

CANADA / JUDGMENT

## Su v. Hougen Co. Ltd.

2025 BCCA 164

### COURT

British Columbia Court of Appeal

### DECIDED

21 May 2025

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2025 BCCA 164 Su v. Hougen Co. Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Su v. Hougen Co. Ltd.,

2025 BCCA 164

Date: 20250521

Dockets: CA49402; CA49662

Docket: CA49402

Between:

Ming Su

Appellant

(Respondent)

And

Hougen Co. Ltd.

Respondent

(Petitioner)

And

Toyomoto Canada Supply Chain Inc.

Respondent

(Respondent)

- and -

Docket: CA49662

Between:

Hougen Co. Ltd.

Appellant

(Petitioner)

And

Ming Su and Toyomoto Canada Supply Chain Inc.

Respondents

(Respondents)

And

Guowie Han, Inspirza Management Group Inc., Gohan Trading Inc., Token Studio Inc., Nazda Holding Inc., and Sogo Marketing Inc.

Respondents

(Respondents)

Corrected Judgment: The title page of the judgment was corrected on May 23 and 30, 2025.

Before:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Winteringham

On appeal from: Orders of the Supreme Court of British Columbia, dated October 5, 2023 and January 16, 2024 (Hougen Co. Ltd. v. Su, 2023 BCSC 1743, 2024 BCSC 74, Vancouver Docket S226845).

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J.J. Mayfield

Place and Date of Hearing:

Vancouver, British Columbia

February 6, 2025

Place and Date of Judgment:

Vancouver, British Columbia

May 21, 2025

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Winteringham

Summary:

Two related appeals concern a shareholder's application for leave to bring a derivative action on behalf of Toyomoto. After Toyomoto became insolvent, the corporate shareholder, Hougen, wanted to sue, on Toyomoto's behalf, its former CEO, Ms. Su, as well as her husband and a number of their companies for fraud, breach of fiduciary duty, knowing assistance in breach of fiduciary duty, and civil conspiracy. While the leave decision was under reserve, Hougen caused Toyomoto to file an action in order to avoid a potential limitation defence. A month later, the judge granted leave to Hougen to commence the derivative action. Ms. Su applied to strike the notice of civil claim as a nullity. Hougen applied for a nunc pro tunc order backdating the grant of leave to the day it filed the notice of civil claim. The chambers judge refused to grant the order nunc pro tunc, struck the notice of civil claim as a nullity, and granted Ms. Su special costs against Hougen. In the first appeal, Ms. Su challenges the judge's decision to grant Hougen leave to bring the derivative action. In the second, Hougen appeals the judge's refusal to grant leave nunc pro tunc and decision to award Ms. Su special costs.

Held: The appeal from the order granting leave is dismissed. The appeal from the order denying a nunc pro tunc order is allowed only to the extent of setting aside the award of special costs and replacing it with an award of party and party costs at Scale B.

In the first appeal, the judge did not err in granting Hougen leave to begin an action in Toyomoto's name. She applied the proper test and made no error in exercising her discretion. In the second appeal, the judge was correct to conclude that the Business Corporations Act requires leave to commence a derivative action, not merely to continue one filed before obtaining leave. The judge understood that she could make the leave order nunc pro tunc, but chose not to do so, taking into account legislative intent, potential prejudice to the defendants, and other circumstances. In awarding special costs against Hougen, the judge failed to consider the uncertainty Hougen faced given earlier decisions that suggested a derivative action could be filed as a placeholder before obtaining leave in order to avoid a limitation defence.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] Before the Court are two related appeals. They arise out of a shareholder's application for leave to bring a derivative action on behalf of Toyomoto Canada Supply Chain Inc. ("Toyomoto"). In the first appeal, the appellant Ming Su challenges the judge's decision to allow the derivative action to be brought against her. In the second, the shareholder appeals the same judge's refusal to backdate the leave order so as to avoid a potential limitation defence that had arisen while the judge's decision on the leave application was under reserve.
- [2] For the reasons that follow, I would largely dismiss both appeals.

