IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leifso v. BevCanna Enterprises Inc.,*
2023 BCSC 579

Date: 20230413
Docket: S223772
Registry: Vancouver

Between:

Curtis Leifso and Andrew Wong

Petitioners

And

BevCanna Enterprises Inc., Embark Health Inc., and Bruce Dawson-Scully, in his capacity as the Shareholder Representative of Embark Health Inc.

Respondents

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Petitioners:	B.J. Cabott C. Fawcett
Counsel for the Respondents:	M.L. Teetaert A.J. Froh
Places and Dates of Hearings:	Vancouver, B.C. August 11, 2022 September 12, 2022 New Westminster, B.C. September 16, 2022
Place and Date of Judgment:	Vancouver, B.C. April 13, 2023

Introduction

[1] This petition concerns an oppression claim against the respondents stemming from a September 2020 share purchase agreement (the "Axiomm Acquisition Agreement") entered into by the parties under which the petitioners became entitled to receive shares in the respondent Embark Health Inc. ("Embark") in consideration for their shares in Axiomm Technologies Inc. ("Axiomm"). When Embark was sold to BevCanna Enterprises Inc. ("BevCanna") in December 2021, the petitioners' Embark shares were issued after being converted to shares in BevCanna.

[2] The respondents have prevented the transfer of BevCanna shares to the petitioners and the petitioners invoke s. 272(2)(a) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*], to obtain a declaration that the respondents have acted in an oppressive or unfairly prejudicial manner in refusing the petitioners' entitlement to the BevCanna shares and an order requiring delivery of the same.

[3] The respondents have not filed a response to the petition but have applied for a stay of the petition pending the resolution of a separate lawsuit in Alberta (the "Alberta Action") in which the respondents claim the petitioners fraudulently misrepresented important facts concerning intellectual property developed by Axiomm and the petitioners' performance as Embark employees, thereby breaching their duties of honesty to the respondents.

[4] If the stay application is refused, the petitioners seek a determination of the issues raised in the petition without allowing the respondents an opportunity to present evidence or submissions on the oppression claims. The respondents seek leave to file responsive material prior to the final hearing of the petition.

Background

[5] The petitioners were founders and shareholders of Axiomm, a pharmaceutical processing technology company based in Calgary, Alberta.

[6] Prior to September 2020, Axiomm was involved in the commercial development of products including aqueous emulsions for beverages and cosmetic

cream. Their business also encompassed development of technologies and related ingredients for production of infused products, including cannabis infused beverages, topicals, edibles and water-soluble powders.

[7] On August 10, 2020 Axiomm entered into the Axiomm Acquisition Agreement with Embark. Embark carries on business in Calgary, Alberta and Delta, British Columbia. Under the Axiomm Acquisition Agreement, the petitioners were to receive fully paid non-assessable shares of Embark for their Axiomm shares at an exchange ratio of .0971603. Subsequent to Embark's acquisition of Axiomm, the petitioners entered into employment agreements with Embark Nano Inc. and continued to work at a Calgary laboratory facility. Embark also entered into incentive agreements with each of the petitioners on September 11, 2020 (the "Incentive Agreements") whereby they would receive incentive shares of Embark in an amount equal to a monetary value specified in each Incentive Agreement per milestone achieved, once Embark achieved certain gross income milestones.

[8] Embark Nano Inc. ("Embark Nano") was a wholly-owned subsidiary of Embark formed by way of an amalgamation of Axiomm and 2278991 Alberta Ltd. that was created after Embark acquired Axiomm.

[9] Embark's purchase of Axiomm's shares included a transfer from Axiomm to Embark of the intellectual property initially developed at Axiomm for the development and commercialization of products.

[10] The petitioners' employment agreements with Embark Nano provided an annual salary to the petitioners of $90,000 each.

[11] On February 21, 2021 the petitioners entered into amended and restated incentive agreements with Embark (the "Amended Incentive Agreements") which changed the criteria under which the incentive shares in Embark would be transferred to the petitioners. In the Amended Incentive Agreements, the parties agreed that upon satisfying the milestones set out therein the petitioners would

receive cash payments or, alternatively, common shares in Embark in equivalent value.

[12] BevCanna carries on a business of manufacturing plant-based and cannabinoid beverages and supplements.

[13] On September 19, 2021 BevCanna entered into an agreement to acquire all of the shares of Embark (the "Embark Acquisition Agreement") and on November 12, 2021 the parties entered into an amended and restated acquisition agreement (the "Amended Embark Acquisition Agreement").

[14] Mr. Dawson-Scully performed an independent review of the Amended Incentive Agreements including production data and associated production scheduling together with legal counsel.

[15] On or about December 6, 2021 and before closing the Amended Embark Acquisition Agreement, Embark issued common shares in the capital of Embark pursuant to the Amended Incentive Agreement between the petitioners and Embark; Mr. Leifso received 4,623,963 incentive shares and Mr. Wong received 2,762,500 incentive shares.

[16] On December 6, 2021 the petitioners and Embark entered into full termination and release agreements in respect of any past, present or future claims Embark may have against each of the petitioners (the "Termination and Release Agreements"). These agreements were executed by Mr. Dawson-Scully in his capacity as CEO and sole director of Embark.

[17] The Amended Embark Acquisition Agreement closed on or around December 17, 2021. As part of BevCanna's acquisition of Embark, the shares held by shareholders of Embark were exchanged for shares of BevCanna with an exchange ratio of 1.07763145 for each Embark share to be exchanged.

[18] On December 24, 2021 the petitioners each resigned from their employment with Embark Nano, effective that day.

[19] On January 28, 2022, all shares held by the shareholders of Embark were transferred to BevCanna and new shares in BevCanna were issued to each former Embark shareholder. Mr. Leifso was issued 5,513,961 BevCanna shares and Mr. Wong was issued 2,976,956 BevCanna shares.

[20] The shares of BevCanna issued to all former Embark shareholders were held by Olympia Trust Co. ("Olympia"), as escrow agent on terms that the BevCanna shares would be released to former Embark shareholders. Pursuant to this January 27, 2022 agreement Olympia and BevCanna agreed that shares were to be released to the petitioners in equal monthly tranches over 12 months beginning January 2022.

