Directors' Briefing

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MINUTES OF DIRECTORS' MEETINGS AND THE DUAL ROLE OF GENERAL COUNSEL AND SECRETARY: SOME ISSUES

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The rulings in the James Hardie Industries Limited ("James Hardie") appeals were handed down by the High Court of Australia on May 3, 2012.[2] These cases highlight two important issues. First, the need to prepare accurate minutes of board meetings, and secondly, the duty and possible liability of a lawyer who holds the dual office of general counsel and secretary of a corporation.

Minutes of Directors' Meetings

In February 2001, the board of James Hardie 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 ("ASX") in a form that was later found to be misleading with regard to the sufficiency of the funds available to finance present and future asbestos-related claims.

The draft announcement was distributed to the directors present at the board meeting prior to its release. The board considered this announcement and was found to have approved it for 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 minutes were drafted before the meeting actually took place.

The High Court concluded that the directors had breached their duties and, in effect, created a higher standard of care for directors to ensure that they take necessary steps to make sure of the validity of information before making decisions or issuing statements to the public.

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. The directors here asserted that the minutes were inaccurate and that the announcement presented to the board was later amended and was never approved by the board. However, the minutes of the meeting never reflected such assertions, and their approval by the board at the later meeting validated them.

The High Court found the directors liable for releasing misleading information.

If the directors of James Hardie had reviewed the minutes, they would have noticed the ASX announcement entry, and could have amended the minutes before approving them, thereby avoiding the entire litigation. Several lessons can be learned from the decision in the *James Hardie* cases. 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 where no immediate action is required, or seeking the directors' approval on a particular matter; and
- the materials provided to the directors before and at the meeting should be carefully reviewed and included as attachments to the minutes.

It is possible that in a similar case, Canadian courts would be influenced by the ruling in the *James Hardie* cases and hold directors to a higher standard of care. Therefore, it is important that directors take into consideration the points outlined above and adhere to them at board meetings.

The Lawyer as General Counsel and Secretary

In addition to the ruling on directors' liability, the High Court also considered the role of a company officer wearing two hats. In this case, Mr. Shafron occupied the dual role of general counsel and secretary of James Hardie. The Australian Securities and Investments Commission brought a claim against Shafron for, among other things, failing to advise the James Hardie board that the draft ASX announcement was expressed in terms that were misleading and about the limitations associated with the financial modelling of the asbestos compensation fund.

The Court ruled Shafron's responsibilities as general counsel and secretary extended to providing advice about how duties of disclosure should be met. It held, by unanimous decision, that Shafron could not divide his responsibilities as between general counsel and secretary, and that they must be viewed as a composite whole. The scope of the responsibilities of a particular officer is to be determined by an examination of all of the tasks in fact performed for that corporation by that officer.

Historically, the role of the secretary has been viewed by the courts as a purely administrative position.[3] The distinction between the Canadian jurisprudence and the *James Hardie* cases is the fact that the High Court found, that where the secretary of the corporation also holds the position of general counsel, that person cannot separate his or her roles and responsibilities. As noted, the Court found that the entirety of the person's roles will be looked at when determining the liability and duty of care that the individual owes to the corporation. Therefore, from a practical perspective, it may be prudent for corporations to assign the roles of secretary and general counsel to two separate individuals.

While the Ontario *Business Corporations Act* ("OBCA") does not include a general counsel in the definition of an "officer" of a corporation, the *Canada Business Corporations Act* ("CBCA") does refer to the "general counsel" in the definition of an "officer". The *James Hardie* cases may have a significant influence on the Canadian courts if a similar situation were to arise. This is especially true in the case of a CBCA corporation; however, a general counsel of an Ontario corporation, governed by the OBCA, may be found to be an officer of the corporation if the courts adopt the interpretation of the High Court in the *James Hardie* cases.

Notes:

[1] The writer wishes to express his appreciation to Ira Stuchberry, articling student at Minden Gross LLP, for her assistance in the preparation of this article.
For a further discussion of the requirements of minutes of board meetings, please refer to the article entitled "Minutes and Notes of Board Meetings" by Hartley R. Nathan in the May 2012 issue (No. 52) of the *Directors' Briefing*.

[2] *ASIC v. Hellicar & Ors* [2012] HCA 17; *Shafron v. ASIC* [2012] HCA 18; ["*James Hardie* cases"].

[3] *Gordelli Management Ltd. v. Turk* (1991), 6 OR (3d) 521 (Gen. Div.).

