

CANADA / JUDGMENT

## Melcer Estate v. Boxer

2020 BCCA 380

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 380 Melcer Estate v. Boxer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Melcer Estate v. Boxer,

2020 BCCA 380

Date: 20201217

Docket: CA47111

Between:

Lee Watson in his capacity as personal representative of the

Estate of George Melcer

Respondent

(Petitioner)

And

Jacob Boxer, also known as Jake Boxer, Regina Boxer, Boxer Holdings Ltd. and Radio City Investments Ltd.

Appellants

(Respondents)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 6, 2020 (Melcer Estate v. Boxer, 2020 BCSC 1686, Vancouver Docket S1610318).

Oral Reasons for Judgment

Counsel for the Appellants (via teleconference):

A.N. Epstein

Counsel for the Respondent (via teleconference):

J. Goulden, Q.C.

S.J. McCalla

Place and Date of Hearing:

Vancouver, British Columbia

December 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 17, 2020

Summary:

This appeal arises in the context of an oppression remedy proceeding. The applicants, the Boxer Group, and the respondent, the Melcer Estate, each own 50% of the shares of Radio City Investments Ltd. In 2018 the judge found it was just and equitable for the parties to obtain a valuation and for the Boxer Group to have the opportunity to purchase the Melcer Estate shares. The parties appointed a valuator, but the Boxer Group took issue with certain aspects of the report. The parties sought directions from the court, and the judge ordered the parties to instruct the valuator to finalize its report without the changes sought by the Boxer Group. The Boxer Group intends to seek leave to appeal on the grounds that the judge erred in: (i) ruling on a matter not before her; (ii) finding the valuation was just and equitable; and (iii) exercising her discretion to order the parties to finalize the valuation. Held: Application dismissed. The proposed grounds of appeal are weak, but not vexatious. The Boxer Group would not suffer irreparable harm through the execution of the order, and they have not provided any evidence to support their claim that the Melcer Estate would be unable to pay any award on appeal. The balance of convenience does not favour a stay.

GRIFFIN J.A.:

## Introduction

- [1] The applicants, Jacob Boxer and various related companies, apply for a stay of execution of the order of Madam Justice Forth pronounced November 6, 2020. Originally they combined this with an application for leave to appeal, but on December 12 they contacted the registry to delay the leave to appeal application until 2021. There is a significant aspect of the order that is to take effect on Monday, December 21, 2020, absent a stay. Today's application was heard on the preceding Thursday. Because of the urgency to the parties, I have given oral reasons.
- [2] This appeal arises in the context of an oppression remedy proceeding having to do with Radio City Investments Ltd. ("Radio City"). That company was founded by two men who were business partners, Joseph Boxer and George Melcer, and was equally held by them, although Mr. Boxer transferred his shares to his holding company Boxer Holdings Ltd. Eventually both men passed away, Mr. Boxer in 1989 and Mr. Melcer in 2001, leaving their respective half-interests to their heirs or estate, which is on the one side the applicants and on the other side the respondent Melcer Estate. Because the applicants were respondents to the petition below, to avoid confusion I will refer to the applicants as the Boxer Group and to the respondent as Melcer Estate.
- [3] These parties have not been able to agree on what to do with Radio City. Radio City owns two significant assets, an apartment building in Burnaby, referred to as the "Radio City property"; and a minority interest in a BC company, Canaland Developments, which owns an apartment building in Vancouver (the "Canaland property"). The Boxer Group made an offer to purchase the Melcer Estate interest for \$3,050,000 on January 13, 2013. The Melcer Estate did not believe they had received sufficient financial disclosure about Radio City and did not accept the offer. They wanted an independent valuation, but this was resisted. They brought a petition alleging oppressive conduct by the Boxer Group.
- [4] The hearing of the petition was in February 2018. In reasons for judgment indexed at 2018 BCSC 775, the judge found:
- [63] I am not prepared to find on the facts as presented that either party have conducted themselves in a way that supports an oppression remedy.
- [64] However, I do concur with both parties that there is a deadlock between the two shareholders with respect to the management of Radio City. As a result, a remedy is needed to ensure equity is achieved and the deadlock is brought to an end.
- [65] Since these parties seek to end their relationship, this is not a case in which the shareholders will need to act cooperatively to resolve operational conflicts in the future. The mechanism put in place later in these reasons will effectively end the relationship.
- [5] The judge considered the parties' positions on how to resolve the deadlock:

