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# REA V. WILDEBOER: THE OPPRESSION REMEDY AND THE REQUIREMENT OF UNIQUE HARM

Brooke Neal

## I. INTRODUCTION

IN May of 2015, the Court of Appeal for Ontario heard *Rea v. Wildeboer*, a case involving the “murky” distinction between the derivative action and the oppression remedy available to minority shareholders.<sup>1</sup> Ultimately the Court, in an opinion written by Justice Robert Blair, dismissed the oppression claim brought by a single shareholder, holding that “unless the harm done was unique to [the shareholder] and [the shareholder] alone,” then an oppression claim is inappropriate.<sup>2</sup> Justice Blair made clear the specific grounds of the holding, noting that the present case was *not* “a case involving the overlap between the oppression remedy and the derivative action,” but “where the facts may give rise to both a ‘corporate claim’ and a ‘personal’ oppression remedy claim . . . the question of whether an oppression remedy proceeding is available will have to be sorted out on a case by case basis.”<sup>3</sup>

This “murky” line between the availability of a derivative action and the oppression remedy is partially the result of the evolution of competing policy concerns in corporate management.<sup>4</sup> These concerns involve balancing the independence of the corporation and its directors to make well-informed decisions on what they feel to be in the best interests of the corporation with the ability of minority shareholders to be protected in instances of actual oppression.<sup>5</sup> Central to these concerns are the basic corporate principles of indoor management and the corporate personality rule.<sup>6</sup> Before discussing the court’s decision and rationale in *Rea v. Wildeboer*, this paper will give a brief overview of the evolution of these basic corporate principles, as well as an explanation of the process of

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1. *Rea v. Wildeboer*, 2015 ONCA 373, at para. 2.
  2. Yamri Taddese, *Unique Harm Needed to Pursue Oppression Claim*, CANADIAN LAWYER MAGAZINE, <http://www.canadianlawyermag.com/legalfeeds/2715/unique-harm-needed-to-pursue-oppression-claim.html?print=1&tmpl=component>.
  3. *Rea*, 2015 ONCA 373, at para. 49.
  4. *Id.* at para 2.
  5. *Rea*, 2015 ONCA 373, at para. 14–21.
  6. *Id.*

bringing a derivative action and the availability of the oppression remedy for minority shareholders.

## II. CORPORATE FORMATION AND SHAREHOLDER REMEDIES

A Canadian corporation may choose to incorporate under either the Canada Business Corporations Act or other provincial legislation, such as the Ontario Business Corporations Act (OBCA), which is the incorporation legislation at issue in *Rea v. Wildeboer*.<sup>7</sup> Corporations are a popular vehicle for conducting business in Canada because they provide a “flexible structure for business organizations,” that gives the corporation freedom to structure themselves in a way that “provide[s] different levels of participation, control and risk-taking in the corporation.”<sup>8</sup> As will be seen in the later discussion of *Rea v. Wildeboer*, an important part of corporate formation includes choosing whether to do business as a private, often closely-held corporation or as a public corporation whose shares “are listed on a stock exchange.”<sup>9</sup>

Once the corporation is validly formed, typically its “shareholders . . . have no authority to deal with the assets of the corporation and cannot make legal commitments which bind the corporation,” instead they “maintain control of the corporation by voting their shares to elect directors who are, in turn, responsible for the management of the corporation.”<sup>10</sup> Because of this, “minority shareholders in corporations ha[ve] very little protection in the face of conduct by the majority . . . that negatively affect[s] either the corporation itself or their interests as minority shareholders.”<sup>11</sup> As noted by Justice Blair, in his historical analysis in *Rea v. Wildeboer*, this power structure “[is] due to two well-entrenched common law principles of corporate law: the notion of a ‘corporate personality’ and the ‘indoor management rule.’”<sup>12</sup>

In cases where shareholders seek relief from the actions of the majority of the board, often times their only form of relief comes in the form of a derivative suit or an oppression claim.<sup>13</sup> Generally, the oppression remedy is available to “parties who believe that management or the board have acted in a matter which was oppressive or unfairly prejudicial to, or unfairly disregards their interests,” and a derivative action is “for parties seeking redress on behalf of the corporation for a breach of the corporation’s rights.”<sup>14</sup> The following sections will explore the often “murky”

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7. Dentons Canada LLP, *Doing Business in Canada*, DENTONS 22, 23 (Mar. 2015), <http://www.dentons.com/en/insights/guides-reports-and-whitepapers/2015/march/1/doing-business-in-canada—practical-considerations-for-investors>

8. *Id.* at 22.

