February 17, 2017

# *Mennillo v Intramodal inc.*: The Supreme Court of Canada Revisits the Oppression Remedy

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**Case Commented On:** *Mennillo v Intramodal inc.*, 2016 SCC 51 (CanLII)

*Mennillo v Intramodal inc*. is the first oppression remedy case since *BCE Inc. v 1976 Debentureholders* 2008 SCC 69 (CanLII) (*BCE*) to reach the Supreme Court of Canada. The SCC had to determine whether the failure of a company to observe formalities required under the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*) constituted oppression as against a former shareholder. The appeal of the former shareholder was dismissed on a finding that neither "sloppy paperwork on its own" nor "the corporation and its controlling shareholder treating [the former shareholder] exactly as he wanted to be treated" (at para 5) constituted oppression. There was a majority opinion (written by Cromwell J), a concurring opinion (McLachlin CJ and Moldaver J), and a strong dissent by Justice Côté.

This post deals with the comments made by the Court, including the dissent, on the oppression remedy. The oppression remedy is available when the court is satisfied that the corporation or its directors acted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any security holder, creditor, director, or officer (*CBCA*, s 241(2)).

## Facts

While the evidentiary record was highly disputed at trial, the facts, once determined, are actually quite simple. In 2004, Johnny Mennillo and Mario Rosati, two friends, formed a road transportation company. The company, Intramodal, was incorporated on July 13, 2004. Mennillo and Rosati named themselves directors and officers and they agreed that Mennillo would contribute funds and Rosati would contribute skill and expertise to run the business. They were the only shareholders, with 49% of the shares issued to Mennillo and 51% to Rosati. They ran their business very informally. They rarely put anything in writing and they did not comply with the requirements in the *CBCA*. They did not have a shareholders' agreement nor did they have written contracts to document any of the substantial advances of money Mennillo made to Intramodal, all of which Intramodal repaid to Mennillo (at paras 20-23).

On May 25, 2005, Mennillo sent a letter to Intramodal, resigning from his position as director and officer. Just under two months later, on July 18, 2005, Intramodal's lawyer filed a declaration indicating that Mennillo was no longer a director or shareholder of the company, but in so doing, did not observe most of the corporate formalities that were required. Five years later, Mennillo brought a claim against Intramodal for oppression, maintaining that he had been unlawfully removed as a shareholder of Intramodal and that the company's subsequent failure to recognize his shareholder status was oppressive (at paras 24-32)

The trial judge determined that as of the date he had resigned his officer and director positions, Mennillo also asked to be removed as a shareholder of Intramodal (at paras 56, 86). That finding was based on the agreement between Mennillo and Rosati that Mennillo would only remain a shareholder as long as he continued to guarantee the company's debts (at paras 67-68, 77). Neither the Quebec Court of Appeal nor the majority or concurring judges of the Supreme Court determined that finding to constitute a palpable and overriding error. Therefore, since it was found that Mennillo did not wish to be a shareholder and had transferred his shares to the other shareholder, the problem in the case was not that he had been illegally stripped of his shares, but that Intramodal had failed to observe the necessary corporate formalities when it was transferring his shares. Although this meant the corporation had failed to properly remove him as a shareholder, it did not mean that he had been oppressed, and it did not mean that he would be regaining his shareholder status.

**Evidentiary Findings**

Some of these findings are mentioned above but they are important to the legal issues and more background on them is necessary. The trial judge had a considerably difficult task of determining the facts because there was a highly contested evidentiary record due to the way the parties conducted their affairs. The parties rarely put anything in writing, not even to exchange emails or write letters. They did not have a shareholders' or partnership agreement. They did not observe most of the formalities required under the *CBCA*; they did not pay for their shares, as s 25(3) *CBCA* requires, and contrary to s 49(4)(a) *CBCA*, Mennillo's share certificate was never signed. The substantial advances of money made by Mennillo to Intramodal were undocumented except for two Rolodex sheets, written on by Mennillo and initialed by Rosati (at para 23). In short, conducting their affairs in this way gave rise to most of the legal issues in this case.