RECENT CASES

Assignee of Shares Entitled To Pursue Oppression Action Initiated by Previous Owner

Ontario Court of Appeal, June 15, 2012

The respondent, Steam Sauna, was a closely held two-shareholder corporation which manufactured sauna equipment. Sao Nam Kam ("Kam") was the original minority shareholder of the corporation. He alleged that the majority shareholder, Jeffrey Ma, and the corporation had failed to pay monies which were owed to him as a shareholder, and so brought an action for oppression. However, Kam was, because of ill health, unable to attend for examinations held in connection with that action, eventually moving to China. In January 2009, Kam made an absolute assignment in writing to the appellant, Ying Ma ("Ma"), of his shares, his contractual rights in respect of those shares, and his oppression claim. Ma then obtained an order to continue from the Registrar of the Superior Court and brought a motion to amend the statement of claim in the oppression action. The motions judge held that the assignment was to transfer the cause of action for oppression was invalid and that decision was upheld by the Divisional Court on appeal. A further appeal was then taken to the Court of Appeal.

The appeal was allowed. The sole issue on the appeal was whether Ma was permitted to sue the respondents in an oppression action where the original minority shareholder, Kam, assigned to Ma his shares, his contractual rights in respect of those shares, and the oppression action itself. The appellate Court concluded that the assignment of the shares together with the cause of action was valid and that the assignee was therefore entitled to proceed with the oppression action.

The Court reviewed the jurisprudence considering the validity of assignments of causes of action. It provided two exceptions to the rule against champerty and maintenance that prohibit the assignment of causes of action. The first allows a cause of action to be assigned where it is ancillary to a property interest that has also been assigned. In such cases, there is no requirement that the property right or interest would have to pre-exist the transfer in order for the assignee to enforce the ancillary cause of action. The second category allows a cause of action to be assigned where the assignee has a genuine commercial interest in taking the assignment. In the Court of Appeal's view, the question of whether a cause of action can be assigned and enforced turns on whether the enforcement action "savours of maintenance". The Court concluded that, provided the assignee has a legitimate interest in the action by falling under either of the two exceptions outlined in the jurisprudence, and cannot be viewed as an "officious intermeddler" with an improper motive, the trend in the jurisprudence is to find that the assignee is able to enforce the action.

It was then concluded that, on the facts of the case, Ma was assigned the property rights in the shares, and was assigned the cause of action at issue as an incident of those property rights. Thus, the first exception to the rule was met. The final question for determination was whether Ma was entitled to bring an action in respect of alleged oppression which occurred prior to the assignment of shares. The motions judge had held that principles outlined in the jurisprudence precluded such a claim, but the appellate Court determined that such principles had not been properly applied. In its view, such principles should apply to shares of a publicly traded company which had been purchased on the open market and for which no other assignment of rights had occurred. In this case, the agreement which gave rise to the property interest in the shares and the attendant cause of action were transferred for $1. On purchasing the shares, Ma assumed the risk of the litigation and there was no double recovery or windfall involved.

Ma v. Ma

Holding of Shareholders' Meeting Ordered and Powers of Existing Partial Board of Directors Restricted

Ontario Superior Court, June 17, 2012

Cathay Forest Products Corp. ("Cathay") was a corporation incorporated under the *Canada Business Corporations Act* (the "Act"). The applicant, Goodwood Inc. ("Goodwood"), was a shareholder of Cathay. Goodwood brought an application alleging that the corporate affairs of Cathay were in disarray and that requests made by shareholders to bring the corporation into compliance with its statutory obligations had not been met. Goodwood sought orders directing the holding of a shareholders' meeting, requiring Cathay to comply with certain corporate governance and reporting obligations, and restraining Cathay from transacting certain types of business without court approval prior to the constitution of a new Board of Directors.

The application was granted. The Court began by reviewing a series of events which had taken place since June 2010. It concluded that the directors of Cathay were in breach of their duties to call an annual meeting of shareholders, that Cathay had failed to comply with its continuous disclosure obligation in respect of financial information, and that no quorum currently existed for Cathay's Board of Directors. As well, the current directors had failed to discharge their duties under the Act with respect to the calling of a shareholders' meeting to elect directors to fill the vacancies on the Board, even though such a meeting had been requested by the shareholders. Further, the Court held that the current chair of the Board of Directors regarded this request as "bad faith" conduct on the part of the shareholders. Finally, the Court noted that, notwithstanding the lack of quorum on the Board, the current directors had purported to continue to exercise their duties as directors.

Having determined that the affairs of Cathay were in significant disarray, the Court considered how to remedy those deficiencies. The Court noted that the general rule is that a court should be reluctant to call a meeting where the shareholders have not utilized the procedure to requisition such a meeting under the governing statute. However, the Court held that the facts before it represented one of the "extraordinary circumstances" where it was appropriate to order the holding of such a meeting. In reaching that conclusion, the Court noted the dysfunctional state of corporate affairs and the fact that statements made and actions taken by the members of the existing Board of Directors indicated a profound misunderstanding of their corporate governance duties. Such facts pointed to a need for court supervision. An order was issued requiring the holding of a shareholders' meeting and providing directions for the conduct of the meeting.

