IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hougen Co. Ltd. v. Su,*
2024 BCSC 74

Date: 20240116
Docket: S226845
Registry: Vancouver

Between:

Hougen Co. Ltd.

Petitioner

And

Ming Su and Toyomoto Canada Supply Chain Inc.

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 66 on January 22, 2024.

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner, Hougen Co. Ltd.:	D. Gibbons
Counsel for the Respondent, Ming Su:	G.R. Cameron
The Respondent, Toyomoto Canada Supply Chain Inc.:	No Appearance
Counsel for Guowie Han, Inspirza Management Group Inc., Gohan Trading Inc., Token Studio Inc., Nazda Holding Inc. and Sogo Marketing Inc.:	M. Fancourt-Smith
Place and Date of Hearing:	Vancouver, B.C. December 11, 2023
Place and Date of Judgment:	Vancouver, B.C. January 16, 2024

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INTRODUCTION

[1] The applications to be addressed at this hearing arose from an order that I pronounced in this proceeding in October 2023. At that time, I granted leave to the petitioner, Hougen Co. Ltd. (“Hougen”), to commence an action in the name of the respondent, Toyomoto Canada Supply Chain Inc. ("Toyomoto"), against the respondent, including Ming Su, and others, pursuant to s. 233(1) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[2] The issues have arisen because, on September 6, 2023, prior to any leave having been granted, Hougen unilaterally filed a notice of civil claim in Vancouver Action No. S236152 (the “NOCC”) against Ms. Su and other parties.

[3] Ms. Su now seeks an order that the NOCC is a nullity as it was commenced without leave, as required. In the alternative, Ms. Su seeks to strike the NOCC as disclosing no reasonable claim or as an abuse of process.

[4] Hougen objects to any striking of the NOCC. In the alternative, Hougen has filed a corresponding application by which it says that, if necessary, leave should be granted to file the NOCC *nunc pro tunc* to an earlier date.

[5] The defendants in the NOCC, other than Ms. Su, support the dismissal of the NOCC on the same grounds as Ms. Su.

BACKGROUND FACTS

[6] In August 2022, Hougen filed its petition in this proceeding, seeking leave to commence a derivative action in the name of Toyomoto.

[7] The background to the dispute concerns the management of Toyomoto, of which Hougen is a shareholder. Essentially, Hougen asserted that Ms. Su, a director of Toyomoto, mismanaged Toyomoto and diverted corporate opportunities and/or corporate assets to herself, her husband, Gouwie Han, and their companies (the “Corporate Defendants”). Details of the dispute are set out in *Hougen Co. Ltd. v. Su*, 2023 BCSC 1743 [*Leave Reasons*] at paras. 6–24.

[8] In late 2022, Hougen began seeking court dates for the hearing, although the earliest date obtained was in late April 2023. The April 23, 2023 hearing did not proceed, as no judge was available. New dates on May 18-19, 2023 were secured.

[9] On May 18, 2023, the hearing began before Justice Gibb-Carsley. Evidentiary issues arose in relation to Ms. Su's attempt to admit her Affidavit #3 sworn April 18, 2023 into evidence for the purposes of the hearing. Gibb-Carsley J. declined to allow Ms. Su's Affidavit to be filed for the purposes of the record. As a result, Ms. Su then applied for an adjournment, which the Court granted.

[10] On June 19-20, 2023, I presided over the hearing of the petition and reserved my judgment.

[11] The evidence before the Court indicated some conflict between the parties as to when Hougen or its director, Yongqin Gu, knew about or had discovered Ms. Su's relationship with the various Corporate Defendants: *Leave Reasons* at paras. 53–56. Mr. Gu is the other director of Toyomoto.

[12] As I will discuss in more detail below, at the hearing, the Court was also advised that there may be some "limitation issues", presumably arising from Mr. Gu's own evidence (*Leave Reasons* at para. 56) that he became aware of the Corporate Defendants and Ms. Su's relationship with them in the September or November 2021 timeframe.