9. *Id.*; *Rea*, 2015 ONCA 373, at para. 29–31, 40.

10. *Doing Business in Canada*, *supra* note 7 at 21.

11. *Rea*, 2015 ONCA 373, at para. 14.

12. *Id.*

13. *Id.* at para. 15.

14. *Doing Business in Canada*, *supra* note 7 at 37.

distinction between these two remedies and will also consider how the availability of remedy is balanced with the long standing idea of corporate personality and indoor management.

#### A. CORPORATE PERSONALITY AND INDOOR MANAGEMENT RULE

It is a long standing rule in corporate law, that a corporation is a “legal entity distinct from its shareholders.”<sup>15</sup> This rule of corporate personality was first applied in the famous English case of *Foss v. Harbottle*,<sup>16</sup> which stands for the idea that “a shareholder of a corporation . . . does not have a personal cause of action for a wrong done to the corporation.”<sup>17</sup> Without a principle of corporate personality such as the *Foss v. Harbottle* rule, there would be nothing barring a shareholder from bringing a suit against “any director, officer, or shareholder alleged to have enriched themselves at the company’s ‘expense.’”<sup>18</sup> This would undoubtedly open the corporation and the court up to the “obvious danger of a multiplicity of shareholder suits.”<sup>19</sup> Many scholars also justify the importance of an independent corporate personality, by arguing that “it is futile to allow the minority to sue where the majority have the retrospective power, by ratifying what has been done, to nullify any decision that a court may give in favour of the minority.”<sup>20</sup>

This second justification is similar to the concept of the indoor management rule, which provides that “if an act that was claimed to be wrongful could be ratified by the majority at a general meeting of shareholders, neither the corporation nor an individual shareholder could sue to redress the wrong.”<sup>21</sup> Similar to the rule in *Foss v. Harbottle*, the indoor management rule was first articulated in the English case of *Royal British Bank v. Turquand*, later adopted by the Supreme Court of Canada in *JH McKnight Construction Co v Vansickler*, and eventually codified in both the Canada Business Corporations Act and the OBCA.<sup>22</sup> Since it has been codified in Canada, “courts have generally adopted a robust application of the indoor management rule,”<sup>23</sup> largely because courts are often “reluctant to interfere in the internal management affairs of the corporation.”<sup>24</sup>

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15. *Rea*, 2015 ONCA 373, at para. 15.

16. A.J. BOYLE, MINORITY SHAREHOLDERS’ REMEDIES 3 (2011); *see also Rea*, 2015 ONCA 373, at para. 15 (noting the “continuing validity” of the *Foss v. Harbottle* rule in Canada after the Supreme Court of Canada’s decision in *Hercules Management Ltd. v. Ernst & Young*).

17. *See Rea*, 2015 ONCA 373, at para. 15.

18. Boyle, *supra* note 16 at 6.

19. *Id.*

20. *Id.* at 7.

21. *Rea*, 2015 ONCA 373, at para. 16.

22. Norm Emblem & Ara Basmadjian, *The “Indoor Management Rule” Explained*, INT’L LAW OFFICE, DENTONS (April 1, 2014), <http://www.internationallawoffice.com/Newsletters/Litigation/Canada/Dentons/The-indoor-management-rule-explained#2>.

23. *Id.*

24. *Rea*, 2015 ONCA 373, at para. 16.

