IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bhatti v. Yellow Cab Company Ltd.,*
2024 BCSC 2031

Date: 20241106
Docket: S246819
Registry: New Westminster

Between:

Amarjit Singh Bhatti and Kuldeep Singh Bhatti

Petitioners

And

Yellow Cab Company Ltd., Kulwant Sahota, Kulwinder Saini, Satnam Jaswal, Nirmaljit Sidhu, Rajesh Thakur and Charanjit Dass

Respondents

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for Petitioners:	G.S. Badh A.N. Mathur
Counsel for Respondents:	R.M. Gagnon Y. Wong
Place and Date of Hearing:	New Westminster, B.C. October 17 and 18, 2024
Place and Date of Judgment:	New Westminster, B.C. November 6, 2024

Table of Contents

Overview

[1] The petitioners allege that the Messrs. Kulwant Sahota, Kulwinder Saini, Satnam Jaswal, Nirmaljit Sidhu, Rajesh Thakur and Charanjit Dass ("Personal Respondents") breached Article 4.1(d) of Yellow Cab Company Ltd. ("Company") Articles of Incorporation ("Articles"). Article 4.1(d) sets out a process for how shares of the Company will be transferred. The petitioners allege that the Personal Respondents participated in or otherwise allowed share transfers that failed to comply with the Article 4.1(d) procedure.

[2] As a consequence of these alleged breaches of Article 4.1(d), the petitioners argue that the Personal Respondents breached their duties as directors of the Company pursuant to s. 142(1) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*], and acted in a manner that amounts to oppressive action against the petitioners pursuant to s. 227(2)(a) of the *BCA*. Based on this assertion, the petitioners seek orders under s. 227(3) of the *BCA*, which sets out a series of possible remedies for oppressive actions. The petition does not seek specific oppressive remedies, but rather seeks "appropriate orders and directions" under s. 227(3).

[3] As a consequence of the same alleged Article 4.1(d) breaches, the petitioners also say the Personal Respondents have breached fiduciary duties to the Company. They argue that a finding of oppression and breach of fiduciary duties should ground a derivative action, and they apply for leave to commence a derivative action in the name of the Company and against the Personal Respondents pursuant to ss. 232 and 233 of the *BCA*. In addition to seeking leave to commence a derivative action, the petitioners seek declarations that the Personal Respondents breached the Articles of the Company, the fiduciary duty they owe towards the Company, and their duties as directors under s. 142 of the *BCA*.

[4] In the petition, the petitioners also sought orders appointing an inspector, for an account of the Company's transfer or sale of assets, and disclosure of certain documents; however, these requests for relief were abandoned at the hearing.

[5] In the petition, the petitioners seek compensation for the legal expenses incurred as a result of the oppressive action of the Personal Respondents or, in the alternative, costs.

[6] In their written submissions, the petitioners restrict the relief sought to the following:

> a. A declaration that Personal Respondents have permitted transfer of shares of Yellow Cab in violation to the Company's articles;
>
> b. A declaration that the actions of the Personal Respondents in allowing the transfer of shares of Yellow Cab in violation of the Company's articles amounts to oppression and/ or unfairly prejudicial conduct;
>
> c. [Repeats b]
>
> d. A declaration that the Personal Respondents breached their fiduciary duties owed to the Company and the shareholders in permitting the transfer of shares of Yellow Cab in violation to the Company's articles;
>
> e. An order the Petitioners be granted leave to commence a derivative action and/or, in the alternative that this matter proceed as a derivative action.
>
> > a. The relief that we are seeking within our derivative action is limited to a declaration that the actions of the Personal Respondents in allowing the transfer of shares of Yellow Cab in violation of the Company's articles amount to a breach of the directors' fiduciary duty to the Company.
> >
> > b. In the alternative, we seek that the Petitioners be granted leave to file a notice of civil claim seeking to a declaration that the actions of the Personal Respondents in allowing the transfer of shares of Yellow Cab in violation of the Company's articles amount to a breach of the directors fiduciary duty to the Company, on the grounds set out in the herein petition.
>
> f. Costs.

[7] The respondents oppose all of the relief sought in the petition and in the written submissions. They submit that during the relevant timeframe, Messrs. Sahota, Saini, Jaswal, Dass, and Thakur transferred shares according to the Company's usual practice, and that this practice is consistent with the Articles and does not support any of the petitioners' claims.

