IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Petersen v. Hawley,*
2024 BCSC 472

Date: 20240321
Docket: S209349
Registry: Vancouver

Between:

Kelly Petersen

Petitioner

And

Kerry Hawley, Vital Holdings Ltd. and Mega Cranes Ltd.

Respondents

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Petitioner:	C. Veinotte C. Brooks
Counsel for the Respondent, Kerry Hawley:	C.D. Rodocker G. Palm
Counsel for the Respondents, Vital Holdings Ltd. and Mega Cranes Ltd.:	T. Goepel
Place and Dates of Hearing:	New Westminster, B.C. September 20-22, 2023
Place and Date of Judgment:	Vancouver, B.C. March 21, 2024

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Introduction

[1] This application is yet another in a long line of applications and petitions in this Court between Mr. Kelly Petersen and Mr. Kerry Hawley.

[2] The applicant and plaintiff, Mr. Petersen, seeks interim relief from oppression and asks the Court to make the following orders:

> 1. The Defendants Kerry Hawley (“Mr. Hawley”), Vital Holdings Ltd. (”Vital”) and Mega Cranes Ltd. (“Mega Cranes”) deliver forthwith to counsel for Mr. Petersen all corporate books and records, including corporate tax returns, working papers, general ledgers, receipts, correspondence, invoicing, and any bills of lading, made since June 22, 2020 to the date of judgment on this Application, and thereafter on an ongoing monthly basis until the date of Trial herein;
> 2. That Mr. Petersen receive his salary, bonuses and health care benefits from Mega Cranes from the date of the Order herein to the date of Trial;
> 3. Prohibiting the Defendants or any of them from disposing of or encumbering the assets of Vital and Mega Cranes except with the consent of Mr. Petersen, or further order of this Court; and
> 4. Prohibiting the Defendants or any of them from entering into any commercial transaction not in the ordinary course of Mega Cranes’ business, except with the consent of Mr. Petersen, or further order of this Court.

[3] Initially, Mr. Petersen also sought to be reinstated to his position as an officer of Vital and director and officer of Mega Cranes, but he abandoned that relief at the commencement of this hearing.

[4] The respondent defendants oppose all of the various interim relief sought on the basis that Mr. Petersen has not met the test in order to be granted such remedies.

[5] By consent, the oppression proceeding has now been converted to an Action. A trial date had been scheduled for April 2024 but has since been adjourned and a new date is scheduled for June 2024. At the time of the hearing, no examinations for discovery had occurred.

Background

[6] The parties have provided a great deal of evidence and material by way of affidavits. They also made detailed submissions, both oral and written, on the facts and the law they consider to be relevant. While I have considered all of the evidence, material, and the law, in these reasons I will focus on the facts and law that I consider to be most directly relevant.

[7] Mr. Petersen and Mr. Hawley are twin brothers.

[8] The Mega Group of Companies (“Mega Group”) is a privately-owned group of family companies which includes the corporate respondents, Vital Holdings Ltd. (“Vital”) and Mega Cranes Ltd. (“Mega Cranes”). As well, there are a number of other companies in the Mega Group, including MBS Structural Engineering Ltd., Mega Truck and Transportation Ltd., Mega Lift Ltd., Mega Building Systems Inc., Mega Structures Ltd. and Value Equity Ltd. (“Value”).

[9] Mr. Hawley founded Vital (then called Mega Cranes Ltd.) in 1984 with a single crane, which grew to eight to ten cranes by 1992. He was the sole beneficial shareholder of Vital until 1987 when his other brother Bill Hawley acquired 22% in the company. In 1992, Mr. Petersen returned from the United States and began working at Vital.

[10] There is no dispute that Mr. Hawley ran the operations and sales side of the business and Mr. Petersen ran the administrative side, including staffing, banking and the collection of accounts. For many years, the two brothers worked well together to manage the Mega Group.

[11] In 1994, a new B.C. company called Mega Cranes Ltd. ("Mega Cranes #2") was incorporated to keep asset ownership separate from the operations side of the business. Mega Cranes #2 was wholly owned by Vital and was the operating entity for the business until 2002, at which point the current iteration of Mega Cranes was incorporated as a federal corporation under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*].

[12] Mega Cranes is the core operating company. It is in the business of providing crane services and equipment for construction projects. It is a very successful company with millions of dollars in annual revenue.

[13] Vital is the parent operating company which wholly owns Mega Cranes. There is much dispute over how much interest each brother has in Vital. Mr. Hawley says that he is the sole director and operating mind of Vital and Mega Cranes, and that Mr. Petersen only holds a 10% interest. Mr. Petersen asserts that he owns 50% of Vital.

