In the Court of Appeal of Alberta

Citation: Nova Oculus Canada Manufacturing ULC v Sather, 2026 ABCA 297

Date: 20260915
Docket: 2601-0024AC
Registry: Calgary

Between:

Nova Oculus Canada Manufacturing ULC

Respondent

\- and -

Justin Sather, MacuMira Medical Devices Inc.,
Walter O'Rourke, Karmatar Consulting Inc.,
Jane Doe, John Doe and ABC Corporation

Appellants

The Court:

The Honourable Justice Jane Fagnan
The Honourable Justice April Grosse
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice M.A. Marion
Dated the 22nd day of December, 2025
(2025 ABKB 760, Docket: 2301-02211)

Memorandum of Judgment

The Court:

Overview

[1] The appellants[1] are former officers or directors of the respondent Nova Oculus Canada Manufacturing ULC and entities in which the former officers or directors are involved. Nova brought a lawsuit against the appellants alleging they wrongfully transferred and used Nova's assets for their own benefit. The appellants applied to strike Nova's claim on the basis that Nova is a British Columbia company, governed by British Columbia's *Business Corporations Act,* SBC 2002, c 57 [*BCBCA*], and the Court of King's Bench of Alberta does not have subject matter jurisdiction over the action. In particular, the appellants argue that the essence of Nova's claim is to set aside a transfer of all or substantially all of Nova's undertaking without shareholder approval, and that such a claim falls within the exclusive jurisdiction of the Supreme Court of British Columbia pursuant to section 301 and related provisions of the *BCBCA*. A chambers judge dismissed the application to strike: *Nova Oculus Canada Manufacturing ULC v Sather*, 2025 ABKB 760 [Decision]. On appeal, the appellants challenge the chambers judge's characterization of the claim and his interpretation of the *BCBCA*. For the reasons that follow, the appeal is dismissed.

Factual and Procedural Context

[2] For the purpose of this appeal, the core underlying facts are not in dispute: Decision at para 1.

[3] Nova is a medical technology company, incorporated in British Columbia in 2017. The appellant Sather was an officer and director of Nova from May 2017 to June 2019. Sather is also a director, officer and shareholder (direct or indirect) of the appellant MacuMira Medical Devices Inc. The appellant O'Rourke was an officer and director of Nova from 2017 until December 2022. O'Rourke is the sole director and shareholder of the appellant Karmatar Consulting Inc., which provided consulting services to Nova until December 2022.

[4] Effective October 2020, when O'Rourke was the President and CFO of Nova, Nova entered into an Assignment of Inventions and Related Patent Rights with MacuMira, which provided for the assignment of assets from Nova to MacuMira, including patents and confidential information relating to certain technology. Nova and MacuMira entered an Amended and Restated Assignment of Inventions and Related Patent Rights in September 2022. By all accounts, O'Rourke signed the

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[1] The style of cause includes as appellants John Doe, Jane Doe and ABC Corporation. However, the application to strike at issue in this appeal was brought by the expressly named appellants only. References to "the appellants" in this decision are to the expressly named appellants.

agreements on behalf of Nova and Sather signed for MacuMira. In December 2022, Nova terminated its relationship with O'Rourke and Karmatar, and in 2023, Nova filed its action against the appellants.

[5] In its amended statement of claim, Nova alleges, among other things, that:

(a) The Assignment and the Amended and Restated Assignment constituted a disposition of all or substantially all of Nova's assets and undertaking and required approval by special resolution of Nova shareholders;

(b) The impugned transactions were not approved by Nova's sole shareholder even though the appellants had legal advice that such approval was required;

(c) By at least June 2020, O'Rourke, Sather and MacuMira were working secretly to complete the Assignment;

(d) Between November 2020 and August 2022, O'Rourke, Sather and MacuMira made efforts to keep the impugned transactions secret, including by representing to third parties that Nova continued to own the assets and that MacuMira was a Canadian licensee;

