IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rayner v. The British Columbia Coast Pilots Ltd.,* 2023 BCSC 373

Date: 20230314
Docket: S226703
Registry: Vancouver

Between:

Edward Rayner, Maciej Niksinski and Lance Schilka

Petitioners

And:

The British Columbia Coast Pilots Ltd.

Respondent

Before: The Honourable Madam Justice Forth

In Chambers

Reasons for Judgment

Counsel for the Petitioners:	S. Whitehead
Counsel for the Respondent:	T.J. Moran N.P. Jones
Place and Dates of Hearing:	Vancouver, B.C. February 9–10, 2023
Place and Date of Judgment:	Vancouver, B.C. March 14, 2023

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Introduction

[1] The petitioners sought various remedies for oppression pursuant to the *Business Corporations Act,* S.B.C. 2002, c. 57 [*BCA*]. On the morning this petition was scheduled to be heard, the petitioners advised the Court that they were making an application pursuant to Rule 9-8 of the *Supreme Court Civil Rules* [*Rules*] to discontinue this proceeding.

[2] The respondent was advised of this application the day before the hearing. The respondent's position was that the petitioners should not be granted leave to discontinue, but the proceeding should be dismissed in its entirety. In addition, the respondent sought an order of special costs. The petitioners opposed the dismissal of the proceeding and the granting of special costs, but agree to costs.

[3] I commenced hearing submissions on the morning of February 9, 2023, but it became clear to me that it would assist the Court if counsel were given time to prepare written submissions and research the applicable caselaw. As such, I adjourned the matter to February 10, 2023, the second day scheduled for the hearing of the petition.

[4] At the continuation of the hearing on February 10, 2023, counsel for the petitioners continue to submit that the only option was a discontinuance, but at the very end of the February 10 hearing, advised that the petitioners would consent to an order that the petitioners would not bring any subsequent proceeding against the respondent for any of the relief sought in this petition.

Relevant Facts

[5] A brief summary of the facts and the nature of the petition is needed to understand the rationale behind each of parties' positions.

[6] The respondent, The British Columbia Coast Pilots Ltd. ("BCCP") is a incorporated company and is in the business of providing licensed marine pilots to certain commercial and pleasure craft vessels for the purposes of navigating, or assisting in navigating, British Columbia's ports and waterways.

[7] The three petitioners are pilots who each hold shares in BCCP and have been employees and shareholders of BCCP for a number of years.

[8] On or about January 1, 2017, BCCP entered into an agreement with the Pacific Pilotage Authority ("PPA"), a federal crown corporation statutorily established under the *Pilotage Act*, R.S.C. 1985, c. P-14 [*Pilotage Act*], to provide pilots' services to the PPA (the "Agreement"). The Agreement ran until December 31, 2021, at which time it was renewed on substantially similar terms.

[9] In August 2021, the BCCP began warning their members of the need to be fully vaccinated in accordance with anticipated vaccine mandates.

[10] On or about October 30, 2021, the Minister of Transport made Interim Order No. 7 Respecting Passenger Vessel Restrictions Due to the Coronavirus Disease 2019 (COVID-19) ("IO No. 7"). IO No. 7 obligated pilots to present proof of vaccination or, for the initial period of November 15, 2021 to January 23, 2022, a negative COVID-19 test, before boarding any Canadian vessel operated with 12 or more crew members. This included cruise ships operating in Canadian waters.

[11] IO No. 7 also obligated the authorized representative of any vessel to implement a vaccine policy that accorded with the requirements set out in IO No. 7. The PPA issued a policy on or about November 3, 2021 (the "PPA Policy") that required as a "contractor of a federal Crown corporation, you must be fully vaccinated". Proof of vaccination had to be submitted by close of business on November 14, 2021. The PPA Policy included that any contractor who failed to comply with the policy would "not be allowed to provide service to or on behalf of the PPA until such time as they comply".

[12] On or about November 5, 2021, BCCP issued its COVID-19 Mandatory Vaccination Policy (the "BCCP Policy"). The BCCP Policy required members to submit vaccination information to the PPA, either directly or through BCCP, in accordance with the PPA Policy. The BCCP's position was it had no choice but to comply with IO No. 7, since s. 15.3 of the *Pilotage Act* compels it to provide services.

Members had to be vaccinated to ensure BCCP was able to provide the required services to the PPA pursuant to the Agreement.