### [Melcer Estate's] Position

- [95] The [Melcer Estate] submits that a business valuator be appointed who will value the assets of Radio City and provide an opinion on fair market value. The [Boxer Group] will be given the opportunity to pay one-half of the fair market value. If the [Boxer Group] do not want to buy one-half, then the assets of Radio City should be liquidated and dissolved pursuant to s. 324 of the BCA.
- [96] The [Melcer Estate] objects to the [Boxer Group's] proposal that a "shotgun" sale be implemented. A "shotgun" sale is not appropriate in these circumstances, as one party is an estate that is not interested in operating the company.

[The Boxer Group's] Position

- [97] The [Boxer Group] agree that Radio City is at a deadlock. The [Boxer Group] would like to purchase the [Melcer Estate's] shares in that company. They propose that a "shotgun" process be implemented.
- [6] After considering relevant legal principles, the judge decided in favour of the Melcer Estate's position as to the fair and equitable remedy:
- [102] In my view, the reasonable expectations of the parties, their relationship, and their positions with respect to Radio City do not support that it would be just and equitable to order a "shotgun" sale to resolve the deadlock.
- [103] The [Boxer Group] submit that a "shotgun" sale is appropriate in this case because one of the parties is seeking to retain control on the company, there are only two definable parties involved with the deadlock, there is an equal division of shares between the parties, the deadlock is resulting in significant interferences of the typical operations of the company, and there is little likelihood of reconciliation: see *Kang v. Sachdev*, 2008 BCSC 1032 at paras. 17-22; *Hurtsfield v. Hektoen*, 2011 BCSC 1290 at para. 24.
- [104] Although I agree with the [Boxer Group] that "shotgun" sales combine the advantages of a market sale with the advantage of a buyout by one of the parties, the case at hand is not a situation in which the parties, in reality, share an equal opportunity to acquire the other's interest in the business. Unlike in *Kinzie*, at para. 25, the parties in this case are not equally familiar with the business property.
- [105] Here, there are imbalances between the parties that would risk an unjust result if this Court were to order a "shotgun" sale. I note that Boxer Holdings is in an advantageous position compared to the Estate, which has limited knowledge of Radio City's business operations. Moreover, the Estate does not appear to have the desire to purchase Boxer Holdings' shares or be in a position to continue the business: see e.g. *Bartholomew Estate v. Electric Power Equipment Ltd.* (1999), 68 B.C.L.R. (3d) 312. That this imbalance may stem from the Estate's unwillingness to be active with the operation of Radio City does not persuade me that a "shotgun" sale would be just and equitable.