[13] On August 28, 2023, Hougen's counsel wrote to Supreme Court (SC) Scheduling, confirming that he had advised the Court during the hearing of a "potential limitation issue that may arise" and that he had expressed concerns earlier to the Court that he would begin to have concerns if he had not received reasons for judgment by mid-late August 2023. Hougen's counsel asked if the Court could advise if reasons for judgment could be expected prior to September 8, 2023. He did not receive a response.

[14] On September 6, 2023, without obtaining leave of this Court to do so, Mr. Gu instructed Hougen's counsel to file the NOCC. Hougen's counsel, purporting to act

on behalf of Toyomoto, filed the NOCC in this Court. The NOCC contained all of the allegations for which Hougen had sought leave to advance in this petition proceeding.

[15] On September 11, 2023, Hougen's counsel delivered the NOCC to Ms. Su's counsel by e-mail. Counsel stated that Mr. Gu had decided that it was in Toyomoto's "best interests" to file the NOCC to maintain Toyomoto's causes of action. Counsel confirmed that no steps would be taken in the NOCC unless and until leave was obtained.

[16] Later, on November 27, 2023, Mr. Gu's Affidavit #4 was filed to the same effect. He stated that he caused Toyomoto to file the NOCC to preserve Toyomoto's claims against the defendants. He had concerns about the potential expiry of limitation periods with respect to certain aspects of the NOCC, if it was not filed at that time. Finally, Mr. Gu states that it was his honest belief that filing the NOCC was in the best interests of Toyomoto and was in keeping with his fiduciary duties as a director to Toyomoto.

[17] September 11, 2023 was the first time that Ms. Su became aware that Hougen intended to take and had taken the unilateral step of filing the NOCC. On September 12, 2023, Ms. Su's counsel advised Hougen's counsel that Ms. Su took the position that the NOCC was a nullity and had been improperly filed. Hougen's counsel did not respond.

[18] On October 5, 2023, I delivered the *Leave Reasons*. At para. 170, I granted leave to Hougen to commence an action in Toyomoto's name for most of the allegations. At para. 167, I also ordered that Hougen was required to post security for costs for the benefit of Ms. Su, Mr. Han and the Corporate Defendants at the same time as the filing of any notice of civil claim to be filed consistent with the *Leave Reasons*.

[19] On October 9, 2023, Ms. Su's counsel followed up with Hougen's counsel. Ms. Su demanded that the NOCC be discontinued, in which case the defendants

would waive costs. Ms. Su's counsel also advised that the filing of the NOCC was unauthorized by Toyomoto and a violation of the Court's order in terms of the posting of security.

[20] On October 10, 2023, Ms. Su appealed.

[21] On October 12, 2023, Hougen's counsel purported to amend the NOCC to delete those claims for which leave was not granted in the *Leave Reasons*. In addition, Hougen posted the security in Court, as required by the *Leave Reasons*.

[22] Hougen refused to discontinue the amended NOCC and file a fresh action based on the *Leave Reasons*.

[23] Shortly thereafter, Ms. Su's counsel sought to reserve dates before me to hear an application to strike the NOCC. Her application was filed November 10, 2023. Hougen's competing application was filed November 24, 2023.

DISCUSSION

[24] The substantial issue that arises is whether the NOCC should be struck or whether a *nunc pro tunc* order is appropriate to, *ex post facto*, validate its filing.

Nunc pro tunc

[25] If the Court finds that the NOCC was a nullity when filed or an abuse of process such that it should be struck, Hougen seeks an order granting leave to prosecute an action *nunc pro tunc* to June 19, 2023 (the first day of the hearing before me) or alternatively, to September 6, 2023 (the date of the filing of the NOCC).

[26] In *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [*Green*], Justice Côté, speaking for the majority, described the inherent jurisdiction of the court to issue an order *nunc pro tunc*, as follows:

> [85] The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil*

> *Procedure*: "An order is effective from the date on which it is made, unless it provides otherwise."
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> [Emphasis in original.]

[27] Rule 13-1(8)(b) of the *Supreme Court Civil Rules* similarly provides that, unless the court orders otherwise, an order takes effect on the day of its date.

