

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Morton v. Cherkaoui*,  
2026 BCCA 156

Date: 20260316  
Docket: CA50974

Between:

**Stuart John Morton, SJM Agency Ltd., and Fino Vino Beverages Inc.**

Appellants  
(Respondents)

And

**Sami Mohammed Cherkaoui**

Respondent  
(Petitioner)

Before: The Honourable Justice Dickson  
The Honourable Justice Mayer  
The Honourable Justice Francis

On appeal from: An order of the Supreme Court of British Columbia, dated  
September 4, 2025 (*Cherkaoui v. Morton*, 2025 BCSC 2218,  
Vancouver Docket S252101).

## Oral Reasons for Judgment

The Appellant, appearing in person:

S.J. Morton

Counsel for the Respondent:

A. Crabtree  
P.R. Senkpiel, K.C.  
M.E. Abdelkader

Place and Date of Hearing:

Vancouver, British Columbia  
March 10, 2026

Place and Date of Judgment:

Vancouver, British Columbia  
March 16, 2026

**Summary:**

*The appellant and respondent started a wine importation company together. Several years into this venture, the respondent sought and was granted leave to bring a derivative action on behalf of the company against the appellant. The appellant appeals the chambers judge's decision granting leave to bring the action. He argues that the judge erred: (1) in refusing his request for an adjournment, (2) in dismissing his application to remove the respondent's counsel due to a conflict of interest, (3) in granting the respondent leave to commence the derivative action, and (4) in awarding solicitor-client costs in the cause of the derivative action. Held: Appeal dismissed. The appellant has failed to demonstrate any reviewable error in the judge's decision.*

**FRANCIS J.A.:****Introduction**

[1] In 2022, the appellant, Stuart John Morton, and the respondent, Sami Mohammed Cherkaoui, went into business together to start a wine importation company called Fino Vino Beverages Inc. ("Fino Vino"). Because Fino Vino did not have its own import licence, it used the import licence of a company owned and controlled by Mr. Morton, SJM Agency Ltd. ("SJM"), to import product on its behalf. Disputes arose between the parties about, among other things, remittances that Mr. Cherkaoui says were owed but never paid by SJM to Fino Vino for sales of its product.

[2] Mr. Cherkaoui filed a petition seeking leave to commence a derivative action on behalf of Fino Vino against Mr. Morton and SJM to pursue these claims. After a series of adjournments, the petition was heard over two days commencing July 16, 2025. The judge granted leave to Mr. Cherkaoui to bring a derivative action against Mr. Morton and SJM on behalf of Fino Vino.

[3] Mr. Morton and SJM appeal that decision. They raise a number of procedural and substantive issues. They argue that the judge ought to have granted an adjournment of the chambers application and that he erred in dismissing an application to remove the respondent's counsel on the basis of an alleged conflict of interest. They submit that the judge erred in granting leave to commence a derivative action because he misapplied the test for good faith and failed to properly

consider the best interests of the company. They also appeal the judge's determination on costs.

### **Background**

[4] Fino Vino's main product is imported Italian wine that is packaged and distributed in Tetra-Pak. To import and distribute the product in British Columbia, Fino Vino was required to obtain an import licence. To avoid delay in bringing the product to market, Mr. Cherkaoui and Mr. Morton agreed that Fino Vino would temporarily use SJM's licence to import and distribute Fino Vino's product in British Columbia. Additionally, Fino Vino stored its wine with ContainerWorld Forwarding Services Inc. ("ContainerWorld") under SJM's import licence.

[5] By June 2023, Fino Vino began shipping its wine to stores in British Columbia. The British Columbia Liquor Distribution Branch ("LDB"), which oversees the importation and distribution of wine in the province, was Fino Vino's primary source of revenue. The LDB operates by placing bulk orders for wine and then paying the import licence holder for the order. As a result, all of Fino Vino's revenue from LDB orders was deposited into SJM's bank account and intermingled with revenue from SJM's operations.