[13] The BCCP Policy required that any members who failed to provide proof of vaccination by November 14, 2021 would be placed on administrative leave without pay, until such time they were fully vaccinated or the BCCP Policy was no longer in force.

[14] All three of the petitioners were ultimately placed on administrative leave without pay as they failed to comply with the vaccination requirements. They failed, or refused, to provide proof of vaccination to the PPA or BCCP as required.

[15] On November 16, 2021, BCCP gave notice to its members of an electronic ballot (the "eBallot") on the following question:

> Are you in favor of providing full wages, including differential payments, to any shareholder who is placed on Administrative Leave due to the mandatory vaccination policy?

[16] Ballots were cast by 113 members, representing 92.62% of the total members. Only 17 members voted in favour of the eBallot, while 96 members voted against it.

[17] As a result of the eBallot, BCCP informed the petitioners they would not receive salary or differential payment, effective December 1, 2021. The petitioners did not request, nor were they offered alternative duties.

[18] On December 21, 2021, counsel for the petitioners sent a letter to PPA regarding, among other things, the PPA Policy (the "December 2021 Letter"). The letter claims that:

- COVID-19 vaccines are experimental and unsafe;
- COVID-19 poses no serious health risk to 99.97% of Canadians;
- Any forced injection program constitutes an assault;

- COVID-19 vaccination mandates could be in violation of the directives for human experimentation set out in the Nuremburg Code;
- the virus was now “extinct” in Canada;
- The vaccinated in the UK are now dying at higher rates than the unvaccinated;
- That there is no scientific data to support the conclusion that the COVID-19 vaccines have had any impact upon reducing the spread of the virus; and
- Ivermectin is a “highly safe and effective drug when used early in the treatment of COVID-19”.

[19] As noted above, the Agreement with PPA was renewed on December 31, 2021, on substantially the same terms.

[20] On September 26, 2022, the federal government announced it was suspending Canada’s vaccination requirements, effective October 1, 2022. BCCP sent letters to each of the petitioners advising them their administrative leave would end and that their return to active duty would begin October 1, 2022.

Background of Proceedings

[21] On July 28, 2022, the petition was filed. It sought the following:

- A declaration pursuant to s. 227(2) of the *BCA* that the certain actions of the BCCP and the manner in which affairs of BCCP had been conducted, or the powers of the directors have been exercised, is oppressive and/or unfairly prejudicial to the petitioners.
- Remedial orders pursuant to s. 227(3) of the *BCA* including prohibiting the continuance of the unpaid administrative leave, directing the reinstatement of the petitioners, directing the payment of backpay, and other benefits.
- An order setting aside, rectifying, and correcting any other oppressive act or omission that may be discovered as the matter proceeds.
- An order granting the petitioners all of their common law and/or statutory entitlements.

- Compensatory damages in the amount of $500,000 to each petitioner pursuant to s. 227(3)(m) of the *BCA*.
- Aggravated damages for mental distress in the amount of $500,000.
- Costs.

[22] The factual basis in the petition filed July 28, 2022 includes the following assertions:

> 9. […]. [The petitioners are] being coerced into taking an unavoidably unsafe experimental medical treatment.
>
> […]
>
> 24. […]. By any rational assessment, SARS-CoV-2 [defined to include COVID-19] poses minimal risk to most, typically producing only mild symptoms, and the Omicron strain is clinically indistinguishable from the common cold. […]
>
> 25. […]. SARS-CoV-2 virus poses no serious health risk to the vast majority of Canadians, […]
>
> […]
>
> 28. The Experimental Vaccines carry severe risks, up to and including the risk of death. […]
>
> […]
>
> 31. There is no material difference between the infection and transmission risk posed by vaccinated and unvaccinated individuals. […]
>
> 32. […] the Experimental Vaccines do not meaningfully reduce the Petitioners' risk of catching Covid-19 and transmitting it to others, the Vaccine Mandate treats the Petitioners' bodies as tools for reducing (but not eliminating) the perceived risk of others, which is ethically indefensible.
>
> 33. […]. The Company had no right to ***punish*** the Petitioners for their medical choices by placing them on involuntary leave and depriving them of their salaries, bonuses, and benefits as a consequence of exercising their right of Informed Consent—*their bodies, their choice.*
>
> [Emphasis in original.]

[23] The only affidavit filed in support of the petitioners' assertions was by Edward Rayner made on July 27, 2022 ("Rayner Affidavit #1"). There was no expert evidence tendered in accordance with the *Rules*.

