IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1012109 B.C. Ltd. v. Racz,*
2020 BCSC 1099

Date: 20200728
Docket: S194717
Registry: Vancouver

Between:

1012109 B.C. Ltd. and Lisa Maddess

Petitioners/Applicants

And

Ethel Mary Racz a/k/a Etus Maria Racz and Michael Siwik

Respondents

Before: The Honourable Mr. Justice Majawa

Reasons for Judgment

In Chambers

Counsel for the Petitioners appearing by teleconference:	S. Turner
Counsel for the Respondents appearing by teleconference:	No appearance
Place and Date of Hearing:	Vancouver, B.C. June 17, 2020
Place and Date of Judgment:	Vancouver, B.C. July 28, 2020

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INTRODUCTION

[1] This is an application by the petitioners for various orders arising from the respondents' refusal to accept payments made to them by Louis Racz Co. Ltd ("the Company"). The payments at issue were made to the respondents pursuant to the Order of Justice Adair pronounced on July 29, 2019, and arise from their respective shareholdings in the Company. As the respondents have refused to accept and have in fact returned the cheques made payable to them, the petitioners, who are also shareholders of the Company, seek an order that those refused funds be returned as assets of the Company which should then be distributed to the remaining shareholders that are willing to accept them.

[2] For the reasons that follow, I have concluded that the orders that the petitioners seek should issue, subject to some modifications which will be described below.

BACKGROUND FACTS AND HISTORY OF PROCEEDINGS

[3] The Respondents and the Petitioners are all members of the Racz family, by marriage or descent. The principal of the corporate petitioner, 1012109 B.C. Ltd, is also a member of the Racz family. In these reasons, I will refer to some of the Racz family by their first name so as to prevent confusion.

[4] The Company was originally established by the late Louis Racz ("Louis") in 1967. Louis and his wife Rozilia Racz had three children: Ernest, Johanna and Ethel. Ernest and his wife Rita have a daughter named Lisa Maddess. Johanna is not involved in these proceedings. Ethel has a son named Michael Siwik. Rita, through her role as principal of 1012109 B.C. Ltd., and Ms. Maddess are the petitioners. Ernest has passed away. Ethel Racz and Mr. Siwik are the respondents.

[5] In 1998, the share capital of the Company was reorganized as part of an "estate freeze" transaction. Prior to the freeze, the shareholders of the Company were Rozilia Racz (the late Louis Racz's surviving spouse), Ernest Racz and the respondent Ethel Racz.

[6] After the freeze, the share capital of the Company consisted of Class B non-participating voting shares, Class C non-participating common shares and Class D preferred shares. For reasons that are not clear to the petitioners, all prior outstanding Class A shares were cancelled.

[7] The shares issued in 1998 were held (in different classes and amounts), by Rozilia, Ernest and Ethel Racz, and by a newly created trust (the "Racz Family Trust"), of which Rita Racz (the spouse of Ernest Racz), Lisa Maddess (Rita and Ernest Racz's daughter) and Michael Siwik (Ethel Racz's son) were the beneficiaries.

[8] The Racz Family Trust was settled by Rozilia Racz. It was issued 70 Class C shares in the Company.

[9] By March 2019, most of the Class D preferred shares issued in 1998 had been redeemed by the Company. Only 415 of those Class D shares remained. They were held by the Respondent Ethel Racz, who had refused to tender the shares for redemption. By this time, Rozilia and Ernest Racz had passed away and the Racz Family Trust had been wound up. The remaining shares of the Company's Class C and D shares were as follows:

a) Rita Racz (through her role as principal of 1012109 B.C. Ltd): 32.5 Class C common shares;

b) Ethel Racz: 15 Class C common and 415 Class D preferred shares;

c) Michael Siwik: 35 Class C common shares; and

d) Lisa Maddess: 17.5 Class C common shares.

[10] In essence, 50% of the Company's Class C shares are held by Rita Racz and Ms. Maddess (who are, for all sakes and purposes, the petitioners in this matter) and the other 50% are held by Ethel Racz and Mr. Siwik (the respondents in this matter). By 2019, Rita Racz was also the sole director of the Company.