[14] Mr. Petersen became a shareholder of Vital in 1994. At that time, Mr. Hawley owned 78% of Vital and Bill Hawley owned 22%. Mr. Petersen was given 5% with an additional 5%, totalling 10%, for the price of $27,500. Mr. Hawley says that Mr. Petersen received his full 10% interest despite never paying the purchase price of $27,500. In 2008, Mr. Hawley bought Bill Hawley's 22% interest in Vital, resulting in Mr. Hawley owning 90% of the shares and Mr. Petersen owning 10% of the shares.

[15] Mr. Petersen says that he is a 50% shareholder of Vital, which he says is a 100% shareholder of Mega Cranes. Mr. Petersen submits that because he is a 50% shareholder in Vital, he has an equal beneficial interest in Mega Cranes. It goes without saying that Mr. Hawley disputes this. Mr. Hawley says that he is the sole director of Vital and has been the only director of Vital since he bought out Bill Hawley’s interest. Mr. Hawley asserts that Mr. Petersen has never been a director of Vital.

[16] The Central Securities Register shows that in 1994, Mr. Petersen had a 10% interest in Vital with Mr. Hawley having 68% and Bill with 22%. Then, in 2000, it shows that Bill Hawley’s 22% interest was transferred to Mr. Hawley.

[17] Mr. Petersen deposes that in September 2012, he and Mr. Hawley agreed in writing to split the Mega Group of Companies 50/50. Mr. Petersen produced a handwritten document dated September 23, 2012, attesting to this agreement. It is not an official document of any sort. It states that Mr. Hawley is to receive $1.5

million before they split the companies. As well, there is only one signature at the bottom of this document. Mr. Hawley says $1.5 million was never paid by Mr. Petersen and as such he does not own a 50% interest.

[18] As well, Mr. Hawley points to a previous admission of Mr. Petersen on his interest in Vital. In August 2013, Mr. Petersen deposed in an affidavit relating to separate family law proceedings that he only had a 10% interest in Vital, to which he attached the Central Securities Register of Vital. He also deposed in this affidavit that he did not have a controlling interest in Mega Cranes or Vital and that Mr. Hawley is the sole director and directing mind of both companies.

[19] As noted, Mega Cranes is federally incorporated and Mr. Hawley claims he is the sole director and Mr. Petersen is an officer of the corporation. It appears from a document filed with Corporations Canada that Mr. Petersen was made a director of Mega Cranes on June 21, 2018, although Mr. Hawley has no specific recollection of that occurring.

[20] It is not disputed that Mr. Hawley founded Mega Cranes. Mr. Hawley deposes that Mr. Petersen's involvement in Mega Cranes has been minimal and intermittent. From approximately 2000 to 2012, Mr. Petersen focused primarily on other business projects and had very little to do with the operations of Mega Cranes because there were others who handled the administrative duties. Mr. Petersen became more involved in the Mega Cranes from about 2012 until about August of 2019. As before, Mr. Petersen handled primarily the administrative side of the business while Mr. Hawley continued to manage the operations and sales. Mr. Hawley asserts that Mr. Petersen was not equally running Mega Cranes with Mr. Hawley from the time of inception and was never more than a 10% shareholder.

[21] The brothers managed to work cooperatively to grow the Mega Group. However, tension between the brothers appears to have begun sometime in 2018 when Mr. Hawley decided to employ his daughter to work at Mega Cranes in an area that Mr. Petersen considered his domain.

[22] In August 2019, their relationship deteriorated further when Mr. Petersen publicly announced his decision to retire. Mr. Hawley says he was neither consulted about nor informed of this decision beforehand. Mr. Petersen says that there was an understanding that each could retire and be paid fairly for his interest. Mr. Petersen wanted Mr. Hawley to either buy out his share of the business or else that they would sell the business and split the profits. Mr. Hawley denies there was any such agreement.

[23] Mr. Petersen and Mr. Hawley's relationship became even more fractured after a heated argument in May 2020 and a physical incident in June 2020 which necessitated the police being called.

[24] Mr. Petersen refers to this incident as a *coup d'état* leading to his termination as an employee of Mega Cranes. Mr. Petersen was no longer receiving his salary (which he later said was in the form of draws) nor the bonuses and benefits that he had enjoyed since joining the company. Mr. Petersen also alleges that he was locked out of the business when Mr. Hawley changed locks to the offices, hired a security guard and replaced the companies' server.