[6] The parties agreed that Mr. Morton would remit to Fino Vino the proceeds that SJM received from the LDB for Fino Vino's sales. They also agreed that Fino Vino would pay a portion of SJM's monthly expenses from ContainerWorld. Disputes arose between Mr. Cherkaoui and Mr. Morton about amounts that Mr. Cherkaoui said were owing by SJM to Fino Vino and amounts that Mr. Morton said were owed by Mr. Cherkaoui to SJM.

[7] On August 12, 2024, Mr. Cherkaoui prematurely commenced a derivative action against Mr. Morton on behalf of Fino Vino without leave, alleging, among other things, that Mr. Morton was not adequately performing his duties to the company and seeking the payment of various remittances that were alleged to be owed by SJM to Fino Vino (the "First Proceeding").

[8] On March 19, 2025, Mr. Cherkaoui filed a petition for leave to start the derivative action (the “Petition”).

[9] On April 14, 2025, Mr. Cherkaoui filed a notice of discontinuance in respect of the First Proceeding. Costs related to the discontinuance of the First Proceeding remain outstanding.

[10] On March 27, 2025, Mr. Morton filed a notice of application seeking, among other things, to remove Mr. Cherkaoui’s counsel due to a conflict of interest arising from counsel having commenced the First Proceeding in Fino Vino’s name (the “Conflict of Interest Application”).

[11] The hearing of the Petition and Conflict of Interest Application was initially scheduled for April 17, 2025, but was adjourned by consent at Mr. Morton’s request. The hearing could not proceed as scheduled on April 28, 2025, due to judge unavailability. On July 14, 2025, two days before the hearing was scheduled to proceed, Mr. Morton appeared in general chambers, seeking to adjourn the hearing scheduled for July 16 and 17, 2025, because of medical issues he was experiencing. The Court granted Mr. Morton short leave to have the adjournment application heard the next day. On July 15, 2025, the adjournment application was heard with both parties present and was dismissed.

[12] Mr. Morton did not appear in court on the morning of July 16 but rather sent his sister to read a letter to the Court, again seeking an adjournment on Mr. Morton’s behalf due to his need to attend a medical appointment with an audiologist that morning. The judge rejected Mr. Morton’s adjournment request. He delayed the start of the hearing to 2:00 pm, and ordered that if Mr. Morton did not attend, the Conflict of Interest Application would be dismissed.

[13] Mr. Morton did not attend court at 2:00 pm. Once again, his sister attended. She advised that Mr. Morton had an appointment with his family doctor and was resting. Finding Mr. Morton’s explanation for his absence to be unreasonable, the judge dismissed the Conflict of Interest Application and set the hearing of the

Petition to the following morning to provide Mr. Morton with another opportunity to attend court. The judge directed that court would start the next day at 9:00 am to accommodate Mr. Morton's appointment with an ENT specialist scheduled for 4:00 pm that afternoon at a nearby location.

[14] On July 17, 2025, at 9:00 am, Ms. Morton again appeared in court in place of Mr. Morton and read a letter to the Court that set out Mr. Morton's reasons for not attending. The judge noted that there was no evidence from a medical doctor regarding the urgency of Mr. Morton's condition. Ultimately, the judge found Mr. Morton's reasons were "delay tactics" and determined it would not be in the interests of justice to grant Mr. Morton's third adjournment request in three days. The hearing proceeded in Mr. Morton's absence.

**Reasons for judgment**

[15] On the substantive issues before him, the judge began his analysis by setting out the legal framework under the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 [BCA] for leave to commence a derivative action. He noted that the test for granting leave required Mr. Cherkaoui to establish that: a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding; b) notice of the application for leave has been given to the company and to any other person the court may order; c) the complainant is acting in good faith; and d) it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[16] The judge noted that Mr. Cherkaoui did not make a demand to Mr. Morton — the other director of Fino Vino — to approve an action against him either before filing the First Proceeding or filing the Petition. While the judge agreed that sending a demand would have been pointless, he observed that this requirement is necessary to comply with s. 233 of the *BCA*.

[17] The judge found that notice of the application for leave had been properly given to the company and Mr. Morton.

[18] With respect to good faith, the judge was unable to find any ulterior motives on the part of Mr. Cherkaoui, nor any disputes, such as shareholder disputes, driving Mr. Cherkaoui's approach. Mr. Cherkaoui asserted that sale proceeds were missing, that he could not access the company's inventory, and that the company could not operate due to Mr. Morton's actions. He provided evidence to support these allegations. As such, the judge found that good faith was established.

