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Bear Lake Gold Ltd. decision - Ontario Court Supports Existing Practice Regarding The Use Of Fairness Opinions In Plans Of Arrangement

In a decision issued on June 5, 2014,[1] Justice Wilton-Siegel of the Toronto Commercial List Court held that a fairness opinion does not need to qualify as an expert report to assist the Court in approving an arrangement. This decision appears to limit the applicability of the March 28, 2014 decision of Justice Brown of the Toronto Commercial List Court in *Champion Iron Mines Limited*[2].

It is standard practice for the board of directors of a target company to obtain a fairness opinion stating that the transaction is fair from a financial perspective. This was reinforced by the decision in *BCE Inc. v. 1976 Debentureholders*,[3] where the Supreme Court of Canada noted that in conducting an analysis as to whether a plan of arrangement is fair and reasonable, courts may consider "the presence of a fairness opinion from a reputable expert".[4]

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[1] *Bear Lake Gold Ltd. (Re)*, 2014 ONSC 3428 [*Bear Lake*]. McMillan LLP represented the Applicant in this matter.

[2] *Champion Iron Mines Limited (Re)*, 2014 ONSC 1988 [*Champion Iron]*. We would also note that, in a decision issued on June 6, 2014 (*Royal Host Inc. (Re)*, 2014 ONSC 3323), Justice Newbould of the Toronto Commercial List Court agreed with the analysis and opinion of Justice Wilton-Siegel of the Toronto Commercial List Court in *Bear Lake.*

[3] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560.

[4] *Ibid* at para 152.

As noted in a previous bulletin of this firm[5], in *Champion Iron*, Justice Brown placed no weight on the fairness opinion that was included in that case in a management proxy circular. He pointed out that the fairness opinion did not disclose the specifics of the actual analysis performed by the financial advisor, which could "inform a reader on the issue of whether the offered consideration was within a minimum range that otherwise could have been obtained in a market-based transaction process."[6] Justice Brown observed that "opinion evidence may only be received by a court if adduced through a qualified expert witness (subject to certain exceptions which have no application to this case)".[7] He concluded that the fairness opinion did not comply with many of the content requirements of an expert report pursuant to Rule 53.03(2.1) of the *Rules of Civil Procedure*,[8] specifically with respect to the requirement that an expert's report contains such expert's reasons for his or her opinion. Justice Brown found that the fairness opinion simply asserted an opinion without disclosing the reasons for it and, accordingly, was inadmissible for purposes of the application.[9]

In *Bear Lake*, Justice Wilton-Siegel specifically addressed the issue of whether a fairness opinion is of relevance to a Court in circumstances where the underlying financial analyses is not disclosed in a proxy circular. He noted that, in such circumstances, a fairness opinion was relevant for two reasons: (a) the use of a fairness opinion by a special committee of a board is evidence that the committee considered the fairness and reasonableness of a transaction "on the basis of objective criteria to the extent possible;"[10] and (b) the publication of a fairness opinion in a circular (even without the detailed analysis underlying the fairness opinion) allows the shareholders to assess for themselves the "integrity of

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[5] Paul D. Davis, Brett G. Harrison & Sandra Zhao, *Ontario Court Makes Observations On Purpose Of Fairness Opinions In The Context Of Plans Of Arrangement*.

[6] *Champion Iron*, *supra* note 2 at para 11.

[7] *Ibid* at para 16.

[8] *Rules of Civil Procedure, RRO 1990, Reg 194, r 53.03 (2.1).*

[9] *Champion Iron*, *supra* note 2 at para 18.

[10] *Bear Lake*, *supra* note 1 at para 15.

the directors' recommendations and ... the fairness of the transaction to them from a market perspective"[11]

This decision supports the current practice of using fairness opinions to provide assistance to boards of directors in reaching an informed decision on a proposed arrangement, as part of the proper exercise of their fiduciary duty. This decision-making process should include a presentation to the board by the financial advisor rendering the fairness opinion, where further details and financial analyses underlying the opinion are presented to supplement the board's understanding. We continue to emphasize that affidavits supporting an application for a final order approving a plan of arrangement should make reference to the fact that financial analyses underlying the opinion was presented to a board.

We would caution, however, that Justice Wilton-Siegel noted that this current practice may not be appropriate for contested transactions. He observed that:

as in previous contested situations, particularly involving a reorganization of the interests of the existing securityholders of a corporation rather than an acquisition of outstanding securities by a third party, if a party proposes to qualify a fairness opinion as expert evidence under the *Rules of Civil Procedure* the detailed analysis that grounds the fairness opinion must be available if required by any objecting securityholders.[12]

Accordingly, in plans of arrangement, which may be or are contested, issuers should consider including in proxy circulars summaries of the underlying financial analyses performed by the investment bankers and presented to boards.

by Paul D. Davis, Brett G. Harrison

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[11] *Ibid.*

[12] *Ibid* at para 16.

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a cautionary note

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