COMPULSORY WINDING-UP—THE "JUST AND EQUITABLE" RULE

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This article discusses the use of compulsory (i.e., involuntary) winding-up as a remedy for resolving intra-corporate disputes.[1] Strictly speaking, the term "winding-up" is used to describe the process whereby the company's assets are liquidated and the affairs of the company are brought to a halt, as distinguished from "dissolution" which formally terminates the corporate existence.[2] For practical purposes, and for the purposes of this article, the terms are used interchangeably.

A. GENESIS OF THE RULE

Virtually all American commentaries on involuntary corporate dissolution dwell at length on the power of courts of equity to dissolve corporations in the absence of express statutory authority.[3] Such discussions generally involve a consideration of the visitorial jurisdiction of courts of equity. While the American writers are not all in agreement, the general consensus would seem to be that the courts have such jurisdiction, presumably as an extension of their visitorial powers in equity.[4]

In Canada and England the visitorial powers of a court of equity over corporations are equally well established,[5] despite statements to the contrary.[6] Indeed, as Mr. Justice Duff said in *Madden* v. *Dimond*:[7]

> Herein the court but exercises its powers of control over trustees and other persons sustaining a fiduciary relation which is inherited from the Court of Chancery; and hence it is not within the operation of the rule which proscribes its interference in purely domestic disputes among the members of such bodies.

Wegenast, a leading Canadian writer on corporations, has gone as far as to suggest[8] that

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1 For American discussion of this same subject matter see generally, Tingle, *The Stockholder's Remedy of Corporate Dissolution* (1954); Israels, *The Sacred Cow of Corporate Existence—Problems of Deadlock and Dissolution* (1952), 19 U. of Chi. L. Rev. 778 (a "classic" in the field); Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder* (1940), 40 Colum. L. Rev. 220; O'neal, *Close Corporations* (1958), Vol. 2, ss. 9.26; O'neal, *Oppughancy and Oppression in Close Corporations: Remedies in America and Britain* (1959), 1 B.C. Ind. & Comm. L. Rev. 1, at 18-25; Cary, *How Illinois Corporations May Enjoy Partnership Advantages: Planning for the Closely-Held Firm* (1953), 48 N.W.U.L. Rev. 427, at 437-40; Barkin, *Deadlock & Dissolution in Florida Closed Corporations* (1959), 13 Miami L.Q. 395; Annot., *Dissolution of Corporation on Grounds of Intra-Corporate Deadlock or Dissolution* (1950), 13 A.L.R. (2d) 1260; Stevens, *Corporations* (2d ed. 1949), c. 22.
For English discussion of this subject matter see McPherson, *Winding Up on the "Just and Equitable" Ground* (1964), 27 Mod. L. Rev. 282.

2 The American writings speak of "dissolution" whereas the Canadian and English writings speak of "winding-up". On the distinction between these terms see Stevens, *Corporations* (2d ed. 1949), at 959-65. *Cf.* Wegenast, *Canadian Companies* (1931), at 101-102.

3 See writings cited *ante*, n. 1.

4 For a discussion of the American view on the visitorial powers of a court of equity see Stevens, *Corporations* (2d ed. 1949), at 956-58; Pound, *Visitational Jurisdiction Over Corporations in Equity* (1936), 49 Harv. L. Rev. 369.

5 See 1 Blackstone, *Commentaries* 481; Wegenast, *Canadian Companies* (1931), 775-77.

6 *Re Town Topics Co.* (1911), 20 Man. R. 574, 576 (Man. Q.B.—"The courts have ordinarily no visitatorial power over companies").

7 (1906), 12 B.C.R. 80, 91 (B.C.C.A.).

8 Wegenast, *ante*, n. 5, at 106.

> where a winding-up could not be brought within the four corners of the Winding-up Act it would be open in a proper case to invoke the general equitable jurisdiction of the court.

Furthermore, in *Featherstone* v. *Cooke*[9] it was held that the existence of disputes between different members of the governing body of a company which prevented its affairs being carried on properly, was a proper ground for the intervention of the court by way of injunction and the appointment of a receiver to protect the property of the company. In that case Vice Chancellor Malins said:[10]

> With regard to private partnerships, nothing is of more frequent occurrence than the quarrels of partners. If parties quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the Court to interfere by injunction, and appoint a receiver if necessary.

In another case,[11] decided by the same judge in the same year, he relied on his earlier decision and went on to say:[12]

> the Court will not interfere with the internal affairs of joint stock companies unless they are in a condition in which . . . there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time, and to as small an extent as possible.

The courts' visitorial powers in equity aside, there is no need to discuss the power of Canadian courts to wind up a company in the absence of express statutory authority to do so, because each Canadian jurisdiction now has legislation expressly granting this power to the courts,[13] and similar legislation also exists in England and the other commonwealth countries.[14] The legislation in question typically provides that winding-up may take place (a) voluntarily, (b) under supervision of the court, and (c) by order of the court. The third means is the most commonly used, and the most relevant for purposes of this article.

The legislation relating to compulsory (involuntary) winding-up provides in every case that "a company may be wound up by the court if . . . the court is of opinion that it is *just and equitable* that the company should be wound up,"[15] or words to that effect. This legislation, granting a broad discretionary power to the court, is commonly referred to as the "just and equitable" rule.

The first statute which provided for involuntary dissolution at the instance of shareholders on grounds other than the insolvency of the corporation was the English Joint Stock Companies Winding-up Act, 1848.[16] It is this same Act which first introduced the broad "just and equitable" rule, expressed in that statute[17] as empowering the court to dissolve and wind up the company when

> any other Matter or Thing shall be shown which in the Opinion of the Court shall render it just and equitable that the company should be dissolved.

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9 (1873), 16 L.R. Eq. 298.
10 *Id.*, at 301 (*dictum*).
11 *Trade Auxiliary Co.* v. *Vickers* (1873), 16 L.R. Eq. 303.
12 *Id.*, at 305 (*dictum*).
13 See *post.*, n. 21.
14 See *post*, n. 15 and 24.
15 See *e.g.*, Companies Act, 1948, 11 & 12 Geo. 6, c. 38, s. 222 (U.K.) (Emphasis added).
16 11 & 12 Vict., c. 45. Interestingly, the full title of the Act indicates that it was designed, *inter alia*, "to facilitate the dissolution and winding-up of *joint stock companies and other partnerships*," (emphasis added).
17 *Id.*, s. 5(8).

This provision, along with others in the statute, was transferred to the English Companies Act, 1862,[18] and now appears, in substantially the same form, as section 222 (f) of the Companies Act, 1948.[19]

By way of comparison, the "just and equitable" rule did not make its appearance in Canada until 1889.[20] All Canadian jurisdictions now have provisions for the involuntary dissolution of corporations on the "just and equitable" ground,[21] although the province of Quebec did not have legislation for involuntary winding-up until 1957[22] and the broad "just and equitable" rule was not enacted there, as such, until 1963.[23] Similar legislation also exists in other commonwealth countries.[24]

It is not infrequently the case that the "just and equitable" rule appears in the statutes at the end of a list of other specified grounds on which he court may order a winding-up,[25] though this is not invariably the case.[26] Such other stated grounds are generally in the nature of a forfeiture or surrender for such things as allowing the number of shareholders to fall below the minimum number required by statute, failure to comply with statutory requisites as to the filing of reports and the like, or failing to commence business within a year, all relate, in turn, to a form of insolvency, as where the capital is impaired or the company is unable to pay its debts. A detailed discussion of these other grounds is beyond the scope of this article and, in any event, it is usually only under the "just and equitable" rule that the principal form of relief relevant to the theme of this article can be obtained. It is, however, vital to note that the courts have now established, beyond any doubt whatsoever, that the "just and equitable" rule is an independent ground for relief and is not to be read *ejusdem generis* with the preceding grounds for winding-up which are commonly set out in the statute.[27]

B. THE GENERAL NATURE OF THE RELIEF

The courts have, in the exercise of their powers under the "just and equitable" rule, made it abundantly clear that there are no fixed outside

18 25 & 26 Vict., c. 89, s. 79(5). The "just and equitable" rule was also transferred to the Partnership Act, 1890, 53 & 54 Vict. c. 39, s.35(f).

19 11 & 12 Geo. 6, c. 38.

20 52 Vict., c. 32, s.4 (Can.).

21 See, Companies Act, R.S.B.C. 1960, c. 1960, c. 67, s. 219(2); Companies Act, R.S.A. 1955, c. 53, s. 179(e), Corporations Act, R.S.O. 1960, c. 71, s. 256(d); Corporations Act, S.M. 1964 (2d Sess.), c. 3, s. 319(d); Companies Act, R.S. Nfdl. 1952, c. 168, s. 131(5); Companies Winding-Up Act, R.S.N.S. 1954, c. 46, s. 4; Companies Winding-Up Act, R.S.S. 1953, c. 131, s.5; Winding-Up Act, R.S. P.E.I. 1951, c. 176, s. 22(c); Winding-Up Act, R.S. N.B. 1952, c. 252, s. 3(f); Winding-Up Act, R.S.C. 1952, c. 296, s. 10(e); Winding-Up Act, R.S.Q. 1964, c. 281, s. 24.

22 S.Q. 1957, c. 41, s. 25. As to the situation in Quebec prior to this time see *Re Muutal Enterprises Inc.*, [1938] 2 D.L.R. 778 (Que. Sup. Ct.). For cases under the 1957 legislation see *Lefebvre* v. *Lefebvre Freres Ltee.* (1963), 4 C.B.R. (N.S.) 38 (Que. Sup. Ct.); *In re Prussin & Park Distributors Inc.* (1963), 6 C.B.R. (N.S.) 31.

23 S.Q. 1963, c. 55, now R.S.Q. 1964, c. 281, s. 24.

24 See, *e.g.*, Companies Act, Victoria Acts of Parliament 1961, No. 6839, s. 221(h) (Australia).

25 See, *e.g.*, U.K. Companies Act, 1948, *ante*, n. 15. See also, Winding-Up Act, R.S.C. 1952, c. 296, s. 10; Companies Act, R.S.A. 1955, c. 53, s. 179. For a discussion of the earliest grounds of dissolution of a corporation see 1 Blackstone, *Commentaries*, 485.

26 See, *e.g.*, Companies Act, R.S.B.C. 1960, c. 67, s. 219(2).

27 That this matter is now universally true throughout the commonwealth would seem beyond doubt from the authorities. See, *e.g.*, England: *Loch* v. *John Blackwood Ltd.*, [1924] A.C. 783 (P.C. Barbados); *In re Yenidje Tobacco Co.*, [1916] 2 Ch. 426 (C.A.); *In re Sailing Ship Kentmere Co.*, [1897] Weekly N. 58 (Ch.); Scotland: *Baird* v. *Lees*, [1924] Sess. Cas. 83 (C.A.); *Symington* v. *Symington's Quarries Ltd.* (1906), 8 Sess. Cas. (5th Ser.) 121. Ireland: *Re Newbridge Steam Laundry Co.*, [1917] 1 Ir. R. 67. Australia: *In re Straw Products Pty. Ltd.*, [1942] Vict. L.R. 222 (Sup. Ct.); *In re Brunswick (Australia) Ltd.* (1931), 32 N.S.W. St. 545 (Eq.). New Zealand: *In re Upper Hutt Town Hall Co.*, [1920] N.Z.L.R. 125 (Sup. Ct.).
For earlier cases holding to the contrary, see *In re Anglo-Greek Steam Co.*, [1866] L.R. 2 Eq. 1 (M.R.); *In re Diamond Fuel Co.* (1879), 13 Ch. D. 400 (C.A.).

limits to the rule but rather that each case must be decided on its own facts. Indeed, where appropriate, the courts have, over the years, expanded the rule into new areas as fresh circumstances and situations have arisen and as the courts' reformulation of standards of intra-corporate conduct have developed. Thus, parallel to, and underlying, the expansion of the "just and equitable" rule there has been a corresponding imposition of stricter standards of behaviour on the directors and majority shareholders in their treatment of minority shareholders. Similarly, there has been a growing recognition by the courts of the special nature and needs of the close corporation or, as some courts prefer to call it, the partnership in the guise of a company.

The power of the court to make a winding-up order is within the realm of its equitable jurisdiction and, as is traditional in courts of equity, the jurisdiction is construed liberally. Thus it has been said:[28]

> The words "just and equitable" are words of the widest significance and do not limit the jurisdiction of the Court to any case. It is a question of fact and each case must depend upon its own circumstances.

And further:[29]

> Nor . . . can any general rule be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase.

In addition, it is clear from the legislation that the courts have been granted a broad discretion under the "just and equitable" rule. This is not to say that such discretion is unbounded, for as was pointed out by Lord Clyde in *Baird* v. *Lees*:[30]

> This discretion must however be judicially exercised. It is not enough for the Court in exercising it to have, in the familiar phrase of a decree-arbitral, "God and a good conscience" before its eyes; grounds must be given which can be examined and justified.

As to the general approach that the court should take in any given case, Lord Shaw stated, in *Loch* v. *John Blackwood Ltd.*,[31] that in considering whether it was "just and equitable" to make a winding-up order, the court's consideration

> ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute and contract, are entitled.