[11] In early 2019, the Company sold its last remaining asset, an apartment building in West Vancouver. After payment of mortgage debt and taxes, the Company was left with more than $11,000,000 in cash for distribution to its shareholders.

[12] Later in 2019, the petitioners commenced these proceedings seeking orders that most of the Company's cash assets be paid out to the shareholders and that, thereafter, (i) a liquidator be appointed, (ii) any remaining cash assets of the Company be transferred to the liquidator for (A) payment of expenses and (B) subsequent distribution to the shareholders, and (iii) the Company be liquidated and dissolved.

[13] On July 29, 2019, Justice Adair granted the relief sought by the petitioners and among other things, ordered that:

a) the Company was permitted to redeem the remaining 415 Class D shares held by Ethel Racz by paying her the sum of $415,000; and

b) Rita Racz, as sole director of the Company, was authorized to declare a capital dividend of $57,000 per Class C common share of the Company and declare a non-capital, taxable dividend, of $43,000 per Class C common share of the Company.

(the "July 29 Order")

[14] The order also provided for the Company's liquidation and appointed MNP Ltd. as liquidator (the "Liquidator"). Importantly, pursuant to paragraph 8(f) the Court empowered the Liquidator to "distribute any remaining assets to the Class C shareholders of the Company, *pro rata,* in accordance with their shareholdings".

[15] The petitioners sought paragraph 8(f) because the Company had no issued or outstanding Class A shares and the petitioners wanted to ensure that the assets of the Company were paid out to the Class C shareholders prior to dissolution. They were of the view that, at the time the July 29 Order was made, there would likely be

substantial residual assets in the Company after the payment of the capital and non-capital dividends authorized by the July 29 Order. The petitioners were also of the view that the Company would be entitled to a substantial refund of tax following the filing of its June 30, 2020, tax return.

[16] On July 30, 2019, the respondents, Ethel Racz and Michael Siwik, were provided with copies of the July 29 Order. Ethel responded by way of letter dated August 23, 2019, but not sent via fax until August 26, 2019. In the August 23 letter, Ethel Racz cites what she calls "unlawful" sales and transactions that occurred in 2013 and 2014 and states that "[a]ny cheque sent to me will be returned". She concludes her letter with the following:

> "I do not accept Justice Adair's decision. No action can be founded on unlawful transactions."

[Emphasis in original.]

[17] On August 26, 2019, counsel for the petitioners sent Ethel Racz three cheques. One in the amount of $415,000 on account of the redemption of her Class D shares, the second in the amount of $855,000 on account of the capital dividends declared on her Class C shares and the third in the amount of $645,000 on account of the non-capital dividends declared on her Class C shares. On the same date, two cheques were sent to Mr. Siwik in respect of the dividends declared on his Class C shares: one cheque in the amount of $1,995,000 and the other in the amount of $1,505,000. The amount sent to Ethel Racz and Mr. Siwik totalled $5,415,000. I will refer to these amounts collectively as the "Refused Payments".

[18] On August 30, 2019, the respondent Ethel Racz wrote to counsel for the petitioners via fax. The entirety of that correspondence stated "[t]he cheques (3) which I received yesterday have been sent back to your office by registered mail." The cheques made out to Ethel Racz were returned to counsel for the petitioner on or about September 3, 2019. The following day, Mr. Siwik sent a fax to the petitioners' counsel advising him that he was returning the two cheques that had

been delivered to him "for the reasons stated in [Ethel] Racz's letter of August 23, 2019."

[19] Some months later, the petitioners decided to try and have the Liquidator deliver the cheques to the respondents in the hopes that they would be accepted. On February 21, 2020, the Liquidator made an attempt to again deliver the amounts payable to the respondents pursuant to the July 29 Order. The Liquidator also advised the respondents that they would be arranging for the preparation, mailing and filing of T5 tax information slips in the respondents' names in respect of the dividends. Those T5 slips were issued and delivered to the respondents on February 27, 2020.