[19] In terms of the best interests of the company, the judge was satisfied the petitioner had met his burden of showing not only an arguable case, but one that has a reasonable prospect of success. The evidence provided was detailed and comprehensive. If accepted, it was supportive of the key allegations raised in the notice of civil claim — namely, breach of fiduciary duty and misappropriation of funds.

[20] The judge concluded that Mr. Cherkaoui had established three out of the four required elements of s. 233(1) of the *BCA*. He directed Mr. Cherkaoui to send a letter to Mr. Morton demanding that he take action to prosecute the claim set out in the notice of civil claim. If Mr. Morton did not consent to the demand, Mr. Cherkaoui would have leave to bring the derivative claim on behalf of Fino Vino. Mr. Cherkaoui complied with the judge's direction.

**Issues on appeal**

[21] The following issues arise on this appeal:

- a) Did the judge err in refusing the appellant's request for an adjournment?
- b) Did the judge err in dismissing the appellant's Conflict of Interest Application with respect to the respondent's lawyer?
- c) Did the judge err in granting the respondent leave to commence a derivative action?
- d) Did the judge err in his award of costs?

**Analysis**

**Fresh evidence**

[22] Mr. Morton has filed a new affidavit containing fresh evidence that was not before the chambers judge. This evidence consists of medical records, court filings, and correspondence between him and Mr. Cherkaoui's lawyers.

[23] The respondent has consented to the admission of this fresh evidence and submits that it is probative of the issues surrounding Mr. Morton's medical circumstances and his adjournment request. As a result, I would allow Mr. Morton's application to adduce fresh evidence.

**Did the judge err in refusing an adjournment?**

[24] Whether to grant or refuse an adjournment of a hearing is a matter of discretion. It is a question that the judge before whom the application originates is best suited to answer. Unless there is evidence that the judge clearly misdirected himself in law or failed to act judicially in the exercise of his discretion, this Court will not interfere: *Bodnar v. The Cash Store Inc.*, 2007 BCCA 366 at para. 16 (Chambers).

[25] In this case, the judge considered the history of delays in the matter, including the fact that Mr. Morton had sought, and been refused, an adjournment the day before. The judge delayed the commencement of the hearing to 2:00 pm on the first day, and then again until 9:00 am the next day, to accommodate Mr. Morton's medical appointments. Nevertheless, Mr. Morton did not appear, nor did he provide a sufficient explanation for his failure to attend. For example, he provided no evidence from a doctor that his medical condition was an emergency or that he was not able to reschedule what appeared to be non-urgent medical appointments so that he could attend a hearing that he had full notice of.

[26] Mr. Morton's fresh evidence does not assist him. Indeed, the new medical records support the conclusion that, while Mr. Morton's medical issues may have been deeply concerning to him, they should not have interfered with his attendance

at court on July 17 or justified an adjournment of a peremptory petition date that had already been adjourned more than once.

[27] In the circumstances, it was well within the judge’s discretion to decline Mr. Morton’s adjournment request and to proceed with the Petition despite Mr. Morton’s failure to attend. I cannot find that he misdirected himself in law or failed to act judicially in the exercise of his discretion in this regard. As a result, I would not accede to this ground of appeal.

**Did the judge err in dismissing the Conflict of Interest Application?**

[28] Mr. Morton did not appear in court to argue the Conflict of Interest Application. The judge, with the benefit of the record before him, dismissed the Conflict of Interest Application. Mr. Morton submits that the judge committed an error in doing so.

[29] In this appeal, Mr. Morton appears to base his assertion that Mr. Cherkaoui’s lawyers were in a conflict of interest on two primary allegations: 1) they purported to act for both Fino Vino and Mr. Cherkaoui personally; and 2) they have in the past acted for companies whose shareholders include individuals who have been involved in this case (albeit not as parties or witnesses).