- [106] In my view, the just and equitable approach is to have an independent valuation performed, and then give Boxer Holdings the option to purchase the [Melcer Estate's] one-half interest in Radio City. As Radio City's assets are primarily real estate, and not restricted assets (compare *Cyprus Anvil Mining Corp. v. Dickson* (1986), 8 B.C.L.R. (2d) 145 at paras. 72-75 (C.A.)), this is a reasonable way of assessing fair market value.
- [107] With respect to the valuation date, the [Melcer Estate] submits that the shares should be valued as of the date it receives the audited financial statements, accounting, and disclosure. The valuation date should be the date that the valuator conducts the valuation: see e.g. *Livramento v. Millennium Powder Coating Ltd.*, 2007 BCSC 1282 at para. 58.
- [108] If Boxer Holdings does not exercise the option to purchase the [Melcer Estate's] interest, then Radio City shall be wound up and sold.
- [7] Thus, the mechanism the judge decided upon to separate the parties' interests was to order the parties to jointly appoint a qualified business valuator to perform a valuation of Radio City. Once the valuation was in hand, the Boxer Group would have the opportunity to purchase the Melcer Estate's interest at the determined fair market value. If the Boxer Group declined, then the company would be wound up and its assets sold. The May 2018 Order of the judge was not appealed.
- [8] In September 2018, the parties sought directions from the judge on the form of the instruction letter to the valuator. She directed that the valuator should consider any tax implications in determining the value of Radio City.
- [9] In October 2019, the valuator provided his draft valuation to the parties. The valuator relied on undated appraisal reports prepared by Burgess Cawley Sullivan & Associates Ltd. The valuator provided a range of fair market value for Radio City, from low to high.
- [10] In November 2019, counsel for the Boxer Group emailed the valuator with some questions. The valuator responded with answers to those questions in December 2019. He also advised that he had made an error in one of the calculations, which affected the low end of the fair market value. The valuator adjusted his calculations, which resulted in an increased low end and increased mid-point. After taking into account the parties' questions and one correction at the low end, the valuator estimated the range of fair market value to be between \$13.41 million and \$16.78 million. The midpoint between these two values was \$15.1 million.
- [11] In February 2020, counsel for the Boxer Group wrote to the valuator with further questions and comments. Two issues were raised: in summary, the treatment of the latent tax liability; and an issue regarding how the valuator assessed the value of the Radio City property, as between the land and improvement (close to zero for the improvement). The Boxer Group say this latter issue would affect the ability to benefit from depreciation of the 50-year-old building for tax purposes.

- [12] Counsel appeared before the judge to seek directions in March 2020, and she ordered the parties to instruct the valuator to provide his responses and finalize his valuation. The judge ordered that the parties had until March 27, 2020, to do so.
- [13] On March 13, 2020, the valuator provided his response to the parties. The Boxer Group asserts that this response raises more questions. The Melcer Estate sought to finalize the report, but the Boxer Group would not consent.
- [14] Due to the COVID-19 pandemic, there was a delay in seeking directions from the judge. The parties appeared before the judge on October 30, 2020. The Melcer Estate sought an order that the parties instruct the valuator to finalize his draft report. The Boxer Group sought an order instructing the valuator to correct "inadequacies" in his report, namely those raised by them in February 2020, and to then issue his final report.
- [15] In reasons for judgment dated November 6, 2020, and indexed at 2020 BCSC 1686, the judge ordered that the parties instruct the valuator to finalize his draft report by November 21, 2020. The judge, having previously decided that it was just and equitable for the Boxer Group to have the option to purchase the Melcer Estate's shares at 50% of the "highest fair market value of Radio City", ordered that the "highest fair market value" meant the highest value in the range of market values identified by the valuator.
- [16] The form of order has not been entered but an agreed-upon form has been provided to me. It reads:

THIS COURT ORDERS that:

1. On or before Tuesday, November 10, 2020 at 4 p.m., the parties shall instruct Daniel Sturgess, the valuator appointed by the parties, to finalize his draft report (the "Final Valuation") within 10 days commencing on November 11, 2020, in the form as circulated to the parties by Mr. Sturgess on October 25, 2019, subject only to the changes that Mr. Sturgess, in his sole discretion, deems necessary to address the error identified in his email of December 12, 2019.
  2. The reference to "the highest fair market value of Radio City" at paragraph 7 of the Order dated May 11, 2018, means the highest value in the range of fair market values identified by Mr. Sturgess in his Final Valuation.
  3. The Petitioner is awarded the costs of this application, including the disbursements incurred for the McEwen Valuation & Forensic report and the Garnett Wilson review reports.
- [17] The result of that order and the earlier May 2018 order means that the Boxer Group will have 30 days from the date of the November 21, 2020, valuation to exercise the option to purchase the Melcer Estate's shares in Radio City at the highest value, that is, as of December 21, 2020, to pay \$8,390,000 for the Melcer Estate's shares. If it declines, Radio City will be wound up and its assets sold.

