

Directors' Briefing

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TOP 10 CONTENTIOUS ISSUES IN THE BOARDROOM-PART 2

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Introduction

Contentious issues can arise at board and shareholders meetings. We have considered the top 10 contentious issues which directors may be faced with and how to address the issues if and when they arise. The first five issues were dealt with in the May 2014 issue of *Directors Briefing*. This article deals with the remaining five issues.

6. Dissent Votes

A director is often faced with a position put forward at a meeting with which he or she does not agree. That person should vote "NO" to the resolution and request that his or her dissent vote be recorded in the minutes. Failure to do so may lead to potential liability since the corporate legislation deem the director to have consented to the resolution if the dissent is not recorded in the minutes.

A director not present at a meeting is deemed to have consented unless, within seven days after becoming aware of the resolution, the director, causes his or her dissent to be placed within the minutes of the meeting.¹

An unusual situation could arise if a board consisted of five directors with three forming a quorum. If two were absent and the vote went 2 to 1 in favour of the resolution at the meeting, the resolution would pass. If the two absent directors requested their dissents be recorded afterwards, the question that arises is if this could make a difference in the vote. The fact is that, since the meeting was over, this would not affect the vote. Their dissent may, however, protect these two directors from liability.

7. Minutes of Meetings

Corporations are required to prepare and maintain records containing minutes of meetings and resolutions of directors. The minutes may be kept in a bound or loose-leaf book, or electronically. The corporation must take reasonable steps to prevent the loss or destruction, or the falsification, of the minute books.

Minute books are also admissible in court as proof of all the facts contained within in the absence of any evidence to the contrary.

Directors have the right to review all minutes of board meetings and under the *Canada Business Corporations Act*² ("CBCA") any shareholder may review that portion of the

minutes of meetings where a director has declared a conflict of interest, but otherwise do not have the right to review minutes of the board.³

Normally the minutes of directors' meetings are signed by both the chair and secretary of a meeting. There does not appear to be any legal requirement to approve minutes of a meeting at a subsequent one nor does there appear to be any obligation to have minutes signed to be valid. In one case, the court stated that the signatures of the chair and the secretary would strengthen the evidence in the sense that at least two persons who attended the meeting would be concurring on what took place. If minutes are signed, the person signing may not afterwards be able to claim an error was made.

A ruling in the *James Hardie Industries Limited*⁴ appeals handed down by the High Court of Australia has brought to the forefront the importance of maintaining accurate minutes of meetings of the board of directors.

In this case, the board approved a separation proposal which included the creation of a fund to compensate claimants in respect of asbestos related liabilities. This proposal was announced to the Australian Stock Exchange in a form that was later found to be misleading.

The draft announcement was distributed to the directors present at the board meeting prior to its release. There were significant errors in the minutes of the meeting, not only in relation to the order in which certain events took place, but also in the recording of certain recommendations made to the board. The directors argued that the minutes were drafted before the meeting actually took place.

Although the directors claimed that the minutes of the meetings were not accurate, the High Court concluded that the directors had approved the release of the announcement to the public and therefore had breached their duties.

These cases exemplify the importance of maintaining accurate minutes of meetings of the board, as it may not be possible to claim that an event occurred or a resolution was actually approved at a meeting if the minutes are inaccurately drafted.

Some considerations that directors should keep in mind at all times are the following:

- Prior to their approval, minutes should be critically and carefully reviewed by directors;
- The bases of directors' decisions at board meetings on crucial matters should be understood and noted in the minutes;
- Management should be clear as to whether it is providing documents for information only where no immediate action is required or seeking the directors' approval on a particular matter;
- The materials provided to the directors before and at the meeting should be carefully reviewed and included as attachments to the minutes.

8. Election of Directors and Appointment of Officers

Whether a for-profit or a not-for-profit corporation, the rules on election or appointment of directors are the same. The basic rule is that shareholder/members elect directors. However, where there is a vacancy on the board, the directors then in office may appoint a suitable replacement for the departed director to hold the office until the end of the term of the departing director. Under all Ontario and Canadian statutes where there is a minimum and maximum number provided for in the articles, the board can increase the number by up to one third, within the limits set out in the articles.

