Nigerian courts, the Canadian courts provide some context (that is the two-pronged test articulated in *Re BCE*) as to how the court decides on whether Section 241 of *CBCA* will be applied. However, it has been said that with respect to the second stage of the test, there is not much analytical clarity as to how the courts arrive at these decisions.[270] This is because unlike with the first prong of the test, the Supreme Court has yet to establish factors or guidelines or even requirements that should be met in determining whether the violation of reasonable expectations resulted in an oppression, unfair prejudice or unfair disregard of the interests of the complainant. This has left the lower courts a gap to fill in and could

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[266] Peterson, *supra* note 231 at para 17.88.
[267]Eluromma, *supra* note 57 at 138.
[268] [2014] ONSC 2885.
[269]*Re BCE*, *supra* note 236 at para 91.
[270]Jassmine Girgis, *The Oppression Remedy: Clarifying Part II of the BCE Test*, SSRN Scholarly Paper ID 3198873, Social Science Research Network, 2018) at 487.

then create some level of uncertainty in deciding oppression cases. In the case of *Scullion v Munro,*[271]for example, the plaintiff and Munro incorporated three companies together and were equal partners throughout the time in their business together. Munro, the defendant, alleged that the plaintiff made improper payments to himself over several years and as a result decided to end business with the plaintiff. Munro proceeded to remove the plaintiff's personal belongings from the companies, denied him access to the companies and stopped paying his salary. The court held that the effect of Munro's conduct was unfairly prejudicial to the plaintiff and he was entitled to relief pursuant to the oppression remedy. Although the court made mention of the case of *Re BCE*, it did not apply the two-pronged test nor did it provide an analysis of why the conduct amounted to unfair prejudice to the plaintiff's interests. By applying an objective test, it is easy to see that there was a breach by Munro of the plaintiff's reasonable expectations since the plaintiff was deprived of his financial benefit and access to the companies. However, with respect to the second prong of the test, it seems as though this is usually decided based on judicial precedents (where there are similar circumstances) or in the discretion of the courts, seeing that the courts do not provide any analysis that helps all parties understand whether the statutory components set out in the CBCA were met.[272]

Unlike the first prong of the test where Canadian courts have set out an analysis and guidelines on how to arrive at whether or not the reasonable expectations of a shareholder have been violated,[273] Canadian courts do not appear to do the same with the second prong of the test. The courts simply assert that certain actions or omissions are, or are not, oppressive, unfairly prejudicial or unfairly disregarding the interests of the applicant, without articulating principles that inform their conclusion. As a result, there seems to be a level of uncertainty about what specific acts the courts will regard as oppressive, unfairly

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[271][2016] ONSC 116, 53 BLR (5th) 320.

[272]In *Paulsen v Wolfson Law Professional Corp* (2015) NSC 5714, 339 OAC 200, the court specifically determined that the conduct was similar to one example of conduct set out in *Re BCE* as evidencing unfair disregard: failing to deliver property belonging to the claimant. The court simply followed the previous decision and did not set out further reason to find that the statutory standard has been met.

[273]*RE BCE, supra* note 236.

prejudicial or unfairly disregarding the interests of the shareholder since there are no laid down principles.[274]

In a more recent case –*Wilson v Alharayeri*[275]- the CEO of the corporation who was also a shareholder, resigned when it was revealed that he failed to disclose a conflict of interest he had with the company. In response to the corporation's financial difficulties, the board decided to complete a private placement to its existing common shareholders. Two of the directors advocated against converting the previous CEO's shares on the basis of his conduct as the CEO. As a result of the private placement, issuing securities, the value of the CEO's shares was greatly reduced, and the control of the two current directors was increased. The CEO then filed an application for oppression under section 241 of the *CBCA*. The court held that section 241 was applicable in this circumstance and that the two directors were personally liable for the oppressive conduct. The court set out four general principles that should guide the courts in determining whether to grant the remedy. First, the oppression remedy must in itself be a fair way of dealing with the situation. It seems fair to hold the two directors personally liable being that they had derived a personal benefit in the form of increased control of the corporation, and misused their corporate power by reducing the value of the previous CEO's shares. Second, an order given by the courts should go no further than is necessary to rectify the oppression. Third, any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders. And fourth, a court should consider the general corporate law context in exercising its remedial discretion.

It is important to note that the above guidelines regulate the discretionary powers of the court with respect to section 241 (3) of the *CBCA*, that is the orders the court can grant having established that section 241 (1) of the *CBCA* applies. However, the second prong of the test remains fact-specific and is very dependent on judicial discretion. Even though this is a common pattern among other equitable remedies provided by the court, providing guidelines with respect to the second prong of the test, just as in the first prong of the test,

[274]As highlighted above, the court in *Re BCE* set out a number of factors that can help the court determine whether the reasonable expectation of the complainant has been violated.

[275] [2017] SCC 39.

will help in strengthening minority shareholders' protection. For instance, a minority shareholder is best protected where both directors and majority shareholders understand that certain conducts determined in accordance with clear principles and analysis laid down by the courts will amount to oppression, unfair prejudice or unfair disregard of the interests of the complainant and not based merely on whether a judge in a particular case might think so.

Upon examining oppression remedy cases in Alberta, British Columbia and Ontario between 2015 and 2017 Girgis[276] advises that two tests should be adopted with respect to the second prong of the test. First, the complainant must experience harm in its corporate role, arising from its relationship with the corporation, and the harm must be particular to the complainant's interests and, secondly, other remedies cannot be capable of addressing the harm. Perhaps, it might also be beneficial to include in the test the existence of any harm negatively affecting the returns of the investments of a shareholder since that is the primary purpose of most investors who buy shares in a corporation. Even if these guidelines were officially established by the court, just like the "reasonable expectations" test, they would not constitute an exhaustive list of considerations but could nevertheless provide some level of clarity for complainants and restrict the exercise of discretion of the courts and create some level of certainty which is essential for a corporate law system that aims to adequately protect its minority shareholders' rights and interests.