[20] On February 24, 2020, the respondents jointly wrote to the Liquidator and advised them that the cheques would be returned for the same reasons they were previously returned to petitioners' counsel. On March 6, 2020, Ethel Racz wrote to the Liquidator enclosing the five cheques and the T5 slips. The cheques have since been cancelled by counsel for the petitioners and the funds have been transferred to the Liquidator.

[21] In her correspondence with the Liquidator when returning the cheques, the text of which is less than one page long, Ethel Racz cited various grievances she has with previous decisions of this Court dating back to 2001 and actions taken by the petitioners over the course of some 20 years including in regards to the sale of the Company's final remaining property and whether Rita Racz is properly the director of the Company. She states:

> "All Court decisions since 2001 have been based on false evidence. Justice Adair's decision is just more of the same."

[22] Despite her expressed displeasure, neither Ethel Racz nor Michael Siwik took any steps to appeal the July 29 Order and the time for doing so has long since passed. Nor have they taken any steps to apply to the Court for further orders or directions as provided for in paragraph 15 of the July 29 Order. Similarly, although they have inferentially expressed displeasure with or opposition to the dissolution of

the Company by refusing to accept the cheques, the respondents have not exercised their dissenting rights as shareholders in the manner required by the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[23] On April 28, 2020, counsel for the petitioners sent a letter enclosing the notice of application for the hearing of this application to Ethel Racz and Michael Siwik via registered mail. In that letter, counsel noted that the application was tentatively set to be heard on June 17, 2020 and he specifically pointed out the possible consequences to the respondents:

> You will see that the application seeks [an] order that, assuming you continue to disclaim the redemption and dividend amounts payable to you pursuant to Madam Justice Adair's Order of July 29, 2019, the Liquidator instead pay those amounts to our clients, Rita Racz (through her holding company) and Lisa Maddess, as well as any other residual corporate funds.

[24] On June 8, 2020, the respondents were personally served with the filed application materials at their residence in Quebec. On June 9, 2020, petitioners' counsel sent another letter to the respondents confirming that the hearing was set to proceed on June 17, 2020, and advising them to follow the procedure set out in the Court's COVID-19 Notice #28 if they wished to participate. He also urged them to obtain legal advice. The respondents did not respond to any of this correspondence and have not taken any steps to appear at this hearing

[25] Having reviewed the correspondence, I am unable to discern the precise reasons as to why the respondents have not accepted the monies sent to them arising from their shareholdings in the Company. Their refusal to accept the funds appears to be based on wrongs they perceive were committed many years ago and the view that these wrongs somehow affect the validity of the July 29 Order. I can find no cogent reason for refusal such as reference to the existence of rights that they fear will be extinguished should they accept the cheques. What is clear from the evidence before me is that the respondents have expressly and intentionally refused to accept the significant amount of funds owing to them on two occasions and that they have taken no steps to set aside the July 29 Order or to exercise their dissenting rights as shareholders.

ISSUE

[26] The issue on this application is whether the Refused Payments should be treated as remaining assets of the Company, and if so, should they be distributed to the petitioners as they are the only Class C shareholders who will accept them.

[27] In order to determine this, I must determine:

a) whether the respondents have any remaining rights to the Refused Payments; and

b) if they do not, who should receive the Refused Payments.

ANALYSIS

[28] The petitioners have properly brought this application pursuant to paragraph15 of the July 29 Order which provided that the parties and the Liquidator would be at liberty to apply to the Court for further directions or orders.

Do the Respondents Still Have Rights to the Refused Payments?

[29] The first step in determining what is to happen with the Refused Payments is to determine whether they are properly categorized as a "remaining asset" of the Company. Before determining this, I must first determine whether the respondents have given up their rights in respect of the Refused Payments. First I will address whether the respondents have "disclaimed" the payments in a manner analogous to the recipient of a testamentary gift. Second, I will address whether the respondents have waived their entitlement to the payments. Finally, I will discuss whether the Company has discharged its obligations to the respondents in respect of the payments and what effect that has in the circumstances.

Have the Respondents "Disclaimed" the Payments?