[21] The petitioner's entitlement to Embark shares turned on the achievement of certain milestones that triggered the petitioners' right to those shares and were addressed by Embark Nano after the final milestone had been achieved. Mr. Dawson-Scully conducted his own internal investigation with the aid of external legal counsel to validate the claim that the milestones had been met.

[22] On December 6, 2021 after Mr. Dawson-Scully's internal review, Embark directors passed a resolution to issue the incentive shares to Mr. Leifso and Mr. Wong. The recital to the directors' resolution included the following:

> And Whereas concurrent with the execution and delivery by the Corporation of an irrevocable treasury direction in a form satisfactory to the Corporation Andrew Wong and Curtis Leifso the corporation and each of Andrew Wong and Curtis Leifso will execute and deliver a termination and mutual release in respect of their obligations under the incentive agreements.

[23] In conjunction with the issuance of the shares, the petitioners entered into the Termination and Release Agreements with Embark which included the following:

> The Incentive Agreement and all rights and obligations of the Parties of thereunder are terminated as of the date hereof and shall not survive termination of the Incentive Agreement.
>
> The Corporation irrevocably and unconditionally releases and discharges [Curtis/Wong] from any and all claims which the Corporation has now or may have in the future against [Curtis/Wong] pursuant to the Incentive Agreement. "Claims" means all actions, causes of action, suits, proceedings, executions, judgements, duties, debts, accounts, contracts and covenants, claims and

> demands for losses, damages, liabilities, indemnity, costs, expenses, interest or injury of every nature and kind whether in law or in equity relating to or arising out of the incentive agreement.

[24] In January 2022, Olympia began releasing BevCanna shares to each former Embark shareholder, including the petitioners, on a monthly basis; two distributions of these shares were made to the petitioners before the Alberta Action was commenced.

[25] On March 30, 2022, Mr. Dawson-Scully acting on behalf of BevCanna and as a shareholder representative, directed Olympia not to release further shares to the petitioners and instead interplead the remaining incentive shares into the Court of Queen's Bench of Alberta (as it then was). Olympia placed a hold on all future escrow releases of BevCanna shares to the petitioners.

[26] On June 14, 2022 an interpleader order was made by the Alberta Court of Queen's Bench about requiring the deposit of the shares held by Olympia in escrow (the "Interpleader Order"). In his reasons for making the order, Justice Yamauchi said:

> …I was trying to find the nexus between the issuance of the shares to Messrs. Leifso and Wong and the intellectual property and I couldn't find that nexus: at page 3-4
>
> I'm really kind of hung up on this issue with respect to the nexus between the shares the[IP]. I mean, in the end, when I look at the statement of claim, the shares are just kind of something to sort of—they're just something else. There kind of out there: at page 9
>
> So, really, that's really the substance of it. And really, you're looking for either – – to get that information, I mean I think your client wants that more than anything else, so that's the first thing. But the second thing is, if they are indeed not willing to provide that information to you, then your client has suffered damages and they could be seeking damages as against Mr. Leifso and Mr. Wong. The shares are really just – – even when you look at the value of the shares, there kind of meaningless in the big picture, are they not?: at pages 9-10
>
> I don't think the shares mean anything to Bevcanna. What they're doing is there holding the shares as ransom to try to get the recipes. And I'm using that in a very gentle sense. I'm not using it in an extortion sense. I'm just saying that these seem to be cited issues that are not relevant to the real issue at had(sic), which are the recipes, and I think that's the real issue that

> has to be dealt with in this lawsuit. I think the shares are aside issue, in my humble opinion, but I'm not ruling on this: at page 12.

[27] The interpleader order expressly allows for the petitioners' shares to be released in accordance with an order from the Supreme Court of British Columbia and was made on a condition that the respondents give an undertaking as to damages.

[28] The Petition is based on the petitioners' claims that shares in BevCanna have been issued to them and were to be delivered monthly throughout 2022. These shares were derived from their sale of shares in Axiomm to Embark and the sale of Embarks shares to BevCanna.

[29] The petitioners contend that BevCanna and Bruce Dawson-Scully, chief executive officer of Embark gave a joint instruction to Olympia, to halt the release of their shares held in escrow thereby preventing the full and unconditional release of their shares on a monthly basis without justification. They contend these actions of the respondents are oppressive or unfairly prejudicial. Their conduct has been coercive and abusive and the respondents should be directed to withdraw the instruction to Olympia to halt release of their shares, among other claims.

Disputed Facts

[30] After the closing of the Amended Embark Acquisition Agreement, the respondents allege that BevCanna discovered and subsequently investigated apparent wrongdoings of the petitioners and that it was these discoveries that led BevCanna to instruct Olympia to stop releasing shares from escrow to the petitioners. They say the alleged wrongdoings put the petitioners' ownership of the incentive shares at issue.

[31] The respondents contend that the petitioners misconducted themselves when making false representations to Embark and BevCanna concerning the existence of the intellectual property and the petitioners' achievement of the milestones set out in

the Amended Incentive Agreements. The misrepresentations alleged against the petitioners by the respondents include:

a. that the petitioners had developed intellectual property including technologies and related ingredients;

b. that Embark Nano had developed a unique and novel “bitterness blocker” to reduce or eliminate the bitterness of cannabinoid infused beverages;

c. that Embark Nano possessed nine products based on the intellectual property held by Axiomm and that they were ready to be sold on a market;

d. that recipes for products were located in Embark’s laboratory in Calgary and that processes were laid out in sufficient detail to be used;

e. that precursors required for the manufacture of products were stored in the Calgary laboratory in sufficient quantities for one year’s worth of production;

f. that the laboratory in Calgary could deliver sufficient products to the facility in Delta; and

g. that the petitioners had achieved the milestones described in the Amended Incentive Agreements.

[32] The respondents allege that the petitioners conspired to defraud the respondents through the above misrepresentations and breached their respective employment agreements with Embark Nano.