3.4. Remedies of the Court

Where the complainant succeeds in satisfying the court that his interest is a "reasonable expectation" and that such interest has been violated in a way that constitutes oppression or unfair prejudice or unfair disregard, the court may then make an order to rectify the situation complained of. Section 241 (3) bestows very wide discretionary powers on the court to address these wrongs, as the very essence of the oppression remedy is to remedy any wrongs done to the complainant, not to decree punishment against the wrongdoers. In the words of Farley J, "[t]he job for the court is to even up the balance, not tip it in favour

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[276]Girgis, *supra* note 270 at 488.

of the hurt party".[277]The *CBCA*, just like *CAMA*, authorizes the court to make such orders as it deems fit. The Canadian corporate law, however, sets out in more specific terms the kinds of orders the court may make. For example, the court may make an order requiring a corporation to produce to the court or interested person financial statements in a form prescribed by the *CBCA* or the court.[278] The court may also order that the affairs of the corporation be regulated by amending the articles or by-laws or creating or amending a unanimous shareholder agreement.[279] In addition to the orders set out under Nigerian corporate law, the *CBCA* also authorizes the court to make the following orders:

a) an order directing an issue or exchange of securities;
b) an order appointing directors in place of or in addition to all or any of the directors then in office;
c) an order directing a corporation or any other person, to pay a security holder any part of the monies that the security holder paid for securities, provided that the company has the financial capability and would not, as a consequence of such payment of monies to a security holder, become insolvent thereafter;
d) an order compensating an aggrieved person;
e) an order directing rectification of the registers or other records of the corporation; and
f) an order requiring the trial of any issue.

The broadness and flexibility of the Canadian oppression remedy make it a necessary tool in protecting minority shareholders in a corporation. This is so because the *CBCA* gives the courts unlimited powers to redress all sorts of unfairness and oppressive actions, whether legal or equitable. Commenting on the flexibility of this remedy, S.M Beck[280] described the Canadian oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world."[281] This can be seen in Section 241 (3) of the *CBCA* which allows the court to grant any order it deems fit to rectify the matters complained of.

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[277]*82099 Ontario Inc v Harold E Ballard* [1991] 3 BLR (3d) 113 at 186 (Ont Ct Gen Div).
[278] Section 241 (3) (i) of the *CBCA*.
[279] This is as opposed to the Nigerian corporate law which simply provides that the court may make an order for regulating the conduct of the affairs of the company in future.
[280] SM Beck, "Minority Shareholders' Rights in the 1980s" in Law Society of Upper Canada, ed., *Special Lectures of the Law Society of Upper Canada: Corporate Law in the 80s* (Don Mills, Ontario: Richard De Boo, 1982) 311 at 312.
[281]*Ibid* at 312.

3.5. Comparative Analysis of the Nigerian and Canadian Oppression Remedy

This section will conduct a comparative analysis of the oppression remedy available under the *CAMA* and *CBCA*. Although most of the oppression remedy provisions of both jurisdictions are very similar, there are certain differences that are worth highlighting. For instance, while the *CAMA* permits members and other stakeholders to commence an oppression remedy action only against the corporation, its directors or officers, the *CBCA* permits members of the corporation to bring such action against the corporation, its, directors and officers, and any of its affiliates. Also, the *CAMA* makes provision for anticipatory oppression such that an applicant can institute an oppression remedy action for a proposed act or omission. The *CBCA*, on the other hand, does not have this provision.

Another significant difference between the two legal systems is the interpretation adopted by the courts in the respective jurisdictions. While the Canadian courts have set out detailed guidelines that the courts take into consideration in deciding an oppression remedy case, the Nigerian courts have yet to lay down any form of guideline to help all parties decide whether the oppression remedy will apply. For example, the Canadian courts have adopted the use of the reasonable expectations test in deciding whether an act or omission is oppressive, unfairly prejudicial or unfairly disregarding of the interests of the complainant, while the Nigerian courts have no expressly set out test that can assist parties decide how the courts will exercise this discretionary power.

3.5.1. Proper Parties to Seek the Oppression Remedy

Just as under the derivative action provision, section 241 of the *CBCA* empowers a complainant to seek the oppression remedy with respect to acts or omissions by the affiliates of the corporation in which it is a registered or beneficial holder of a security.[282] The *CAMA*, on the other hand, does not explicitly provide for such powers that will allow an applicant to institute this remedy against an affiliate of the corporation of which it is a registered holder of a security unless the court uses its discretion to allow such action.[283]

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[282] Section 241 (2) of the *CBCA*.
[283] Section 310 of the *CAMA*.

The recent Bill passed by the House of Senate which extends the application of the Nigerian derivative action to affiliates does not include similar changes to the oppression remedy provision. The reason for permitting such recourse under the derivative action provision and not yet under the oppression remedy is not clear. Perhaps, it is an omission by the legislators, as there seems to be no reasonable reason why this provision should not also be extended to cover affiliates of the corporations in which the shareholder is a registered holder of securities. The implication of this is that the court may prevent shareholders from applying for this remedy in relation to acts or omissions of an affiliate of the corporation in which it is a shareholder because of the strict adherence to its *locus standi* principle.[284] In doing so, this may be prejudicial to the personal rights of minority shareholders especially in instances where the supposed affiliate is the financial backbone of the corporation and minority shareholders are unable to bring an application against the directors where they have mismanaged its funds.

3.5.2. Anticipatory Oppression Suits

An interesting point under the Nigerian oppression remedy is that its provision allows an applicant to seek relief for anticipatory or threatened oppression. The *CAMA* provides that an applicant can seek this remedy for a proposed act or omission or resolution that would be oppressive or unfairly prejudicial to or discriminatory against a member.[285] This provision is put in place to prevent a violation of that minority shareholder's rights, such that they can seek this remedy even when their rights are yet to be violated, but when they understand such imminent act or omission or resolution will amount to oppression or disregard of their interests. The *CBCA* does not have any provision for anticipatory oppression claims.[286]In *Sparling c. Javelin International Lte*[287]the court refused to make an order because the matter complained of was an apprehension of future oppression. In interpreting section 234 of the *CBCA* (now 241), the court noted that it was allowed to "make orders to rectify the matters complained of and not to remedy injustices which have

[284]See *Adenuga v Odumeru* [2002] FNWDR (pt 821) 163.
[285] Section 311 (2) *CAMA*.
[286]Note that the *OBCA* provides for anticipated oppression acts. See section 248 (2) of the *OBCA*. See also *820099 Ontario Inc. v. Harold E. Ballard* Ltd (1991) CarswellOnt 141.
[287](1986) CarswellQue 406.

not yet occurred and which may never occur".[288] In other words, the Canadian courts (in interpreting section 241 of the *CBCA*) are of the view that any order of rectification should only address injustices which have occurred, not those that may only be feared as possibly happening in the future. However, Morritt *et al* are of the view that where there are reasonable grounds to believe that damage will occur if an order is not granted, the broad statutory authority to grant oppression relief exists.[289]

3.5.3. The Reasonable Expectation Rule

One of the significant developments of the Canadian oppression remedy is the adoption of the reasonable expectations test. This is a device applied by the Canadian courts in interpreting the oppression remedy provisions available under the *CBCA* and other provincial corporate law statutes. The application of this test gives a wider approach to protecting minority shareholders, such that clear bargains or expectations of parties to a corporate contract or compact not found in the legal documents guiding contracting parties can also be enforced. Also, the adoption of this test has to a great extent provided some level of certainty for all actors in the Canadian corporate environment. This is because the concept of the "reasonable expectations" test means that specific conduct can be found to be oppressive, unfairly prejudicial or unfairly disregarding of interests only if it violates the reasonable expectation of the complainant. In other words, a reasonable expectation has to be established first before the courts will determine whether or not the oppression remedy will avail the applicant.

