

Update

Court of Appeal Clarifies Distinction Between Oppression Remedy and Derivative Actions

On May 27, 2015, the Court of Appeal for Ontario released an important decision clarifying a dividing line between two statutory shareholder remedies that had become somewhat blurred. In [Rea v. Wildeboer](#), the Court confirmed that the oppression remedy and the derivative action are separate and distinct remedies and that, although there may be circumstances in which there is overlap, generally one remedy will have to be pursued to the exclusion of the other.

The Oppression Remedy and the Derivative Action

Under Canadian corporate statutes, the oppression remedy¹ and the derivative action² are mechanisms which protect the interests of shareholders and other stakeholders against wrongful corporate conduct. Oppression proceedings and derivative actions provide corporate stakeholders with statutory rights against corporations not otherwise available as a result of the entrenched common law principle that a corporation is a legal entity distinct from its shareholders, which precludes shareholders from seeking relief in respect of wrongs done to the corporation.

The oppression remedy is a personal remedy available to a complainant where a corporation, a board or a corporation's affiliate acts in a manner oppressive or unfairly prejudicial to, or which unfairly disregards, that complainant's individual interests. The derivative action, on the other hand, empowers complainants to commence an action on behalf of the corporation to remedy alleged wrongs *done to the corporation itself* (although, in certain circumstances, the complainant can request that any damages awarded be paid to current or former shareholders).

¹ In Ontario, the oppression remedy is provided for in s. 248 of the Business Corporations Act (Ontario), R.S.O. 1990 (the "OBCA").

² OBCA, s. 245.

An important difference between the oppression remedy and the derivative action is that a potential complainant must obtain leave of the court prior to commencing a derivative action. This often expensive and time-consuming procedural hurdle has in certain cases led complainants to seek to frame alleged wrongdoing against a corporation as personal in nature in order to seek relief under the oppression remedy instead.

The historically broad and flexible approach courts have taken when interpreting the oppression remedy to provide relief to shareholders has created uncertainty surrounding the distinction between the oppression remedy and the derivative action. In certain circumstances, courts have allowed what would historically have been characterized as derivative claims to proceed in an oppression action. *Rea v. Wildeboer* provides clarification as to the availability of these remedies. In *Rea*, certain former shareholders of a widely held, public company brought an oppression claim under Ontario's *Business Corporations Act* alleging misappropriation of corporate funds by certain of the corporation's directors and executives. The defendants responded that the claim ought to have been pursued as a derivative action brought in the name of the company itself.

The Decision

The Court of Appeal recognized that the derivative action and oppression remedy are not mutually exclusive. There may be circumstances that give rise to both a derivative action and an oppression proceeding. In particular, the Court observed that overlap between the derivative action and the oppression remedy has primarily arisen in cases of closely held private corporations – for example, claims for wrongs to the corporation by a majority shareholder alleged to have directly affected the personal interests of a minority shareholder, where there are a relatively limited number of shareholders and as such the minority shareholder may be uniquely impacted.

However, the Court affirmed that the oppression remedy and derivative action remain distinct remedies with separate rationales and statutory foundations: the derivative action is a corporate remedy, while the oppression remedy is a personal or individual remedy.

The Court found that a claim *must* be brought as a derivative action where wrongful conduct is alleged to have affected a corporation and that wrongful conduct affects all shareholders equally. The Court identified three hallmarks of a claim that must be pursued by way of derivative action:

- the alleged wrongful conduct is done to a public corporation
- the relief sought is for the benefit of the corporation (e.g., the return to the corporation of misappropriated funds)
- there is no personal element (i.e., the complainant's personal interests are not uniquely and directly affected by the alleged wrongful conduct)

To fall under the rubric of an oppression proceeding, alleged wrongful conduct must impact the personal interests of the complainant and not, for example, the complainant's interests as a member of the "body corporate" or collectivity of shareholders. The Court held that the oppression remedy will not be available simply because the complainant asserts a reasonable expectation that it holds in common with every other shareholder. Instead, the complainant must demonstrate that the alleged wrongful conduct has been oppressive, unfairly prejudiced or unfairly disregarded *its personal interests*.

Conclusion

Rea v. Wildeboer provides corporations with helpful clarification regarding the nature of potential claims by corporate stakeholders and the types of conduct that can expose corporations to an oppression proceeding on one hand and a derivative action on the other. Additionally, the Court has affirmed that the leave requirement for derivative actions remains an important gatekeeping device to prevent costly, multiple and potentially meritless proceedings against corporations.

Finally, *Rea* serves as a cautionary tale to potential complainants whose claims are in the nature of a derivative action but seek to commence oppression proceedings to circumvent the requirement to obtain leave of the court. Potential complainants should consider carefully whether alleged wrongful conduct has affected their interests personally or those of the corporation.

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