[24] On October 31, 2022, the response to petition was filed. It raised the following issues:

> 1. […] this Petition is defective and unviable for numerous reasons. […] the petitioners seek to rely on hearsay evidence for final orders, and purport to give irrelevant, inadmissible, and discredited opinion evidence regarding the safety of vaccines. […]
> 2. […] the petitioners target policy decisions over which BCCP effectively had no control. Instead, the impugned decisions underlying the allegedly oppressive conduct were required by law. … BCCP was legally required to implement a mandatory vaccination policy, because of a government order mandating that all marine pilots be vaccinated against COVID-19. […]
> 3. If BCCP had failed or refused to implement such a vaccination policy, it would have been in breach of its legal obligations, and could have been subject to significant penalties and fines. Further, failing to adopt the legally-required vaccination policy would have put BCCP in breach of, […], its agreement to provide pilotage services to the federal government. The consequences of such non-compliance would have been catastrophic, including significant and unacceptable disruptions to western Canada's commercial and passenger vessel operations.
>
> […]
>
> 5. […], the complaints and claims in this proceeding are unsustainable and wholly devoid of merits. The Petition should be dismissed, with costs to BCCP.

[25] On December 19, 2022, the notice of hearing was filed setting the hearing of the petition for February 9 and 10, 2023.

[26] On Dec 20, 2022, counsel for the respondent delivered to counsel for the petitioners a letter, stating:

> For the reasons set out in our client's Response to Petition, it is our position that all of the claims alleged in the Petition are wholly without merit, and indeed rise to the level of frivolous and vexatious.
>
> Where a party persist with claims that are devoid of merit and displays a "reckless indifference to the manifest deficiencies" of their case, the court may punish such conduct with an award of special costs upon the dismissal of the proceeding […]
>
> We hereby put you on notice that, upon the dismissal of the Petition, we will be seeking an award of special costs against the Petitioners. In this regard, we will be seeking an order from the court requiring that the Petitioners fully indemnify the Respondent, jointly and severally, for the actual legal costs incurred in responding to this matter.

Issues

[27] The following issues are raised:

1. Is an application required when seeking leave of the court pursuant to Rule 9-8(2) to file a discontinuance?

2. Does the court have jurisdiction to dismiss a petition without the consent of all parties and without hearing it on its merits?

3. Should an order of special costs or, in the alternative, increased costs, be granted?

Issue 1: Is an Application Required When Seeking Leave of the Court Pursuant to Rule 9-8(2) to File a Discontinuance?

Statutory Provisions

[28] The *Rules* allow for proceedings to be discontinued. Rule 9-8 provides, in part:

> **Discontinuance before action set for trial**
>
> (1) At any time before a notice of trial is filed in an action, a plaintiff may discontinue it in whole or in part against a defendant by filing a notice of discontinuance in Form 36 and serving a filed copy of the notice of discontinuance on all parties of record.
>
> **Discontinuance after action set for trial**
>
> (2) After a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties of record or by leave of the court.
>
> […]
>
> **Costs and default procedure on discontinuance or withdrawal**
>
> (4) Subject to subrule (2), a person wholly discontinuing an action against a party or wholly withdrawing his or her response to civil claim filed in response to a notice of civil claim of a party must pay the costs of that party to the date of service of the notice of discontinuance or the notice of withdrawal, as the case may be, and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.
>
> […]
>
> **Discontinuance not a defence**
>
> (8) Unless the court otherwise orders, the discontinuance of an action in whole or in part is not a defence to a subsequent proceeding for the same or substantially the same cause of action.

> **Application to counterclaim, third party proceeding and petition.**
>
> (9) This rule applies to a counterclaim, a third party proceeding and a petition.
>
> [Emphasis added.]

[29] Of further significance is Rule 8-1(2), which reads:

> **How applications must be brought**
>
> (2) To apply for an order from the court other than at trial or at the hearing of a petition, a party must do the following […]
>
> [Emphasis added.]