The natural tendency of text-writers and judges alike is to categorize the relevant cases within a given area of the law so that they may be more easily handled, discussed and applied. This writer proposes to do likewise, in order to make the task at hand more manageable, though it is felt appropriate at this point to add the following caveat:

> Facts rendering it just and equitable that a company should be wound up cannot be resolved into categories. Cases upon the subject are to be read with this always in mind. They merely illustrate the diversity of the circumstances calling for an exercise of the Court's discretion in winding up a company because it is just and equitable to do so.[32]

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28 *In re Bleriot Aircraft Mfg. Co.* (1916), 32 T.L.R. 253, 255 (Ch., *per* Neville, J.).
29 *Davis & Co.* v. *Brunswick (Austl.) Ltd.*, [1936] 1 All E.R. 299, 309 (P.C., Austl., *per* Lord Maugham).
30 [1924] Sess. Cas. 83, 90 (Scot.).
31 [1924] A.C. 783, 788 (P.C., Barbados).
32 *In re Straw Products Pty. Ltd.*, [1942] Vict. L.R. 222, 223 (C.A., *per* Mann. C. J.).

With this admonition in mind, it is now proposed to consider the circumstances which will amount to a "just and equitable" cause.

There are no fixed definitions of what circumstances will constitute sufficient grounds under the broad "just and equitable" rule although a few jurisdictions have sought to supplement the "just and equitable" rule by legislating specific related grounds which might conceivably also fall under the rule.[33]

There emerge from the cases three principal relevant categories which will be analyzed and discussed presently under the headings (1) "justifiable lack of confidence," (2) "deadlock", and (3) "the partnership analogy". Before doing so, however, it is only appropriate to point out that these three grounds do not exhaust the "just and equitable" rule. Indeed, these three grounds are actually of fairly modern origin. While the other grounds under the "just and equitable" rule are beyond the scope of this article by virtue of their not being directly relevant to the resolution of intra-corporate disputes, they are, nevertheless, worthy of brief mention, if only because of their historical importance and by way of comparison.

The first of such other grounds which will justify a winding-up order under the "just and equitable" rule (and the first ground to have emerged under the rule) is where there has been a failure of the corporate objects—the "substratum" of the company has disappeared[34] or, as so colorfully described by Lord President Clyde in *Baird* v. *Lees*,[35] "the case in which circumstances occur which have the effect of knocking the bottom out of the company's business." It has been held, however, that the winding-up process cannot be used to evoke a judicial decision as to the probable success or failure of the company.[36]

Similarly, the company may be wound up where it is a mere "bubble company"[37] or a fraudulent scheme,[38] or where it is being operated solely for the benefit of debenture holders.[39]

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33 See, *e.g.*, Winding-up Act, R.S.N.B. 1952, c. 252, s. 3(e). *Cf.* S.Q. 1957, c. 41, s. 25; repealed by S.Q. 1963, c. 55. See also *In re Prussin & Park Distributors Inc.*, *ante*, n. 22 which, in *obiter*, nevertheless construed the 1957 Quebec provision as the equivalent of the "just and equitable" rule.

34 For a discussion of scope and effect of the "loss of substratum" rule see, *e.g.*

England:

Re Eastern Telegraph Co., [1947] 2 All E.R. 104 (Ch.); *Re Kitson & Co.*, [1946] 1 All E.R. 435 (C.A.); *Re Baku Consolidated Oilfields Ltd.*, [1944] 1 All E.R. 24 (Ch.); *In re Amalgamated Syndicate*, [1897] 2 Ch. 600; *In re Haven Gold Mining Co.* (1882), 20 Ch.D. 151 (C.A.); *In re German Date Coffee Co.* (1882), 20 Ch.D. 169 (C.A.); *In re Diamond Fuel Co.* (1879), 13 Ch.D. 400 (C.A.); *In re Joint Stock Coal Co.* (1869), L.R. 8 Eq. 146; *In re Anglo-Greek Steam Co.* (1866), L.R. 2 Eq. 1; *In re Factage Parisien Ltd.* (1864), 34 L.J. Ch. 140; *In re National Live Stock Ins. Co.*, 26 Beav. 153, 53 E.R. 855 (M.R. 1858).

Canada:

Re Westcoast Research & Developt. Co. (1963), C.C.H. Dom. Cos. L.Rep. No. 30-462 (B.C. Sup. Ct.); *Re Columbia Gypsum Co.* [1959], 17 D.L.R. (2d) 280 (B.C. Sup. Ct.); *In re Winnipeg Saddlery Co.* (1934), 42 Man. R. 448 (K.B.); *Re Toronto Finance Corp.* (1930), 65 O.L.R. 351 (H.C.); *Re Jury Gold Mine Developt. Co.* (1928), 63 O.L.R. 109 (C.A.); *Re British Empire Steel Corp.*, [1927] 2 D.L.R. 964 (N.S. Sup. Ct.); *Re Hamilton Ideal Mfg. Co.*, 34 O.L.R. 66, 23 D.L.R. 640 (H.C. 1915). See also, *Fraser & Stewart, Company Law of Canada*, (5th ed 1962), 798.

35 [1924] Sess. Cas. 83, 90 (Scot.).

36 *In re Suburban Hotel Co.* (1867), L.R. 2 Ch. App. 737.

37 Having reference to the famous South Sea Company and the "Bubble Act of 1720", as to both of which see generally, Gower, *Modern Company Law*, (2d ed. 1957), c. 2.

38 *In re T. C. Brinsmead & Sons*, [1897] 1 Ch. 406 (C.A.); *In re Anglo-Greek Steam Co.* (1866), L.R. 2 Eq. 1. *Cf. In re Gold Co.* (1879), 11 Ch. D. 701 (C.A.); *Re Medical Battery Co.*, [1894] 1 Ch. 444; *Re Horwood & Co.*, [1921] N.S.W. St. 750 (Sup. Ct.).

39 *Re Chic Ltd.*, [1905] 2 Ch. 345; *In re Alfred Melson & Co.*, [1906] 1 Ch. 841.

C. THE "JUST AND EQUITABLE" RULE

This section discusses, in considerable detail, the circumstances under which a corporate winding-up may be obtained under the three main recognizable categories of the "just and equitable" rule which are relevant to the theme of this article. These are here labelled, for convenience sake only, as (i) "justifiable lack of confidence," (ii) "deadlock", and (iii) "the partnership analogy". These categories are by no means mutually exclusive, but rather are very much intertwined, both by judicial construction and by plain common sense. For this reason, it is not at all uncommon to find that the facts of any given case may give rise to a claim under any one or more of these categories. It is by no means necessary to bring a case under all three categories. Any one of the grounds will suffice, provided there is no other impediment to the granting of the relief. While this is so, and while this article does purport to discuss each category separately as if it were an independent ground for relief, it should be pointed out that, as the subsequent discussion will show, one or more of these separate grounds may now have proven to be redundant in light of the development and expansion of the "partnership analogy" ground and the great scope that it affords. Indeed, by virtue of the fact that the "partnership analogy" seems to be pervading the whole of the "just and equitable" rule, it may well prove to be the case that there are not any separate categories at all, but only one broad "partnership analogy" category.

This development is not really very surprising, for in a sense the "just and equitable" rule is predicated on the partnership analogy and its fundamental recognition of the close corporation as a special kind of company and as being in reality the equivalent of an incorporated partnership. This is unquestionably the principal reason why winding-up has proven to be such an effective remedy.

It should also be pointed out that running through the cases under the "just and equitable" rule, and under each of the three categories herein discussed, are several fundamental propositions. The most basic of these is that there is a well-recognized reluctance on the part of the courts to interfere in the internal affairs of a corporation. As one judge put it: [40]

> While the words "just and equitable" are clearly intended to be elastic in their application in order that as the case arises injustice and inequity may be prevented, it is common ground that a very strong case must be made to justify the interference of the court in the internal management of the company's affairs.

This reluctance to interfere is based on several well known "rules", variously called the "internal management" rule; the "business judgement" rule, and the principle of "majority rule". Simply put, these rules come down to nothing more than this—the courts believe strongly that the majority of a corporation are entitled to govern the corporation as *they*, and not the court, see fit and the majority will be allowed to do so free from court interference, unless their conduct is so gross as to stock the conscience of the court.

Not all courts are as reluctant as others to grant winding-up orders. Those that are reluctant tend invariably to fall back on the standard

[40] *Re British Empire Steel Corp.*, [1927] 2 D.L.R. 964 (N.S. Sup. Ct., Chisholm, J.). See also, *Re Langham Skating Rink Co.* (1877), 5 Ch.D. 669, 685 (James, L. J.).

principles of majority rule, and the like. Those courts less reluctant, manage skillfully to avoid reference to these time-worn cliches. Hopefully, in the discussion which follows, the foregoing matters will become apparent.

(i) *"Justifiable lack of confidence"*

The leading case which established this ground is *Loch* v. *John Blackwood Ltd.*[41] The facts of the case are briefly as follows. A company was formed under the Barbados Companies Act to take over an engineering business carried on by Mr. Blackwood before his death and left by his will for the benefit of members of his family. The testator's brother-in-law was given a preponderating voting power and the post of managing director. He, together with fellow directors omitted to hold general meetings, submit financial statements, or recommend any dividends and, in the opinion of the court, had laid themselves open to the suspicion that they were keeping the minority shareholders in ignorance of the company's position and affairs so as to freeze out the minority and acquire their shares at an under value. In these circumstances the minority shareholders, who were not directors, petitioned for a winding-up order on the ground, *inter alia,* that it was "just and equitable" that the company should be ordered to be wound up.

Lord Shaw, speaking for the Privy Council, allowed the petitioners' appeal from the lower courts, which had refused to make a winding-up order, and said that the circumstances were such that it was indeed just and equitable that the company should be ordered to be wound up. In the course of his judgement Lord Shaw propounded the now classical "justifiable lack of confidence" test in the following words:[42]

> It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

This statement by Lord Shaw contains all the elements of this test, though subsequent cases have often added a gloss to it.

In the course of developing his judgement, Lord Shaw had occasion to rely[43] on the following statement by Lord President Clyde in *Baird* v. *Lees,*:[44]

> I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who

41 [1924] A.C. 783 (P.C., Barbados).
42 *Id.*, at 788.
43 *Id.*, at 793.
44 [1924] Sess. Cas. 83, 92 (Scot.).

> wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company.

As to the scheme of the directors to freeze out the petitioners and acquire their shares at an under value, Lord Shaw, in a classic bit of judicial understatement, simply said: [45]

> Their Lordships do not desire to characterize these suggestions in the language which they fully deserve. . . . . confidence in its management was, and is, and that most justifiably, at an end.

It is interesting to note, before leaving this case, that in spite of the fact that the company in question was formed as a "public" company, the Privy Council treated it as a "domestic or family concern"[46] and hence perhaps foretold the eventual application of the "partnership analogy".

The *Loch* case, in addition to being the fountainhead of the "justifiable lack of confidence" test, is also a classic example of one of the most frequently encountered forms and manifestations of intra-corporate conflict, namely the situation where the power of the majority shareholders is used to secure ownership of the undertaking of the company or of the holdings of the minority at an undervalue through the classic device of a "freeze out"[47] of the minority.[48]

The other classic manifestation of cause and effect of intra-corporate disputes is the situation where the majority shareholders treat the company or its assets as their own property and thus avoid the necessity of even buying the minority shareholders out. It is now abundantly clear that such conduct will also come within the "justifiable lack of confidence" test and thus support a winding-up order.[49] Probably the leading case which best illustrates this point is *Thomson* v. *Drysdale*.[50] There the majority shareholder held 1,501 shares to the minority shareholder's one share and, after differences arose between the parties, the majority shareholder proceeded to take over the entire control of the business and treat it as if it were his alone. In granting the minority shareholder's petition for winding-up order Lord President Clyde stated that[51]

> in any case in which the shareholders who hold a preponderating voting interest in a company make it manifest that they intend to set at naught the security provided by company procedure, and to treat the company and its affairs as if

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45 *Ante*, n. 41, at 796.
46 *Id.*, at 786.
47 On "freeze-outs" (or "squeeze-outs") see generally, O'Neal & Derwin, *Expulsion or Oppression of Business Associates: Squeeze-Outs in Small Enterprises* (1961).
The earliest known use of the term "freeze-out" in Canada is believed to be in *Re James Lumbers Ltd.* (1925), 58 Ont. L.R. 100, 117 (Ont. H.C.).
48 For another classic case of "freeze-out" see *In re Wondoflex Textiles Pty. Ltd.*, [1951] Vict. L.R. 458 (Sup. Ct.). Majority deliberately made false accusations against minority, reduced his salary and status, and threatened further action of the same kind, all with the object of making minority's position intolerable and forcing him to resign and to sell his shares at a substantial undervalue.
Cf., *Re Florentine Land Co.* (1926), 31 O.W.N. 70 (H.C.); *Re James Lumbers Ltd.*, *ante*. n. 47.
49 See, *e.g.*, *Baird* v. *Lees*, [1924] Sess. Cas. 83 (Scot. C.A.); *Re Martello & Sons Ltd.*, [1945] 453 (C.A.); *In re W.A. Swan & Sons Ltd.*, [1962] So. Austl. St. 310 (Sup. Ct. 1947); *In re Straw Products Pty. Ltd.*, [1942] Vict. L.R. 139 (Sup. Ct.), aff'd. [1942] Vict. L.R. 222 (C.A.). See also, *Re Consolidated South Rand Mines Deep Ltd.*, [1909] 1 Ch. 491; *Re Bleriot Mfg. Aircraft Co.* (1916), 32 T.L.R. 253 (Ch.); *Re Newbridge Sanitary Steam Laundry Ltd.*, [1917] 1 I. R. 67 (C.A.).
50 [1925] Sess. Cas. 311 (Scot. C.A.).
51 *Id.*, at 315.