It should be noted that under section 23(4) of Ontario's *Not-for-Profit Corporations Act*,⁵ *ex officio* directors are permitted, but are not under Canada's *Not-for-profit Corporations Act*⁶ ("CNCA").

If however, there are not enough directors remaining on the board to constitute a quorum, a meeting of shareholder/members must be called for the purpose of electing new directors to the board.

9. Removal of Directors

In Canada, when a director is considered to be a problem because of misbehaviour, or where a faction of the board refuses to attend meetings and thereby frustrates a quorum, the available remedies are limited.

A special meeting of shareholders or members could be convened to remove the "dissident" directors and to replace them with more compatible ones. The current Ontario *Corporations Act*⁷ ("OCA") requires that the right to remove

directors to be set out in the Letters Patent or by-laws and requires a 2/3 majority of members (s. 67), otherwise a director cannot be removed during his or her term. The CBCA and OBCA provide that the removal is by a simple majority vote. The percentage of votes required for this purpose cannot be increased in the articles or by-laws. A resolution signed by all the shareholders would normally be binding. However, directors may not be removed by a resolution in writing, but only at a properly constituted meeting of the shareholders pursuant to section 123 of the OBCA and section 110 of the CBCA.

The operative words in the CBCA and OBCA are: "a director of a corporation is entitled to receive notice of and to attend and be heard at every meeting of shareholders".⁸

In *Kaiser v. Borillia Holdings Inc.*,⁹ the sole shareholder removed the sole director and admitted that he did not follow the requirements of the OBCA. He argued that the breach was technical because he would have removed the director in any event. The director was successful in his application for a determination that he was still a director because he was not removed in accordance with the Act. The Court so held even though it stated that it was fairly evidenced that the shareholder would remove the director as soon as he could.

If the director ceases to be qualified, for example, he or she is certified to be mentally incapable, becomes a bankrupt, or if the by-laws of a charity so provide, becomes an "ineligible individual" under the *Income Tax Act*,¹⁰ the director is automatically off the board.

Directors normally do not have the right to remove other directors as this is the role of the body that elected them. A recent case under the Ontario *Condominium Act*, 1998 has confirmed the right of the board to remove a director who has breached the code of ethics of the corporation.¹¹

10. Removal of Officers

Subject to any unanimous shareholder agreement, officers are normally appointed by directors. There are no provisions dealing with the removal of officers under corporate statutes. It has been assumed those who appointed the officers have the power to remove them.

Conclusion

This concludes this two part series on contentions issues in the boardroom. While the issues we addressed are not all of the issues that a director may encounter, they are some of the most prevalent issues which face seem to directors on a regular basis.

Notes:

¹ *Business Corporations Act*, RSO 1990, c. B.16, s. 135(3). ("OBCA").

² RSC 1985, c. C-44.

³ *Ibid.* at s. 120(6.1).

⁴ *ASIC v. Hellicar*, [2012] HCA 17 and *Shafron v. ASIC*, [2012] HCA 18.

⁵ SO 2010 c. 15. (Not expected to come into force until 2016.)

⁶ SC 2009, c. 23.

⁷ RSO 1990, c. C.38.

⁸ OBCA, s. 123(1) and CBCA, s. 110(1).

⁹ 2007 CanLII 18729 (ONSC).

¹⁰ RSC 1985, c. 1 (5th Supp.).

¹¹ *Gordon v. York Region Condominium Corporation No. 818, et al.*, 2014 ONCA 549 (CA).

RECENT CASES

Application To Set Aside Election of Corporate Directors Because of Alleged Proxy Tampering Dismissed