The "reasonable expectations" test is a very important tool in light of the broadness of the oppression remedy, such that it helps to narrow the applicability of the broad legislation which may otherwise give rise to uncertainty, inconsistency, and confusion if care is not taken. Also, this test is in line with the principles of corporate law that a minority shareholder expects that the directors and officers will comply with their statutory duties which may include maximizing profits and share value in order to meet the expectation of

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[288]*Ibid* at para 407.
[289] D. Morritt, S. Bjorkquist & A. Coleman, *The Oppression Remedy* (Toronto: Canada Law Book, 2006) as cited in *Argo Protective Coatings Inc., Re* (2006) NSSC 283.

the shareholder.[290]This judicial tool is however not used by the Nigerian courts in deciding whether the oppression remedy applies in a given case. In fact, there is yet to be any laid down guidelines by the Nigerian courts in interpreting this extremely wide remedy. This then leads to a clear case of uncertainty for all parties because no one can clearly understand the basis upon which the courts may decide that the oppression remedy applies. It is even possible that the Nigerian court may refuse to grant such remedy based on "judicial discretion" even where the reasonable expectations of the applicant have been violated. Therefore, it is recommended that the Nigerian courts adopt this test as it not only provides certainty for the interpretation of the oppression remedy but also goes to support the fundamental principles of corporate law.

Having highlighted the differences between the oppression remedy provided under each of *CAMA* and the *CBCA*, it is clear that statutory provisions provided under the *CAMA* are not significantly different from the oppression remedy provisions available under the *CBCA*. However, the significant difference lies in the interpretation provided by the courts under the respective jurisdictions. The Canadian courts set out more details and guidance by adopting the reasonable expectations test in interpreting the oppression remedy provision, while the Nigerian courts have no laid down guideline or test that assists in such interpretation. While the oppression remedy provisions under both jurisdictions were derived from section 210 of the *U.K Companies Act 1948*, the Canadian oppression remedy has evolved to a higher level of sophistication by enlarging the scope of the remedy[291] and setting out tests and factors that can help parties decide whether the reasonable expectations of the applicant have been violated or not, so as to further determine whether the oppression remedy applies. The Nigerian oppression remedy, on the other hand, still mirrors section 210 of the *U.K Companies Act* with slight changes and the Nigerian judiciary does not provide any form of analysis that can provide some guidance on how the courts will exercise their judicial discretion. No doubt, there is need for the Nigerian corporate system to catch up with these "Canadian-inspired" changes and tests adopted by the Canadian

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[290]*Re BCE*, *supra* note 236 at para 64.

[291] For instance, the Canadian oppression remedy allows a complainant to institute an action against the corporation and its affiliates.

courts, in order to provide more clarity for oppression remedy cases, and thereby improve the minority shareholders' protection regime.[292]

Conclusion

As highlighted above, the oppression remedy is an equitable and far-reaching remedy that allows the court to remedy any form of corporate wrong done to the minority shareholder. It looks beyond the provisions set out in the statutes and ensures that shareholders are adequately protected where an act or omission is oppressive or unfairly prejudicial or if such act unfairly disregards the interest of the shareholder.

The oppression remedy provisions under both Nigerian and Canadian corporate law are very similar in form; however, it appears that the Canadian corporate system allows for a more extensive approach than the Nigerian legal system. For instance, while the *CBCA* allows a shareholder to bring an application for an oppression remedy in respect of an act or omission by the affiliate of the corporation, the *CAMA* does not explicitly do so. The *CBCA* also provides more details on the grounds upon which an oppression remedy may be brought, i.e., where the act effects a result or where the business or affairs of the corporation or director's powers are exercised in an oppressive manner.

The *CAMA*, on the other hand, provides that the remedy can be sought when the affairs or act or omission or proposed resolution will amount to oppression. Aside from the few differences between their legislation, a significant difference between both legal systems is the broad interpretation given to this provision by Canadian courts. The introduction of the concept of "reasonable expectations" by the courts in assessing these claims allows this provision to accommodate more than just legal expectations but reasonable expectations that could have been anticipated from the interaction among stakeholders of the corporation. While the Nigerian courts may have applied this test in a number of cases, it is not one clearly pronounced or set out as a standard for the Nigerian courts in deciding oppression

[292] As highlighted above, where there is a laid down test or guideline in relation to equitable remedies, it provides some level of certainty for all parties involved. And minority shareholders are better protected where directors and other stakeholders in the corporation based on previous laid down tests, understand that certain acts violate the minority shareholders' reasonable expectations.

cases. And therefore it is important that the Nigerian courts clearly pronounce this test and guidelines to assist in determining whether an oppression remedy applies in any given case. This will then provide a level of certainty for all parties, such that minority shareholders and other stakeholders understand that certain acts may be declared a violation of the reasonable expectations of the minority shareholder (s) or any other stakeholder, as the case may be.

Chapter 4: Solving the Predicament

Introduction

The previous chapters set out a comparative analysis of minority shareholders' protection (derivative action and oppression remedy) under Nigerian and Canadian corporate law. It highlighted the flaws in the legislative provisions and judicial interpretations of both remedies under the respective jurisdictions and concluded that some of the legal provisions and rigid interpretations provided by the Nigerian courts compared to Canadian courts can hinder the corporate law system from providing adequate protection for minority shareholders in a Nigerian corporation. This chapter will summarize in table form, key points of comparison between the derivative action and the oppression remedy under Nigerian and Canadian corporate law regimes that have been identified in the previous chapters.