[8] For the reasons that follow, the petitioners have failed to establish any breach of the Articles, of director duties, or that any actions taken by the Personal Respondents amounted to oppressive action against the petitioners. I have found

that the petitioners have failed to meet the requirements of s. 233 of the *BCA* and they are therefore not granted leave to pursue a derivative action. The petition must be dismissed.

Background Facts

[9] The Company is a taxi operating company which was incorporated in the year 1962.

[10] The Personal Respondents were, at all material times, directors of the Company and shareholders in the Company.

[11] The petitioners are shareholders in the Company.

[12] The Company is an owner-operated taxi company. All shareholders in the Company are also owners of taxis. All the shares of the Company are associated with particular taxis.

[13] There are 321 allocated Class A shares in the Company. Each Class A share is tied to a Yellow Cab license to operate a taxi on either the day or the night shift. Each Class A share entitles the owner to one vote. The Articles provide that no person is permitted to hold more than two Class A shares. At all material times, both of the petitioners held two Class A shares.

[14] There are 4875 allocated Class B shares issued in the Company. Class B shares do not grant voting rights, except as set out in Article 23.1 of the Articles.

[15] On or about March 28, 2021, the Company held its Annual General Meeting (“AGM”). Pursuant to the Articles, at each AGM all the directors retire and members are entitled to vote to elect a new board of directors.

[16] About two weeks prior to the AGM, the petitioner Kuldeep Singh Bhatti sought a copy of the Company’s list of shareholders. When he received a copy of the list of shareholders and compared it to the previous year’s list, the petitioners realized that new shareholders had replaced old or existing shareholders of the Company. They

also realized that some existing shareholders had altered their shareholding, including some of the Personal Respondents.

[17] At the AGM, the petitioner Kuldeep Singh Bhatti questioned the respondent Sahota about the alteration of his shareholding and questioned whether the Articles had been complied with.

[18] The issues in this proceeding center on Article 4.1(d). Article 4.1 provides as follows:

> Part 4. – TRANSFER OF SHARES
>
> 4.1 The transfer of shares of the Company is restricted as follows:
>
> (a) The Directors may decline to register any transfer of shares to person of whom they do not approve; and,
>
> (b) No person shall be entitled to own shares of the Company unless such person owns at least one-half interest in a taxicab operated by or in agreement with the Company; and,
>
> (c) The owner of such a taxicab shall be entitled to one Common Class “A” share and fifteen (15) Common Class “B” shares for each one—half interest in such a taxicab with a maximum of two (2) Common Class "A” shares to be owned by any one person; and,
>
> (d) Subject to any rights to transfer shares pursuant to a member’s operating agreement with the Company, any member wishing to sell his shares shall grant a right of first refusal to the Company to match any acceptable offer for the shares, said right to be exercised within ten (10) days of receipt by the Company of notice from the selling member; if the Company declines to exercise its right, the other members of the Company shall have a right of second refusal to match offer, to be exercised within ten (10) days after expiry of the right of first refusal. If more than one member exercises this right of second refusal, the seller may select the member to whom he wishes to sell. If neither the Company nor any member exercises the right of refusal herein, the selling member shall be free to sell the shares on the same terms and conditions to any other person subject to the requirement for approval for such person by the Directors aforesaid; and,
>
> (e) The above restriction shall be binding on the legal and personal representative of a deceased shareholder.

[19] After the AGM, the petitioner Amarjit Singh Bhatti demanded disclosure of documents pertaining to the transfer of shares by the Personal Respondents.

[20] On February 8, 2022, the petitioners filed a notice of civil claim challenging, amongst other things, the transfer of shares undertaken by the Personal Respondents.

[21] In March 2022, the respondents filed a response to civil claim and in May 2022 they applied, amongst other things, to strike the pleadings.

[22] In June 2022, the petitioners filed a notice of discontinuance in respect of the notice of civil claim.

[23] The petition was filed on November 3, 2022.

Issues

[24] At the hearing of this petition, the petitioners raised two preliminary issues:

a) The petitioners challenged the admissibility of Affidavits #1 and #2 of Carolyn Bauer, the General Manager of the Company.

b) The petitioners asked that adverse inferences be drawn against the Personal Respondents because none of the Personal Respondents gave evidence in this proceeding.

