

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

APR 18 2019



No. S-194717
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, [S.B.C. 2002] c. 57
and *THE BUSINESS CORPORATIONS ACT*, R.S.A 2000, c. B-9

-AND-

IN THE MATTER OF THE LOUIS RACZ CO. LTD.

-AND-

Between

1012109 B.C. Ltd. and LISA MADDESS

Petitioners

and

ETHEL MARY RACZ a/k/a ETUS MARIA RACZ
and MICHAEL SIWIK

Respondents

PETITION TO THE COURT

ON NOTICE TO:

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

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or, and
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: Vancouver Law Courts 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: Scott A. Turner Burns Fitzpatrick LLP Barristers and Solicitors 1400 – 510 Burrard Street Vancouver, BC V6C 3A8 Fax number address for service (if any): 604-685-2104 E-mail address for service (if any): sturner@burnsfitz.com
(3)	The name and office address of the petitioner's(s') lawyer is set out in the address for service above.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Petitioners claim the right to serve this Petition on the Respondents outside British Columbia on the grounds that there is a real and substantial connection between this proceeding and British Columbia, as it involves the liquidation of a British Columbia company, and also on the grounds provided for in the following paragraphs of section

10 of the *Court Jurisdiction and Proceedings Transfer Act* [S.B.C. 2003] c. 28, namely that this proceeding:

- (a) is brought to enforce, assert, declare or determine proprietary rights in property in British Columbia that is immovable or movable property;
- (b) is brought to interpret or enforce a deed, contract or other instrument in relation to property in British Columbia that is immovable or movable property;
- (c) concerns contractual obligations, and
 - (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia; and
 - (ii) by its express terms, the contract is governed by the law of British Columbia;
- (d) concerns a business carried on in British Columbia;
- (e) is a claim for an injunction ordering a party to do or refrain from doing something:
 - (i) in British Columbia; and
 - (ii) in relation to property in British Columbia that is immovable or movable property; and
- (f) is concerned with matters that, generally, have a real and substantial connection to British Columbia.

CLAIM OF THE PETITIONERS

Part 1: ORDER(S) SOUGHT

The Petitioners seeks orders that:

1. The Louis Racz Co. Ltd. (the "**Company**") be liquidated pursuant to s. 324 of the *Business Corporations Act*, [S.B.C. 2002] c. 57 (the "**Act**");
2. MNP Ltd. ("**MNP**") be appointed as liquidator of the Company, with power to take possession of and distribute the assets of the Company among the creditors and shareholders of the Company, in accordance with those certain special resolutions of the shareholders of the Company dated as of June 7, 2018 (the "**Resolutions**"), and otherwise on such terms as the court may order having regard to section 330 of the Act; and
3. Upon payment of all creditors and shareholders in accordance with the terms of the Resolutions, the Company be dissolved pursuant to section 342 of the Act,

together with such other and further relief as the court may deem appropriate to give effect to the liquidation and dissolution of the Company, including any and all remedies available to the court under section 227(3) of the Act.

Part 2: FACTUAL BASIS

The Parties and the Racz Family

1. The Petitioners are shareholders of the Company.
2. The Petitioner 1012109 B.C. Ltd. ("**101 Co.**") is a British Columbia holding company owned by Rita Racz, the daughter-in-law of the late Louis Racz, who founded the Company in 1967. The Petitioner Lisa Maddess is Rita Racz's daughter and a granddaughter of Louis Racz.
3. Louis Racz was married to Rozalia Racz, who was also sometimes known as Rosalia Racz.
4. Louis and Rozalia Racz had three children, Ernest Anthony Racz, the Respondent Ethel Mary Racz, who is also known as Etus Maria Racz, and Johanne Gidney. Ms. Gidney died in 2008. She plays no part in these proceedings.

5. Ernest Racz married the Petitioner, Rita Racz, in 1965. They had one child, the Petitioner Lisa Maddess.
6. The Respondent Ethel Racz has one child, the Respondent Michael Siwik.
7. Louis Racz died in 1988. Ernest Racz died in 2000. Rozalia Racz died in 2004.
8. Rita Racz is now 85 years old. Ethel Racz is 78 years old.
9. The Petitioners ask that the Company be wound up and that the assets of the Company, which today consist solely of cash deposits in the amount of about \$15,000,000, be distributed to the Company's shareholders, in accordance with the terms of the Resolutions (as defined above), the text of which is reproduced below in paragraph 44 of this Petition.