Ontario Superior Court of Justice, April 2, 2014

A non-profit condominium corporation (the "Corporation") administered a condominium complex with a high number of non-resident unit owners, which meant that most of the votes cast at directors' elections were cast by proxy. An election (the "Election") to fill two vacant positions on the Corporation's board of directors (the "Board") took place at the Corporation's Annual General Meeting ("AGM") on September 26, 2013. After counting the votes and declaring 135 of the tendered proxies invalid (through tampering and on other grounds) the Chair, Mr. Campbell, reported on October 1, 2013 that Gure and Gosal had been validly elected as directors. In a letter of November 25, 2013, he reported that a recount had been requested by the new Board, and that the results of the Election had been confirmed following a recount. Upon the subsequent receipt of new information, however, Mr. Campbell determined that there was a genuine possibility that multiple proxy forms had been improperly altered and counted during the Election. He therefore purported to "rescind" his October 1, 2013 findings regarding the validity of the Election, to "de-certify" the results of the Election, and to declare all proxy forms used at the Election to be invalid. Accordingly, in a letter of November 29, 2013, he stated that, because Gure and Gosal were seeking legal advice with respect to his letter of November 25, 2013, he was purporting to remove them from the Board and to require a new AGM to be held on January 3, 2014. The pre-September 26, 2013 Board then applied for an order setting aside the results of the Election (the "Khan Application"), and the newly elected Board applied for an order upholding the results of the Election (the "Gosal Application"). No unsuccessful candidate at the meeting of September 26, 2013, however, attempted to set aside the Election, and no person that had delivered a proxy for that meeting raised any complaints about any alleged use/misuse of such proxy.

The Khan Application was dismissed; the Gosal Application was allowed. The chair of a condominium owners' meeting must enforce the rules of order and make rulings on such matters as the validity of proxies. If the chair acts in good faith, reasonably, and in accordance with the law, courts will uphold that chair's rulings (see *Davis v. Peel Condominium Corporation No. 22*, 2013 ONSC 3367, and *Hastman v. St. Elias Mines Ltd.*, 2013 BCSC 1069). In addition, objections to the acceptance or rejection of proxies must be made at the meeting, or the party objecting may be deemed to have waived any irregularity. Furthermore, the burden of proof is on those seeking to have proxies declared invalid (see *Nathan's Company Meetings for Share Capital and Non-share Capital Corporations*, 10th Edition, pp. 81–85). In the present proceedings, therefore, Mr. Campbell made a legal error in undertaking a recount seven weeks after the Election, and in purporting to de-certify that Election. In undertaking the recount, Mr. Campbell merely became an unwitting pawn in a power struggle to control the Board. His decision to invalidate all of the proxies used at the Election, moreover, was equally without legal foundation. Proxies are *prima facie* valid and those appearing to bear an amendment are certainly not automatically improper. Similarly, his attempt to remove Gure and Gosal from the Board was both beyond his jurisdiction and based on an entirely erroneous consideration, i.e., Gure's and Gosal's decision to obtain legal advice. Also, the allegations concerning proxy tampering raised in the Khan Application were not proved.

YCC No. 42 v. Gosal et al.

Former Corporate Director's Claim for Negligent Misrepresentation Against Fellow Directors Statute-Barred

Ontario Court of Appeal, May 12, 2014

The appellant, a former director and chairman of the board of the corporate respondent, Echo Energy Canada Inc. ("Echo"), invested in shares of Echo through a private placement. The investment became worthless, and a receiver was appointed over Echo's assets. The appellant sued the other respondents (three former directors of Echo, its former chief financial officer, and its former engineering consultant) for damages for negligent misrepresentation, and moved for summary judgment. Three respondents brought a cross-motion dismissing the appellant's claim as being statute-barred. One respondent sought judgment by way of cross-motion based on the Court's inherent jurisdiction. The motion judge:

(a) dismissed the appellant's motion for summary judgment on the ground that there were genuine issues requiring a trial; and (b) granted the respondents' cross-motions dismissing the appellant's action with respect to all but one of his claims on the basis of the *Limitations Act*, and, in the alternative, on the basis of the Court's inherent jurisdiction to grant summary judgment. The appellant appealed.

The appeal was dismissed. The appellant was aware of all the material facts underlying his misrepresentation claims more than two years before they were made in his amended statement of claim. Hence, his action was statute-barred. The issue of whether a director can owe a duty to other directors, however, was one that did warrant consideration, but in a case where the matter had been squarely raised and argued. The motion judge's findings were affirmed accordingly.

Fuda v. Jim McIntosh Petroleum Engineering Ltd.