The Court then held it was appropriate to restrict the powers of the current directors. The jurisprudence stated that the remedial powers possessed by the Court in this area were broad, but the remedy to the non-compliance in issue must be both reasonably required in relation to the restraining or compliance order, and proportional to the character of the breach. In this case, the Court held that the evidence indicated that the existing directors of the company intended to continue to exercise their powers notwithstanding the lack of quorum. As a result, the Court determined that the appropriate remedy was an order restricting the powers of the directors to those outlined in the Act in the circumstances, being the right to call a special meeting of shareholders to remedy the lack of quorum. To ensure that the meeting would be meaningful, as well as to bring certainty to the affairs of the company, the Court also ordered the appointment of a temporary receiver to supervise the affairs of the company until a full Board of Directors was elected.

Goodwood Inc. v. Cathay Forest Products Corp.

Director of Non-Share Capital Corporation Not Entitled To Withdraw Resignation Without Consent of Governing Council

Ontario Superior Court, June 28, 2012

The applicant, J. David Adams ("Adams"), was President of the Association of Professional Engineers Ontario ("PEO"), a self-governing body established pursuant to the *Professional Engineers Act* and charged with regulating the engineering profession in Ontario. The Council of PEO was charged with governing and managing the administrative affairs of the organization. In March 2012, as a result of disputes internal to the Council, one of the council members, Dr. Michael Hogan ("Hogan"), sent an email to all Council members advising them that he was resigning from the Council, with his resignation to take effect immediately. The next day, Hogan sent an email to the Council stating that his resignation would not be effective until PEO's next general meeting in May 2012. Finally, eight days later, Hogan sent a further email retracting his resignation from the Council and indicating that he would stay on. The matter of Hogan's resignation was discussed at the next meeting of the Council. At that meeting, a motion was brought to accept Hogan's resignation and the motion passed. An application for judicial review of the decision by the Council to accept Hogan's resignation was then brought. Adams submitted that it was not open to the Council to accept Hogan's resignation as such resignation had been withdrawn and that the Council had no authority to remove a sitting member of the Council.

The application was dismissed. The Court reviewed the rules respecting director resignations in Ontario's two primary corporate statutes. The Ontario *Business Corporations Act* ("OBCA") provided that a director's resignation becomes effective at the time a written resignation is received by the corporation or at the time specified in the resignation, whichever is later, but the *Corporations Act* did not contain a parallel provision. Following a review of the jurisprudence, the Court held that, under common law, in terms of the resignation of a director from a share capital corporation, such resignation did not have to be accepted to be effective, and could not be withdrawn without the consent of the corporation. The balance of jurisprudential authority, in the Court's view, was that the resignation of a director is valid without being accepted.

The Court held that the rationale for such finding was twofold. First, such practice creates certainty for the director as to when the period for any liability he or she might have exposure to has ended and, second, a corporation is not in a position to refuse the director's resignation and force him or her to stay on. As well, if effective resignations could be delivered and then revoked at will by directors, uncertainty and confusion for both the corporation and the remaining directors would result. Adams had argued that the public nature of the duties held by the directors of corporations without share capital necessitated or justified a different approach. However, the Court held that the cases put forward by Adams in support of that position did not support a departure from the general rule. The Court concluded that there was no principled reason why the general rule should not apply. Members of the Council, like the directors of other corporations, should be able to effectively resign from the Council without needing to have their resignations accepted. Hogan had unequivocally resigned from the Council and could not withdraw that resignation without the consent of the Council. Finally, although the the Council may have had a practice of accepting resignations, there was no need for them to do so. Hogan's resignation was valid and effective and the Council was entitled to act on it.

Adams v. Association of Professional Engineers of Ontario

Rectification of Corporate Records Refused Where Records Accurately Reflect Intentions of Parties

Nova Scotia Supreme Court, June 11, 2012

FNF Canada Company ("FNF") was incorporated in July 2003 as an unlimited liability company and had operated as such since that time. No advice was received at the time of incorporation with respect to the capitalization of the company under Canadian law. Shortly after it was incorporated, FNF had purchased the assets and liabilities of a Canadian company for cash with funding provided by Fidelity National Financial Inc. ("Fidelity"). Fidelity, FNF, and Chicago Title Insurance Company were all part of the same family of companies, and Fidelity was, directly and indirectly, the holder of all issued and outstanding shares of Chicago Title Insurance Company. In the years between 2003 and 2008, significant investments were made in FNF by Fidelity. However, throughout that time, Chicago Title Insurance Company held all the shares in FNF (after having purchased the shares from Chicago Title & Trust Company, a related company).

