IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leean International Corp. v. CF Energy Corp.,* 2026 BCSC 387

Date: 20260306
Docket: S243749
Registry: Vancouver

Between:

Leean International Corp.

Petitioner

And

CF Energy Corp.

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Petitioner:	E. Kirkpatrick A. Dhawan
Counsel for the Respondent:	M. Pontin
Place and Date of Hearing:	Vancouver, B.C. December 3, 2025
Place and Date of Judgment:	Vancouver, B.C. March 6, 2026

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Introduction

[1] The petitioner, Leean International Corp. (“Leean”), which is a shareholder of the respondent, seeks leave pursuant to ss. 232(2) and 233(1) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*], to pursue a claim on behalf of the respondent, CF Energy Corp. (“CF Energy”) to enforce an agreement. CF Energy is incorporated in British Columbia, but many of its business operations are in China.

[2] The claim in issue arises from an agreement by which the late Huajun Lin, who was the founder of CF Energy, was to invest Chinese RMB 36,000,000 (about CA$6.8 million) to acquire shares of CF Energy at a share price of CA$0.68. The agreement was governed by the law of Ontario and contained an exclusive jurisdiction clause saying that all proceedings with respect to it could only be brought in Ontario.

[3] Mr. Lin’s estate and his beneficiaries continue to control substantial shares of CF Energy, and two of his beneficiaries are directors.

[4] Leean says that pursuing this claim would be in the best interests of CF Energy and that Leean is acting in good faith in seeking this leave.

[5] CF Energy says that:

a) Its board of directors determined using its business judgment to pursue the claim in China rather than in Ontario, and that although it commenced an Ontario action in 2022, it chose not to serve the Ontario Statement of Claim on the Estate. CF Energy says that when the courts in China declined jurisdiction, its board of directors appropriately decided not to pursue the claim.

b) It would not be in its best interests to now pursue litigation in Ontario, in that any attempt to extend the time for it to serve the Ontario Statement of Claim on the Estate would be surely dismissed. CF Energy also questions

the good faith of Leean, and suggests that Leean may have ulterior motives.

c) If Leean is given leave to pursue the claim, it should be required to post security for any liability for costs of the Estate that CF Energy may become exposed to.

Background Facts

[6] The primary underlying facts are not substantially in dispute.

[7] CF Energy is a public company incorporated in British Columbia. Its shares are traded on the TSX Venture Exchange. It operates as an integrated energy provider and natural gas distribution company in China. Its financial statements show gross profits of RMB 119,308,000 (about CA$24 million) in 2023 and net assets of RMB 399,373,000 (about CA$80 million).

[8] The agreement in issue was made in May 2017. It was titled “Loan Discharge Agreement”. The parties are CF Energy (at the time, known as Changfeng Energy Inc. (“Changfeng”)), as well as:

a) a wholly owned subsidiary, Sanya Changfeng Offshore Natural Gas Supply Co. (“Offshore”); and

b) Mr. Lin, who at the time was CF Energy’s Chairman, CEO and President, and who was described in the document as the “Lender”.

[9] The recitals of the Loan Discharge Agreement set out various facts that underlie the agreement:

A. Offshore is a wholly owned subsidiary of Changfeng, and its financial statements are consolidated into the financial statements of Changfeng;

B. On April 27, 2007, Offshore entered into separate loan agreements, as amended and extended from time to time with … (collectively, the Original Lenders”) in an aggregate amount equal to Chines RMB 40,000,000 (collectively, the “Loans”);

C. On November 7, 2016, the Original Lenders transferred and assigned all of their rights and obligations pursuant to the Loans to the Lender;

D. On December 20, 2016, Changfeng announced its intention to pursue a listing of its shares on The Stock Exchange of Hong Kong Limited (the "HKSE") and initiated steps to facilitate this process;

E. In connection with the proposed HKSE listing, Changfeng has ben advised by its Hong Kong financial and legal advisers that in order to satisfy the listing requirements of the HKSE it must be in a position to demonstrate that it is capable of carrying on its business independently of its controlling shareholder and any close associate, and accordingly that the Loans must be discharged;

F. The Lender is the Chairman, Chief Executive Officer and President of Changfeng, and currently owns, directly or indirectly, 34,675,000 common shares of Changfeng (the "Lender Shares") representing approximately 54.4% of the issued and outstanding common shares of Changfeng; and

G. The Board of Directors of Changfeng has appointed a Special Committee, composed of independent directors, to negotiate with the Lender for the discharge of the Loans of Offshore to the Lender, and such Special Committee has recommended (after receipt of independent financial and legal advice) to the Board of Directors of Changfeng that it enter into this Loan Discharge Agreement, which recommendation has ben accepted by the Board of Directors of Changfeng.

[10] The Loan Discharge Agreement provides in s. 1 that Changfeng will cause Offshore to pay Mr. Lin Chinese RMB 36,000,000 in return for a release of any and all obligations in respect of the Loans of Offshore to the Lender. Section 2 then provides that:

> If Changfeng has not successfully completed the listing of any class of its shares on the HKSE on or prior to June 28, 2019, Changfeng shall have the right (the "Right"), exerciseable at any time in the 90 day period following June 28, 2019, to require the Lender, directly or through designated nominees, to subscribe for common shares of Changfeng on the following terms, subject to receipt of applicable regulatory approval: (i) subject to Section 3, the subscription amount shall be the Canadian dollar equivalent of Chinese RMB 36,000,000 (based on the CAD:RMB exchange rate published by the Bank of Canada on June 28, 2019); and (ii) the subscription price shall be equal to the volume weighted average trading price of the common shares of Changfeng in the period of 30 calendar days preceding June 28, 2019 on the TSX Venture Exchange (the "TSXV") or such other stock exchange or quotation system on which the greatest volume of trading of common shares of Changfeng has occurred in such 30 day period, converted to Canadian dollars to the extent the trading price is in a currency other than Canadian dollars.

[11] The petitioner notes the significance of the amount of RMB 36,000,000 in the context of CF Energy's business. For the 2018 year, it was equivalent to 22% of CF Energy's gross profit and 9% of CF Energy's total assets.

[12] The Loan Discharge Agreement contained choice of law and forum provisions:

> 11. This Loan Discharge Agreement is governed by and will be construed in accordance with the laws of the Province of Ontario and with the federal laws of Canada applicable therein.
>
> 12. The parties: (a) hereby irrevocably and unconditionally submit to the exclusive jurisdiction of the courts of the Province of Ontario and to any appellate court for the purpose of any suit, action or other proceeding arising out of or based upon this Loan Discharge Agreement; (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Loan Discharge Agreement except in the courts of the Province of Ontario; and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Loan Discharge Agreement or the subject matter hereof may not be enforced in or by such court.

[13] On January 30, 2019, CF Energy announced that it was deferring its HKSE initial public offering.

[14] In February 2019, Mr. Lin resigned from his positions at CF Energy. His daughter, Ann Siyin Lin, succeeded him as CEO and Chair of CF Energy. She continues to hold those positions.

[15] Mr. Lin passed away on March 1, 2019, in China. The beneficiaries of Mr. Lin's estate (the "Estate") are:

a) His widow, Mingfei He;

b) Ann Siyin; and

c) Two other children: Siqin Lin and Zhipei Lin.

[16] The members of CF Energy's board of directors from about February 2019 until shortly before the hearing of this petition were:

a) Ann Siyin (also an estate beneficiary);

b) Siqin Lin (also an estate beneficiary);

c) Frederick Wai Keung Wong;

d) Guodong "Laurence" Wang; and

e) Ming Zhao "Rick" Zhu.

[17] It is Mr. Wong, who became a director in February 2019, who provided the primary affidavit in support of CF Energy's position in response to this petition.

[18] On July 26, 2019, CF Energy issued a new release announcing its intention to exercise the rights set out in the Loan Discharge Agreement, and to thereby require the Estate to purchase RMB 36,000,000 worth of its shares.

[19] The Canadian dollar equivalent of Chinese RMB 36,000,000 as of the June 28, 2019 exchange rate was $6,861,587.

[20] On September 5, 2019, CF Energy delivered a Notice of Exercise to the estate beneficiaries. The Notice of Exercise was sent by email by an Ontario law firm to each of the Estate beneficiaries. It provided that:

> The Company hereby gives notice that it is exercising its right to require the estate of the Lender to subscribe for [common shares as set out in s. 2 of the Loan Discharge Agreement].
>
> The Company reserves all of its rights in respect of such subscription, including enforcement thereof in the courts in accordance with the terms of the Agreement.
>
> The Company hereby requests that each of the addressees hereof return their executed consent and agreement to the matters contained herein by September 13, 2019. To the extent the addressees hereof do not returned their executed consent and agreement by such date, the Company intends to pursue its legal rights in connection herewith.