Defendant Held To Be Shareholder and Director of Corporation After Her Dismissal as CFO

Ontario Superior Court of Justice, June 6, 2014

The defendant, Toulia Sotirakos ("Sotirakos"), was a shareholder, director, and the Chief Financial Officer of the corporate plaintiff FlexITy Solutions Inc. ("FlexITy"). Sotirakos was dismissed without cause by FlexITy at a time when she and a certain family trust (the "Trust") owned eight per cent of the Class A Shares of FlexITy. Under the terms of a unanimous shareholders' agreement (the "USA"), Sotirakos could be dismissed without cause. In that case, provision was made in the USA for FlexITy's other shareholders to exercise an option to purchase her shares and the shares of the Trust, and for Sotirakos to resign as a director. The remaining shareholders of FlexITy exercised their option to acquire the Class A Shares owned by Sotirakos and the Trust, but the transaction did not close because of ongoing disputes between the parties. During the course of proceedings, Sotirakos moved for an order making certain declarations with respect to her ongoing status as a shareholder and director of FlexITy. FlexITy brought a cross-motion seeking declarations that Sotirakos had ceased to be one of its directors, and that she and the Trust were no longer holders of its Class A Shares.

Sotirakos' motion was granted and FlexITy's motion was dismissed. The delivery by FlexITy's remaining shareholders of their notice exercising their option to acquire the Class A Shares owned by Sotirakos and the Trust did not cause the latter to cease to be FlexITy shareholders, nor did it result in Sotirakos ceasing to be a director of FlexITy. A plain reading of the relevant provisions in the USA led to the conclusion that: (a) Sotirakos and the Trust should remain as shareholders of FlexITy until the sale of their shares to the remaining shareholders closed; and (b) Sotirakos should remain as a director of FlexITy until that time. Declarations to this effect were made accordingly. In addition, FlexITy was ordered to comply with the disclosure provisions of section 20 of the *Canada Business Corporations Act* by providing Sotirakos with copies of its financial statements for the relevant periods.

FlexITy Solutions Inc. v. Sotirakos

Action by Plaintiff Landlord Against Director of Corporation Based on Agency and Piercing Corporate Veil Dismissed on Summary Judgment

Supreme Court of Nova Scotia, June 18, 2014

The defendant Michael D. Sutton ("Mr. Sutton") was a director, officer, and authorized agent, but not a shareholder, of the corporate defendants Sutton Holdings and The Physio Clinic Ltd. ("TPL"). Sutton Holdings was a property holding company, and TPL was a corporation formed upon the amalgamation in 2006 of a number of individual physiotherapy operating corporations collectively referred to as "Woodlawn". In 1995, Woodlawn had entered into a long-term lease of premises in a shopping centre with the corporate plaintiff (the "Lease"), but vacated the premises in 2011 allegedly because of the plaintiff's failure to fulfill its obligations under the Lease. The plaintiff sued TPL for breach of the Lease and included Mr. Sutton and Sutton Holdings in the proceedings as party defendants. Relying on the law of agency and on the doctrine of piercing the corporate veil, the plaintiff alleged that Mr. Sutton was the controlling mind of both Sutton Holdings and TPL, and was therefore personally liable for their actions. Accordingly, the plaintiff pleaded that Sutton Holdings and Mr. Sutton: (a) committed the tort of conspiracy by transferring TPL/Woodlawn's business from

the original leased premises to a new location owned by Sutton Holdings, thereby leaving TPL insolvent and unable to pay rent to the plaintiff; (b) breached the *Assignments and Preferences Act* and the *Statute of 13 Elizabeth* 1571 (Eng.) 13 Eliz. 1 c. 5, by rendering TPL insolvent through the above-mentioned transfer of TPL/Woodlawn's business; and (c) intentionally interfered with economic relations between the plaintiff as landlord and TPL/Woodlawn as tenant by causing the latter to breach its obligations to the plaintiff under the Lease. Alleging that the plaintiff's dispute was only between the parties to the Lease (i.e., the plaintiff and TPL/Woodlawn), the defendants, Mr. Sutton and Sutton Holdings, moved for summary judgment removing them as parties to the proceedings.

