CITATION: Meson Capital Partners, LLC v. Aberdeen International Inc., 2015 ONSC 532
COURT FILE NO.: CV-15-10823-00CL
DATE: 20150123

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Meson Capital Partners, LLC and Nightscape Capital (UK) LLP, Applicants

AND:

Aberdeen International Inc., Sulliden Mining Capital Inc., Stan Bharti, George Faught, David Stein, 2378083 Ontario Inc. and John Doe, Respondents

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *John Keefe* and *David E. Lederman*, for the Applicants

Orestes Pasparakis, Jennifer Teskey and *John Picone*, for the Special Committee of the Board of Directors of Aberdeen International Inc.

Wendy Berman and *Lara Jackson*, for Aberdeen International Inc., David Stein and George Faught

Robert Staley, for Stan Bharti

Ellen Snow, for Sulliden Mining Capital Inc.

HEARD: January 21, 2015

ENDORSEMENT

[1] In this motion, Meson Capital Partners, LLC and Nightscape Capital (UK) LLP (collectively, the "Applicants"), sought an order respecting certain matters pertaining to a special meeting of the shareholders of Aberdeen International Inc. ("Aberdeen" or the "Company") to be held on February 3, 2014 (the "Meeting"). This motion was brought seeking discretionary relief of the Court under ss. 106 or 107 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "BCA"). The other relief sought by the Applicants in this application has been adjourned on consent to be addressed after the Meeting.

[2] At the conclusion of the hearing, I advised that, for reasons to follow, I would dismiss the requests for the appointment of an independent chair of the meeting and a declaration of the invalidity of the management form of proxy, and I would not address the two remaining issues at this time. This endorsement sets out my reasons for the disposition of these matters.

Background

[3] The Applicants requisitioned a special meeting of shareholders pursuant to a requisition delivered to the Company on December 16, 2014 (the "Requisition"), which sought resolutions removing the current directors of the Company and electing the Applicants' proposed slate of

directors, respectively. On December 27, 2014, the Company issued a Notice of Record and Meeting Dates calling the Meeting.

[4] On January 5, 2015, the board of directors established a special committee of the board, comprised of three independent directors (the "Special Committee"), including Bernard Wilson ("Wilson"), to direct all matters pertaining to the Applicants' proxy campaign.

[5] On January 7, 2015, Aberdeen filed and mailed a notice of meeting, management information circular and form of proxy in respect of the Meeting. On January 8, 2015, the Applicants filed and mailed a dissident proxy circular and form of proxy. On January 12, 2015, counsel for the Special Committee raised with the Applicants the fact that their proposed slate did not satisfy the Company's by-laws, which require that a majority of the directors be resident Canadians. On January 13, 2014, Aberdeen filed and mailed a new notice of meeting amending the resolutions to be considered at the Meeting and a revised form of proxy (the "Current Proxy").

The Issues

[6] The Applicants raise four matters to be addressed in turn.

An Independent Chair of the Meeting

[7] The Special Committee has proposed that Wilson chair the Meeting. This is opposed by the Applicants who submit that an independent chair should be selected to conduct the Meeting.

[8] The Applicants argue that Wilson is deeply conflicted to the point where there can be no certainty that he will conduct the Meeting fairly. They rely upon four matters that they suggest collectively render Wilson conflicted.

[9] First, they say Wilson is implicated in the private placement transaction and related investment by Aberdeen that the Applicants are challenging in this application as oppressive of the shareholders. Second, they say Wilson is deeply involved with other companies associated with Stan Bharti ("Bharti"), the founder and executive chair of Forbes & Manhattan Inc., and that such relationships have not been publicly disclosed. Third, they argue that the fact that Wilson has taken the side of the incumbent directors in a letter to shareholders that accompanied the management information circular, and in particular made certain strong allegations directed against the principal of Meson Capital Partners, LLC in that letter, disqualifies him from acting as the chair. Lastly, they argue that he has taken a legal position on an important issue – the Applicants' proposal of a resolution amending the articles of the Company in the event the Applicants' slate is successful – which prevents him from acting fairly if this issue should arise at the Meeting.