Furthermore, this chapter concludes that there are not many significant differences in the statutory provisions relating to the Nigerian and Canadian minority shareholders' protection. Yet, there are different outcomes in the application of minority shareholders' protection in both countries (with minority shareholders in Nigeria enjoying less protection) because of different patterns of enforcement. Therefore, this chapter places more emphasis on enforcement errors and systematic inefficiencies that could affect minority shareholders' protection under the Nigerian corporate law regime.

4.1. Derivative Action under Nigerian and Canadian Corporate law

The derivative action is embodied in 238 and 239 of the *CBCA* and section 309 and 303 of the *CAMA* respectively, with both provisions being substantially similar. The table below will summarize the differences between the provisions identified in the previous chapters.

S/N	***CBCA***	***CAMA***
1.	Section 238 of the *CBCA* lists the categories of persons authorized to bring a derivative action. The *CBCA* authorizes a shareholder of a corporation or any of its affiliates to bring a derivative action on behalf of a corporation or any of its subsidiaries.	Section 309 of the *CAMA* lists the categories of persons authorized to bring a derivative action. Unlike the *CBCA*, it does not explicitly authorize a shareholder of a corporation to bring a derivative action on behalf of its affiliates and vice versa.
2.	Section 248 of the *CBCA* provides that a derivative action may be commenced in a summary manner but also leaves in the discretion of the party seeking the remedy to proceed by way of action. Most importantly, the courts have also pronounced that they will not set aside the originating process on the ground of wrong mode of commencement.	Rule 2 (1) & (2) of *the Companies Proceedings Rules* provides that all applications, including the derivative action must be brought by originating summons. The Nigerian courts have rejected applications not brought in this form.
3.	Section 239 (2) (a) of the *CBCA* requires a complainant to show he has given notice of not less than 14 days to the directors of the	The *CAMA* requires the applicant to show that he has given reasonable notice to the directors of his intention to file an application for a derivative

	corporation informing them of his intention of instituting a derivative action. The *CBCA* also allows the court to use its discretion where the complainant is unable to give the stipulated notice period.	action on behalf of the company. The *CAMA* does not define the term "reasonable notice".
4.	The *CBCA* sets out three prerequisites that a complainant must satisfy before leave to commence a derivative action can be granted by the court. The complainant must show that he has provided at least 14 days' notice to the directors, that he is acting in good faith and he is acting in the best interest of the corporation.	The *CAMA* sets out 4 prerequisites an applicant must satisfy before a leave to commence a derivative action can be granted by the court. In addition to the prerequisites provided under the *CBCA*, the applicant is also required to show that the wrong doers are the directors who are in control and will not take the necessary steps to sue. In other words, this remedy may not cover minority shareholders in cases where the dominant shareholders are the wrong doers.

4.1.1. Recommendations relating to the Nigerian derivative action

4.1.1.1. Party to Institute a derivative action

As highlighted in the second chapter of this thesis, the Companies and Allied Matters (Repeal and Re-enactment) Bill which is yet to be made into law, allows shareholders of a corporation to bring a derivative action on behalf of the subsidiary of the corporation. Hopefully, this bill will be passed into law so that shareholders of a corporation can remedy any wrong done to a subsidiary of the corporation in which it is a registered holder of a security.

4.1.1.2. Mode of Commencement of Derivative Action

The Nigerian Companies Proceeding Rules could be amended to allow the applicant to decide the mode of commencement, so long as the conditions precedent for a derivative action required under *CAMA* are fulfilled. The word "shall" used under Rule 2 (1) of the Nigerian Companies Proceedings Rules should be amended to read "may" to imply that the applicant has the discretion to bring an application for a derivative action in any other mode. Furthermore, there is a need to also provide language similar to what is available under Rule 2.01 (2) of the *Ontario Civil Procedure Rules* which provides that the "court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed".[293] This will make it very clear to the courts that the intention of the legislators is to eradicate such unreasonable adherence to technicality. This will also enable the courts to adopt a flexible approach just like the Canadian courts in interpreting the provisions of the Companies Proceeding Rules. However, in the absence of such amendment (especially because the Nigerian legislators do not turn around amendments frequently), the Nigerian courts should overlook such technicality and adopt the more flexible approach of the Canadian courts, so long as the non-compliance relates to the form and not the substance of the application.

4.1.1.3. Notice to Directors

It is recommended that the Nigerian legislature adopt the provision relating to the notice to directors in the *CBCA* by setting out a specific notice period. It should also set out provisions allowing the court to use its discretion in urgent situations where irreparable damage may be done to the interests of the corporation if no derivative action is brought before the mandatory notice period to directors required under the law.

4.1.1.4. Conditions Precedent to Bringing Derivative Actions

It is recommended that the additional condition in the *CAMA* which requires the applicant to show that the wrongdoers are the directors, who are in control and will not take the

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[293] Rule 2.01 (2) of the *Ontario Civil Procedure Rules*, R.R.C. 1990, Reg 194.

necessary steps,[294] should be removed from the derivative action provisions under *CAMA*. This is because it clearly connotes that the directors are the only proper defendants in a Nigerian derivative action. However, there may be instances where the wrongdoers may be the dominant shareholders and not the directors, or the wrongdoers maybe both the directors and dominant shareholders. It is important that this provision be removed so as not to create further restrictions on shareholders who want to institute a derivative action on behalf of the corporation.

4.2. Oppression Remedy under Nigerian and Canadian Corporate Law

The oppression remedy is set out in section 241 of the *CBCA* and section 310-312 of the *CAMA* respectively. Just as with the derivative action, both provisions are very similar. The table below will summarize the few key differences between the respective provisions and the interpretations provided by the courts in the respective jurisdictions:

S/N	*CBCA*	*CAMA*
1.	Section 241 explicitly empowers a complainant to seek the oppression remedy with respect to acts or omission by the corporation or any of its affiliates.	Section 311 of the *CAMA* does not explicitly empower a member of a corporation to seek an oppression remedy against its affiliate and vice versa.
2.	The *CBCA* does not expressly provide for anticipatory oppressive claims. In fact, the Canadian courts are of the view that any order of rectification should only be made to address injustices which have occurred and not those feared to possibly happen in the future.	Section 311 (2) of the *CAMA* allows an applicant to bring an action for a proposed act or omission that would be oppressive, unfairly prejudicial or discriminatory against the applicant.

[294] Section 203 (2) *CAMA*.