As this is an oppression remedy case, the reasonable expectations of the complainant are fundamental to the outcome. Reasonable expectations are those that reasonably arise in the context the business, having regard to the specific facts of the case, and, for a successful oppression remedy claim, they must be found to have been breached. The trial court therefore had to make certain factual findings in order to determine the types of expectations that could reasonably arise in the circumstances. One of the foundational facts was when and how Mennillo ceased being a shareholder of Intramodal, because he would have different expectations as to the treatment he should be receiving as a shareholder as opposed to a former shareholder.

It is undisputed that on May 25, 2005, Mennillo sent a letter to Intramodal, resigning as officer and director of the company. What was at issue was whether Mennillo also wished to cease being a shareholder of Intramodal at the time. Intramodal argued that he did, and that he transferred his shares to Rosati at the time he resigned as director and officer, while Mennillo argued that he did not intend to stop being a shareholder at any time. The trial judge found, based on the evidence, that Mennillo had transferred all his shares to Rosati as of May 25, 2005, and by extension, that he knew he was no longer a shareholder at that time (at para 52). He made that finding based on several documents, including a 2006 document relating to insurance policies, showing that Rosati believed that he was the sole shareholder and director of Intramodal and that Mennillo was only a creditor; a 2007 memorandum from a tax advisor retained by Mennillo's accountant, describing the ownership of Intramodal's shares as of 2007 and concluding that Mennillo was not a shareholder at the time; a demand letter by Mennillo's lawyer to Intramodal in 2010, showing that Mennillo knew he was no longer a shareholder and had not been since May 2005, when he resigned as director; and an out-of-court examination of Mennillo, in which he stated several times that he had removed himself as shareholder of Intramodal.

While the judge found that Mennillo expressly wished to cease being a shareholder as at May 25, 2005, the actual transfer of Mennillo's shares was a problematic issue because of the non-compliance with the *CBCA* formalities and because there was no evidence in writing to show the transfer from Mennillo to Rosati. The trial judge found that Mennillo only wished to be a shareholder as long as he was willing to guarantee the company's debts; when he no longer wished to do so, he transferred his shares to Rosati. That the corporation failed to comply with the corporate formalities or to properly remove him as a shareholder, as he wished, did not entitle him to regain his shareholder status (at para 58). On appeal, the majority of the Court of Appeal came to the same conclusion but did so by determining that the May 25, 2005 letter was an agreement between Mennillo and Rosati to retroactively cancel their original agreement of 2004, and that both the agreement and its cancellation were informal. The Supreme Court noted that the argument on retroactive cancelation had not been adopted by the trial judge nor pleaded by the parties, and the Court was of the opinion that it was not possible to retroactively cancel the issuance of shares through an oral agreement. Rather, the *CBCA* has certain requirements for the cancelation of shares and, contrary to s 76 *CBCA*, the shares that were transferred were not endorsed by Mennillo. The Court nonetheless found that the shares had been transferred. In addition, although it would have been possible for Mennillo to take issue with the transfer due to the non-compliance, the Court found that he had not, in spite of him knowing that the company had failed to comply with this formality when it registered the transfer in its corporate books in 2007. Additionally, in Quebec, if the transfer is to be deemed null for non-compliance, it must be so pronounced by a tribunal (at para 74), and that pronouncement must be sought within three years of becoming aware of the cause of nullity, which did not happen.

Accordingly, the Court based its decision on the findings that Mennillo had ceased being a shareholder as of May 25, 2005.