[30] Perhaps not surprisingly, counsel for the petitioners was unable to identify a case in which shareholders refused the payments owing to them on account of the declaration of dividends. Thus, the petitioners argue that the situation in this case is analogous to the combined circumstances described in *Canada Tea Co Ltd., Re,*

[1959] O.W.N. 378; 21 D.L.R. (2d) 90 (where dividends went unclaimed) and in estate cases where a testator's gift has been disclaimed.

[31] In *Canada Tea,* the liquidator of an Ontario company sought directions regarding the disposition of certain unclaimed dividends of the company. The dividends had been declared more than six years prior to the application, and any debt claims by the shareholders who would otherwise have been entitled to sue for payment of the dividends had therefore been extinguished by operation of Ontario's then *Limitation Act.* The court held that the money therefore formed part of the assets of the company available for distribution to shareholders on winding-up. The dividends that were payable on a date less than six years prior to the application were ordered to be paid to the Public Trustee for payment out on the application of the respective shareholders.

[32] In a number of estate cases cited by the petitioners, including a decision of this Court in *Grund Estate, Re,* (1998) 77 A.C.W.S. (3d) 685; [1998] B.C.J. No. 160, the courts have held that a beneficiary of a testamentary gift has the right to not accept that gift and if the gift is declined, then it falls into the residue of the estate. This "right to disclaim" arises from the well-established view that no one should be forced to accept a gift they do not want (*Grund Estate* at para. 11 citing *Moss, Re* (1977), 77 D.L.R. (3d) 314 (B.C.S.C.)). Drawing an analogy between the aforementioned cases and the circumstances of the present case, the petitioners argue that the Refused Payments should be treated as being "disclaimed" and thus should be returned to the Company.

[33] While the circumstances of this case are somewhat similar to the circumstances cited in the estate cases (in that in both situations those entitled to the funds or gift have expressly declined to accept them) I am not persuaded that the circumstances are sufficiently analogous to warrant the same result. The respondents' refusal to accept monies owing to them that arise from their interest and rights as shareholders in a company governed by its articles and the *BCA* are, in my view, fundamentally different than the refusal to accept a testamentary gift and

I have been provided with no authority directly in support of the petitioners' position on this point.

Have the Respondents "Waived" their Shareholder Rights?

[34] Unlike "disclaimer", the concept of waiver has been considered in commercial law contexts. Waiver occurs where one party to a contract or a proceeding takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party. In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 [*Saskatchewan River*], the Supreme Court of Canada described the elements of waiver as follows:

> … The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
>
> > The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.
>
> [Emphasis added]

[35] In the present case, there is no evidence that the respondents have signed a written waiver. Therefore, if I am to find that they have formally waived their rights it must be inferred by their conduct. I am not aware of any authority in which a court treated a shareholder's refusal to accept a dividend cheque as conduct waiving their right to that entitlement.

[36] The respondents have a bundle of rights as shareholders of the Company. The shareholder rights which are pertinent to this application and the concept of

waiver are the right to dissent and the right of entitlement to monies upon dissolution.

[37] The respondents lost their dissenting rights due to their conduct. The respondents did not participate in the meeting in which the Company adopted the relevant resolutions. Therefore, they failed to comply strictly with the *BCA* requirements for exercising their dissenting rights. They also failed to participate in any of the proceedings in this Court (either before me or before Justice Adair). As a result, the respondents have lost their right to dissent and object to the dissolution. They remain only with their rights of entitlement and thus my analysis of waiver is limited to this right.

[38] The test for waiver, as articulated in *Saskatchewan River*, is a stringent one with two requirements: (1) a full knowledge of rights and (2) an unequivocal and conscious intention to abandon them.

[39] In the circumstances of this case, the first element presents less of an issue than the second element. The right at issue is the entitlement to the money payable to shareholders upon dissolution of the Company. The respondents have been given notice of the Company meetings where the resolutions to sell assets and dissolve the Company were adopted. They were given notice of the original petition for court-ordered dissolution and notice of this application. They have also been sent cheques payable to them. On the evidence before me, I have no trouble in inferring that the respondents have a “full knowledge” of their rights.