[21] On September 13, 2019, an Ontario law firm representing two of the beneficiaries (Siqin Lin and Zhipei Lin) wrote to the lawyers for CF Energy, stating:

> … given the fact that there is an imminent civil trial in China on the Estate to determine the shares and rights of each beneficiary and administration of the Estate, it is important for the Board and Company to be prudent and not to rush into a situation where the administration of the Estate has not been determined and all beneficiaries are in their limited capacities in dealing with the Estate.
>
> Therefore, Ms. Siqin Lin and Mr. Zhipei Lin hereby express and request the following:
>
> 1) My clients acknowledge the rights and obligations from the Loan Discharge Agreement …
> 2) My clients are not in a position to grant consent to Company as requested in the Notice at this point without knowing that how such exercise of option may negatively affect their interests as well as the best interest of the Company;
> 3) My clients expressly request the Company to postpone the exercise of right and option undil the China Estate litigation completes with a judgment;
> 4) My clients ask the Company to provide more detailed information about the Company's plan as to how to exercise of option.

[22] Another Ontario law firm responded on September 13, 2019, on behalf of Mingfei He, advising that she was unable to execute the requested Notice of Exercise, and saying:

> As you have been previously advised, a civil complaint has been filed in China by the Plaintiff, He Mingfei, and names as Defendants Lin Siyin, Lin Siquin and Lin Zhipei, regarding the Estate ("Civil Complaint"). It is anticipated that once the Civil Complaint has been finally determined by the Courts in China, an executor with authority to bind the Estate will be appointed in order to consider the request of CF Energy regarding the Loan Discharge Agreement … and the requested execution of the Notice of Exercise.

[23] The Estate has not purchased the shares required under the Loan Discharge Agreement. The position ultimately taken by each beneficiary is summarized as:

a) Mingfei He has asserted that the rights and obligations of the Loan Discharge Agreement were dismissed with the death of Mr. Lin;

b) Zhipei Lin has acknowledged the rights and obligations under the Loan Discharge Agreement but has refused to consent to the Estate honouring those obligations; and

c) Ann Siyin and Siqin Lin have advised that they consent to the Estate honouring the Loan Discharge Agreement.

[24] Mr. Wong, in his affidavit on behalf of CF Energy, said that CF Energy learned in 2019 that "the assets readily available to honor the [Loan Discharge Agreement] and all of the Estate Beneficiaries are located in China". He went on to say:

> The Board of Directors of CF Energy, of which I was a member of at all material times and participated in making these decisions, determined that pursuing the enforcement of the LDA through the Sanya Action in China and not in Canada was in CF Energy's best interests. In reaching this conclusion, the Board of Directors considered many factors, including:
>
> (a) The Estate Beneficiaries were located in China;
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> (b) The assets readily available of the Estate to honor the LDA were located in China;
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> (c) The Estate was already the subject of litigation amongst the Estate Beneficiaries in China;
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> (d) The cost and complexity of serving a claim in the Ontario Superior Court of Justice against the Estate Beneficiaries in China;
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> (e) The enforceability of foreign judgments in China; and
>
> (f) The advice the Board received from CF Energy's legal advisors in Canada and China. CF Energy is only relying on the fact it sought legal advice, is not putting the content of that legal advice in issue, and maintains solicitor-client privilege.

[25] This is the only evidence about the decision of the board of CF Energy. The evidence did not include any minutes of the board of directors, nor is there anything indicating whether the determination of the board was in accordance with the legal advice that CF Energy received. The affidavit does not describe the timing of the decision referenced, but presumably it predates the commencement of litigation in China.

[26] On June 21, 2021, CF Energy filed a contract dispute case against the Estate in the Sanya Intermediate People's Court, Sanya City, Hainan Province, China. The purpose of the case was to enforce the Loan Discharge Agreement. CF Energy filed this case notwithstanding the choice of forum provisions in the Loan Discharge Agreement. A hearing was scheduled for August 31, 2021.

[27] On August 30, 2021, (just over two months after it had commenced proceedings in China), CF Energy filed a statement of claim against the Estate in the Ontario Superior Court of Justice, with court file number CV-21-006677904 (the "2021 Ontario Action"), seeking to enforce the obligations under the Loan Discharge Agreement.

[28] Mr. Wong explained in his affidavit that:

> In light of the decision of the Board of Directors described above and the existence of the [action commenced in China on June 21, 2021], the Board did not effect service of the Statement of Claim in the [2021 Ontario Action] against the Estate.

[29] The Sanya Intermediate People's Court declined to take jurisdiction over the dispute. CF Energy appealed from that decision to the Hainan Provincial High People's Court.

[30] On February 17, 2022 – six months after it had commenced the initial Ontario claim – CF Energy:

a) Discontinued action CV-21-006677904; and

b) Filed an identical statement of claim that same day, also in the Ontario Superior Court of Justice, with court file number CV-22-00677083 (the "2022 Ontario Action").

[31] At the hearing of the present petition, it was common ground between the parties that, as a result of a Covid-19-related suspension of limitation periods in Ontario, the filing of the 2022 Ontario Action was within the applicable limitation.

I gather, however, that this explanation was not provided until just before the hearing of the present petition in December 2025.

[32] Under the Ontario Rules of Court, a statement of claim must be served within six months. The deadline for service of the Statement of Claim in the 2022 Ontario Action was thus August 17, 2022.

[33] With respect to the 2022 Ontario Action, Mr. Wong explained that:

> In light of the decision of the Board of Directors described above and the existence of the [action commenced in China on June 21, 2021], the Board did not effect service of the Statement of Claim in the [2022 Ontario Action] against the Estate.

[34] On September 5, 2022, the Hainan Provincial High People's Court dismissed CF Energy's appeal of the order declining jurisdiction. CF Energy then applied for a new trial in the Sanya Intermediate People's Court on the basis that it had new evidence. That application was rejected on February 24, 2023.

[35] The petitioner owns approximately 9.3% of the common shares of CF Energy. Leean's Ontario counsel wrote to CF Energy on April 28, 2023, raising concern about the lack of efforts to enforce the Loan Discharge Agreement. The letter noted the dismissal of the initial Chinese action in February 2022, and also the existence of litigation in Ontario, commenting with respect to the Ontario proceedings that:

> We have grave concerns that the original claim was discontinued to ensure that any claim against the Estate would be statute-barred. Despite there being no defence filed, it does not appear that the Company has noted the Estate in default.

[36] The letter requested various information from CF Energy, including confirmation that the Ontario Statement of Claim had been served on the Estate, evidence as to steps taken in default, and whether any tolling agreement had been made with the Estate to preserve any limitations.

[37] CF Energy's Ontario counsel responded by letter of May 18, 2023, explaining that:

> CF actively pursued and continues to pursue the enforcement of the Loan Discharge Agreement. Based on the location of the assets of the Estate, the location of the beneficiaries of the Estate, the dispute with respect to the appointment of a trustee for the Estate, and the complexities of enforcing foreign judgment in China, CF determined that pursuing the enforcement of the Loan Discharge Agreement in China was the more appropriate course of action.

The other questions raised in the April 28, 2023 letter were not responded to.

[38] On May 23, 2023, counsel for Leean again wrote, noting the lack of response to the questions asked, asserting once again that CF Energy had knowingly allowed the limitation period to laps, and demanding a response to the questions it had posed on April 28, 2023.

[39] Then, on September 19, 2023, counsel for Leean wrote demanding:

> 1. That CF immediately take all steps to proceed to judgment in the [2022 Ontario Action] (including, but not limited to, default judgment).
> 2. That CF immediately take all steps to secure its anticipated judgment in the [2022 Ontario Action] without delay (including, but not limited to, all available steps to freeze the assets of the Estate and/or prevent distribution, and/or freeze assets of the anticipated beneficiaries).
> 3. That CF take all steps to enforce its judgment in the [2022 Ontario Action] without delay.
> 4. That CF immediately commence a claim against the members of the Board of Directors for failure to prosecute the [Ontario proceeding that had been commenced in 2021], and their determination to withdraw that proceeding …
> 5. That CF immediately commence a claim against [counsel for CF] for its role in failing to prosecute the [Ontario proceeding that had been commenced in 2021].

The letter concluded by noting that in the absence of a response by October 31, 2023, "we anticipate instructions to request leave to commence a derivative action".

[40] CF Energy's Ontario lawyers responded on October 30, 2023, that:

> As we set out in our letter dated May 18, 2023, CF is actively pursuing a claim to enforce the Loan Discharge Agreement. CF has not taken any steps "to extinguish CF's claim following the expiration of the limitation period" as alleged in your letter. CF's board of directors, in exercising its business judgment after receiving advice from CF's legal advisors in Canada and

> China, determined that pursuing the claim in China was in CF's interests. No member of CF's board of directors was in a conflict of interest in connection with the board's decision in this regard.
>
> Accordingly, CF will vigorously oppose any application by your client for leave to proceed with a derivative action.

[41] That same day (October 30, 2023), CF Energy filed another contract dispute case in China – this time in the Sanya Suburban People's Court. The claim was dismissed by the Sanya Suburban People's Court on December 7, 2023.

[42] On April 26, 2024, CF Energy issued a media release that included the following:

> The Company wants to update on the status of its efforts to enforce its rights under the terms of the Loan Discharge Agreement … to require the estate of Mr. Lin (the "Estate") to invest an aggregate amount of RMB 36,000,000 in common shares of the Company (the "Investment") at a price of C$0.68 (being the 30 day volume weighted average trading price of the common shares of the Company preceding June 28, 2019).