[28] In *Green*, Côté J. further discussed what factors might be considered in granting an order *nunc pro tunc*:

> [90] In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice (… *Krueger v. Raccah* (1981), 12 Sask. R. 130 (Q.B.), at paras. 11-15; *Parker v. Atkinson* (1993), 104 D.L.R. (4th) 279 (Ont. Unif. Fam. Ct.), at p. 286; … [Other Citations removed]. None of these factors is determinative.
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> [91] Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a *nunc pro tunc* order, and is therefore an "insurmountable obstacle": *Holst v. Grenier* (1987), 65 Sask. R. 257 (Q.B.), at para. 10. According to the second view, such a failure is merely a procedural irregularity that can be corrected by a *nunc pro tunc* order: see, e.g., *CIBC Mortgage Corp. v. Manson* (1984), 32 Sask. R. 303 (C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.
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> [92] In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant *nunc pro tunc* orders where leave is sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A *nunc pro tunc* order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.
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> [93] Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made *nunc pro tunc* where leave is sought prior to the expiry of the limitation period. One very important caveat, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.

> [94] This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order: *McKenna*, at para. 27; *Parker*, at pp. 286-87; *New Alger Mines*, at pp. 570-71. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.
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> [Emphasis added.]

[29] As can be seen above in the Court's discussion in *Green* at paras. 93–94, while the Court has the inherent jurisdiction to grant *nunc pro tunc* orders, that discretion must be exercised with regard to the purposes of the statute and can be circumscribed by legislative intent.

Is the NOCC a nullity and should it be struck?

[30] The first point to be made in respect of this relief is that, even if leave was granted *nunc pro tunc*, that would not result in the filing of an action at an earlier date prior to the filing of the NOCC since no filing had taken place until September 6, 2023: *Ren v. Eastern Platinum Limited*, 2023 BCSC 706 [*Ren*] at para. 16. The same result would apply if the NOCC is struck as a nullity in that any subsequent backdating of the granting of leave would have no legal effect.

[31] The real issue is whether the NOCC should be struck as a nullity or saved by the Court's backdating of the granting of leave to September 6, 2023, when the NOCC was filed, so as to regularize or validate its filing.

[32] The analysis must start with a consideration of the legislative intention and purpose underlying the leave provisions in the *BCA*.

[33] A shareholder is not entitled to sue in the name of the company to enforce a right of the company, unless duly authorised by the company: *1115830 B.C. Ltd. v. Treasure Bay HK Limited,* 2022 BCCA 380 at para. 40.

[34] Hougen initially contended that Mr. Gu was authorized to file the NOCC in his capacity as a director of Toyomoto. However, Hougen ultimately conceded that Toyomoto had not authorized the filing of the NOCC by any corporate mechanism. In particular, Toyomoto has two directors and no meeting of the board of directors was convened.

[35] In fact, Mr. Gu was well aware that his efforts to cause Ms. Su, as the other Toyomoto director, to sue herself and the others had not been successful: *Leave Reasons* at paras. 111–114. That was the sole reason why Hougen began this petition proceeding seeking leave under the *BCA* to do so in Toyomoto's name. As Justice Smith noted in *550934 British Columbia Ltd. v. A.R. Thomson Group*, 2011 BCSC 279 [*A.R. Thomson #1*] at para. 8, that kind of deadlock or division in terms of what is in the best interests of a corporation is precisely why the statutory derivative action provisions were enacted in the *BCA*.

[36] When the NOCC was filed, Hougen and Mr. Gu were well aware that Hougen lacked the capacity as a shareholder to commence an action in Toyomoto's name and that Hougen had not obtained leave of the Court to do so, as was required. I reject Hougen's counsel's contention that some leeway should be given to Hougen that there was an "issue" regarding Mr. Gu's authority to instruct counsel that the NOCC be filed.

[37] Derivative actions were specifically created by the Legislature through statute, to provide a process to advance a cause of action in the name of a company. The clear legislative intent is that judicial oversight is required in respect of whether any such action that may be brought and, if so, on what conditions that can occur. It is a judicial decision as to whether the necessary prerequisite - leave of the Court - will be granted under the *BCA*: *Discovery Enterprises Inc. v. Ebco Industries Ltd.,* 1998 CanLII 7049 (B.C.C.A.) at para. 21; *A.R. Thomson #1* at paras. 8–12.