> they were their property, it is impossible that the minority should retain any confidence in the impartiality or probity of the company administration.

The fact that the petitioner held only one share to the majority shareholder's 1,501 singularly failed to impress the court. As Lord Skerrington said: [52]

> it behoves [sic] the shareholder who has 1,501 votes to avoid any conduct which would reasonably lead to the inference that he fails to appreciate the fact that it is his duty to use his voting power in the interests of the company as a whole, and that he must not ignore the interests of the other shareholder or treat the company and its assets as if they were his own private property.

Subsequent cases have sometimes rephrased the test and, as a result, new illustrations have emerged. Thus, as Mr. Justice Rose said in *Re James Lumbers Ltd.*,[53] the test required

> misconduct sufficient to destroy a reasonable shareholder's confidence that the business, if left in the hands of the respondents, will be conducted competently and honestly and in the interests of all the shareholders, including the petitioners.

Clearly, acts of fraud or dishonesty will suffice to give rise to a justifiable and well founded lack of confidence in the conduct of the management of the company. Thus, by way of illustration, it has been held that involving the firm in serious income tax evasions[54] or misappropriating company funds[55] will suffice to meet the test.

It is impossible to say with any confidence what circumstances are *certain* to meet the test for there are a series of cases, most of them in the Ontario courts, which suggest that a very serious wrongdoing will be required before the courts will interfere by way of making a winding-up order.[56] These cases all rely on the internal management rule and the principle of majority rule and sprinkled throughout them are such unfortunate expressions as "might is right".[57] These cases also speak in terms of requiring something akin to clear "oppression"[58] or fraud. Anything falling below these tends to be labelled a mere "domestic dispute or quarrel",[59] or "a matter of domestic policy and internal management."[60] In addition, these courts tend to insist that such non-serious disputes be settled by the domestic forum of the company, the general meeting or by ordinary suit in the courts. Thus we find one court saying: [61]

> A winding-up petition cannot be resorted to merely because there is dissension within the company. The majority must govern. If they act in such a way

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52 *Id.*, at 316.
53 58 O.L.R. 100, 118 (H.C.). Quoted with approval and applied in *Re Toronto Finance Corp.* (1930), 65 O.L.R. 351, 355 (H.C.).
54 See, *e.g.*, *Re Maritime Asphalt Products Ltd.* (1965), 52 D.L.R. (2d) 8 (P.E.I. Sup. Ct.).
55 See, *e.g.*, *Bannerman* v. *Concrete Column Clamps Ltd.*, [1953] 4 D.L.R. 60 (Que. Sup. Ct.); *Re Martello & Sons Ltd.*, [1945] O.R. 453; [1945] 3 D.L.R. 626 (C.A.).
56 See, *e.g.*, *Re Jury Gold Mine Developt. Co.* (1928), 63 O.L.R. 109 (C.A.); *Re Shipway Iron Bell & Wire Mfg. Co.* (1926), 58 O.L.R. 585 (C.A.); *Re James Lumbers Ltd.* (1925), 58 O.L.R. 100 (H.C.); *Re Noden Hallit & Johnson Ltd.* (1924), 26 O.W.N. 296 (H.C.), leave to appeal refused, 26 O.W.N. 330; *Re Imperial Steel & Wire Co.* (1919), 17 O.W.N. 324 (H.C.); *Re Harris Maxwell Larder Lake Gold Mining Co.* (1910), 1 O.W.N. 984 (H.C.); *Re Dewey & O'Heir Co.* (1909), 13 O.W.N. 32 (Div. Ct.).
See also, *In re Winnipeg Saddlery Co.* (1934), 42 Man. R. 448 (K.B.); *Re Sydney & Whitney Pier Bus Service Ltd.*, [1944] 3 D.L.R. 468 (N.S. Sup. Ct.).
57 *In re Winnipeg Saddlery Co.* (1934), 42 Man. R. 448, 458 (K.B.).
58 See, *e.g.*, *Re Sydney & Whitney Pier Bus Service Ltd.*, [1944] 3 D.L.R. 468, 472 (N.S. Sup. Ct.).
59 See *e.g.*, *Re Jury Gold Mine Developt Co.* (1928), 63 O.L.R. 109, 110 (C.A.); *Re Shipway Iron Bell & Wire Mfg. Co.* (1926), O.L.R. 585 (C.A.).
60 See, *e.g.*, *Re R. C. Young Insurance Ltd.*, [1955] O.R. 598, 607 (C.A.). See also, *Scott* v. *Northland Beverages* (1956) *Ltd.* (1959), 31 W.W.R. (N.S.) 287 (B.C.C.A.).
61 *Re Harris Maxwell Larder Lake Gold Mining Co.* (1910), 1 O.W.N. 984 (H.C.).

> as to give the minority any actionable grievance, redress must be sought in an action in the courts, not by the staying of the company by means of the winding-up clauses of the Companies Acts.

Such a statement similarly illustrates that the closer the conduct complained of is to "oppression", the greater the likelihood of a finding of lack of probity and a justifiable lack of confidence. On the other hand, the closer the conduct complained of is to the other end of the scale, mere dissension, the less likely the chance of success in obtaining a winding-up order under the justifiable lack of confidence test. This is illustrated by a line of cases[62] which adopt and apply that portion of Lord Shaw's judgment in *Loch* v. *John Blackwood Ltd.* to the effect that the petitioner's lack of confidence must not spring from "dissatisfaction at being outvoted in the business affairs or on what is called the domestic policy of the company."[63]

Similarly, it is clear that mere dissatisfaction with dividends or profits will not sufficiently justify a lack of confidence.[64] In the words of one court,[65]

> profit or loss, prudence or imprudence, are matters with which this court has nothing whatever to do.

Seemingly, such matters fall within the realm of "domestic policy."

It is also clear that alleged misconduct of the directors in refusing to register transfers[66] or transmissions of shares[67] will not meet the required test to justify a lack of confidence. Nor will dissatisfaction with the failure of the majority to buy out the shares of the dissident minority.[68]

Whether or not mismanagement *per se* is sufficient to justify a winding-up order is impossible to determine, for the cases seem in hopeless and possibly irreconcilable conflict. Thus in *In re Diamond Fuel Co.*,[69] it was held that

> mere mismanagement on the part of the directors, even although it might be such as to justify a suit against them in respect of such misconduct or mismanagement, is not of itself sufficient to justify a winding-up order.

It should be pointed out, however, that the case just quoted from also held that the "just and equitable" rule had to be read *ejusdem generis* with the stated grounds which preceded it, a view no longer valid. This case, among others, was, however, relied on by Mr. Justice Plowman in *In re Surrey Garden Village Trust Ltd.*,[70] decided in 1965. Mr. Justice Plowman stated as a "well-settled" principle that "misconduct or mismanagement by the management committee . . . is not of itself a ground for making an order on the petition of a member."[71] It could of course be argued that Mr. Justice Plowman relied on weak authority at best, but the difficulty is that there is no express authority to the contrary.

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62 See, *e.g.*, *Re R. C. Young Insurance Co.*, [1955] O.R. 598, 607 (C.A.).
63 *Ante*, n. 42.
64 See *e.g.*, *Buckner* v. *Bourbon Farming Co.* (1955), 14 W.W.R. (N.S.) 406, 412 (Sask. Q.B.); *Re James Lumbers Ltd.* (1925), 58 O.L.R. 100, 112 (H.C.); *Re Noden Hallitt & Johnson Ltd.* (1924), 26 O.W.N. 269 (H.C.), leave to appeal refused, 26 O.W.N. 330; *Re Anglo-Continental Produce Co.*, [1939] 1 All E.R. 99 (Ch.). *Cf.*, *In re W. A. Swan & Sons Ltd.*, [1962] So. Austl. St. 310 (Sup. Ct.).
65 *Re European Life Assurance Soc.* (1869), L.R. 9 Eq. 122, 131.
66 *Charles Forte Investments Ltd.* v. *Amanda*, [1964] Ch. 240 (C.A.).
67 *Re Cuthbert Cooper & Sons Ltd.*, [1937] Ch. 392.
68 *Buckner* v. *Bourbon Farming Co.* (1955), 14 W.W.R. (N.S.) 406, 412 (Sask. Q.B.).
69 (1879), 13 Ch. D. 400, 408 (C.A.). See also, *In re Anglo-Greek Steam Co.* (1866), L.R. 2 Eq. 1 (M.R.).
70 [1965] 1 W.L.R. 974 (Ch.).
71 *Id.*, at 981.

Indeed the only other case even remotely relevant raises the affirmative only by implication.[72]

Seemingly with a view to overcoming any doubt on the matter, the legislature of New Brunswick has seen fit to enact a provision whereby the court may make a winding-up order

> when the company, to such an extent as to prejudice the interests of the shareholders or creditors, . . . has committed fraudulent acts in the management of its affairs, *or has been negligently mismanaged.*[73]

Admittedly, the mismanagement must have been done "negligently", but the petitioner's task is made easier by the fact that the legislation goes on to provide that the onus is on *the company* to show that it is not liable to be wound up on this ground.[74] Unfortunately no other Canadian jurisdiction has such legislation and within the commonwealth only India has even comparable legislation.[75]

One other important type of conduct is similarly free from doubt. That is the propriety of those in control issuing new shares to themselves or their nominees so as to keep control and keep down a dissident minority, and whether such conduct would justify a lack of confidence sufficient to warrant the making of a winding-up order. The 1962 Australian case of *Re Wm. Brooks & Co. Ltd.*[76] held that such conduct was improper and would justify a winding-up order. By contrast, in the 1965 case of *In re Surrey Garden Village Trust Ltd.*,[77] Mr. Justice Plowman held, as one of many grounds for refusing a winding-up order, that there was not impropriety in such conduct. The matter is, therefore, as yet still unsettled, though it should be pointed out that the *Brooks* case was also decided on the basis of a recently enacted provision in the New South Wales Companies Act[78] which empowered the court to make a winding-up order if

> the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members.

The language of the statute just quoted is strangely reminiscent of a judgement which takes one of the most liberal views of the degree of conduct required to show a "justifiable lack of confidence," that of Mr. Justice Lowe in *In re Straw Products Pty. Ltd.*,[79] wherein he stated:

> It is not necessary . . . that the facts should show a lack of probity in the majority shareholders. A lack of probity might be sufficient ground, but it is not the only ground. It is sufficient if the conduct of the majority has been unfair or unjust to the minority, or if that conduct furnishes just ground for the destruction of the confidence of the minority in the majority shareholders.

Mr. Justice Lowe's liberalized view of the test was predicated and, seemingly, dependent on his recognition that the company there sought to be wound up was in reality a partnership and[80]

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72 *In re Westcoast Research & Developt. Co.* (1963) C.C.H. Dom. Cos. L. Rep., No. 30-462 (B.C. Sup. Ct.).
73 R.S.N.B. 1952, c. 252, s. 3(e) (emphasis added).
74 *Id.*, s. 4.
75 Indian Companies Act of 1956 (consol. to 1961), Act 1 of 1956, VI, "Prevention of Oppression *and Mismanagement*".
76 1962 N.S.W. St. 142 (Sup. Ct.). See Also, *In re Kurilpa Protestant Hall Pty. Ltd.*, [1946] Qd. St. R. 170 (Sup. Ct.).
77 [1965] 1 W.L.R. 974 (Ch.).
78 Now, N.S.W. Companies Act, 1964, s. 222(1)(f).
79 [1942] Vict. L.R. 139, 141 (Sup. Ct.), aff'd., [1942] Vict. L.R. 310 (C.A.).
80 *Ibid.*

> conduct which is sufficient to destroy the confidence of one partner in another is an adequate ground for ordering a winding up of a private company.

This unequivocal molding of the "partnership analogy" into the "justifiable lack of confidence" test has undoubtedly expanded the scope of the latter test. Alternatively, as was commented on earlier in this article, it may well indicate the disappearance of the "justifibale lack of confidence" test into what is gradually becoming an all encompassing "partnership analogy" test.[81] The intertwining of the two concepts by Mr. Justice Lowe seems all the more valid when one remembers that even Lord Shaw in *Loch* v. *John Blackwood Ltd.*[82] hinted at such inter-involvement, although Lord Keith, in *Elder* v. *Elder & Watson,*[83] has thrown some doubt on the validity and thrust of Mr. Justice Lowe's approach. Lord Keith stated: [84]

> Lack of confidence rested on a lack of probity in the conduct of a company's affairs seems to me to be something quite different from mutual lack of confidence between partners in the management of partnership affairs.

Before leaving a discussion of the "justifiable lack of confidence" test, it is not inappropriate to point out that, regardless of the conduct complained of, the petitioner will be more likely to impress the court if he can show some prejudice to himself. This is so because, as one judge has pointed out: [85]

> I can see no reason why there should be a lack of confidence—quite the contrary. . . . I could stand a lot of nonsense from a man who was making me as much money as [defendant] is making, not only for himself but for the applicants.