After describing the various litigation commenced in China, the media release went on to comment that:

> A beneficiary of the Estate (Mingfei He) applied to the court in China for distribution of certain funds from the Estate. The court approved the distribution of funds to Mingfei He and other beneficiaries. The Company is exploring its options, if any, to compel the return the return of all funds distributed to the beneficiaries of the Estate so that the Estate can comply with the Loan Discharge Agreement. If no reasonable options are available to the Company, the Company will cease to pursue enforcement of the Loan Discharge Agreement.

[43] This was the first indication that CF Energy's board of directors was contemplating not pursuing enforcement of the Loan Discharge Agreement.

[44] Leean's British Columbia counsel wrote to CF Energy on May 9, 2024, identifying concerns about the Chinese proceedings and the lack of any update with respect to the Ontario proceedings. CF Energy's Ontario lawyers responded on May 16, 2024, that:

> The Company disclosed in its April 26, 2024 news release that it is exploring available options to compel the return of all funds distributed to the

> beneficiaries of the Estate so that the Estate can comply with the Loan Discharge Agreement. If no reasonable options are available to the Company, the Company will cease to pursue enforcement of the Loan Discharge Agreement.

British Columbia Litigation

[45] On June 6, 2024, Leean commenced the present proceeding, seeking leave pursuant to ss. 232(2) and 233(1) of the *BCA* to prosecute the 2022 Ontario Action on behalf of CF Energy.

[46] The petition is supported by an affidavit of Mr. Gao, a director of Leean, made May 30, 2024. Mr. Gao has attached several of CF Energy's audited financial statements to his affidavit, and under the heading "Loss suffered by CF Energy", says that:

> 27. As a result of the Estate's breach of the LDA, CF Energy has been deprived of access to the funds to which it is entitled flowing from the required subscription (being approximately Chinese RMB 36,000,000).
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> 28. That amount is significant to CF Energy which, since 2019 has increased its long-term debt from RMB 102,000,000 in 2018 to RMB 397,785,000 in 2023.
>
> 29. Share performance and key financial parameters have fallen sinc 2018, specifics of which would include:
>
> (a) CF Energy's share price has dropped 75%;
>
> (b) CF Energy's earnings per share has dropped 99%;
>
> (c) CF Energy's gross profit has dropped 28%;
>
> (d) CF Energy's profit has dropped 108%; and
>
> (e) CF Energy has stopped dividend distribution.

[47] Leean notes that CF Energy's continual accrual of debt – which would have been substantially reduced had it had access to that RMB 36,000,000 – has led to steadily increasing debt servicing costs, with the audited financial statements showing the following financing costs:

a) RMB 5,445,000 in 2019;

b) RMB 6,942,000 in 2020;

c) RMB 10,092,000 in 2021;

d) RMB 17,467,000 in 2022; and

e) RMB 15,912,000 in 2023.

[48] CF Energy filed its Response to Petition on August 8, 2024. As noted, the Response to Petition is supported by an affidavit from Mr. Wong made August 5, 2024. In that affidavit, Mr. Wong deposes that:

> As of the date of this affidavit, the Board of Directors of CF Energy continues to explore the options available to it to compel the performance of the LDA against the Estate in China.

[49] Unfortunately, it took some time to obtain a long hearing date from the court registry. The delays experienced in obtaining a hearing date for a long chambers matter in a civil case are unfortunately not uncommon in British Columbia, and the parties were agreed that each side worked diligently to obtain a hearing date for which counsel on both sides were available.

[50] A hearing date for the petition was initially obtained for October 10, 2025. That hearing did not proceed as there was no judge available. The hearing ultimately took place on December 3, 2025, and judgment was reserved.

The 2022 Ontario Action

[51] The Statement of Claim in the 2022 Ontario Action was issued on February 17, 2022. The plaintiff is CF Energy, while the defendant is “The Estate of Huajun Lin, Deceased”. Although there is only one named defendant, the Statement of Claim is said to be on notice to each of the four beneficiaries of the Estate.

[52] The relief sought in para. 1 of the Statement of Claim is:

a) A declaration that the Estate is obligated to subscribe for common shares, and

b) An order directing the Estate to complete the subscription, or alternatively

c) Damages in the amount of $6,861,587; plus

d) Prejudgment interest, post-judgment interest and costs.

[53] The Statement of Claim pleads the Loan Discharge Agreement, the Notice of Exercise, and the failure of the Estate to comply with the terms of the Loan Discharge Agreement. At para. 12, it pleads that:

> The Loan Discharge Agreement is governed by and is to be construed in accordance with the laws of the Province of Ontario. Further, the Loan Discharge Agreement provides that any suit, action or other proceeding arising out of or based upon the Loan Agreement shall be commenced in the courts of the Province of Ontario. Accordingly, this Statement of Claim will be served on the defendant outside Ontario without leave pursuant to rule 17.02(f) of the *Rules of Civil Procedure*.

Legal Context

Authorization of Derivative Actions

[54] Sections 232 and 233 of the *BCA* provide a process for the authorization of a derivative action to be brought or pursued on behalf of a British Columbia company. Pursuant to s. 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.

[55] A complainant means a shareholder or director of the company: s. 232(1).

[56] Section 233(1) provides the framework for a decision as to whether to grant leave:

> (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if
>
> (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
>
> (b) notice of the application for leave has been given to the company and to any other person the court may order,

> (c) the complainant is acting in good faith, and
>
> (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[57] In this case, the key issues are (a) whether the claim is brought in good faith (s. 233(1)(c)), and (b) whether pursuing the claim is in the best interests of the company (s. 233(1)(d)).

Good Faith

[58] In *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2019 BCSC 1446, aff'd 2020 BCCA 313 [*Eastern Platinum*], Justice N. Smith concluded that a proposed claim in negligence against the directors of the company was in the best interests of the company, but that the applicant had not proved that it was acting in good faith. As a result, leave to pursue the claim was refused. The majority of the Court of Appeal upheld that decision.

[59] The judgment of Justice Griffin, for the majority of the Court of Appeal, contains a detailed summary of applicable legal principles:

> *Good Faith Requirement*
>
> [29] The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at paras. 27–30.
>
> [30] The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), 40 B.C.L.R. (3d) 43 at paras. 117–118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 50 B.C.L.R. (3d) 195 at para. 5 (C.A.) [*Discovery Enterprises* (C.A.)].
>
> [31] The evidence that may be considered by the court in determining the good faith requirement includes the applicant's stated belief in the merits of the proposed action. If this evidence is accepted by the court, it is a *prima facie* indication of good faith, but it is not necessarily determinative: *Jordan Enterprises* at para. 29; *Discovery Enterprises* (S.C.) at para. 117. The court must also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties.
>
> [32] A conclusion that there is an absence of "good faith" simply means that the applicant has not met the onus of showing that the primary purpose

> of the action is to benefit the company. There is no requirement that the respondent show the applicant is acting in bad faith.
>
> [33] A finding of good faith, or of a failure to prove good faith, is a finding of fact in the purview of the trial judge, typically based on inferences drawn from the record, and the appeal court will not interfere absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Discovery Enterprises* (C.A.) at para. 7.

[60] At paras. 51-58, Justice Griffin considered the burden of proof on the question of good faith. Although as she noted the question is at times described as "substantive" and at times described as "substantial", she concluded that the use of these terms does not displace the civil standard of proof of balance of probabilities. Thus:

> [53] In summary, the good faith requirement for leave to commence a derivative action is a separate and substantive requirement for which the onus of proof is on the applicant and requires evidence, and it will not be presumed simply because there is some merit to the proposed action.

[61] Justice Griffin cautioned against conflating the merits of the potential claim with the question of good faith:

> [62] The appellant submits in its factum that, as a matter of law, the applicant's belief in the merits of the action is "an overriding consideration". With respect, that is not an accurate statement of the law. The requirement of good faith requires that the primary purpose of the applicant, in bringing the action, be to benefit the company. That means it is not enough that there is some belief in the merits of the proposed action.
>
> [63] There is good reason for this. It is not particularly difficult to believe there is some merit to a proposed lawsuit, or to show on a preliminary basis that there is some merit. But a derivative action application can be brought only after the company's own management has declined to prosecute the proposed action. The consequences of approving the derivative action application can be significant for the company's operations. The good faith requirement helps protect against a party meddling in a company's management for ulterior motives.
>
> [64] The applicant's stated belief in the merits of the action was evidence of good faith but it was not determinative, nor can it be said to have been an overriding consideration. It was some evidence that the judge should have taken into account. …

[62] In the chambers judgment, Justice Smith had noted the lead role played by the CEO of the applicant in a proxy battle and subsequent litigation with respect to Eastern Platinum, concluding that:

> [57] In short, the CEO of the corporate petitioner, who 2538520 puts forward to give evidence on its behalf, clearly has or has had personal interests separate from whatever concern he may have for the best interests of EPL. He was involved in a failed bid to take over the company. He subsequently was rebuffed or ignored when he sought to enter into a transaction with the company. His efforts were rejected in favour of the very transaction that 2538520 now complains of.
>
> [58] Those facts clearly suggest that Mr. Hong's personal interests, as opposed to the interests of EPL, are a significant motive for this proposed action. The most likely inference to be drawn from the evidence before me is that the proposed action is an attempt to continue Mr. Hong's unsuccessful takeover bid by other means or to obtain retribution for that bid's failure.