## Background

- [3] Ms. Su and her husband, Guowie Han, were in the business of importing food, cosmetics, and other goods from Asia for resale in Canada through two companies, Inspirza Management Group Inc. ("Inspirza") and Nazda Holding Inc. ("Nazda"). One of Inspirza's business partners was PH International Co. Ltd. ("PH"), a Japanese exporter. Inspirza and PH wanted to expand their business, so in 2018 PH introduced Ms. Su to a Japanese company, Hougen Co. Ltd., as a potential investor. Hougen's principal is Yongquin Gu.
- [4] Eventually, Hougen agreed to a proposal to form a new company in Canada to take over the existing business of Inspirza. In April 2019, Nazda, Hougen, and PH entered into an agreement which provided in part:
1. The shares in the new company, Toyomoto, would be held 51% by Hougen, 44% by Nazda, and 5% by PH;
  2. Hougen would export goods to Toyomoto. Nazda, through Ms. Su, was to build sales and seek out opportunities for Toyomoto, and PH was to find brands and suppliers for Toyomoto; and

3. Inspirza would gradually be wound down and its business transferred to Toyomoto.
- [5] Ms. Su was appointed CEO of Toyomoto. As agreed, her original company, Inspirza, was dissolved. However, Ms. Su incorporated other companies: Token Studio Inc. in June 2019, Gohan Trading Inc. in October 2019, and Sogo Marketing Inc. in June 2020 (collectively, the "Corporate Defendants"). These companies, along with Nazda, were involved with Toyomoto as suppliers and resellers.
- [6] Although Toyomoto's sales revenue grew substantially, it consistently operated at a loss or marginal profit only. Ms. Su contended Toyomoto's lack of success was due to improper accounting done at the behest of Hougen's principal, Mr. Gu, and Toyomoto's CFO, Mr. Yang.
- [7] In early 2021, Hougen stopped financing Toyomoto; by the summer of 2021, Toyomoto was functionally insolvent. The shareholders agreed to wrap up the company's operations and clear out the inventory to pay down the company's debts. When the CFO resigned in October 2021, Mr. Gu took on the role of director of Toyomoto. After reviewing the company's financial records, he became convinced that Ms. Su, her husband Mr. Han, and the Corporate Defendants had engaged in malfeasance in carrying out Toyomoto's business operations. He caused Hougen to apply for leave to bring a derivative action against them in Toyomoto's name for breach of fiduciary duty, knowing assistance in breach of fiduciary duty, fraud, and civil conspiracy.

### The First Chambers Hearing

- [8] Hougen filed its petition for leave in August 2022. The application was originally set for hearing in April 2023 but did not proceed because a judge was not available. A second hearing in May 2023 was adjourned at Ms. Su's request so that she could respond to a late-filed affidavit. The application finally came on for hearing over two days in June 2023. Judgment was reserved until October 5, 2023, when the judge granted leave to Hougen to commence a derivative action in relation to seven of 11 proposed claims. In addition, the judge ordered Hougen's solicitors to hold any money recovered in the action in trust to ensure those monies would remain in Canada to be used for an orderly distribution to Toyomoto's stakeholders and creditors. Finally, she required Hougen to post security for costs in favour of Ms. Su, Mr. Han, and the Corporate Defendants.

### The Second Chambers Hearing

- [9] Unbeknownst to the judge when she delivered her decision granting leave to Hougen to commence a derivative action, Hougen had already done so while the decision was under reserve. Hougen did so to avoid a potential limitation defence that could have arisen if the claim were not filed before September 8, 2023. Although Hougen's counsel had flagged this potential limitation problem at the hearing before the judge, he had not asked for a response by a particular date. He had also written to Supreme Court scheduling on August 28, 2023 identifying the issue and asking if the Court could advise if reasons for judgment could be

expected prior to September 8, 2023. Having received no response to that request, counsel for Hougen proceeded to commence the action on September 6. He provided a copy of the pleading to Ms. Su on September 11 and advised that no steps would be taken in the proceeding unless and until leave was granted.

- [10] Ms. Su's counsel took the position that the notice of civil claim was a nullity and demanded that the action be discontinued.
- [11] After the leave decision was pronounced on October 5, 2023, Hougen's counsel purported to amend the notice of civil claim to delete those claims for which leave had not been granted. In addition, he posted security for costs as required by the order. Ms. Su then applied to strike out the claim, and Hougen cross-applied for a nunc pro tunc order (literally "now as then") backdating the leave order to September 6, which would have the effect of validating and preserving the notice of civil claim filed on that date.
- [12] The competing strike and nunc pro tunc applications were heard together on December 11, 2023. On January 16, 2024, the judge gave reasons refusing to backdate the leave order and striking the notice of civil claim as a nullity. She also awarded Ms. Su special costs against Hougen.