Analysis

[30] The respondent referenced two cases in support of its position that the petitioners were required to file and serve a notice of application:

- *Taylor v. Blenz The Canadian Coffee Company Ltd.*, 2019 BCSC 906 – the application was being made prior to the commencement of the trial. As such, it is clear that under Rule 8-1(2) an application was necessary.
- *Matharu v. The Canadian Ramgarhia Society*, 2020 BCSC 449 – the notice of hearing was filed scheduling the hearing of the petition on June 28, 2019: at para. 12. On May 24, 2019, the petitioners filed a notice of discontinuance without obtaining the consent of the respondent and without leave of the court. The parties agreed that the discontinuance should stand, but disagreed on whether there should be terms attached to the discontinuance, including an order barring further proceedings and whether there should be special or double costs: paras. 21–22.

[31] Neither of these cases address the issue of whether an application is needed at the hearing of the petition.

[32] In my view, the hearing of this petition was set for February 9 and 10, 2023. It was during the hearing of the petition that the petitioners requested leave to file a discontinuance. As such, no application was needed. Had the petitioners decided to file a notice of discontinuance prior to February 9, 2023, then consent of the respondent or leave of the Court would have been required.

[33] I note that the timing of when the petitioners informed the respondent on their plans to seek leave to file a notice of discontinuance is a relevant factor on the issue of costs.

Issue 2: Does the Court Have Jurisdiction to Dismiss a Petition Without the Consent of all Parties and Without Hearing it on its Merits?

Position of the Parties

[34] The petitioners submit that they are entitled to discontinue the petition, unless there are special or very unusual circumstances mitigating against obtaining leave to discontinue: *J.S. v. British Columbia (Ministry of Children and Family Development)*, 2015 BCSC 575 at para. 26. If leave is not granted, then the petitioners would be forced to continue the petition against their wishes, which should only be done in unusual circumstances: *Niccoli v. Canadian Home Assurance Company and London Assurance Corporation* (1966), 57 W.W.R. 113 at 115, 1966 CanLII 658 (B.C.S.C.). The petitioners submit there are no unusual circumstances that would warrant forcing the petitioners to continue. The petitioners point out that a dismissal should only be granted after the hearing on the merits and that hearing will not take place.

[35] The respondent submits there are special circumstances that exist such that leave should not be given to the petitioners to file a discontinuance, including its public importance, the timing of the petitioners' decision to abandon their claim, the impact on BCCP's reputation, and BCCP's compelling interest in a full and final resolution on its merits. The respondent argues even if the Court makes an order under Rule 9-8(8), this is inadequate. The respondent submits that a dismissal should be ordered, since without it, the door is still open to allow the petitioners to commence a new legal proceeding premised on the same alleged facts under the banner of a different cause of action.

[36] The respondent argues that in deciding whether to grant leave to discontinue, the Court must consider the "rights and interests of the other party or parties": *Aiton v. Fisher,* 2007 BCSC 1468 at para. 22.

[37] The respondent submits that the test for special circumstances has been met here and, as such, leave should not be granted for a discontinuance.

Analysis

[38] None of the three cases the respondent cited resulted in the court ordering a dismissal of the proceedings instead of leave to discontinue:

- *HMTQ v. Chief Ronnie Jules et al*, 2005 BCSC 492 – the court refused to grant leave to discontinue the action on the basis that special circumstances existed. The decision was that the matter should proceed to trial as directed several years ago: at paras. 34–35.

- *Aiton* – an appeal to a master's decision who dismissed the plaintiffs' application for leave to discontinue the action against some of the defendants. On appeal to the Supreme Court, it was found that the master had erred on the basis that the master failed to apply the correct principles in assessing the proper balance to be struck between the interests of the parties: para. 36–37. In this case, the trial date was over a year away and the discoveries had not yet begun: para. 35. Justice Lynn Smith allowed the appeal and granted the order of discontinuance. There was not a dismissal of the action as against the specific defendants.

- *Moon v. Sails at the Village on False Creek Developments Corp*., 2012 BCSC 1999 – the plaintiffs in this case filed notices of discontinuances of portions of their pleadings relating to misrepresentation. One of the defendants opposed on the basis that they should be afforded the opportunity to prove that the plaintiffs' allegations were false. There had been no notice of trial filed. The court found that no leave was required to discontinue: para. 22. The further issue was whether the notices should be struck as an abuse of process. The Court declined to strike them on that basis: para. 30. The Court was satisfied that it was an appropriate case to order the plaintiffs' discontinuance be a defence to a subsequent proceeding for the same or substantially the same cause of action: para. 42.