(e) By August 2022, O'Rourke had acquired an interest in MacuMira, which he concealed from Nova and related parties;

(f) By August 2022, O'Rourke, Sather and MacuMira had altered patent ownership records and regulatory records to show MacuMira as the owner and manufacturer of the technology, patents or other assets in question;

(g) Nova discovered the impugned transactions in December 2022 and terminated its relationships with O'Rourke and Karmatar. However, O'Rourke continued to hold himself out to others as a representative of Nova;

(h) O'Rourke's involvement in the impugned transactions and his conduct after December 2022 amounted to a breach of his fiduciary obligations in many respects. The other appellants assisted O'Rourke in his breach of fiduciary duty, knew the impugned transactions would cause damage to Nova and received a benefit from the impugned transactions, while Nova suffered a corresponding loss;

(i) O'Rourke and Karmatar received confidential information from Nova in the course of O'Rourke's employment and misused that confidential information to the detriment of Nova;

(j) O'Rourke breached the terms of his employment agreement with Nova and the other appellants induced O'Rourke to breach those obligations;

(k) The appellants conspired to engage in the impugned transactions and other alleged wrongful conduct; and

(l) The appellants committed the tort of conversion through the impugned transactions and other pleaded wrongful conduct.

[6] The amended statement of claim seeks an order setting aside the impugned transactions and declaring them void; a declaration that Nova owns certain patents that were transferred; an order that patents and related property be returned to Nova; an order for the preservation of Nova's confidential information and related injunctive and replevin relief; declaratory relief relating to the alleged wrongdoing of the appellants; a constructive trust over profits earned by the appellants; an accounting and disgorgement of profits; and judgment against the appellants.[2]

[7] The statements of defence allege that Nova's own acquisition of the assets at issue in the claim was in breach of an agreement between a subsidiary of MacuMira and Nova's ultimate parent company. The statements of defence also allege that neither Nova nor its related United States entities could commercialize the technology in issue and that it was worthless in Nova's hands. Among other defences, the appellants plead that the impugned transactions were carried out in good faith and in the best interests of Nova. Sather and MacuMira also plead that they believed O'Rourke had authority to enter the impugned transactions on behalf of Nova.

The Application

[8] The appellants applied to strike Nova's claim pursuant to rules 3.68(1)(a) and 3.68(2)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 on the basis that the Court of King's Bench of Alberta has no jurisdiction. They argue that the *BCBCA* creates a complete code governing the claim and grants exclusive jurisdiction to the Supreme Court of British Columbia. In particular the appellants rely on section 1(1) of the *BCBCA*, which defines "court" to be the Supreme Court except for specific provisions not in issue, and on section 301:

> 301(1) A company must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless
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> (a) it does so in the ordinary course of its business, or

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[2] The amended statement of claim also alleges an alternative claim and associated relief, but those are not relevant to this appeal.

(b) it has been authorized to do so by a special resolution.

(2) If the company contravenes subsection (1) in respect of a disposition of all or substantially all of a company's undertaking, the court, on the application of any shareholder, director or creditor of the company, may, unless subsection (3) applies, do one or more of the following:

(a) enjoin the proposed disposition;

(b) set aside the disposition;

(c) make any other order the court considers appropriate.

(3) A disposition of all or substantially all of the undertaking of a company is not invalid merely because the company contravenes subsection (1), if the disposition is

(a) for valuable consideration to a person who is dealing with the company in good faith, or

(b) ratified by a special resolution.

(4) Despite the passing of a special resolution under subsection (1) (b) or (3) (b) to authorize or ratify a disposition of all or substantially all of the undertaking of a company, the directors may abandon the disposition without further action by the shareholders.

(5) Any shareholder of the company may send notice of dissent, under Division 2 of Part 8, to the company in respect of a special resolution under subsection (1) (b) or (3) (b).