[25] Mr. Hawley responds that in his capacity as the sole director of Vital, which is in turn the sole shareholder of Mega Cranes, he made the decision to remove Mr. Petersen as a director and officer of Mega Cranes. Mr. Hawley says the decision was based on the best interests of Mega Cranes. Given Mr. Petersen's stated intention to retire, his behaviour towards Mr. Hawley and others at the office, his improper use of company funds, and his threats to act to the detriment of Mega Cranes, Mr. Hawley felt that Mr. Petersen could not be trusted to act in the best interest of Mega Cranes. He felt that there was a risk Mr. Petersen could cause further damage to the company, and that having Mr. Petersen affiliated with Mega Cranes going forward was not workable. The issue of misappropriation of funds by Mr. Petersen for personal expenses is not something I need to decide for the purposes of this application.

[26] Mr. Petersen says his removal as an officer of Mega Cranes was unlawful. He did not receive notice of any Board meeting that he says he was entitled to receive as a 50% shareholder in both Vital and Mega Cranes.

[27] The parties agree that the central issue at trial will be the shareholdings that each brother has in Vital and Mega Cranes. As I have noted above, Mr. Petersen says he has a 50% interest in Vital, whereas Mr. Hawley says that Mr. Petersen only has a 10% interest. I am advised by counsel that I do not need to decide this issue in order to determine whether I ought to grant the orders being sought by Mr. Petersen.

[28] In terms of the orders sought, Mr. Petersen seeks a return to the *status quo* prior to June 2020.

[29] In regards to the provision of corporate documents sought in paragraph 1(a) of the orders sought, Mr. Petersen says that as a shareholder he is entitled to have access to the books and records of Mega Cranes as required by the *CBCA*. I note that Mr. Petersen also seeks “working papers, general ledgers, correspondence, invoicing, and bills of lading” made since June 2020.

[30] The respondents submit that, even if the Court were to accept that Mr. Petersen is a 50% shareholder, which the respondents do not accept, Mr. Petersen would not be entitled to all of the documents he seeks. As well, the respondents argue that this should instead be brought as a document production application under Rule 7-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[31] Although Mr. Petersen has not worked at either Vital or Mega Cranes since June 2020 and has abandoned the request that he be reinstated as a director and officer, he asks that his salary, bonuses and benefits be restored. Mr. Petersen says that prior to being removed from the business he received $200,000 per year plus a $25,000 bonus. He also received health benefits.

[32] The respondents say that there is no evidence to support that Mr. Petersen was receiving the income he seeks to have this Court restore. They submit that Mr. Hawley and Mr. Petersen received management fees and other equal payments

when they were both engaged in the affairs of the companies and the compensation was based on the work done by each of them. Further, the respondents argue that there was no agreement that Mr. Petersen would continue to be paid this compensation once he ceased to perform any work for the companies.

[33] Mr. Petersen submits that he is entitled to draws as a shareholder. However, he concedes that for the purpose of this application, he has not presented evidence such as tax returns, cancelled cheques or bank statements which could have easily been included to support his position. Rather, he relies on a spreadsheet purportedly created by Mr. Hawley during negotiations in 2022. I note that the spreadsheet shows an entry from 2004 indicating a yearly "salary" of $200,000 and $50,000 expenses.

[34] The respondents object to the use of this document on the basis that it is hearsay as there is no evidence to support when or by whom the document was drafted. As well, they argue that even if this evidence were accepted, it refers to "wages" and not "draws", which implies the brothers were compensated for work performed.

[35] The respondents argue that Mr. Petersen is not entitled to a salary or bonuses because he is no longer doing any work for the companies. As such, there is no oppression by virtue of him not being paid a salary. The respondents also submit that Mr. Petersen is not entitled to health benefits as he is no longer employed by the companies.

[36] In respect of the orders sought in paragraph 1(d) and (e) of his Notice of Application, Mr. Petersen submits that had Mr. Hawley not altered the *status quo* by removing him as an officer and director of Mega Cranes and an officer of Vital, he would have continued to have an equal say in the direction of the companies as he had since he joined in 1992. Mr. Petersen says Mr. Hawley should be prevented from taking any actions in Mega Cranes outside the normal course of its business pending trial.

[37] Mr. Petersen acknowledges that this amounts to an effective veto in terms of decisions surrounding the companies. No evidence was led on what the circumstances were prior to his departure from the companies. Mr. Petersen argues that if the *status quo* is not returned, Mr. Hawley may cause damage to the companies while in control and there is nothing stopping him from looting the companies.