3.	In determining whether an oppression remedy will be granted, the Canadian courts have adopted the reasonable expectations test. The application of the test offers broad protection to shareholders, such that clear bargains and even expectations of parties not found in the legal documents can be enforced by the courts on the basis that the complainant reasonably expected certain treatment.	The reasonable expectations test is not applied in deciding oppression remedy cases in Nigerian courts.

4.2.1. Recommendation for Nigerian Oppression Remedy

4.2.1.1 Party to Institute an Oppression remedy action

As highlighted in chapter 3, the recent Companies and Allied Matters (Repeal and Re-enactment) Bill passed by the Nigerian legislators does not permit an applicant to bring an oppression action against the affiliate of the corporation in which it is a registered holder of a security.[295] It, however, does permit an applicant to institute a derivative action against the affiliate of a corporation. Apparently, the failure to extend application of the oppression remedy to affiliates is an omission and it is recommended that the Nigerian legislators amend this provision before it is passed into law, so that defendants in an oppression remedy suit that are subsidiaries or affiliates of the corporation in which the applicant is a registered holder of security do not use this provision to their advantage and prevent liability where they have erred. In the event that it is not amended and the Bill is passed into law, the courts should use their discretion to allow such claims against the affiliates since there seems to be no reasonable reason why actions in respect of affiliates should not

[295]Section 352 of the Repeal and Re-enactment Bill.

be permitted in the case of the oppression remedy just as they are in the case of derivative actions.

4.2.1.2. Reasonable Expectations Test or Analysis

Another area of the minority shareholders' regime that needs reform is the uncertainty of the test for liability under the oppression remedy. It is recommended that the courts adopt the "reasonable expectations" test adopted by the Canadian courts and provide analysis in deciding whether the oppression remedy will apply. This will help provide some level of clarity and certainty.[296]Where the applicability of this remedy is clear, then all stakeholders in a corporation understand that certain acts analyzed in accordance with guidelines laid down will amount to oppression, unfair prejudice or unfair disregard of minority shareholders' interests. This would also serve as a precaution to directors and controlling shareholders who understand that the court will apply the same guidelines and provide the remedy to the minority shareholders if such acts or omissions occur.

4.3. Policy Implications

Introduction

The previous chapter set out the statutory provisions of the derivative action and oppression remedy under the Nigerian and Canadian corporate law. The analysis shows that the statutory provisions of both jurisdictions seem to be very similar with not many significant differences as highlighted in the tables above. However, this section argues that, in practice, minority shareholders in Nigeria enjoy less protection perhaps suggesting that there are other factors other than statutory provisions that really account for the differences in the protection provided to shareholders in the respective jurisdictions.

Research has shown that there is a strong correlation between investor protections, dispersed shareholdings, and economic development.[297]More importantly, research has also shown that without adequate enforcement patterns in place, shareholders' rights in a

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[296]*Re BCE, supra* note 236.

[297]Rafael La Porta *et al*, "Law and Finance" (1998) 106:6 Journal of Political Economy 1113 at 1142.

corporation may not be effectively protected.[298]Therefore, this section will also identify the patterns of enforcement in Nigeria, particularly highlighting enforcement errors, juridical approaches to statutory interpretation, court procedures and professional norms among lawyers that could impede effective enforcement.

4.3.1. Corporate Law Theory

The corporate law theory of corporate finance propounds that countries with strong legal investor protections have more dispersed investments than countries with weak legal investor protections[299]or better said, that countries with weaker legal protection, have more concentrated ownership of equity and fewer minority shareholders in publicly-traded companies than countries with strong legal protections.[300] The theory then predicts that countries with strong legal investor protections will likely have significantly larger equity markets than countries with poor investor protection[301] as more investors, both small and large, will be convinced to invest bearing in mind that their rights and interests will be adequately protected especially with respect to the returns of their investments.

Apart from the above logical reasoning and predictions, empirical studies have shown that countries with strong legal protection do have more dispersed shareholders than countries with weak investor protections.[302] Research has also shown that countries with much stronger legal investor protections provide a much better environment in which securities markets can prosper and grow than countries with weak legal investor protections.[303] For instance, La Porta *et al's* research revealed that common law countries which had the strongest investor protections also had the highest average ratio of outsider held stock markets to Gross National Product ("GNP") compared to civil law countries which had weak investor protection.[304] Further research has also shown that strong legal protection of

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[298]*Ibid*.
[299]La Porta *et al*, *supra* note 297.
[300] C. Himmerlberg, R. Hubbard, & I. Love, "Investor Protection, Ownership, and Investment" (2002) World Bank Policy Research Working Paper No. 2834. Available at SSRN: https://ssrn.com/abstract=303969.
[301]La Porta *et al*, *supra* note 297 at 1115.
[302]*Ibid*.
[303]Rafael La Porta *et al*, "Legal Determinants of External Finance" (1997) 52:3 The Journal of Finance 1131 at 1137.
[304]*Ibid*.

minority shareholders against expropriation is correlated with a significant increase in valuable stock markets, more initial public offerings and a reduction in ownership concentration.[305]

In view of the above research results, the corporate legal theory suggests that if the legal investor protections available under Nigerian law are stronger, small investors may feel more comfortable to invest in Nigerian companies and hence increase the size of capital markets in Nigeria, whereas where the legal investor protections are weak, such small investors may be put off or offer to pay prices so low that companies are discouraged from issuing at such prices. Alternatively, investors may only decide to invest when they are able to purchase concentrated ownership of shares in companies that could enable them to protect their rights and interests, and may as such, influence dispersed investments and growth of capital markets and the economy.

La Porta *et al's* research shows that, to a large extent, there is a strong correlation between weak investor protections and concentrated ownership of shares. In particular, French civil code countries, which had the weakest shareholders' protections, were shown to have highly concentrated ownership of shares.[306] One author has noted that "concentrated ownership emerges naturally when investor protection is weak"[307] as the controlling shareholders may see the need to buy more shares in the company in order to closely monitor the activities of directors of the company and avoid being expropriated by them.[308] However, the level of investor protection and the degree of concentration of share ownership are not always correlated. The previous chapters of this thesis have highlighted Canada's strong minority shareholders' protection compared to the Nigerian minority shareholders' protection. However, most publicly-traded corporations in Canada have concentrated ownership of shares.[309]Most publicly traded corporations in Nigeria are also

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[305]Djankov, S., La Porta, R., Lopez-de-Silanes, F., Shleifer, A, "The Law and Economics of Self-Dealing" (2008) 88:3, Journal of Financial Economics 430 at 466.
[306]*Ibid*.
[307] Enrico Perotti& Ernst Thadden, "The Political Economy of Corporate Control and Labour Rents" (2006) 114:1 J. Polit. Econ. 145 at 147.
[308]La Porta et al, *supra* note 297 at 1145.
[309]Walid Ben-Amar & Paul Andre, "Separation of Ownership from and Acquiring Firm Performance: The Case of Family Ownership in Canada" (2006) 33:3 Journal of Business Finance & Accounting 517 at 518.

held by a controlling shareholder that exercises significant control over the corporation. Recent statistics show that the average percentage for concentrated ownership of shares of the largest shareholders in the top 5 publicly-traded companies in Nigeria is 65.58%.[310] Although it has been argued in the previous chapters of this thesis that shareholder protections are stronger in Canada than in Nigeria, both Nigeria and Canada have concentrated ownership structures in most of their public corporations.