## On Appeal

- [13] As noted, there are two distinct but related appeals before the Court. Ms. Su seeks to set aside the order allowing Hougen to sue her and the Corporate Defendants on behalf of Toyomoto. Hougen seeks to set aside the strike order and asks for a nunc pro tunc order backdating the leave order to September 6. It will be evident that if the first appeal were to succeed, the second would be moot. I will accordingly begin with Ms. Su's appeal from the leave order.
1. Su v. Hougen - CA49402: Did the Judge Err in Granting Leave to Hougen to Sue on Toyomoto's Behalf? (2023 BCSC 1743)
- [14] The parties agree the judge correctly stated the test for granting leave to commence a derivative action. That test corresponds to ss. 232-233 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA], which require the applicant to establish that:
- 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 is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[15] Ms. Su grounds her appeal on errors in the way the judge applied: (a) the "good faith"; and (b) the "best interest" elements of the test to the facts. I will address each in turn.

[16] A decision granting or denying leave to commence a derivative action under ss. 232 and 233 is discretionary and is reviewed on a deferential standard: *Eastern Platinum Limited v. Ren*, 2024 BCCA 109 at paras. 5, 63 [Eastern Platinum]. Application of the correct principles to the facts raises a question of mixed fact and law subject to the standard of palpable and overriding error: *Eastern Platinum* at paras. 64-65.

(a) Did Hougen Establish the Good-Faith Element?

[17] Ms. Su contends the judge did not consider three aspects of the evidence pertaining to good-faith. First, she says the judge failed to consider that four of the 11 claims Hougen wanted to pursue were meritless. She says Hougen's attempt to bring meritless claims is evidence that Hougen was not acting in good faith.

[18] I would not accede to this submission. The judge approached the task before her, saying:

[49] It is not my role on this application to make any determinations on the various issues raised given the competing scenarios presented in the Affidavits. My task on this application is to undertake a limited weighing of the evidence to determine if Hougen has presented "some evidence" in support of its various allegations and that the allegations are not bound to fail per *Eastern Platinum*.

[Emphasis added.]

[19] The judge found Hougen had failed to provide sufficient evidence in support of four of the allegations. For example, concerning misappropriation of Toyomoto's equipment, the judge wrote:

[73] Mr. Gu states that he has attempted to determine the location of various equipment and office supplies of Toyomoto. Again, he alleges that Ms. Su has failed to cooperate in his efforts. Mr. Gu says that the fact that Ms. Su has refused to provide any information on Toyomoto's fixed assets led him to believe that she misappropriated the missing equipment for the use of Gohan, Token or Sogo.

[74] At its highest, Mr. Gu's allegations are speculative and not based on any evidence other than his "belief" that assets are "missing" and that Ms. Su failed in her duty to safeguard them.

[75] In my view, Hougen has failed to provide sufficient evidence in support of these allegations.

[20] The failure of Hougen to meet the evidentiary burden to support its concerns on four of the 11 issues it wished to pursue does not necessarily equate to an absence of good faith. The judge did not draw that inference in the circumstances of this case, nor was she compelled to do so.

- [21] Second, Ms. Su argues the judge did not consider that PH, one of Toyomoto's three shareholders, was opposed to the derivative action. However, the judge squarely addressed this evidence. She simply did not agree that it rose to a level where it could be said that PH opposed prosecution of the claim by Hougen: at para. 144. Instead, the judge found that the email relied on by the appellant reflected nothing more than ambivalence on the part of PH.
- [22] Third, Ms. Su submits the judge failed to consider that Hougen was entirely motivated by self-interest. She points to evidence that Hougen tried to take \$50,000 USD out of Toyomoto ahead of other shareholders and has, since the hearing of the leave application, commenced an action against Toyomoto to recover outstanding loans.
- [23] Again, I cannot agree that the judge failed to consider these allegations in assessing whether the applicant was acting in good faith. In this regard, the judge said:
- [123] Ms. Su asserts that Hougen is simply seeking to secure a preference for its losses over the losses of other creditors who have not yet been paid and the other shareholders, being Nazda and PH. In that regard, Ms. Su refers to Mr. Gu attempting to transfer US\$50,000 to Hougen in January 2022. Again, this evidence is highly contested. Mr. Gu says that his intention to repay this debt was well-known to all shareholders, including Ms. Su, and was consistent with an agreed upon "Repayment List". I am unable on this application to determine the truth of these competing allegations.
- [ ]
- [125] There is no doubt that recovery by Toyomoto from Ms. Su and the other defendants would potentially benefit Hougen to the extent that Hougen is owed loans by Toyomoto. It is undeniably in the interests of a company to properly recover on its assets so as to distribute funds to the stakeholders who are entitled to be paid, including creditors. This claim is an asset of Toyomoto.
- [126] Indeed, if the recovery is sufficient, any recovered funds may be used to pay equity to the shareholders, including Hougen, which is a valid purpose in advancing such a claim. The fact that a shareholder's personal interest coincides with the interests of a company does not mean that the shareholder is acting in bad faith: *Carr v. Cheng*, 2005 BCSC 445 at para. 16; *Zaker v. Bagheri-Azghadi*, 2022 BCSC 2012 at para. 48.
- [Emphasis added.]
- [24] Although the judge did not expressly address the claim filed by Hougen against Toyomoto (since it had not yet been filed), she was nonetheless alive to Hougen's interest in recovering money owed to it by Toyomoto.
- (b) Is the Lawsuit in Toyomoto's Best Interest?