The motion was granted. To succeed in this case, the defendants had to show, on the undisputed material facts that, *prima facie*, the plaintiff did not have a valid claim against them (see *MacNeil v. Bethune*, 2006 NSCA 21), and that their defence had a real chance of success (see *Burton Canada Company v. Coady*, 2013 NSCA 95). In addition, the corporate veil may be pierced where a corporation is a mere agent or puppet of a shareholder (see *Globex Foreign Exchange Corporation v. Launt*, 2011 NSCA 67). Courts have, moreover, pierced the corporate veil where failure to do so would be unfair and flagrantly opposed to justice, where representations have been made or activities have been undertaken for a fraudulent or illegal purpose, and where the corporation is merely acting as the controlling shareholder's agent (see *Le Car GmbH v. Dusty Roads Holdings Ltd.*, [2004] N.S.J. No. 140 (S.C.)). In the present proceedings, however, there was no evidence to indicate that the defendants had agreed and combined to act unlawfully, or that Mr. Sutton, either by way of agency or controlling mind, had caused either TPL/Woodlawn or Sutton Holdings to act against the plaintiff in the way that it had alleged. Nor was there any direct evidence that TPL was insolvent at any relevant time or that there had been any transfer of property for the purpose of delaying or prejudicing creditors. In addition, there was no direct evidence that Mr. Sutton or Sutton Holdings had unlawfully interfered with the contractual relationship between the plaintiff and TPL. The plaintiff's pleadings respecting the tort of conspiracy, the alleged breach of the preference statutes, and the tort of economic interference, therefore, failed, on the evidence adduced, to raise any genuine issue for trial. Hence, summary judgment dismissing the action against Mr. Sutton and Sutton Holdings was justified.

4187440 Canada Inc. v. The Physio Clinic Ltd.

Derivative Action Against Corporate Director and Others Based on Alleged Breach of Fiduciary Duty Dismissed on Summary Judgment

Supreme Court of British Columbia, July 23, 2014

The corporate plaintiff, Briere Sound Ltd. ("BSL"), was incorporated by the defendant Mr. Briere in 1997. In 1998, Mr. Reis purchased a one-half interest in BSL, and he and Mr. Briere ran it essentially as a partnership. On September 18, 2005, one of BSL's secured creditors, a credit union, proceeded to realize on its security and to have a receiver appointed. During September 2005, however, Mr. Briere instructed the defendant law corporation ("Morrison") to: (a) incorporate 736524 (that later became known as "BPG"), which was owned by Mr. Briere's father; and (b) incorporate 734540 (whose sole shareholder and director was the uncle of Mr. Briere's wife). BSL's assets were assigned to 734540 and a new receiver was appointed. At the end of 2005, BPG (formerly 736524) acquired what had been BSL's assets for \$180,000 at a public auction. On May 19, 2006, Mr. Reis applied for leave to commence a derivative action on BSL's behalf against Mr. Briere, Morrison, BPG, and a number of other defendants who, in Mr. Reis's opinion, had allegedly been involved in Mr. Briere's acquisition of a secured debt against BSL through BPG. In particular, the allegations were, in part, that: (a) Mr. Briere, in breach of his fiduciary duty as a director of BSL, arranged indirectly to acquire the security being held by the credit union against the debt owed by BSL; (b) BPG was carrying on BSL's former business; and (c) BSL was therefore entitled to equitable damages or an accounting of profits from Mr. Briere. In granting Mr. Reis's application, the Court concluded, in part, that he was acting in good faith, the proposed derivative action was not "bound to fail", and it was thus in BSL's best interests for it to go forward. On June 17, 2005, Mr. Reis commenced an oppression action against BSL and Mr. Briere. On March 18, 2011, the parties settled the oppression action. As a result, Mr. Reis received \$150,000 for his shares of BSL, and resigned as an officer and director, although his shareholder loan in the amount of \$130,000 remained outstanding. In the continuing course of the derivative proceedings, Mr. Briere applied for an order disqualifying Mr. Reis from having conduct of the action, and all of the defendants applied for an order summarily dismissing the action in its entirety.