[33] The respondents have commenced the Alberta Action against the petitioners seeking the following:

> a. An order requiring the petitioners to show BevCanna where the recipes (including all ingredients and standard operating procedures for the fabrication of all products) and the precursors exist, including all data files used in validation studies and sample preparation methods;
> b. rescission of the granting of the shares held in escrow;

c. damages, jointly and severally, in an amount to be proved at trial, but estimated to be $1 million;

Positions of the Parties

The Respondents' Position

[34] The respondents have not filed a response to the petition in this case relying on Rule 8-1 of the *Supreme Court Civil Rules* and ss. 8 and 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, invoking the Court's inherent jurisdiction to stay proceedings. They contend that a response to the petition would have been hollow because their position on the merits would replicate their position in the Alberta Action and responding to this proceeding would cause unnecessary cost, expense and duplicated work.

[35] The respondents contend that this petition proceeding and the Alberta Action involve the same factual matrix, namely that the petitioners' fraudulent and dishonest representations to Embark and BevCanna may justify rescission of the granting of shares held in escrow by Olympia.

[36] The respondents contend that the petition proceeding should be stayed pending resolution or judgment in the Alberta Action because the oppression claim cannot be decided unless there is a finding that the petitioners were not guilty of fraudulent misrepresentation or dishonesty.

[37] They contend that it would be unfair and improper if these two actions were to proceed in parallel because the factual issues will need to be decided in the Alberta Action and that decision will likely dictate the outcome in the oppression claim in British Columbia.

[38] In any event, the respondents say the authorities dealing with jurisdictional issues encourage the avoidance of a "multiplicity of legal proceedings and to avoid conflicting decisions in different courts".

[39] The respondents contend there are no jurisdictional issues in this petition because the petitioners have attorned to the jurisdiction of the Alberta Court of

King's Bench (the "ABKB") on the issues set out in the pleadings of the Alberta Action, which were included in the material on this application.

[40] The respondents also contend that there is no impediment to the ABKB ordering rescission of the granting of shares on the basis that it can order equitable rescission of portions of agreements where full restoration of the parties to their pre-contractual circumstances is not possible.

[41] The respondents submit that the petitioners will not be irreparably harmed if this proceeding is stayed. The value of BevCanna shares declined from January 2020 to June 2022 by 65% but the only shares impacted by the Interpleader Order are shares that would have been issued to the petitioners after March 31, 2022 when the price per share was $0.13. By the end of April 2022, the value had decreased to $0.10 and by the end of June 2022 to approximately $0.05.

[42] The respondents' submissions also focused on the need to avoid the risk of conflicting decisions as to the facts or the law in proceedings in different jurisdictions on "virtually identical" issues. They contend that the central factual matrix concerns the milestone misrepresentations made by the petitioners that triggered their entitlement to shares in Embark which have been converted to shares in BevCanna. They argue that the ABKB will determine if the granting of the incentive shares should be rescinded as a result of the petitioners' fraudulent misrepresentations. If the incentive shares are rescinded, they argue the petitioners will no longer be shareholders and will have no standing to bring this oppression claim.

[43] The respondents contend if the petition precedes, they will be exposed to unfairness and prejudice because of the need to litigate the same issues in two courts at the same time.

[44] They contend that a temporary stay of proceedings would not prejudice the rights of the petitioners, who would still have the opportunity to have their petition heard in BC if the respondents are not successful in the Alberta Action.

The Petitioners' Position

[45] The petitioners contend that there is very little overlap between the Alberta Action and this petition in terms of the relief sought by the parties. If this Court concludes the petitioners are entitled to an oppression remedy, that finding would not render the Alberta Action moot as the damages remedy remains available to the respondents.

[46] They contend that BevCanna has no proprietary interest in the petitioners' shares held by the escrow agent and that the respondents' application is an attempt to circumvent their right as shareholders to receive and deal with shares already issued to them. They say the respondents' actions in jointly instructing Olympia to freeze the petitioners' shares is without justification or support in fact and that the respondents have acted oppressively by denying the petitioners the benefits they obtained when selling their shares in Axiomm to Embark. Thus, the petitioners say their claim for an oppression remedy is designed to prevent the respondents from achieving, what is a Mareva-like injunction, not tied to a particular breach of any agreement.

[47] They say that stays of proceedings are extraordinary remedies to be granted by the Court with regard to the factual circumstances of the case before it. In this case, the petitioners say they will be significantly prejudiced by a stay of proceedings and that such prejudice will outweigh any potential prejudice to the respondents if the stay were denied. They suggest that the harm a stay would cause will become irreparable and not compensable by damages given the continued decline in the value of BevCanna shares and concerns regarding the ongoing solvency of BevCanna.

[48] The petitioners contend that there is no admissible evidence in this application to support the respondents' assertion of a possessory right to the petitioners' shares in BevCanna. More specifically, the petitioners contend that the affidavit of legal assistant Ms. Vanessa Coupar submitted on this application attaches affidavits sworn by Mr. Dawson-Scully in the Alberta Action as exhibits. The

petitioners say the contents of the appended affidavits are hearsay and should not be given weight on the issues before the Court as Ms. Coupar has no knowledge of the facts set out in Mr. Dawson-Scully's affidavits. Thus, they say there is no proper evidence in this proceeding that addresses the legal and factual issues in the Alberta Action, save and except for the pleadings in that action: *Tietz v. Cryptobloc Technologies Corp*., 2021 BCSC 810 at paras. 25–28.

[49] Further, the petitioners contend the affidavit evidence in support of the application provides little detail as to the respondents' allegation that the petitioners did not meet the milestones in the Amended Incentive Agreements as claimed. The respondents rely on a bald unsupported statement that "neither of the petitioners delivered any of the required milestone certificates". They contend the allegations of fraudulent misrepresentation are a simple attempt to circumvent the operation of the Termination and Release Agreements which otherwise preclude the respondents from claims in respect of the incentive shares granted to the petitioners under the Amended Incentive Agreement.

[50] They say the principles directing the Court to look at fairness, prejudice, the applicant's motivation in seeking a stay, the merit in the applicant's position, and the balance of convenience warrant refusal of the stay of proceedings request.