- [25] Ms. Su submits that, in considering whether the derivative action was in Toyomoto's best interest, the judge failed to grapple with two aspects of Toyomoto's insolvency that weighed against the proceeding being commenced.
- [26] First, Ms. Su asks what benefit there could be in a "dead company" trying to recover damages when it has no operations to fund and no intention to continue operating. Second, the appellant says the judge did not consider the expense to the company of the litigation and how it was to be funded.
- [27] With respect, I find neither submission persuasive. It is evident that the judge addressed the "dead company" issue, saying:
- [135] Ms. Su says that the proposed action is not in the best interests of Toyomoto since it is a "dead" corporation with no prospect of reviving its business operations.
- [136] That may be so, but I do not agree that those circumstances inevitably mean that advancing this claim is not in Toyomoto's best interests. In these circumstances, where a company has ceased to do business, it would be a normal process to recover all assets to the extent possible and, during those recoveries, pay down valid debts and, if possible, pay any equity value to the shareholders. Such a result is clearly contemplated by the BCA and is intended to provide for an orderly wind-up of a company's affairs for the benefit of all stakeholders.
- [137] As above, Mr. Gu states that any recovery from the derivative action would be used to pay any debts of Toyomoto, including shareholder loans, with the remainder of any monies to be distributed to the shareholders as part of a winding-up process.
- [Emphasis added.]
- [28] The judge also referred to a derivative action case (*Zaker v. Bagheri-Azghadi*, 2022 BCSC 2012) which cited *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at para. 42, for the principle that the best interest of the company may include consideration of the interest of creditors.
- [29] As to the costs of the litigation, the judge said:
- [141] In addition to addressing the merits of the proposed claim, Hougen must also show that the potential relief sought in the claim makes it worthwhile to Toyomoto to undertake the costs and inconvenience of pursuing it.
- [142] Mr. Gu's evidence is that he estimates that the potential losses to be recovered are currently in the range of \$700,000, but may be much higher once the action proceeds toward discoveries. If that is the case, I agree that this establishes that the pursuit of the derivative claim is financially worthwhile to Toyomoto.

[Emphasis added.]

[30] Further, as the respondents submitted at the hearing, since Toyomoto does not have the funds to prosecute the claim, it is Hougen that will bear that burden. That reality is reflected in the judge's order that Hougen post security for costs. Although it is possible Hougen could apply under ss. 233(3)(b) and (4) of the BCA for recovery from Toyomoto, recovery will depend on success in the derivative action itself.

[31] In summary, Ms. Su has not established an error that would warrant this Court interfering with the judge's discretionary decision to grant leave to Hougen to sue Ms. Su, Mr. Han and the Corporate Defendants on behalf of Toyomoto. Having so found, I turn to the second appeal before us.

2. Hougen v. Su et al. - CA49662: Denial of a Nunc Pro Tunc Order and Awarding of Special Costs (2024 BCSC 74)

[32] Hougen contends the judge was wrong to refuse a nunc pro tunc order and to award special costs against it. Both are discretionary decisions reviewable on a deferential standard. This Court may only interfere with those decisions if the judge erred in principle, misapprehended or failed to take account of material evidence, or the decision amounted to an injustice: *Perrier v. Canada (Revenue Agency)*, 2021 BCCA 269 at paras. 45-46.

[33] Hougen raises three grounds of appeal, contending the judge erred by:

- a) Interpreting s. 232 of the BCA as requiring leave to commence a derivative action, when the section requires only leave to continue such an action;
- b) Assuming that a nunc pro tunc order is not available where a statute imposes a leave requirement; and
- c) Awarding special costs against Hougen in the absence of reprehensible conduct.

I will address each ground of appeal in turn.

(a) Is Leave Required to Commence a Derivative Action?