[38] In response, the respondents submit that since Mr. Petersen's departure, both Mega Cranes and Vital have operated as usual, their revenues and earnings have increased and the office runs more smoothly. The work that was done by Mr. Petersen has since been delegated to others.

[39] There is no dispute that the brothers are unable to get along, at least since 2020. The respondents argue that given the irreconcilable differences, it would not be practical to make such an order.

[40] Mr. Hawley says that if such an order were made he would be forced to seek Mr. Petersen's consent for all his decisions, despite the fact that it is Mr. Hawley who actively runs the business and has always been the one responsible for the operations and sales side of the business. Mr. Hawley further points out that if Mr. Petersen were granted his relief sought, they would be destined to return to court to resolve any disputes relating to decision making. He says that such an order would effectively paralyze the business.

[41] As I have noted above, in the three short years since Mr. Petersen's departure from the Mega Cranes, there have been numerous applications and petitions filed with the Court.

[42] In September 2020, Mr. Petersen brought a petition in which he initially sought a declaration that Value was being run in an oppressive manner, contrary to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[43] The parties appeared before Chief Justice Hinkson in December 2020 during which Mr. Petersen sought the appointment of a receiver. In reasons indexed as

Petersen v. Hawley, 2021 BCSC 44, Hinkson C.J. dismissed the application on the basis that he was unable to find a strong *prima facie* case for oppression: at para. 71.

[44] At a subsequent hearing before Justice Branch in September 2021, Mr. Petersen then sought an order to have Value liquidated, pursuant to s. 324 of the *BCA*. In response, Mr. Hawley applied for an order that the petition be converted to an action and put on the trial list. In reasons indexed as *Petersen v. Hawley*, 2021 BCSC 2348, Branch J. ordered that Value be wound up, citing irreconcilable differences between the brothers, and declined to convert the petition to an action. The Court of Appeal affirmed Branch J.'s decision in *Petersen v. Hawley*, 2022 BCCA 169.

[45] Finally, the parties were before Justice Wilson in April 2022 on two separate matters. Mr. Petersen brought a petition for oppression and sought a remedy that the share register of Vital be corrected to reflect his 50% interest in the company. Mega Cranes and Mr. Hawley brought applications to strike Mr. Petersen's pleadings as an abuse of process. Mega Cranes argued that Mr. Petersen's pleadings were inconsistent with his position in a previous family law proceeding, including his 2013 affidavit mentioned above. In particular, that Mr. Petersen had previously sworn to only having a 10% interest in Vital yet was then asserting a 50% interest. Justice Wilson dismissed the applications to strike in reasons indexed as *Petersen v. Hawley*, 2022 BCSC 622, concluding "that the integrity of the administration of justice will not be undermined by allowing Mr. Petersen to proceed with his claim as pleaded": at para. 58. In declining to find an abuse of process, Wilson J. found the following:

> [45] While it could be argued that Mr. Petersen was perhaps being coy with the wording of his affidavits in the divorce proceeding, it is at least possible for a court to conclude that Mr. Petersen's shareholding increased from 10% to 50% subsequent to the divorce proceeding, in which case there may be no inconsistency at all. His evidence in the divorce proceeding may have been true at the time he swore it. Circumstances may not have remained static. His prior pleading is not demonstrably contradictory to the position he advances in this litigation.
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> …

> [56] However, the applicants' arguments require me to reject Mr. Petersen's explanations and to assume a certain interpretation of the divorce documents. It is not apparent that Mr. Petersen's positions are necessarily contrary, and it would be inappropriate for me to make what would amount to nothing more than a pre-emptive credibility assessment.

[46] There is no dispute that this application is being brought over three years after Mr. Petersen left the Mega Cranes in 2020. It is also not disputed that this application was heard 14 months after it was filed in July 2022, which itself was three years after the initial petition.

[47] The respondents submit that the application should have been brought in a timely manner and the Court has the discretion to dismiss this application solely on this basis.