[40] However, it is not so clear whether the respondents’ conduct evinces an “unequivocal and conscious intention to abandon” their rights as shareholders. The correspondence between the petitioners and the respondents shows that the respondents are not indifferent with respect to their legal rights even though they have taken no steps to enforce them. While I am unable to determine the precise reasons as to why the respondents have refused the payments, there is nothing in their correspondence that indicates a “clear and unequivocal conscious intention” to abandon their rights. They have expressly indicated their displeasure with the state

of affairs by returning the cheques issued to them, but there is no language to suggest that they intend, or understand, that the refusal of the cheques could constitute an extinguishment of their rights to the monies upon dissolution.

[41] Granted, the correspondence from the respondents lacks an express intention to *preserve* their rights to the monies upon dissolution; however, I am not convinced that the absence of such language meets the standard of "clear and unequivocal" intention to abandon shareholder rights. I say this despite the warning of the relief sought in this application that was provided to them in counsel for the petitioners' April 28, 2020, letter.

Has the Company Discharged its Obligations to the Respondents in Respect of the Payments?

[42] The Company's conduct in providing the cheques is also relevant to the analysis of whether the respondents' remaining shareholder rights have been extinguished. Thus, it is useful to discuss the effect of the Company's mailing of the payments to the respondents.

[43] The Articles of the Company provide:

> 20.7 Any dividend, interest or other monies payable in cash in respect of shares may be paid by cheque or warrant sent through the post directed to the registered address of the holder, or in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register, or to such person or to such address as the holder or joint holders may direct in writing. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent. The mailing of such cheque or warrant shall, to the extent of the sum represented thereby (plus the amount of any tax required by law to be deducted) discharge all liability for the dividend, unless such cheque or warrant shall not be paid on presentation.
>
> [Emphasis added]

[44] There is no dispute that the cheques were mailed to the respondents; they received them, refused to accept them and returned them. Although I am not aware of any authority in which a court has considered the effect of similarly-worded articles in circumstances where a dividend cheque was mailed to a shareholder who

then *refused* to accept it, there is some authority that addresses the effect of such provisions where cheques sent by mail were intercepted by third parties.

[45] In *Steen v. Gunnar Mining Limited*, [1963] 1 O.R. 329 (C.A.), the plaintiff shareholder began an action against the defendant company because his dividend cheque was intercepted by a third party who cashed it. The company's by-laws provided that the mailing of a dividend cheque to a shareholder would satisfy and discharge all liability for the dividend unless the cheque was not paid on presentation. The trial judge thus dismissed the action for the dividend. The Ontario Court of Appeal affirmed the trial decision but varied it to the extent that the cheque was returned to the shareholder so that it could be presented for payment at the bank.

[46] In *Rands v. Hiram Walker-Gooderham & Worts Ltd.*, [1936] O.R. 488 (Ont. H.C.), the plaintiff shareholder alleged that he did not receive the proceeds of a dividend cheque sent by the defendant company. The company's bylaws provided that any dividends issued by the company would be payable by cheque sent through the mail. The Court accepted that the plaintiff's name was forged on the cheques and cashed, but declined to consider the plaintiff's argument that the company was negligent. Instead, the Court found the relevant provision of the bylaws constituted a contract between the company and its shareholders. "The by-law having been fully complied with by the defendant company and its agent, The National Trust Company, there was a legal payment of these dividends by the defendant."

[47] My reading of *Steen* and *Rands* suggest that, where the articles of a company as to the method of payment of a dividend are fully complied with: there is legal payment of the dividend; the company's liability has been extinguished; and no action lies with the shareholder to enforce rights in respect of those shares against the company.

[48] The articles of the Company are a binding contract between it and its shareholders (including the respondents). In the words of Article 20.7, the Refused Payments are "dividend, interest or other monies payable in cash in respect of

shares". It is uncontroverted that the cheques were mailed to and received by the respondents. As discussed above, the cheques were initially mailed to the respondents on August 26, 2019, by counsel for the petitioners. In my view, this event is sufficient to conclude that the Company's liability to pay the amounts to the respondents on account of their shareholdings has been discharged and the respondents' rights to the same have been extinguished.