[10] I am not persuaded that these considerations are sufficient, either individually or collectively, to require that Wilson refrain from acting as chair of the Meeting.

[11] The fact that Wilson participated as a director in authorizing the private placement transaction cannot, by itself, be determinative. More important is the fact that he was not a purchaser in that transaction nor is he a respondent in the application. Second, it is not clear that Wilson's involvement in other companies related to Bharti was not publicly disclosed. Nor is Wilson's involvement significant for present purposes, as there is no evidence that Wilson has

acted improperly in his capacity as a director or advisory director of any of the four companies with which he is or has been involved. In the absence of evidence of impropriety, I cannot take into consideration the circumstances pertaining to a loan to Bharti's wife by one company of which Wilson is a director. Moreover, as the lead director of Aberdeen, to which role Wilson was appointed before the Applicants delivered the Requisition and commenced this application, Wilson's responsibility is to address the corporate governance of Aberdeen including, in particular, its relationship with other Bharti-related companies. Third, taking sides in a contested proxy fight is not, on its own, a basis for requiring an independent chair. Lastly, although the Special Committee has expressed a view in their factum regarding the Applicants' proposal to address the majority Canadian resident requirement, I am not persuaded that Wilson will consider himself bound to take a particular position on this issue were it to arise at the Meeting, given his professional background and my understanding that he will be advised by separate legal counsel as chair of the Meeting.

[12] More generally, the case law suggests that demonstrated impropriety by a proposed chair is required before a court will exercise its discretion to impose an independent chair: see, for example, *Maudore Minerals Ltd. v. Harbour Foundation*, 2012 ONSC 4255, [2012] O.J. No. 3548 (Sup. Ct.) per Perell J. at para. 106 et seq. There is no such evidence in this case, only speculation and expressions of concern by the Applicants. Insofar as the test might be expressed to be demonstration of a likelihood that the proposed chair will not act fairly and reasonably in such capacity as a result of previous actions or other circumstances – for example a demonstrated serious conflict of interest or a fettering of the party's discretion in some manner – there is also an absence of evidence. In particular, the present circumstances do not involve actions on the part of the proposed chair to disqualify the votes of the dissident group or otherwise prevent the dissident shareholders from exercising their voting rights as in *Allied Cellular Systems Ltd. v. Bullock*, [1990] B.C.J. No. 1437, 49 B.L.R. 306 (Sup. Ct.).

[13] Essentially, the Applicants base their position on Wilson's association with Bharti. In the absence of evidence that this association has resulted in Wilson compromising his responsibilities or otherwise acting improperly, the allegations against Bharti do not justify the cost of an independent chair and intervention in the internal corporate affairs of the Company at this stage. The facts in this case are closer to those in *Maudore* in that, given Wilson's professional background and the fact that the Applicants' application is primarily between the Applicants and the non-independent directors, it is more likely that Wilson will act responsibly in carrying out his duties as chair of the Meeting.

[14] As in *Maudore* also, the appropriate course of action for the Applicants is to await the results of the Meeting, including any material determinations of the chair, and to apply to Court for relief under the BCA at that stage if they feel there has been some error or impropriety in the conduct of the Meeting.

The Current Proxy

[15] The Applicants seek an order declaring the Current Proxy to be invalid.

[16] The amended notice of meeting contemplates two resolutions: (1) removing the current directors; and (2) if (1) is passed, electing seven of fourteen nominees for directors, being the Applicants' proposed slate of directors and the current directors who will also be nominated for

re-election at the Meeting by a representative of management of the Company. The Current Proxy therefore contemplates two votes. In the first vote, shareholders can vote for or against a resolution to remove all of the current directors. In the second vote, shareholders can vote for or withhold their vote for all fourteen nominees, being limited to seven votes in favour of nominees.

[17] The Applicants' position, which is reflected in their form of proxy, is that, on the first resolution, the shareholders should vote for or against each of the current directors individually and, on the second resolution, should vote for or withhold their votes for only the Applicants' nominees.

[18] The Applicants' position was dismissed for the following reasons.