[63] In the Court of Appeal, Justice Griffin's conclusion with respect to good faith is as follows:

> [83] The appellant complains now that there was not sufficient evidence for the judge to conclude that 253 was acting in bad faith in seeking leave to commence a derivative action against the Proposed Defendant Directors. However, that is not what the judge found. What the judge found was that 253 had failed to satisfy the onus of proving good faith. As mentioned, good faith in this context means that the primary purpose for the proposed lawsuit is to benefit EPL.
>
> [84] The judge's finding that Mr. Hong was personally motivated (as opposed to being primarily motivated to benefit the company) was a reasonable inference to draw on the evidence.

Best Interests

[64] The governing principles with respect to the best interests requirement were described by Justice Griffin in the appellate decision in *Eastern Platinum*:

> *Best Interests Requirement*
>
> [34] The question of whether it appears to the court to be in the best interests of the company to prosecute the action includes consideration of the merits of the proposed action.
>
> [35] In this regard, many of the authorities have adopted the language of Tysoe J. (as he then was) in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R (3d) 300 [*Primex* (S.C.)], var'd (1996), 26 B.C.L.R.(3d) 357, leave to appeal ref'd [1997] S.C.C.A. No. 4. He held that the court should consider whether "the proposed action has a reasonable

> prospect of success or is bound to fail" and whether the defence is "bound to be accepted": at para. 49; see *Discovery Enterprises* (C.A.) at para. 11. This Court in *Discovery Enterprises* (C.A.) approved the description of this requirement as requiring the applicant to show "an arguable case" (para. 10).
>
> [36] The onus is on the applicant, not the respondent. The applicant has to not only plead a proper cause of action, but also have some evidence to support the case that its proposed claim has a reasonable prospect of success. This is why the authorities typically review the evidence of the merits of the proposed claim in considerable detail: see for example *Discovery Enterprises* (S.C.); *Primex* (S.C.); *Arkansas Teacher Retirement System v. Lions Gate Entertainment Corp.*, 2016 BCSC 432 [*Lions Gate*].
>
> [37] What the authorities illustrate is that the approach to considering the merits of the proposed action lies somewhere on a spectrum. The court should do more than skim the surface of the pleadings and should consider the evidence but ought not to dive so deeply into the merits as to try the case.
>
> [38] Other factors must also be brought to bear on whether the proposed action appears to be in the best interests of the company, namely whether the potential relief sought in the action makes it worthwhile to the company to undertake the costs and inconvenience of pursuing it: *Primex* (S.C.) at para. 49; *Lions Gate* at paras. 163–165; *Jahnke v. Johnson*, 2018 SKCA 59 at para. 68.

[65] To similar effect is the explanation of the phrase "best interests" in *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559:

> [38] "Best interests" can only be interpreted as speaking to a more rigid consideration of what is good for the corporation than what would be required under "interest". "Best interests" can be defined as the maximization of the value of a corporation. It is best for a corporation to be profitable, well-capitalized, and with strong prospects. The deterioration of a corporation's financial stability should be avoided. See *Carr v. Cheng* at para. 25.

[66] One of the cases referenced by Justice Griffin with respect to the question of "best interests" is *Jahnke v. Johnson*, 2018 SKCA 59, a case involving a real estate project that encountered financial problems. Chief Justice Richards noted at paras. 65-66 comments of Justice Baynton in *International Capital Corp. v. Schafer*, 1996 CanLII 6845, [1996] S.J. No. 770 (Q.B.), that:

> [25] … The rule is in effect a presumption that if the directors of the corporation make an informed decision that the disadvantages outweigh the advantages of commencing the action, then this is what is in the best interests of the corporation. The decision to commence or not to commence an action is like any other business decision that is ordinarily a matter of internal management to be left to the discretion of the directors absent instruction from the shareholders. Courts seldom interfere with such *intra*

> *vires* discretion unless the directors are guilty of misconduct equivalent to breach of trust, or unless they stand in a dual relation which prevents an unprejudiced exercise of judgment. If there is misconduct or a dual relation then the presumption that the decision of the directors is in the best interests of the corporation will not apply.

[67] Chief Justice Richards went on to comment that:

> [67] Justice Baynton's overall approach to s. 232(2)(c) was endorsed by this Court when it dismissed the appeal from his decision by briefly saying "[w]e are not persuaded that the learned chambers judge's order was based on any misunderstanding of the law". See: *Schafer v International Capital Corp.*, 1997 CanLII 9750, [1997] 8 WWR 412 (Sask CA). Since that time, the Court of Queen's Bench has regularly turned to *Schafer* in determining whether to authorize derivative actions.
>
> [68] That noted, I should clarify that the "interests of the corporation" inquiry is not tightly restricted to nothing more than an assessment of the apparent strength of the proposed action. This is because, as recognized in the Dickerson Report itself, there are circumstances when it would clearly not be advisable for a corporation to pursue a claim even where success seems almost certain. I have in mind here, for example, situations such as those where an action will cost far more to prosecute than it can possibly yield in damages, where pursuing a claim will harm important and ongoing business relationships, or where going to court will generate problematic publicity for the corporation. In all of these sorts of situations, the narrow question of whether a claim is arguable will not properly answer the question of whether that claim is in the interests of the corporation. This is not a new idea. Cases where a court has been prepared to consider more than just the chances of success for a proposed action include *Schadegg v Alaska Apollo Resources Inc.*, 1994 CarswellBC 2132 (BC Sup Ct), *Melnyk v Acerus Pharmaceuticals Corporation*, 2017 ONSC 1285, *Maxwell v Schuman*, 2005 BCSC 1430, *Discovery Enterprises Inc. v Ebco Industries Ltd.* (1997), 40 BCLR (3d) 43 (Sup Ct), and *Primex Investments*. Thus, while the strength of the proposed action is the central consideration in any s. 232(2)(c) inquiry, it is not the only consideration or, necessarily, the deciding consideration.

[68] The chambers judgment of Justice N. Smith in *Eastern Platinum* includes a helpful discussion of the business judgment rule in the context of a proposed derivative claim:

> [35] EPL relies on the "business judgment rule", which accords deference to a business decision by directors of a corporation as long as it lies within a range of reasonable alternatives: *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69 at para. 40. In *Lions Gate*, Justice Maisonville referred to the earlier Supreme Court of Canada decision in *Kerr v. Danier Leather*, 2007 SCC 44:
>
> > [226] The Supreme Court of Canada summarized the business judgment rule in *Kerr v. Danier Leather Inc*., 2007 SCC 44:

> [54] … The Business Judgment Rule is a concept well-developed in the context of business decisions but should not be used to qualify or undermine the duty of disclosure. The Business Judgment Rule was well stated by Weiler J.A. in *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.):
>
> > The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision … [Emphasis in original deleted; p. 192.]

[36] In *Lions Gate*, as in this case, the board appointed a special committee to consider whether to proceed with litigation. Justice Maisonville decided that the committee's decision should be given deference under the business judgment rule:

> [233] However, I find that the decision of the Special Committee not to proceed with the litigation proposed by [the petitioner] is to be accorded due deference under the business judgment rule. It is clear that the Special Committee was in the best position to assess the impact of the proposed litigation on the Company and determine whether to proceed was in its best interests. … I find that the considerations of the Special Committee, which included the reputation of [the respondent], the cost of the litigation, the effect of litigation on its ability to attract high quality directors, [the respondent's] current financial success and the negative effect of distracting the upper management from running the company were, all reasonable considerations.

[37] In *Lions Gate*, the proposed derivative action was based on Lions Gate having agreed to pay a civil monetary penalty in the U.S. for filing misleading documents with the Securities and Exchange Commission. These facts were clearly before the Court on the leave application. The Court was therefore in a position to weigh those facts against the considerations relied on by the special committee in order to assess the reasonableness of the special committee's decision.

[38] That is not the situation on this application. Mr. Dentoom says the special committee considered a variety of documents, including board minutes, presentations and reports, as well as "various internal notes, analyses, correspondence, studies, drafts, models, and other materials."

[39] The problem with that evidence is that none of the documents referred to are exhibited in Mr. Dentoom's affidavit. Similarly, no detail or further documentation is provided about the discussions or the assessment referred to …

[40] The effect of the business judgment rule is that if, after consideration of relevant and reasonably available information and advice, the directors made a reasonable business decision, a claim against them cannot succeed even if others might have come to a different conclusion or their decision

> turns out to be wrong. But it does not prevent the Court from finding directors negligent if they failed to use reasonable care in obtaining necessary information, or failed to consider facts that they knew or should have known, or ignored important information that was in their possession.
>
> [41] There is no specific evidence of the information or documents the directors or the special committee considered beyond Mr. Dentoom's very general description. That material may well support the special committee's assessment, or it may contain evidence that 2538520 can point to as showing the negligence and lack of due diligence that it alleges. In the absence of that material, or at least some of it, the Court is in no position to assess the reasonableness of the special committee's decision.