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Applicable Law**Stay of Execution**

- [18] Boxer Group applies for a stay of execution, such that the court-ordered option to purchase the shares in Radio City does not have to occur pending the determination of their leave to appeal application. I presume they may seek an extension of any stay if granted leave to appeal.
- [19] There is a question as to whether a stay application should be heard and determined before the hearing of an application for leave to appeal. There is obviously no sense in granting a stay of an order where leave to appeal is required and has been denied.
- [20] Section 18(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, grants a justice of this Court the power to stay the execution of an order "[a]fter an appeal or application for leave to appeal is brought" (emphasis added).
- [21] Rule 9(1) of the Court of Appeal Rules provides that an applicant for leave to appeal may join, with the application for leave, an application for a stay pending an appeal (emphasis added). Rule 9(3) provides that a party who wishes to apply for a stay that is not joined with an application for leave to appeal may do so if the appropriate motion and motion book materials are filed.
- [22] Section 10(2)(b) of the Court of Appeal Act allows a justice to make an interim order to prevent prejudice to any person "[i]n an appeal or other matter before the court".
- [23] All of these provisions do support the conclusion that the court has jurisdiction to grant a stay pending the hearing and determination of the leave to appeal application.
- [24] Nevertheless, generally the preferred practice is to hear the leave to appeal application at the same time as the stay application, and perhaps in some cases even prior to the stay application. Both applications involve a preliminary consideration of whether there is some merit to the appeal, but to a different end. It somewhat puts the cart before the horse to consider the stay application first.
- [25] In *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 (Bennett J.A. in Chambers), a stay application was heard before an application for leave to appeal. In that case, the applicant was self-represented and although the court noted that normally leave to appeal would be required before hearing the stay application, it would entertain the stay application because the respondent did not object. The court did not grant the stay application, finding no merit to the appeal.

- [26] In *Doman v. British Columbia (Superintendent of Brokers)* (1996), 12 C.C.L.S. 97 (B.C.C.A.), Goldie J.A. in Chambers granted a temporary stay pending a leave to appeal application, satisfied that he had this jurisdiction pursuant to s. 10(2)(b) if necessary to prevent prejudice to a party. The stay was temporary until the hearing of the application for leave to appeal and a hearing of an application for a stay pending disposition of the appeal.
- [27] Here the Melcer Estate does not object to determining the stay application prior to the leave application.
- [28] The Boxer Group submit they are bringing the stay application first because the deadline for the purchase of the shares is December 21, 2020. They say when they take into account notice and filing requirements for the leave application and response to it, as well as the calendars of counsel, the leave to appeal application cannot be heard before that date. Generally speaking I would think it best for counsel to bring an expedited leave to appeal application in a similar situation, but I will accept that counsel were trying to be accommodating of each other in this case.
- [29] I turn to the principles that govern a stay application.
- [30] Justice Smith succinctly summarized the general principles for granting a stay of proceedings in *Gill v. Darbar*, 2003 BCCA 3 at para. 7 (in Chambers):

The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [In Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.).

- [31] In order to receive a stay, an applicant is typically required to show (B.C. (Milk Marketing Board) v. Grisnich (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A., Hinds J.A. in Chambers)):
- (1) that there is some merit to the appeal, in the sense that there is a serious question to be determined;
  - (2) that irreparable harm would be occasioned to the applicant if the stay was refused; and
  - (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.
- [32] The second branch of the test examines the potential harm to the party seeking the stay, should it be refused. This Court has previously held that the determination of whether or not the applicant has shown irreparable harm would occur is often determinative: *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2015 BCCA 6 at para. 8 (Harris J.A. in Chambers).

- [33] Irreparable harm is generally harm that cannot be quantified in monetary terms. Where the harm is purely monetary, it will usually only constitute irreparable harm if one party cannot collect damages against the other: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 24 (Frankel J.A. in Chambers). Harm to the applicant is examined at the balance of convenience stage: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341.
- [34] At the third stage of the test, the court is asked to weigh the interests of the parties and balance the potential harm to each of them: *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 146 at paras. 36-37 (Frankel J.A. in Chambers).