[…]

[9] The parties do not dispute the law relating to jurisdiction. Provincial superior courts have inherent subject-matter jurisdiction over a claim unless exclusive jurisdiction has been expressly bestowed on another forum: Decision at paras 18-21. Claims may be struck pursuant to rule 3.68(2)(a) of the *Rules of Court* where the court does not have subject matter jurisdiction because another forum has exclusive jurisdiction: Decision at para 21. In order to determine whether it has subject matter jurisdiction, a court must determine the essential nature or character of the claim or dispute and whether, based on that determination, the claim or dispute falls within the scope of the exclusive jurisdiction of the competing forum: Decision at paras 22-23, 43-44.

[10] The chambers judge held that contrary to the appellants' assertion, the essential nature of Nova's claim was not to set aside the impugned transactions under section 301 of the *BCBCA*: Decision at para 33. Rather, it was "to seek non-statutory rescission of the Transactions, together with other ancillary relief to preserve its business, its confidential information, and its interests in the [technology]": Decision at para 38. The chambers judge held that section 301 of the *BCBCA* does not purport to oust the jurisdiction of courts in other provinces to provide relief to a British Columbia company simply because the transfer of all or substantially all of the company's undertaking is involved in the alleged wrongdoing: Decision at para 50. Ultimately, the chambers judge concluded:

> In this case, Nova does not seek an express statutory remedy under the *BCBCA* and the essence of its claims is not to *direct or regulate* the internal affairs of Nova – it is to pursue alleged wrongdoers for wrongdoing *against* Nova, which happen to include its former officer and director (O'Rourke), his corporation (Karmatar), the corporation that benefitted from the Transactions (MacuMira), and its principal (Sather), for wrongfully transferring Nova's main asset (the Device) and related confidential information to MacuMira, and then for improperly using the Device and confidential information without Nova's consent.
>
> The essence of the [amended statement of] claim is not in the exclusive jurisdiction of the British Columbia Supreme Court. This Court has inherent subject-matter jurisdiction.
>
> Decision at paras 59-60 [emphasis in original]

Grounds of Appeal

[11] The appellants argue the chambers judge erred in:

(a) His characterization of the essence of Nova's claim;

(b) His interpretation of section 301 of the *BCBCA*; and

(c) His application of the *BCBCA* to Nova's claim.

Grounds (b) and (c) are related and are addressed together in the analysis below.

Standard of Review

[12] The decision whether to strike a claim is generally entitled to deference unless there is a legal error, a palpable and overriding factual error, or a failure to exercise discretion judicially:

Kniss v Stenberg, 2014 ABCA 73 at para 17; *HOOPP Realty Inc v The Guarantee Company of North America*, 2015 ABCA 336 at para 10; *Resler v Anglin*, 2026 SCC 23 at paras 24-25.

[13] The chambers judge's characterization of the essential nature of the claim is a question of mixed fact and law, reviewable on the standard of palpable and overriding error unless an extricable question of law is identified: *MTS Allstream Inc v TELUS Communications Company*, 2009 ABCA 372 at para 14; *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 25, 36-37. The interpretation of a statute is a question of law, reviewable on the correctness standard: *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 33.

Analysis

Characterization of the essential nature of the claim

[14] As set out above, in assessing whether it has subject matter jurisdiction, a court must determine the essential nature or character of the claim: *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at paras 25-27; *Kniss* at para 24. The essential nature of the claim is determined based on a realistic and practical consideration of the facts alleged and the remedy sought: *Windsor* at paras 25-26. While the analysis looks beyond "artful pleading", the focus is on the claim itself and not a claim the defendant submits the plaintiff ought to have brought instead: *Windsor* at para 27; *Prodaniuk v Calgary (City)*, 2023 ABCA 165 at paras 8-9.

[15] The appellants acknowledge the chambers judge considered and applied the correct legal principles to analyze the essential nature of the claim: Decision at paras 22-23. They also acknowledge that the chambers judge's characterization of the essence of the claim is entitled to deference. However, the appellants argue that the chambers judge made a "fundamental error" in that he "missed Nova's key admission" that the impugned transactions amounted to a disposition of all or substantially all of Nova's undertaking. The result, according to the appellants, is that this Court may determine the essential character of Nova's claim afresh.