In its 2006 income tax return, FNF reported imputed income amounts concerning accounts receivable from Fidelity, but those imputed income amounts were not reported in subsequent years. In FNF's 2009 financial statements, a note dealing with related party transactions showed an amount advanced by FNF in March 2008 as an account receivable. However, in FNF's balance sheet for the 2004 through 2009 years, the total amount advanced by Fidelity was recorded as "contributed surplus" under the heading of "Stockholders Equity". FNF and Fidelity applied to the Court for an order permitting the rectification of the share register of FNF to reflect the issuance of common shares to Fidelity retroactive to October 2003, along with the redemption of sufficient common shares to allow payments by FNF to Fidelity as a return of paid-up capital, which could be made on a tax-free basis.

The application was dismissed. In an appropriate case, the Court may amend corporate documents. Such rectification is permitted where the applicant can satisfy the court that all of the parties were in complete agreement as to the terms of their contract, but that those terms were incorrectly recorded in the corporate records. The jurisprudence provides that what is rectified is not a mistake in the transaction itself, but a mistake in the way that transaction has been expressed in writing. The Court reviewed the evidence before it with respect to the intentions of the parties. Evidence had been provided by a corporate officer of FNF that it was the clear intention of the parties that Fidelity's investment would constitute invested capital which could be repaid without attracting Canadian income tax.

However, the Court noted that both a note to the 2009 financial statement of FNF and the company's corporate income tax return for 2006 treated the amounts in question as accounts receivable. As well, although FNF's financial statements or draft financial statements for the years 2003 to 2009 showed amounts advanced as "contributed surplus", the Court noted that contributed surplus is not the same as paid-up capital. The use of the term contributed surplus shows that funds came from an equity holder but not necessarily an intention that such funds be paid-up capital. The Court noted that FNF and the members of the Fidelity group were sophisticated financial companies. Overall, the Court concluded that the applicants had not demonstrated convincing proof of their intention that Fidelity's payment would constitute invested capital which could be repaid as a return of paid-up capital. Fidelity was not and had never been a shareholder of FNF, and there was nothing to show an intention of the parties that Fidelity be such.

FNF Canada Company v. Canada (Attorney General)

Decision Requiring Sale of Shares in Family Company Upheld Where Allegations of Oppression and Self-Dealing Not Proven

Ontario Superior Court, June 14, 2012

Kenneth and Elizabeth Tracey, who had a family of 11 children, had purchased a dairy business in 1980. In 1990, Kenneth and Elizabeth Tracey separated, and in the following two decades, a series of share transfers took place among the members of the family. Relations among family members were not harmonious and a number of court applications were made in relation to ownership of the shares in the company and to which family members were entitled to director positions. The dispute over control of the company deteriorated to the point where restraining orders were issued to prevent some members of the family from interfering with the management of the business and from entering the business premises. All family members agreed that the corporation was in a state of deadlock and that the only two alternatives were the winding up of the company or the transfer of shares into the hands of a single family member. None of the family members wished to see the corporation wound up, and one of the sons, Mark Tracey ("Mark"), brought an application for an order requiring his mother, Elizabeth Tracey ("Elizabeth"), who held a majority of the shares, to sell her shares to him for fair market value. The application was allowed. The Court held that there was indeed a state of deadlock, and the corporation could no longer continue to function and meet the reasonable expectations of the shareholders.

As the parties were unanimous in their desire to see the corporation continue, the only solution was to have one shareholder purchase the shares of the others for reasonable consideration. The Court considered which of Mark or Elizabeth had the best ability to continue the business, and this inquiry led to the conclusion that Mark was best able to do so. The Court concluded that, in view of their relative amounts of business experience and knowledge and their likely ability to generate future income from the business, the surest way for the business to prosper was for Elizabeth to transfer her majority shareholding in the company to Mark, at fair market value. The value of the shares was fixed, and an order issued requiring their transfer, with Mark being given 120 days to arrange the necessary financing. Elizabeth appealed from that ruling.

The appeal was dismissed. The appeal was based on several grounds, including an argument that the trial judge had erred in ignoring Elizabeth's reasonable expectations as a shareholder, as well as in dismissing her claim respecting Mark's alleged misappropriation of a corporate opportunity and/or self-dealing. The appellate Court first reviewed the factors considered by the trial judge in reaching his conclusion that Elizabeth ought to be required to sell her shares to Mark. Those factors included, in particular, identifying which shareholder had contributed the most to the corporation's state of deadlock. While the trial judge noted that blame for that deadlock was not one-sided, he also held that Elizabeth had, in refusing to sell her shares, consistently failed to abide by agreements or to follow court orders.

The appellate Court reviewed the conduct of both sides in the dispute and concluded that the appellants had engaged in a consistent pattern of self-help that "crossed the line into lawlessness on more than one occasion". There was, in the appellate Court's view, a firm foundation for the trial judge's conclusion that the appellants were more to blame for the deadlock than was the respondent. Overall, the appellate Court held that the trial judge had properly identified the factors to be considered in determining which party should be required to sell its shares, and that there was no palpable and overriding error in the trial judge's conclusion that the respondent was clearly the preferable choice to operate the business.