[51] The petitioners contend that in this case, a stay will not promote the judicial economy and efficiency by avoiding unnecessary or costly expenses because the respondents cannot succeed in obtaining an order for rescission of the grant of the shares. They say the relief sought will be impossible to grant even in the event the respondents are successful in the Alberta Action as there is no basis in law on which the ABKB could order rescission of the Amended Incentive Agreements, the Termination and Release Agreements, and / or the Embark Acquisition Agreement. The statement of claim does not detail which agreement or series of agreements the respondent seeks to rescind.

[52] If the respondents were successful proving the factual assertions concerning fraudulent misrepresentation and dishonesty in the Alberta action, nothing close to

perfect rescission of the agreements would be possible; at best, a monetary remedy might be employed to restore the respondents to their original position as a means to achieve rescission without interfering with the impugned transaction or rewriting their agreements. In that case, the petitioners would be entitled to their shares in BevCanna immediately.

[53] Moreover, the petitioners claim that partial rescission is not a remedy available at common law or equity. Absent the ability to partially rescind or unwind any of the agreements, damages would be the only remedy available.

[54] Finally, the petitioners say a stay of proceedings in this case would be unfair because:

a) a stay of proceedings in this case is animated by a tactical decision to deny them BevCanna shares already issued and subject to the outcome in the Alberta Action which is unsupported by convincing evidence in respect of the allegations raised on this application;

b) a resolution of the Alberta Action is not likely to be reached within a reasonable time; and

c) BevCanna's deteriorating financial condition creates a risk of irreparable harm to the petitioners in the event a stay delays the petitioners' access to their shares.

[55] Concerning the hearing of the petition the petitioners contend that, if the Court rejects the stay application, judgment should be given on the petition because the respondents had full notice that they expected the respondents to address the issues in the petition. They say that the respondents' unilateral decision to eschew the opportunity to file material deprives them of the right to seek a further audience on this question after filing affidavit material.

Preliminary Issue: Admissibility of Affidavit Evidence

[56] The petitioners contend that there is no admissible evidence on this application to support any of the underlying allegations made by the respondents. In one affidavit, made by Vanessa Coupar, a legal assistant at the respondent's law firm, she simply attached as exhibits several affidavits filed in the Alberta Action setting out the alleged pertinent facts. Ms. Coupar deposed that "except where stated to be on information and belief, and where so stated, I verily believe the same to be true", however she does not suggest that the facts set out in the three attached affidavits are true. Thus, the content of the attached affidavits is hearsay if offered for the truth of their contents.

[57] To illustrate the issue, in the affidavit of Mr. Dawson-Scully sworn June 10, 2022 he provides a lengthy description of the events in which he says it appeared and continues to appear that the petitioners made significant misrepresentations in connection with the issuance of the incentive shares and later in connection with BevCanna's acquisition of Embark. His affidavit also contains hearsay evidence from Pushp Singh and Ulrich Kamp advising him of the alleged wrongdoing by the petitioners, which on this application, amounts to double hearsay if offered for the truth of its contents.

[58] In *Tietz*, Justice Wilkinson rejected an attempt by one party to rely on an affidavit attaching three other affidavits as exhibits from a securities commission proceeding. In that case, there was no direct evidence before the Court as to why the original affiant could not file their own affidavit in the proceeding. The Court in *Tietz* relied on *Carter v. Canada (Attorney General),* 2011 BCSC 1371 where the Court rejected an attempt to append another person's affidavit to an affidavit by a different person who also provided their evidence based on third party information. This was held to be inadmissible hearsay.

[59] The above cases are apposite to this application and I find that the two affidavits of Mr. Dawson-Scully, attached as exhibits to Ms. Coupar's affidavit, are inadmissible hearsay on this application. No evidence was provided as to why

Mr. Dawson-Scully was not able to provide an affidavit in support of the respondents' stay application.

Discussion

Legal Framework

[60] In *Dixon v. Morgan,* 2020 BCCA 200 at para. 24, the Court of Appeal set out the test commonly applied to stay applications as follows:

> The elements of the test are generally the same as those applied when deciding whether to grant an interim injunction: that there is some merit to the appeal in the sense that there is a serious issue to be resolved; that the applicant would suffer irreparable harm if the application were denied; and that the balance of inconvenience favours a stay.

[61] The overarching question on a stay application is whether the interests of justice will be served: *Dixon* at para. 25; *Grewal v. Mann*, 2021 BCSC 1995 at para. 45.

[62] In *Peh v. The Owners, Strata Plan LMS 3837*, 2008 BCSC 291, Justice Sigurdson provided a helpful analysis of the legal principles and their application to the circumstances in this case.

[63] The underlying action in *Peh* was in connection with a hotel in Vancouver over which there had been much litigation. As recognized by Justice Sigurdson at paras. 11–12 of *Peh,* the Court has jurisdiction to grant a temporary stay of proceedings pursuant to s. 8 of the *Law and Equity Act* and pursuant to its inherent jurisdiction. Whether to order a stay is a matter of discretion which depends on the facts of the individual case before the court.

[64] On a stay application, the burden is on the applicant to demonstrate that "in all the circumstances a stay is appropriate": *Peh* at para. 61. The authorities indicate that judges should exercise their jurisdiction to grant a stay "cautiously after a consideration of all relevant factors, including the benefits of granting a stay and the possible prejudice that would be suffered or incurred by the parties" if a stay is

granted or refused: *Peh* at para. 62. The use of a stay is exceptional and a case for its use must be clearly established: *Peh* at para. 63.

[65] In *Victoria Shipyards Co. Ltd. v. Lockheed Martin Canada Inc.,* 2022 BCSC 790, the Court said that in determining whether to grant a stay, the fundamental question is "whether granting the stay is just and equitable in the circumstances" (para. 31). According to *Victoria Shipyards,* in determining whether to grant a stay, the Court considers the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at 314–15, 1994 CanLII 117:

a) Is there a serious question to be tried?

b) Will the applicant suffer irreparable harm if the stay is refused?

c) Does the balance of convenience lie with the applicant?