Should a Stay of Execution Be Granted?

### Merits of the Appeal

- [35] The threshold for finding that an appeal has some merit on a stay application is generally quite low. In essence, if an appeal is not frivolous or vexatious, the requirement will be satisfied: *Western Forest Products Inc.* at para. 22.
- [36] However, where leave to appeal has not yet been granted, and the appeal will be from a discretionary order, as in this case, in my view the merits test should keep in mind the question of whether there is merit to the leave to appeal application.
- [37] The test for leave to appeal is well-established and was set out by Saunders J.A. in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (in Chambers):
- [10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
- [1] whether the point on appeal is of significance to the practice;
  - [2] whether the point raised is of significance to the action itself;
  - [3] whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
  - [4] whether the appeal will unduly hinder the progress of the action.
- [38] No argument was advanced before me that the point on appeal is of significance to the practice.
- [39] Rather, the force of the applicant's position is that the appeal itself has merit.
- [40] In order to appeal a discretionary order, the applicant must show that the judge below erred in principle, that the order is not supported by the evidence, the order is clearly wrong, or that the order will result in an injustice: *Sullivan v. Strata Plan BCS-251*, 2005 BCCA 630 at para. 12 (Kirkpatrick J.A. in Chambers).
- [41] The Boxer Group have identified three proposed grounds of appeal:

- a) the judge erred in finding that an end to the parties' relationship can only be achieved by finalizing the valuator's report;
  - b) the judge erred in finding that it was just and equitable for the Boxer Group to purchase the shares in a fashion that includes the Melcer Estate's tax liability; and
  - c) the judge erred in exercising her discretion by ordering the parties to instruct the valuator to finalize his report without amendment.
- [42] The first alleged error appears to be the thrust of the Boxer Group's proposed appeal. They say that the judge erred in ruling on a matter that was not before her. In support of this proposition, they rely on paras. 41-42 of her reasons for judgment:
- [41] I am not convinced that the door should be unlatched to allow the parties to challenge the opinion of the Valuator. This will create the proverbial slippery slope, with each party seeking to raise issues they say will change the ultimate valuation in their favour.
- [42] I conclude that there needs to be an end to the parties' relationship and it can only be achieved if the May Order is now complied with.
- [43] The Boxer Group submit that this is an error because the Melcer Estate had not sought any additional changes or corrections to the valuation. They say that the judge was in effect ruling on an application by Melcer Estate that had not been brought.
- [44] In response, the Melcer Estate points out that in their submissions before the judge they identified that if the valuation were not finalized, they too would want to raise their several issues with it, but that they wanted it finalized. Further, the order sought by the Boxer Group in their application response before the judge was for "directions from the Court for the parties to instruct the Valuator to correct the inadequacies in his draft report and issue his final report" (emphasis added).
- [45] The judge noted that there were concerns with the valuation identified by counsel for the petitioner Melcer Estate, Mr. Goulden, and other arguments raised by Melcer Estate, at paras. 35-38:
- [35] I am concerned that if the door is opened for the [Boxer Group] to have the Valuator address the land/building split, the same door should be left open for the [Melcer Estate] to address concerns they have with the Draft Report. Those initial concerns were set out in Mr. Goulden's letter dated November 29, 2019:
- a) The deductions of \$1,180,000 and \$432,000 from the value of the properties to account for deferred maintenance. It is our client's position that Boxer Holding's failure to keep the properties in proper repair should not have resulted in savings to Boxer Holdings in the context of the purchase of the Estate's shares. In particular, the [Draft] Report notes that the Burnaby Street Property has been poorly maintained, including with respect to leak damage to sub-floors, ceilings and walls. The Report also notes that there are several items of deferred maintenance outstanding at the West 7th Property, including with respect to

underground parkade leaks, plumbing leaks, and electrical matters. It is our client's position that Boxer Holdings has failed to meet its duty to properly maintain the subject properties, and that it would not be in the best interests of Radio City for Boxer Holdings to continue as property manager.