The Company's Business and Assets

10. At all times material to this Petition, the sole asset of the Company was an apartment building known as Cedar Terrace located at 1575 Esquimalt Avenue in West Vancouver. The apartment building sits on two parcels of land legally described as PID: 010-793-763 and 008-837-368 (the "Property").
11. Since July 3, 2014, Rita Racz has been the sole director and officer of the Company.
12. Until January 31, 2019, the Company maintained the apartment building, which generated modest profits for the Company. From time to time, those profits were distributed to shareholders by way of dividends.
13. As at January 31, 2019, the Company had accumulated cash on hand of approximately \$300,000.
14. On January 31, 2019, the Company sold the apartment building and realized net proceeds of approximately \$15,000,000, as described in greater detail below.

The Company's Share Capital

15. As of March 17, 1998, the capital of the Company consisted of 12,000 shares, divided into 1,000 Class "A" common voting shares without nominal or par value, 1,000 Class "B" common non-voting share without nominal or par value, and Class "C" preferred, redeemable, non-participating eight percent (8%) shares of a par value of one dollar (\$1.00) each.
16. Of these, only the Class A and B shares had been issued. They were held as follows:

Rozalia Racz	396 Class "A" Common Voting 396 Class "B" Common Non-voting
Ernest Racz	104 Class "A" Common Voting 104 Class "B" Common Non-voting
Ethel Racz	100 Class "A" Common Voting 100 Class "B" Common Non-voting

17. The share capital of the Company was altered effective March 19, 1998, pursuant to a special resolution filed with the Registrar of Companies on that date. The resolution altered the memorandum and articles of the Company by:
- a. Changing the name and designation of the Class B non-voting common shares without par value to Class B voting common shares with a par value of \$1.00 per share and creating an additional 9,000 of such Class B voting shares;
 - b. Creating 10,000 Class C common shares with a par value of \$1.00 each;
 - c. Creating 10,000 Class D preferred shares with a par value of \$0.01 each;
 - d. Changing the name or designation of the 10,000 Class C preferred redeemable non-participating 8 percent (8%) shares with a par value of \$1.00 per share to Class E preferred share with a par value of \$1.00 per share; and
 - e. Attaching special rights and restrictions to the Class A, Class B, Class C, Class D and Class E shares.

18. Following the reorganization, the shareholders exchanged their Class A and Class B shares for Class D preferred shares, receiving a fixed number of Class D shares for every Class A and Class B share previously held. Thereafter, the issued shares were held as follows:

Ernest Anthony Racz	50 Class "B" common 15 Class "C" common 431 Class "D" preferred
Ethel Mary Racz	50 Class "B" common 15 Class "C" common 415 Class "D" preferred
The Racz Family Trust	70 Class "C" common
Rozilia Racz	1,641 Class "D" preferred

The Racz Family Trust

19. The reorganization of the Company's share capital in 1998 was done conjunction with the establishment of a trust know as the Racz Family Trust.
20. The Racz Family Trust was created effective March 31, 1998.
21. The settlor of the trust was Rozalia Racz. The beneficiaries of the trust were, and at all times remained, Rita Racz, Lisa Maddess and Michael Siwik.
22. At all material times, the sole asset of the Racz Family Trust was its Class "C" common shares in the Company.
23. The share structure of the Company was reorganized, and the Racz Family Trust created, for tax planning purposes.
24. The exchange of Class A and Class B shares for Class D shares constituted a disposition of those shares for tax purposes. However, as the exchange occurred during the course of an alteration of the Company's capital, the exchange occurred on a tax-free basis by virtue of Section 86 of the *Income Tax Act*. In effect, the holders of the Class A and Class B Common shares were considered to have disposed of those shares for proceeds of disposition equal to the adjusted cost

based of those shares and to have acquired the new Class D shares for the same amount.

25. Freezing the value of the Company's new Class D shares constituted what is known as an "estate freeze". It allowed the Company to issue the new non-voting, participating Class C shares for nominal consideration to the Trust without any adverse tax consequences.
26. The original Trustees of the Racz Family Trust were Ernest and Ethel Racz. After Ernest's death in 2000, Ethel's son, the Respondent Michael Siwik, became a Trustee.