[38] As emphasized in *Green*, the intention of the legislature as requiring leave in these circumstances is a key consideration.

[39] Here, I have no difficulty concluding that the legislative intent in fashioning the derivative action leave provisions in the *BCA* is that leave is required to be obtained *before* such action is filed. Section 232(2) of the *BCA* provides that a complainant may, *with leave of the court*, prosecute a legal proceeding …". The corollary to that provision is that a complainant has *no capacity* to prosecute the legal proceeding if no leave is in hand.

[40] In my view, requiring leave before any action is commenced makes good commercial sense. The filing of legal proceedings has consequences, for not only the defendants, but the corporate plaintiff too. Allowing shareholders to commence proceedings in a corporation's name, as they alone see fit, even with the future intention to seek leave under the *BCA*, has the real potential to wreak havoc and cause confusion and uncertainty in corporate affairs. The prospect is that any number of "potential" claims may proliferate, which may or may not be found to be justified at a later time.

[41] If nothing else, such unilateral action by any shareholder takes place without any of the judicial oversight that is inherently required under the *BCA* leave provisions.

[42] This case is a prime example, where the NOCC was filed without regard to first complying with the posting of the security for costs, as was clearly the potential under s. 233(2) of the *BCA*. In addition, the NOCC included claims that were not authorized to be advanced by Hougen.

[43] This expression of the reason for the leave provisions was adopted by Smith J. in *A.R. Thomson #1* at para. 9, when he cited comments by Markus Koehnen, as he then was, in his text:

> [9] The reason for the requirement that leave of the court be obtained for a derivative action is well summarized in Markus Koehnen's, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 454:
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> > The better reason for requiring leave is that the plaintiff is assuming control over corporate decision-making and is committing corporate resources to the action. The decision to bring an action requires corporate actors to balance risks and apply business judgment. The

> strength of any claim must be balanced against the financial and management resources required to pursue the law suit and against other business risks that the law suit might entail. A corporation should not be deprived of this decision-making ability without some safeguard.

[44] Ms. Su refers to many cases where court actions were commenced, but where leave had not been granted, as required. Those pleadings were struck as disclosing no reasonable cause of action: *Goldstream Resources Ltd. (Re)*, 1986 CanLII 1042 (B.C.S.C.); *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.*, 2017 BCCA 405; and *Wang v. Epoch Press Ltd.,* 2017 BCSC 136 at paras. 23–24 and 41. Those case authorities were considered in *Treasure Bay HK Limited v. 1115830 B.C. Ltd.,* 2022 BCSC 761, where Justice Brongers stated:

> [31] All of these cases related to derivative proceedings where the existence and applicability of a statutory leave requirement could not reasonably be disputed. They demonstrate that summary dismissal or a stay of proceedings may be appropriate for derivative actions brought without leave when they are clearly subject to a leave requirement. …

[45] The same type of analysis was undertaken in *Owners, Strata Plan LMS 888 v. Coquitlam (City),* 2003 BCSC 941 [*Coquitlam City*], a case authority cited by Ms. Su. In that case, Justice Cohen, as he then was, was addressing the validity of an action commenced by the strata corporation which had not complied with the statutory prerequisites in obtaining owner approval to do so. Similar to what is stated in *Green*, at paras. 31–33, Cohen J. began with a consideration of the interpretation of the statutory provisions which required owner approval before an action could be brought. At para. 39, Cohen J. rejected the plaintiff's contention that the statute contained only procedural requirements.

[46] In *Coquitlam City* at para. 41, Cohen J. held that non-compliance with the statute resulted in the legal proceeding being a nullity.

[47] Hougen relies on *A.R. Thomson #1,* where Smith J. found that the action had been commenced without the necessary corporate approvals. At paras. 8–12, he emphasized that, otherwise, the matter could only proceed with leave under the *BCA*. At para. 13, the Court stayed the action until a leave application could be

brought, which might allow the action to continue. Some months later, leave was granted to continue certain claims in the action: *550934 British Columbia Ltd. v. A.R. Thomson Group*, 2012 BCSC 1332 at para. 140 [*A.R. Thomson #2*].