## B. DERIVATIVE SUIT AND OPPRESSION REMEDY

Because of the growth of concepts such as the independence of corporate personality and the indoor management rule, as well as the general reluctance of courts to become involved in corporate governance, for many years minority shareholders were often left without any powerful defensive tactics.<sup>25</sup> In fact "it took over a century for legislative reforms to be put in place to temper the restrictive effect of these principles on minority shareholder rights."<sup>26</sup> Perhaps two of the most powerful tools for shareholder relief that were created during this era of legislative reform are the oppression remedy and the derivative suit.<sup>27</sup>

The oppression remedy is available without any leave requirements to a complainant "in order to recover for wrongs done to the individual complainant by the company or as a result of the affairs of the company being conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the complainant."<sup>28</sup> The first oppression remedy that was adopted in England in 1948 cited "two specific examples of 'abuse,'" that would qualify as oppressive conduct, including, "the refusal of directors to register transfers of shares resulting from the death of a shareholder . . . and the taking of excessive remuneration by the directors."<sup>29</sup> The nature of an oppression action and what is considered to be "oppression" has changed since this first inclusion of the oppression remedy in legislation.<sup>30</sup> For example, the OBCA has expansive language that goes beyond the two specific examples listed above.<sup>31</sup> Under Section 248 of the Act, the oppression remedy is available to a complainant where corporate action is "unfairly prejudicial to or . . . unfairly disregards the interests of any security holder, creditor, director or officer of the corporation."<sup>32</sup>

A derivative suit, in contrast to a personal oppression action, is brought "where it is the corporation that is injured by the alleged wrongdoing."<sup>33</sup> Therefore, unlike a personal oppression action, where the harm must have a "differential impact on shareholders," a derivative action is appropriate when "all shareholders are affected equally, with none experiencing any special harm."<sup>34</sup> In a derivative action, the recovery is to the corporation not the shareholder, because the "injury to shareholders is

25. *See id.* at para. 14.

26. *Id.* at para. 17.

27. *See id.*; *see also*, Jeffrey G. MacIntosh, *The Oppression Remedy, Personal or Derivative?*, 70 THE CANADIAN BAR REV. 29 (1991).

28. *Rea*, 2015 ONCA 373, at para. 19.

29. MacIntosh, *supra* note 27 at 30.

30. *Id.* at 34 (noting the change in the application of the oppression remedy from small closely held corporations to larger publicly held corporations).

31. *See Rea*, 2015 ONCA 373, at para. 2; Ontario Business Corporations Act, R.S.O. 1994, c. 27, s. 71 (33).

32. Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 248 (2).

33. MacIntosh, *supra* note 27 at 30.

34. *Id.*

only indirect.”<sup>35</sup> For example, even though “the value of shares in the company is diminished by the conduct,” of the corporation, it only indirectly harms the shareholders and the harm is uniformly felt amongst the shareholders.”<sup>36</sup> On the other hand if the “directors of a corporation refuse to accept the proxies of a shareholder at an annual meeting,” the action is a personal one,” and the specific shareholder’s injury is unique to him only.<sup>37</sup>

In order to bring a derivative action, the preliminary requirements set forth in the incorporation legislation, which almost always include the court granting leave, must be fulfilled before the suit can commence.<sup>38</sup> For example, under the Canada Business Corporations Act and similar provincial legislation, there are three general “conditions precedent that must be satisfied before the court will grant leave.”<sup>39</sup> These conditions include: “(1) reasonable notice to the directors; (2) a finding that the complainant is acting in good faith; (3) it appears to be in the interests of the corporation that the action be brought.”<sup>40</sup>

As is evident from the above discussion, although the basic distinction between the two forms of shareholder relief is whether the injury was personal or corporate in nature, there can be significant overlap between the oppression remedy and the derivative suit; such is seen in cases where the injury is *both* corporate and personal. In *Malata Group Ltd. v. Jung* (“*Malata*”), The Court of Appeal for Ontario explored the distinction between the two shareholder remedies and held that “there is not a bright line distinction between the claims that may be advanced under the derivative action section of the [OBCA] and those that may be advanced under the oppression remedy provisions.”<sup>41</sup> Instead, the court must “examine the relevant statutory text and the facts of the claim at issue” to decide, based on the type of harm done, whether the oppression remedy or a derivative suit is more appropriate.<sup>42</sup>

*Malata* itself involved a closely held Ontario corporation “that imported and sold consumer electronic products manufactured in China.”<sup>43</sup>

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35. *Id.* at 31.