[39] The respondent cited no rule that would permit the Court to order a dismissal of a petition without a hearing on its merits. The respondent had the option of applying to strike under Rule 9-5 on the basis that the petition disclosed no reasonable claim, was vexatious, or an abuse of process. It did not do so. I am not persuaded that a dismissal of the petition should take place without hearing the

petition on its merits or where there has not been an application to strike pursuant to Rule 9-5.

[40] I grant leave to the petitioners to discontinue the petition. The thrust of the concern of the respondent is that the petitioners could simply start another proceeding on the same alleged facts, but pleading a different cause of action. This concern will be addressed by the following orders. The petitioners agreed that they should be barred from bringing a subsequent proceeding for the same or substantially same cause of action. In addition, the petitioners have consented to an order that they shall not bring any subsequent proceeding against the respondent for any of the relief sought in the petition. In my view, that concession adequately addresses the respondent's concern for finality.

[41] I turn now to the issue of costs.

Issue 3: Should an Order of Special Costs or, in the Alternative, Increased Costs, be Granted?

[42] The respondent submits that a special costs claim is warranted, pointing to the following conduct of the petitioners:

- filing the petition and persisting with it right until the last moment;
- misusing the court process to spread misinformation about COVID-19; and
- attacking certain health policies with which they disagree.

[43] The respondent submits that:

> […] the Court should award special costs against the petitioners. Doing so will send an unmistakable message that this Court's process is not to be misused as a venue to spread COVID-19 misinformation. Discredited pseudo-scientific theories have no place in British Columbia courtrooms (especially in connection with important public health issues). Misusing the Court's process to propagate such theories, whether as part of a misguided political cause or otherwise, should not be tolerated. An award of special costs is the best mechanism to both repudiate the petitioners' conduct in this proceeding and to discourage frivolous litigation premised on COVID-19 misinformation or anti-vaccination fearmongering.

[44] If special costs are not awarded, the respondent seeks an order for increased costs.

[45] The petitioners concede that the respondent is entitled to an order of costs, but oppose an order of special costs.

[46] The petitioners submit that any pre-litigation conduct is irrelevant in determining whether to award special costs against another party: *Price v. Robson*, 2017 BCCA 419 at para. 23. This is in particular reference to the letter the petitioners' counsel sent to PPA on December 21, 2021.

[47] The petitioners submit that there is no evidence that they engaged in any reprehensible conduct. They sought to discontinue the proceeding on the belief that there was an unlikelihood of success. If there was a lack of merit to the petition, that is not sufficient to warrant an award of special costs. The petitioners deny that they brought this petition for an improper motive and say no conduct on their part justifies special costs.

Legal Principles

Special Costs

[48] Special costs are awarded against an unsuccessful party as punishment for reprehensible litigation conduct. The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (C.A.), where Lambert J.A., writing for the Court of Appeal, determined that the threshold for awarding special costs is "reprehensible" conduct during the litigation, which includes "scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke": at para. 17. He further explained this standard at para. 23:

> [23] […] the fact that an action or an appeal "has little merit" is not itself a reason for awarding special costs [...].Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

[49] In *Mayer v. Osborne Contracting Ltd*., 2011 BCSC 914, special costs have been awarded in a wide range of circumstances, which include:

> [11] […]
>
> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (g) where a party brings a proceeding for an improper motive;
>
> (h) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (i) where a party pursues claims frivolously or without foundation.
>
> [Citations omitted.]

Increased Costs

[50] Section 2(5) of Appendix B of the *Supreme Court Civil Rules,* provides the discretion to judges to adjust costs awards. It states:

> 2(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).

[51] In *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd*., 2021 BCSC 1574, Justice Davies set out factors which may be relevant to "unusual circumstances":

> [38] […] misconduct by the successful party; complexity or difficulty of the issues in the litigation; position or behaviour that have added to the complexity of the litigation; the serious nature of the allegations; the importance of the matter to the party or to the development of the law; and the degree of disparity of costs calculated at the fixed scale and the actual legal costs incurred. [Citations omitted.]

[52] Unlike special costs, increased costs are not intended to be punitive, but rather, ensure that a litigant is indemnified for "the costs associated with defending against that which should never have happened": *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 1675, at para. 91.

Analysis

[53] In my view, the petition lacked all merit in light of the legal obligations placed on BCCP to institute a vaccine policy in accordance with PPA Policy and governmental requirements. It is not clear to me how an oppression remedy could have been pursued when the respondent had to be in compliance with the law.