General Discretion

[69] In *Eastern Platinum*, Justice Griffin noted the importance of not losing sight of the discretionary nature of the leave process for a derivative claim:

> *Discretion*
>
> [39] Even where the conditions in s. 233(1) are met, the court retains discretion as to whether to grant leave: *Discovery Enterprises* (C.A.). Section 233(1) provides that the court "may"—not must—grant leave if the requirements are met.
>
> [40] Not much has been said about the remaining exercise of discretion to grant or not grant leave. A common approach to the exercise of discretion in analogous circumstances is to consider the required factors as a whole, rather than separately. This is a sensible approach in derivative action applications as well.
>
> [41] It is conceivable that there may be cases where the requirements are met but so thinly established that in the end the court will exercise its discretion to not grant leave. More likely, however, if an application fails it will fail on one of the requirements of the test.

Security for Costs

[70] Section 233(2) of the *BCA* provides that:

> (2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

[71] This provision, as worded, does not expressly grant authority to require security for costs; it simply says that granting leave pursuant to s. 233(1) does not prevent a court from ordering that a party provide security for costs. Section 233(3) provides the court with the jurisdiction to give "directions for the conduct of the legal proceedings", or to order the company in whose name the proceedings are

advanced to fund legal costs on an interim basis. Section 233(4) provides for allocation of costs after "final disposition of the legal proceeding". Neither of these provisions expressly authorizes an interim order at the time a proceeding is authorized that would require the party taking conduct of the proceeding to provide security for costs itself.

[72] Rather, it appears that the courts have instead applied the general principles developed in respect of s. 236 of the *BCA* to order security for costs on an interim basis where appropriate. One of the leading cases on s. 236 is *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.*, 1997 CanLII 4037, 29 B.C.L.R. (3d) 252 (C.A.), and its principles were applied in the context of leave granted pursuant to s. 233 in *Hougen Co. Ltd. v. Su*, 2023 BCSC 1743, aff'd 2025 BCCA 164:

> [159] In any event, Hougen also asserts that the proposed defendants have not met the usual test for security for costs. In that respect, in applying s. 233(2) of the *BCA*, I see no need to develop any different test beyond what has been regularly applied by this Court in the past.
>
> [160] A recent discussion of the principles applied by the Court in assessing whether the Court will exercise its discretion to order security for costs is found in *1600 Davie Limited Partnership v. ITC Constructions Management BC Inc.*, 2023 BCSC 889 where Justice Macintosh stated:
>
> > [10] The Court has broad discretion in deciding whether to order security. That point, and other applicable legal criteria, were set out by our Court of Appeal in *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252, at para. 17, as follows:
> >
> > 1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
> > 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
> > 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
> > 4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;

5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
7. The lateness of the application for security is a circumstance which can properly be taken into account.

[11] Justice Romilly distilled the factors, from *Kropp* and other cases, at para. 14 in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.):

> 14 Based then, on the decision in *Kropp*, *supra* as well as the decision of Spencer J. in *Ruko*, [(1991), 49 C.P.C. (2d) 105 (B.C.S.C.).], the test to be applied on an application for security for costs is as follows:
>
> 1. Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails?
> 2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
> 3. Is the court satisfied that the defendants have an arguable defence to present?
> 4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

Extension of Time to serve an Ontario Statement of Claim

[73] As I have noted, it was common ground between the parties that the applicable limitation period in Ontario is two years from the date of discovery of the claim. It was also common ground that the 2022 Ontario Action was commenced within the applicable limitation period, but that by the time Leean commenced this proceeding seeking derivative leave, the limitation period had expired. Thus, it is necessary to consider the likelihood that an Ontario court would grant leave to extend the time for service of the Statement of Claim in the 2022 Ontario Action. While this is a matter of Ontario law, I accept that it is something that needs to be considered in the context of whether to grant derivative leave in this proceeding in British Columbia.

[74] Subrule 14.08 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that:

> Where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued.

[75] Subrule 3.02(1) of those *Rules* provides that:

> (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.
>
> (2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

[76] Leean notes the summary of principles applied by the Ontario courts in determining whether to extend the time for service, recently summarized in *Tookenay v. O'Mahony Estate*, 2024 ONSC 709 at para. 32:

> The factors to be considered in determining whether an extension of time to serve a statement of claim should be granted have been expressed in similar ways in different cases, including:
>
> a. the length of the delay,
> b. the evidence filed that explains the delay,
> c. whether the evidence regarding the explained delay is sufficient,
> d. whether or not the plaintiff moved promptly for an extension of time after the period expired,
> e. whether or not the delay in serving the claim resulted from the direction, participation, or involvement of the plaintiff personally in the service of the claim,
> f. the extent to which the defendant, themselves, bears some or all of the responsibility for this delay,
> g. whether or not it was reasonable for a defendant to infer from all the circumstances that the plaintiff had abandoned his claim,
> h. whether the applicable limitation period for the action has already expired,
> i. whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against the defendant, and
> j. whether the defendant would suffer prejudice if the motion is granted

[77] CF Energy, on the other hand, relies on *Pagliuso v. Primerica Financial Services Ltd.*, 2019 ONSC 460. In that case, the plaintiff commenced a wrongful

dismissal action against his former employer in March 2015, but did not serve it at the time. More than three years later, he brought an application to extend the time for service. His explanation was:

> [4] In his affidavit, the plaintiff deposes that he did not have funds to immediately proceed with the litigation, and states "As such, I instructed my previous counsel not to serve any of the defendants until I had funds to proceed with this action." He further deposes that he was fearful that Primerica would put him to significant costs and legal fees by bringing various motions and taking various legal steps once the Statement of Claim was served on the defendants. At that time, he was not prepared to bear that expense. Thus, he intended to get out of his debts and accumulate funds and then proceed to serve the defendants with the Statement of Claim.
>
> [5] The plaintiff deposes in or about May 2015, he was sued for negligence in his capacity as an agent of Primerica, and he was forced to fund that litigation on his own because Primerica refused to extend coverage under its Errors and Omissions policy.
>
> [6] After the settlement of that action, the plaintiff deposes that he was able to recuperate financially, and is now prepared to proceed with the litigation and serve the Statement of Claim. He has moved to discontinue as against the individual defendants, and has now instructed his counsel to bring a motion to extend time for service of the Statement of Claim.

[78] Justice Gray noted the principles that were summarized in *Tookenay*, but went on to say:

> [18] It seems to me that the principles to be applied in a case such as this are similar to those applied on a motion to dismiss an action for delay. LeMay J. appears to have accepted as much in *Kuner v. Nguyen*, 2015 ONSC 730, at para. 33. He quoted with approval what was said by Borins J.A. in *Armstrong v. McCall* (2006), 213 O.A.C. 229 (C.A.) at para. 11:
>
> > 11. The test for dismissal of an action for delay is not in dispute. In my view, it is correctly stated at paragraph 4 of the reasons of the Divisional Court in an appeal from the master in *Woodheath Developments Ltd. v. Goldman* (2003), 66 O.R. (3d) 731 at 732:
> >
> > > Specifically, I accept as correct the principles applicable to motions to dismiss for delay derived by the learned Master from the case law and accurately summarized in the headnote at (2001), 56 O.R. (3d) 658 as follows:
> > >
> > > > The principle to be applied on a motion to dismiss for delay is that the action should not be dismissed unless: (1) the default is intentional and contumelious; or (2) the plaintiff of his or her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible. It is presumed that memories fade over time, and an inordinate delay after the cause of action arose or after the passage of limitation

> period gives rise to a presumption of prejudice. Where there is a presumption of prejudice, the defendant need not lead actual evidence of prejudice and the action will be dismissed for delay unless the plaintiff rebuts the presumption. The presumption of prejudice may be rebutted by evidence that all documentary evidence has been preserved and the issues in the lawsuit do not depend on the recollection of witnesses or that all necessary witnesses are available with detailed recollection of the events. If the presumption is rebutted then the action may still be dismissed if the defendant leads convincing evidence of actual prejudice. [Emphasis added]

[19] It seems clear that where default is "intentional and contumelious", the issue of prejudice is not relevant on a motion to dismiss under Rule 24. Clearly, if the plaintiff has made a conscious decision to delay, he or she has elected to take a calculated risk. In such a case, there is little need to balance any equities since the plaintiff has made a decision and must live with the consequences.

[20] I agree with counsel for Primerica that the cases relied on by the plaintiff are cases in which the delay cannot be laid at the feet of the plaintiff personally, but rather flow from inaction by the plaintiff's counsel or for other reasons that do not rise directly from action or inaction on the part of the plaintiff personally. Those cases include *Chiarelli v. Weins* (2000), 46 O.R. (3d) 780 (C.A.); *Desjardins v. Mooney*, [2001] O.J. No. 697 (S.C.J.); *Heaps Estate v. Jesson*, [2007] O.J. No. 1478 (S.C.J.); *Kuner v. Nguyen, supra*; and *Lico v. Griffiths* (1996), 28 O.R. (3d) 688 (Gen. Div.).

