
CANADA / JUDGMENT

Bamrah v. Waterton Precious Metals Bid Corp.

2020 BCCA 122

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 122 Bamrah v. Waterton Precious Metals Bid Corp.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bamrah v. Waterton Precious Metals Bid Corp.,

2020 BCCA 122

Date: 20200430

Docket: CA45979

Between:

Nandeep Bamrah

Appellant

(Petitioner)

And

Waterton Precious Metals Bid Corp.

Respondent

(Respondent)

Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated

February 28, 2019 (Bamrah v. Waterton Precious Metals Bid Corp., 2019 BCSC 258, Vancouver Docket S157396).

Counsel for the Appellant:

R.P. Agarwal

Counsel for the Respondent:

M. Pontin

M.F. Rozee

Place and Date of Hearing:

Vancouver, British Columbia

March 2, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Grauer

Summary:

This appeal is from an order setting the fair value of shares owned by the appellant, a dissenting shareholder in Chaparral Gold Corp. ("Chaparral"), pursuant to s. 245(2)(a) of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57. The respondent, Waterton Precious Metals Bid Corp. ("Waterton"), acquired Chaparral by way of a court-approved plan of arrangement for CAD \$0.61 per share. The appellant petitioned the Supreme Court of British Columbia, seeking to have it appraise the fair value of the appellant's shares at USD \$1.60 and \$1.85. The court set the fair value of the shares at \$0.61.

Held: Appeal dismissed. The judge applied the correct legal framework for determining the fair value of a dissenting shareholder's shares and appropriately considered the objective market evidence as indicative of fair value. The judge did not, as the appellant submits, make palpable and overriding errors of fact in his analysis of market factors. The judge was entitled to prefer the market-based analysis of the respondent's expert over the theoretical analysis of the appellant's

expert. There was ample evidence to support the judge's conclusion that the transaction price of \$0.61 was the highest price available in an open and unrestricted market, negotiated by informed and prudent parties, acting at arm's length and under no compulsion to act.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

- [1] This is an appeal from an order of the Supreme Court of British Columbia, which set the fair value of a dissenting shareholder's shares in Chaparral Gold Corp. ("Chaparral") at \$0.61 cents as of December 11, 2014.
- [2] The respondent corporation, Waterton Precious Metals Bid Corp. ("Waterton"), acquired Chaparral under a plan of arrangement for CDN \$0.61 cash per share (the "Arrangement"). The appellant was a minority shareholder of Chaparral who opposed the Arrangement and exercised his dissent rights under the British Columbia Business Corporations Act, S.B.C. 2002, c. 57 [BCBCA]. He petitioned the Supreme Court seeking to have it find the fair value of Chaparral shares to be between USD \$1.60 and \$1.85.
- [3] In reasons for judgment indexed at 2019 BCSC 258 (the "Reasons"), Justice Funt determined that the fair value for the dissenting shareholder's shares was the price under the Arrangement, described as the "deal price" in the Reasons, that is \$0.61 per share. He found that this price was arrived at by sophisticated, arm's length parties, negotiating in an unburdened open market, and that these conditions ensured the price was reflective of fair value.
- [4] The appellant argues that the judge:
 - erred in law by failing to apply the established legal framework for determining the fair value of a dissenting shareholder's shares pursuant to s. 245(2)(a) of the BCBCA; and
 - committed palpable and overriding errors in relation to certain findings of fact in his analysis of market forces.
- [5] For the reasons that follow, I would dismiss the appeal. In my view, the judge applied the correct legal test and his findings of fact were amply supported by the evidentiary record.

II. Background

- [6] Chaparral is a British Columbia corporation engaged in the development of two early-stage mining properties in Nevada, United States of America (the "U.S.").
- [7] Chaparral's corporate history was summarized in paras. 23-27 of the Reasons:
- [23] Chaparral is a mining company engaged in the exploration and development of gold (and silver) deposits in Nevada, U.S.A. Chaparral's principal mining assets are two wholly-owned mining properties: Goldfield and Converse.