[66] Interestingly, the Court in *Peh* did not mention or apply the *RJR-Macdonald* test. Rather, it considered a number of factors, including irreparable harm and the balance of convenience in determining whether, in all the circumstances, a stay was appropriate.

[67] In *Peh* at para. 66–67 the Court discussed other factors that may be taken into account on an application for a stay of proceedings including:

a) whether success in the foreign proceeding would substantially reduce the issues to be determined in the local action, render it moot, or otherwise have a "material impact on the outstanding issues in the case" (para. 66);

b) whether the defendants are merely seeking a tactical advantage;

c) issues of delay;

d) whether the conduct of any party to date is relevant to the granting of a stay; and

e) the strength of the applicant's position and whether the applicant's position is meritorious or merely arguable or frivolous.

[68] When considering the balance of convenience, the court asks whether the applicant or the respondent will suffer greater harm if the stay is granted or denied by weighing the interests of the parties and balancing the potential harm to each: *Victoria Shipyards* at para. 43. At paras. 44–45 of *Victoria Shipyards,* the Court provided the following:

> [44] The Court in *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2013 BCSC 751 at para. 32 provided a summary of the factors to consider at this stage of the test:
>
> > a) whether the result in the related proceedings could effectively resolve the litigation: *Peh v. The Owners, Strata Plan LMS 3837*, 2008 BCSC 291 [*Peh*]; *Ainsworth Lumber v. Canada (Attorney General)*, 2001 BCCA 105 [*Ainsworth Lumber*];
> >
> > b) whether the stay will promote judicial economy and efficiency by avoiding unnecessary and costly additional expenditures of judicial and legal resources: *Ainsworth Lumber*;
> >
> > c) whether the stay sought is temporary or permanent: *Peh*;
> >
> > d) the length of delay caused by the temporary stay relative to the length of time of the litigation in general: *Roeder v. Lang Michener Lawrence & Shaw*, 2004 BCSC 80 [*Roeder*]; and
> >
> > e) the risk of inconsistent judgments: *Roeder*…
>
> [45] The status quo is a factor to consider: *Sunshine Logging (2004) ltd. v. Prior*, 2011 BCSC 1044, at para. 82.

Analysis

[69] Below, I consider the relevant factors from *Peh* in the context of the case before the Court. Ultimately, I conclude that in all the circumstances, a stay of the petition is not appropriate and would not serve the interests of justice.

Material Impact

[70] First, I have considered whether success in the foreign proceeding would materially impact the outstanding issues in this case. In doing so, I take into account the statement of claim in the Alberta Action, including the remedies sought by the respondents.

[71] In the statement of claim in the Alberta Action, BevCanna seeks “rescission of the granting of the shares held in escrow”. The respondents contend that if the ABKB were to grant this remedy, then the shares which are the subject of the oppression petition would not belong to the petitioners, and thus their petition seeking an oppression remedy would be materially impacted, or effectively resolved. One question in this case turns on whether the respondents have demonstrated an arguable case that the ABKB could order “rescission of the granting of the shares held in escrow”.

[72] Thus, one question at this stage is whether the respondents’ pleadings could reasonably support a claim for rescission of the granting of shares to the petitioner. In part, this analysis must consider whether the risk of inconsistent findings of fact or law would undermine judicial economy, efficiency threaten the integrity of the adjudicative functions of the court.

[73] First, in the Alberta Action, the respondents have pleaded what appeared to be inconsistent remedies. The respondents seek an order requiring the petitioners to show BevCanna where recipes and precursors exist including all of the data files used in the validation studies and sample preparation methods. Clearly this pleading invokes the petitioners’ obligations under the Axiomm Acquisition Agreement and represents an affirmation of the petitioners’ employment agreements and the Axiomm Acquisition Agreement; it has the appearance of requesting specific performance claim, while seeking the inconsistent remedy of rescission of the same agreement.

[74] The petitioners contend that the shares are currently issued in their names and should have been delivered to them over 12 months and there is no basis on which Olympia or the respondents resile from the obligation to distribute those shares.

[75] Accepting that there may have been fraudulent misrepresentations by the petitioners, I accept that the remedy of rescission is designed to put parties in the position they would have been in had the misrepresentation not been made. That

remedy is not likely available given the complexity of the overall transactions and the different agreements currently in place.

[76] In the statement of claim in the Alberta Action, BevCanna seeks “rescission of the granting of the shares held in escrow”. If the ABKB were to grant this remedy, then the shares which are the subject of the oppression petition would not belong to the petitioners, and thus their petition seeking an oppression remedy would be materially impacted, or effectively resolved. The question in this case turns on whether the respondents have demonstrated an arguable case that the ABKB could order “rescission of the granting of the shares held in escrow”. Thus, the question at this stage is whether the respondents’ pleadings could reasonably support a claim for rescission of the granting of shares to the petitioner in part, this analysis must address whether the risk of inconsistent findings of fact or law would undermine judicial economy, efficiency threaten the integrity of the adjudicative functions of the court.

[77] Where a representee is induced to enter into a contract by a fraudulent misrepresentation, they have the right to elect to treat the contract as *void ab initio* or affirm the contract and sue for damages: *415703 B.C. Ltd. v. JEL Investments Ltd.,* 2010 BCSC 202 at paras. 186, 188. The representee must elect within a reasonable time of learning of the misrepresentation and if they affirm the contract, the right to rescission may be lost: *JEL Investments* at paras. 187–188. Earlier cases indicate that rescission will not be granted unless the parties can be put back into their previous positions: *JEL Investments* at para. 186. As such, even if the respondents are successful in the Alberta Action, the ABKB may find that the respondents affirmed the agreement and as a result are barred from seeking rescission.