[25] The issues raised in the petition are:

a) Whether the petitioners have established a breach of the Articles.

b) Whether the petitioners have established that the Personal Respondents breached their statutory duties as directors under s. 142(1) of the *BCA*, or their fiduciary duties owed to the Company.

c) Whether actions taken by the Personal Respondents amounted to oppressive action against the petitioners under s. 227(2)(a) of the *BCA*?

d) Whether the petitioners have met the requirements of s. 232 of the *Act* for leave to bring a derivative action?

Legal Analysis

Admissibility of Ms. Bauer's Affidavits #1 and #2

[26] The petitioners object to the admissibility of Ms. Bauer's Affidavits #1 and #2 in their entirety, or in the alternative, to certain portions of the affidavits. They argue that her evidence is based on information and belief which is not permitted in a petition proceeding that seeks final orders for relief, pursuant to Rules 22-2(12) and (13) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*SCCR*]. In the alternative, they argue that certain portions of the affidavits are argumentative, opinion evidence, or statements made without any factual basis.

[27] I do not find that Ms. Bauer's evidence is inadmissible in its entirety, as I find that her evidence is based on personal knowledge rather than on information and belief. I do not admit those portions of Ms. Bauer's Affidavit #1 and #2 which purport to offer the legal opinion that certain actions taken were "in accordance with the Company Articles" or "consistent with the Articles" or "not required by the Articles" (see e.g. Affidavit #1, paras. 25, 27, 29, 30, Affidavit #2, para. 12). I do not find that any other portions of her affidavits are argumentative, opinion evidence, or statements made without a factual basis.

[28] Corporations speak through their representatives: *Latifi v. The TDL Group Corp.*, 2024 BCSC 832, at paras. 76-77.

[29] Ms. Bauer has been employed as the Company's General Manager since 2010. Her job duties are described in Article 15.3 as having the "responsibility of handling the day to day operations of the Company in accordance with these Articles, and with the policies of the Company determined by the Resolution of the Directors from time to time."

[30] With respect to share transfers in particular, she has provided evidence describing the Company's general practice:

a) When a share transfer is made to a new shareholder, the process is as follows:

i. When the selling shareholder has found a purchaser for the share, the seller and purchaser attend at the Senior Operations Manager's office (“Mr. Bali”);

ii. Mr. Bali prepares certain transfer documents, including the Amended and Restated Purchase and Sale Agreement (the "Agreement");

iii. The Agreement is dated, the purchase price is written on the Agreement, and the Agreement is signed. The Agreement is created at this stage to ensure fairness—so that if the Company or an existing shareholder wishes to match the offer, the prior offer is documented and there is evidence of the offer made by the non-shareholder. Then the Agreement is put before the Board of Directors for approval. Once the Board approves, it is put on hold for at least ten days;

iv. Mr. Bali, or the Company's receptionist (Ms. Remo in 2020), will then post notice of the proposed sale on the Company's noticeboard for at least ten days; and

v. If no shareholder has exercised their right of second refusal within ten days, then the seller may sell their share to a non-shareholder.

b) When a share transfer is made to an existing shareholder, the process is the same except that if the Company declines to exercise its right of first refusal, the transaction is not put on hold for ten days and notice of the transaction is not posted on the Company noticeboard.

[31] Ms. Bauer attaches, as Exhibits A and B to her Affidavit #1, a copy of the notices that she deposes were posted at the time of the respondent Sahota’s share transfer to a new shareholder, and at the time of the respondent Saini’s share transfer to a new shareholder. (She deposes that no such notices were posted when the other Personal Respondents transferred their shares, as these transfers were all to existing shareholders.) I reject the argument that in attaching Exhibits A and B, Ms. Bauer has offered inadmissible hearsay evidence. She has deposed that she has personal knowledge of the facts provided in her affidavit unless stated

otherwise. I accept that she has personal knowledge that the notices attached at Exhibits A and B were posted on the Company's noticeboard.

[32] Ms. Bauer has deposed that the Company has never exercised its right of first refusal to purchase shares from any shareholder, including from the Personal Respondents. I accept that as the Company's General Manager, she is an appropriate representative witness of the Company to depose to that fact.

[33] She has deposed that she is personally responsible for submitting the documentation to the Company's general counsel, who legally transfers the shares. To the extent she has described actions taken by Mr. Bali and Ms. Remo, this is appropriate for a corporate representative to do. These individuals were both employees of the Company at the material time, and the corporate representative is entitled to have personally obtained information about their activities and testified on behalf of the corporation about what occurred.