[54] The petitioners claims aggravated damages, but provided no authority suggesting aggravated damages are available in oppression proceedings under s. 227 of the *BCA*. Aggravated damages are not included in the list of remedies set out in s. 227(3), however, the court has broad discretionary power in granting oppression remedies: *Quaite v. Lebedovich*, 2010 BCCA 242 at para. 30 (Chambers).

[55] Aggravated damages are awarded "for aggravation of the injury by the defendant's high-handed conduct": *Feldstein v. 364 Northern Development Corporation,* 2017 BCCA 174 at para. 83. I need not consider whether aggravated damages could be available to the petitioners. There are no particulars of any high-handed conduct by the respondent. Considering the respondent was acting in compliance with legal requirements, it is not clear how such actions could be "high-handed". The petitioners also failed to set out the material facts to support their claim for aggravated damages, which may be an absolute bar to the claim: *A. (T.) v. K. (R.),* [1996] 3 W.W.R. 720 at 734–735, 1995 CanLII 16144 (B.C.S.C.).

[56] The petitioners seek employment-related relief, including the petitioners be reinstated, paid backpay including loss of wages, and other benefits. It is not appropriate to seek such relief in an oppression petition. This type of relief sought is clearly not ones being alleged as suffered by a shareholder qua shareholder: *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd*., 2016 BCCA 258 at para. 54.

[57] As noted by the Court of Appeal in *Dubois v. Milne*, 2020 BCCA 216 at para. 113:

> It is well-established that a plaintiff may pursue an action for oppression only in respect of wrongs suffered *qua* shareholder, and not for wrongs suffered in other capacities: see *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.* at para. 54, and the cases cited therein. Normally, a person who is both an employee and a shareholder of a company cannot bring an oppression action in respect of claims that arise *qua* employee.

[58] On December 22, 2021, respondent's counsel put the petitioners on notice that special costs would be sought on the basis that the petition was wholly without merit.

[59] I note that counsel for the petitioners conceded that there was an unlikelihood of success.

[60] I accept that this petition was bound to fail and lacked merit. The fact that the petition lacked merit is not enough to justify an award of costs but "something more" is needed: *Neural Capital GP, LLC v. 1156062 B.C. Ltd.*, 2022 BCSC 1800 at para. 14.

[61] In my mind, that "something more" is the reliance on a deficient affidavit that sought to spread COVID-19 misinformation and sought to use inadmissible evidence. As noted in *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at para. 21, the tendering of inadmissible evidence and hurtful opinions can be a factor in making the order for special costs.

[62] I agree with the respondent's submissions that the Rayner Affidavit #1, which was the only affidavit in support of the petition, contained a range of hearsay, and allegations respecting COVID-19 and vaccines that may well be Mr. Rayner's personal opinions, but are clearly subjects outside of his expertise as a marine pilot. The petitioners were obliged to obtain expert opinion evidence on those issues and they failed to do so.

[63] Some of the language used in the Raynor Affidavit #1 violates the requirements that affidavits are to only contain facts and not opinion, inadmissible gratuitous comments, and argument in the guise of evidence. As commented on in *L.M.U. v. R.L.U.*, 2004 BCSC 95:

> [40] Despite judicial warnings about these matters, deponents often include inadmissible personal opinions and scandalous comments about the character or actions of another person and derogatory statements about their behaviour. Sopinka*, supra*, pages 604-616, paragraphs 12.1 to 12.24 set out the limits the law places on the admissibility of opinion evidence coming from lay persons. In *Creber v. Franklin* (August 26, 1993), Vancouver Registry DO83222 at pp. 8-9, [1993] B.C.D. Civ. 1549-03 (S.C.), Spencer J. commented that affidavit deponents should state facts only. They should not add their descriptive opinions of the facts. Affidavits should not be "larded with adjectives" expressing opinions about the conduct of others. "Self-serving protestations of surprise, shock, disgust or other emotions claimed" by deponents are not helpful, even if they rarely might be admissible.
>
> [41] These kinds of inadmissible gratuitous comments affect the weight given to the rest of the admissible affidavit material. They may also result in a cost penalty order to the offending party.

[64] As noted in *C.L.C. v. T.R.S.*, 2022 BCSC 260:

> [24] In other words, statements contained within an affidavit must be relevant and probative of a fact in issue, must not contain conclusions, inadmissible opinions or statements of argument. The statements must be known to the affiant as a matter of personal knowledge, unless the statements are stated to be on information and belief and the source of the information and belief is given and (unless leave is granted) the application does not seek a final order or any change to a final order.