- b) The valuations of the properties at 23% and 36% less than assessed value. Our client's position is that the [Draft] Report does not justify these significant deviations from assessed value.
  - c) The application of a latent tax discount. It remains our client's position that a prudent purchaser would engage in common and simple tax planning practices to eliminate most of any latent tax liability.
  - d) The related party loans from Canaland to Boxer Holdings and Spring Ram Ventures Inc., which we understand is controlled by Dr. Gunn. As you know, Canaland's three shareholders are Boxer Holdings, Dr. Gunn and Radio City. In essence, Canaland appears to be lending funds to two of its shareholders, to the exclusion of its third shareholder, Radio City. It is our client's position that this unfair treatment of shareholders should not result in a negative impact on the Estate's interest in Radio City.
- [36] The door could be open even wider to address the [Melcer Estate's] concerns with both the Burgess Cawley appraisals. The [Melcer Estate] obtained a review report of both the Burnaby Street Appraisal and the West 7th Appraisal, from Garnett Wilson, an appraisal company, dated October 19, 2020. This review report concludes that the current market value found in the Burnaby Street Appraisal is actually below market value. Mr. Wilson opines that the current fair market value of the Radio City Property is in the range of \$7,917,000 and \$8,677,000. This compares to Ms. Lohead's opinion of \$7,630,000.
- [37] Mr. Wilson assesses the current value of the Canaland Property in the range of \$31,920,000 and \$34,920,000. This compares to Ms. Lohead's opinion of \$29,700,000.
- [38] If the Valuator was asked to use Mr. Wilson's appraised values, instead of Ms. Lohead's, it would clearly impact the fair market values of the two properties. The [Melcer Estate] retained McEwen Valuation & Forensic in October 2020 to provide answers to a series of questions posed by counsel. Mr. McEwen's opinion was that if the values set out in the Garnett Wilson review report were provided to the Valuator, it would result in the Valuator finding "materially higher" fair market values. Mr. McEwen raises some further "errors or inconsistencies which Sturgess may wish to examine."
- [46] Read as a whole, the reasons suggest the judge declined the Boxer Group's request to have the valuation amended because she believed the present valuation was appropriate and balanced the competing concerns of the parties. The judge was alive to the Boxer Group's concerns regarding the valuation, but she was also aware that the Melcer Estate had some concerns about the valuation as well.

- [47] In addition, the judge noted that the valuator was alerted to the concerns raised by the Boxer Group and decided not to change his report other than to correct an error: at para. 40.
- [48] This is the analysis that preceded the judge's statement at para. 41 that she was "not convinced that the door should be unlatched to allow the parties to challenge the opinion of the Valuator".
- [49] I have difficulty seeing any merit to this first asserted ground of appeal. The judge did not decide an application that was not before her, she simply explained why she did not think it prudent to open up the valuation to address issues which could be raised by either side.
- [50] Dealing with the second alleged error, this is stated by the Boxer Group in a way that predetermines the issue. It presupposes that the valuation is unfair, which in my view cannot be presumed.
- [51] In essence, the Boxer Group submit that the effect of the judge's ruling means that the existing valuation will result in an unjust "windfall" to the Melcer Estate at the expense of the Boxer Group, should the Boxer Group exercise their option to purchase the shares of Radio City from the Melcer Estate. The thrust of their submission is that the valuator took an approach that would put all of the tax burden on the purchaser, to the benefit of the vendor, and that this cannot be what would occur in an arm's length negotiation and so cannot reflect fair market value. They say that if the valuator took the approach they insist is the correct one, the higher valuation would be reduced by roughly \$1.8 million.
- [52] Respectfully, I have difficulty seeing any merit to this alleged error either. The judge considered these arguments and was not persuaded by them. This appears to me to simply quarrel with the judge's exercise of her discretion to finalize the valuation, as is, rather than to allow more back-and-forth disputes over it.
- [53] Turning to the third error, this is clearly stated as a dispute over the judge's exercise of her discretion. No error in principle is apparent.
- [54] I accept that it cannot be said at this stage of the appeal proceeding that it is vexatious for the Boxer Group to bring an application for leave to appeal. However, in my view, the Boxer Group will have a difficult time making out a case that the judge erred in principle, that the order is not supported by the evidence, or that enforcing the order will result in an injustice.