[34] Ms. Bauer's job duties over the years clearly placed her in a position to have corporate knowledge about the shares of the Company, transfers of those shares, the general practices of the Company, consultation processes with the taxi industry, and changes in the industry and insurance. I accept that Ms. Bauer is the appropriate corporate representative to give the evidence that has been offered.

[35] To the extent that Ms. Bauer has offered evidence that actions taken by the Personal Respondents and/or the Company were in accordance with or consistent with the Articles, the petitioners rightly concede that the question of compliance with the Articles is for this Court to decide. As noted above, I have not admitted that inadmissible legal opinion evidence.

Adverse Inferences

[36] The petitioners argue that the Personal Respondents should have given evidence explaining the share transfers, and that I should draw an adverse inference from their decision not to do so.

[37] Given my findings in respect of the admissibility of Ms. Bauer's affidavits, I do not accede to the argument that any adverse inferences should be drawn against the Personal Respondents. Ms. Bauer was capable of speaking on behalf of the Company, including with respect to these specific share transfers. There is nothing that compels the Personal Respondents to give their own affidavit evidence, and therefore no reason for me to find fault in their decision not to do so.

Alleged Breach of Articles

[38] The petitioners argue that in allowing and participating in the transfer of shares of the Company, the Personal Respondents breached Article 4.1(d). In particular, with respect to transfers to *new shareholders*, the petitioners say there is insufficient admissible evidence to establish that notice was given to both the Company and existing shareholders. With respect to transfers to *existing shareholders*, the petitioners say that the process described by Ms. Bauer, even if accepted, establishes a breach of Article 4.1(d).

[39] The respondents argue that Article 4.1(d) was complied with. With respect to transfers to *new shareholders,* the respondents say the evidence establishes that notice was properly given to both the Company and existing shareholders. With respect to transfers to *existing shareholders*, the respondents argue there is no requirement for notice to be given to other existing shareholders.

New Shareholders

[40] With respect to transfers to *new shareholders*, the evidence establishes that each of the respondents Sahota and Saini transferred a share to a new shareholder. The petitioner Kuldeep Singh Bhatti has appended documents showing that:

a) The respondent Sahota sold share 3 Day. The Agreement was made August 28, 2020. The takeover date was September 1, 2020. The purchase price was $90,000. The extract of the minutes of the director's meeting approving the transaction was signed September 1, 2020.

b) The respondent Saini sold share 58 Night. The Agreement was made August 24, 2020. The takeover date was September 1, 2020. The purchase price was $83,500. The extract of the minutes of the director's meeting approving the transaction was signed September 1, 2020.

[41] Given that the Board approved these transactions as reflected in the extract of minutes of the director's meeting, I cannot give effect to the argument that the Board was not given notice of them. It is inconsequential that the Board approved the transactions before the ten days contemplated in the Articles had elapsed. There is no requirement that the Board wait ten days to make its decision.

[42] The petitioner Kuldeep Singh Bhatti deposes that existing shareholders were not notified of these transfers on the Company's noticeboard or through any other medium. The petition record also contains 15 substantively identical four paragraph long affidavits from other shareholders in the Company deposing in relevant part:

> 3. I state that I have become aware of the fact that shares of Yellow Cab have been transferred/sold and purchased/ disposed off [*sic*], when the Personal Respondents were directors of Yellow Cab.
>
> 4. I state that I was never informed either prior to or after such sale and purchase of/ transfer of/ disposal of such shares of Yellow Cab.

[43] In contrast, Ms. Bauer deposes that notices for the transfer of both shares were posted on the noticeboard on August 28, 2022, and were posted for at least ten days. She attaches the notices that were posted for both 3 Day and 58 Night. With respect to share 3 Day, she further deposes that no existing shareholder exercised their right of second refusal while the notice was up. She therefore directed Ms. Remo to have their counsel document the sale on or around September 17, 2020. Ms. Remo's e-mail of the same date to counsel is appended to Ms. Bauer's Affidavit #2. There is no similar correspondence with respect to 58 Night.

[44] On the question of whether the notices were posted, I find Ms. Bauer's evidence to be more reliable than Mr. Bhatti's and the 15 additional affiants who say they were not informed of such transfers. Ms. Bauer has given direct evidence that is

consistent with the Company's usual practice and is corroborated by documentary evidence including the notices themselves for both transactions and contemporaneous e-mail correspondence with respect to share 3 Day. There are any number of reasons why Mr. Bhatti may not have observed or recalled seeing the notices when they were posted. The 15 substantively identical affidavits which do not directly comment upon the noticeboard are entitled to little weight and do not shift the balance of reliability. Even if those affiants had deposed that they had not seen the notices, there are any number of reasons why they may not have observed or recalled seeing the notices when they were posted.