[48] I am not convinced that the reasoning and result in *A.R. Thomson #1* applies here. Justice Smith does not seem to have grappled with the validity of the action that had been commenced without leave in terms of the legislative intent, prejudice and any other factors. The same can be said for the Court's conclusion in *A.R. Thomson #2,* in terms of the validity of the action and whether, as sought here, the Court could "bless" the action *ex post facto* either through a *nunc pro tunc* order or otherwise.

[49] Similarly, Hougen also relies on *Anderson v. Envoy Realty Ltd.*, 2002 BCCA 10. In that case, an appeal had been launched by the corporate appellant without proper corporate approvals. Justice Huddart declined to dismiss the appeal, relying in part on the fact that the appeal had merit; rather, she stayed the appeal pending the shareholder taking steps to obtain approval: para. 31.

[50] As before, in my view, the legislative intent under the *BCA* is that leave will be required *before* any action is filed. This requirement is not attenuated by the fact that Hougen had brought the necessary application for leave and was waiting for reasons.

[51] Ms. Su says that a *nunc pro tunc* order should not be granted since it would contradict the express requirements of the statute which requires leave prior to filing the action.

[52] She cites Judge Beckett's decision in *Parker v. Atkinson*, 1993 CanLII 9404 (O.N.S.C.) [*Parker*], in which the court relied on *Krueger v. Raccah,* 1981 CanLII 2106 (S.K.K.B.) [*Krueger*]. Both of these cases were referenced at para. 90 of *Green*, reproduced above, as supporting Côté J.'s summary of various factors that may support a *nunc pro tunc* order.

[53] At para. 19(5) of *Parker*, the court states that the power to grant an order *nunc pro tunc* should be exercised sparingly. At para. 19(2) of *Parker*, relying in part on *Krueger,* the court states that the power to grant an order *nunc pro tunc* should not be exercised to correct a default which is due to the noncompliance of a statutory directive.

[54] In *Krueger*, at para. 8, the court found that an action commenced without obtaining the necessary leave was not an irregularity, but a "substantive failure which resulted in a nullity". On the issue of *nunc pro tunc*, at para. 11 of *Krueger*, the court stated:

> However there remains, in my view, considerable uncertainty, as to whether the power is sufficiently broad to encompass the grant of leave to bring action; indeed I very much doubt it is. But in view of the conclusion I have come to it is neither necessary nor desirable, I think, to comment further.
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> (b) Even if the power to grant an order *nunc pro tunc* was so broad as to permit the court to grant leave retrospectively to bring action, I have rather strong reservations about whether that power could or should be used where its exercise would in its effect serve to revive that which is a nullity owing to non-compliance with a statutory directive;
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> (c) Moreover, a limitation period has intervened between the commencement of the action and the application for leave altering materially the rights of the parties. The potential for prejudice to one of the parties will be apparent immediately. This was fatal to a similar application in *G.B. Wood Ltd.; Spivak v. Lee* (supra.)

[55] *Krueger* has been considered in BC case law. In *L.R.V. v. A.A.V.*, 2004 BCSC 1696, at para. 14, Justice Martinson reproduced the argument of the respondent referring to the case as supporting that a *nunc pro tunc* order should not be used to revive that which is a nullity. At para. 42, Martinson J. agreed with "the general analysis of the remedy" found in *Krueger.*

[56] The court in *Parker* also referred to *BP Exploration Canada Limited v. Hagerman,* 1978 CanLII 668 (A.B.K.B.), where the court found that an appeal had not been properly brought as required by a statutory provision:

> [24] A court has an inherent jurisdiction to validate proceedings which had been found to be ineffective by reason of some slip or oversight, having been made in the conduct of proceedings, to ensure against injustice by granting a "nunc pro tunc order", but this applies only to supply an omission in the

> record of action taken but mistakenly not recorded rather than to supply the omitted action: *Hogarth v. Hogarth,* [1945] O.W.N. 448, [1945] 3 D.L.R. 78, affirmed [1945] O.W.N. 617, [1945] 3 D.L.R. 750 (C.A.).
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> [25] What I am faced with here is not an omission or a mistake in the record of an action but an omission of an act required by statute, and nowhere can I find any inherent power in a court to correct a default of that nature regardless of what injustice may seem to follow.