The question that, therefore, arises is whether the Canadian minority shareholders' protections are strong enough to trigger dispersed shareholdings in Canadian public corporations. In fact, the research conducted by La Porta *et al* shows that the Canadian corporate law system offers one of the strongest regimes of minority shareholders' protection and rule of law mechanism among the common law countries examined, and common law systems were said to have the strongest investor protection rules among all the legal families.[311] What this seems to suggest is that Canada's public corporations' ownership structure challenges the validity of the corporate law theory that provides that strong investor protections encourages dispersed shareholding in an economy. On the other hand, the Nigerian experience seems to be consistent with La Porta *et al.*'s theory since protection of minority shareholders of Nigerian corporations is weak, and the ownership of Nigerian top public corporations is highly concentrated.

It is important to note that the corporate law theory is not the exclusive way of explaining differing corporate ownership structures in various jurisdictions. Other factors may also come into play that may trigger dispersed shareholdings or concentrated shareholdings, as the case may be. In fact, it has been argued that concentrated ownership of shares may arise not as a result of weak legal protections but because acquiring a controlling interest has been employed as a strategy to yield better monitoring of the management of the corporation. Concentrated ownership may also help to subsidize the cost of effective monitoring by offering the block shareholders the practical ability to "engage in forms of

[310] Available on the https://www.marketscreener.com at 11/20/19.
[311] La Porta *et al, supra* note 303 at 1138.

self-dealing and insider trading that are anathema to market-centered systems of dispersed ownership".[312]

While it is clear from the above that the corporate legal theory does not explain all observed patterns in corporate ownership structures, nevertheless it is important to appreciate that minority shareholder protections play some role in making a jurisdiction attractive to investors as the research conducted by La Porta *et al* has shown, especially in a growing economy like Nigeria. Thus, although it would be an overly simplistic mistake to overstate the broad economic significance of strong minority shareholder protections, it is still pertinent to address differences in statutory investor protections, as well as strong enforcement in place as factors contributing at least to some extent to increased investment and economic development. Therefore, this thesis has focused on minority shareholders' protection, acknowledging that this one particular factor is only part of a larger, complex set of factors affecting capital market developments, but also recognizing that it is equally important not to overlook this important factor in trying to ensure that there are no areas impeding investments in the Nigerian economy.

4.3.2. Enforcement as a substitute for weak minority shareholders' protection

La Porta *et al* initially advanced the proposition that a strong system of legal enforcement could substitute for weak legal minority shareholders' rules since an effective judiciary can step in to provide remedies for minority shareholders where their rights have been violated.[313] However, their study has shown that this prediction is not what occurs in the corporate world and that legal protection and strong enforcement usually co-exist as opposed to one being a substitute for the other. To address this point, La Porta *et al* examined proxies for the quality of enforcement of minority shareholders' rights, namely – measures of "law and order" in different countries compiled by private credit risk agencies for foreign investors interested in doing business in respective

[312]John Coffee, "The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications" (1999) 93 Nw U L Rev 641 at 648.
[313]La Porta *et al*, *supra* note 297 at 1142.

jurisdictions.[314]They examined among other factors the efficiency of the judicial system, the rule of law and corruption in the various countries. In particular, the aggregate of common law countries seems to outperform the aggregate of French civil law countries (which have weak legal protections) on all measures of rule of law.[315] Thus, this research suggests that enforcement is not a substitute for weak investor protection but that legal protection for shareholders can only be effective where there are both strong legal provisions and enforcement by the courts and regulators, as the case may be.

More recent studies have also analyzed the effect of judicial efficiency on a country's ability to attract investments, most especially foreign investments.[316]It has also been revealed that most foreign investors structure their international investments based on a country's characteristics, with judicial efficiency being one of the foremost.[317] This is mainly because even where there are well-designed laws, there is a greater need for the courts to enforce the provisions and protect investors' rights expeditiously. These studies make it clear that the two factors - strong legal provisions and judicial enforcement- co-exist probably because the courts will usually not provide remedies that are outside of what is stipulated in the statutes. Thus, just like statutory provisions, the efficiency of the judiciary and other enforcement institutions are key to improving investment levels in an economy and perhaps economic development.[318]

As noted by North:[319]

> Indeed, the difficulty of creating a relatively impartial judicial system that enforces agreements has been a critical stumbling block in the path of economic development. In the western world the evolution of courts, legal systems, and a relatively impartial system of judicial enforcement has played a major role in permitting the development of a complex system of

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[314]*Ibid* at 1140.
[315]*Ibid.*
[316]Gwendolyn G Ball & Jay P Kesan, "Judges, Courts and Economic Development: the Impact of Judicial Human Capital on the Efficiency and Accuracy of the Court System" (2010) (unpublished manuscript), available at https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010& paper_id=380 at 4.
[317]*Ibid.*
[318]Increase in Investment levels is simply the increase of money brought into the company for profit or material result. Economic development on the other hand, is the process by which the economic well-being and quality of life of a nation, region or local community are improved.
[319] Douglass C. North "Institutions, Ideology, and Economic Performance" (1992) 11:3 Cato Journal 477 at 478.