[21] In this case, it is clear that the plaintiff made a deliberate decision to not serve the Statement of Claim. Accordingly, pursuant to the test set out in *Armstrong v. McCall, supra*, the default must be considered to be "intentional and contumelious". That being the case, pursuant to the test applied there, the issue of prejudice would not be relevant. That was certainly the view of Quinn J. in *Elltoft v. Mann*, [2001] O.J. No.1521 (S.C.J.), at para. 21, where he stated:

> However, must prejudice always exist before rule 24 can be said to apply? Almost always; but not always. A lawsuit requires a demonstrable commitment on the part of a plaintiff to have the case tried. Granted, some actions do not progress at a fast or even a steady speed. Many move glacially. Others are marked by spurts of activity, incited, perhaps, by urging from the plaintiff, interjections of money or the lawyer's doleful acceptance that he or she cannot indefinitely continue to move the file from one flat surface to another. Generally, delay has either of two fathers: the client or the lawyer. Delay by the lawyer is frequently forgiven so as to not to punish the client. Delay by the client requires closer scrutiny.

[22] At para. 22, he stated:

> Here, the plaintiff, effectively, has abdicated his role as plaintiff. He has chosen to sojourn rather than litigate. This cannot be countenanced by the court and I believe rule 24 is wide enough to encompass the situation.

> Consequently, for this reason, as well, the action must be dismissed. The conduct of the plaintiff is offensive to the administration of justice.
>
> [23] In other cases under Rule 24, the court has required the plaintiff to provide an explanation that any delay was not intentional: *Berg v. Robbins* (2009) 206 O.A.C. 200 (Div. Ct.); *Nugent v. Crook* (1969), 40 O.R. (2d) 110 (C.A.); and *Purkis v. 736007 Ontario Ltd.* (2001), 143 O.A.C. 344 (Div. Ct.).
>
> [24] I am prepared to dismiss this motion on the sole ground that the delay in serving the Statement of Claim was as a result of a personal decision made by the plaintiff, and was not the fault of his counsel or some other cause. In effect, the plaintiff took a risk that he would be successful on a motion of this sort. I do not think it is appropriate to allow the plaintiff to play fast and loose with the rules in this way.

[79] In *Gupta v. Chacko*, 2020 ONSC 1457, the plaintiff had commenced a medical negligence claim in January 2016 in respect of a surgery just under two years previously. In February 2016, she instructed her lawyer to stop working on the case. She made no contact with the lawyer for over 20 months, then instructed her lawyer to start working on the case again. After another lengthy delay, she applied for leave to extend the time to serve the statement of claim. Master McAfee refused the order, quoting the same excerpts from *Pagliuso* and concluding at para. 14 that "the plaintiff's deliberate decision not to proceed with the action is determinative".

Positions of the Parties

Leean

[80] Leean says as the holder of over 9% of the common shares of CF Energy, it meets the standing requirement.

[81] Leean also says that it has made reasonable efforts to cause the directors of CF Energy to pursue the claim. It points to the extensive correspondence from April 2023 to May 2024, in which it communicated specific concerns and made specific requests that the Ontario claims be pursued. Leean says that it was clear that it would seek derivative leave if it did not receive satisfactory responses. It notes that it was not until late April 2024, that CF Energy gave an indication that it might decide not to pursue the claim, and that within weeks of CF Energy's media release to that effect, Leean had brought the present proceeding.

[82] With respect to the question of best interests, Leean notes that this case is somewhat unusual, in that the action in question has already been commenced by CF Energy. As well, the evidentiary record on this hearing includes not only the Loan Discharge Agreement itself but also evidence of demands made for performance and of the failure of the Estate to comply with the Loan Discharge Agreement. Thus, there is no real dispute here that the cause of action in issue is a viable one. It is also a substantial claim. The key issues here are whether the claim should be pursued in the place that the parties to the claim agreed would have exclusive jurisdiction, and whether it is simply too late now to pursue the claim.

[83] With respect to CF Energy's reliance on its "business judgment", Leean says that upon close examination, Mr. Wong's affidavit is unhelpful in much the same way as the evidence criticized by Justice Smith in *Eastern Platinum*. It is simply a list of topics that the board of directors is said to have considered. It references legal advice, without indicating whether legal advice was followed. As well, it provides no certainty as to timing. On a close reading, one might conclude that the factors that were listed were before the board at some time prior to June 2021. The evidence as to CF Energy's subsequent litigation steps does not say that the board reconsidered its approach after the Chinese courts repeatedly refused to take jurisdiction. The statements in Mr. Wong's affidavit as to why the two Ontario statements of claim were not served do not expressly state that the question came back before the board of directors, and could very well be read as a situation in which senior management simply referred back to the decision of the board of directors in or before June 2021 to commence litigation in China.

[84] Leean says that this vague and uncertain evidence needs to be read in light of the existence of strong choice of forum language in the parties' agreement, which would have rendered a decision to litigate in China questionable to begin with, much less after each decision of a Chinese court. Leean suggests that to simply allow the 2022 Ontario Action to lapse in such circumstances makes no sense, and the lack of any firm evidence of CF Energy's board exercising business judgment after the

decision made prior to the June 2021 commencement of litigation in China should be read in that light.

[85] Leean says that the real issue here is whether, as a result of CF Energy's decision not to pursue the Ontario proceedings, there is no longer any prospect of success because (a) the Statement of Claim filed in 2022 expired without being service, and (b) a limitation defence will prevent new proceedings being commenced to pursue the claim.

[86] Leean acknowledges that, before moving forward with the 2022 Ontario Action, it will be required to obtain an extension of time pursuant to Ontario Rule 3.02(1). Leean says that in all of the circumstances, and without suggesting that there is any certainty as to result, it is reasonable to believe that the Ontario court could permit an extension of time to serve the Statement of Claim. With respect to the various factors summarized in *Tookenay*, Leean says that:

a) So far as it is aware, there is not yet any appointed executor of the Estate, and therefore no formal representative on whom the 2022 Statement of Claim was properly served directly;

b) Each of the Estate beneficiaries has been aware of the Loan Discharge Agreement claims, and dating back to 2019 at least three of the four have at minimum "acknowledged" the rights of CF Energy under the agreement;

c) Several of the Estate beneficiaries had asked that the estate-related litigation proceed in China ahead of any pursuit of the Loan Discharge Agreement;

d) Proceedings were initially pursued in China, ultimately being dismissed on jurisdictional grounds; and

e) A petition was ultimately filed for derivative leave, and time was required to obtain a hearing date and have the proceeding decided.

[87] Leean does not accept that there is a hard and fast rule that any time a plaintiff bears some responsibility for delay, leave to extend time will not be granted. It notes that the circumstances in each of *Pagliuso* and *Gupta* are very different from the present case. Neither case involved corporations where minority shareholders have been required to act to compel a company to proceed with litigation against a majority shareholder.

[88] With respect to whether the relief sought justifies the cost and inconvenience, Leean says that the amount of the investment required by the Loan Discharge Agreement is significant in the context of CF Energy's financial health, and could allow the company, for example, to pay off a significant part of the debt that it has accrued recently. As well, Leean says that some portion of CF Energy's loss from being deprived of the use of the funds may also be recoverable. In that regard, Leean notes that the total cost of borrowing since 2019 totals over RMB 55,000,000 – more than the principal amount owing pursuant to the Loan Discharge Agreement.

[89] Finally, Leean notes that the primary objection to the derivative claim – that it is doomed to fail because it will be difficult to revive – is something that is amenable to an early determination without a full trial. If CF Energy is correct that the time for service cannot be extended, then that should be conclusively determined without the need for significant expenditure or inconvenience.

[90] With respect to the time taken to commence the present proceedings, Leean notes that its first inquiries were made in April 2023. From that point to April 2024, there were exchanges back and forth, but those exchanges were characterized by (a) a lack of any detailed information and an ignoring of the specific inquiries made, and (b) an assertion that CF Energy had matters in hand and was actively pursuing the claim. Leean says that it was not until the April 2024 media release that it became apparent that CF Energy's choice to litigate in China had failed and that CF Energy was considering giving up its claim. Leean notes that the petition seeking derivative leave was commenced a few weeks thereafter. Leean said that it had no way of knowing what was going on in China, that its repeated requests for

information were met with little in the way of substantive responses, and that it acted quickly once it was apparent that the present petition was appropriate.

[91] With respect to good faith, Leean notes:

a) Mr. Gao's evidence that he believes in the merits of the claim, as set out in the pleadings filed in Ontario – evidence as to which there has been no request for cross-examination;

b) If the claim is successful, it will benefit CF Energy directly as a result of a decrease in the overall debt burden, with indirect benefits to all shareholders in proportion to their shareholdings;

c) It did not commence this proceeding until (a) it was clear that the 2022 Ontario Action was the only possible avenue to enforce the Loan Discharge Agreement, and (b) CF Energy failed to pursue the claim even after having the issue drawn to its attention; and

d) It is willing to bear the costs of pursuing the Ontario action on an interim basis.

[92] In response to CF Energy's allegation of ulterior motives, Leean says that what CF Energy has put forward is entirely speculative. It says that the "connection" that CF Energy asserts is not established on the evidence, and in any event, there is no coherent explanation as to how such a connection would give rise to any ulterior motive. Leean says that the cases do not support the proposition that if a responding party comes up with any sort of suggestion of a connection, no matter how tortured or tenuous, then there is an obligation to respond.