[45] The petitioners also challenge the timing of the notice to the existing shareholders, arguing that it was posted so that the notice period for the Company and the existing shareholders ran concurrently and pointing out that the take over date set out in the Agreement was before ten days had elapsed. I find this to be inconsequential. There is nothing in the text of Article 4.1(d) which precludes the notice periods from running concurrently. If both the Company and the existing shareholders were given ten days within which to make their decision, those time periods do not need to run consecutively, and it is open to the holder of the right of refusal to make its decision within a shorter time frame. As for the takeover date set out in the Agreement, Ms. Bauer has described (above) how the Agreement is created and then put on hold while the notice period runs. It is not until Ms. Bauer sends the paperwork to counsel that the share is legally transferred and this does not occur until after the notice period. Given this procedure, the takeover date set out in the Agreement is not material to the present issue.

Existing Shareholders

[46] With respect to transfers to *existing shareholders*, I find that the plain meaning of the text of Article 4.1(d) supports the respondents' interpretation.

[47] The Article requires that the Company be given the right of first refusal. If the Company wished to exercise this right of first refusal, that would be evidenced by a refusal to approve the proposed sale in the minutes. However, in each instance

referred to in evidence in these proceedings, Ms. Bauer indicates that the Board approved the sale. There is documentary evidence corroborating that evidence. Again, it is inconsequential that the approval in each case occurred prior to 10 days having passed. The Company's right is to be exercised *within* 10 days.

[48] Article 4.1(d) stipulates that if the Company declines to exercise its right, the other members of the Company shall have a right of second refusal to match the offer. However, it also provides that if more than one member exercises this right of second refusal, the seller may select the member to whom he wishes to sell. Thus, shareholders who have a right of second refusal are by no means guaranteed a right to acquire the shares. The crystallization of their right may be frustrated by forces outside of their control, including the choice of the selling shareholder: *Pandher v. Yellow Cab Co. Ltd.*, 2011 BCSC 460 at para. 34.

[49] When a shareholder-to-shareholder sale takes place, there is no need to put the transaction on hold for others to exercise their right of second refusal. The only party who could be prejudiced by the decision not to do so is the seller who foregoes the chance to have a bidding war. No such seller has challenged the process in this proceeding and the logical inference is that the challenged transactions simply reflect the seller's right, which is set out in Article 4.1(d), to choose which existing shareholder to sell to.

[50] I say this notwithstanding the evidence of Mr. Chow, a former shareholder of the Company, who deposed that he asked Mr. Bali to sell his share (186 Night) and to post the sale on the Company's noticeboard. Mr. Chow deposed that a few days later he received an offer to purchase his share and that he was under the impression that he received the offer because of the posting on the noticeboard. He therefore sold his share. He deposes:

> 15. I was under the impression that my share was sold after a notice was posted on the Yellow Cab notice board. However, I understand that no such notice was ever posted.
>
> 16. There is a strong likelihood that I would have received a higher price from the sale of my share had the company representatives posted a notice regarding the sale of my share on the Yellow Cab notice board.

[51] No basis for the reversal of Mr. Chow's understanding as to what occurred has been provided, and given that he went through with the sale, it appears this reversal occurred sometime after the transaction. The evidence is therefore likely based on information and belief and if so, would be inadmissible. This evidence is entitled to little weight. Mr. Chow has, in any event, not sought any relief in these proceedings.

Alleged Breach of Director's Duties

[52] The petitioners argue that the Personal Respondents have a duty as directors to ensure the Articles are complied with. The duty is said to arise from s. 142(1) of the *BCA*, which sets out the statutory duties of directors and officers:

> **Duties of directors and officers**
>
> **142** (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must
>
> (a) act honestly and in good faith with a view to the best interests of the company,
>
> (b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,
>
> (c) act in accordance with this Act and the regulations, and
>
> (d) subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.

[53] The duty is also said to arise from the Personal Respondent's roles as fiduciaries.

[54] Given my finding above that the petitioners have not established a breach of the Articles, I do not accede to the argument that the Personal Respondents breached any such duty.

[55] Further, an action for breach of fiduciary duty may not be pursued by petition.