[78] In *Motkoski Holdings Ltd. v. Yellowhead (County),* 2008 ABQB 454, Justice L.J. Smith summarized an approach to the issue of rescission versus damages:

> [125] Put another way in *Nash v. McMillan*, 1997 CanLII 24701 (AB KB), [1997] A.J. No. 892, 222 A.R. 4 (QB) (at paras 42-44):
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> > The starting point for assessing damages for a contract induced by fraudulent misrepresentation is, in theory, to first

> put the plaintiff to an election. He must either affirm the contract and pursue damages in contract for loss of bargain and consequential losses, or rescind the contract and pursue damages in tort. The Plaintiffs at bar have, as stated above, not elected rescission, and it would be unfair at this point for me to permit such an election even if they wished. This point may, in any event, be moot because, regardless of theory, the authorities which discuss damages for contractual fraudulent misrepresentation almost invariably dictate that contract principles of compensation should be rejected in favour of tort principles. Put succinctly, the "out of pocket" or tort method is far more frequently adopted than the "loss of bargain" contract method.

[79] In *Sethi v. Dawnne*, 2002 ABQB 736, a plaintiff alleged fraudulent misrepresentation on the part of the defendant in the sale of shares of a business. While the Court found that the claim was not made out, it went on to discuss remedy in the case it was wrong.

[80] At paras. 84–85 the Court notes that “rescission will be denied where the injured party has affirmed or adopted the contract” and that the plaintiff in that case “by his own actions has adopted the Agreement the parties entered into and has thereby disentitled himself to the rescission he requests”.

[81] Second, nothing in the respondents’ material filed on this application informs this Court which of the four interrelated agreements involving the petitioners the respondents seek to have rescinded. The equitable remedy of rescission works to set aside or unwind an agreement, “terminating the contractual rights of the parties and restoring the pre-contractual status quo”: *Bacanora Minerals Ltd. v. Orr-Ewing Estate,* 2021 ABQB 670 at para. 47. Generally speaking, a claimant cannot set aside part of a transaction, while enforcing the rest; likewise, if several contracts are combined as a part of a larger transaction, it is normally impossible for an aggrieved party to avoid one agreement, but not the others: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution,* 2nd ed. (LexisNexis Canada Inc., 2022) at 34.02.

[82] There is no plea in the Alberta Action seeking rescission of *a contract*; the claim is for the rescission of partial delivery of consideration granted to the

petitioners when the shareholders of Embark sold their shares to BevCanna. It has the appearance of seeking partial rescission.

[83] A recent Alberta Court of Appeal decision on partial rescission is apposite. In *Hudye Inc. v. Rosowsky*, 2022 ABCA 279, the plaintiff sued its lawyer, Mr. Rosowsky, for breach of fiduciary duty, asking that the Court rescind certain agreements between the parties. One such agreement was the general counsel agreement which Rosowsky negotiated and drafted while on the initial retainer agreement with the Hudye Group. That agreement made Mr. Rosowsky in-house counsel for the plaintiff. In addition to receiving an annual salary of $150,000, the agreement gave him an equity position and provided that he was entitled to 10% equity of the Hudye Group Trust. At trial, the judge rejected the claim of breach of fiduciary duty. On appeal, the ABCA found the trial judge had erred in finding that Mr. Rosowsky had not breached his fiduciary duties in negotiating the agreement. When discussing the appropriate remedy, the Court of Appeal said the following regarding the plaintiff's request for partial rescission of the agreement:

> [72] The Hudye Group seeks to have only the equity component of the GCA set aside, which would leave intact the salary component, pursuant to which Rosowsky was entitled to an annual salary of $150,000 in his position as General Counsel. Partial rescission of a contract is not generally available: see *Kingu v Walmar Ventures Ltd* (1986), 1986 CanLII 142 at p 6 (BCCA), 10 BCLR (2d) 15; *Mirage Consulting Ltd v Astra Credit Union Ltd*, 2017 MBQB 63 at para 15.
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> [73] The rule against partial re[s]cission is based on the notion that "the court should not involve itself in the rewriting of bargains along lines it may consider to be fair where the contract is not severable": *Mirage* at para 15; Dominic O'Sullivan, Steven Elliott & Rafal Zakrzewski, *The Law of Rescission*, 2nd ed (New York: Oxford, 2014) at 398, para 19.03. O'Sullivan goes on to note, at para 19.05, that rescission will be refused where the contract is part of a wider transaction where each of the components were contracted in contemplation of the others. The effect would be to enforce an agreement to which the parties did not agree: see John D McCamus, The Law of Contract, 3rd ed (Toronto: Irwin Law, 2020) at 482.
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> [74] We are satisfied that it would be inappropriate to set aside only a portion of the GCA. It is not at all clear that the parties would have entered into the salary component of the GCA in the absence of the equity component, or in the absence of Rosowsky's participation in the Trust Agreement. It would be unjust in these circumstances to uphold only a portion of that agreement.

[84] The distinction between fraudulent misrepresentation and breach of fiduciary duty did not affect the remedy.

[85] Absent the prospect of perfect rescission, partial rescission of contracts is not a remedy at common law or equity: See *Kingu v. Walmar Ventures Ltd.*, [1986] 10 B.C.L.R. (2d) 15 (C.A.) at paras 14-15. Where a contract cannot be completed in any practical sense, innocent victims of misrepresentation may not be entitled to rescission of a contract but remains entitled to damages for fraud.

[86] In BC there is "more flexibility in crafting an appropriate remedy of rescission when there is fraud": *JEL Investments* at para. 198. In *Kupchak v. Dayson Holdings Ltd.* (1965), 53 D.L.R. (2d) 482, 1965 CanLII 497 (B.C.S.C.), the Court made adjustments to put the parties in their original positions, such as combining rescission with compensation where a subject property had been sold on to a third party and could not be rescinded. However, in *JEL Investments* the Court found the adjustments made in *Kupchak* were "relatively modest" but in *JEL Investments* the court did not order rescission finding that "minor financial adjustments could not be ordered that would put the parties all back in their pre-contractual positions" (at para. 202).

[87] In the final result in *JEL Investments*, the court fashioned a practically just result even though the parties could not be restored to their precontract state; Sigurdson J. ordered that the parties could be returned to their pre-contractual position by giving a financial allowance to the plaintiff: see para 220.