Who Should Receive the Refused Payments?

[49] Having found that the Company's liability for the Refused Payments has been extinguished, I now must determine what should happen with those monies. The petitioners argue that the Refused Payments should be returned to the Company as remaining assets of the Company to be distributed to the remaining shareholders who will accept them. Although provided with the application materials and the April 28, 2020, letter expressly warning them of the potential outcome of this application, the respondents have chosen not to appear. The Liquidator has provided an affidavit in which it states it takes no position in respect of the relief sought by the petitioners in this application.

The Refused Payments are not Unclaimed Property

[50] Counsel for the petitioners rightly points out that this Court should consider whether the Refused Payments should be treated as "unclaimed property" within the meaning and ambit of British Columbia's *Unclaimed Property Act,* [SBC 1999] c. 48, or the Quebec *Unclaimed Property Act,* CQLR c. B-5.1. The reason that the Quebec *Unclaimed Property Act* is referenced is because the petitioners reside in Quebec and the Refused Payments were sent to them at their residence. However, for reasons described below, it is not necessary for me to decide whether the Quebec or British Columbia Act is applicable because I have found that the Refused Payments are not "unclaimed property".

[51] In British Columbia, section 337 of the *BCA* requires that before distributing the residual assets of a company in liquidation, a liquidator must pay any amounts that would otherwise be payable to a shareholder of the company to the

administrator of the *Unclaimed Property Act,* "if the whereabouts of ... [the] shareholder... is unknown". However, the whereabouts of the shareholders in this case are well known. They have been sent the funds and have simply refused to accept the payments. Therefore, I find that section 337 of the *BCA* does not operate to require the Refused Payments to be paid to the administrator of the *Unclaimed Property Act.*

[52] The Quebec *Business Corporations Act* [SQ c. S-31.1] does not contain a provision similar to section 337 of the British Columbia *BCA.* However, section 3 of the Quebec *Unclaimed Property Act* defines:

> "unclaimed property" to include "amounts due on the ... redemption of... stocks, shares or any other form of participation in a legal person", as well as "dividends ...attaching to the securities or other form of participation", if the person entitled to those amounts or dividends is domiciled in Quebec and "no claim or transaction has been made and no instructions have been given by the right-holder in respect of the amounts or the income in the three years following the date on which they became due or payable".

[Emphasis added.]

[53] The right-holders (the respondents) in this case have given instructions in respect of the amounts that have become due or payable: their instructions are that they refuse to accept those payments. Therefore, I find that the Refused Payments are not "unclaimed property" as that term is defined in the Quebec statute.

[54] I also note that petitioners' counsel served the administrators of both the British Columbia and Quebec unclaimed property regimes and both of them advised that they would not appear at the hearing of this application and that they took no position on the petitioners' application.

The Refused Payments are Remaining Assets of the Company and Should be Distributed to the Petitioners

[55] I am not aware of any authority wherein a shareholder refused to accept payment of a dividend at the dissolution of a company and those monies were returned to the company as remaining assets. The remedy sought in this application is novel and the Court should be guided by the concepts of equity, judicial discretion

and common sense in its treatment of the issue (*Penson Financial Services Canada Inc. (Syndic de)*, 2014 QCCS 4078 [*Penson Financial*] at para. 56.)

[56] In the circumstances of this case, the respondents' refusal to accept the payments is preventing the Liquidator from facilitating an orderly dissolution of the Company. Having found that the Company has discharged its liability to the respondents with respect to the Refused Payments, and that the Liquidator takes no position, it would, in my view, be fair to treat the Refused Payments as remaining assets of the Company so that the Liquidator can continue with the orderly dissolution of the Company.

[57] Under the Articles of the Company, all unpaid dividends and all remaining profits and assets of the Company are payable to the holders of any Class A shares. However, as mentioned before, there are no Class A shareholders. Recognizing the absence of any Class A shareholders, the Company, prior to its liquidation, passed resolutions to ensure that the net profits from the sale of its remaining asset, after payment of taxes and expenses, as well as "all other cash and investment assets of the Company" be paid out to its Class C shareholders, *pro rata* in accordance with their shareholding entitlement.