[56] There was also a suggestion made in oral argument, though not pleaded, that the Personal Respondents failed in their duty to act honestly and in good faith with a view to the best interests of the Company. In particular, it was argued that because

the respondent Sahota sold his pre-existing share for more than he paid for a new share, the directors should have caused the Company to exercise its right of first refusal in respect of the lower priced sale.

[57] There is no evidence before the Court to explain why any share was priced in any particular way. Given that the shares are tied to vehicles, there are many possible explanations for that difference that do not amount to sharp dealing. That there is a lacuna in the evidence is not surprising given this argument is not pleaded. I would not accede to this argument raised for the first time orally. The petitioners have not met their burden of proving that the directors ought to have acted as they suggest in the Company's best interest.

Alleged Oppressive Action

[58] The petitioners allege that in breaching or permitting the breach of Article 4.1(d), the Personal Respondents' conduct amounted to oppressive actions against the petitioners under s. 227(2)(a) of the *BCA*.

[59] The respondents argue that the Articles were not breached. In the alternative, they submit that if the Articles were breached, the petitioners have not proven any adverse effect suffered by them due to the alleged breach.

[60] Section 227 of the *BCA* sets out the statutory right to relief invoked by the petitioners:

> **227** (1) For the purposes of this section, "shareholder" has the same meaning as in section 1(1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A shareholder may apply to the court for an order under this section on the ground
>
> > (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
> >
> > (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is

> proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[61] A shareholder must show direct and special harm in order to maintain a personal action for oppression, otherwise, he must seek leave to bring a derivative action in the name of the company: *Pasnak v. Chura*, 2004 BCCA 221 at paras 5, 27.

[62] As I have already explained, I do not find that Article 4.1(d) was breached.

[63] If I am wrong about that, the claim for oppression fails for the further reason that the petitioners have not proven that the conduct in question caused any direct or special harm to them.

[64] In particular, if there was a failure to give notice to the Company or to existing shareholders of transfers to new shareholders and/or if Article 4.1(d) required that notice of transfers to existing shareholders be posted, then all existing shareholders would be at least equally prejudiced by a failure to post notice. Indeed, the petitioners would likely be less prejudiced than some as they each currently own the maximum allowable number of shares under Article 4.1(c), so they would have been unable to purchase more shares even if they had notice of the opportunity to do so. The most they could have hoped to do was to sell an existing share in order to buy another. There is no evidence that the petitioners desired to do so with respect to any of these specific transactions, or at all. There is no evidence that the petitioners, or any of their supportive affiants, would have acted differently in any way if they had seen notice of any of these transactions.

Proposed Derivative Action

[65] Under s. 232 of the *Act*, a shareholder or director may apply to the court for leave to bring a proceeding in a company's name to enforce a right, duty, or obligation owed to the company, or to obtain damages for a breach.

[66] Pursuant to s. 233(1), the court may grant leave if four conditions apply:

a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

b) notice of the application for leave has been given to the company and to any other person the court may order,

c) the complainant is acting in good faith, and

d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[67] The petitioners seek leave to pursue a derivative action on two bases. First, they argue that in breaching Article 4.1(d), the Personal Respondents breached a fiduciary duty to the Company. Second, they argue that a finding of oppression would also ground a derivative action.

[68] The respondents dispute that the conditions set out in subsections (a), (c) and (d) have been met.

Have the petitioners made reasonable efforts to cause the directors of the Company to pursue action?

[69] The respondents argue that the petitioners have failed to meet the first branch of the test for a derivative action. They argue that no demand was ever made of the directors to pursue a claim on behalf of the Company with respect to the issues raised in this petition.

[70] The petitioners argue that letters that they sent in September 2022, which are attached as Exhibit C in Amarjit Singh Bhatti's Affidavit #1, constitute reasonable efforts to cause the directors to prosecute the action. They also say that the fact that they have sought leave to commence a derivative action in the within petition is itself sufficient to meet the requirements of s. 233(1)(a).

[71] I cannot accede to the petitioners' arguments. The letters appended to Exhibit C of Affidavit #1 of Amarjit Singh Bhatti do not demand that the respondents pursue action. Rather, in this correspondence, the petitioners demand to inspect certain

Company documents. Nor can the pleading itself be sufficient to meet the requirements of s. 233(1)(a), or else this criterion would be met in every case pursued in court. I cannot adopt an interpretation of s. 233(1)(a) that would render it meaningless.