[88] As Edelmann J. concluded in *Cornerstone Global Partners Inc. v. Hill Road Capital Inc.*, 2021 BCSC 1517, at para 83, that where perfect rescission is not possible and the parties cannot be returned to their pre-contract positions the court will exercise jurisdiction to award compensation through rescission: see also *Kupchakat* at page 486.

[89] It is clear to me the transactions in this case cannot be unwound nor can the parties be returned to their original positions. More importantly, partial rescission is

generally not available, though the ABKB has the power to grant relief that is "practically just, though it cannot restore the parties precisely to the state they were in before the contract"; see *JEL Investments* at para. 220. Because it is not possible to ascertain from the Alberta Action pleadings which agreement the respondents' wish to rescind, it is not possible to make a finding as to whether any of the agreements entered into by the petitioners are severable from the others so as to allow partial rescission. On the record before me, it is apparent the parties cannot be restored to their precontract state, and monetary damages stemming from the alleged breaches would most likely be awarded.

[90] The petitioners were issued shares in Embark to be delivered over a 12 month timeframe. Those shares were the consideration for the transfer of the petitioners shares in Axiomm. Issuance of the BevCanna shares to the petitioner flowed from the agreement between Embark and BevCanna without any participation by the petitioners. The petitioners employment agreement was yet another agreement not mentioned in the respondent's prayer for relief.

[91] On the record before me, it is apparent the parties cannot be restored to their precontract state, and monetary damages stemming from the alleged breaches would be the most likely outcome .

[92] I have concluded that because the respondents' pleadings in the Alberta Action begin with an affirmation seeking an order that the petitioners comply with some obligation on their part to disclose or provide information under an agreement there is a strong likelihood they will be found to have affirmed the agreement eschewing the right to rescission of any agreement challenged in their pleadings. There is no evidence the respondents communicated an acceptance of the purported fraudulent misrepresentation entitling them to rescission of one of the agreements between the petitioners and one or more of the respondents.

[93] On the balance of probabilities, I find that it is unlikely that the Alberta court will rescind the granting of shares to the petitioners because of the impediments to unwinding any or all of the agreements that resulted in BevCanna shares being

issued to the petitioners, flaws in the Alberta Action pleadings and for the other reasons noted above. If the respondents are able to establish claims for equitable rescission of the shares granted to the petitioners, their remedy will most likely be in damages and not return of the shares. In the result, it is unlikely that the petitioners' oppression claims will be resolved in the Alberta Action.

Prejudice

[94] The petitioners' shares are currently held by the ABKB pursuant to the Interpleader Order. The sole question in considering what consequences might flow from ordering or not ordering the stay is whether the respondents will become entitled to the shares *in specie* if successful in the Alberta Action. This would only be the result if the ABKB ordered rescission, which for the above reasons I find unlikely.

[95] The petitioners' shares have been issued in their names with an entitlement that they be given to the petitioners over the 12-month period. That 12 months has now expired. The petitioners surrendered their shares in Embark in exchange for their allocated shares in BevCanna and those shares cannot be returned.

[96] If the respondents succeed in the Alberta Action, their damages will be easily calculable. Conversely, if the petitioners are deprived of the shares pending resolution of the Alberta Action, their losses would extend to the loss of opportunity to realize the value of the shares and further decline in the value of their shares and use sale proceeds for other purposes. Additionally, there is some risk stemming from BevCanna's breach of its obligations under the securities regulations.

[97] The respondent's attempt to use the Interpleader Order in the Alberta Action to secure the shares in the petitioners' names and held by Olympia against any distribution to the petitioners is contrary to the historical practice in British Columbia. As noted in G. Peter Fraser, John W. Horn & Susan A. Griffin, *The Conduct of Civil Litigation in British Columbia,* 2nd ed (LexisNexis Canada Inc., 2007) (loose-leaf updated 2022, release 42) at 49.20:

> With the exception of the attachment of debts, it historically has not been the practice in British Columbia to secure the property of the defendant *before*

> *judgement*, in order to provide a fund or asset against which plaintiffs may execute if they recover judgement.

[98] In *Areva NP GmbH v. Atomic Energy of Canada Ltd.,* [2009] O.J. No. 861 (QL), 2009 CarswellOnt. 1149 (WL) (S.C.J.) at para. 19, the Court stated that "a party's right to access the courts should not be lightly interfered with – even temporarily, if the delay would cause an injustice or prejudice to the interests of the plaintiffs". In that case, the Court declined to order a temporary stay, finding that "it would be prejudicial and unfair to require the plaintiffs to await the outcome of the [parallel] action…before they are permitted to seek…damages that are within the jurisdiction of this court to provide" (at para. 22). The prejudice to the plaintiff's interest outweighed any resultant inconvenience to the party seeking the stay. In that case, the two proceedings shared a factual background arising out of a series of contracts, however, the Court was unable to conclude that a determination in the parallel proceeding would have a material impact on the claim before it. The burden of proof rests with the respondents. The petitioners have likely suffered significant damages due to the falling market price of the BevCanna shares since delivery of their issued shares was suspended in March 2022. In view of BevCanna's failure to meet its obligations under the Alberta securities legislation and the cessation of trading of those shares, there appears constitute a significant risk that the petitioners will be deprived of any remedy if I grant the temporary stay and the petitioners oppression claims are eventually successful.

[99] I must address the fairness and prejudice issues, the balance of convenience and whether irreparable harm might occur if the order is not made.

[100] In the affidavit of Marcello Leone, he does not provide any evidence concerning prospective prejudice or unfairness to the respondents that might result from the transfer of the BevCanna shares to the petitioners. Further, the only evidence concerning the reasons for withholding the shares from the petitioners is set out in respondents' counsel's letter of March 30, 2022 indicating the reasons that shares would not be delivered to the petitioners:

> … While the issue of the Intellectual Property and Assets is being investigated, Mr. Dawson-Scully as Shareholder Representative and Mr. Lyons as representative of the Company jointly request pursuant to s. 6.11 of the Escrow Agreement that the Escrow Agent not release any shares from Escrow or deliver or cause to be delivered any Certificates…

[101] It is clear from the text of this letter that the respondents' approach amounts to an attempt to secure or control the issued shares pending the outcome of their investigations into the alleged wrongdoings by the petitioners. In my view, this approach is contrary to the accepted practice in British Columbia as mentioned above and weighs against any suggestion that withholding the shares to maintain the *status quo* is necessary except as a pre-emptive strategy to forestall the petitioners exercising their rights to dispose of these shares in the usual course of business.