(ii) *"Deadlock"*

Deadlock in the management of the company's affairs was held to be a sufficient ground to justify the making of a winding-up order as early as 1897 in England,[86] but this category of winding-up was first given full expression in *In re Yenidje Tobacco Company Ltd.,*[87] a case which is also credited with the firm establishment of the "partnership analogy". The facts of the *Yenidje* case are briefly as follows. Two individuals, W and R, who had previously carried on separate businesses as tobacconists and cigarette manufacturers, agreed to amalgamate their businesses and to this end formed a private limited company in which they were the sole shareholders and directors. Each was to have equal voting control and any differences between them were to be settled by arbitration. The one difference which was submitted to arbitration, whether or not a certain individual should be employed as factory manager, resulted in an arbitration which lasted for eighteen days and involved costs exceeding £1,000, not including the costs of the parties. The arbitration resulted in an award to which R declined to give effect. Relations between the two shareholders deteriorated further and they became so hostile and antagonistic to one another that neither would even speak to the other, and all communications between them had to be conveyed

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81 See, *e.g., Re National Drive-in Theatres Ltd.* (1954), 11 W.W.R. (N.S.) 145 (B.C.S.C.); *In re Purvis Fisheries Ltd.* (1954) [13 W.W.R. (N.S.) 401 (Man. C.A.).
82 *Ante,* n. 46.
83 [1952] Sess. Cas. 49 (Scot. C.A.).
84 *Id.,* at 59.
85 *Re Michael P. Georgas Ltd.,* [1948] O.W.N. 429, 431 (H.C., *per* Urquhart, J.) (Winding-up granted for "deadlock"), revs'd. by [1948] O.R. 708 (C.A.).
86 *In re Sailing Ship "Kentmere" Co.,* [1897] W.N. 58 (Ch.). *Cf. In re Mason Bros. Ltd.* (1891), 12 L.R. (N.S.W.) Eq. 183.
87 [1916] 2 Ch. 426 (C.A.).

through the secretary of the company. Despite this bitter dissension and hostility, the company continued to prosper. In these circumstances W petitioned the court for a winding-up order under the "just and equitable" rule. The Court of Appeal affirmed the trial judgement that the circumstances justified the making of a winding-up order under the "just and equitable" rule. Lord Cozens-Hardy, Master of the Rolls, categorized the situation which existed between the parties by saying: "If ever there was a case of deadlock I think it exists here."[88] He pointed out the futility of arbitration as a means of resolving the differences between the parties and also pointed out that the company was in substance a partnership. He approved and adopted,[89] as the basis for justifying the making of a winding-up order in the circumstances there present, the following passage from *Lindley on Partnership*: [90]

> Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.

Lord Justice Warrington also confirmed that "a company may be wound up if, for example, the state of things is such that what may be called a deadlock has been arrived at in the management of the business of the company."[91]

It should also be noted that the company was ordered to be wound up despite the fact that it continued to earn substantial profits, even in the face of the "deadlock" and inability of the two shareholder-directors to agree on matters of corporate management.

From the *Yenidje* case the "deadlock" rule can be formulated as follows. Where it is impossible to carry on the business of the company owing to internal disputes which have produced a state of deadlock which cannot be ended by a resolution passed by the shareholders, the court will wind up the company on the ground that it is "just and equitable" to do so. As is readily apparent, this rule is really only applicable to close corporations or incorporated partnerships, for in non-close corporations there is likely to be a separation of ownership and management and hence at least the possibility of the shareholders meeting apart from the disputing factions and resolving the dispute.

One of the most fascinating Canadian cases on "deadlock" is *In re Prussin and Park Distributors Inc.*,[92] a case which also serves to introduce an examination of a most unique legislative attempt to define the "deadlock" category. In the *Prussin* case the shares were owned equally by two factions, each faction being comprised of a husband and wife. Each of the four was to be a director, officer and employee. Disputes arose and the relationship between the parties deteriorated to the point where one faction was excluded from any participation in the management and

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88 *Id.*, at 432.
89 *Id.*, at 430.
90 Lindley, *Partnership*, (8th ed. 1912), 657; now found at (12th ed. 1962), 593.
91 *Ante*, n. 87, at 435.
92 (1963), 6 C.B.R. (N.S.) 31 (Que. Sup. Ct.). *Cf. Lefebvre* v. *Lefebvre Freres Ltee.* (1963), 4 C.B.R. (N.S.) 38 (Que. Sup. Ct.).

affairs of the company. This excluded faction petitioned for a winding-up order under legislation first enacted less than five years previously.[93]

Mr. Justice Hannen of the Quebec Superior Court held that this was a case of "deadlock" and made the winding-up order on the basis of the petitioner's having met the five statutory requirements. These requirements were that there be (1) no other effective and appropriate remedy, (2) an equal split of shares and control, (3) serious and persistent disagreement, as to the choice of directors or officers or as to some important questions respecting the management or functioning of the corporation, (4) a resulting deadlock (5) which paralyses and seriously interferes with the normal operations of the corporation.[94]

Needless to say, this legislation almost exactly describes the common law version of the "deadlock" category and indeed, Mr. Justice Hannen went out of his way to point out that as far as he was concerned this legislation should be construed and interpreted in a manner analogous to the "just and equitable" rule, despite the difference in wording.

In the course of his judgement Mr. Justice Hannen alluded to the fact that in the French language version of the statute the word "impasse" was used in place of "deadlock" and that that word equally described the state of affairs which existed between the parties.[95] He went on to point out his interpretation of the "paralysis" requirement of the legislation and in so doing took an extremely realistic view for he said:[96]

> I include in "normal operations" not only the trading operations but also the basic matters of administration and control and policy.

This interpretation is, it is submitted, completely consistent with the realistic approach taken in the *Yenidje* case.

It should be pointed out that the Quebec legislation just discussed was the sole ground provided for involuntary winding-up. It was repealed in 1963[97] and replaced by a simple "just and equitable" rule, thus bringing the legislation into conformity with the legislation of all the other Canadian jurisdictions.[98]

These are by no means the only cases which have held that "deadlock" was a sufficient basis on which to justify the making of a winding-up order.[99] The cases are not, however, in complete agreement as to whether or not deadlock is *of itself* a sufficient basis for the making of a winding-up order, although the tendency to be found in the more modern cases would seem to be that "deadlock" is *per se* sufficient.[100]

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93 S.Q. 1957-58, c. 41, s. 25.
94 *Ibid.*
95 6 C.B.R. (N.S.) 31, 40.
96 *Id.*, at 40-41.
97 S.Q. 1963, c. 55. Now see R.S.Q. 1964, c. 281.
98 See, *e.g.*, Companies Act, R.S.B.C. 1960, c. 67, s. 219(2).
99 See, *e.g.*, *Re Vancouver Minit Auto Wash Ltd.* (1956), 17 W.W.R. (N.S.) 208 (B.C.S.C.); *Re National Drive-in Theatres Ltd.* (1954), 11 W.W. (N.S.) 145 (B.C.S.C.); *In re Purvis Fisheries Ltd.* (1954), 13 W.W.R. (N.S.) 401 (Man. C.A.); *Bonar* v. *Toth*, [1957] O.W.N. 268 (C.A.); *Re Bondi Better Bananas Ltd.*, [1951] O.R. 845 (C.A.); *In re White Castle Inn Ltd.*, [1946] O.W.N. 773 (H.C.); *Bannerman* v. *Concrete Column Clamps Ltd.*, [1953] 4 D.L.R. 60, C.S. 107 (Que. Sup. Ct.); *Re Citizen's Coal & Forwarding Co.*, [1927] 4 D.L.R. 275 (Ont. Cty. Ct.); *In re Upper Hutt Town Hall Co.*, [1920] N.Z.L.R. 125 (Sup. Ct.); *Re The Merchants & Shippers' S.S. Lines Ltd.* (1917), 17 N.S.W. St. 146 (C.A.); *In re Fromm's Extract Co* (1901), 17 T.L.R. 302 (C.A.); *In re Mason Bros. Ltd.* (1891), 12 L.R. (N.S.W.) Eq. 183.
100 See, *e.g.*, *Re Bondi Better Bananas Ltd.*, [1951] O.R. 845, 855 (C.A.). See also *In re Fromm's Extract Co.* (1901), 17 T.L.R. 302 (C.A.). *Cf.*, *In re F. Hall & Sons Ltd.*, [1939] N.Z.L.R. 408 (C.A.).

As was suggested by the Quebec legislation discussed in the *Prussin* case,[101] the "deadlock" must involve and be the result of "serious and persistent disagreement", for the courts will be loathe to interfere in anything less serious. The rule was best expressed in the case of *Symington* v. *Symington's Quarries Ltd.*:[102]

> [If] the Court finds that . . . the company has come to a deadlock they will consider themselves justified in acting. . . . On the other hand, they certainly will not allow the aid of that section where all that has happened is merely what you might call a domestic quarrel between two sets of shareholders. The company itself is the proper "forum" for the settlement of domestic differences, according to the powers of the majority under the constitution of the company.

While the classic case of "deadlock" is the situation where there are only two equal shareholders at odds, or two equal factions at odds, the authorities now establish (despite cases to the contrary)[103] that "for a situation in a company to be recognized as a deadlock, equal holdings of stock by the contesting factions is not required.".[104] The trend is, hence, to treat "*complete* deadlock" and "deadlock *in substance*" alike.[105]

It is submitted that a court would have no difficulty in resolving not only a deadlock caused by an equality of votes, but also a deadlock caused by the exercise of a veto power[106] built in to the corporate structure in the form of higher than normal voting or quorum[107] requirements. Indeed, the chances of deadlock occurring are greatly increased where there are such veto or high quorum provisions or where there are only two shareholders or an even number of directors. As one judge said, in commenting on a provision of a shareholders' agreement which provided for an equal number of directors, "the likelihood of impasse was foolishly agreed upon in advance."[108]

Some of the cases, most notably those which imply that a "complete" or "absolute" deadlock must exist, have tended to hold that a winding-up will not be granted where the deadlock is only "temporary"[109] or where it can be overcome by the appointment or election of an additional director.[110] Similarly, it has been held that the deadlock must be actual and present and not merely speculative or future.[111]

The proposition that an "absolute deadlock" is not required and that a "deadlock in substance" will suffice finds its clearest expression in the cases dealing with casting votes. Theoretically and technically, the

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101 *Ante*, n. 72.

102 8 Sess. Cas. (5th Ser.) 121, 129 (Scot. C.A.). Quoted and applied in *Re Jury Gold Mine Developt. Co.* (1928), 63 O.L.R. 109 (C.A.). See also, *Re Hugh-Pam Porcupine Mines Ltd.*, [1942] O.W.N. 544 (H.C.); *Re Toronto Finance Corp.* (1930), 65 O.L.R. 351 (H.C.); *Re James Lumbers Ltd.* (1925), 58 O.L.R. 100 (H.C.).

103 See, *e.g.*, *In re Bambi Restaurant Ltd.*, [1965] 1 W.L.R. 750, 752 (Ch.), (by implication); *In re Davis Investments (East Ham) Ltd.*, [1961] 1 W.L.R. 1396, 1399 (C.A.), (by implication); *Re Furriers' Alliance Ltd.* (1907), 51 Sol. J. 172, 173 (Ch.), (by implication).

104 *In re Purvis Fisheries Ltd.* (1954), 13 W.W.R. (N.S.) 401, 409 (Man. C.A.). Accord, *Bannerman* v. *Concrete Column Clamps Ltd.* (1953), C.S. 107, 115 (Que. Sup. Ct.). See also, *Re Winding-up Ordinance & Timbers Ltd.* (1917), 35 D.L.R. 431 (Alta. C.A.); *St. Joseph's Lithuanian Benefit Soc.* v. *Wasilianskas* (1924), 27 O.W.N. 318.

105 See, *e.g.*, *In re White Castle Inn Ltd.*, [1946] O.W.N. 773, 775 (H.C.).

106 See, *e.g.*, *Re The Merchants & Shippers, S.S. Lines Ltd.* (1917), 17 N.S.W. St. 146 (C.A.).

107 See, *e.g.*, *Re Michael P. Georgas Co.*, [1948] O.W.N. 429 (H.C.), revs'd. by [1948] O.R. 708 (C.A.).

108 *In re Prussin & Park Distributors Inc.*, *Ante*, n. 22, at 37 (*per* Hannen, J.).

109 See, *e.g.*, *Re Michael P. Georgas Co. ante*, n. 107 (C.A.).

110 See, *e.g.*, *Re Toronto Finance Corp.* (1930), 65 O.L.R. 351, 355, (H.C.); *In re Davis Investments (East Ham) Ltd.*, [1961] 1 W.L.R. 1396, 1399 (C.A.); *Re Furriers Alliance Ltd.* (1907), 51 Sol. J. 172, 173 (Ch.).

111 *Re Anglo-Continental Produce Co.*, [1939] 1 All E.R. 99, 103 (Ch.).

presence of a casting vote in one of two equal factions at serious odds with one another precludes the possibility of an absolute deadlock and ensuing corporate paralysis. Fortunately, the courts have held, subject to dictum in one case,[112] that the presence of a casting vote is *not* a bar to obtaining a winding-up order under the "deadlock" category.[113] This was most eloquently put in *Re Citizen's Coal and Forwarding Co. Ltd.*[114] In discussing the use of a casting vote to break a deadlock "of a particularly embarrassing and persistent nature" the judge said:[115]

> I am disposed to think that that provision is not intended to go further than to provide a ready and reasonable means of dealing with occasional or even frequent tie-votes rather than a continuous and settled condition which here existed.