Mr. Briere's application was dismissed, and the defendants' application was granted. This case was suitable for summary

trial, inasmuch as the facts necessary to resolve the factual and legal issues were before the Court. In addition, a fiduciary duty includes the duty of loyalty, which is the obligation to put the plaintiff's interests above all others (see *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411). Also, section 34 of the *Law and Equity Act* provides that a guarantor who pays the debt of another is entitled to have assigned to him/her the security that is held by that party's creditor. Applying the foregoing principles to the present proceedings led to the following analysis. Mr. Briere and his father took steps to acquire BSL's assets whereas Mr. Reis did not. Once BSL entered receivership, it was incapable of carrying on business as the credit union had seized the cash in its operating account. Mr. Briere's duties as a director and shareholder of BSL, moreover, did not extend to a duty to rescue BSL from receivership, and there was no evidence that BPG collected any of BSL's receivables. In addition, there was nothing to prevent Mr. Briere from establishing a new business in the same industry as the one in which BSL was operating, and the evidence did not support Mr. Reis's contention that Mr. Briere had breached any fiduciary duty owed by him to BSL by doing this. Nor was Mr. Reis able to prove damages, since there was no evidence that the sale of BSL's assets at a public auction would have generated anything in excess of the \$180,000 that was actually obtained for them. In the absence of any breach of fiduciary duty owed by Mr. Briere to BSL, the related claims against the other defendants for having knowingly assisted Mr. Briere to commit such a breach also had to be dismissed.

Briere Sound Ltd. v. Briere

Defendant Solicitor Holding Corporate Shares in Trust for Plaintiff Liable to Plaintiff for Damages for Breach of Fiduciary Duty

Alberta Court of Queens Bench, August 13, 2014

John Boreta was the plaintiff's brother and his business associate. The plaintiff was a shareholder of two corporations, Primrose Drilling Ventures Ltd. ("Primrose") and Aries Services Ltd. ("Aries"). The defendant, Edd McRory, a solicitor, was the nominal owner of 93 per cent of the shares of Primrose and of 100 per cent of the shares of Aries, as well as a director and the president of both corporations. He had executed a declaration of trust under which he held 93 per cent of the shares of Primrose and 100 per cent of the shares of Aries in trust for the plaintiff. The remaining 7 per cent of the shares of Primrose were held by Aries. John Boreta instructed the defendant to reflect in Primrose's corporate minutes that Primrose had issued treasury shares to Hamid Jafar in return for Hamid Jafar having provided substantial financing to Primrose. As a result, Hamid Jafar became the holder of 51 per cent of Primrose's shares, and the plaintiff's beneficial share ownership in Primrose was significantly diluted without his consent, since neither the defendant nor John Boreta had consulted him prior to Primrose's issuance of its treasury shares to Hamid Jafar. The plaintiff sued the defendant and others for damages for breach of trust. The allegations were, in part, that: (a) under the terms of a verbal agreement both the plaintiff and John Boreta would always hold a 50 per cent beneficial ownership interest in Primrose; (b) John Boreta would manage Primrose's business; (c) the plaintiff and the bank would be Primrose's only lenders; and (d) the plaintiff's loans to Primrose would be paid back in priority to all of its debts except for amounts owing to the bank. The plaintiff's actions against the defendants, other than Edd McRory, were settled, and as part of that settlement, he sold a 49 per cent interest in Primrose to Primrose itself, leaving him with a 1 per cent interest in Primrose, and leaving John Boreta with a 50 per cent interest.

The action was allowed in part. It was clear that the plaintiff was content to be a silent investor in Primrose and to let John Boreta run all aspects of its operations. From the outset, John Boreta masked his equity interest in Primrose, placing all of its shares in the defendant's name in trust for the plaintiff as the sole beneficiary of such trust. The plaintiff knew that John Boreta had arranged for 7 per cent of Primrose's shares to be held for a person employed by a bank, in return for that bank granting Primrose favourable financing, which was totally improper. John Boreta did not divulge this arrangement to the defendant, nor did he tell the plaintiff about Hamid Jafar's involvement with Primrose as a financier and shareholder. However, the defendant did not provide legal advice to the plaintiff at any time, and the plaintiff always understood that the defendant was acting as Primrose's corporate solicitor. Hence, his allegations that the defendant breached any duty to him in the defendant's capacity as a solicitor were unfounded. Corporate directors and officers, however, do owe a duty to the corporation, and the long-standing rule in *Foss v. Harbottle* is that a suit for breach of these duties must be brought by the corporation. As a shareholder, the plaintiff was entitled to institute proceedings directly against the defendant as a director of Primrose and Aries under the general remedial provisions of section 242 of the Alberta Business Corporations Act. Despite the defendant's arguments to the contrary, his actions diluted the plaintiff's interest in Primrose without any effort to inform the plaintiff, and thus breached his