Subsequent Redemptions and Transfers of Shares – 1998-2000

27. In 1998, 1999 and 2000, the Company redeemed some of Rozalia's Class D shares, with the result that, as of July 2000, Rozalia Racz held 1,481 Class D common shares.
28. All of the redemptions were for the price established by the 1998 estate freeze: \$1,000 per share.
29. Ernest Racz died in 2000. He left his estate to his wife, Rita Racz, with the result that, following Ernest's death, Rita Racz held the shares listed as being held by Ernest Racz in paragraph 19 of this Petition.

Litigation Relating to the Estate of Rozalia Racz

30. Rozalia Racz died in 2004. Both before and after her death, members of the Racz family were engaged in litigation relating, first, to her care while alive and, after her death, relating to her will, including its validity and construction.
31. The matter of the validity of the will went to trial for 14 days in 2008. In reasons for judgement dated November 17, 2008, Madame Justice Gray found the will to be valid and proved in solemn form: *Maddess v. Racz*, 2008 BCSC 1550, aff'd 2009 BCCA 539, leave to appeal to SCC refused, [2010] S.C.C.A. No. 72. She subsequently awarded Lisa Maddess special costs of the litigation, payable by Ethel Racz and the estate of Johanne Gidney, who had asserted the invalidity of the will.

32. Subsequently, an issue arose as to the proper construction of the will. A disposition of real property that comprised about half of the Estate's value contained an incomplete legal description, which was alleged to create an ambiguity in the will.
33. Ultimately, the court declined to find any ambiguity in the terms of the will, and concluded that the will was intended to and did bequeath the deceased's (Rozalia's) interest in an apartment complex (different than the one in issue in this proceeding) to her son, Ernest Racz: *Racz Estate v. Gidney Estate*, 2012 BCSC 1810.

Further Redemptions and Transfers - 2014-2015

34. In 2014, following the conclusion of the litigation relating to the will of Rozalia Racz, Rita Racz, acting on the advice of legal and accounting professionals, caused the Company to redeem 1,912 of its Class D shares, including the 431 Class D shares originally held by Ernest Racz (which, as described above, Ernest Racz had bequeathed to Rita Racz) and the remaining 1,481 Class D shares held by the estate of Rozalia Racz.
35. Prior to the redemption of these Class D shares, they were transferred to the Petitioner, 101 Co. This was done pursuant to an estate planning device known as a "Pipeline Plan".
36. The transfer of the 1,481 Class D shares held by the estate of Rozalia Racz was done at the request of the Administrator of the estate, Colin Topley. In effect, the estate sold its Class D shares to 101 Co. and the Company then redeemed the shares for \$1,000 per share, or a total of \$1,481,000. That sum was then paid to the Administrator for distribution to the beneficiaries of the estate, including the Respondent Ethel Racz.
37. At the same time as the redemption of the Class D shares in 2014, Rita Racz caused the other shares that she then held, namely 50 Class B common and 15 Class C common shares, to be transferred to the Petitioner, 101 Co. At all material times, the sole shareholder and beneficial owner of 101 Co. has been Rita Racz.
38. The Respondent Ethel Racz, who at the time held (and today still holds) 415 Class D shares, was invited to participate in this Pipeline Plan, but declined or refused to participate.

39. As a result of the redemption of 101 Co.'s Class D shares, the shareholdings of the Company, as at September 30, 2015 were:

101 Co. (Rita Racz)	50 Class "B" Common 15 Class "C" Common
Ethel Racz	50 Class "B" Common 15 Class "C" Common 415 Class "D" Preferred
The Racz Family Trust	70 Class "C" Common

VanCity Mortgage

40. To pay for the redemptions of its Class D shares, the Company borrowed funds from Vancouver City Savings Credit Union ("**VanCity**"). The loan was secured by a mortgage registered against title to the Property on September 14, 2015 (the "**Mortgage**").
41. The VanCity Mortgage was originally in the amount of \$2,000,000. The Company made regular payments on account of principal and interest on account of the Mortgage until January 31, 2019, when the Property was sold.
42. On January 31, 2019, the Company paid VanCity the sum of \$1,759,281.79, in full and final satisfaction of its obligations to VanCity, and the Mortgage was discharged.