Legal Framework

Oppression Remedy

[48] In *Canada Snow Mountain Investments Co. Ltd. v. Miller Springs Ltd.*, 2015 BCSC 1117 [*Snow Mountain*], Madam Justice Fleming provided a helpful summary of the oppression remedy:

> [65] The oppression remedy is an equitable one that focuses on harm to the legal and equitable interests of shareholders and other stakeholders caused by the oppressive or unfairly prejudicial conduct of a company or its directors. It seeks to ensure fairness and is fact specific. Importantly, it protects the interests of shareholders *qua* shareholders, and is not intended to be a substitute for an action in contract, tort or misrepresentation (*Stahlke v. Stanfield*, 2010 BCSC 142, at para. 9).
>
> [66] What is just and equitable is judged by the reasonable expectations of the parties. The concept of reasonable expectations is both objective and contextual. While it is impossible to catalogue all of the situations where a reasonable expectation may arise, what is clear from the jurisprudence is not every unmet expectation gives rise to a claim.
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> [67] The Supreme Court of Canada's decision in *BCE Inc*. *v*. *1976 Debentureholders,* 2008 SCC 60, mandates a two-step inquiry in assessing oppression claims. The first question to be answered is: does the evidence support the reasonable expectation asserted by the claimant? If so, the second question is: does the evidence establish that the claimant's reasonable expectation was violated by conduct that was oppressive or unfairly prejudicial?

> [68] Determining reasonable expectations is also a two-step process. First, the complainant must set out his or her subjective expectations, *qua* shareholder. Second, the court must determine objectively whether those expectations were reasonable.
>
> [69] In *BCE* the court identified several factors that may be considered in making that determination including general commercial practice, the nature of the corporation, the relationship between the parties, past practice, representations and agreements, the fair resolution of conflicts between shareholders, and the risks willingly assumed by the claimant and the steps he could have taken to protect himself, such as negotiating a better bundle of rights against the corporation (at para. 72).

Interim Relief from Oppression

[49] Mr. Petersen seeks various forms of interim relief from oppression under the authority of the *CBCA* and the *BCA*. The relevant section of the *CBCA*, with respect to the federally incorporated respondent, Mega Cranes, is s. 241. The relevant section of the *BCA*, with respect to the provincially incorporated respondent, Vital, is s. 227.

Interim Relief

[50] For the purpose of this application, the relevant sections of the *CBCA* and *BCA* are analogous. Under *CBCA*, s. 241(3) and *BCA*, s. 227(3), a court may order either interim or final relief “it thinks fit”, in the case of the *CBCA*, or “it considers appropriate”, in the case of the *BCA*. Under this broad power, several such orders include those restraining the corporation or company from the complained of conduct, regulating a corporation’s or company’s affairs, appointing directors in place of or in addition to current directors, requiring a corporation or company to produce financial statements, or compensating an aggrieved person: see *CBCA*, s. 241(3); *BCA*, s. 227(3).

[51] The test for granting interim relief in an oppression proceeding is the same under the *CBCA* and under the *BCA*, and is the same test as that for granting an interim injunction: *Trainer v. Tractorhill Sales Ltd.*, 2018 BCSC 2043 at para. 36; *Abougoush v. Abougoush*, 2015 BCSC 398 at para. 36.

[52] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR*], the Supreme Court of Canada noted that granting an interim injunction is an extraordinary remedy. Under the *RJR* test, the applicant must establish: (1) there is a serious question to be tried, (2) irreparable harm will occur if the relief is not granted, and (3) the balance of convenience favours the granting of the relief: *Abougoush* at para. 37.

[53] In British Columbia, the *RJR* test has been reformulated with only two prongs: *Coburn v. Nagra*, 2001 BCCA 607; *British Columbia (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 345, 1986 CanLII 171 (C.A.). In this two-part assessment, the applicant must demonstrate: (1) that there is a serious issue to be tried, and (2) that the balance of convenience favours granting the relief sought: *Mayer v. Mayer*, 2014 BCSC 1850 at para. 7; *Morrisonn v. Kaaringten*, 2022 BCSC 2413 at para. 6. The two-part and three-part tests are generally of no practical difference: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 93. The irreparable harm consideration is "subsumed into the balance of convenience analysis": *Abougoush* at para. 38. Whether or not irreparable harm makes up its own step in the analysis, it remains "at the very least an important component of the test": *McIsaac v. David*, 2019 BCSC 931 at para. 53.

[54] In *Short v. Ewachniuk*, 2018 BCSC 1686, Justice Matthews described the test as follows:

> [26] In *Mayer v. Mayer* this court noted that interim injunctions are extraordinary discretionary remedies not to be handed out lightly. Often the balance of convenience is the focus of the argument. The balance is between the risk to the applicant that if the immediate remedy is withheld, rights will be so seriously impaired that it will be impossible to afford an adequate remedy at trial, against the rights of the respondents that if an immediate remedy is granted, they may suffer harm by being prevented from engaging in what proves to be a lawful, proper conduct.
>
> [27] Having said that, whether there is a serious question to be tried is a low threshold. The applicant must satisfy the court that its claim is neither frivolous nor vexatious, and the court should not attempt to resolve contested factual matters on an interim injunction application. *RJR MacDonald* at paragraphs 337 to 338, *Abougoush v. Abougoush Collision Inc*. at paragraph 40, *Civelli v. Pacific Hunt Energy Corp*., 2015 BCSC 1051, at paragraph 59.