[34] Hougen argues the judge erred in law by interpreting s. 232 of the BCA as requiring leave to commence a derivative action when the section only requires leave to prosecute such a claim. Section 232 reads as follows:

Derivative actions

232 [ ]

- (2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company
  - (a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

- (b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.
- (3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.
- (4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

[Emphasis added.]

- [35] The appellant argues the plain meaning of the word "prosecute" is to "continue" an action, and is to be distinguished from "commence," which means "start" or "initiate" an action. It follows, it says, that a complainant may commence an action on behalf of a corporation by filing a notice of civil claim but cannot take any further steps to prosecute the action without first obtaining leave of the court to do so.
- [36] The appellant points out that in at least five other places in the BCA, the word "commence" rather than "prosecute" is used in relation to legal proceedings: ss. 51.993(4)(a) and (b); ss. 154(9); 227(3)(r); and 430(1). Hougen contends meaning must therefore be attributed to the different choice of wording in the various sections of the BCA. It says the legislature chose the word "prosecute" in order to: 1) provide prospective derivative plaintiffs with the ability to start actions in the name of the company without corporate authorization so as to stop the running of the limitation period while leave is being sought and deliberated upon; and 2) provide the court with the power to perform a gatekeeping role when derivative claims have been filed without corporate authorization.
- [37] Hougen argues the significance of the word "prosecute" is underscored by the legislative history of the section. The equivalent provision in an earlier version of the BCA expressly required leave to "bring an action." The appellant contends the change to "prosecute" must be given substantive effect. Interpreting the section in this way, the appellant says it complied with s. 232, the NOCC was not a nullity, and the judge, having granted leave after the filing of the claim, should not have struck it out.
- [38] The appellant did not press this ground of appeal at the hearing. In my respectful view, it cannot succeed.
- [39] First, as the appellant candidly acknowledges, the plain meaning of the word "prosecute" in the context of civil litigation is broad enough to include all stages of a proceeding, including its commencement.
- [40] Second, because there may be cases in which a shareholder or other complainant will apply to assume conduct of litigation already started by the company, use of the word "commence" would not be apt. In a case deciding whether leave was required to bring a common law derivative action, this Court consistently referred to leave in the context of starting or continuing such a proceeding: 1115830 B.C. Ltd. v. Treasure Bay HK Limited, 2022 BCCA 380

at paras. 1, 6, 29, 51-53; leave to appeal ref'd: 1115830 B.C. Ltd., 1104227 B.C. Ltd., Kang Yu Canning Zou also known as Kenny Zou and Harlow Holdings Ltd. v. Treasure Bay HK Limited, et al., 2023 CanLII 64850 (S.C.C).

- [41] Third, "prosecute" is used in s. 232(2) in contradistinction to an application for leave "to defend" a proceeding in s. 232(3). These are broad and inclusive terms that in no way suggests steps may be taken on behalf of a company without first obtaining leave from the court.
- [42] Fourth, nothing can be drawn from the change in wording from "bring an action" in the former version of the derivative action provision to "prosecute a legal proceeding" in the current version. Section 37(2) of the Interpretation Act, R.S.B.C. 1996, c. 238, provides that the amendment of an enactment must not be construed to be "a declaration that the law under the enactment prior to the amendment was or was considered by the Legislature [ ] to have been different from the law under the enactment as amended."
- (b) Did the Judge Assume a Nunc Pro Tunc Order Was Not Available Because of the Leave Requirement?
- [43] Hougen submits the judge did not appreciate that leave can be granted nunc pro tunc to a date before the leave application was heard where necessary to avoid a limitation defence, as long as the application was heard before the limitation period expired. It contends the judge made this error because she misapprehended the decision of the Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [Green].
- [44] I must respectfully disagree with the premise of this submission. As I read the judge's reasons for judgment, she did not misapprehend Green. To the contrary, she recognized that Green confirmed the authority of a judge to backdate an order granting leave to commence an action where, as in the present case, the application for leave was filed before the limitation period expired. It will be helpful to briefly review Green before returning to the judge's reasoning.
- [45] In Green, three appeals were heard together. Three sets of plaintiffs--CIBC, IMAX and Celestica--commenced class proceedings on the common law action of misrepresentation. They all subsequently sought leave to commence a statutory claim for misrepresentation in the secondary market under the Ontario Securities Act, R.S.O. 1990, c. S.5 [OSA], as part of the class proceedings. The OSA prohibited the commencement of a statutory claim without leave of the court. The parties had relied on a provision in the Class Proceedings Act, 1992, S.O. 1992, c. 6 [CPA], that suspended the running of the limitation period for claims asserted in a class proceeding. However, a subsequent decision of the Ontario Court of Appeal held that the CPA suspended limitation periods only after leave to commence the statutory claim had been granted.

