nmay@goodmans.ca

Two similar, two different

By Neill May

The analysis of a complex corporate transaction by talented tax lawyers is an impressive spectacle. They isolate elements of the deal, apply a statute that is virtually indecipherable to a lay person, and develop structures to implement commercial bargains efficiently and effectively. At least I think so; I might have nodded off just a bit the last time, or maybe the last few times (I can't be certain). It is similar to the elegant framing of a fact pattern that gifted litigators can achieve, or the tactical vision of successful restructuring lawyers. Listening to those specialists, who often appear to be speaking their own language, is instructive for a corporate lawyer, because it is a reminder that we also use terms that do not necessarily have their intuitive meanings (don't worry, this is not another column about "corporate incest").

It gets even more confusing when the corporate concepts themselves have similar purposes and occasionally overlap. Two such concepts, "derivative actions" and the "oppression remedy," were the focus of the recent Ontario Court of Appeal decision in *Rea v. Wildeboer*. The word "derivative" means different things to art critics (assessing whether one artist's work derives from another), investors (considering investment products whose value depends on the value of some underlying asset), and math (I can't fake this one, having unintentionally but quite obviously deleted all of the calculus files in my head).

To a corporate lawyer, however, a derivative action is the right of shareholders in certain circumstances to bring an action on behalf of the corporation to seek redress for wrongs done to the corporation. A classic example would arise in circumstances where the party that caused the wrong is in a position to influence the corporation not to pursue a remedy (such as a misappropriation of funds by a party with significant influence over the corporation).

The corporate "oppression remedy," on the other hand, has a meaning closer to what its label would suggest, though the conduct it is intended to address does not constitute "oppression" in a cocktail party sense. The "oppression remedy" is a broadly cast tool that provides for remedies where the reasonable expectations of a complainant were violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregarded the relevant interest.

The oppression remedy and derivative actions have tended to get blended together for two reasons: because they are similar, and because they are different.

They are similar in that both are mechanisms that protect the interests of corporate stakeholders against wrongful corporate conduct perpetrated or supported by the corporation's majority shareholders. In circumstances where the corporation has been harmed, it can be anticipated that there has been conduct that meets the tests for oppression. At the same time, one of the significant differences between the two is that there is a leave requirement for derivative actions; in order to proceed with a derivative suit the complainant must demonstrate that it gave notice to the board, is acting in good faith, and is pursuing a claim that is in the best interests of the corporation.

The aim of the leave requirement, presumably, is to restrict meritless, vexatious, or duplicative proceedings. Because of the leave requirement, corporate stakeholders have often framed actions under the broadly cast oppression remedy, on the basis that the harm suffered by the corporation (which might otherwise have been addressed through a derivative action) resulted in oppression.

Rea v. Wildeboer involved allegations of misappropriations of funds by corporate insiders. The Court of Appeal noted that, although the plaintiffs had made submissions that attempted to particularize the harm to them individually, the essence of the relief sought was for the benefit of the corporation and there was no meaningful allegation that the complainant's individual interests had been affected (rather, any damage it suffered was because of the ratable diminution in the value of its investment).

The court acknowledged that the derivative action and the oppression remedy are not mutually exclusive, and that there is overlap particularly in the context of closely held private corporations. However, the court determined that where there is no wrong specific to the particular complainant, particularly where the corporation is a widely held public corporation, a complainant's claims must proceed by way of a derivative action.

The reasons for the distinction between public and private corporations in this context is not perfectly clear, though it is likely informed by the practical perspective that the requirement for leave is less relevant for stakeholders in a closely held company who, if they have reached the point of litigation, likely need their disputes resolved in order for the corporation to effectively proceed.

As I think about it, other than an "order for compliance," many corporate law remedies have labels that may confuse non-lawyers. For example, "winding-up orders" must seem like remedies for dying batteries, and "rectification orders" sound disconcertingly proctological. Having said this, the appeal court has provided some useful guidance on the oft-discussed distinction between the derivative action and oppression remedy. Now all that I need is a remedy to address my slight to my talented tax law colleagues. **CL**

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law, with an emphasis on M&A and corporate finance. The opinions expressed in this article are those of the author alone.

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