Next considered was the appellants' argument that the respondent had appropriated a corporate business opportunity and that such appropriation constituted self-dealing. This was an alleged breach of his obligations as a director of the corporation and, in addition, unfairly disregarded the appellant's interests as a shareholder of the corporation. The alleged corporate business opportunity had arisen in connection with an arrangement in which the corporation entered into a distribution agreement with another company, of which the respondent was the sole owner. The appellate Court concluded that, while the agreement was not at arm's length and was therefore a form of self-dealing, it had not been established that such self-dealing was wrongful. The Court noted that if the distribution agreement was disclosed and approved by the shareholders of the company, then there was no wrongdoing. As well, in order for a director's pursuit of a business opportunity to be a breach of his or her obligations to the corporation, that opportunity must also have been available for the corporation itself to pursue. The facts showed that the family corporation was not in a position to pursue such opportunity. Finally, there was no evidence that the corporation suffered any damages as a result of entering into the distribution agreement. The Court of Appeal concluded that the trial judge had correctly identified the true issues for trial and, in considering the evidence before him on those issues and reaching his conclusions, he made no palpable and overriding error. There was no basis for interfering with those conclusions.

Tracey v. Tracey,

Directors Possessing Residual Power To Create Advance Notice Policy for Elections

British Columbia Supreme Court, July 20, 2012

The petitioner, Northern Minerals Investment Corp. ("Northern"), and the respondent, Mundoro Capital Inc. ("Mundoro"), were both corporations incorporated under the British Columbia *Business Corporations Act* (the "Act"). Northern held approximately 10 per cent of the shares of Mundoro. In April 2012, Mundoro gave notice of its annual general meeting ("AGM"), to be held on June 26, 2012. Around June 11, 2012, the company announced that its directors had approved an Advance Notice Policy (the "Policy"), in order to fix a deadline by which time shareholders were required to submit nominations for directors to be elected at the AGM. The Policy provided that only such nominated persons would be eligible for election as directors, that the chairman of the meeting had the power to determine whether a nomination had been made in accordance with the Policy and, finally, that the Board in its sole discretion could waive any requirement of the Policy. Northern brought a petition seeking a declaration that the Policy was unenforceable and an order providing that no nominations be disallowed by Northern on the basis of the Policy. Mundoro then postponed the holding of the AGM from June 26 to August 27, a decision which was opposed by Northern.

The petition was dismissed. The petition was based on Northern's argument that the directors of a company incorporated under the Act possessed only those powers specifically granted to them by the articles of the company, and that there were no other residual powers held by the directors. However, Canadian appellate jurisprudence on the issue holds that, under the corporate model adopted by the *Canada Business Corporations Act* (the "CBCA"), the residual power to manage the corporation's affairs rests with the directors. The appellate courts have held that this power is given by statute and is not derived from the delegation of powers by the shareholders. Such courts rejected the contrary model, under which directors possess only those powers delegated to them by the shareholders, as unduly restrictive. The Court considered whether the approach taken by Canadian appellate courts with respect to the CBCA was also applicable to the Act, and concluded that it was. In the Court's view, the directors' powers flow from the Act and from the articles in which the directors are, in fact, granted residual powers.

The Court then considered the actions taken by the directors in light of those conclusions. With respect to the postponement of the date of the AGM, the Court held that Northern had not provided evidence that the directors were acting other than in the best interests of the shareholders of the corporation. There was, in the Court's view, no evidence to support allegations that the Board members were acting to protect their own positions, or that the Board was not acting to protect shareholder rights. The Court held that it was for the Board to determine what was in the best interests of the corporation and its shareholders, and that if the Board's decisions were to be challenged, there were statutory remedies by which the shareholders could seek redress. Finally, the Court considered the enforceability of the Policy put forward by the Board. The petitioner argued that a special resolution of shareholders would be required to alter the articles of the company, and that, therefore, the Policy required a special resolution to amend its articles. The Court disagreed, holding that the argument was based on the incorrect premise that the directors do not have a power unless such power is specifically granted by the articles. The Court concluded that neither the Act nor the articles precluded the directors from creating such a Policy and, in addition, that the Policy was one which did not infringe shareholder rights but ensured an orderly nomination process.

Northern Minerals Investment Corp. v. Mundoro Capital Inc.