> [28] Irreparable harm refers to the nature of the harm, not its magnitude: *RBC Dominion Securities Inc. v. Macdonald,* 2013 BCSC 992, at paragraph 25. Irreparable harm is harm that cannot be compensated by an award of damages. Such circumstances arise when damages cannot be calculated, as in damages to reputation; or are not reversible, such as permanent market loss; or where damages would not collectible.

Serious Issue to Be Tried

[55] The first hurdle an applicant must overcome is to show there is a serious issue to be tried. As described below, the substance of this stage of the test depends on whether the injunction is categorized as prohibitive or as mandatory.

Prohibitive vs. Mandatory Injunctions

[56] Justice Masuhara explained the difference between a prohibitive and a mandatory injunction in *TELUS Communications Inc. v. Shaw Communications Inc*., 2020 BCSC 1354 [*TELUS*]:

> [49] … A prohibitive interlocutory injunction is the usual type of pre-trial interlocutory relief which takes the form of an order restraining the defendant from engaging in conduct for a limited period of time. In contrast, a mandatory injunction takes the form of an order requiring the defendant to carry out some positive obligation. The distinction between the two types of injunctions is important as there is a different legal threshold at the first stage of the approach to an interlocutory injunction.

[57] To put the difference another way, a prohibitive injunction creates a negative obligation, restraining a person from acting in a certain way, whereas a mandatory injunction creates a positive obligation, requiring a person to act in some way.

[58] While the test for a prohibitive injunction is the typical *RJR* test, in the case of a mandatory injunction, the first step of the *RJR* test is modified. When seeking a prohibitive injunction, in assessing whether there is a serious question to be tried, the applicant need only show a *prima facie* case. However, when seeking a mandatory injunction, the applicant must show a "strong *prima facie* case": *TELUS* at para. 52.

[59] In *TELUS*, Masuhara J. outlined the two tests as follows:

> [50] While prohibitive injunctions are subject to the often cited test articulated in *RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311[RJR], the test for granting a mandatory injunction is subject to a modified RJR test, which, as laid out in *R v. Canadian Broadcasting Corp*., 2018 SCC 5[CBC], imposes a higher threshold at the first stage.
>
> [51] Under the *RJR* test the application judge assesses whether: (1) there is a serious issue to be tried, (2) the applicant has established it will suffer irreparable harm if an injunction is refused; and (3) the balance of convenience favours granting the injunction, in so far as the applicant would suffer greater harm from the refusal of the interlocutory injunction than the respondent would if the injunction is granted: *RJR* at pp. 334-35.
>
> [52] However, where the applicant seeks a mandatory interlocutory injunction, the first stage question is whether "a strong prima facie case that it will succeed at trial" as been established: *CBC* at para. 15. As discussed in *CBC*, "[t]his entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": para. 15.

[60] Justice Brown, writing for the Supreme Court of Canada in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, justified the higher threshold and modified test as follows:

> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.

[61] Justice Brown also noted that distinguishing between a mandatory and prohibitive injunction can be difficult:

> [16] … While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive

> injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions". … In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.
>
> [Footnotes omitted.]

The Balance of Convenience

[62] Where the plaintiff establishes either a serious issue to be tried, or, under the modified *RJR* test for mandatory injunctions, a strong *prima facie* case, the court then considers whether the balance of convenience weighs in favour of granting relief. As set out in *Short* at para. 29, in assessing the balance of convenience, the court considers:

a) the adequacy of damages as a remedy if the injunction is not granted;

b) he likelihood that if damages are finally awarded, they will be paid;

c) which of the parties acted to alter the balance of their relationship and so affect the status quo;

d) the strength of the applicant's case;

e) any of the other factors affecting the public interest; and

f) any other factors affecting the balance of justice and convenience.

Discussion

[63] I will begin by stating that I agree with the comments expressed by Chief Justice Hinkson in *Petersen v. Hawley*, 2021 BCSC 44, that while each brother blames the other for the differences that have arisen between them, it is unnecessary for me to decide who to believe.

[64] There is no question that they are unable to reconcile their differences. This was a sentiment also expressed by Justice Branch and Justice Wilson.