[57] Finally, Ms. Su refers to *Sedgwick v. Edmonton Real Estate Board Co-Operative Listing Bureau Limited (Realtors Association of Edmonton)*, 2022 ABCA 264 [*Sedgwick*]. In *Sedgwick*, the court was considering the viability of an appeal when the appellant had not been granted prior permission to do so by the appeal court, where such permission was clearly required. In response, the appellant sought a *nunc pro tunc* order to regularize the appeal proceedings.

[58] Beginning at para. 80 of *Sedgwick*, the court considers *nunc pro tunc* relief as discussed in *Green*, highlighting para. 94 of *Green* that emphasized that such relief cannot be used to circumvent or defeat the will of the legislature. The court found that the lack of permission in that case was fatal:

> [84] As is evident from these cases, the relatively bright line test behind *nunc pro tunc* orders is that they are extraordinary powers to be used sparingly and not to defeat the general purposes of enactments such as leave / permission requirements. The Legislature is presumed to have been aware of the possibility of *nunc pro tunc* order (and the rest of the common law): see eg *Saskatoon (City) v The Canadian Nationalist Party Inc*, 2021 SKCA 22, [2021] SJ No 56 (QL), *Green* at para 94. If the legislation does not expressly or implicitly allow for such orders as a substitute for prior grant of permission to appeal, this Court can take the hint. This bright line test, in our view, applies to this case.
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> [85] Permission to appeal was not obtained in this case. It was required by the *Alberta Rules of Court*. The appeal is dismissed for that reason alone.
> ...

[59] In *Ren* at paras. 17–18, Justice Gomery doubted that the *BCA* conferred powers on the Court to affect the rights of the parties to a derivative action – such as to grant leave *nunc pro tunc* that could affect a later determination of limitation issues.

[60] Hougen asserts that, if there is a "technical issue" with Mr. Gu's authorization to file the NOCC, it should be treated as an irregularity. I disagree.

[61] The *BCA* provides that leave is required to commence any derivative action. The Court exercises a gatekeeping function and such a function is necessary to ensure that any legal proceedings are appropriate in terms of it being in the best interests of the corporation as required by the *BCA*, s. 233(1)(d).

[62] The comments found in *Sedgwick* are apt here:

> [69] The appellant proposes a backstop thesis that the panel may grant permission *nunc pro tunc* but, as noted below, doing so would risk reducing the permission requirement imposed by the Legislature to a dispensable irregularity, rather than an effective gate keeping decision as the Legislature intended.

[63] Hougen was at all times aware that, unless the Court granted leave, it had no authority to commence an action in the name of Toyomoto. Any "irregularity" on Hougen's part was intentional, a consideration that runs against the granting of any *nunc pro tunc* order: *Green* at para. 90.

[64] To bless Hougen's unilateral actions in this case would invite any shareholder to file an action as a "placeholder" action pending either forming the intention of seeking leave under the *BCA*, or even while the leave proceedings were extant, as was the case here. As I discussed earlier in these reasons, this state of affairs could only be a source of confusion, controversy and uncertainty for a corporation and its stakeholders, a result that could not have been intended by the Legislature.

[65] Hougen's unilateral action is difficult, if not impossible, to reconcile with the fact that it had expressly sought leave of the Court and was waiting for the Court's decision at the time.

[66] Hougen asserts that the Court and the court process is to blame for its "need" to file the NOCC when it did. Hougen refers to *Couture v. Bouchard* (1892), 21 S.C.R. 281, where Justice Taschereau refers to the maxim *actus curiae neminem gravabit*. That maxim is to the effect that no delay of the court should result in injury

to a party. *Couture* and this maxim were also cited at paras. 86 and 90 of *Green*, as above.

[67] Hougen's assertion in relation to the Court requires some discussion.