36. *Id.*

37. *Id.*

38. *Id.* at 32.

39. *Id.*; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 246 (2) (The Ontario Business Corporations Act, which is the incorporation legislation for the corporation in *Rea v. Wildeboer*, includes the following requirements before a derivative action can be commenced: “No action may be brought and no intervention in an action may be made under subsection (1) unless the complainant has given fourteen days’ notice to the directors of the corporation or its subsidiary of the complainant’s intention to apply to the court under subsection (1) and the court is satisfied that, (a) the directors of the corporation or its subsidiary will not bring, diligently prosecute or defend or discontinue the action; (b) the complainant is acting in good faith; and (c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.”).

40. MacIntosh, *supra* note 27 at 32.

41. *Malata Group Ltd. v. Jung*, 89 O.R. 36, 37 (2008).

42. *Id.*

43. *Id.* at 39.

The harm for which the suit was commenced involved the misappropriation of corporate funds which “threatened the business life of the company and rendered [it] incapable of paying its debt to the [minority shareholder], “who was also a creditor of the corporation.<sup>44</sup> Because the minority shareholder’s role as a creditor rendered the harm unique to him only, the Court found that the case was “properly advanced under the oppression remedy section of the [OBCA].”<sup>45</sup> In *Rea v. Wildeboer*, the Court was again faced with a similar appeal; however, in this recent case the Court explored the distinction within the realm of a large publicly held corporation, where the harm was not as clearly personal in nature.

### III. ONTARIO COURT OF APPEALS DECISION IN *REA V. WILDEBOER*

Martinrea is a publicly held Canadian corporation specializing in auto parts manufacturing.<sup>46</sup> It has “approximately 84.5 million outstanding shares,” and its stock is traded on the Toronto Stock Exchange.<sup>47</sup> Mr. Rea, along with Fred Jackel, who is a named defendant in the case at hand, were the founding members of Martinrea.<sup>48</sup> In September 2013, Mr. Natale Rea brought suit in the case, alleging that certain corporate insiders, including directors and executives, “undertook a series of transactions and other activities that involved a breach of fiduciary and other duties to Martinrea result[ing] in the misappropriation of large amounts of Martinrea’s corporate funds.”<sup>49</sup> This misappropriation of corporate funds resulted in losses of “\$50 to \$100 million” to the corporation.<sup>50</sup> Mr. Rea’s action in the Superior Court of Justice of Ontario sought to “recover the funds for Martinrea,” through an oppression claim and the “disgorgement of the ill-gotten gains back to Martinrea” but not to recover for any personal loss.<sup>51</sup> Whether Mr. Rea as a claimant can proceed under an oppression claim without a showing of unique personal harm, thereby circumventing the leave requirements of a derivative suit, was the central issue addressed on appeal.<sup>52</sup>

In addition to being a founding member of Martinrea, Mr. Rea through his corporation, Rea Holdings, Inc., “[was] a significant minority shareholder of [Martinrea] - holding 12% to 17% of its shares,” from 2002 to 2012.<sup>53</sup> Mr. Rea also served on the board of directors of the corporation alongside Jaekel, Wildeboer, Orland, and Rashid, who were all named

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44. *Id.*

45. *Id.* at 47.

46. *Rea*, 2015 ONCA 373, at para. 4

47. *Id.*

48. *Id.* at para. 5.

49. *Id.* at para. 5, 7.

50. *Id.* at para. 7, 45

51. *Id.*

52. *Id.* at para. 2—3.