**The Oppression Remedy**

The issue in this case was whether the business of Intramodal inc. was conducted in a way that was oppressive, unfairly prejudicial or unfairly disregarded the interests of Mennillo, under s 241(2) *CBCA*. Once the facts are distilled down to the finding that Mennillo had ceased being a shareholder as of May 25, 2005, the answer to this question was simple. If Mennillo no longer wished to be a shareholder, then he could not have a reasonable expectation that he would subsequently be treated as one. Given that the finding of having a reasonable expectation of certain treatment is the first step of an oppression remedy claim, failure to find one ends the analysis. Additionally, the majority decision found that even if he could reasonably expect the corporation to comply with the *CBCA* formalities, its failure to do so does not rise to the level of oppression, unfair prejudice of unfair disregard for his interest (at para 11). Similarly, the concurring opinion found that Mennillo, in requesting to be removed as a shareholder, had no reasonable expectation of being treated thereafter as one, and that his oppression claim must fail.

The dissenting opinion of Justice Côté found two things. First, that there was a reasonable expectation that the company would act in accordance with the law, and that its failure to do so was unfairly prejudicial to Mennillo (at para 195). She also found, however, that the concept of reasonable expectations applied more when the shareholders' rights were not clearly articulated in the articles and bylaws of the corporation or in legislation (at para 181). Where there is clear unlawful conduct by the corporation, the focus should not be so much on reasonable expectation as it should be on whether there was unlawfulness and therefore oppression (at para 182). Therefore, the dissent maintained that where there is unlawfulness, there would be oppression.

The oppression remedy was enacted in the *Canada Business Corporations Act* of 1975 as a result of the recommendations made by the federally commissioned Dickerson Committee (Robert W.V. Dickerson, John L. Howard, Leon Getz, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971)). The Dickerson Committee, perceiving that the common law did not provide enough protection for minority shareholders, recommended in its report that the oppression remedy be adopted.

Since the oppression remedy test is broad and open-ended, many concerns arose as to how the remedy would be interpreted once it was enacted. This was not surprising, given the very little guidance provided by the Dickerson Committee, combined with the breadth of the language in the statute, and the numerous elements that would need to be identified, defined, and interpreted. In spite of these concerns, the remedy has been used extensively, which has allowed courts to comment on and develop the law in this area (see Brian Cheffins, "An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law" (1990) 40 U Toronto LJ 775 at 777). As a result, many of the questions that arose initially and developed as the oppression remedy came to be used more frequently, have been litigated, and have, accordingly, been settled by case law. The interpretations that have been used to shape the oppression remedy as we now know it have, to a large extent, substantiated the broad nature of the statutory language. It has been determined that it is, in fact, a broad remedy, applicable to a broad spectrum of applicants, conduct, and situations. It is, as with other equitable remedies, a fact-based remedy, which means that what could constitute oppression in one instance might not necessarily be oppressive in another (*BCE* at para 59).

One of the significant developments in oppression remedy jurisprudence was the adoption of the concept of reasonable expectations. That adoption alleviated a lot of the uncertainty in the area because the reasonable expectations test constrained the oppression remedy. When the concept of reasonable expectations operates within the oppression remedy, it means the conduct can be found to be oppressive, unfairly prejudicial or unfairly disregarding of the interests only if it breaches a reasonable expectation. In other words, without a breach of a reasonable expectation first, then a finding that that breach was also oppressive, unfairly prejudicial or unfairly disregarding of the interests, is not available. As the Court put it in *BCE*, "[w]hat is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play" (*BCE* at para 59).

This test has developed through decades of case law but it was very clearly articulated in the last oppression remedy decision to reach the Supreme Court, *BCE*. The Court in *BCE* articulated the test as follows:

> One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA* (*BCE* at para 56).

The test provides an analytical framework that narrows the boundaries of the legislation and provides guidance on how to proceed with these claims. This is necessary when dealing with broad and inherently uncertain legislation that is fact-based, encompasses a wide range of complainants and a wide range of remedies, has broad, undefined heads designed to catch any conduct, and is built on principles of fairness and equity, not illegality. Moreover, the *BCE* Court

listed the factors that have developed, through decades of judicial commentary, to determine whether a reasonable expectation exists, to be considered under the first part of the test. The factors are: commercial practice; the nature of the corporation; relationships; past practice; preventative steps; representations and agreements; and fair resolution of conflicting interests (*BCE* at paras 73-88).