#### Irreparable Harm

- [55] Regardless of the merits, I am not persuaded that the Boxer Group would suffer irreparable harm if a stay is not granted.

- [56] The whole basis for their irreparable harm argument is the theory that if the Boxer Group decide to go ahead and purchase the Melcer Estate shares on December 21, 2020, but later are successful on appeal, they will have overpaid for those shares by approximately \$1.8 million. They suggest that it will be difficult to retrieve the overpayment because the beneficiaries of the Melcer Estate are based in the United States, and the estate has no assets but for its interest in Radio City.
- [57] In my view there is a key problem with this argument. The very structure of the remedy to separate the interests in Radio City allows for a difference of views as to the valuation because it gives the Boxer Group a choice. If they think the valuation is too high, they do not have to purchase the Melcer Estate shares and the company can be wound up. The Boxer Group has not introduced evidence that the present valuation prevents them from making the choice, or that it effectively prevents them from purchasing the Melcer Estate shares. It would appear that they simply do not like the valuation.
- [58] Indeed, the Boxer Group have not tendered any evidence relating to whether they intend to exercise their purchase option at any given price. For that matter, it is possible that even if the proposed appeal is allowed the Boxer Group will decline to purchase the Melcer Estate shares.
- [59] The Boxer Group have not provided any evidence to persuade me that they will be unable to recover any overpayment if they pay too much for the Melcer Estate's shares and somehow succeed in a remedy on appeal that alters the valuation.
- [60] The Boxer Group rely on this Court's decision in *Bank of Montreal v. Maxham*, [1993] B.C.J. No. 3097 (C.A.), in which Mr. Goldie J.A., sitting in Chambers, stayed the execution of an order that would have seen approximately \$500,000 be paid out of court. That case, however, is readily distinguishable.
- [61] Justice Goldie found that Mr. Maxham was at risk of irreparable harm because it was likely that the funds would leave the jurisdiction if they were paid out to the party in question, which possessed no assets in British Columbia. That case, unlike this one, involved serious claims of impropriety and potentially fraudulent behavior. The appeal was ultimately allowed, with this Court setting aside the order for payment out of court and remanding the case to the Supreme Court in reasons for judgment indexed at [1995] B.C.J. No. 468 (C.A.).
- [62] The present case does not include evidence of fraud or bad faith on the part of the Melcer Estate. It is instead a relatively routine oppression remedy proceeding. I am not prepared to conclude that there would be some bad faith conduct on the part of Melcer Estate if they were paid for their shares but the Boxer Group succeeded on appeal in obtaining a remedy that reduced the valuation.
- [63] I am therefore not persuaded that the Boxer Group faces irreparable harm if a stay is not granted.

### The Balance of Inconvenience

- [64] The Boxer Group also submit that the balance of inconvenience favours a stay, essentially on the same basis as the irreparable harm argument.
- [65] The Melcer Estate submits that it is being harmed by continued delay in the resolution of the Radio City conflict and that the balance of convenience does not favour a stay, which would just add to the delay. The fact that this matter remains unresolved is causing prejudice to the estate and its beneficiaries. The Melcer Estate points out that due to the length of time that has passed since Mr. Melcer's death, for tax purposes the estate is going to be deemed to have disposed of the shares for fair market value on January 12, 2021. That will trigger a significant tax liability. A stay would simply delay when the Melcer Estate can recover on the assets and pay any tax liabilities.
- [66] I am persuaded by the Melcer Estate submissions that the balance of convenience does not favour granting a stay.

### Disposition

- [67] For all these reasons, I would dismiss the application for a stay of execution.

"The Honourable Madam Justice Griffin"

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ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/ca/20/03/2020BCCA0380.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/melcer-estate-v-boxer-2020>

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