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Technically but not reasonably mistaken

By Neill May

Mixed emotions are a dangerous topic of conversation for lawyers, because you can end up hearing about punchlines about a client's hilarious mixed feelings if her lawyer drives off a cliff in her new Maserati. However, a mixed response is mildly inevitable to the recent Supreme Court of Canada case, *Mennillo v. Intramodal Inc*. There can be few better advertisements for the benefits of legal services than a case that goes to the highest court because of sloppy corporate paperwork, but I expect that many corporate lawyers have lost sleep over the prospect of technical procedural glitches resulting in massive expense, delay and (worst of all) scrutiny. The court's decision in the case shed useful light on the difference between failure to observe technical requirements of applicable corporate law and conduct amounting to oppression.

The facts in *Mennillo* were straightforward though, as the case demonstrated, subject to very different nuances and characterizations. In the winter of 2004, Messrs. Johnny Mennillo and Mario Rosati, two friends, agreed to create a transportation company, to which Mr. Mennillo would contribute the funding while Mr. Rosati would bring his expertise in the space. Intramodal was then incorporated under the Canada Business Corporations Act. Mr. Rosati reserved the name "Intramodal" in April 2004. The notices of subscription and the resolution were signed by Mr. Rosati alone. Intramodal's affairs were marked by a consistent lack of formality and technical compliance. Virtually nothing was committed to writing, and the requirements of the corporate statute were rarely observed. Though both gentlemen were made directors and officers of the company, as well as shareholders, the initial resolutions were signed only by Mr. Rosati, neither paid for their shares and Mr. Mennillo's share certificate was never signed. Business was conducted by handshake; the two had neither a partnership nor a shareholders' agreement, and there was no written contract documenting Mr. Mennillo's substantial funding advances.

In May 2005, Mr. Mennillo sent a letter to Intramodal resigning as an officer and director. Intramodal's position was that at the same time Mr. Mennillo transferred his shares to Mr. Rosati. Mr. Mennillo, conversely, never intended to stop being a shareholder. The evidence adduced by the two in support of their respective characterizations of the facts — including statements about commercial counterparty sensitivities, life insurance applications and tax memos — was confusing. However, the central finding at the trial level was clear: Although the legal requirements for a transfer of shares were not followed, Mr. Mennillo in 2005 no longer wanted to be a shareholder and asked to be removed. Mr. Mennillo applied for an oppression remedy to rectify the stripping of his shareholdings.

The core elements of an oppression claim are well established post-*BCE*. First, the claimant must identify the expectations that have been violated and establish that the expectations were reasonably held. Then the claimant must show that those reasonable expectations were violated by conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of the claimant.

The majority acknowledged that the legal requirements for a share transfer were largely ignored, but they concluded that Mr. Mennillo could not have had a reasonable expectation of being treated as a shareholder where he had requested to cease being such; the acts of the company which Mr. Menillo claimed to be oppressive were in fact taken, albeit imperfectly, in accordance with his own wishes. This underlines the point that the trigger for the oppression remedy is conduct that frustrates reasonable expectations, not simply conduct contrary to the statute.

Lest those enamoured of legal technicalities feel abandoned, the court did opine on some technical points. Most interestingly, the Supreme Court acknowledged that, because the shares were not endorsed for transfer as required by Mr. Mennillo, the transfer did not meet the requirements of the CBCA and may be nullified. However, Mr. Mennillo had not made a timely claim on that basis and, in a twist that could only warm the hearts of commercial lawyers, determined that just because the transfer was subject to nullity did not mean that it did not exist. Under the reasonable expectations lens, the key was that Mr. Mennillo would not have expected the legal formalities to be fulfilled by Intramodal.

When I was a young lawyer, I attended a series of meetings with a senior lawyer. After more than a few, at which I'd taken very rough notes, he asked that I prepare minutes for all of them, resulting in a lost pound of sweat. This, I thought without a sense of irony, was not a reasonable expectation. These types of legal formalities, not to mention the increasingly complex web of requirements and regulations, are a frightening minefield for corporate counsel. Unfortunately, it is not always possible to take comfort in the old adage that you're only incompetent if you make the same mistake twice. Fortunately for me, I keep making the same mistakes many more times than twice, so I'm safe. **CL**

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