[30] With respect to the first assertion, Mr. Cherkaoui’s lawyers do not purport to act for Fino Vino. They act for Mr. Cherkaoui. Although they erroneously filed an initial notice of civil claim on behalf of Fino Vino in August 2024 without first seeking leave, this does not change the nature of their solicitor-client relationship with Mr. Cherkaoui, who was and remains their only client in this matter.

[31] With respect to the allegation regarding conflicts with Mr. Crabtree’s other clients, these facts were not before the judge and in any case, would not give rise to an impermissible conflict of interest.

[32] The issues raised by Mr. Morton do not give rise to a disqualifying conflict of interest on the part of Mr. Cherkaoui's counsel. In my view, the judge made no error in dismissing the Conflict of Interest Application.

**Did the judge err in granting leave for commencement of a derivative action?**

[33] Sections 232 and 233 of the *BCA* provide the statutory authority for derivative actions. Section 233(1) establishes four conditions that must be met by an applicant seeking leave to commence a derivative action:

- (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.

[34] In this appeal, the dispute between the parties centers on the third and fourth conditions, that is, whether the applicant is acting in good faith and whether the proposed proceeding is in the best interests of the company.

**Standard of review**

[35] A decision granting leave to commence a derivative action under the *BCA* is discretionary and is reviewed on a deferential standard: *Eastern Platinum Limited v. Ren*, 2024 BCCA 109 at paras. 5, 63.

[36] A finding of good faith is a finding of fact. This Court will not interfere absent a palpable and overriding error: *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 at para. 33 [*253 Ltd.*].

**Good faith**

[37] Mr. Morton asserts that the judge erred in finding the good faith test had been met, because he failed to consider facts which, in Mr. Morton's submission,

supported the conclusion that Mr. Cherkaoui was “financially delinquent” to the company and had engaged in a pattern of financial misconduct.

[38] The focus of the good faith test is the applicant’s purpose in bringing a derivative action. The court must consider the evidence as to why the derivative action is being brought, particularly 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 is not determinative: *253 Ltd.* at paras. 29, 31.

[39] In considering good faith, the judge properly focussed his attention on the purpose for which the litigation was brought:

[35] In my view, Mr. Cherkaoui has established that he is acting in good faith. The evidence before the Court is comprehensive. It sets out considerable evidence in support of the allegations raised in the Notice of Civil Claim. Mr. Cherkaoui has provided affidavits detailing the steps he has taken since mid-2023 to address the problems that arose, investigate and gather facts, and work with Mr. Morton to address the identified issues and concerns. The petitioner submits that he “continuously gave Mr. Morton the benefit of the doubt as he and Mr. Gable attempted to identify the root of accounting issues.” Based on the voluminous affidavit material, I have no hesitation concluding that this is an accurate statement.

[36] On my review and consideration of the evidence, I am unable to find any ulterior motives on the part of Mr. Cherkaoui, nor do I find that there are any disputes, such as shareholder disputes, that are driving Mr. Cherkaoui’s approach. Mr. Cherkaoui asserts that sale proceeds are missing, that he cannot access the company’s inventory, and that the company cannot operate due to Mr. Morton’s actions. He has provided evidence to support these allegations.

[37] I also note that before filing the Notice of Civil Claim and this petition, Mr. Cherkaoui has made efforts to resolve the dispute. He and Mr. [Gable] made numerous efforts, both through email and in meetings, to identify and address the accounting issues. Other company shareholders have been brought in to try to mediate the situation. A settlement offer was made. Mr. Cherkaoui and Mr. [Gable] have offered to sign non-disclosure agreements to alleviate any concerns that Mr. Morton may have about breaching confidentiality agreements or risking the disclosure of trade secrets by sharing documents. Mr. Cherkaoui also proposed that a neutral third-party accountant be retained to access the records from the LDB and ContainerWorld directly and deal with the accounting issues. Mr. Morton has either not agreed to these proposals, reneged on them, or imposed unreasonable conditions.

[38] I am satisfied that Mr. Cherkaoui's primary and, in fact, overwhelming purpose for bringing this claim is to recover the company's sale proceeds and to reduce the risk of liability.

[Emphasis added]

[40] The judge considered the evidence and concluded that the action was primarily brought for the purpose of recovering funds on behalf of Fino Vino.