In another Canadian case[116] the judge said, in respect of a by-law which provided for a casting vote, that

> the court is of the opinion that the elementary rules of ordinary business morality would preclude the application of that by-law in favor of a president who sought to use the same to perpetuate his corrupt administration.[117]

Similarly, the "deadlock" category has been applied where there is a clear imbalance of voting power between two irreconcilable factions.[118]

One last aspect of the law relating to the "deadlock" category remains to be mentioned. That is that the court will not grant a winding-up order under the "deadlock" category where the petitioner has himself caused the deadlock,[119] as for example where he has persistently and deliberately refused to attend meetings and has thus "broken quorum".[120] These cases presumably have reference to the last portion of the statement taken from Lindley on Partnership and applied by the court in the *Yenidje* case,[121] namely that the impossibility of reconciliation and cooperation have "not been caused by the person seeking to take advantage of it."

In summary it may be said that the "deadlock" category is now both clearly established and fairly fully developed. Circumstances falling short of actual deadlock will suffice though presumably the disagreement must be present, serious and persistent to avoid being treated as a mere domestic quarrel or as being of a merely temporary character. The more permanent and hopeless the deadlock is, the greater the chance of inducing the court to interfere.

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112 *In re Davis Investments (East Ham) Ltd.*, *ante*, n. 110.

113 *Re Citizen's Coal & Forwarding Co.*, [1927] 4 D.L.R. 275, 277 (Ont. Cty. Ct.); *Bannerman* v. *Concrete Column Clamps Ltd.* (1953), C.S. 107, 114-115 (Que. Sup. Ct.); *Re National Drive-in Theatres Ltd.* (1954), 11 W.W.R. (N.S.) 145, 153 (B.C.S.C.); *Slone & Holt* v. *Margolian* (1957), 8 D.L.R. (2d) 115, 123 (N.S.S.C.) (*dictum*).

114 [1927] 4 D.L.R. 275.

115 *Id.*, at 277.

116 *Bannerman* v. *Concrete Column Clamps Ltd.*, *ante*, n. 113.

117 *Id.*, at 114-115.

118 *Re The Merchants & Shippers' S.S. Lines Ltd.*, *ante*, n. 106.

119 See, *e.g.*, *Re Bondi Better Bananas Ltd.*, [1951] O.R. 410 (H.C.) revs'd by (1951), O.R. 845 (C.A.); *Re James Lumbers Ltd.* (1925), 58 O.L.R. 100, 115 (H.C.); *Re Dewey & O'Heir Co.* (1909), 13 O.W.R. 32, 38 (Div. Ct.—Appeal); *In re F. Hall & Sons Ltd.*, [1939] N.Z.L.R. 408 (C.A.).

120 See, *e.g.*, *Re Michael P. Georgas Co.*, (*ante*, n. 107 (C.A.); *Re Toronto Finance Corp.* (1930), 65 O.L.R. 351 (H.C.); *Re James Lumbers Ltd.* (1925), 58 O.L.R. 100, 115 (H.C.).
On the propriety of "breaking quorum" *compare Barron* v. *Potter*, [1914] 1 Ch. 895 *with In re Copal Varnish Co.*, [1917] 2 Ch. 349.

121 *Ante*, n. 89.

(iii) *The "Partnership Analogy"*

The "partnership analogy" category of the "just and equitable" rule is unquestionably the most important and far-reaching of the three categories discussed in this article.

Its development and subsequent expansion may well prove, in time, that the "partnership analogy" has made the other categories redundant. This is so because the "partnership analogy" is extremely broad in scope and, at the same time, the easiest category to satisfy in terms of proof.[122]

The "partnership analogy" category may be summarized as follows: in the case of a private company which is in substance a partnership, the court, in exercising its jurisdiction under the "just and equitable" rule, should apply the same principles as would be applied in a claim for dissolution of a partnership.

The earliest expression of the "partnership analogy" is probably to be found in *Symington* v. *Symington's Quarries Ltd.*,[123] wherein Lord McLaren found that the company comprised as it was of three brothers was really a "domestic company" and not one "formed by appeal to the public."[124] He said that "one of the grounds on which it has been the practice of the court to decree a dissolution is where there is a small number of *partners* equally, or nearly equally divided, so that it is impossible that the business can be carried on."[125] He went on to say that "in such a case it is quite obvious that all the reasons that apply to a dissolution of private companies, on the ground of *incompatibility between the views or methods of the partners,* would be applicable in terms to the division among the shareholders of this company".[126]

While the *Symington* case might be said to have contained the seeds of the "partnership analogy" category, it was really in the famous case of *In re Yenidje Tobacco Co. Ltd.*[127] that the "partnership analogy" took root and bloomed. The facts of that case have already been related.[128] It need only be repeated that relations between the two equal shareholder-directors had deteriorated to the point of open hostility, such that neither would even speak directly to the other and all communications had to be conveyed between the parties by the company's secretary. In the course of his now classic judgement, Lord Cozens-Hardy, Master of the Rolls, set out all the elements of the "partnership analogy" rule. Thus he said:[129]

> I think it right to consider what is the precise position of a private company such as this and in what respects it can be fairly called a *partnership in the guise of a private company.*

He went on[130] to add that

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122 As to the "proof" required, see, however, *In re Davis Investments (East Ham) Ltd.*, *ante*, n. 110.

123 (1906), 8 Sess. Cas. (5th Ser.) 121 (Scot. C.A.).

124 *Id.*, at 130.

125 *Ibid.* (Emphasis added).

126 *Ibid.* (Emphasis added).

127 [1916] 2 Ch. 426 (C.A.).

128 See text accompanying no. 87.

129 [1916] 2 Ch. 426, 429 (Emphasis added).

130 *Id.*, at 432.

> circumstances which would justify the winding up of a partnership . . . are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company.

Then, with these basic principles established Lord Cozens-Hardy, went on to examine the state of affairs which existed between the parties and considered whether the existing state of hostility and dissension should be allowed to continue. He held that the state of things should not be allowed to continue since that was not what the parties contemplated by the arrangement into which they entered when they formed the company. He said[131] that

> they assumed, and it is the foundation of the whole of the agreement that was made, that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other.

He later concluded his judgement by adding:[132]

> It is contrary to the good faith and essence of the agreement between the parties that the state of things which we find here should be allowed to continue.

Lord Cozens-Hardy made it abundantly clear that the "partnership analogy" rule was an independent ground and was not dependent on the establishment of "deadlock". While he conceded that a serious deadlock did in fact exist there, he went on to add:[133]

> but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the *analogy of the partnership law* and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible.

In the course of setting out the criteria for partnership dissolution which would apply with equal force to the winding-up of a company in the guise of a partnership, Lord Cozens-Hardy adopted the broadly worded passage from Lindley on Partnership which was earlier quoted in this paper.[134] Its nub and effect is simply that "continued quarrelling and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation" will suffice to justify the order.[135]

There is no doubt whatsoever now about the firm establishment of the "partnership analogy" category, for both the *Yenidje* case and the principles which it established have been widely quoted and applied.[136] In fact, so firmly is the "partnership analogy" established that at least one court felt sufficiently confident to apply it without even relying on the *Yenidje* case.[137]

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131 *Id.*, at 431.
132 *Id.*, at 433.
133 *Id.*, at 432 (Emphasis added). See also *In re Davis & Collett Ltd.*, [1935] 1 Ch. 693, at 698 and 701.
134 See text accompanying *ante*, n. 90.
135 *Re Bondi Better Bananas Ltd.*, *ante* n. 119, at 855 (*per* Aylesworth, J. A.). See also, *Bonar* v. *Toth*, *ante*, n. 99, at 269.
136 See, *e.g.*, *Re Davis & Collett Ltd.*, [1935] 1 Ch. 693; *In re Lundie Bros. Ltd.*, [1965] 1 W.L.R. 1051 (Ch.); *Re Winding-up Ordinance & Timers Ltd.* (1917), 35 D.L.R. 431 (Alta. C.A.); *Re National Drive-in Theatres Ltd.* (1954), 11 W.W.R. (N.S.) 145 (B.C. Sup. Ct.); *In Re Purvis Fisheries Ltd.* (1954), 13 W.W.R. (N.S.) 401 (Man. C.A.); *Bonar* v. *Toth*, [1957] O.W.N. 268 (C.A.); *Re Bondi Better Bananas Ltd.*, [1951] O.R. 845 (C.A.); *Re Michael P. Georgas Co.*, [1958] O.W.N. 429 (H.C.), revs'd by [1948] O.R. 708 (C.A.); *In re White Castle Inn Ltd.*, [1946] O.W.N. 773 (H.C.); *Bannerman* v. *Concrete Column Clamps Ltd.*, [1953] C.S. 107 (Que. Sup. Ct.); *In re Wondoflex Textiles Pty. Ltd.*, [1951] Vict. L.R. 458 (Sup. Ct.); *Tench* v. *Tench Bros. Ltd.*, [1930] N.Z.L.R. 403 (C.A.); *In re Upper Hutt Town Hall Co. Ltd.*, [1920] N.Z.L.R. 125 (Sup. Ct.). *Cf. Re Horwood & Co. Ltd.*, [1921] N.S.W. St. 750 (Sup. Ct.). See also, *Re R. C. Young Insurance Ltd.*, [1955] O.R. 598 (C.A.).
137 *Re Maritime Asphalt Products Ltd.* (1965), 52 D.L.R. (2d) 8 (P.E.I. Sup. Ct.).

The application of the "partnership analogy" in any given case quite clearly necessitates that the court be prepared to find that the company sought to be wound up is in substance an incorporated partnership with all that that entails by way of implicit mutual good faith, understanding and cooperation between the "partners". Some Canadian courts have construed this requirement very strictly and have required that the shareholders be true "co-adventurers".[138] Other courts have been more realistic and liberal and have said that for the partnership analogy to apply it is *not* essential that there should be any agreement or understanding that all the shareholders are to be entitled to take part in the company's business.[139]

By way of comparison with the United States, there are at least some American courts which have refused to treat "incorporated partnerships" as partnerships for dissolution purposes[140] and the statement was made in one case[141] that

> there is no occasion, either, for holding that, after all, the corporation is only a partnership. . . . The corporation was chartered by the State, contracted and incurred debts as a corporation and in all respects operated in that capacity. Apparently it is only when dissension arises that respondents become dissatisfied with their position as shareholders.

These views should be contrasted with the following statement by Lord Justice Warrington in the *Yenidje* case:[142]

> In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding up has to be resorted to. Now, if this had been an ordinary partnership and an action had been brought for dissolution, it seems to me quite clear that the plaintiff, who is the petitioner in this case, would have had sufficient ground for a dissolution of partnership according to the ordinary principle by which the Court is guided in such matters.

The principal reason why the "partnership analogy" affords such great scope is that it opens the door to reliance on any of the grounds which would suffice to justify the dissolution of a partnership by a court.[143] The full panoply of these "added" grounds may be seen, for example, in the provisions of the British Columbia Partnership Act,[144] which provides:

> *s.* 38 On application by a partner, the Court may decree a dissolution of the partnership in any of the following cases:—
>
> (a) When a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner:

138 *Re James Lumber Ltd.* (1925), 58 O.L.R. 100, 116 (H.C.). See also, *Re Sydney & Whitney Pier Bus Service Ltd.*, [1944] 3 D.L.R. 468, 471 (N.S.S.C.).
139 See, *e.g.*, *In re Wondoflex Textiles Pty. Ltd.*, [1951] Vict. L.R. 458, 465 (Sup. Ct.).
140 *Hanes* v. *Watkins* (1953), 63 So. (2d) 625 (Fla.); *Hennessy* v. *During* (1953), 124 N.Y.S. (2d) 266 (Sup. Ct.), both cited in 2 O'Neal, *Close Corporations* (1958), 228.
141 *Freedman* v. *Fox* (1953), 67 So. (2d) 692, 693 (Fla.).
142 [1916] 2 Ch. 426, 434 (C.A.).
143 As to the grounds on which a partnership may be dissolved by the court see generally, Lindley, *Partnership*, (12th ed. 1962), at 587-97.
144 R.S.B.C. 1960, c. 277.

(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of business, is calculated to affect prejudicially the carrying-on of the business:

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(e) When the business of the partnership can only be carried on at a loss:

(f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Similar legislation exists in every other Canadian province[145] but one,[146] as well as in the English Partnership Act, 1890.[147]

It is readily apparent that the incorporation by reference of the partnership criteria affords tremendous scope for justifying the winding-up of a close corporation under the "just and equitable" rule and that, accordingly, it is not necessary to resort to either the "justifiable lack of confidence" or "deadlock" categories since it will invariably be easier to prove a case under the "partnership analogy". As if the specific grounds stated in the statute for partnership dissolution were not enough, it should also be remembered that the last ground stated is in itself a "just and equitable" clause and so the whole category is really still very much open-ended.