fiduciary duty to the plaintiff as a director of Primrose and as a trustee of the plaintiff's shares of Primrose, by unfairly disregarding the plaintiff's interests. The issuance of the Primrose treasury shares to Hamid Jafar, moreover, was not concluded until June 1996, and this fact was not reasonably discoverable by the plaintiff until July 15, 2005. His action against the defendant brought on March 13, 2006 was, therefore, within the two-year limitation period in section 3(1)(a) of the Alberta *Limitations Act*, as well as within the ultimate 10-year limitation provided in section 3(1)(b) of that Act. Hence, the plaintiff was entitled to damages of \$109,500, which represented the mid-range value of his 1 per cent interest in Primrose, which had become unsaleable.

Boreta Estate v. McRory

Certain Meetings Organized by Society Held Not to be Valid General Meetings

Supreme Court of British Columbia, August 22, 2014

The petitioner, the Riley Park Hillcrest Community Association, was a society (the "Society") incorporated under the *Society Act* (the "Act") for the purpose of providing the Riley Park Community with recreational and other services. The respondents were various members of the Society. The Society and the City of Vancouver Board of Parks and Recreation (the "Park Board") jointly operated the Hillcrest Centre. A dispute developed between two groups of Society members as both groups claimed to be duly elected directors of the Society. Two of the Society's directors (Mr. Johl and Mr. Constant) applied, in the name of the Society, for: (a) a declaration that meetings of the Society held on April 17, 2014, April 24, 2014, and June 26, 2014 were not valid meetings; (b) a declaration that a notice of change of directors issued after the June 26, 2014 meeting was improperly filed with the BC Registrar of Companies; and (c) an order restraining the respondents from holding themselves out as directors of the Society.

The application was granted. Mr. Johl, along with the Society and four of the named respondents who were challenging their removal as directors, reached an agreement to postpone until sometime in September 2014 the annual general meeting that had been called for April 17, 2014. They posted a notice to this effect on the Society's Web site, although the Society's by-laws contained no provision expressly granting its directors the power to cancel a general meeting after it has been called. However, directors who are given residual powers in a corporation's articles or by-laws have the power to postpone a general meeting as part of their power to manage the business of the corporation, in the absence of any improper purpose or bad faith on their part (see *Northern Minerals Investment Corp. v. Mundoro Capital Inc.*, 2012 BCSC 1090). In the present proceedings, the Society's directors had all the residual powers under its by-laws, and there was no evidence that they acted improperly or in bad faith. Hence, they were entitled to postpone the general meeting called for April 17, 2014, and they did this properly by publishing notice of such postponement on the Society's Web site. Hence, the actual meeting held by 10 individuals (including some of the respondents) on April 17, 2014 was not a valid annual general meeting of the Society. Nor were the meetings held on April 24, 2014, and on June 26, 2014 valid, since they purported to be reconvened meetings of the invalid annual general meeting which was held on April 17, 2014. The meeting of June 26, 2014 purported to be a valid extraordinary general meeting requisitioned pursuant to section 68 of the Act. However, the requisitionists were not authorized to call an extraordinary general meeting before June 24, 2014. By purporting to call such a meeting on June 11, 2014, and by holding the meeting on June 26, 2014, they acted in breach of section 58(4) and section 60 of the Act. In addition, they did not give proper notice of the June 26, 2014 meeting under section 60 of the Act. These directors simply posted a notification of it on a community bulletin board (despite their past practice in using this method and despite the Society's bylaw number 64(2) which sanctioned this practice). Section 60 requires written notice of a society's general meetings to be given to members entitled to receive it, and using bulletin boards or newspapers with small circulations is not adequate in this context (see *Grewal v. Guru Nanak Sikh Gurdwara Society*, 2012 BCSC 131, affirmed 2012 BCCA 430). The Society's By-law 64(2) was thus inconsistent with section 60 of the Act, and hence, was *ultra vires*. The June 26, 2014 meeting was, therefore, not validly requisitioned. The Society also failed to maintain a register of members in breach of section 70 of the Act, and a directors' resolution passed by the Society's board to no longer accept memberships being sold by the Park Board was in breach of the Society's By-law 37, since such resolution did not have the requisite agreement of two-thirds of the Society's directors. Faced with all of the foregoing irregularities, the Court's obligation in exercising its supervisory jurisdiction over incorporated societies under section 85 of the Act was to ensure that the Society continued to operate and that the rights of the Society's members under its by-laws be upheld (see *Kwantlen University College Student Association v. Canadian Federation of Students — British Columbia*