[72] A letter from the petitioners' solicitor demanding that the Company prosecute the action would constitute the reasonable efforts required under s. 233(1)(a): *Gill v. Kalgidhar Darbar Sahib Society*, 2018 BCSC 813 at para. 39. The petitioners failed to take this fairly basic step in order to meet the requirements of s. 233(1)(a).

[73] No explanation has been proffered by the petitioners as to why they did not simply write a demand letter. They have not met the requirements of s. 233(1)(a).

[74] Although a failure to meet the first condition in s. 233(1) is sufficient to find that the petitioners' application for leave must fail, I will also address the other three conditions.

Are the petitioners acting in good faith?

[75] The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 at para. 29.

[76] The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Eastern Platinum* at para. 30.

[77] Factors to be considered in determining good faith include the applicant's belief in the merits of the proposed claim, existing disputes between the parties, and alleged ulterior motives: *Eastern Platinum* at para. 31.

[78] The petitioners argue that the fact they are pursuing these claims shows they are doing so in good faith, and that the Court should infer there is no ulterior motive from the fact that they are pursuing these claims and from the September 2022 letters sent to the directors, which I have described above.

[79] The respondents say this proceeding is political and that the petitioners are dissatisfied with the Company's leadership and trying to make trouble for that leadership by engaging in this litigation. They say the petitioners have not established good faith.

[80] I do not agree that the fact of pursuing a claim is sufficient to establish good faith. That approach amounts to the very presumption prohibited in the jurisprudence I've summarized above. The evidence is not sufficient to discharge the petitioners' burden of proof in establishing good faith.

[81] The petitioner Bhatti has deposed, in part, as follows:

> 20. About two weeks prior to the 2021 AGM, I, with the intention of contesting the elections sought a copy of the list of shareholders of Yellow Cab. This copy of the list of shareholders was provided to me by the general manager of Yellow Cab…
>
> [Emphasis added.]

[82] Mr. Bhatti then goes on to describe how he noticed that there were new shareholders, that certain existing shareholders had altered their shareholding, and how he raised the issue of the share transfers at the 2021 AGM.

[83] Mr. Bhatti's own evidence thus supports that his initial interest in the shareholder list was political. He sought it out pre-emptively in furtherance of his plan to contest the elections which were taking place in a couple of weeks.

[84] The relief sought in the petition includes orders that the Personal Respondents' actions amounted to oppressive action *against the petitioners* and relief under s. 227(3) of the *BCA*. Thus, the petitioners appear to be pursuing the claim for their own benefit and not simply for the benefit of the Company.

Is this legal proceeding in the best interests of the Company?

[85] As noted in *Eastern Platinum* at paras. 34-35, a consideration of the best interests of the company includes a consideration of the merits of the proposed action and whether the action has a reasonable prospect of success or is bound to fail. The onus is on the applicant to provide some evidence that the proposed action has a reasonable prospect of success*: Eastern Platinum* at para. 36.

[86] The court should not attempt to resolve conflicting versions of the facts in the leave application. The sole purpose of considering the respondent's version of the facts is to test the reasonableness on its face of the applicant's version: *550934 British Columbia Ltd. v. A.R. Thomson Group*, 2012 BCSC 1332, at paras. 60-61. Nevertheless, the court should do more than "skim the surface" of the pleadings: *Eastern Platinum* at para. 37.

[87] The court must also consider "whether the potential relief sought in the action makes it worthwhile to the company to undertake the costs and inconvenience of pursuing it": *Eastern Platinum* at para. 38.

[88] The contemplated actions in this proceeding are not at all clear. No draft notice of civil claim has been included in the materials. Orally, the petitioners indicated an intent to advance two arguments both premised on the allegation that the Personal Respondents have breached Article 4.1(d), an argument I have rejected.

[89] I also do not agree with the submission that a finding of oppression is a proper grounding for a derivative action. To the contrary, oppression proceedings and derivative actions seek to address different harms. The former seeks to redress direct and special harms to a shareholder, while the latter seeks to redress harms to the company: *Pasnak* at paras. 5, 27.

[90] In all the circumstances, I find the claim that the petitioners seek to bring is bound to fail. As such, it is not in the best interests of the Company and it is not worthwhile for the Company to undertake the costs and inconvenience of pursuing it.

Conclusion

[51] The petition is dismissed in its entirety, with costs.

"Latimer J."