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## “Sloppy Paperwork” Does Not an Oppression Claim Make

For decades, Canadian Courts have used the oppression remedy to give effect to the reasonable expectations of shareholders in commercial disputes. Since the Supreme Court of Canada’s 2008 decision *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, the Courts have maintained that an oppression claim will only be successful where the stakeholders’ expectations have been violated in a way that is unfair or prejudicial.

The Supreme Court of Canada has reaffirmed this theme in a recent decision, *Mennillo v. Intramodal Inc.*, 2016 SCC 51, per Cromwell J.

In *Mennillo*, the question was whether the parties’ failure to comply with the legal formalities of the *Canada Business Corporations Act*, R.S.C. 1985, c.C-44 (the “CBCA”) during a share transfer could amount to oppression.

The majority of the Court held that it could not.

Particularly with respect to smaller, closely-knit corporations that do not follow ordinary legal and commercial practices, the Court held that so long as

the shareholders’ reasonable expectations have been honoured, the corporation’s failure to abide by the technical requirements of the CBCA will not amount to oppression.

### Facts

The dispute in *Mennillo* arose out of a road transportation company incorporated by Johnny Mennillo (“Mennillo”) and Mario Rosati (“Rosati”) named Intramodal. Mennillo agreed to contribute money to Intramodal, while Rosati would contribute his skills. 51 class “A” shares were issued to Rosati and 49 class “A” shares were issued to Mennillo. The notices of subscription and resolution issuing these shares was signed by Rosati alone.

Throughout their business dealings, the parties did not comply with the formal requirements of the CBCA and rarely put anything in writing. There was no shareholders’ or partnership agreement. As the Court noted, the parties frequently agreed on matters “by a simple handshake”.

The monies Mennillo advanced to Rosati were not governed by a



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written contract. In fact, the only evidence of the money given to Intramodal by Mennillo were two Rolodex sheets initialed by Rosati.

By 2005, Mennillo no longer wanted to remain a shareholder of Intramodal as he did not want to guarantee all of the company's debts. Accordingly, he sent a letter to Rosati in which he stated that he was resigning as an officer and director of the company. Mennillo argued that he always intended to continue being a shareholder of Intramodal. Rosati argued that, at this point in time, Mennillo transferred his shares to Rosati and had no intention of being a shareholder.

In July, 2005, Intramodal's lawyers filed an amending declaration stating that Mennillo had been removed as a director and shareholder of the company. Afterward, Mennillo continued to advance monies to Rosati.

Shortly thereafter, Mennillo learned that Intramodal and Rosati were becoming evermore financially successful. By 2007, Mennillo demanded that his loans be repaid and that he receive his share of Intramodal's profits. At that time, he rejected an offer to transfer his shares to Rosati.

Following negotiation, the money Mennillo advanced to Rosati was repaid. According to Mennillo, it was only upon receiving a final payment for the loans from Rosati that he realized he was no longer a shareholder of Intramodal.

Mennillo then brought an oppression action against Intramodal and Rosati alleging that Rosati had wrongfully stripped him of his status as a shareholder.

As part of his oppression claim, Mennillo argued that Intramodal's lawyer had failed to comply with certain corporate formalities under the *CBCA* when he removed Mennillo as a shareholder. Mennillo argued that such conduct was oppressive.

The trial judge dismissed the oppression claim. The trial judge held that Mennillo agreed that he would only remain a shareholder for as long as he personally guaranteed Intramodal's debts. Since Mennillo no longer wanted to offer such a guarantee, he transferred his shares to Rosati. According to the trial judge, the company's failure to comply with the necessary formalities to effect the share transfer was a mere "oversight" on the part of Rosati's lawyer. Such conduct did not amount to oppression. The Québec Court of Appeal affirmed the trial judge's ruling.

On appeal to the Supreme Court of Canada, the Court upheld the trial judge's ruling. In so doing, the Court affirmed that the failure by the company to comply with the formalities of the *CBCA* in effecting the share transfer did not amount to oppressive conduct.

Mennillo's reasonable expectations had been fulfilled—since he no longer wanted to guarantee the

company's debts, he was removed as a shareholder. The fact that the share transfer was effected by "sloppy paperwork" on the part of Rosati's lawyer was irrelevant to the oppression claim.

### **What Are the Requirements of an Oppression Claim?**

Citing its earlier decision in *BCE Inc. v. 1976 Debenture Holders*, the majority of the Court affirmed the two elements of an oppression claim. First, the claimant must "identify the expectations that he or she claims have been violated... and establish that the expectations were reasonably held". Once this requirement has been met, the claimant must then show that these reasonable expectations were violated by conduct that was "oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder".

### **Oppression is Concerned With Business Realities, Not Narrow Legalities**

In relying on the *BCE Inc.* decision, the Court noted that the issue of whether an oppression claim has been made out depends largely on "business realities", not "narrow legalities". That is, the Courts will consider the oppression claim in context, assessing the parties' reasonable expectations based on the nature of the relationship between the parties and how they conducted business. As an equitable remedy, oppression is largely fact-dependent.

## Failure to Comply With CBCA Formalities Did Not Amount to Oppression

In *Mennillo*, the parties rarely transacted their business on paper or pursuant to the CBCA. The Court characterized the lawyer's share transfer from Mennillo to Rosati as "sloppy paperwork". That is, the parties did not specifically comply with section 76(1) of the CBCA to effect the share transfer, amongst other errors. Section 76(1) of the CBCA requires that Mennillo endorse the share transfer, which he did not.

According to the Court, while this conduct did formally comply with the requirements of the CBCA, it could not amount to oppression. The parties' relationship had long been characterized by informality. The parties' expectations were that if Mennillo did not want to guarantee the corporation's debts, he would no longer be a shareholder. The Court held:

It is uncontested that Intramodal did not ascertain whether some of the corporate formalities of the CBCA were complied with by Mr. Mennillo and Mr. Rosati when it registered the transfer of

shares, but that cannot in and of itself invalidate any transfer between them...

...

In this case, the requirements of s.76(1)(a) [of the] CBCA are not fulfilled. It is common ground that the shares that were transferred were not endorsed by Mr. Mennillo...Intramodal proceeded to register a transfer that did not meet all the criteria in the CBCA. But this is of no assistance to Mr. Mennillo **under the circumstances**. It is not as a result of an improper registration of this share transfer that Mr. Mennillo is no longer the holder of any shares in Intramodal...[emphasis added]

### Oppression: A Contextual Remedy

The Court's analysis in *Mennillo* emphasizes a few themes:

1. *Oppression claims will always be assessed in context.* When determining the claimants' "reasonable expectations", the Court will look to how the parties conducted themselves throughout the commercial relationship.

2. *Commercial reality is essential to an oppression claim.*

Canadian courts will assess oppression claims through the lens of "business realities", not legal formalities. A failure to comply with a governing statute or common law requirements is not necessarily fatal to an oppression claim. Everything depends on the business context in which the oppression claim is asserted.

3. *The conduct must be oppressive.* A mere failure to comply with a statute is not oppressive if the claimant cannot show real prejudice or unfair disregard for the claimant's interests.

All in all, the *Mennillo* decision reaffirms the nature of oppression as an equitable commercial remedy. The success of an oppression claim depends largely on its facts. What amounts to oppression in one case may not in another. The crux of an oppression claim is the violation of a shareholder's reasonable expectations in a way that is prejudicial or unfair to the shareholder. Anything else is a mere irregularity.