- [46] As a result, the plaintiffs moved to apply for leave to bring the OSA claim. The CIBC plaintiff applied for leave before the limitation period expired but the hearing occurred after its expiration. The IMAX plaintiff applied for and argued the motion before the limitation period's expiration, but received leave after the limitation period expired--as in the present case. The Celestica plaintiffs applied for leave after the limitation period had expired.
- [47] Justice Côté, writing for the majority, considered whether the doctrine of *nunc pro tunc* could save the appellants' statutory claims in the circumstances. She began by stating that courts have inherent jurisdiction to issue orders *nunc pro tunc* (at para. 85), and observed that a court's inherent jurisdiction to backdate orders is tied to the maxim *actus curiae neminem gravabit*, meaning an act of the court shall prejudice no one (at para. 86).
- [48] Justice Côté provided the following guidance on the issuance of an order *nunc pro tunc*:
- [90] In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice [ ]
- [49] Justice Côté confirmed that a *nunc pro tunc* order would be of no use to a plaintiff who applied for leave after the limitation period expired because "it would be retroactive to a date after the expiry of the limitation period": at para. 92.
- [50] In *Green*, the IMAX plaintiffs were granted leave *nunc pro tunc* to the date of the hearing of their leave application. The CIBC plaintiffs were denied a *nunc pro tunc* order because of the plaintiffs' delay in bringing the leave motion, which resulted in the hearing occurring well after the limitation period's expiration. The Celestica plaintiffs were denied a *nunc pro tunc* order because they had brought the leave motion after the limitation period's expiration.
- [51] With that background, I return to my reasons for rejecting Hougen's premise that the judge did not appreciate it was open to her to grant a *nunc pro tunc* order in the circumstances of this case.
- [52] The judge noted that Hougen sought an order granting leave to prosecute the action *nunc pro tunc* to June 19, 2023, the first day of the hearing before her, or alternatively to September 6, 2023, the date of the filing of the NOCC. She then turned to *Green*, quoting from it at para. 28 of her reasons at some length as follows (the underlining is the judge's):

[ ]

- [91] Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a nunc pro tunc order, and is therefore an "insurmountable obstacle": *Holst v. Grenier* (1987), 65 Sask. R. 257 (Q.B.), at para. 10. According to the second view, such a failure is merely a procedural irregularity that can be corrected by a nunc pro tunc order: see, e.g., *CIBC Mortgage Corp. v. Manson* (1984), 32 Sask. R. 303 (C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.
- [92] In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant nunc pro tunc orders where leave is sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A nunc pro tunc order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.
- [93] Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made nunc pro tunc where leave is sought prior to the expiry of the limitation period. One very important caveat, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.
- [94] This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant nunc pro tunc orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a nunc pro tunc order: *McKenna*, at para. 27; *Parker*, at pp. 286-87; *New Alger Mines*, at pp. 570-71. However, nunc pro tunc orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.
- [53] The judge concluded her review of *Green*, saying:
- [29] As can be seen above in the Court's discussion in *Green* at paras. 93-94, while the Court has the inherent jurisdiction to grant nunc pro tunc orders, that discretion must be exercised with regard to the purposes of the statute and can be circumscribed by legislative intent.
- [54] The judge then framed the question before her, saying:
- [31] The real issue is whether the NOCC should be struck as a nullity or saved by the Court's backdating of the granting of leave to September 6, 2023, when the NOCC was filed, so as to regularize or validate its filing.