While, seemingly, it is not necessary to establish more than a serious and persistent disagreement with one's fellow shareholders in a close corporation to succeed under the "partnership analogy", more flagrant situations will clearly provide "just and equitable" cause, as for example where the petitioner has been excluded from the management and affairs of the corporation,[148] assuming it to have been the understanding of the parties when he entered the firm that he was to be an "active partner" rather than a "sleeping partner".[149] It must be pointed out, however, that, generally speaking, a petition for winding-up based upon the "partnership analogy" cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles,[150] as for example where the petitioner was a party to articles of association or a shareholders' agreement which provides for restrictions on the transfer of shares and he now complains that the directors have refused to "consent" to his transferring his shares.[151] In such circum-

145 See, Partnership Acts: R.S.A. 1955, c. 230, s. 38; S.M. 1965, c. 59, s. 38; R.S.N.B. 1952, c. 167, s. 36; R.S. Nfdl. 1952, c. 224, s. 35; R.S.N.S. 1954, c. 212, s. 37; R.S.O. 1960, c. 288, s. 35; R.S. P.E.I. 1951, c. 106, s. 38; R.S.S. 1953, c. 352, s. 37.

146 Quebec has no Partnership Act as such. The dissolution of partnerships is, however, provided for in the Quebec Civil Code, Arts. 1895, 1896.

147 53 & 54 Vict., c. 39, s. 35 (This is, of course, still the current English partnership legislation).

148 See, *e.g.*, *In re Lundie Bros. ltd.*, [1965] 1 W.L.R. 1051, 1057 (Ch.); *In re Davis & Collett Ltd.*, [1935] 1 Ch. 693; *Re Winding-Up Ordinance & Timbers Ltd.* (1917), 35 D.L.R. 431 (Alta. C.A.); *Re National Drive-in Theatres Ltd.* (1954), 11 W.W.R. (N.S.) 145 (B.C.S.C); *In re Wondoflex Textiles Pty. Ltd.*, [1951] Vict. L.R. 458 (Sup. Ct.). *Cf., Scott* v. *Northland Beverages* (1956) *Ltd.* (1959), 31 W.W.R. (N.S.) 287 (B.C.C.A.); *Re R. C. Young Insurance Ltd.*, [1955] O.R. 598 [1955], 3 D.L.R. 571 (C.A.).

149 *In re Wondoflex Textiles Pty. Ltd.*, id., at 467.

150 *Ibid.*

151 See, *e.g.*, *In re Cuthbert Cooper & Sons Ltd.*, [1937] Ch. 392. *Cf., Charles Forte Investments Ltd.* v. *Amanda*, [1964] 1 Ch. 240 (C.A.).

stances the "partnership analogy" has worked in reverse, for the courts have held[152] that

> private companies are . . . from the business and personal point of view . . . more analogous to partnerships than to public corporations. Accordingly, it is to be expected that, in the articles of such a company, the control of the directors over the membership may be very strict indeed. There are very good reasons . . . why those who bring such companies into existence should give them a constitution which gives to the directors powers of the widest description.

Seemingly, this use of the "partnership analogy" to sustain the validity of share transfer restrictions takes precedence over the use of the "partnership analogy" to justify a winding-up for refusal of the directors to register a transfer[153] or transmission[154] of shares.

On the other hand, it must be remembered that at least one judge has said[155] that

> acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding-up. Indeed, it may be said that one purpose of . . . [the "just and equitable" rule] is to enable the Court to relieve a party from his bargain in such cases.

Thus, it is on the basis of this reasoning that winding-up orders have been made where the petitioners were excluded from their positions as "working partners", even though such exclusions were made by the majority in the exercise of lawful powers.[156]

The creation and development of the "partnership analogy" seems less surprising and a little less "modern" when one remembers that the predecessor of the English company as we now know it was the joint stock company, which in many ways may be said to be simply an extension of the partnership.[157] It should similarly not be overlooked that the English legislation which introduced the "just and equitable" rule for winding-up in 1848[158] had as its formal title, "AN ACT . . . TO FACILITATE THE DISSOLUTION AND WINDING-UP OF *JOINT STOCK COMPANIES AND OTHER PARTNERSHIPS.*" In addition Nathaniel Lindley's[159] treatise on the law of Companies, published in 1888, was subtitled: "Considered as a Branch of the Law of Partnership".[160]

Whether or not the "partnership analogy" has pre-empted the other categories under the "just and equitable" rule remains still to be seen. It is quite clear, however, that even under the existing cases the "partnership analogy" pervades the cases dealing with both "justifiable lack of confidence"[161] and "deadlock".[162] In fact, the "partnership analogy"

152 *Re Smith & Fawcett Ltd.*, [1942] Ch. 304, 305 (C.A.).

153 *Chas. Forte Investments Ltd.* v. *Amanda*, *ante*, n. 151.

154 *In re Cuthbert Cooper & Sons Ltd.*, *supra ante*, n. 151.

155 *In re Wondoflex Textiles Pty. Ltd.*, *ante*, n. 148, at 467 (per Smith, J.).

156 See cases cited, *ante*, n. 148.

157 For the history of company law, see generally, Gower, *Modern Company Law*, (2d ed. 1957), c. 2, 3.

158 11 & 12 Vict., c. 45 (1848).

159 Afterwards Lord Lindley, M. R., and a Lord of Appeal.

160 Lindley, *A Treatise on the Law of Companies: Considered as a branch of the Law of Partnership*, (5th ed. 1889).

161 See, *e.g.*, *In re Purvis Fisheries Ltd.* (1954), 13 W.W.R. (N.S.) 401 (Man. C.A.); *Bannerman* v. *Concrete Column Clamps Ltd.*, [1953] C.S. 107 (Que. Sup. Ct.).

162 See, *e.g.*, *Re Bondi Better Bananas Ltd.*, *ante*, n. 119.

is so engrossing that it may well prove in time to be so broad that all that will be required to be proved by the minority shareholder who petitions for a winding-up order is that there has been a "failure of cooperation in the common interest,"[163] regardless of what form it takes.

It now seems quite clear that, on the authority of cases such as *Yenidje,* it is not necessary to establish any misconduct or a deadlock in order to succeed in obtaining a winding-up order. All that is required is a fundamental and persistent disagreement such as makes it impossible for the parties to get together again and work in harmony and mutual cooperation. It may one day even be sufficient to show mere mutual incompatability.

The liberalization of the "just and equitable" rule by the broad scope of the "partnership and analogy" bodes well for the dissident minority shareholder who seeks to be rescued by the court from an unpleasant business relationship.

If the true nature of the close corporation is such that it resembles a "marriage" of partners, then the "partnership analogy" has provided what would appear to be, in most circumstances, very broad and effective grounds for "divorce".

D. BASIC CONDITIONS PRECEDENT TO RELIEF

This section discusses a variety of matters which, under the present case law and the existing legislation, restrict or bar the right of a petitioner to get a winding-up order, despite the fact that he may have in all other respects established a "just and equitable" cause sufficient to entitle him to a winding-up order.

(i) *Who may apply*

Among the conditions which must be fulfilled by a minority shareholder in England who seeks to bring a winding-up petition is that he prove to the court that

> the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding-up, or have devolved on him through the death of a former holder.[164]

This provision, originally enacted in 1867,[165] was obviously designed to prevent a person from becoming a shareholder merely to enable him to present a winding-up petition.

Similar legislation exists in Australia[166] and India.[167] Only two Canadian provinces have similar legislation,[168] although a recent unreported case[168a] in British Columbia held that an *unregistered* owner of shares did not meet the statutory definition of "member" and hence lacked status to seek a judicial winding-up.

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163 Hornstein, *A Remedy for Corporate Abuse: Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder,* (1940), 40 Colum. L. Rev. 220, at 230.

164 (U.K.) Companies Act, 1948, 11 & 12 Geo. 6, c. 38, s. 224(1)(a)(ii). For cases dealing with the need to comply with this requirement see *In re City & County Bank* (1875), 10 Ch. App. 470 (C.A.); *Re A Co.,* [1894] 2 Ch. 349.

165 See Companies Amendment Act, 1867, 30 & 31 Vict. c. 131, s. 40.

166 See, *e.g.,* Companies Act, Victoria Acts of Parliament 1961, No. 6839, s. 255 (3).

167 Companies Act (India), Act 1 of 1956 (consol. to 1961), s. 439(4)(b).

168 See, Companies Act, R.S. Nfdl. 1952, c. 168, s. 134; Companies Act, R.S.A. 1955, c. 53, s. 180(2)(a)(ii).

168a *In re Sullivan Hotel Ltd.,* (unreported, April, 1966, B.C. Sup. Ct.).

Most American statutes which provide for involuntary dissolution at the suit of a minority shareholder require that the plaintiff be the holder of a specified percentage of the outstanding capital stock of the corporation, varying from ten percent[169] to one third[170] of the "outstanding capital stock". Still others require a specified percentage of the "voting power", in some cases as much as fifty percent.[171]

The only comparable provision in Canada is a requirement under the federal *Winding-up Act*[172] that the petitioner hold "shares in the capital stock of the company to the amount of at least five hundred dollars par value or . . . five shares without nominal or par value in the capital stock of the company".[173]

The object of such requirements is, seemingly, to curb "strike suits" brought for ulterior or frivolous purposes.[174] The absence of any statutorily required minimum shareholding in England and Canada, where the petition for winding-up may be brought by any member (or contributory) regardless of the size of his shareholding,[175] has not restricted the courts from exercising an inherent jurisdiction to refuse a winding-up order whenever they felt the petition was vexatious or frivolous and not brought bona fide.[176]

(ii) *The requirement of "clean hands"*

Since the relief granted by the court in making a winding-up order is equitable the courts are wont to insist that the petitioner come into court with "clean hands".[177] Thus, in one case,[178] the court refused to make a winding-up order on the basis, *inter alia,* that the petitioners had already secretly gone about setting up a business in competition. In the colorful language of the judge:[179]

> People who neglect the obligation to be off with the old love before being on with the new, and who act in this way, do not display that delicate sense of honour which one would expect from those who complain of the injury to their name and fame.

Similarly, the courts have refused in innumerable cases to make a winding-up order where "the petitioner is himself responsible for the position in which he finds himself"[180] by reason of his own conduct.[181] This is, it is submitted, simply another manifestation of the "clean hands" requirement. Thus, in one case[182] the court refused to make a winding-up order where it felt that the petitioner himself had precipitated and created the deadlock in a desire to get his money out of the company. The court there said that the petitioner "does not come

169 See, *e.g.,* Conn. Gen. Stat. 1949, s. 5226.
170 See, *e.g.,* Cal. Corp. Code 1953 (Deering), s. 4650 (b).
171 Ky. Rev. Stat. 1933, s. 271, 570(2).
172 R.S.C. 1952, c. 296.
173 *Id.,* s. 11.
174 As to the nature of "strike suits" see, Note, *Extortionate Corporate Litigation—the Strike Suit* (1934), 34 Colum. L. Rev. 1308.
175 See, *e.g., Thomson* v. *Drysdale,* [1925] Sess. Cas. 311 (Scot.), where plaintiff holder of only one share to defendant's 1,501 shares got a winding-up order.
176 See, *e.g.,* cases cited *post,* section D (iii).
177 See *Re Martello & Sons Ltd.,* [1945] 3 D.L.R. 626 (Ont. C.A.), (by implication).
178 *Re Horwood & Co.,* [1921] N.S.W. St. 750 (S.C.Eq.).
179 *Id.,* at 756.
180 *In re Sovereign Oil Co.,* [1934] 3 W.W.R. 317, 319 (B.C.S.C.).
181 See, *e.g.,* cases where the court held that any alleged deadlock was due largely to the conduct of the petitioner: *Re Toronto Finance Corp.* (1930), 65 O.L.R. 351 (H.C.); *Re James Lumbers Ltd.* (1925), 58 O.L.R. 100, 115 (H.C.); *Re Dewey & O'Heir Co.* (1909), 13 O.W.R. 32, 38 (Div. Ct.); *In re F. Hall & Sons Ltd.,* [1939] N.Z.L.R. 408 (C.A.).
182 *Re Bondi Better Bananas Ltd., ante,* n. 99.

to Court with clean hands. They are soiled in uncleanliness of his own making".[183]

(iii) *The "bona fides" of the petition*

The court will almost invariably dismiss a winding-up petition as frivolous, vexatious and an abuse of the process of the courts[184] where, in the opinion of the court, the petition is not brought bona fide, but rather to achieve some ulterior or personal motive, such as "to extort submission to demands."[185]

Thus, the courts have dismissed winding-up petitions where they felt that the real motive of the petitioner was solely a desire to get his money out of the company,[186] even where the petitioner was a *majority* shareholder.[187] Similarly, a winding-up petition has been granted where the objection to it was based solely on a desire to force settlement of a claim for wrongful dismissal,[188] rather than on any real bona fide desire to keep the company alive. Likewise, a petition has been dismissed where the object in bringing it was to collect a debt,[189] or where, in the opinion of the court, the real object of the petition was to remove a restrictive covenant imposed by the company and thus facilitate the sale of the petitioners' land.[190]

Another situation in which the courts have summarily dismissed a winding-up petition is where, in the opinion of the courts, the real motive behind the petition was to force a purchase of the petitioner's shares.[191] It is this ground, more than any other, which can prove to be grossly unfair to the minority shareholder who seeks, as a means of resolving an impasse between himself and the other shareholders or as a means of extricating himself from a hostile climate, to sell out his share interest. In a publicly held corporation he generally has a ready market for his shares. In the close corporation, however, he may well be virtually "frozen-in"[192] to his position as a shareholder because the shares of a close corporation normally have no ready market, particularly where they represent only a minority interest in the corporation. To add to the troubles of the minority shareholder in the close corporation, the shares are invariably subject to restrictions on their transferability

183 *Id.*, at 419. See also cases cited *ante*, n. 181.