53. *Id.* at para. 6.

defendants and referred to collectively, along with other executives, as “insider” directors.<sup>54</sup> In seeking the recovery of the corporate funds that were lost by the inside directors, Mr. Rea alleged that among other things, the insiders bought equipment and a land parcel at prices well above market value in transactions where the insiders themselves “received substantial kickbacks.”<sup>55</sup>

When Mr. Rea became aware of the improper transactions, which cost the corporation a significant amount of money, he brought the information to defendants Wildeboer and Rashid, the Executive Chairman and head of the Audit Committee, respectively.<sup>56</sup> The audit committee prepared a report that, according to Mr. Rea, was a “complete whitewash” of the facts underlying the issue.<sup>57</sup> Wholly unsatisfied with the resolution of the problem, Mr. Rea sold his shares and those that were held by his company, Rea Holdings, Inc., and removed himself from the Board of Directors and his position as Vice-Chairman.<sup>58</sup> Upon commencing the action in the case in September 2013, Mr. Rea reacquired 1% or 100,000 of Martinrea’s outstanding shares.<sup>59</sup>

#### A. ARGUMENTS OF THE PARTIES

At the heart of Mr. Rea’s argument was the claim that the oppression remedy and the derivative action are essentially a distinction without a difference, and as such he should be able to proceed under an oppression claim even in the absence of personalized harm.<sup>60</sup> His argument relied heavily on the *Malata* case which, as discussed above, stands for the idea that there is “a degree of overlap between claims that could be made out as a derivative action and those that fall under the oppression remedy.”<sup>61</sup> Therefore, Mr. Rea argued that he was “entitled to pursue an oppression remedy” because his “reasonable expectations ha[d] been violated by means of conduct caught by the terms ‘oppression,’ ‘unfair prejudice,’ or ‘unfair disregard,’ regardless of whether “the wrong in question is a wrong in respect of the corporation.”<sup>62</sup> According to Mr. Rea, the “rationale” behind the oppression remedy lends it to be broadly interpreted giving shareholders “a personal statutory right not to have their reasonable expectations violated.”<sup>63</sup>

On the other hand, the respondents’ argument took issue with the plaintiff’s claim that the oppression remedy and the derivative suit are “not mutually exclusive,” arguing that the distinction between the two

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54. *Id.* at para. 5.

55. *Id.* at para. 9.

56. *Id.* at para. 10.

57. *Id.*

58. *Id.*

59. *Id.* at para. 6.

60. *Id.* at para. 22.

61. *Id.* at para. 23; *see also Malata Group*, 89 O.R. 36, 45.

62. *Rea*, 2015 ONCA 373, at para. 22.

63. *Id.*



remedies remains . . . for good reason,” pointing to the importance behind the leave requirement in derivative suits.<sup>64</sup> Specifically, they mentioned three important reasons for the leave requirement in filing a derivative suit that would almost certainly be destroyed if the oppression remedy was read as broadly as the claimants argued.<sup>65</sup> Those reasons included the function of the derivative suit in “preventing strike suits,” “preventing meritless suits,” and “avoiding a multiplicity of proceedings – all of which may lead to the corporation incurring significant and unwarranted costs. . . .”<sup>66</sup> In contrast to Mr. Rea’s argument, the respondents distinguished the facts of the case at hand with the *Malata* case, pointing out that in cases involving closely-held corporations, “there is less reason to require the plaintiff to seek leave of the court,” because the small size of the corporation naturally “minimizes the risk of frivolous lawsuits.”<sup>67</sup> Therefore, given that the facts in the present case do not involve a small closely-held corporation, according to the respondents, Mr. Rea can only pursue a remedy through a derivative action.<sup>68</sup>

#### B. COURT’S DISCUSSION AND HOLDING

In deciding whether Mr. Rea’s oppression claim was the appropriate cause of action, the Court concluded that given the facts, the claims for disgorgement of the “ill-gotten gains” of the inside directors and executives must be pursued through a derivative action.<sup>69</sup> The Court, while finding that the “derivative action and the oppression remedy are not mutually exclusive,”<sup>70</sup> ultimately held that because Mr. Rea did not experience any “unique” harm as a result of the mismanagement of corporate funds, only a derivative suit and recovery to the corporation would be appropriate.<sup>71</sup>

Justice Blair did note that the oppression remedy was intended as a “broad and flexible form of relief.”<sup>72</sup> Even so, out of respect for corporate management and independence, he steered away from the “open ended approach” of equating the oppression remedy and the derivative suit, holding that “the impugned conduct must [still] harm the complainant personally, not just the body corporate.”<sup>73</sup> The Court recognized the debate, which was briefly discussed above, in “how to treat cases where there is an overlap” in personal and corporate harm, but did not find it “necessary to resolve it” here given that the Mr. Rea’s accusations did not

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64. *Id.* at para. 23, 24.