- [55] The judge thus began her assessment of whether to grant a nunc pro tunc order with the recognition that such an order could be made in the present case, subject to the limits on the exercise of judicial discretion as described in Green.
- [56] She noted that "[t]he analysis must start with a consideration of the legislative intention and purpose underlying the leave provisions in the BCA": at para. 32. In this regard, she said:
- [37] Derivative actions were specifically created by the Legislature through statute, to provide a process to advance a cause of action in the name of a company. The clear legislative intent is that judicial oversight is required in respect of whether any such action that may be brought and, if so, on what conditions that can occur. It is a judicial decision as to whether the necessary prerequisite - leave of the Court - will be granted under the BCA: *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 1998 CanLII 7049 (B.C.C.A.) at para. 21; A.R. Thomson #1 at paras. 8-12.
- [38] As emphasized in Green, the intention of the legislature as requiring leave in these circumstances is a key consideration.
- [39] Here, I have no difficulty concluding that the legislative intent in fashioning the derivative action leave provisions in the BCA is that leave is required to be obtained before such action is filed. Section 232(2) of the BCA provides that a complainant may, with leave of the court, prosecute a legal proceeding ". The corollary to that provision is that a complainant has no capacity to prosecute the legal proceeding if no leave is in hand.
- [40] In my view, requiring leave before any action is commenced makes good commercial sense. The filing of legal proceedings has consequences, for not only the defendants, but the corporate plaintiff too. Allowing shareholders to commence proceedings in a corporation's name, as they alone see fit, even with the future intention to seek leave under the BCA, has the real potential to wreak havoc and cause confusion and uncertainty in corporate affairs. The prospect is that any number of "potential" claims may proliferate, which may or may not be found to be justified at a later time.
- [41] If nothing else, such unilateral action by any shareholder takes place without any of the judicial oversight that is inherently required under the BCA leave provisions.
- [42] This case is a prime example, where the NOCC was filed without regard to first complying with the posting of the security for costs, as was clearly the potential under s. 233(2) of the BCA. In addition, the NOCC included claims that were not authorized to be advanced by Hougen.
- [Emphasis added.]
- [57] The judge then quoted with approval from Markus Koehnen's, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 454:

The better reason for requiring leave is that the plaintiff is assuming control over corporate decision-making and is committing corporate resources to the action. The decision to bring an action requires corporate actors to balance risks and apply business judgment. The strength of any claim must be balanced against the financial and management resources required to pursue the law suit and against other business risks that the law suit might entail. A corporation should not be deprived of this decision-making ability without some safeguard.

[58] It is evident, then, that the judge applied the important caveat identified in *Green*: a court should not exercise its inherent jurisdiction to backdate a grant of leave if to do so would undermine the legislation in issue. Here, the legislation requires that the court act as a gatekeeper before a shareholder, director, or other complainant files an action in a corporation's name. In her view, granting a *nunc pro tunc* order to "validate" a notice of civil claim filed without first obtaining leave would "effectively circumvent or defeat the express will of the legislature": *Green* at para. 94.

[59] There is, in my view, nothing contradictory in the judge coming to this conclusion after recognizing that the Supreme Court of Canada in *Green* had backdated leave orders for some plaintiffs in that case. As the respondents point out, the Court in *Green* applied the doctrine of *nunc pro tunc* in the context of a different legislative scheme and factual matrix.

[60] Section 138.8(1) of the OSA provides:

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

- (a) the action is being brought in good faith; and
- (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[61] The OSA also imposes a limitation period for the commencement of statutory actions based on s. 138.3:

138.14 S.B.C. 2021, c. 36 No action shall be commenced under section 138.3,

- (a) in the case of misrepresentation in a document, later than the earlier of,
  - (i) three years after the date on which the document containing the misrepresentation was first released, and
  - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

- [62] A significant difference between the two Acts is that the plaintiff pursuing an OSA claim brings the action in their own name and at their own risk, in order to recover personal loss. They are not binding another person--i.e., a corporation--to undertake the risks and expense of a proceeding to which the company's directors have not consented.
- [63] Nor did the judge err in declining to follow Ontario cases granting leave orders *nunc pro tunc* under the Ontario Business Corporation Act, R.S.O. 1990, c. B.16. s. 246 [Ontario BCA]. In *Vadeko International Inc. v. Philosophe* (Gen. Div.), 1990 CanLII 6800 (O.N.S.C.), the Ontario Court General Division held that specific wording of an earlier version of the legislation (not found in the BCA) implied that leave to bring a derivative action could be granted *nunc pro tunc* in the discretion of the Court.
- [64] I address next the appellant's submission that the judge did not follow other BCSC cases in which a complainant filed a derivative action without leave, and the action was stayed to permit the seeking of a *nunc pro tunc* order to validate the claim: 550934 *British Columbia Ltd. v. A.R. Thompson Group*, 2011 BCSC 279; 550934 *British Columbia Ltd. v. A.R. Thompson Group*, 2012 BCSC 1332 [collectively, the Thompson Cases].
- [65] In the Thompson Cases, a single director of a corporation began an action in the corporation's name without the corporation's board of directors authorizing the action. The applicant argued that the other directors were in a conflict of interest. The judge determined that such an action could only proceed as a derivative action and stayed the action to allow the director to apply for leave to do so. The application was heard by a different judge who granted the leave sought.
- [66] However, as the judge in this case observed in relation to the Thompson Cases, the question of whether the action as filed was a nullity or could be cured by granting leave *nunc pro tunc* was not considered or addressed in those cases.
- [67] The appellant next submits that the judge's decision leads to an untenable situation--if the judge is correct and a *nunc pro tunc* order cannot backdate leave to bring a derivative claim, the determination of whether a company's derivative claim will be statute-barred will depend on when the court's judgment is issued. Those applicants who are granted leave before the expiry of the limitation period will be able to continue the action, but applicants who must wait for reasons for judgment long enough that the limitation period expires will lose their right to proceed regardless of when the leave application was filed and heard. Hougen submits this is neither just nor equitable.
- [68] I am not persuaded by this submission. Limitation periods are part of the legal landscape. Their drastic effect can be avoided by the timely filing of applications and suits. As the judge outlined in her reasons, parties faced with the impending expiry of a limitation period have options to expedite applications for leave and to ensure they receive a decision in a timely way. *Nunc pro tunc* orders are to be used sparingly and cannot be assumed to be available to remedy delay in meeting statutory requirements.