Shareholder of Company Possessing Sufficient Interest in Land for Filing of Certificate of Pending Litigation

British Columbia Supreme Court, July 16, 2012

CSA Building Sciences Western Ltd. ("CSA") was incorporated in 1993 to provide engineering/building science services. The respondent, Ralph Jeck ("Jeck"), who was the company's president and sole director, held 56 per cent of the shares in CSA. The remaining 44 per cent of shares in CSA were held by the petitioner 1043325 Ontario Ltd. ("104"). Christian Skene ("Skene") was the principal of 104. In 2004, Skene lost his engineering licence to practice and 104 was struck from the corporate register in Ontario. Thereafter, all aspects of the care and control of CSA were undertaken by Jeck. Between 2004 and 2011, Jeck received salary and bonus amounts from CSA. As well, between 1997 and 2010, Jeck purchased certain properties in his personal capacity, including the premises on which CSA had its business office. In 2012, an oppression action was brought by 104 against CSA and Jeck, alleging that funds had been diverted to Jeck from CSA, that Jeck had wrongfully appropriated a business opportunity belonging to CSA, and that Jeck had failed to disclose a conflict of interest arising from his ownership of CSA's business premises. One of the remedies sought was a declaration that Jeck held property in trust for CSA because the properties were acquired and maintained by funds taken from CSA. Based on that claim, the petitioner filed certificates of pending litigation against those properties, with Jeck applying for an order cancelling those certificates.

The application was allowed. The application for an order cancelling the certificates of pending litigation was based on the wording of section 215 of the *Land Titles Act*, which provides that only a person who is claiming an interest in land is entitled to register a certificate of pending litigation. In this case, the petitioner had not claimed such an interest, but rather sought a declaration that the properties were held in trust for CSA. The applicant argued, therefore, that there was no basis on which the petitioner, as a shareholder of CSA, could claim an "interest" in land, as required by the statute. The Court reviewed the jurisprudence on the question of a shareholder's right to claim for a wrong done to the company. It concluded that the basic principle that a shareholder will never have a personal cause of action for a wrong done to the corporation was unchanged, remaining a basic principle of company law. The question for determination, however, was whether the nature of a particular oppression action allowed the oppressed minority shareholder to claim on behalf of the company against the wrongdoer, without the need to commence a derivative action.

Based on its review of the jurisprudence, the Court concluded that, where there are allegations of self-dealing by the director/majority shareholder to the detriment of the corporation and the other shareholder, a court can declare the beneficial ownership of the property at common law by the corporation, as a remedy to rectify oppression. That being the case, it followed that an oppressed shareholder could claim a tracing remedy or constructive trust claim on behalf of a company as a means of rectifying oppression, without the need to commence a derivative action. The Court held that the provisions of the *Land Titles Act* did not preclude the filing of a certificate of pending litigation by a shareholder on behalf of a company, if the shareholder had legal standing to do so. Consequently, there were no grounds for discharging the certificate of pending litigation on the grounds that the petitioner could not show a personal interest in the land in question. The Court then considered the relative merits of the parties' positions on the substantive issue of oppression. It held that, for a number of reasons, the petitioner's claim on the properties in question was a tenuous one, and that the equities as between the parties favoured the applicant. The Court ordered, therefore, that the certificates of pending litigation be discharged upon the posting of nominal security of $1.

1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.

Dissolved Corporation Which Had Not Been Revived Not Entitled To Bring Motion in Respect of Representation in Ongoing Action

Tax Court of Canada, July 23, 2012

GMC Distribution Ltd. ("GMC") was incorporated in April 1994 under the Ontario *Business Corporations Act* (the "Act"). However, the company failed to file its corporate tax returns and was, as a result, dissolved in November 2007. In June 2004, prior to its dissolution, GMC had filed a Notice of Appeal in a matter before the Tax Court of Canada. In 2012, the company brought a motion seeking leave to have it represented in that appeal by the individual who was its shareholder, officer, and director. The motion was opposed by the Crown.

The motion was dismissed. The issue for determination by the Court was whether a company which had been dissolved had standing to bring a motion with respect to its representation in an appeal which predated the company's dissolution. Section 242 of the Act provides that, despite the dissolution of a corporation, an action brought by or against the corporation before its dissolution may be continued as if the corporation had not been dissolved. The jurisprudence interpreting that provision, however, indicates that, even though an action brought against a corporation continues despite the corporation's dissolution, the corporation cannot take any action until it is revived as provided for in the Act. Consequently, the Court held that, while GMC's appeal on the tax matter would continue despite its dissolution, the company could not, unless and until it was revived under the Act, take any action in relation to the appeal. That prohibition would, in the Court's view, include a motion for someone to represent the company and the motion was accordingly dismissed.