65. *Id.* at para. 25.

66. *Id.* at para. 24.

67. *Id.* at para. 25; see also, *Malata Group*, 89 O.R. 36, 47.

68. *Rea*, 2015 ONCA 373, at para. 24.

69. *Id.* at para. 45.

70. *Id.* at para. 26, 45.

71. Yamri Taddese, Unique Harm Needed to Pursue Oppression Claim, CANADIAN LAWYER MAGAZINE, <http://www.canadianlawyermag.com/legalfeeds/2715/unique-harm-needed-to-pursue-oppression-claim.html?print=1&tmpl=component>.

72. *Rea*, 2015 ONCA 373, at para. 33.

73. *Id.*

involve any such overlap.<sup>74</sup>

The Court also carefully pointed out that most cases involving the possible overlapping of causes of action “involve small closely-held corporations not public companies,” distinguishing *Malata*’s relevance to the case at hand.<sup>75</sup> Further, unlike the harm done to Martinrea, a large publicly held corporation, in *Malata* the misappropriation of corporate funds, directly affected the small, closely-held corporation *and* the minority shareholder, who was also a creditor of the corporation.<sup>76</sup> Because the harm to the shareholder-creditor was unique and did not come indirectly as a result of the harm to the corporation, the Court found that an oppression claim was appropriate.<sup>77</sup>

Finally, the Court clarified that in order to successfully bring a cause of action under an oppression remedy there must be more than “boiler plate repetition of the statutory language from the OBCA describing the oppression remedy.”<sup>78</sup> For example, the Court made clear that the oppression remedy is not available . . . simply because a complainant asserts a “reasonable expectation and the evidence supports that the reasonable expectation has been violated by conduct falling within the terms oppression, unfair prejudice, or unfair disregard.”<sup>79</sup> Instead, the Court reiterated that in order to properly proceed under an oppression claim and “cross the line – however “murky” that line may be – between the derivative reality of this action and its proposed oppression remedy,” the actions must be more than “wrongs done to the corporation,” but must amount to personalized harm.<sup>80</sup>

#### IV. CONCLUSION

Even though most of the Court’s discussion in *Rea v. Wildeboer* attempts to clarify what Justice Blair admits is the murky line between the oppression remedy and derivative actions, ultimately, because of the facts presented, the Court refuses to adopt a bright line rule or even get rid of the line altogether.<sup>81</sup> By deciding to rule narrowly, based on the facts at hand and leave the bigger policy question to a case by case determination, the Court found a way to both respect the claims of the minority shareholders and still maintain the effectiveness of long-standing corporate policies such as the indoor management rule and corporate personal-ity.<sup>82</sup> Also, by refusing to read the oppression remedy as broad and almost limitless, the Court appropriately balanced corporate independence with the rights of the shareholder by leaving the derivative action

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74. *Id.* at para. 28, 29.

75. *Id.* at para. 29.

76. *Id.* at para. 31.

77. *Malata Group*, 89 O.R. 36, 47.

78. *Rea*, 2015 ONCA 373, at para. 32.

79. *Id.* at para. 34.

80. *Id.* at para. 42, 47.

81. *See id.* at para. 26—46.

82. *See id.* at para. 49.

and the leave requirements in place.<sup>83</sup> Reading the oppression remedy narrowly, however, means that in some instances where the shareholder may rightfully “feel personally aggrieved given their substantial shareholding” in a corporation that suffered loss at the hands of the directors, unless the harm was “unique,” a derivative action may still be the only way to proceed.<sup>84</sup>

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83. *See id.* at para. 33.

84. Taddese, *supra* note 71.