> contracting that can extend over time and space, an essential requirement for economic specialization

While it has been argued that adequate minority investor protections can improve investments which may eventually lead to an improved economy,[320] it is important to note at this point that adequate minority investor protections do not automatically mean that there will be improved investments in the economy, nor does a dispersed shareholding structure such as that associated with publicly-traded corporations in the US and the U.K equate to higher investment levels or a more developed economy.[321] Also, additional or more adequate minority shareholders' protections are not a panacea for a nation's economic problems. In fact, it can be argued that the improvement of minority shareholders' protection is only a small piece of a wide-ranging set of solutions that may be required in order to generate economic development in a complex system. However, earlier research conducted by LaPorta et al has shown that there is a strong correlation between strong legal provisions and enforcement and investment levels and economic development. Roe, a strong political theorist, admits the importance of legal provisions in economic development:

> I have not denied the value of strong corporate law that protects distant stockholders nor denigrated its usefulness in building efficacious business enterprises, nor refuted its academic utility in explaining some key aspects of corporate differences around the world, especially in transition and third world nations.[322]

4.3.3. Practical Enforcement Obstacles

As highlighted above, there are a few significant differences in the Canadian and Nigerian statutory provisions relating to the derivative action and oppression remedy. However, most of the statutory provisions are somewhat similar especially because of the initial sources of both corporate laws – English law. The question that arises is what makes the Canadian minority shareholders' protection different from what is obtainable under

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[320] La Porta *et al*, *supra* note 297 at 1115.
[321] For example, several countries like Germany and China have strong minority shareholders protection and concentrated ownership of shares and yet have good economies.
[322] Mark J Roe, *Political Determinants of Corporate Governance* (New York: Oxford University Press, 2003) at 194.

Nigerian minority shareholders' protection. The answer appears to be enforcement patterns in Nigeria. These enforcement patterns reflect the attitudes and approaches that the courts adopt in interpreting the provisions of the statutes, the delays in delivering judgments, and different court procedures, to mention a few.

For instance, the Nigerian courts have continued to adopt a common law approach in interpreting the provisions of *CAMA* relating to the derivative action and oppression remedy provisions. As highlighted in chapter 2 of this thesis, the Nigerian courts will usually dismiss any application not brought under the required mode set out in the *Companies Proceeding Rules* even though the application shows proof of the conditions to be satisfied. The Canadian courts, on the other hand, have expressly pronounced in accordance with the rules of civil procedure that the court will not set an application aside simply because it was instituted in the wrong procedural mode. The Canadian courts have also emphasized that although it partly originated from English common law, the current Canadian law no longer reflects the attitude underlying the old common law rule.[323]No doubt, textual differences in the Canadian legislative provision also aid the Canadian courts in making such flexible pronouncements. Nevertheless, the Nigerian courts could apply their discretion and adopt a more flexible approach pending legislative amendment in order to simplify the procedure for minority shareholders who want to apply for a derivative action on behalf of the corporation.

With respect to the oppression remedy, even though the Canadian and Nigerian oppression remedy provisions are very similar, the Canadian courts have provided a broader interpretation to cover "reasonable expectations" of parties even where such expectations are not set out in legal documents. Nigerian courts have yet to establish any guidelines for exercising their judicial discretion of the sort that have evolved under the Canadian corporate legal system. The Nigerian courts examine the facts of each case and simply go straight to pronouncing whether or not the oppression remedy will apply without providing any form of guidelines or analysis that can create some level of certainty in the Nigerian minority shareholders' protection regime.

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[323]*Chilian v Augdome Corp (*1991) 2 OR 3d 696 (Ont CA) at para 39.

Apart from the manner in which the Nigerian courts interpret the statutory scope of the derivative action and oppression remedy, there is also the issue of the effectiveness of the judiciary in adequately enforcing the provisions of *CAMA*. Just as highlighted by La Porta *et al*, the importance of an effective judiciary cannot be overemphasized in adequately protecting shareholders. In other words, apart from ensuring that the Nigerian statutory investor protections are strong, there is need for an effective judiciary in place to enforce the statutory provisions. However, the effectiveness of the judicial system has been questioned in recent times especially in light of the delay in judicial proceedings caused by unnecessary adjournments orchestrated by the lawyers and even judges. In some instances, the judges are overburdened with cases they are required to hear weekly, thereby making them cancel on some when they feel overstretched. This is because the registrar may have fixed too many cases on a particular day without informing the judge simply because the registrar cannot turn down applications of lawyers who will prefer a particular date, which will not be convenient for the court.[324] The lawyers also sometimes pressure these registrars or even offer bribes in order to get a certain date which may not be convenient for the court. Consequently, the judges have no option other than to adjourn when there are too many cases to be heard on a day that is inconvenient for the court. In some other instances, the delay is caused primarily by the legal practitioner who may be purposely requesting for adjournments where he is unprepared or believes his case is not likely to come out positively. In such cases, he may feel the need to keep requesting for such adjournments. If granted by the courts, these adjournments may frustrate the other party and perhaps even lead the other party to drop the matter.[325]Even though this is against the Nigerian rules of professional conduct for lawyers, many legal practitioners have continued these practices thereby causing unnecessary delays in proceedings, probably because there are not obvious consequences for these actions.

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[324]John Agbonika &Musa Alewo "Delay in the Administration of Criminal Justice in Nigeria: Issues from a Nigerian Viewpoint"(2014) 26 Journal of Law, Policy and Globalization 130 at 131.
[325]*Ibid.*

In Nigeria, statistics have shown that the average period to begin and conclude litigation is about six to ten years.[326]Recent statistics also show that in the beginning of the 2018/2019 legal year, 191,766 cases were still pending at the Federal High Court (the court bestowed with the jurisdiction to handle company-related matters)[327]across its various divisions in Nigeria.[328]These statistics could be very discouraging to a minority shareholder who is seeking a remedy as such shareholder may have fears of spending several years in court while also incurring significant legal costs. At the margins, prospective investors conducting due diligence on the Nigerian legal system before investing may be put off by the estimated timeline for obtaining a remedy in the event that a breach has occurred. Conversely, if litigation processes were known to be timely and efficient, the threat of effective enforcement of minority shareholders' rights could deter corporate management and other stakeholders from abusing minority shareholders' rights, especially where such parties may predict that the court will speedily protect the minority shareholders' rights.[329]

Generally, many have argued that perhaps relying more on regulators to settle investment-related disputes will make the legal system more effective especially because some judges do not understand the issues revolving around law and investments.[330]Regulators, on the other hand, tend to be more knowledgeable about securities and investments generally and understand the impact these sectors have on the Nigerian economy and as such understand the urgency required in resolving investment disputes. However, under Nigerian law these regulators such as the Commission and the Investment Securities Tribunal only have limited jurisdictions over certain investment disputes,[331] leaving most of the enforcement