[93] Leean says that, fundamentally, good faith is synonymous with the applicant's purpose being the recovery of relief, while the absence of good faith is synonymous with the applicant being subject to an alternative motive. Leean says that there is nothing put forward by CF Energy to suggest that Leean is motivated by anything

other than securing recovery for CF Energy and thus maximizing the value of the company to all of its shareholders.

[94] Leean suggests that the facts of this case are very different from those in *Eastern Platinum*, in which the CEO of the company seeking derivative leave had been directly involved in a proxy battle and ongoing litigation with the subject company.

[95] While recognizing that the court retains an overall discretion whether to grant leave, Leean says that there is no reason to depart from the usual rule in this case, and that if it has satisfied the good faith and best interests tests, then derivative leave should be granted.

[96] With respect to security for costs, Leean recognizes that s. 233(2) confirms a discretion in the court to order that a complainant post security for costs as a condition of leave. Leean notes that it is willing to finance the costs of pursuing the Ontario litigation. It says that it would not have advanced the present proceeding to this point if it did not have the capacity to fund the cost of counsel for the 2022 Ontario Action. It says that there is no evidence suggesting that it would be unable to pay an award of costs. It says that it is an Ontario company, dealing with Ontario litigation, and the fact that the search conducted by British Columbia counsel shows no real property in British Columbia is not a basis to conclude that it would not be able to pay an award of costs.

CF Energy

[97] With respect to the best interests issue:

a) CF Energy says that it is not in the best interests of CF Energy to pursue the 2022 Ontario Action because it is bound to fail, and thus the cost of pursuing the litigation is not justified. The Statement of Claim was filed in February 2022 and was not served within the six months permitted (or at all). While a court in Ontario has the discretion to extend the six-month deadline, CF Energy says that in this case, there was a deliberate

decision by CF Energy's board not to take any steps to serve the Statement of Claim. CF Energy says that where a party has made a deliberate decision not to serve a claim, the Ontario courts have been clear that time will not be extended.

b) CF Energy says that it made a deliberate and strategic decision not to advance the 2022 Ontario Action, and that under well-established Ontario law that is the end of it. CF Energy describes this issue as a "brick wall" and not a "hurdle" to be overcome. While Leean may disagree with the decision made by CF Energy, they cannot take issue with the fact that the decision was made and that is the end of matters.

c) CF Energy further submits that even if litigation was successful in Ontario, any judgment would still have to be enforced in China, and the petitioner has not explained how that would be done.

d) CF Energy says that in deciding to proceed in China, its board of directors considered a variety of issues including the potential enforceability of a judgment, and made a decision to prefer litigation in China. It says that the decision falls within a reasonable range of options, and that the business judgment rule applies such that the decision should not be second-guessed.

e) CF Energy says that the six-month deadline for service is not the only issue that would need to be addressed. CF Energy says that given that issue as well as concerns about enforceability, it was reasonable for the board of directors to have concluded that it is not worth pursuing the claim any further. The onus is on Leean to establish that the claim is worth pursuing, and Leean has not met that onus.

[98] CF Energy says that even if there may at one time have been a chance of having time extended, the delay in seeking derivative leave has only increased the degree to which the claim is bound to fail. Counsel for CF Energy specified that the

delay he referenced was the delay from April 2023, when Leean first brought forward its concerns, and June 2024, when the petition was filed. CF Energy acknowledges that the delay in obtaining a hearing date cannot be laid at the feet of Leean.

[99] In response to comments made about the fact that beneficiaries of the Estate at all material times constituted two of its five directors, CF Energy says that the petition does not directly raise or rely upon any allegations of parties acting in a conflict of interest. As a result, counsel for CF Energy did not canvass with the company what if any steps were taken to address any potential conflicts, and has not put forward any evidence that might be relevant to that question. In any event, CF Energy notes that the two board members who are Estate beneficiaries are the ones who have consented to the Estate honouring the Loan Discharge Agreement. As a result, they are "aligned in a view" as to what should happen.

[100] With respect to the issue of good faith, CF Energy alleges that Leean has an ulterior motive. In support of that, it puts forward the following evidence:

a) CF Energy tendered in evidence a dissident shareholder's information circular from October 2020, which reflected an attempt by a numbered company (11882716 Canada Inc.), which held approximately 3% of the common shares of CF Energy, to seek election of its slate of nominees at the 2020 Annual General Meeting of CF Energy.

b) Among the slate of nominees listed in the information circular are two Estate beneficiaries: Zhipei Lin and Mingfei He.

c) In October 2020, CF Energy issued a press release alleging that 11882716 Canada Inc. was a "front" for Zhipei Lin and Mingfei He.

d) At the 2020 Annual General Meeting, none of the dissident shareholder's nominees were elected to the board.

e) A company search for 11882716 Canada Inc. shows a sole director for the company, a Wenjie Due, with an address on McGill Street in Toronto, Ontario.

f) CF Energy has also obtained a company search for a different numbered company of which Wenjie Du is one of two directors. That company search, which appears to reflect information from 2019, shows an address for Wenjie Du of 8 Suncrest Drive, Toronto, Ontario, M3C 2L2.

g) In his affidavit in this matter, Mr. Gao deposes that Leean is

> … a company incorporated pursuant to the laws of Ontario with a registered office at 8 Suncrest Drive, North York, Ontario.

h) Mr. Gao attached a company search to his affidavit. The company search shows the registered office of Leean as “170 The Donway W, 204, North York, Ontario”.

[101] Counsel for CF Energy says that this evidence is not “clear as day”, and perhaps something of a “breadcrumb trail”, but that there is “something suspicious”. He says that it is suggestive of some connection to one of the Estate beneficiaries.

[102] CF Energy goes on to assert that it had raised this connection in its petition response, and that it had anticipated that some explanation would be provided for this “troubling connection”, but that Leean did not respond to it at all. Leean did not explain the similar address, nor did it disclaim any knowledge of Wenjie Du. CF Energy says that the lack of any response to the “red flag” that has been raised should be seen as deliberate, and that it provides a sufficient basis for the Court to draw an inference of an ulterior motive.

[103] CF Energy notes that the law is clear that there is no presumption of good faith, and that Mr. Gao’s stated belief in the merits of the claim is not sufficient. There is no onus on the respondent to show bad faith. CF Energy says that it has demonstrated what on its face is a connection between Leean and others with past

disputes with CF Energy, and that the failure of Leean to respond to that evidence leaves open an inference with respect to a lack of good faith.

[104] Finally, CF Energy says that if Leean is authorized to take conduct of the 2022 Ontario Action, it should post security for costs of $100,000. With respect thereto, CF Energy says that:

a) Because it will remain as the named party in the Ontario action, any costs award that the Estate might be given would be enforceable against CF Energy and not Leean.

b) While that costs order would presumably be made in Ontario, CF Energy's remedy to recover the costs from Leean would be by way of an application in British Columbia pursuant to s. 233(4) of the *BCA*. Thus, it is British Columbia assets that are relevant for this purpose.

c) CF Energy has provided searches showing that Leean has no real property in British Columbia.

d) Leean has not responded to the *prima facie* evidence of lack of exigible assets in British Columbia.

Analysis

[105] It was not in dispute that the first two criteria set out in s. 233(1) have been met. Prior to commencing this proceeding, Leean made reasonable efforts to cause the directors of CF Energy to pursue the 2022 Ontario Action. As well, notice of this proceeding has been properly given.

Good Faith

[106] As noted above, Mr. Gao has deposed that he believes in the merits of the claim set out in the 2022 Ontario Action. He has supported that belief with his description of the impact on CF Energy of not having access to the capital that was to be invested pursuant to the Loan Discharge Agreement. He has further deposed that:

> Leean has no personal disputes with the Estate, nor does it have any ulterior motives for bringing this proceeding. It is doing so in good faith and in what it believes to be the best interests of CF Energy to recover on the LDA as soon as possible.

[107] It is clear from the authorities that such statements can constitute *prima facie* evidence of good faith. They are necessary to meet the positive onus on the complainant to establish good faith based on evidence. However, the court is not required to accept that evidence and may consider any contradictory evidence brought forward as well as the overall context before determining whether the complainant has met the onus on them.

[108] Leean points to the lack of any request to cross-examine Mr. Gao to challenge his evidence. CF Energy, on the other hand, has placed in evidence certain company searches that appear to reference a common address in North York/Toronto. CF Energy acknowledges that the connection is not a strong one, but in submissions suggests that Leean's failure to tender evidence responding to the common address issue should lead to an inference that Leean has something to hide. Leean, in response, says that there is no obligation on it to respond to something that has no probative value.

[109] While it is clear that the onus with respect to good faith falls on the complainant, it is my view that in circumstances like the present, I need to consider whether the evidence tendered by CF Energy is sufficiently probative to give rise to an obligation on Leean to respond. Ultimately, it is my view that it is not and that I should not consider Leean's failure to respond to give rise to an inference that would undercut the *prima facie* evidence of good faith.

[110] With respect to the company searches for the two numbered companies involving Wenjie Du, and the common references to 8 Suncrest Drive, it is my conclusion that the connection is so tenuous that it does not give rise to any material concerns about the good faith of Leean. There is no evidence as to the location (8 Suncrest Drive), including whether it is a residence, or for example whether it is a location from which a lawyer or account operates. As well, the company searches

reflect information from 2019 or earlier, while Mr. Gao's affidavit is from 2024 – a difference of five years.