[16] There is no basis for the appellants' assertion that the chambers judge "missed" Nova's admission that the impugned transactions amounted to a disposition of all or substantially all of Nova's undertaking and were carried out without a special resolution of shareholders. To the contrary, the chambers judge addressed this point when he said: "[t]he pleaded facts go well beyond the lack of a required special resolution – the Defendant[s] place undue emphasis on this one pleaded fact while ignoring the entire factual context as required by *Windsor* and *Transalta*": Decision at para 49. Further, the Decision must be read in the context of the record before the chambers judge. The chambers judge had Nova's amended statement of claim, which clearly pleads that the impugned transactions disposed of all or substantially all of Nova's undertaking and were carried out without the requisite shareholder approval. He also had the parties' arguments

as to how to characterize the claim by reference to the pleadings. The appellants have not established a threshold, extricable error.

[17] The appellants have not otherwise explained how the chambers judge made a palpable and overriding error in his assessment of the nature of the claim. The chambers judge's characterization of the claim is grounded in the applicable legal principles and a fair reading of the claim as a whole. That the impugned transactions involved all or substantially all of Nova's undertaking is a relevant pleaded fact – a feature of the claim – but it is not the essence of the claim. Notably, Nova could have pleaded substantially similar causes of action against the appellants even if Nova alleged the impugned transactions had transferred less than all or substantially all of Nova's undertaking.

[18] There is no basis for appellate intervention in respect of the chambers judge's characterization of the essential nature of Nova's claim.

Interpretation and application of the BCBCA

[19] Having determined the essential character of Nova's claim, the chambers judge was required to assess whether exclusive jurisdiction over that subject matter has been granted to the Supreme Court of British Columbia.[3] This involves the interpretation and application of section 301 of the *BCBCA* and related provisions, subject to a correctness standard of review.

[20] We need not address all of the chambers judge's reasoning with respect to the scope and interpretation of the *BCBCA*. Our conclusion that the chambers judge made no reversible error in characterizing the essence of Nova's claim renders some of the appellants' arguments about interpretation moot because those arguments rely on different characterizations of the claim. Further, the arguments of the parties have evolved on appeal and some of the matters raised before the chambers judge are not in issue before us. Given that the *BCBCA* is not legislation regularly interpreted by this Court, and in keeping with the principles of comity, we limit our analysis to points that are dispositive of the appeal.

[21] The appellants describe section 301 of the *BCBCA* as a "complete code" for "the granting of a remedy to invalidate a transaction that purports to transfer or sell all or substantially all of a company's undertaking" or for "the governance of the disposition of all or substantially all of a BC company's undertaking." Even if one accepts the latter description, it does not include Nova's claim, as characterized by the chambers judge. The claim is not, in essence, a claim for or about the disposition of all or substantially all of Nova's undertaking. The "all or substantially all" aspect

[3] Because the appellants tied their characterization of Nova's claim to section 301 of the *BCBCA*, the reasons of the chambers judge with respect to the essential character of the claim and the interpretation of the scope of the legislation are intertwined, but one can discern his findings on each aspect of the analysis.

of the claim is merely one relevant fact. Nova's claim does not fall within the "complete code" on the appellant's own interpretation.

[22] To the extent the appellants' argument interprets section 301 of the *BCBCA* as establishing the exclusive cause of action, process and remedy available to any party who claims to be wronged in any way by a transaction involving the disposition of all or substantially all of a British Columbia company's undertaking, abrogating all common law or equitable claims that would otherwise exist in relation to such a transaction, we disagree. The chambers judge was correct in holding that section 301 does not go this far, at least as it applies to this case.