[65] The Raynor Affidavit #1 contains multiple violations of the requirements of a proper affidavit, examples include:

> 10. […]. The glaring omission of exemptions based on the International Human Rights Law, privacy rights, and constitutionally-protected *Charter* grounds including conscience, liberty, and security of the person, *inter alia*,

> betray a galling contempt for individual sovereignty and a fundamental misunderstanding of the ethics of Informed Consent. […]
>
> […]
>
> 15. […]. In response to the Authority's extraordinary demand for private medical information, […]
>
> 16. […], the directors ought to have advocated on our behalf by challenging the draconian Decision and the PPA Mandate, which imposed as a condition of ongoing employment the unprecedented requirement to choose between our livelihoods and being coerced into taking an unavoidably unsafe experimental medical treatment.
>
> […]
>
> 30. The Covid-19 vaccines are experimental. Clinical trials are ongoing, key toxicological studies were never performed (particularly genotoxicity, carcinogenicity, and developmental and reproductive toxicity studies), and there is no long-term safety data. […]. It is perfectly reasonable to refuse experimental treatments with such a terrible safety profile. […]
>
> […]
>
> 34. Because the Experimental Vaccines are associated with an increased risk of seizures, fainting, and heart attacks, and because any pilot who is liable to experience an "unpredictable loss of consciousness" risks losing his pilotage licence, the Experimental Vaccines could render a pilot medially unfit for pilotage duties and result in the loss of his licence and livelihood. […]. Our right to refuse to consent to medical treatment must be respected, as much our right to refuse to participate in a medical or scientific experiment.
>
> 35. […]. Any employer that would purpose to ***punish*** its employees for exercising this fundamental human right violates all established tenets of medical ethics. By any standard, punishing people for asserting their human rights is oppressive.
>
> [Emphasis in original.]

[66] In respect to the COVID-19 misinformation contained in the Rayner Affidavit #1, I note in British Columbia, Ontario, and Alberta, there exists judicial commentary on the judicial notice of certain facts courts have taken regarding the COVID-19 pandemic and the safety of vaccines. All of these cases pre-dated the filing of the petition on July 28, 2022.

[67] In *Steiner v. Mazzotta*, 2022 BCSC 827, pronounced May 6, 2022, Justice Branch cited from an Ontario decision of *Dyquiangco Jr. v. Tipay*, 2022 ONSC 1441 pronounced March 4, 2022:

> [5] It is true that courts and governments have begun to recognize that we are entering into a new phase of the pandemic, which brings with it changes in the threat

posed by the COVID-19 virus. For example, in *Davies v. Todd*, 2022 ONCJ 178, the court granted the vaccinated father sole decision-making authority with respect to the children's vaccination status, but ordered that the parenting arrangement would remain unchanged from its existing status (*i.e.*, with the children remaining in the primary care of their unvaccinated mother without restrictions). That said, I find that is still appropriate to take judicial notice of the basic facts recently accepted in the March 4, 2022, decision in *Dyquiangco Jr. v. Tipay*, 2022 ONSC 1441, wherein the court stated as follows:

> [22] So what are the notorious or "accepted" facts which this Court is prepared to accept and which cannot be the subject of dispute among reasonable persons? And represent our collective lived experience. They are:
>
> (a) The Covid virus kills;
>
> (b) The virus is transmissible;
>
> (c) The virus can, and has, mutated;
>
> (d) Variants of the virus are more transmissible than others;
>
> (e) Asymptomatic carriers of the virus can infect other people;
>
> (f) Symptoms of the virus may vary according to age, health and co-morbidity factors;
>
> (g) The virus does not discriminate;
>
> (h) There is no known immunity to contracting the virus;
>
> (i) There is no verifiable evidence of natural immunity to contracting the virus, or any mutation, a second or more times;
>
> (j) Vaccines work;
>
> (k) Vaccines are generally safe and have a low risk of harmful effects, especially in children;
>
> (l) Vaccines do not prevent infection, reinfection or transmission, but they reduce the severity of symptoms and the risk of bad outcomes …

[68] The Alberta Court of King's Bench, on January 21, 2022, noted in *Sembaliuk v. Sembaliuk,* 2022 ABQB 62:

> [8] In *R v Morgan*, 2020 ONCA 279, it was held at paragraph 8 that it falls within the accepted bounds of judicial notice to take into account the fact of the COVID-10 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission. This conclusion was adopted by Graesser J. of this Court in *R v Mella*, 2021 ABQB 785 at paragraph 40. Similar conclusions were drawn by Devlin J. in *R v Aiello*, 2021 ABQB 772, who wrote:
>
> > 3 Factually, I am satisfied that vaccination is a safe and highly effective means of preventing the spread of the coronavirus, the development of COVID 19 infections, and severe illness in those who do become infected.

