



## THE REQUIREMENTS FOR LEAVE TO BE GRANTED IN A DERIVATIVE APPLICATION REVIEWED BY THE SUPREME COURT OF BRITISH COLUMBIA

CATHERINE DAIGLE<sup>\*</sup>  
**LEGER ROBIC RICHARD, L.L.P.**  
LAWYERS, PATENT AND TRADEMARK AGENTS

### ***Bennett v. Rudek*, 2008 BCSC 1278 (Docket L023468), Lynn Smith J., 2008**

The parties (three individuals, Bennett, Vela and Rudek) to this application used to carry on business under the name Nexus Capital Corporation but are now involved in a litigation concerning, amongst others, the right to use the name “Nexus” to identify their business. At the time of filing of the various proceedings opposing Bennett to Vela and Rudek, Nexus Capital ceased to carry on business.

Bennett, one of the shareholders of Nexus Capital, commenced an action against the two other shareholders Vela and Rudek before the Federal Court for infringement of the Nexus and Nexus Logo trade-marks. Bennett also filed a petition before the British Columbia’s Supreme Court, seeking an injunction restraining Vela and Rudek from using the name “Nexus”.

In the above proceeding, it was stated by Vela and Rudek that Nexus Capital was a defunct company that would never do business again and as such, that all parties were entitled to use the name “Nexus”. It was also argued that the name “Nexus” was not an asset of Nexus Capital.

In the context of the underlying petition, an application was filed by Vela and is about whether he should be granted leave to represent Nexus Capital in both the above petition and before the Federal Court of Canada.

To be granted leave as requested in his application, Vela must establish (1) that he has made reasonable efforts to cause the directors of Nexus Capital to commence a proceeding; (2) that he has given proper notice of this application; (3) that he is acting in good faith; and (4) that it is in the best interests of Nexus Capital for the proceeding to be prosecuted or defended.

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<sup>\*</sup> Lawyer and trade-mark agent, Catherine Daigle is a member of LEGER ROBIC RICHARD, L.L.P., a multidisciplinary firm of lawyers, and patent and trademark agents. Published in the World Trademark Report. Publication 293.057

To be considered as acting in good faith, Vela had to demonstrate that his application was primarily filed for the purposes of pursuing a claim on the company's behalf. In rendering her decision, the Court considered various factors, amongst which the existing disputes between the parties and alleged ulterior motives.

Bennett argued that Vela's primary motive in this application was in his own interests and not those of Nexus Capital. Indeed, it was pointed out that Vela would have some advantages before the Federal Court should the present application be granted. On the other side, and although he admitted having mixed motives for filing the application, Vela argued that it did not follow from the fact that he had an incidental personal interest that he was acting in bad faith.

In reaching its decision, the Court noted that if successful, the action for infringement initiated before the Federal Court would conclusively establish Nexus Capital's right to the use of the name "Nexus". Should Vela be granted leave to represent Nexus Capital, he would then have a tactical advantage in the Federal Court's litigation.

The Court also noted that Nexus Capital's benefit with regards to Vela's application was unclear and that his change in position as to whether Nexus Capital had rights in the "Nexus" name and logo raised question about his good faith in filing his application.

In light of the above, the Court found that Vela had not established that he was indeed acting in good faith, filing the application for its own interests instead of those of Nexus Capital. Vela's application was therefore dismissed.