- [24] Chaparral was formed in September 2013 to participate in a spin-out transaction among International Minerals Corporation ("IMZ"), Hochschild Mining plc ("Hochschild"), HOC Holdings Canada Inc. ("HOC Canada"), a wholly-owned subsidiary of Hochschild, and itself.
- [25] Prior to the spin-out, the Goldfield and Converse mining properties were held by IMZ. Under the spin-out, HOC Canada acquired all of the issued and outstanding shares of IMZ; each IMZ shareholder was entitled to receive cash consideration of US \$2.38 per IMZ share and the number of common shares in Chaparral equal to his or her shareholdings in IMZ; and IMZ transferred to Chaparral its cash and receivables and all of its rights, title and interest to its wholly-owned non-Peruvian subsidiaries, and its assets and related liabilities, which included a 100% interest in the Goldfield and Converse properties.
- [26] Paradigm Capital Inc. ("Paradigm") acted as the independent financial advisor to IMZ and provided a valuation and fairness opinion in connection with the spin-out. Paradigm was of the opinion that the fair market value of a Chaparral share was in the range of \$0.58 to \$0.85.
- [27] The spin-out transaction completed on December 20, 2013. Chaparral began trading on the TSX on December 30, 2013.
- [8] By way of summary, in February 2014, Waterton made an unsolicited hostile bid to acquire all shares of Chaparral for \$0.50. Chaparral's Board of Directors (the "Board") rejected this bid, citing various concerns including that it undervalued the company's assets, was "financially inadequate", and "highly conditional": Reasons at para. 30.
- [9] The company responded aggressively to the hostile take over bid. The Board appointed an independent special committee (the "Special Committee"), which comprised three independent directors, to consider the hostile bid and to make recommendations to the Board. Two of these directors were formerly independent directors of International Minerals Corporation ("IMZ").
- [10] Then, in March 2014, the company entered into negotiations with thirteen companies to explore potential transactions (the "white knights"), all of whom executed confidentiality agreements. They received access to certain corporate documents including the valuation provided by Paradigm Capital Inc. ("Paradigm").
- [11] By April 7, 2014, Chaparral received three expressions of interest for its shares, each in the range of \$0.60 per share.
- [12] On April 17, 2014, Chaparral disclosed a potential liability to the U.S. Environmental Protection Agency (the "EPA"). By May 5, 2014, the potential white knights that had made offers withdrew from the bidding process. Chaparral had also entered into a confidentiality agreement with an additional company, but this did not lead to an offer.
- [13] On July 17, 2014, the respondent increased its offer to \$0.55 per share. The Board again recommended that shareholders reject the bid, but approximately 16.83 percent of the shares were purchased by the respondent. By the end of the month, the respondent held

approximately 19.72 percent of Chaparral shares, just below the 20 percent required by the BCBCA for effective control of the company. During this time frame, Chaparral also attempted to settle its dispute with the EPA, which was summarized as follows in the Reasons:

- [68] On May 5, 2014, Mr. N. Appleyard, Chaparral's chief executive officer, told the Special Committee that all the companies that had submitted written proposals had withdrawn from the bidding process. He also told the Special Committee that Chaparral's management team was focused on the EPA's complaint and Chaparral's potential liability, and was pursuing a couple avenues to restrict liability.
- [69] On May 14, 2014, the Board agreed to postpone further discussion on the Initial Hostile Bid until after Chaparral had "met with the EPA and received clarification regarding the Company's potential responsibility in connection with the Eureka smelter site remediation issue".
- [70] On June 12, 2014, Mr. Appleyard advised the Special Committee that "the main focus of the Company's efforts is presently concentrated on resolving the EPA issue in as timely a manner as possible" and suggested that "until the Company receives an estimate of what an equitable settlement might be, it is not prudent to move forward with negotiations for other projects and plans".
- [71] On July 21, 2014, Mr. Appleyard advised that Special Committee that Metallic had made a US \$100,000 settlement offer to the EPA. He reported that it had yet to receive a response to the offer, but that the management team had subsequently contacted the EPA to suggest that Metallic "would consider making an increased settlement payment if the EPA would expedite a resolution to the case, thus allowing the Company to proceed with White Knight scenarios before the Waterton deadline of July 31." Later that day, the Board authorized management to negotiate an expedited settlement with the EPA up to US \$1.8 million.
- [14] In August 2014, the Board changed its strategy. The Special Committee recommended opening "a dialogue with the respondent to see if a fair and reasonable transaction may be negotiated": Reasons at para. 47. The Board accepted the recommendation and instructed management to enter into negotiations with the respondent. These led to the Arrangement, in which the respondent offered to acquire all shares in Chaparral for \$0.61 per share in cash.
- [15] Paradigm provided an opinion to the Special Committee that the fair market value of shares was in the range of \$0.45 to \$0.76 per common share and that the proposed Arrangement was fair, from a financial point of view, to Chaparral shareholders. The Special Committee also considered, among other things, that the respondent's offer arose from a comprehensive negotiation process and represented a premium to current and historical trading prices of Chaparral shares. The Special Committee recommended that the Board approve the Arrangement, which then occurred in early October 2014.