[19] First, the Current Proxy reflects the text of the resolutions contemplated by the Requisition. If the Applicants had intended the approach they now contend for, they could have proposed a form of resolution that both removed the current directors and replaced them with the Applicants' slate in the same resolution. Not having done so, they are, in effect, asking the Court to impose such a resolution on the Company and its shareholders. I see no basis in the BCA for doing so. While the management information circular does not specifically state that the current directors will also be nominated for purposes of consideration in the second resolution, if it proceeds, there can be no doubt that this is contemplated as a procedural matter from the form of the Current Proxy and the disclosure in the circular.

[20] Second, there is no suggestion that the Current Proxy fails to comply with the proxy requirements of the BCA or applicable securities legislation. In particular, there is nothing in the BCA that prevents a corporation from including further matters for consideration in a requisitioned special meeting in addition to the resolutions requisitioned by the shareholders. I see no difference in substance between such circumstances and the present situation. The addition of the Company's seven nominees in the list of fourteen nominees to be voted upon in the second resolution, while additional to the second resolution contemplated by the Requisition, is not in conflict with it.

[21] Third, and most important, the parties agree that it is desirable to allow individual votes in respect of the current directors. However, I think that, in this context, the Applicants' proposed approach can lead to confusion when voting on the second resolution, and perhaps in other respects, in the minds of those shareholders who choose to vote in favour of some incumbent directors and against others on the first resolution. In particular, there could easily be confusion regarding the number of votes available to such shareholders in respect of the second resolution and the manner of treatment of the favoured directors on that resolution. Conversely, I think the Current Proxy reflects an approach that avoids such risk of confusion.

Compliance with the Company's By-Laws in Regard to the Dissident Slate

[22] The Company's by-laws require that a majority of the directors be resident Canadians. The Applicants' slate does not comply with this requirement. They propose that, if their slate is elected, a further resolution be put to the shareholders at the Meeting amending the by-laws to remove this requirement. They suggest that such a resolution would fall under "other matters to be voted upon at the Meeting" by the proxy holders.

[23] The Company has confirmed that the vote for the election of directors will proceed in the manner described above, notwithstanding the view of the Company and the Special Committee that the slate is "invalid" because such a board, if elected, would not comply with the Company's by-laws. However, in their factum, the Special Committee argues that ss. 96(5) and (6) of the BCA would treat the further resolution proposed by the Applicants as special business for which notice is required to be given to the shareholders, which was not expressly set out in the Applicants' dissident proxy circular. The Special Committee goes on to mention that an option in such circumstances would be to compose a complying slate of directors substituting American residents for Canadian residents to the extent necessary on the basis of vote totals.

[24] This issue is clearly moot. For that reason I decline to address it at this time. Instead, I consider it more appropriate for the chair of the Meeting to address the matter in the context of actual voting results and with the benefit of advice of his own legal cousel in order that there be a complete record if it is necessary for the Court to address this issue.

Proxy Inspection Issues

[25] The Applicants also raised five issues pertaining to their right to review the proxies and make timely objections to the chair. The Applicants sought specific commitments from the Special Committee who responded with a general assurance that the Meeting will be conducted in a "fair and transparent manner in accordance with the Company's articles and by-laws, applicable law and customary rules of order, with full knowledge of scrutiny by the Court." However, the Company has refused to offer specific commitments.

[26] After a review of the Applicants' issues at the hearing, I am satisfied that they all pertain to the Applicants' reasonable demand for adequate time to inspect all the proxies and to make submissions to the chair of the Meeting regarding any issues they identify in their review. Unfortunately, in this case the parties have been unable to address these issues in the customary protocol regarding the conduct of the proxy contest and the Meeting. However, the Special Committee has agreed that the Applicants will be entitled to review the proxies no later than 2:00 p.m. on February 2, 2015.

[27] On the basis of this understanding, there is no need for an order of the Court at this time. The Court remains available to address any issues that may arise to the extent this understanding is not implemented.

Costs

[28] As indicated at the hearing, the Court will address costs of the motion after receipt of costs outlines from each of the parties seeking costs and from the Applicants, if they so choose. Such costs outlines should be delivered within thirty days of the date of release of this Endorsement.

Wilton-Siegel J.

Date: January 23, 2015