- [69] I recognize that it is difficult to obtain chamber dates, and that the demands on judicial resources mean that decisions are often delayed beyond what is required for the expeditious prosecution of a claim. But the challenge of litigating in such circumstances can be addressed by seeking expedited hearing dates and by clearly identifying the date by which a decision is required in order to avoid even a potential limitation issue.
- [70] I have considerable sympathy for counsel for Hougen in this case. He did make some efforts to draw the potential limitation problem to the judge's attention at the first hearing, but the risk was not clearly identified. It was not until correspondence with the Court on August 28, 2023 that counsel gave a precise date, and even then he did not follow up on the auto response to call the registry if the matter was urgent. It is incumbent on counsel to draw a potential limitation problem to the attention of the application judge in no uncertain terms.
- [71] In summary on this ground of appeal, the judge considered all of the factors pertaining to the issuance of a nunc pro tunc order laid down by the Supreme Court of Canada in *Green*. She exercised her discretion judiciously to refuse to backdate the grant of leave, taking into account legislative intent, potential prejudice to the respondents, the lack of clarity with respect to the potential limitation defences, and the circumstances of the case generally.
- [72] I see no error in the judge's approach that would warrant appellate interference with her decision. That is not, however, to preclude entirely the exercise of the nunc pro tunc power in relation to leave to bring a derivative action. Although the legislative intent of the BCA will remain an important factor, it is conceivable that facts could arise making the exercise of such equitable jurisdiction appropriate.
- (c) Could the Judge Award Special Costs in the Absence of Reprehensible Conduct?
- [73] Under Rule 14(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the general rule is that the successful party is awarded party and party costs. Special costs are punitive and are typically awarded to address conduct during the litigation that warrants rebuke: *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 284 at para. 53.
- [74] The judge in this case awarded special costs against Hougen, saying only:
- [88] Ms. Su seeks special costs of these applications, contending that Hougen's conduct is worthy of rebuke and justifies such an award of costs. I agree. At the end of the day, Hougen has acted unilaterally in a manner and with knowledge that it had no right to cause Toyomoto to file the NOCC. That unilateral action has caused some expense, when the entire matter could have been avoided earlier. Ms. Su is awarded her special costs for the applications, as sought.
- [Emphasis added.]
- [75] In my respectful view, the judge failed to consider the context in which Hougen filed the notice of civil claim in advance of the leave application. In particular, she did not acknowledge the uncertainty created by cases such as the *Thompson Cases* and *Eastern*

Platinum, which implicitly accepted that a notice of civil claim could, and indeed would, have to be filed to act as a placeholder for a future backdated leave order to be effective in avoiding a limitation defence. Those cases also suggested that a proceeding commenced in that way could be stayed while leave was sought.

[76] In the present case, Hougen tried to do the right thing; it applied for leave well in advance of the limitation period expiring. It also tried, albeit unsuccessfully, to draw the limitation problem to the attention of the application judge. When that failed, faced with obligations to its client and the uncertain state of the law, counsel thought it prudent to take the steps he did. He informed the respondents and confirmed that, in accordance with the Thompson Cases, no steps would be taken unless and until leave was granted.

[77] In my respectful view, the judge's failure to consider this factor in the exercise of her discretion warrants appellate intervention. I would accordingly set aside the award of special costs and replace it with an award of party and party costs to Ms. Su at Scale B.

## Disposition

[78] I would dismiss the appeal in *Su v. Hougen* (CA49402). I would allow the appeal in *Hougen v. Su et al*, (CA49662) only to the extent of setting aside the award of special costs to Ms. Su and replacing it with an award of party and party costs at Scale B.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Winteringham"

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