184 Compare the discussion in section E, *post*.

185 *Niger Merchants Co.* v. *Capper* (1880), 18 Ch. 557 (1875), (M.R.). See also, *Cadiz Waterworks Co.* v. *Barnett* (1875), L.R. 19 Eq. 182; *Re London & Paris Banking Co.* (1875), L.R. 19 Eq. 444; *Re A Co.*, [1894] 2 Ch. 349; *Re Horwood & Co.*, [1921] N.S.W. St. 750, 756 (S.C. Eq.).

186 See, *e.g.*, *Re Bondi Better Bananas Ltd.*, [1951] O.R. 410, 418-19 (H.C.), reversed by [1951] O.R. 845 (C.A.). See also, *In re Maquinna Hotel Ltd.* (1961), C.C.H. Dom. Cos. Reporter No. 30-381 (B.C.S.C.), (petitioner leaving the area and wishing a return of his investment).

187 "The mere fact that a majority want to get their money back does not make it just and equitable that the company should be wound up in order that they may get it back. There must be something more than that." *Re Anglo-Continental Produce Co.*, [1939] 1 All E.R. 99, 102 (Ch.). *Accord*, *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669, 685-86 (C.A.).

188 *Re Coast Quarries Ltd.* (1956), 18 W.W.R. (N.S.) 47 (B.C.S.C.).

189 *Niger Merchants Co.* v. *Capper*, *ante*, n. 185.

190 *In re Surrey Garden Village Trust Ltd.*, [1965] 1 W.L.R. 974 (Ch.).

191 See, *e.g.*, *Re A Co.* (1917), 34 D.L.R. 396 (Man. K.B.).

192 This term is used as an appropriate counterpart of the reverse situation, a "freeze-out".

and, indeed, in all Commonwealth countries such a corporation *must* have some restriction on the transferability of its shares.[193]

The need to allow some latitude in these circumstances was clearly expressed in *Tench* v. *Tench Brothers Ltd.*[194] In that case the petitioner, one of four brothers, was removed as a director and as a working partner. He tried unsuccessfully to get his three brothers to buy his shares and on their failure to do so, brought a petition for a winding-up. The trial judge ordered the proceedings stayed as vexatious and not filed bona fide for obtaining a winding-up order, but rather for the purpose of putting pressure on the remaining directors to purchase his shares. The New Zealand Court of Appeal reversed the trial judge. Several of the judgments are worth quoting from briefly.

Chief Justice Myers said that "although the court has an inherent jurisdiction to dismiss a petition which is frivolous or vexatious, or otherwise an abuse of its process, it should be sparingly exercised".[195] He went on to point out that "it has to be remembered that in the circumstances of the case it would be difficult, if not impossible, for him to find a purchaser outside the membership of the company."[196]

Mr. Justice Smith said:[197]

> To hold that these admitted facts amount to putting an improper pressure upon the company would seriously endanger negotiations for the settlement of disputes—even family disputes, as is the case here.

Mr. Justice Kennedy expressed himself even more eloquently when he said:[198]

> I do not draw the inference that the petition was not presented bona fide with the legitimate aim of procuring a winding-up. The purchase of shares was intended as a solution of the impasse which had arisen, and when the negotiations failed the petitioner sought other means of getting his money out of the company.
>
> I am reluctant to come to a contrary conclusion, because otherwise contributories might well hesitate to seek to settle differences out of Court. They could not negotiate for a sale of shares without running the risk of being greatly prejudiced if the presentation of a petition, on a disagreement as to price, were held to be not with the object of obtaining a winding-up order, but for the purpose of putting pressure on the other shareholders to buy.

It is to be hoped that other courts will similarly take a realistic approach to the unfortunate position of the minority shareholder in a close corporation and not penalize him for attempting to resolve intra-corporate dissension or deadlock by means of having some or all of the other shareholders buy him out.

The courts have, unfortunately, imposed further restraints on the minority shareholder's ability to sell out. Thus, where the existing shareholders had refused to purchase the petitioners' shares and the

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193 All such corporations, commonly called "private companies" or "proprietary companies", must, in order to maintain that status, comply with certain basic conditions as set out in the applicable Companies Act. Typical of such legislation is the Companies Act, R.S.B.C. 1960, c. 67, s. 2:
"private company" means a company that by its memorandum or articles
(a) *restricts the right to transfer its shares;* and
(b) limits the number of its members to fifty or less . . .; and
(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company;" (Emphasis added).

194 [1930] N.Z.L.R. 403 (C.A.).

195 *Id.*, at 406.

196 *Id.*, at 408.

197 *Id.*, at 411.

198 *Id.*, at 413.

petitioner had sought to sell them to outsiders but was unable to effectively do so because the directors had refused to consent to the transfer of shares, a court has held that such a refusal does *not* constitute a basis for making a winding-up order under the just and equitable rule.[199] In so doing, the court held that in view of the broad discretion conferred on the directors under the articles of association and under the existing state of the law,[200] there was no basis for complaint and the petition to wind up the company was therefore an abuse of the process of the court.[201] The court has similarly held in the case of a refusal of directors to register shares acquired by transmission.[202] One need only point out that such refusals are commonly accompanied by, and aggravated by, a sudden increase in the majority's salaries and a failure to declare any, or adequate, dividends.[203]

There are still other situations where the courts have refused to entertain a petition to wind up. Though not strictly cases where the courts have held the petitions to be frivolous, or vexatious, or an abuse of their process, they do appear to be sufficiently relevant to merit reference at this point. The courts have held, by way of illustrative examples, that a winding-up petition is not the appropriate procedure in which to determine the beneficial ownership of shares[204] or to give redress for wrongs connected with dealings in shares.[205]

(iv) *The court may look at the consequences of a winding-up*

In a number of cases the courts have considered it appropriate, though not conclusive, to look at the consequences likely to flow from the making of the winding-up order requested, and in particular to the likelihood of loss to the respondent. Thus, Mr. Justice Rose in *Re James Lumbers Co. Ltd.*[206] said:[207]

> This risk of loss is something to which the Court ought not lightly to subject [certain of the parties affected], and so I say that before proceeding upon the ground of the petitioner's loss of confidence in the respondents, the Court ought to be quite sure that the respondents as directors have really done something to merit the distrust which the petitioners feel.

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199 *Charles Forte Investments Ltd.* v. *Amanda*, [1964] 1 Ch. 240 (C.A.).

200 The law relating to directors' refusal to register transfers of shares is beyond the scope of this article. See, however, the following leading cases: *In re Coalport China Co.*, [1895] 2 Ch. 404 (C.A.); *In re Smith & Fawcett Ltd.*, [1942] Ch. 304 (C.A.). See also Palmer, *Company Law*, (20th ed. 1959), 341-44.

201 *Charles Forte Investments Ltd.* v. *Amanda*, *ante*, n. 199, at 259. Mr. Justice Cross, in the same case said (*id.*, at 263): "I do not say that there could never be a case in which the facts were such that it would be proper to launch a winding-up petition in respect of a refusal to register a transfer." The learned judge would seem to have overlooked the case of *In re Smith & Fawcett Ltd.*, *ante*, n. 200, a most shocking example of refusal to register, which, it is submitted, would not, on the present state of the law, even be sufficient to obtain a winding-up order.
See also, discussion in Section E, *post*, on "The Exclusiveness of Winding-up Remedy."

202 *Re Cuthbert Cooper & Sons Ltd.*, [1937] 2 All E.R. 466 (Ch.).

203 For a classic example of the last two types of conduct see, *In re W. A. Swan & Sons Ltd.*, [1962] So. Austl. St. 310 (Sup. Ct. 1947). For examples of recommendations made to cure these problems and the problems relating to the directors' refusal to register transfers and transmissions see: *Report of the Committee on Company Law Amendment*, CMD. 6659, paras. 59, 60 (U.K. 1945); *Report of the Company Law Committee*, CMD. 1749, paras. 205, 211, 212 (U.K. 1962); *Memorandum by the Council of the Law Society*, Minutes of Evidence taken before the Company Law Committee, 1192-93 (15th day, Feb. 17, 1961).

204 See, *e.g.*, *In re Bambi Restaurant Ltd.*, [1965] 1 W.L.R. 750, 754 (Ch.).

205 See, *e.g.*, *In re Gold Co.* (1879), 11 Ch. D. 701, 714 (C.A.) (fraud in inducing petitioner to become a shareholder).

206 (1925), 58 O.L.R. 100 (H.C.).

207 *Id.*, at 118-19 (*dictum*). See also *In re Sovereign Oil Co.*, [1934] 3 W.W.R. 317 (B.C.S.C.) (*dictum*).

To the same effect is the statement by Mr. Justice Pruhart in *Re Michael P. Georgas Co. Ltd.*[208] that "the dire consequences of a winding-up are to be considered only in making the Court exercise more than ordinary care in examining the circumstances on which the order might be based."[209] The learned judge went on to concede that the consequences of the winding-up order "will be very serious and perhaps ruinous"[210] to the respondent, but nevertheless made the order.

E. THE "EXCLUSIVENESS" OF THE WINDING-UP REMEDY

Apart from any difficulties the petitioner may have in proving his basic entitlement to a winding-up, he is faced with yet another hurdle for, broadly speaking, the courts have been generally unwilling to grant a winding-up under the "just and equitable" rule where the petitioner has another remedy. The courts have indeed viewed the destruction of a company as such a drastic and distasteful thing that they have insisted that the remedy will only be made available in circumstances where it is, in the last resort, the sole and exclusive means of affording relief.

Thus, as Lord Justice Mellish said in the case of *In re Professional, Commercial and Industrial Benefit Building Society,*[211] the court . . . ought not to grant a winding-up order unless it sees that some plain injustice is being done to the members who present the petition *which cannot be avoided otherwise than by giving a winding-up order.*"

The alternative remedy which must first be exhausted is most commonly, though not invariably, the "domestic forum" of the company, i.e., the general meeting. Thus Lord Jessel, Master of the Rolls, in *In re Langham Skating Rink Co.,*[212] stated that

> it is a power which must not be acted upon unless there is very strong ground for acting upon it, and for this reason, that these companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal.

Lord Justice James, in the same case, went on to say that "it is really very important to these companies that the Court should not . . . take upon itself to interfere with the domestic forum which has been established for the management of the affairs of the company."[213]

Some indication of the alternative remedies which might first have to be exhausted is suggested by *In re Surrey Garden Village Trust Ltd.,* where Mr. Justice Plowman expressed as a "well-settled" principle that

> where other remedies are available, such as calling a general meeting, arbitration under the rules, an action for a declaration or an injunction, or an application to rectify the register, a winding-up petition is misconceived.[214]

Even in a leading case in which a winding-up was granted on the basis of deadlock the court went out of its way to state that "the company itself is the proper 'forum' for the settlement of domestic dif-

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208 [1948] O.W.N. 429 (H.C.) (*dictum*), reversed by [1948] O.R. 708 (C.A.).
209 *Id.,* at 435.
210 *Ibid.*
211 (1871), L.R. 6 Ch. 856, 864 (emphasis added); quoted and relied on in *Re Shipway Iron Bell & Wire Mfg. Co.* (1925-26) 58 O.L.R. 585 (C.A.).
212 5 Ch. D. 669, 684 (C.A.).
213 *Id.,* at 685. *Accord, Re Hugh-Pam Porcupine Mines Ltd.,* [1942] O.W.N. 544 (H.C.).
214 [1965] 1 W.L.R. 974, 981 (Ch.).

ferences, according to the powers of the majority under the constitution of the company."[215]

Wegenast, in his classic treatise on Canadian Companies, published in 1931, stated that "the just and equitable rule for winding-up has apparently never been favored by the Ontario courts."[216] Indeed, with a few notable exceptions,[217] the courts of Ontario have continued to act only with great reluctance toward petitions for winding-up a company.[218]

Wegenast speculates[219] that the reason for the Ontario courts' reluctance to make winding-up orders on the just and equitable ground was their failure to fully perceive the partnership analogy. With respect, it is submitted that the real reason for the courts of Ontario displaying a marked reluctance to decree winding-up orders was their over-adherence to the "internal management" rule and an extremely inhospitable view of the position of minority shareholders. In this they are not alone.

As to the "internal management rule" reference need only be had to some of the very cases cited by Wegenast as support for his proposition. Thus, in *Re Harris Maxwell Larder Lake Gold Mining Co.*,

> A winding-up petition cannot be resorted to merely because there is dissension within the company. The majority must govern. If they act in such a way as to give the minority any actionable grievance, redress must be sought in an action in the courts, not by the staying of the company by means of the winding-up clauses of the Companies Acts.

As to the inhospitable view of the courts towards the position of minority shareholders, reference need be had to only a few cases. Thus, in *Re Imperial Steel & Wire Co.* it was said:[221]

> These shareholders were in the position in which minority shareholders frequently find themselves—bound to submit to the ruling management of the majority; but that in itself was not a justification for a winding-up at the instigation of the minority.