**So What Is The Problem?**

Oppression remedy jurisprudence has traditionally been rife with uncertainty, inconsistency and confusion. When broad statutory language is combined with the considerable number of cases claiming oppression, a fact-based test, it is easy to have inconsistent articulations of the test, inconsistent applications and seemingly inconsistent results. Oppression is an easy claim to make, it has the low bar of unfairness, it seems to arise from any unwelcome conduct in a (usually) closely-held corporation, and it can be appended to any corporate misconduct claim. In short, there are endless opportunities to botch this test. Moreover, given the number of oppression claims, botching the test has considerable consequences by adding more confusion to an already muddy area.

Unfortunately, even though the test itself is relatively simple, its articulation, analysis and application has posed challenges, as seen in *BCE* and in *Mennillo*. Although the *BCE* Court laid out the test for oppression and carefully applied the first step of the test to the facts, there were numerous instances within the decision where the Court's articulation of the concept of reasonable expectations and how it fit into the broader test were contradictory and confusing. For example, at three places in *BCE*, the Court collapsed the two steps of the test into one. In the first instance, it said, "[f]air treatment – the central theme running through the oppression jurisprudence – is most fundamentally what stakeholders are entitled to 'reasonably expect'" (*BCE* at para 64). The Court said this again a few paragraphs later: "[a]s stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment" (*BCE* at para 70). Another time, the Court described the three heads of the claim (oppression, unfair prejudice, and unfair disregard of relevant interests), then stated, "[t]he phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders" (*BCE* at para 67). The actual test consists of two steps, one about reasonable expectations and the other, about having that reasonable expectation breached in a way that is oppressive, unfairly prejudicial, or unfairly disregarding of a relevant interest. The Court itself accurately noted that this is a two-step process when it said, "[i]f a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s 241(2) of the *CBCA*" (*BCE* at para 56).

By confusing the test, the Court made two inherently contradictory statements, within 10 paragraphs of each other. It said that a complainant is entitled to a remedy upon a breach of reasonable expectations. It also said that if a complainant shows a breach of reasonable expectations, he must go to the second stage of the analysis, where he must show that that breach is also oppressive, unfairly prejudicial or unfairly disregarding of the complainant's interests before becoming entitled to a remedy (see also Jeffrey G. MacIntosh, "BCE and the Peoples' Corporate Law: Learning to Live on Quicksand" (2009) 48 Can Bus LJ 255, where Professor MacIntosh takes great issue with the Court's carelessness, on this issue, and several others). It is the second articulation of the test that is correct but the Court undermined its own decision when it overlooked inaccuracies such as these.

In *Mennillo*, we see again the problem arising from the careless articulation and application of the oppression test in the concurring and dissenting opinions. The majority decision properly articulated the oppression test and applied it (at para 9). The majority found that Mennillo could reasonably expect the corporation to adhere to corporate formalities, but that failure to do so would not rise to the level of oppression, unfair prejudice or unfair disregard of his interests (at para 10). The majority later says, "[w]hat may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the CBCA" (at para 11). Assuming "trigger the remedy" means meeting the first step of a two-step test, then the test is properly articulated.

The concurring opinion, however, wrongly stated the test by completely omitting the second step: "To establish oppression, the shareholder must show: (1) a reasonable expectation that the corporation would treat him in a certain way; and (2) that the corporation breached that reasonable expectation" (at para 84). The concurring opinion went on to find the oppression remedy claim must fail, as there was no reasonable expectation of Mennillo staying on as a shareholder of Intramodal.

The dissenting opinion focused on the conduct of the company and not on the reasonable expectations of the complainant. The dissenting opinion maintained: "where…a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive…"(*Mennillo* at para 182). Therefore, the dissent finds there is a blanket reasonable expectation of lawful conduct and automatic oppression where there is unlawful conduct. Essentially, there is a successful oppression remedy claim where there is unlawful conduct.

