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Seeking a Corporate Oppression Remedy? Make Sure Your Hands Are “Clean”.



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It has been nearly ten years since the Supreme Court of Canada set out the legal framework for a corporate oppression claim in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. In *BCE*, the Court established its broad jurisdiction to grant relief to stakeholders affected by the oppressive acts of a corporation or a director. The theme of *BCE Inc.* is that the oppression remedy, both in its scope and application, depends on the reasonable expectations of the plaintiff stakeholders.

A recent decision of the Ontario Court of Appeal, *790668 Ontario Inc. v. D’Andrea Management Inc.*, 2017 ONCA 1019, takes the oppression remedy back to its common law and equitable roots. The decision reminds Ontarians that, at its core, oppression is an equitable claim and that the conduct of all parties will determine whether relief is available to minority shareholders.

Facts

D’Andrea concerned a family-owned corporation, *D’Andrea Management Inc.* (“DMI”), which was incorporated to acquire a commercial property

in 1994. The acquisition was largely managed by the director of DMI, Daney D’Andrea (“Daney”).

DMI financed the property’s purchase in part through a vendor-take back mortgage. Ultimately, because of environmental concerns with the property, the vendor agreed to reduce the mortgage significantly, from \$4.5 million to \$1.05 million. Libro Financial Group (“Libro”) financed DMI’s indebtedness with a \$1.3 million-dollar loan, secured by a first mortgage.

One of the requirements for closing the deal with Libro and the vendor was that DMI shareholders were to agree to discharge their second mortgages on the property. All shareholders agreed to do so, except for the appellants, Peter and Onorio Frezza.

It was later determined at trial that Peter and Onorio refused to discharge their second mortgages against the property in order to secure more favorable terms in relation to another debt owed by one of Peter’s companies to DMI.

Because of Peter and Onorio's lack of co-operation, Daney incorporated a new company, Newco, and assigned the vendor's first-ranking mortgage to Libro through Newco. This placed Libro in the position of first-ranking mortgagee, without the requirement of Peter and Onorio's consent. Libro then provided the loan of \$1.3 million, which was secured through the assignment of the vendor's first mortgage and a personal guarantee provided by Daney.

Following the assignment to Libro, Daney, who controlled DMI, had DMI pay Newco the equivalent of the prior loan payments on the former \$4.1 million indebtedness to the vendor. In effect, this action by Daney diverted the financial benefit of the settlement of the mortgage with the vendor from DMI to Newco. As a result, Onorio commenced a derivative action against DMI, which was ultimately settled.

The majority of DMI's shareholders then agreed to list the property for sale in April, 2001. This decision was opposed to by the appellants, who commenced an oppression action shortly thereafter.

In the meantime, DMI defaulted on its loan to Libro. Libro issued a notice of sale in April, 2002.

Daney then incorporated another company, 1476335 Ontario Inc. ("147"), which continued the power of sale proceedings against the property in Libro's stead. A third party purchased the property for \$1.3 million. The third party ultimately transferred the property back to 147 for \$1.1 million.

The appellants, Peter and Onorio, argued that Daney had diverted interests in the property to his benefit and these actions were oppressive. They also argued that there was a conspiracy between the defendants to allow DMI to default on the mortgage so that 147, a company controlled by Daney, could take assignment of the power of sale and sell the property.

The trial judge dismissed both the oppression action and the conspiracy claims. These findings were upheld by the Court of Appeal.

The Availability of an Oppression Remedy Depends on the Conduct of All Parties

In assessing Peter and Onorio's oppression claim, the trial judge held that Daney's efforts to have Newco pay the \$1.3 million indebtedness with Libro, while DMI paid Newco in relation to the \$4.1 million indebtedness, was "clearly wrong".

However, the trial judge also observed that Peter and Onorio's efforts to renegotiate a debt owed by Peter to DMI by refusing to discharge the second mortgage in favour of Libro amounted to questionable conduct that was not in DMI's best interests.

The Court noted that "in fact the plaintiffs [i.e. Peter and Onorio] are the ones who conducted themselves inappropriately and against DMI's best interest. It was the plaintiffs' conduct that showed a complete lack of regard for DMI's welfare". Peter and Onorio attempted to "squeeze" Daney into agreeing to a reduction or elimination of Peter's debt to DMI. In the circumstances, Peter and Onorio

could not claim corporate oppression.

"Clean Hands" are a Requirement for Those Seeking Oppression

On appeal to the Court of Appeal, Peter and Onorio argued that the trial judge misapplied the "clean hands" doctrine in the context of their oppression claim. The basis for this argument is not entirely clear from the judgment, but it appears that Peter and Onorio took issue with the trial judge's consideration of their conduct in denying liability for oppression.

The Court of Appeal rejected the appellants' position. Characterizing the oppression remedy as one grounded in equity, the Court held that where parties seek equitable relief, they must come to Court with "clean hands":

When claims in equity are made, the court will not reward those who come with unclean hands. The trial judge was entitled to consider and make findings based on [Peter and Onorio's conduct].

The Court of Appeal deferred to the trial judge's factual findings regarding Peter and Onorio's behaviour:

...the trial judge noted that because the oppression remedy is an equitable remedy, it was necessary to consider the conduct of both the defendants and the appellants in the circumstances. She concluded that Peter and Onorio refused to agree to discharge the second mortgage in an attempt to gain leverage over DMI and Daney, in order to renegotiate the original 1994 shareholders' agreement and reduce or eliminate the debt that Peter owed to DMI.

Oppression is an Equitable Remedy

While there is nothing new about the Court's approach to oppression in *D'Andrea*, the case serves as a reminder, since the *BCE Inc.* decision, that oppression is fundamentally an equitable claim. Although oppression actions have largely been codified in *Business Corporation Acts* across the country, the Courts still respect the remedy's equitable origins.

This means that, above all, the equities of a case will drive the Court's analysis in determining liability for oppression.

It further implies that doctrines such as "clean hands", which look to the parties' conduct leading up

to the litigation, are of paramount importance.

D'Andrea is a warning to plaintiff minority stakeholders who claim oppression that their behaviour will be placed under the microscope as well, to determine if they have acted in the corporation's best interests.