GMC Distribution Ltd. v. The Queen

Motions for Interlocutory Injunctions with Respect to Election of Directors Dismissed Where Neither Party Demonstrating Strong Prima Facie Case

Ontario Superior Court, July 18, 2012

Maudore Minerals Ltd. ("Maudore") was a publicly traded Canadian mining corporation. The Harbour Foundation ("Harbour") and City Securities Limited ("City") together owned 18.4 per cent of Maudore, making them, together, the company's largest shareholder. The next largest shareholder in Maudore was Anglo Pacific Group plc ("Anglo"), which held 8.8 per cent of the shares. In 2011, Seager Rex Harbour ("Mr. Harbour"), who was a trustee of Harbour and a founder and principal of City, began to have doubts about the competency of Maudore's management. He asked Dr. Howard Carr ("Carr"), an economic geologist, to investigate the company. In the course of doing so and before being given access to the company's drilling sites, Carr signed a confidentiality agreement. Carr reported his conclusions to Mr. Harbour, who decided to put Carr forward as the next chief executive officer of Maudore and a member of its Board of Directors. In April 2012, Maudore gave notice that the company's annual and special meeting of shareholders would be held in June, with a record date early in May. Among the items for consideration at that meeting would be the election of the Board of Directors. Discussions ensued between Mr. Harbour and the current management of Maudore whereby the parties attempted to reach a compromise with respect to the changes which Mr. Harbour wished to bring about. As part of that process, a Special Committee of Independent Directors of the Board was established. However, the parties were unable to reach agreement on the changes needed and Mr. Harbour ultimately decided to propose his own slate of directors for the Board. A proxy solicitation agent was engaged to assist him. Throughout the Spring, Harbour's counsel made several unsuccessful attempts to obtain a list of company shareholders. During that period, Maudore postponed the date of the shareholders' meeting several times and also announced that it had changed its bylaws to require shareholders who wanted to propose an alternate slate of directors to comply with new rules. The day before the holding of the annual and special meeting of shareholders, Maudore brought an application for an interlocutory injunction to enjoin Harbour and City from voting their shares and from soliciting proxies, on the basis that Carr had breached the confidentiality agreement he had signed and that confidential information had been used by Harbour and City to obtain proxies, with the aim of replacing the current Board of Directors of Maudore. Harbour and City then sought an order that the meeting be chaired by an independent third party appointed by the Court, that certain shareholders not be permitted to vote at the meeting, and that Maudore be compelled to adopt a proxy review procedure set out in Harbour's application to the Court.

The motions were dismissed. The Court began by noting that both motions before it were requests for interlocutory injunctive relief. In determining whether to grant or refuse such relief, the Court must consider three factors: (1) the Court must determine whether the plaintiff has presented a serious issue to be tried or, where the outcome of the injunction will, as a practical matter, make a trial superfluous, the plaintiff has made out a strong prima facie case; (2) the Court must determine whether the plaintiff would suffer irreparable harm if the remedy for the defendant's alleged misconduct were left to be granted at trial; (3) the Court must consider where the balance of convenience lies as between granting or refusing of the application for interlocutory relief. The Court first considered the arguments put forward by Maudore with respect to Harbour and City's alleged use and misuse of confidential information. It reviewed the elements of a claim of breach of confidence and concluded that, to succeed in its application, Maudore was required to show that the defendants received confidential information under the agreement signed by Carr or in circumstances governed by the law of breach of confidence, and that they made unauthorized use of that information. The Court concluded that, while the evidentiary record established that the defendants had received confidential information from Maudore, it had not been established that there was misuse of that confidential information. In the Court's view, Maudore had not shown that the defendant's motivation for its actions came from confidential information obtained by Carr and, in addition, Maudore could not actually identify confidential information contained in the dissident proxy circular.

The Court then considered the application made by Harbour and City for interlocutory relief in connection with the scheduled shareholders' meeting and concluded that no relief was justified. The company argued, and the Court agreed, that in the absence of demonstrated impropriety, a Court ought not to interfere in advance with the operation of the exercise of shareholders' rights to design their own corporate constitution and electoral process. In the Court's view, Harbour and City were asking the Court to rewrite the bylaws of the corporation, and the Court concluded that there was no basis for doing so. Secondly, there was no evidence that the current Chairperson of the Board would fail to act fairly or reasonably in his duties as Chair. Finally, there was nothing unfair or inappropriate about the introduction of a new procedure for the election of directors. The Court concluded that Harbour and City would not suffer any irreparable harm if the injunction were not granted. If the shareholders' meeting was not properly conducted, it was open to Harbour and City to apply to the Court for declaratory or injunctive relief at that time.