[23] Legislation must be interpreted in accordance with the modern approach to statutory interpretation, with the intent of the legislature determined through a consideration of text, context and purpose: *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21; *Telus Communications Inc v Federation of Canadian Municipalities*, 2025 SCC 15 at paras 30-32. Absent clear language, statutes are generally not interpreted as creating a comprehensive scheme that abrogates related common law or equitable rights and obligations: *Moore v Sweet*, 2018 SCC 52 at para 70; *Tucci v Peoples Trust Company*, 2020 BCCA 246 at paras 18-22; see also *Bilin v Sidhu*, 2017 BCCA 429 at paras 59-61.

[24] The text of section 301 is set out above. On its face, the provision establishes the limited circumstances in which a company may dispose of all or substantially all of its undertaking, establishes a process by which shareholders may approve or dissent, and provides a statutory remedy for specific stakeholders ("any shareholder, director or creditor of the company") if the company does not comply. The text of section 301 does not expressly contemplate claims by the company itself against directors or officers for breach of fiduciary or other alleged wrongs in disposing of and using assets of the company for their own benefit. There is similarly no express wording abrogating common law or equitable causes of action by a company in those circumstances. As found by the chambers judge, the language suggests that section 301 is intended to protect stakeholders from specific company conduct, not to provide relief to the company itself or to modify obligations otherwise owed to the company: Decision at para 34.

[25] This interpretation is consistent with section 301's purpose and genesis. The origin of section 301 was to alter a common law rule that prevented a company from disposing of substantially all of its undertaking without unanimous shareholder consent. The common law rule was premised on an implied agreement with investors that the company would continue to carry on the business for which it was formed: *Jahn v Jahn Enterprises Ltd*, 2016 BCSC 2273 at para 35, citing *85956 Holdings Ltd v Fayerman Brothers Ltd*, 1986 CanLII 160 (SK CA), 25 DLR (4th) 119. Section 301 and its predecessors were enacted to address the practical problem of a holdout shareholder by authorizing a company to enter transactions that dispose of substantially all of its undertaking without the consent of every shareholder, while offering other shareholder protections: *Jahn* at paras 34-38.

[26] The appellants take specific issue with the chambers judge's reasoning that section 301 establishes a statutory remedy for specific stakeholders but not for the company itself: Decision at para 34. In their factum, the appellants accepted that a company could not apply for relief under section 301. However, they argued that this did not preclude section 301 from operating as a complete code for the governance of the disposition of all or substantially all of a British Columbia company's undertaking. Rather, it simply meant that the company could not apply under section 301 to get the undertaking back. According to the appellants' factum, companies were protected because a director, shareholder or creditor could make the necessary application. They characterized Nova as attempting to circumvent the statute by "purporting to bring a Court action in the name of the company seeking a remedy exclusively governed by the statute."

[27] By the time of the oral appeal hearing, the appellants had pivoted. They now argue that while not expressly named as a party that may apply for relief in section 301, a company could invoke section 228 of the *BCBCA* to make an application relating to a contravention of section 301. Subsection 228(2) provides:

> If a company or any director, officer, shareholder, employee, agent, auditor, trustee, receiver, receiver manager or liquidator of a company contravenes or is about to contravene a provision of this Act or the regulations or of the memorandum, notice of articles or articles of the company, a complainant may, in addition to any other rights that that person might have, apply to the court for an order that the person who has contravened or is about to contravene the provision comply with or refrain from contravening the provision.

A "complainant" in section 228 is defined as "a shareholder of the company or any other person whom the court considers to be an appropriate person to make an application under this section": *BCBCA*, s 228(1). Subsection 228(3) states the court may make any order it considers appropriate under this section and specifically identifies examples, such as an order requiring compliance with a legal obligation or an order preventing a company from disposing of property.

[28] The appellants argue that a company in Nova's position could be a complainant for the purposes of section 228 as "any other person whom the court considers to be an appropriate person to make an application" and could then apply for an order requiring compliance with section 301. This proposition raises some obvious questions. For example, does the specific provision (section 301) exclude the operation of the more general (section 228)? If the legislature intended for companies to be applicants under section 301, as opposed to stakeholders of companies, it could have expressly included companies in the list of potential applicants under subsection 301(2). How would the application work, since the company would be suing itself? The applicants have not provided any jurisprudence in which a company has invoked a combination of section 228 and section 301 to seek relief against itself for a transfer of all or substantially all of its undertaking.