[65] In determining whether to grant the interim remedies sought by Mr. Petersen, I will conduct my analysis applying the modified *RJR* test.

Is there a serious issue to be tried?

[66] Mr. Petersen submits that the orders sought in paras. 1(a) and 1(c) of his Notice of Application are prohibitive because he seeks to restore the *status quo* as it was on June 20, 2020. He agrees with the respondents that the orders sought in paras. 1(d) and 1(e) are mandatory in nature, attracting the higher standard of a strong *prima facie* case at this stage.

[67] However, I find that all of the relief sought by Mr. Petersen is in fact mandatory in nature, requiring that he show a strong *prima facie* case. In paras. 1(a) and 1(c), Mr. Petersen asks the Court to compel the respondents to provide him with various corporate documents as well as to restore his salary, bonuses and health benefits. As stated in *Canadian Broadcasting Corp.* at para. 15, a mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be". I agree with the respondents that they cannot "prohibit" themselves into making these events occur. The relief sought requires the respondents to take a positive course of action. Therefore, I find that the relief sought in 1(a) and 1(c) are in fact mandatory in nature and as such, Mr. Petersen must show a strong *prima facie* case that he will succeed at trial on these issues as well.

[68] In determining whether Mr. Petersen has a strong *prima facie* case, the Court must assess his reasonable expectations. As I understand it, his expectations are premised on his claim that he has a 50% interest in both Vital and Mega Cranes.

[69] The test to determine a shareholder's reasonable expectations is "a modified objective test that asks what a shareholder in the applicant's position would reasonably expect to have": *Gierc Jr. v. Wescon Cedar Products Ltd.*, 2021 BCSC 23 at para. 72. In *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69 at paras. 72–84, the Supreme Court of Canada described certain factors relevant to determining whether a shareholder's expectation is a reasonable expectation, including:

a) general commercial practice;

b) the nature of the corporation;

c) the relationships between the parties, which can be of particular importance in disputes involving a family company;

d) past practice, especially among shareholders of a closely held corporation on matter relating to participation of shareholders in the corporation's profits and governance;

e) whether the claimant could have taken steps to protect itself;

f) shareholder agreements or representations made by the parties; and

g) the fair resolution of conflicting interests between corporate stakeholders.

[70] While I make no factual determinations on this issue, I agree with the respondents that Mr. Petersen's position is weakened by the affidavit from his family law proceedings in which he swore that he only had a 10% interest and Mr. Hawley was the directing mind of both Vital and Mega Cranes. I note that Mr. Hawley was a party to those proceedings and also swore an affidavit that he had a 90% interest in Vital. In fact, Justice Branch made similar comments in this regard in *Petersen v. Hawley*, 2021 BCSC 2348 at para. 20.

[71] In his oral submissions, Mr. Petersen's counsel argued that he had reasonable expectations that he would continue to receive his "draws", bonuses and benefits. I note that in his Notice of Application, Mr. Petersen asks the Court for an order that he receive his "salary and applicable benefits".

[72] Mr. Petersen relies on *Mayer*. In that case, Justice Grauer, as he then was, ordered that the monthly payment and benefits payable to the plaintiff be restored on an interim basis. The plaintiff had argued that he did not walk away from the company but rather was forced out.

[73] In my view, *Mayer* is distinguishable on the facts. Mr. Petersen acknowledged that he intended to retire in 2019. Yet, four years later, he seeks restoration of his

salary for work that he is not doing. I am not satisfied that he has reasonable expectations that he would continue to receive a salary, bonuses and benefits upon retirement. In fact, on the basis of his own affidavit, upon retirement, it was his expectation that he would receive 50% of his interest in the companies, not his salary.

[74] Mr. Petersen also contends that he has reasonable expectations that he would continue to receive all of the relevant financial information of the companies. I agree that as a shareholder, Mr. Petersen would be entitled to receive certain financial information. However, this does not mean that he would be entitled to receive all of the financial documents he seeks, including receipts, correspondence, invoicing, and bills of lading.

[75] Finally, Mr. Petersen asks that he have an equal say in the management of the companies, which effectively would give him a veto on decisions concerning Vital and Mega Cranes.

[76] As required, I have considered the relationships at issue and the entire context, including the commercial practice. It is undisputed that Mr. Petersen was not involved in the creation of the first Mega Cranes company started by Mr. Hawley in 1984, and also was not involved in the running of Mega Cranes for a significant number of years.