Maudore Minerals Ltd. v. The Harbour Foundation

Inspector Appointed for Corporation Where Shareholder Unable To Obtain Information with Respect to Corporate Financial Status

Alberta Court of Queen's Bench, July 9, 2012

Canadian Consolidated Salvage Ltd. ("CCS") was a company engaged primarily in the business of buying and selling scrap metal for recycling, and was a wholly owned subsidiary of CCS Holdco. 554168 Alberta Ltd. ("554") was in the business of holding the lands on which CCS conducted its scrap metal business, and was a wholly owned subsidiary of 554 Holdco (CCS Holdco and 554 Holdco hereinafter referred to as the "Holdcos"). CCS and 554, together with two other companies, 1248429 Alberta Ltd. and 1247738 Alberta Ltd. (collectively the "CCS Group"). The Gerald Murphy's Children's Parallel Life Interest Settlement Trust (the "Trust") was an investor in the CCS Group. The applicant, Gerald Murphy ("Murphy"), and the respondents, Margaret Cahill ("Margaret") and Christopher Cahill ("Christopher"), were the sole shareholders of each of the Holdcos, and Murphy and Margaret were the sole directors of the CCS Group. Murphy, Margaret, and Christopher had entered into a unanimous shareholders' agreement in respect of the Holdcos which provided, among other matters, that any shareholder, officer, or director of the Holdcos and any subsidiaries would have full and unrestricted access to corporate and business records.

Murphy brought an application in his personal capacity and on behalf of the Trust for an oppression remedy, alleging that he had been unable to obtain information with respect to the financial dealings of the CCS Group. Specifically, he alleged that he had learned that property taxes on certain properties owned by CCS Group were in arrears, that a number of liens had been registered against CCS, and that a number of Statements of Claim had been filed against various companies comprising the CCS Group. Murphy also alleged that he had not been given any notice of directors' meetings since 2008 and had not received audited financial statements of the CCS Group for the same period. Under the oppression remedy, Murphy sought the appointment of an interim receiver-manager of the CCS Group as a result of (1) the respondents' failure to call formal directors' meetings; (2) Margaret having taken management actions without legal authority; (3) the Board of Directors' state of deadlock; and (4) the respondents' failure to provide proper financial information and disclosure. Murphy also sought the appointment of an inspector to conduct an investigation of the CCS Group, on the basis that there was clear evidence of oppressive and/or fraudulent or dishonest conduct in the respondents' failure to provide him with information about the CCS Group's corporate decision-making and finances.

The application was allowed in part. Section 231 of the Alberta *Business Corporations Act* (the "Act") provides the Court with the authority to appoint an inspector to conduct an investigation of a corporation where the business of the corporation has been carried on in a manner which is oppressive or unfairly prejudicial or persons connected with the affairs of the corporation have acted dishonestly. In interpreting that section, courts have held that the standard of proof is one of the appearance or outward show of oppressive or fraudulent behaviour. Several indicia of such behaviour have been identified, including a failure to provide financial information, a failure to pay bills or expenses as they fall due, improper use of company funds, failure to call annual meetings of shareholders, and failure to consult directors about decisions or taking action without Board approval and failing to hold regular Board meetings. The Court reviewed the recent history of the conduct of corporate affairs in this case and found that the CCS Group had taken actions without authorizing directors' resolutions, including the acquisition and financing of significant assets, and had waived the requirement for audited financial statements without a shareholders' resolution authorizing such waiver. As well, Murphy had received no information with respect to any of those decisions, leaving him unable to determine the financial status of the CCS Group or his investment in it.

The Court concluded that the appointment of an inspector was necessary to provide an accurate assessment of the CCS Group's historical and current financial position. It noted that the appointment of an inspector was an extraordinary remedy, and in determining whether to provide such remedy, the Court was required to consider whether the applicants still needed access to important information, whether there were better routes (such as litigation) which could be used to acquire the needed information, and whether the appointment of an inspector to investigate the affairs of the corporation was prohibitively expensive, in light of the corporation's resources. The Court ruled that, in the circumstances, the appointment of an inspector was the most practical means for Murphy to acquire the needed information. Finally, the Court considered whether the appointment of a receiver-manager was justified. The test for such an appointment is similar to the three-part test for injunctive relief, being the existence of a serious issue to be tried, irreparable harm resulting to the applicant from a failure to provide such relief and, finally, the balance of convenience. While the Court was convinced that there was a serious issue to be tried with respect to the affairs of the corporation, it could not conclude that irreparable harm would result from a failure to appoint a receiver-manager. A receiver-manager was not necessary to preserve or protect the property of the CCS Group, as it continued to operate without incurring significant debt while increasing in value. Also, the balance of convenience did not favour such an appointment, owing to the lack of urgency or other exigent circumstances. An order was therefore issued providing for the appointment of an inspector, while the application for the appointment of a receiver-manager was dismissed.

Murphy v. Cahill,

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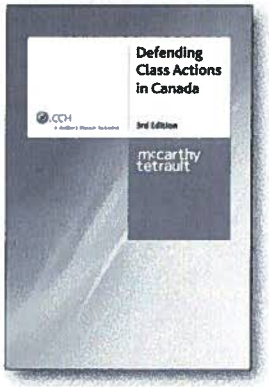

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