Resolutions of June 7, 2018

43. On June 7, 2018, the Company held its most recent Annual General Meeting. The Respondent, Ethel Racz, as one of two voting shareholders of the Company, was given notice of the meeting, but did not attend.
44. At the meeting, the sole voting shareholder present, Rita Racz, resolved as follows:

"BE IT RESOLVED BY ORDINARY RESOLUTION THAT:

1. Rita Racz be appointed as the sole Director of the Company to serve until the next Annual General Meeting of the Company or until her successor is elected or appointed;

2. the Company retain Patrick Mangan of KPMG to prepare and file, as appropriate, financial statements and tax returns for the Company for the year ending June 30, 2018, and otherwise to act as the Company's external accountant;
3. the requirement that the Company retain an auditor be waived;

AND BE IT RESOLVED BY SPECIAL RESOLUTION THAT:

4. pursuant to s. 301 of the *Business Corporations Act*, the Company sell the property located at 1575 Esquimalt Avenue West, West Vancouver, British Columbia, and legally described as PIDs: 010-793-763 and 080-837-368 (the "**Property**"), including the land, building, equipment, inventory and good will associated with the Cedar Terrace apartment building operated on the Property at that location (the foregoing resolution being referred to herein as the "**Asset Sale Resolution**");

AND BE IT FURTHER RESOLVED BY ORDINARY RESOLUTION THAT:

5. Rita Racz, acting alone, be authorized and directed to, for and on behalf of the Company, execute and deliver all such agreements and do all acts and things, including:
 - a. the retention of listing agents and other professionals to sell the Property; and
 - b. the execution and delivery of any deeds, agreements or other documents,

as may in the opinion of Rita Racz be reasonably required to give full and complete effect to the Asset Sale Resolution and the transactions contemplated thereby, and that any documents or instruments so executed or delivered and any acts or things so done will be binding on the Company;

6. following the sale of the Property and the payment of all appropriate capital gains, property and other taxes, real estate commissions and other expenses associated with the sale of the Property, the balance of the proceeds from the sale of the Property (the "**Net Proceeds**"),

together with all other cash and investment assets of the Company, be paid out:

- a. first, to redeem the remaining Class D shares of the Company for the price of \$1,000 per share; and
 - b. second, as a dividend to the Class C shareholders of the Company, pro rata according to their shareholding entitlement (the "**Dividend**");
7. following the redemption of the Class D shares and payment of the Dividend, the Company apply to be dissolved pursuant to Division 2 of Part 10 of the *Business Corporations Act* (the "**Dissolution Resolution**"); and
 8. Rita Racz, acting alone, be authorized and directed, for and on behalf of the Company, to retain counsel and do all acts and things, including the execution and delivery of any deeds, agreements or other documents, as may be reasonably required to give full and complete effect to the Dissolution Resolution."

Sale of Cedar Terrace

45. Following the 2018 AGM, and acting on the foregoing Resolutions, the Company retained agents to market the Cedar Terrace apartment building for sale.
46. On or about September 28, 2018, the Company received an offer from an arm's length purchaser to buy the property for \$17,000,000.
47. On October 17, 2018, after negotiations with the offeror, the Company accepted a revised offer from the purchaser to buy the property for \$17,200,000. The Company's agents recommended acceptance.
48. The sale closed on January 31, 2019.
49. After the payment of the VanCity Mortgage and other costs associated with the sale, including real estate commissions, the Company received net sale proceeds of \$15,029,261.05 from the sale of the property. Those funds have been placed in trust pending resolution of the issues giving rise to this Petition.

Distribution of the Racz Family Trust's Class C Shares

50. The date of division under the Racz Family Trust was March 1, 2019. If the assets of the Trust had not been disposed of prior to that date, they would have been transferred in equal shares to the three beneficiaries of the Trust, Rita Racz, Lisa Maddess and Michael Siwik.
51. At all material times, the sole asset of the Trust consisted of 70 Class C shares in the capital of the Company.
52. On February 19, 2019, the Trustees of the Racz Family Trust, Ethel Racz and Michael Siwik, advised Rita Racz and Lisa Maddess that they intended to distribute the 70 Class C shares held by the Trust to the beneficiaries of the Trust in the following proportions:
- a. To Michael Siwik: 35 shares (or 50%)
 - b. To Rita Racz: 17.5 shares (or 25%); and
 - c. To Lisa Maddess: 17.5 shares (or 25%).
53. The distribution of the Trust's assets to the beneficiaries, although unequal, was acceptable to the Petitioners, because it represents a 50-50 split between the two "sides" of the Racz family (namely Ethel and Michael, on the one side, and Rita and Lisa, on the other).
54. In accordance with the decision of the Trustees, the Trust's Class C shares were distributed to the beneficiaries in the above amounts, effective February 21, 2019.
55. Accordingly, as at February 21, 2019, and since that date, the issued shares of the Company have been held as follows:

101 Co. (Rita Racz)	50 Class B Common 32.5 Class C Common
Ethel Mary Racz	50 Class B Common 15 Class C Common 415 Class D Preferred
Michael Siwik	35 Class C Common
Lisa Maddess	17.5 Class C Common

Subsequent Events

56. On March 1, 2019, the Company advised the Respondents that the Property had been sold and that it wished to redeem the Respondent Ethel Racz's Class D preferred shares and make dividend distributions on the Class C shares, in accordance with the Resolutions

57. On March 5, 2019, the Respondent Ethel Racz responded through counsel and said:

"Our client Ms. Racz does not agree, nor did she consent with the sale of the Company's main property being the Cedar Terrace apartment building in Vancouver, which was not sold in the ordinary course of business. If the sale actually took place it is invalid as my client owns a majority [sic] company and is in disagreement of same.

We call upon you not to make any changes in building ownership without our client's express written consent.

Govern yourselves accordingly."

58. The Respondents replied to this communication, but received no further answer.

59. On March 8, 2019, the Company tendered transfer documents for the Class D shares to counsel for Ethel Racz.

60. On March 18, 2019, Ms. Racz responded directly. She refuses to consider the redemption of her Class D shares and appears not to understand that the Company's main asset, the Cedar Terrace apartment building, has been sold.

61. In the face of the threats received from the Respondent's counsel, and the Respondent's refusal to participate in the affairs of the Company, the Petitioners seek an orderly winding up and dissolution of the Company and distribution of its assets in accordance with the terms of the Resolutions.

Appointment of Liquidator

62. MNP, in the person of Patricia (Patty) Wood, is qualified and willing to act as liquidator.

Part 3: LEGAL BASIS

1. The Petitioners apply pursuant section 324(1)(b) of the *Business Corporations Act* [SBC 2002] c. 57, specifically, and Part 10 of the Act, generally.
2. The Petitioners rely, as well, on cases decided in this and other jurisdictions as to the court's jurisdiction to order a winding-up where it is just and equitable to do so, including where there is deadlock between equal shareholders: *In re Yenidge Tobacco Co. Ltd.*, [1916] 2 Ch. 426; *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 (UKHL); *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342 (B.C. C.A.); *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2012 BCSC 173:

56 The threshold for liquidation and dissolution under s. 324 is that the court considers it "just and equitable", as provided in s. 324(1)(b). This is a lower threshold than the oppression remedy in s. 227, which requires a finding of oppression or unfairly prejudicial conduct. The court has discretion to fashion a remedy that is "just and equitable" where the conduct complained of falls short of oppressive or unfairly prejudicial acts. There does not need to be a finding of oppression or wrongdoing to engage s. 324: *Samra* at para. 92; *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342 (B.C. C.A.) at paras. 87-93, 103-104, 118-122, (1995), 22 B.L.R. (2d) 1 (B.C. C.A.). The court's jurisdiction is engaged where, for example, there is a deadlock between the shareholders...

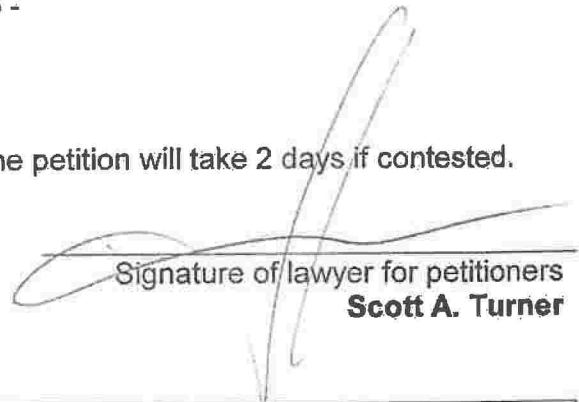
3. The court has broad jurisdiction to fashion an appropriate remedy, including the implementation of the Company's Resolutions passed June 7, 2018.
4. The court is required to appoint a liquidator. MNP is a large, reputable firm and Patty Wood, one of its partners, is eminently qualified for the role. There is no need for a bond in the circumstances.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lisa Maddess sworn April 15, 2019;
2. Affidavit #1 of Patty Wood sworn April 17, 2019.

The petitioners estimate that the hearing of the petition will take 2 days if contested.

Date: April __, 2019



Signature of lawyer for petitioners
Scott A. Turner

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this petition

with the following variations and additional terms:

Date: [dd/mmm/yyyy]

Signature of Judge Master