[77] More importantly, Mr. Petersen has not produced any evidence to support that he was in charge or responsible for the operations of the companies. In fact, it is undisputed that Mr. Hawley was responsible for the operations of the companies and Mr. Petersen conducted administrative and financial tasks.

[78] Mr. Petersen’s assertion that the interim orders sought would prevent Mr. Hawley from looting or destroying the companies is speculative and not founded on evidence. In fact, evidence supports the opposite. The financial statements of both Vital and Mega Cranes suggest that they continue to be financially successful

with increases in revenues and profits in the two years after Mr. Petersen's departure.

[79] In all of the circumstances, I am not satisfied that Mr. Petersen has sufficiently identified his expectations as a shareholder or director of Vital and Mega Cranes, nor are they objectively reasonable in light of all of the evidence before me.

[80] Accordingly, I am not satisfied that there is a strong *prima facie* case for oppression or unfair prejudice.

Does the balance of convenience favour granting the relief sought?

[81] Even if Mr. Petersen's case was a strong one, I find the balance of convenience favours refusal of the interim injunction.

[82] I have come to this conclusion based in part on my assessment of whether Mr. Petersen's interests will be harmed sufficiently such that they could not be remedied with damages if a final decision were ultimately in his favour.

[83] It must not be forgotten that "'[i]rreparable' refers to the nature of the harm suffered rather than its magnitude": *RJR* at 341. Harm is irreparable when it either cannot be quantified in monetary terms or cannot be cured because one party cannot collect damages from the other party: *RJR* at 341.

[84] To be successful, Mr. Petersen must provide clear evidence demonstrating irreparable harm which is not based on speculation. I find that he has failed to do so. His rhetorical questions of "who knows what damage Mr. Hawley can occasion upon the company…?" and "what stops him from looting the company between now and the date of the trial?" are speculative. On the other hand, there is clear evidence that the companies are operating in the normal course and are financially stable with increased revenue and profits.

[85] As well, the healthy financial statements of the companies support that if Mr. Petersen is successful at trial, the respondents would be in a position to pay damages. I have not been provided with any evidence to the contrary.

[86] The respondents further submit that the delay in bringing an application can be a factor when assessing whether a petitioner will suffer irreparable harm. In *Canada Snow*, Fleming J. stated:

> [109] The respondents also urge the court to consider the petitioner's delay in bringing this injunction application at this stage. In *Fission Uranium Corp. v. Dahrouge*, 2014 BCSC 1214 Madam Justice Harris found the plaintiff's delay in asserting the *claim* material to the irreparable harm analysis. She had also been asked to consider delay in bringing the injunction application itself and it appears to be one factor that formed the basis for her conclusion that the evidence of irreparable harm was not persuasive.
>
> [110] Given the task of the court to decide what is just and equitable in all the circumstances, as a matter of common sense, delay in bringing an application such as this one by six months undermines the petitioner's assertion of irreparable harm if the injunctive relief it seeks is not ordered pending the hearing.

[87] As I noted earlier in these reasons, this application is being brought over three years after Mr. Petersen's departure in 2020. In my view, this delay does indeed undermine Mr. Petersen's assertion of irreparable harm.

[88] In all of the circumstances, I conclude that Mr. Petersen has not established that he will suffer irreparable harm if the injunction is not granted.

[89] On the balance of convenience, I must also assess the relative irreparable harm to the respondents. In my view, the greatest harm to the respondents, albeit on an interim basis, is that the veto power sought by Mr. Petersen could possibly be misused or abused in the context of the dysfunction, distrust and dissention that the existed prior to Mr. Petersen's departure.

[90] The evidence supports that three years after Mr. Petersen's departure, the companies are doing well. It is preferable and in the best interests of the companies for Mr. Hawley to continue operating them. In my view, there is a real risk that if the Court were to grant the injunction, given that the brothers do not get along (to the point that physical altercations have occurred in the past), dysfunction and deadlock will likely require court intervention. I conclude that the respondents would suffer irreparable harm if the injunction were to be granted. I am also comforted by the fact

that the parties have a trial date scheduled in June 2024 that will allow the timely resolution on the merits of this dispute.

[91] Accordingly, given my finding that Mr. Petersen will not suffer irreparable harm if the injunctions are not granted but that the respondents would suffer irreparable harm if they were, I find the balance of convenience favours not granting the injunction.

Conclusion

[92] I conclude that, in all circumstances, it is not just and equitable to grant the interim injunction sought by Mr. Petersen. Accordingly, his application is dismissed.

Costs

[93] As the successful parties, the respondents are entitled to their costs on Scale B.

"Girn J."