[102] Absent any evidence concerning prospective prejudice or unfairness to any of the respondents if the stay is not granted , I find that any potential damages suffered by the respondent's arising from the transfer of shares to the petitioners will be easily calculable.

[103] In several authorities provided by the applicants in cases where stays were ordered, the court found that staying the proceeding would not cause undue prejudice, harm, or injustice to respondents (*Lomas v. Clark,* 2020 BCSC 553; *Ainsworth Lumber v. Canada (Attorney General)*, 2001 BCCA 105; *Concord Kingsway Project Limited Partnership v. Ivanhoe Cambridge II Inc.,* 2017 BCSC 282; and *Roeder v. Lang Michener Lawrence & Shaw,* 2004 BCSC 80). This case is distinguishable on the facts given and the financial losses already sustained by the petitioners which may increase further if the shares remain held by the ABKB under the Interpleader Order.

[104] Further, I do not accept the respondents' submission that this situation is analogous to *ABOP LCC v. Qtrade Canada Inc.,* 2007 BCCA 290. In that case, the court stayed the oppression action on the basis of s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, which concluded that where an application for

a stay is brought by a party to an arbitration agreement, the court must order a stay of the legal proceedings unless the arbitration agreement is "void, inoperative or incapable of being performed". In this case, there is no such arbitration agreement limiting the petitioners' right to bring an oppression proceeding in BC Supreme Court.

Balance of Convenience

[105] In my view, the prejudice to the petitioners that will result from a stay of the petition would far outweigh the risks of prejudice to the respondent that will happen if the oppression claim is successful and the shares are delivered to the petitioners. The Court must act cautiously on this application because a stay of their claims will deprive them of reasonable access to the Court to settle the narrow issue of their entitlement to the shares held in ABKB. It must be kept in mind that the shares have been issued and exist in the names of the petitioners.

[106] In my view, the following factors suggest the balance of convenience falls in favour of the petitioners:

a) The Alberta Action is not likely to resolve the petition. The ABKB is unlikely to order rescission of the shares held in escrow, as this would amount to ordering partial rescission. It is only if rescission of the shares is ordered that the Alberta Action would resolve the BC petition proceeding;

b) The length of delay that would be caused by the temporary stay would be lengthy, as the applicants are asking the petition be stayed until the conclusion of the Alberta Action which could be a year or two;

c) Staying the petition proceeding would result in prejudice to the petitioner, as the value of the shares has already fallen and continues to fall; and

d) The conduct of the respondents is relevant; they are holding the shares as a 'self-help' or extra-judicial remedy to what they allege is a fraudulent

misrepresentation by the petitioners rather than simply seeking recourse through the courts.

Other Factors

[107] I have also considered the following factors referenced in *Peh* as follows:

a) Absent evidence about which contract the respondents seek to rescind, and in the face of the pleadings wherein they have not accepted the repudiation of the contract by the petitioners, the merits of the respondent's claim to hold back the petitioner shares is weak;

b) The risk of parallel proceedings producing different findings of fact or conclusions of law, seem minimal in view of the respondent's pleadings;

c) Regrettably a stay will not promote judicial economy and efficiency in expenditures of judicial and legal resources because for all practical purposes the respondents are not likely to achieve rescission of the grant of shares already issued to the petitioners;

d) The Alberta Action has not proceeded very far and a trial is likely two years in the future, meaning a stay, while temporary, will have the effect of delaying the petitioners' progress toward a resolution on the issue of their entitlement to the shares;

e) Given that the respondents seek to enforce their agreements with the petitioners through specific performance in the Alberta Action, the application for a stay of the petition proceeding appears to be, at least in part, an attempt by the respondents to obtain a tactical advantage by forestalling the petitioners exercising their rights to dispose of the shares in the usual course of business; and

f) The conduct of the applicants is relevant; they unilaterally prevented Olympia from delivering the petitioners' shares prior to the interpleader order while

exercising a self-help or extra-judicial remedy to preserve their control of the shares at a point when rescission of the grant of shares is extremely unlikely.

Conclusion

[108] Balancing the competing factors presented on this application, I am not satisfied the respondents have proved on the balance of probabilities that this proceeding should be stayed pending the outcome of the Alberta Action. I accept the respondents were not seeking a permanent stay of this proceeding and there may be some overlap in the factual issues that will arise in this Court. However, taking into account all aspects of the test, I am not persuaded that this case warrants exercising the discretion necessary to deny the plaintiffs a timely resolution of their claims for the reasons noted above.

[109] In my view, the prejudice of a stay to the petitioners outweighs the prejudice to the respondents of dealing with the oppression action in BC and the balance of convenience weighs in favour of refusing the respondents' application.

[110] Taking into account the pleadings in the Alberta Action seeking a mandatory order for the petitioners to perform their obligations under one of the agreements while at the same time seeking rescission of the grant of shares, I am not satisfied the respondent's have established a sufficiently meritorious claim to the shares to interfere with the petitioner's right to have delivery of the shares already issued to them.

[111] The respondent's peremptory interference in the delivery of the petitioners' shares should not materially impact their claims to an oppression remedy. Although there may be some factual issues common to both proceedings, they do not rise to a sufficient level of concern that there may be inconsistent conclusions in either court sufficient to warrant an" exceptional" remedy sought by the respondents.

[112] The stay application brought by the respondents is dismissed.

[113] I decline the petitioners' request to decide the petition in the absence of evidence filed by the respondents. I accept that the respondents were warned to file their material; compelling them to file their affidavit material would have been against the principles of fairness, economy and the interests of justice. Nevertheless, I will make an order that the respondents provide a response to the petition and any affidavits to be relied upon within 21 days of these reasons being published.

[114] Costs of this application are awarded to the petitioners.

"Armstrong J."