[326]For example, in the case of *Ariori v. Muraimo Elemo* (1983) 1 SC 13, proceedings commenced in October 1960 and took 23 years to reach the Supreme Court of Nigeria.
[327] Section 251 of the Constitution of Nigeria, 1999.
[328]Statistics available at https://punchng.com/judiciary-still-in-search-of-solution-to-delayed-justice/ on 11/16/19.
[329]Yahaya Abdulkarim, "Socio-Economic Effects of Judicial Corruption in Nigeria" (2012) 1:1International Journal of Humanities and Social Sciences Invention 31 at 34.
[330]Mierta Capaul, "Minority Shareholders : what works to protect shareholder rights?" (2003) Public policy for the private sector; Note no. 265. Washington, DC: World Bank. http://documents.worldbank.org/curated/en/505951468330917213/Minority-shareholders-what-works-to-protect-shareholder-rights at 3.
[331] For instance, Section 274 of the Investment and Securities Act provides for the jurisdiction of the Investment and Securities Tribunal which is merely to settle disputes between capital markets operators, investors and a security exchange or capital trade point of clearing and settlement agency.

of minority shareholders protections available under *CAMA* to the courts. Therefore, it is important that the Nigerian government seeks to ensure that courts speedily apply the statutory provisions where investors' rights and interests have been violated.

Even though the legislative provisions relating to the derivative action and oppression remedy under the *CBCA* and *CAMA* are very similar, the above factors may be responsible for the different outcomes in the protection of minority shareholders under the respective jurisdictions in addition to the difference in their statutory provisions. Other factors may also be responsible for the difference in their outcomes. However, it is the hope that the courts would consider granting adjournments sparingly especially where such adjournments are simply used as a delay-tactic by the defendants in an investor-related dispute. Furthermore, it is important that policymakers make conscious efforts to reduce the delays in the attainment of the minority shareholders' remedies by setting specific timelines within which the courts should decide investor remedy related cases. The fact that a simple derivative action case today could last between 2-3 years before being disposed does not speak well of the Nigerian legal system and makes a mockery of the government's commitment to ensure increase of investments in the Nigerian economy.

Conclusion

This chapter highlights the differences in the legislative provisions and interpretation of the courts of the derivative action and oppression remedy under the *CBCA* and *CAMA*. It reveals that there are not many significant statutory differences between the provisions in each jurisdiction but the difference in protection of minority shareholders appears to lie in the judicial approaches to statutory interpretation and patterns of enforcement. It also briefly highlights the connection between corporate law and enforcement and ownership structures in corporations and economic development, while also acknowledging that there are other factors that may significantly trigger dispersed investments and economic development. As Roe rightly noted, there can be more than one theory that explains the variation in corporate structures. Therefore, it is important that the various pitfalls available under each theory be addressed in order to ensure that economic growth is facilitated from

all angles. The focus in this thesis is upon inadequacies typically under corporate law statutory provisions and in enforcement patterns.

Chapter 5: Conclusion

The purpose of this research was to examine the minority shareholders' protection available under the Canadian and Nigerian corporate legal systems, focusing specifically on the derivative action and oppression remedy. The reason for this, as highlighted in chapter 3 of this thesis, is that the derivative action and oppression remedy are the two most important remedies currently available under corporate law, with the latter being described by a Canadian author as "the broadest, most comprehensive and most open-ended remedy in the common-law world".[332] The derivative action, which is a remedy obtained for wrongs done to a corporation is also a vital tool used in protecting minority shareholders because a wrong done to a corporation may consequently affect shareholders' rights and interests. In assessing these remedies, the primary sources of law considered in the two jurisdictions were statutes namely, *CAMA*, which is applicable to all companies incorporated in Nigeria, and the *CBCA*, applicable only to federally incorporated business organizations in Canada. Apart from these statutes, another key source of law examined in this thesis was case law from Nigeria and Canada and some historically relevant English law cases.

This thesis highlights, in a comparative style, how Canadian and Nigerian corporate laws protect minority shareholders' corporate and personal rights and how the courts in their respective jurisdictions interpret and implement these statutory provisions. The objective is to re-emphasize the importance of having a strong mechanism in place such that when corporate-related issues and disputes arise, minority shareholders who are investors are not left without adequate remedy. This research further highlights the differences in the legislative provisions and interpretation of the courts of the derivative action and oppression remedy under the *CBCA* and *CAMA*. It reveals that there are not many significant differences between the statutory provisions in the two jurisdictions but important differences appear to lie in the judicial approaches to statutory interpretation and patterns of enforcement. It also emphasizes the importance of not only strong statutory

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[332]SM Beck, *supra* note 280 at 312.

provisions but also adequate implementation of those provisions. For the government, it is important that these laws adequately protect both local and foreign investors so as to encourage prospective investors or current investors to invest more which may in turn increase investment levels in the economy.

This thesis presents to prospective investors, legal personnel, and government agencies responsible for policymaking in both jurisdictions a clear picture of the fundamental protections available to shareholders, particularly minority shareholders in the corporation. It further reveals the attitudes of the courts in the respective jurisdictions in interpreting statutory provisions protecting the rights and interests of the minority shareholders.

While it has been argued that the legal factors affecting shareholders' rights are not all that is required to increase investments and that they are perhaps only a small piece of a wide range of factors necessary for increase in investments, it is well settled that there is some connection between the level of investment and minority shareholder protections.[333]This thesis not only provided a comparison of the derivative action and oppression remedy under Nigerian and Canadian corporate law, which will be of great assistance to the legislators, but also highlighted the significance of strong statutory provisions and enforcement in order to encourage investments. This is a crucial point for the future development of the Nigerian economy, but more importantly it is also an opportunity for Nigeria's legislators to act fast and review the archaic Nigerian corporate legal provisions and for Nigerian courts to adopt the approach taken by the Canadian courts in interpreting the derivative action and oppression remedy. It is further suggested that this research be used as a foundation for further research in the field of corporate minority shareholder remedies as well as for enforcement reforms, especially in Nigeria where the Nigerian government is currently reviewing legislation and developing mechanisms that can stimulate a significant economic reform. It is hoped that this thesis will help to advance this journey.

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[333]La Porta *et al*, *supra* note 297.

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Curriculum Vitae

Name:	Oluwabukola Fadahunsi
Post-secondary Education and Degrees:	University of Ibadan, Ibadan, Nigeria.
	LL.B, The University of Ibadan Ibadan, Nigeria 2009-2015
	B.L. The Nigerian Law School Lagos, Nigeria 2016-2017
Work Experience	Research Assistant The University of Western Ontario
	Associate Aluko & Oyebode Lagos Nigeria 2017- 2018