[29] We do not need to resolve these questions to dispose of the appeal. Even if one assumes that a company could apply by way of section 228 for relief relating to the operation of section 301 of the *BCBCA*, this does not undermine the conclusion of the chambers judge or the interpretive reasoning set out above. The text, context and purpose of section 301 simply do not support the appellant's interpretation, regardless of whether the company could theoretically bring a section 228 application for related relief.

[30] The appellants also argue that section 301 should be interpreted as a "complete code" by analogy to other parts of the *BCBCA*, which have been held to be "complete codes", such as sections 147 to 153 relating to director and officer conflicts of interest: *Rhyolite Resources Inc v Canquest Resource Corp*, 1990 CarswellBC 366 at para 18 (SC), [1990] BCWLD 2004; *Roussy v Savage*, 2019 BCSC 1669 at paras 313-315, aff'd 2021 BCCA 441 at paras 70-73, 81, leave to appeal to SCC refused, 40031 (17 June 2022). This argument is not persuasive for two reasons. First, just because legislation includes a complete code on one topic does not mean that other provisions of the legislation also amount to a complete code. The appellants have not provided any persuasive analysis as to why the interpretation of sections 147 to 153 of the *BCBCA* as a complete code would apply to section 301. On their face, the wording and structure of the two sets of provisions are substantially different. Second, and more importantly, this argument ignores the essential nature of Nova's claim. Section 301 may well be a complete code in some respects. For the reasons set out above, we decline to delineate its exact contours. The key point is that Nova's claim is not a claim for relief under section 301 and it is not, in essence, a claim about the transfer of all or substantially all of Nova's undertaking. To the extent section 301 could be a complete code, it does not go so far as to abrogate Nova's claim in common law or equity against the appellants for improperly taking and using corporate assets, even where the allegation is that they took all such assets.

[31] Another specific error alleged by the appellants is that the chambers judge's interpretation of section 301 results in absurdity. According to the appellants, it is absurd to interpret the *BCBCA* as allowing a company to "forum shop" when it complains of a disposition of all or substantially all of its undertaking, while restricting the stakeholders expressly listed as potential applicants in section 301 to the British Columbia courts. We do not accept the absurdity alleged by the appellants. The essence of Nova's claim is not an application under section 301 or otherwise the seeking of a remedy for the disposition of all or substantially all of its undertaking *per se*. There is nothing absurd about the Supreme Court of British Columbia having exclusive jurisdiction, for example, over applications for statutory relief under section 301, but no such exclusive jurisdiction for some other claims that may arise in the context of a disposition of all or substantially all of a company's undertaking.

[32] Our assessment of the appellants' argument that the legislature intended British Columbia courts to have exclusive jurisdiction over fundamental changes to, or revival or dissolution of, companies incorporated under the *BCBCA* is similar. Nova's claim is not, in essence, one about fundamental change, revival or dissolution. The appellants argued for that characterization of the claim and they were not successful. Whatever exclusive jurisdiction the courts of British Columbia may have over matters relating to British Columbia companies, it does not cover the essence of Nova's claim.

Disposition

[33] The appeal is dismissed.

Appeal heard on June 18, 2026

Memorandum filed at Calgary, Alberta
this 15th day of September, 2026

Fagnan J.A.

Grosse J.A.

Feth J.A.

Appearances:

J. Hannan
K. Pratt (no appearance)
J.B.K. Koonar
for the Respondent

T.R. McDonald
B. Kalinoski
R. Yanke
for the Appellants Justin Sather and MacuMira Medical Devices Inc.

K.S. Burron (no appearance)
for the Appellants Walter O'Rourke and Karmatar Consulting Inc.