Component, 2011 BCCA 133). The Court, therefore, made a number of orders and declarations. These included declarations that: (a) the Society's meetings of April 17, 2014, April 24, 2014, and June 26, 2014 were not validly held; and (b) the notice of change of the Society's directors filed after the meeting of June 26, 2014 was not properly filed. Among other things, the Court also: (a) struck the Society's by-law 64(2) as being *ultra vires*; (b) set aside the Society's directors' resolution of July 11, 2014 prohibiting the further sale of memberships by the Park Board; (c) ordered the Society to hold an annual general meeting in accordance with its by-laws on or before October 30, 2014 on at least 14 days' notice, and to elect a full slate of directors at that meeting; (d) confirmed an interim board of directors including Mr. Johl, Mr. Constant, and some of the respondents; (e) authorized the continuing sale by the Park Board of Society memberships, subject to a legally valid directors' resolution revoking such authorization; and (f) ordered the Society's directors to create and maintain a register of members in compliance with section 70 of the Act.

Riley Park Hillcrest Community Association v. Waterston

In Proceedings by Corporation Against a Former Director for Breach of Fiduciary Duty, Director Not Entitled to Order for Security for Costs

Supreme Court of British Columbia, August 25, 2014

Collins had been a shareholder, director, and officer of the plaintiff, WestCorp Solutions Ltd. ("WestCorp"), but ceased holding these positions following the settlement of oppression proceedings involving himself and another shareholder/director of WestCorp. WestCorp subsequently sued Collins and other defendants for damages flowing from its allegation that the defendants, including Collins, had wrongfully commenced doing active business (through the corporate defendant PSE Project Management Services Inc.) with another corporation, Nexen Inc. ("Nexen"), with which WestCorp itself had had a contract. According to WestCorp, Collins engaged in the exploitation of this contract opportunity with Nexen while he was still a director and officer of WestCorp, thereby breaching his fiduciary duties to WestCorp. In the course of these proceedings, Collins applied for an order for security for costs. WestCorp's position was that: (a) Collins did not make out a *prima facie* case that WestCorp would be unable to pay his costs if its claim against him were to fail; (b) WestCorp's action against Collins had merit, and Collins had no arguable defence; and (c) Collins' application was intended to delay or frustrate the litigation process.

The application was dismissed. In security for costs proceedings, the first stage of the legal test is the requirement that the applicant make out a *prima facie* case that the respondent would be unable to pay the applicant's costs if the respondent's claim fails. If the applicant meets this requirement, the respondent may resist an order for security for costs by showing that it has sufficient exigible assets to satisfy an award of costs. Finally, the respondent can resist an order for security for costs if it can show there is no arguable defence to its claim (see *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2009 BCSC 965). In the present proceedings, WestCorp did not use a line of credit, it was not indebted to the bank (except for a \$24,000 car loan), it never had any claims against it for unpaid debt, and it had been profitable since its incorporation. Not only did WestCorp produce convincing evidence of its solvency, but Collins' evidence did not even remotely establish that WestCorp was insolvent, or that funds to pay his costs would not be available if WestCorp's claim were to fail. These findings were sufficient to justify declining Collins' application and obviated the necessity for analysing the other arguments put forward by WestCorp.

WestCorp Solutions Ltd. v. Collins

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