[111] Importantly, good faith is connected to the question of whether the complainant is acting pursuant to an ulterior motive. CF Energy argues that the evidence could suggest some sort of connection between Zhipei Lin and Mingfei He and Leean. But Zhipei Lin and Mingfei He are Estate beneficiaries who have no interest whatsoever in reviving a claim that would be advanced against the Estate. There is no logical ulterior motive that would flow from such a connection.

[112] In any event, in my view the evidence is so tenuous and speculative that it does not form a foundation for any inference of an ulterior motive. Further, it is so tenuous and speculative that in my view Leean is correct to argue that it did not give rise to any obligation to respond.

[113] The evidence relied on by CF Energy is entirely different from that in issue in *Eastern Platinum*. In *Eastern Platinum*, there was evidence of actual disputes between the principal of the complainant and the subject company. There is no such evidence in the present case.

[114] Good faith and best interests are separate statutory criteria, and as demonstrated in *Eastern Platinum*, it is possible that a court may find that good faith is not established, even though the claim in question is one that it would have been in a company's best interests to pursue. However, as discussed in the next section of this judgment, I am of the view that it is in the company's best interests to pursue this claim. In my view, the manner in which Leean went about making inquiries from April 2023 to May 2024, seeking to encourage CF Energy to pursue the claim in Ontario and seeking information about the status of the various proceedings, supports an inference of good faith. Having viewed the correspondence as a whole, I conclude that the limited and cautious responses of counsel for CF Energy were such as to leave sufficient uncertainty that it would have been difficult for Leean to prepare a successful application for derivative leave prior to the media release of

April 28, 2024. Once it had the information communicated in that media release, Leean moved quickly to commence this proceeding.

[115] I conclude that Leean has met the onus upon it to establish that it is acting in good faith in seeking derivative leave.

Best Interests

[116] The evidence before me establishes what appears to be a contractual claim supported by documentary evidence, the benefits of which are significant in the context of CF Energy's business. Mr. Gao's evidence as to the financial impact of the investment contemplated by the Loan Discharge Agreement was not contested. The fact that CF Energy took steps to make demand for performance of the Loan Discharge Agreement and then to pursue litigation is consistent with pursuit of the claim being in the best interests of the company. There is no indication in the materials of any available defence to the claim. It seems clear that, apart from any limitations that may have accrued, the claim is both viable and substantial. If there is a prospect of moving forward with the claim, then it does seem that the relief sought would justify the cost and inconvenience.

[117] I agree with Leean that the evidence tendered by CF Energy with respect to the alleged exercise of its business judgment is subject to the same sort of vagueness concerns as referred to by Justice Smith in *Eastern Platinum* (at paras. 38-41 of that judgment, which are quoted above). A list of relatively generic factors said to have been taken into account by the board, and a reference to having obtained legal advice, do not in my view establish a solid basis for application of the business judgment rule. More importantly, the insistence of CF Energy on litigating in China, even after the courts there had declined jurisdiction, is difficult to understand. Clearly, at least one of the Estate beneficiaries did not want to litigate in China, as it is clear that someone challenged the jurisdiction of the Chinese courts. It would seem to me that as soon as it was clear that jurisdiction was in issue, CF Energy should have either negotiated for a tolling agreement or served the Ontario Statement of Claim (possibly then seeking either a formal or informal stay). The

language in the Loan Discharge Agreement giving the Ontario courts exclusive jurisdiction to hear the claims appears to be clear and straightforward, and nothing in the evidence provides any sort of explanation as to why those provisions would not be enforceable if any of the parties sought to rely on them.

[118] I have referenced the series of letters written by Leean's counsel beginning in April 2023. Those letters repeatedly suggest that CF Energy was intentionally acting in such a manner as to render the claim statute-barred. They raised questions about possible conflicts of interest, which CF Energy responded to by asserting that "no member of CF's board of directors was in a conflict of interest" in connection with the decisions taken.

[119] In light of the fact that the primary shareholder of CF Energy is the Estate, and that two of CF Energy's five directors at all material times were beneficiaries of the Estate, there was clearly a foundation for the concerns raised in those letters. I understand CF Energy's position to be that because the two Estate beneficiaries who were directors had consented to the Estate honouring the Loan Discharge Agreement, there is no question about conflict of interest. It is not clear to me that the fact they had indicated their consent left them with no financial interest in the outcome.

[120] I conclude that if the claim continues to be meritorious, then it would be in the best interests of CF Energy to pursue it. The primary issue with respect to the merits of the claim is whether there is any prospect of an Ontario court granting an extension of time to serve the Statement of Claim for the 2022 Ontario Action. In considering this question, I acknowledge that Ontario law is something properly decided by an Ontario court. However, it is necessary for me to assess the prospects of success as part of considering the best interests factor.

[121] I have reviewed the *Pagliuso* and *Gupta* cases relied upon by CF Energy. Both of them involved individuals advancing personal claims. In my view, the circumstances of the present case are substantially different. This case involves a claim that is sought to be pursued by way of derivative leave. It involves a claim to

be brought by a company against its primary shareholder, in circumstances in which nearly half of the directors of the company were *de facto* defendants to the claim, and in which there is no reasoned explanation given as to the decision not to pursue the claim in the forum that the parties to the subject agreement had agreed would have exclusive jurisdiction to deal with the claim. It is not clear to me that an Ontario court would simply apply the principles in *Pagliuso* and *Gupta* in such circumstances as if CF Energy was an individual.

[122] Questions of delay infuse the list of factors in the *Tookenay*. I accept Leean's submission that due to the lack of detailed information provided by CF Energy before late April 2024, there was no reasonable opportunity for Leean to properly prepare an application for derivative leave prior to that point. Leean moved quickly from that point to commence this proceeding on June 6, 2024. The delays subsequent to that point are largely systemic delays arising from delays in our court system.

[123] The delay between commencement of the proceeding in February 2022 and the notification to shareholders in April 2024 of CF Energy's intentions is attributable to CF Energy's board of directors and its choice of strategy. I anticipate that an Ontario court would be troubled by the connections between the board and the Estate, and it is not clear to me that an Ontario court would accept that the delays in such circumstances would prevent it from granting an extension of time.

[124] It is thus my view that there is a reasonable prospect that Leean would succeed on an application to extend the time to serve the Statement of Claim in the 2022 Ontario Action.

[125] Finally, I struggle to see much concern with enforceability of any judgment given that the subject matter of the claim is an interest in a Canadian company.

Conclusion on Derivative Leave

[126] I have concluded that the four statutory criteria in s. 233(1) are all met in this case. Although the court retains discretion with respect to the granting of leave, CF Energy made no submissions with respect to that general discretion, and I agree

with Leean that there is no reason to depart from the usual rule in this case. Having considered the criteria set out in s. 233(1) in their entirety, it is my view that derivative leave should be granted.

Security for Costs

[127] The situation is somewhat unusual because a British Columbia court is being asked to order security for costs that might be ordered in an Ontario proceeding.

[128] I accept that a court hearing an application for leave to pursue derivative proceedings may apply the general principles that have developed pursuant to s. 236, as explained in *Hougen*. As well, I accept that because the Ontario proceedings will be pursued in the name of CF Energy, it is CF Energy that would *prima facie* incur that liability for costs. CF Energy would then have the ability to apply for allocation of costs pursuant to s. 233(4).

[129] It is clear in the circumstances that any effort to pursue the 2022 Ontario Action will begin with an application for leave to extend the time to serve the Statement of Claim. The potential liability for costs arising from a single court application will be somewhat constrained.

[130] As I noted to the parties during submissions in this case, the evidence indicates that Leean owns some 9% of the shares of CF Energy. CF Energy is incorporated in British Columbia, and it would seem to me that the shares that Leean holds in CF Energy would themselves constitute an asset in British Columbia.

[131] I have no evidence of either the value of Leean's shares or of a reasonable range for the costs of a single application in an Ontario civil proceeding. I had understood the $100,000 amount for security that CF Energy proposed was for potential costs liability for the entire claim.

[132] Finally, I note that Leean has been successful in this proceeding, and will be entitled to costs, and that those costs may well be somewhat comparable to the costs of a single application in the Ontario court.

[133] In my view, the appropriate course of action in all the circumstances is to decline to order the posting of cash security for costs at this point, but instead to:

a) grant CF Energy liberty to apply for such security once the application for leave to extend the time to serve the Ontario Statement of Claim has been decided; and

b) direct that the costs that will be payable to Leean in respect of this proceeding not be paid until:

i. 30 days after the application for leave to extend has been decided, and

ii. if CF Energy applies for security for costs pursuant to the liberty I have given, then not until that application has been decided.

Conclusion

[134] I order that Leean be given leave pursuant to s. 232(2) of the *BCA* to prosecute the claim in the 2022 Ontario Action in the name of and on behalf of CF Energy against the Estate of Huajun Lin.

[135] CF Energy has liberty to apply for security for costs once an application for leave to extend the time to serve the Statement of Claim in the 2022 Ontario Action has been decided.

[136] Leean is entitled to its costs of this petition, but payment of those costs will be delayed as set out above.

"Veenstra J."