In *Re Jury Gold Mine Development Co.* the court said,[222] in speaking of the petitioner:

> He is a minority shareholder who must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transactions ultra vires, the majority must govern, and there should be no appeal to the courts for redress.

One court expressed the unfortunate position of the minority more succinctly when it simply said "might is right".[223] A somewhat more sympathetic, but equally direct, message was conveyed by the aside

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215 *Symington* v. *Symington's Quarries Ltd.* (1906), 8 Sess. Cas. (5th Ser.) 121, 129 (Scot. App. Div.); quoted and applied in *Re Jury Gold Mine Developt. Co.* (1928), 63 O.L.R. 109 (C.A.).

216 *Wegenast, Canadian Companies* (1931), 104.

217 See, *e.g.*, *Re Martello & Sons Ltd.*, [1945] 3 D.L.R. 626 (Ont. C.A.); *In re White Castle Inn Ltd.*, [1946] O.W.N. 733 (H.C.); *Re Bondi Better Bananas Ltd*, [1951] O.R. 845 (C.A.).

218 See, *e.g.*, *Re Hugh-Pam Porcupine Mines Ltd.*, [1942] O.W.N. 544 (H.C.); *Re Michael P. Georgas Co.*, [1948] O.R. 708 (C.A.); *Re Bondi Better Bananas Ltd.*, [1951] O.R. 410 (H.C.), reversed [1951] O.R. 845 (C.A.); *Re R. C. Young Insurance Ltd.*, [1955] O.R. 598, [1955] 3 D.L.R. 571 (C.A.).

219 Wegenast, *ante*, n. 216, at 104. (Wegenast is possibly basing his suggestion on *Re James Lumbers Ltd.* (1925), 58 Ont. L.R. 100, 116 (H.C.).

220 (1910), 1 O.W.N. 984, 986 (H.C.). See also, *Re James Lubers Ltd.*, *ante*, n. 219, at 117; *Re Jury Gold Mine Developt. Co.*, *ante*, n. 215, at 110; *Re Toronto Finance Corporation* (1930), 65 O.L.R. 351, 356 (H.C.).

221 (1919), 17 O.W.N. 324 (H.C.).

222 *Ante*, n. 215, at 111.

223 *In re Winnipeg Saddlery Co., Ltd.* (1934), 42 Man. R. 448, 458 (K.B.).

made by another court, in answer to the petitioner's argument that his exhaustion of other avenues of relief would be futile, that "that, of course, is the unfortunate position of minority shareholders".[224] Many courts unfortunately rely too heavily on the view that a minority position is one assumed voluntarily.[225]

Fortunately for petitioning minority shareholders not all courts have held them in such disdain. While paying lip-service to the "exclusivity" principle a number of courts approach the matter realistically. The classic formulation of the realist school must surely be that of Mr. Justice Mayo in *In re W. A. Swan & Sons Ltd.*[226]

> There can be no doubt that problems which involve conflicting interests among shareholders of a company, where it is possible, should be effectively dealt with and settled as matters of internal administration and adjustment. . . . Where the internal organization provides an instrument that *can* deal with such difficulties, and which affords opportunity to ventilate troubles and to adjust and dispose of obstacles, whatever they may be, thereby enabling peace and efficiency to be maintained or restored, and where no fraud has vitiated the situation, there is no occasion for a Court to interfere. . . . But the forum must be capable of functioning effectively. . . . If the domestic instrument does nothing to rectify an intolerable position, the Court can hardly be said to be *interfering* with the activities of a body so impotent, or supine, or otiose, as the case may be.

There are strong reasons for being critical of the narrow "exclusivity" rule applied by the courts. Resort to the "domestic forum" will invariably prove futile where the complainant is a minority shareholder, for the majority will prevail.[227] Similarly, where the shares are evenly divided, a "deadlock" cannot be resolved. Resort to derivative or representative actions in the courts, if available at all, will very often entangle the plaintiff in the intricacies of the Rule in *Foss* v. *Harbottle*[228] and, what is more, would frequently not provide a means of protection against *future* misconduct. Put even more clearly, in the words of a leading Canadian judge,[229]

> A petitioner is entitled to be protected not only against the past misconduct of the management, but against future misconduct. Even though an action might give him some measure of relief for past misconduct, I do not think it would afford adequate relief therefor and certainly it would afford no protection for the future.

In the clear recognition that some courts were still adhering unduly to the "exclusivity" rule, the Report of the Committee on Company Law Amendment[230] recommended the enactment of clarifying legislation to provide that the court should be empowered to make a winding-up order *notwithstanding* the existence of an alternative remedy.[231]

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224 *Buckner* v. *Bourbon Farming Co.* (1955), 14 W.W.R. (N.S.) 406, 412 (Sask. Q.B.). For one of the most salutary attitudes to the contrary see *Thomson* v. *Drysdale*, [1925] Sess. Cas. 311, 316 (Scot., *per* Lord Skerrington).

225 See, *e.g.*, *Re Horwood & Co.*, [1921] N.S.W. St. 750, 756 (S.C. Eq.).

226 [1962] So. Austl St. 310, 315 (S.C. 1947), (no emphasis added). For other cases in which a realistic attitude was applied by the courts see, *e.g.*, *Baird* v. *Less*, [1924] Sess. Cas. 83, 91 (Scot. App. Div.); *Loch* v. *John Blackwood Ltd.*, [1924] A.C. 783, 787 (P.C. Barbados); *Trench* v. *Trench Bros. Ltd.*, [1930] N.Z.L.R. 403, 411 (C.A.); *Re Yenidje Tobacco Co.*, [1916] 2 Ch. 426, 435 (C.A.).

227 See, *e.g.*, *Re The Merchants & Shippers' S.S. Lines Ltd.* (1917), 17 N.S.W. St. 146, 151 (C.A.).

228 2 Hare 461; Eng. Rep. 67 E.R. 189; as to which see, generally Gower, *Modern Company Law* (2d ed. 1957), c. 25.

229 *Re Martello & Sons Ltd.*, [1945] 3 D.L.R. 626, 636 (Ont. C.A., *per* (McRuer, J. A.); see also, *Re The Merchants & Shippers'* S.S. Lines Ltd. (1917), 17 N.S.W. St. 146, 150 (C.A.).

230 CMD. 6659 (U.K. 1945).

231 *Id.*, para. 152. See alsoid., Recommendation I, at 95.

The resulting legislation, which is now section 225(2) of the English Companies Act, 1948[232] is as follows:

> s. 225 (2) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion,—
>
> (a) that the petitioners are entitled to relief either by winding-up the company or by some other means; and
>
> (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up;
>
> *shall*[233] make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

Similar legislation has been enacted in Australia[234] though, unfortunately, not yet in Canada.

Needless to say, the intention of the recommendation and the resultant legislation is clear and this legislation does mark a tremendous step forward. That it has not, however, affected the basic scope of the underlying "just and equitable" rule is made abundantly clear by a comparison of *Re Cuthbert Cooper & Sons Ltd.*,[235] decided before this new legislation, and *Charles Forte Investments Ltd.* v. *Amanda*,[236] decided after the enactment of the legislation.

The "exclusivity" rule is based on a view of winding-up as a drastic remedy to be applied only as a last resort. While winding-up is admittedly a drastic remedy, and while other alternative solutions may be preferable (in as much as they seek to preserve the corporate entity), nevertheless the fact is that such alternative schemes are (a) as yet not widely in use, (b) often inadequate and ineffective and (c) in some cases of doubtful legal validity. Where the parties fail, for one reason or another, to build-up such alternative schemes or where such schemes fail to do the job, then invariably the parties will end up looking to the courts for assistance via a petition for a winding-up order. It is this "backstopping" feature of judicial winding-up which makes it so deserving of special attention. All things said and done, the right of a dissident shareholder to petition for a judicial winding-up may indeed prove to be the shareholder's "court of last resort."

F. EVALUATION AND CONCLUSIONS

Efforts to evaluate and describe court-ordered corporate dissolution have provoked a spate of metaphors, each of them giving some indication of its inventor's attitude toward resort to this remedy. Rohrlich[237] has described the remedy as the "Sword of Dissolution." Gower[238] has described it as "killing the company" and Reuschleim,[239] not to be outdone, has called it, variously, the "Judicial Guillotine,"[240] "a kind of death sentence for corporations"[241] and "corporate death."[242]

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232 11 & 12 Geo. 6, c. 38.
233 Emphasis added.
234 See, *e.g.*, Companies Act, Victoria Acts of Parliament 1961, No. 6839, s. 225(3); Companies Act, New South Wales, Act. No. 71 of 1961, s. 225(3).
235 [1937] 2 All E.R. 466 (Ch.).
236 [1964] 1 Ch. 240 (C.A.).
237 Rohrlich, *Organizing Corporate & Other Business Enterprises* (Rev. ed. 1953), 138.
238 Gower, *Modern Company Law*, *ante*, n. 228, at 540.
239 Reuschleim, *The Schools of Corporate Reform* (1950).
240 *Id.*, at 34.
241 *Id.*, at 26.
242 *Id.*, at 35.

All of these expressions seem to indicate a genuine but perhaps unrealistic preoccupation with corporate "death" and the great tragedy it would bring to all concerned. Unfortunately, what seems to have been largely overlooked is that "death" can often be a blessing, especially to a corporate body badly wracked with incurable dissension or deadlock, permanently crippled or even paralyzed, and incapable of enjoying a normal, healthy, and well-adjusted business life.

One has, indeed, some qualms about recommending "corporate euthenasia" but, given the reality that as yet there exist few effective "cures" which may readily be resorted to with confidence, one also sees that in appropriate circumstances "death" may be preferable to a protracted period of pain and suffering.

There is no denying that dissolution is a form of corporate death and judges have been noticeably reluctant to impose the death sentence. This reluctance is all the more surprising when one remembers that the corporation is but an artificial legal being, a mere corporate fiction, a figment of the legal imagination. Canadian and English courts have, on the whole, been less reluctant to decree corporate dissolution than have their counterparts in the United States, where Israels[243] was moved to characterize this near-indestructibility of the corporate entity as the "sacred cow of corporate existence." But not all Canadian courts are as willing to grant the remedy as they could be or should be.

While conceding the effectiveness of corporate dissolution, it has been described as "a singularly clumsy method"[244] of solving the problem. Clumsy it may be, but under the existing state of the law it is probably the "surest" way of resolving most intra-corporate disputes. There are, to be sure, a number of situations in which less drastic and more sophisticated "alternative" remedies would be preferable.

To date, the efforts of the courts to create such "alternative" remedies have proved both too infrequent and largely ineffective. With perhaps the exception of the only slightly less crude section 210 remedy in England,[245] the legislatures have similarly failed to create suitable "alternatives." It is true that corporate lawyers have devised ingenious schemes for creating less drastic "alternatives," such as intra-corporate arbitration, voting trusts, and the like, but many of these fall short of the mark and, what is worse, are of questionable legal validity.

Unquestionably, the most effective "alternatives" are some form of "buy-out" (whether voluntary or compulsory), or, even better, the initial creation of a corporate structure which minimizes the possibility of deadlock by avoiding equal shareholdings, even-sized boards of directors and the use of veto and high quorum requirements. Given the realization, however, that incorporators frequently desire such elements and that intra-corporate disputes need not necessarily partake of the nature of deadlock, it may still be necessary to have ultimate resort to winding-up.

Whatever doubts do exist about the legal validity of some of the "alternatives" to winding-up are due, in large part, to the failure of

243 Israels, *The Sacred Law of Corporate Existence—Problems of Deadlock & Dissolution* (1952), U. of Chi. L. Rev. 778.
244 Gower, *ante*, n. 238.
245 Companies Act 1948, 11 & 12 Geo. 6, c. 38.

some courts to perceive fully the unique nature and needs of the close corporation and its participants. The development and wide adoption of the "partnership analogy" by the courts have admittedly, gone a long way toward providing the minority shareholder with an effective, albeit sometimes drastic, remedy for the resolution of intra-corporate disputes. On the other hand the practice of judges in clinging to outmoded and wholly unrealistic corporate norms has done little to inspire confidence in the judiciary and has seriously impaired the development of less drastic and often more appropriate "alternative" remedies.

The legislatures, for their part, have proved themselves woefully inept in providing badly needed assistance by way of "alternatives" and realistic norms. In part this may be due to a preoccupation on the part of the legislatures with the public corporation. It is axiomatic that the public corporation requires different mechanisms, procedures and norms than does the close corporation. The distinction between the public and private company in the Canadian and English legislation is not enough, for the close corporation is a special variety of private company which, to date, has not received the special attention or special legislation that it deserves.[240]

Hopefully the courts and the legislatures will make the necessary adjustments. Until they do, however, the dissident minority shareholder can at least take heart in the fact that he still has, generally speaking, a very effective winding-up remedy.

240 For an early American commentary on the same problem (which is still very much current) see Weiner, *Legislative Recognition of the Close Corporation* (1929), 27 Mich. L. Rev. 273-84. See also Weiner, *Proposing a New York Close Corporation Law* (1943), 228 Cornell L.Q. 313. See also, 1 O'Neal, *Close Corporations* (1958 with 1964 cum supp.) c.l.; Note, *Statutory Assistance for Closely Held Corporations* (1958), 71 Harv. L. Rev. 1498.