> The scientific consensus on this fact is notorious and beyond reasonable dispute. I take judicial notice of it: *R v Find*, 2001 SCC 32 at para 48.
>
> 4 Short of ceasing all contact with other humans, vaccination is now proven to be the single most effective method of reducing the risk and prevalence of COVID 19, a disease which has ravaged our society, its institutions, and the physical and mental well-being of all Canadians.

[69] The *R. v. Aiello* , 2021 ABQB 772 decision was pronounced September 23, 2021.

[70] There were also cases released shortly after the petitioners filed their petition, which ought to have influenced the prudency of continuing with it. In *Parmar v. Tribe Management Inc.*, 2022 BCSC 1675 at para. 153, pronounced September 26, 2022, Justice MacNaughton noted that: "[…]. The safety of vaccines is 'so notorious as not to be the subject of dispute among reasonable people' […]. Various publications by Health Canada and the BC Ministry of Health and the Provincial Health Officer cannot reasonably be disputed to be inaccurate".

[71] In *Parmar*, MacNaughton J. further pointed out:

> [154] Finally, I accept that it is extraordinary for an employer to enact a workplace policy that impacts an employee's bodily integrity, but in the context of the extraordinary health challenges posed by the global COVID-19 pandemic, such policies are reasonable. They do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income. Ms. Parmar made her choice based on what appears to have been speculative information about potential risks.
>
> [155] I note that in *Maddock v. British Columbia*, 2022 BCSC [1605], Chief Justice Hinkson reached a similar conclusion with respect to the requirement for proof of vaccination to restaurants. At para. 78, Hinkson C.J. wrote that such policies ""[do] not compel or prohibit subjection to any form of medical treatment": para. 78. Rather, individuals remain free to make choices within the bounds of the policy. The MVP did not, in the words of *Maddock*, "[leave Ms. Parmar] with no reasonable choice but to accept, or effectively accept, non-consensual treatment": paras. 78–79. Ms. Parmar retained the choice to remain on unpaid leave.

[72] The *Maddock v. British Columbia*, 2022 BCSC 1605 decision was released on September 12, 2022.

[73] It is my view that in light of this jurisprudence, the petitioners showed a reckless indifference to the truth in commencing and continuing to pursue the petition until the hearing date.

[74] I accept that the petitioners commenced this petition with a view to propagating their misguided views and in an attempt to disseminate COVID-19 misinformation using the court processes. They were, in essence, improperly attacking health policies. I accept they did so with a political motive. The courtroom is no place for the dissemination of COVID-19 misinformation, nor for the pursuit of political motives.

[75] The Rayner Affidavit #1 also asserted that the directors of BCCP received a benefit “of some kind”. It claimed the petitioners were minority shareholders, and the officers, directors, and majority shareholders all stood to directly or indirectly benefit by receiving “a larger portion of the Company’s profits for themselves”. I find that such a statement was false and making it consists of reprehensible conduct.

[76] I am persuaded that an order for special costs should be made. The petitioners continued to advance their meritless claims up until the eve of the hearing of the petition. They did so with a reckless disregard for the truth, improper motive, and based on improper allegations. However, in light of the decision made by the petitioners to discontinue the petition, albeit late in the day, and the further concession that they would not bring any other proceeding seeking the same remedy, I will only order the respondent recover 70% of its special costs, jointly and severally, from the petitioners.

Conclusion

[77] In summary, I grant the following orders:

a) The petition is discontinued.

b) The discontinuance is a defence to further proceedings for the same or substantially the same cause of action commenced by any of the petitioners as against the respondent.

c) By consent of the petitioners, the petitioners are not permitted to bring any subsequent proceeding against the respondent which seeks any of the relief sought in the petition.

d) The respondent is awarded 70% of their special costs against the petitioners, jointly and severally.

"Forth J."