[41] Mr. Morton argues that Mr. Cherkaoui has engaged in wrongdoing of his own and that the judge overlooked evidence of this. He submits that if the judge had considered this evidence, he would have concluded that the good faith test had not been met. There are two problems with this submission. First, the judge did not overlook Mr. Morton's evidence. He summarized that evidence in the following paragraph:

[43] In his response materials, Mr. Morton characterizes this dispute as a shareholders' dispute and an attempt by Mr. Cherkaoui to complete a hostile takeover of the company. Mr. Morton states that he has provided the documentation that he is able to provide (and that isn't subject to confidentiality) and denies any wrongdoing. He says that Mr. Cherkaoui and Mr. [Gable] are the ones who have engaged in wrongdoing. Further, he states that Mr. Cherkaoui and Mr. [Gable] have failed to make payments to ContainerWorld and that SJM has been forced to infuse cash into the company. Last, Mr. Morton states that Mr. Cherkaoui and Mr. [Gable] have incurred significant and unexplained expenses on behalf of the company. In his affidavit material, Mr. Morton does provide some evidence that reconciles the LDB remittance issue; however, the documents provided appear to be reports and spreadsheets, rather than original source documents.

[42] Second, with respect, Mr. Morton appears to have misunderstood the nature of the good faith analysis, which is focussed on the purpose of the proposed action, not whether the applicant has potential liabilities to the company. Mr. Morton has not pointed to any evidence relevant to good faith that was overlooked by the judge and instead simply argues that the judge should not have found good faith in the face of his claim that it is Mr. Cherkaoui, not him, who owes money. In these circumstances, I see no error in the judge's factual finding of good faith.

***Best interests of the company***

[43] Mr. Morton asserts that the judge erred in finding that the derivative action was in the best interests of the company.

[44] The question of whether it appears to be in the best interests of a company to prosecute an action includes consideration of the merits of the proposed action: *253 Ltd.* at para. 34.

[45] The applicant seeking to commence a derivative action must plead a proper cause of action and must have some evidence to support that its proposed claim has a reasonable prospect of success: *253 Ltd.* at para. 36.

[46] In this case, the judge properly instructed himself that his task in addressing the best interests of the company was “to do more than skim the pleadings, and to consider the evidence, but not to dive so deeply into the merits as to try the case”. He then engaged in a review of the pleadings and evidence and satisfied himself that the respondent had met the burden of showing not only an arguable case, but one that has a reasonable prospect of success.

[47] Mr. Morton argues that the judge failed to weigh the financial detriment to the company of funding the litigation. While Mr. Morton is correct that the cost of litigation, and the proportionality of that cost measured against the likely remedy could sometimes militate against a derivative action, this argument is not compelling on these facts. As the judge found, Mr. Morton and SJM have not remitted any funds to the company since March 22, 2024. Mr. Morton has withdrawn funds from the company’s bank account and transferred funds to SJM. Fino Vino’s Alberta sales proceeds are going to an SJM account. In these circumstances, it was open to the judge to find that the derivative action was in the best interests of the company. I cannot find he made any error in this regard.

**Did the judge err in awarding costs?**

[48] The judge ordered that Mr. Cherkaoui should be indemnified on a solicitor-client basis for costs incurred in respect of the conduct of the claim. He ordered that costs of the Petition will be payable in the cause of the derivative action.

[49] Mr. Morton has appealed the award of costs, although his only basis for doing so is his allegation that the judge made palpable and overriding errors in finding that the derivative claim was brought in good faith and that it was in the best interests of the company. As I would find no error in this regard, I would also find no error in the judge’s costs determination.

**Disposition**

[50] In all the circumstances, I would dismiss the appeal.

[51] **DICKSON J.A.:** I agree.

[52] **MAYER J.A.:** I agree.

[53] **DICKSON J.A.:** The appeal is dismissed.

[Discussion with parties re: costs]

[54] **DICKSON J.A.:** Leave to file written submissions on costs is granted. The respondent’s written submissions on costs must be filed by March 30, 2026. The appellant’s written submissions on costs must be filed by April 7, 2026. Parties’ written submissions should not exceed five pages.

“The Honourable Justice Francis”