[68] Firstly, if there is any urgency in having an application heard, it is incumbent upon the moving party to seek early dates from the Court. I am not aware that Hougen advanced such a request based on urgency in respect of its efforts to obtain court dates, including the three hearing dates that were scheduled.

[69] Secondly, at the conclusion of the hearing on June 20, 2023, I was advised of "potential limitation issues", in relation to the timing of Mr. Gu's discovery of Ms. Su's relationship with the Corporate Defendants. However, it was apparent that any "limitation issues" were hotly contested and the factual basis for any such issues was not apparent. At the conclusion of the hearing, Hougen's counsel reiterated his "concerns" regarding that issue. He then stated that, if leave was granted, and no action had been filed by sometime in "August or later", the Corporate Defendants may raise limitation issues in the action. Counsel indicated that he did not intend to ask for reasons for judgment within any particular timeframe, but he emphasized his concerns about a timely filing of any claim to avoid any "potential issues". Finally, he indicated that "if we were to get into August in any significant way, I may need to consider what to do in that event if [we are] still waiting for reasons".

[70] By late August 2023, Hougen had not yet received the *Leave Reasons*. On August 28, 2023, Hougen corresponded with SC Scheduling. Unfortunately, Hougen did not receive a substantive reply and that was no doubt as a result of its email being missed within the huge volume of correspondence that SC Scheduling gets every day. However, Hougen did not pay heed to the automated reply from SC Scheduling that, if the matter was urgent, counsel should contact them by phone. Hougen's counsel did not do that.

[71] In addition, it is always the case that the Court deals with urgent matters. Despite the chronic shortage of judges in our Court, court staff do not ignore

requests to attend for urgent applications or even attendances before specific presiders. For obvious reasons, the Court does its best to consider those types of matters given such circumstances.

[72] When Hougen made the unilateral decision to file the NOCC on September 6, 2023, its counsel had not directly contacted SC Scheduling to arrange such an urgent hearing (in fact, I was sitting at Vancouver Law Courts during the week of September 11-15, 2023). At no time was the Court, or I, made aware that Hougen could not wait any longer and required an immediate decision. No explanation for that lack of effort has been advanced.

[73] In my view, the above circumstances are such that Hougen itself can be faulted for not seeking an immediate hearing before the Court to address the urgency that it considered had arisen by reason of any looming limitation period.

[74] Similar comments were made in *Green* at paras. 99–100 to the same effect, when the Court found that the failure to obtain leave was a result of the person's own decision and that is was not acceptable or reasonable to simply assume that the court would grant leave and that it would exercise its discretion to grant a *nunc pro tunc* order to remedy the lack of prior authorization. In particular, at para. 100, the Court noted that the plaintiffs could have requested an expedited hearing, just as Hougen could have done when it did not get an email response from SC Scheduling. That lack of effort to obtain leave was found to not justify overriding the legislative intent by granting a *nunc pro tunc* order: *Green* at para. 104.

[75] Frankly, it is still not clear to me what, if any, limitation issues have arisen, that might ground the Court's jurisdiction to provide Hougen relief. As I stated, the facts regarding Mr. Gu's discovery of Ms. Su's relationships with the Corporate Defendants are quite uncertain at this stage and are very much a contested point between the parties.

[76] Finally, there is the matter of prejudice.

[77] In *Coquitlam City*, Cohen J. also addresses arguments regarding prejudice. He rejected that a lack of prejudice was a complete answer to the issue:

> [40] I also agree with defence counsel that merely because there may be no prejudice to a defendant in allowing a strata corporation to commence an action and obtain the requisite approval afterward, that does not satisfactorily answer the question of where a strata corporation obtained the power to commence the action in the first place. As defence counsel correctly argued, in my view, the plaintiff does not have capacity or status to act as the representative of the owners until the 3/4 vote has been obtained. While this result may appear harsh in the circumstances of the instant case, it is not, in my view, the function of the court to fashion a remedy which will cure a strata corporation's failure to acquire the capacity to sue by complying with the clear and unambiguous requirements of the *SPA*.

[78] Even so, I accept that the matter of prejudice is a relevant consideration: *Green* at para. 90.