While the dissenting opinion does not improperly articulate the test, it does overlook some important elements of the *BCE* test. First, in order to form a reasonable expectation, one must consider the past practice of the company and the preventative steps the claimant could have taken to protect itself against the issue it now claims to have. In this case, the shareholders consistently failed to follow corporate formalities while running Intramodal, so due to the past practice of the company, Mennillo could not have a reasonable expectation that the company would now act as required under the *CBCA*. Additionally, the Court found, on the evidence, that Mennillo knew he was no longer regarded as a shareholder, according to the documents listed above, and that he did not take issue with the share transfer on the basis that it did not comply with s 76 *CBCA* when he commenced legal proceedings in 2010. Given these findings, there is a strong argument that Mennillo should not have expected the corporation to act any differently than it did. Therefore, while it is banal to say that all shareholders should have a reasonable expectation of lawful conduct by the company and any unlawful conduct breaches that reasonable expectation, the actual legal test and its practical application are more nuanced.

Second, there are two points to make about unlawful conduct automatically meeting the test for oppression. (1) With regard to the claim that all unlawful conduct is oppressive, that is not necessarily the case. Directors can undertake unlawful actions that benefit shareholders, which brings me to (2), that without showing harm or compensable injury, a claim cannot lie for oppression. Specifically, "the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors" (*BCE* at para. 45; see also para 90). Therefore, even if the first part of the test is met, the breach of the reasonable expectation still has to rise to the level of oppression, unfair disregard, or unfair prejudice in order to get the remedy, as "[n]ot every failure to meet a reasonable expectation will

give rise to the equitable considerations that ground actions for oppression" (*BCE* at para 89). To get from the first step of the test to the second one, the complainant must show harm or "prejudicial consequences" (*BCE* at para 89). Professor Vanduzer provides a good example of unlawful conduct that would not be oppressive. Assume a corporation sells a corporate asset to another corporation and one of the directors has an interest in the sale, but fails to disclose it. That conduct is a clear breach of fiduciary duty but unless the sale price exceeded its value, it would not be oppressive to the shareholders (see J. Anthony Vanduzer, "*BCE v 1976 Debentureholders*: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*" (2010-2011) 43 UBC L Rev 205 at 233).

In this case, Justice Côté maintained that it was prejudicial to Mennillo to be "unlawfully stripped" of his status as a shareholder (at para 200). However, given that Mennillo knew he was no longer a shareholder, according to the evidence cited by the trial judge, he was not conducting his affairs on the basis of being a shareholder. Essentially, if he did not have a reasonable expectation of being treated as a shareholder, then he could not suffer harm from not having been treated as a shareholder. This highlights the importance of applying both steps of the test.

Third, as a matter of policy, the dissent should be approached with great caution. The *BCE* Court limited the use of the oppression remedy against public companies in its articulation of the reasonable expectations test. The Court maintained that greater leeway may be given to directors of small closely held corporations to depart from strict formalities (*BCE* at para 74), and that the reasonableness of expectations formed in small companies are accorded greater weight than those in large, public companies (*BCE* at para 109). Additionally, the elements that must be considered for the reasonable expectations part of the test are clearly more applicable to closely held corporations. By skipping the reasonable expectations part of the test, the floodgates would open on claiming oppression against public companies.

**Conclusion**

The oppression remedy has come a long way. We now have a test that is easy to articulate and, with the guidance of the factors, not overly onerous to apply. There is still uncertainty, of course, as any fact-based test inherently contains uncertainty, but that uncertainty does not have to be crippling. It is possible to work within the confines of the test and to create a body of judicial decisions that is clear and consistent. To do so, judges must articulate and apply the test carefully. The steps cannot be confused or collapsed into each other. The test has two parts; both parts are necessary to meet the test. The relevant facts must be applied to the proper parts of the test. While this is all axiomatic, it is not as evident as one would think, given the confusion in the case law that has not been alleviated by the Supreme Court.

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This post may be cited as: Jassmine Girgis "*Mennillo v Intramodal inc.*: The Supreme Court of Canada Revisits the Oppression Remedy" (17 February, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/02/Blog_JG_Mennillo_Intramodal.pdf