[58] This resolution was later captured in paragraph 8(f) of the July 29 Order, which directs the Liquidator to:

> distribute any remaining assets to the Class C shareholders of the Company, *pro rata* in accordance with their shareholdings.

[59] As stated above, the petitioners and the respondents are the Class C shareholders. Thus, applied to the circumstances of this case, a *pro rata* distribution in accordance with the resolution and the July 29 Order would result in the respondents once again being sent cheques for monies which they have expressly refused in the past (albeit, the amounts this time would be smaller as the Refused Payments would now be split amongst all the current shareholders, not just the respondents). In light of the respondents' clearly expressed intention to refuse payment and to avoid what appears may be a never-ending process of the sending

and returning of cheques, the petitioners submit that the remaining assets (i.e. the Refused Payments) should be distributed to those Class C shareholders who will accept them.

[60] Given the unique history of this case, it would be just and equitable that the remaining assets be paid by the Liquidator to the petitioners in accordance with their respective shareholdings. Doing so will permit for the orderly dissolution and winding up of the Company. As the respondents have refused payment on two occasions, the result would be that all remaining assets would be paid by the liquidator to the petitioners, *pro rata* in accordance with their respective shareholdings - that is, 65% to the petitioner 1012109 B.C. Ltd. (i.e. Rita Racz) and 35% to the Petitioner Lisa Maddess.

[61] As the respondents will not have received the monies arising from the Refused Payments, the T5 Statement of Investment Income slips issued by the Liquidator in respect of the Refused Payments should be canceled and the Canada Revenue Agency should be notified of the same. This will assist the respondents in not being held liable for tax on income that they did not receive.

LEAVE TO SET ASIDE THIS ORDER

[62] In their notice of application, the petitioners suggest that the respondents should be provided one final notice and opportunity to accept payment failing which the Refused Payments would be distributed to the petitioners. Although this approach of giving the respondents one final opportunity is not reflected in the draft order presented to me during oral argument, counsel for the petitioners confirmed that his clients would be content that some sort of “last chance” be given to the respondents.

[63] Given the novel relief requested in this case, and being mindful of the need for this Court to exercise caution in making an order which has the effect of completely diminishing the beneficial interest of shareholders not before the Court (*Penson Financial* at para. 57), I am inclined to give the respondents one final opportunity to make claim to the Refused Payments.

[64] Therefore, it will be a term of the order flowing from these reasons that the entered order be provided to the respondents forthwith and that the respondents have 30 days from the date the order is entered to apply to this court to have this order set aside and to indicate that they will accept the Refused Payments. In light of these reasons, the respondents should be aware that this Court may subsequently treat the choice to not apply to set aside this order as a clear and unequivocal indication of their intention to waive their rights to the Refused Payments.

CONCLUSION

[65] The Company complied with its articles in respect of delivering the payments to the respondents, and therefore, the Company's liability for, and the respondents' rights to the Refused Payments are extinguished. Thus, the Company's obligation and liability to make further payments to the respondents on account of their shareholdings, and as was required by the July 29 Order, is also extinguished. In the interests of fairness and the orderly winding up and dissolution of the Company, the Refused Payments are to be returned to the Company as its remaining assets and are to be distributed, *pro rata,* to the petitioners. The Liquidator shall take all reasonable steps to notify the Canada Revenue Agency of this Order and to cancel any T5 Statements of Investment Income issued to the respondents on account of the Refused Payments.

[66] The implementation of the order is stayed for a period of 30 days from the date the order is entered. The petitioners are to provide the respondents with a copy of these reasons and the entered order forthwith and the respondents may apply to set aside this order within 30 days of the date upon which it is entered. If the respondents do not apply to set the order aside within the time frame, the terms of the order discussed above will come into effect.

[67] The petitioners are entitled to their costs of this application, on a full indemnity basis, payable by the Company from the funds now being held by the Liquidator.

"Majawa. J"