[79] Hougen asserts that Ms. Su, Mr. Han and the Corporate Defendants will not suffer any prejudice if leave is granted *nunc pro tunc* to the earlier date(s). Essentially, Hougen argues "no harm, no foul" in that, having later been granted leave, and satisfying the conditions of leave, the defendants are in no worse position.

[80] In *Ren*, the Court granted leave for the complainant to sue the former president, Ms. Hu, on behalf of Eastern Platinum Limited; meanwhile, leave was sought to commence a derivative action against several present and former directors. Out of concern that a claim against Ms. Hu may be precluded by the statutory limitation period, the complainant asked the Court to grant the leave *nunc pro tunc* to the date when the initial petition was filed. Justice Gomery declined to grant any leave *nunc pro tunc* given the lack of involvement in the leave application by Ms. Hu and her potential limitation defences:

> [19] Turning to the second point, Ms. Hu is not a party to this proceeding. Two of the factors considered in deciding whether to grant an order *nunc pro tunc* are the presence of prejudice to the opposing party and whether "the timing of the order is merely an irregularity"; *Green* at para. 90. <u>These factors assume the presence of an opposing party who has had an opportunity to make submissions, and a case in which the issue is simply one of timing. In this case, Ms. Hu has not had notice of the request and an</u>

> opportunity to address the question of prejudice. If I could make an order that would be legally effective to affect the running of the limitation period in the derivative action, it would deprive Ms. Hu of a substantive defence to the claim against her. It would not be a simple matter of correcting an irregularity. I would not exercise my discretion to make such an order.
>
> [20] Accordingly, I decline Ms. Ren's request that I grant leave *nunc pro tunc*.
>
> [Emphasis added.]

[81] The Corporate Defendants raise similar issues here, in that a *nunc pro tunc* order would deprive them of limitation defences which now benefit them. At the leave application, Hougen objected to any participation on the part of the Corporate Defendants, taking the position that they had no standing. That position was not contested and the Corporate Defendants made no submissions at the hearing, save as to what conditions might be imposed if leave was granted: *Leave Reasons* at para. 149.

[82] It is, therefore, as in *Ren*, not simply a matter of timing. Nor is there any merit to Hougen's argument that the Corporate Defendants were not strangers, that they "knew about" Hougen's potential claim and that Ms. Su is married to Mr. Han and had relationships with the Corporate Defendants.

[83] Ms. Su similarly alleges prejudice by any *nunc pro tunc* order, as it may deprive her of limitation defences that may have now become available to her. She emphasizes too that she was not made aware at any time of Hougen's intention to file the NOCC.

[84] As Hougen's counsel himself puts it, it is very much contested that there are any limitation issues between the parties to the derivative action and it is certainly not my task to determine that matter on this application. In that event, I am simply unable to fully comprehend what impact, if any, a *nunc pro tunc* order would have on the rights as between the parties.

[85] The fact remains that time has expired both before and since this petition proceeding began in August 2022 that may or may not affect the rights between the

parties. The defendants could suffer prejudice by a *nunc pro tunc* “blessing” of the filing of the NOCC. I am not convinced that such relief is appropriate given that actual or potential prejudice may result.

CONCLUSION

[86] I conclude that the filing of the NOCC is a nullity and should be struck, as having been filed without leave of the Court under the *BCA* provisions. In that event, it is not necessary to consider Ms. Su’s application to strike the NOCC as an abuse of process, although that legal basis would have been equally available in the circumstances.

[87] I decline to exercise my discretion to maintain the filing of the NOCC in the context of a *nunc pro tunc* order granting leave back to September 6, 2023. Hougen’s notice of application filed November 24, 2023 is dismissed.

[88] Ms. Su seeks special costs of these applications, contending that Hougen’s conduct is worthy of rebuke and justifies such an award of costs. I agree. At the end of the day, Hougen has acted unilaterally in a manner and with knowledge that it had no right to cause Toyomoto to file the NOCC. That unilateral action has caused some expense, when the entire matter could have been avoided earlier. Ms. Su is awarded her special costs for the applications, as sought.

“Fitzpatrick J.”