[16] The Board, referring to Paradigm's opinion, then recommended that shareholders vote in favour of the Arrangement providing several reasons for supporting the transaction, including that:

- the Board had pursued a variety of strategic alternatives before negotiating with the respondent; and
- the offer price provided a "significant premium" for shareholders: Reasons at para. 57.

[17] On November 8, 2014, the EPA demanded that Chaparral pay USD \$6.3 million within 30 days to resolve the environmental issues: Reasons at para. 73.

[18] The Arrangement was approved at a special meeting of shareholders on December 12, 2014. The judge found that all material information was available to Chaparral's shareholders to allow them to assess whether to approve the Arrangement. Approximately 57.91 percent of Chaparral shares were voted on the special resolution to approve the Arrangement; of those, approximately 99.48 percent voted in favour of the Arrangement: Reasons at para. 62. Only 7,642 shares were used to vote against the resolution: Reasons at para. 123. The Arrangement received court approval on December 17, 2014.

[19] On September 3, 2015, the underlying proceeding was commenced.

III. The Opinion Evidence

[20] Both the appellant's expert, Mr. Low, and the respondent's expert, Mr. Crosson, adopted the same definition of fair value (Reasons at paras. 16-17), stated by Mr. Low as being:

Fair Value is defined as the ratable portion of 'en bloc' fair market value ("FMV") where FMV is defined as "the monetary consideration that, in an open and unrestricted market, a prudent and informed buyer would pay to a prudent and informed seller, each acting at arm's length with the other and under no compulsion to act."

[Emphasis in original.]

[21] Mr. Low opined that fair value of Chaparral shares was in the range of USD \$1.60 to \$1.85 based on theoretical measures of value derived from two going-concern valuation approaches, described in his report as follows:

- a. Comparable Public Company Analysis - we have identified publicly traded junior gold exploration and development companies that were considered to be similar to Chaparral. We have assessed the valuation multiples and metrics associated with these comparable public companies (Enterprise Value per Ounce of Gold Resource) to derive an implied FMV [fair market value] for Chaparral. We have adjusted the comparable public company valuation metrics to reflect average takeover premiums.

- b. Precedent Transactions Analysis - we have identified transactions involving the acquisition of junior gold exploration and development companies that we consider to be similar to Chaparral. We have analyzed the valuation multiples and metrics associated with these precedent transactions (Enterprise Value per Ounce of Gold Resource) to derive an implied FMV for Chaparral.

(Reasons at para. 144.)

- [22] With respect to market trading, Mr. Low's report stated that it "placed limited weight on Chaparral's publicly traded share price as an indication of the [fair market value] of the Company's shares": Reasons at para. 149. Mr. Low relied on the Ontario Securities Commission, Multilateral Instrument 61-101, Protection of Minority Security Holders in Special Transactions (MI 61-101), Part 1, s. 1.2, which defines a liquid market as one in which the shares of the company are subject to valuation traded for 12 months prior to the transaction. As Chaparral only traded on the Toronto Stock Exchange ("TSX") for 34 trading days prior to the respondent's first hostile bid in February 2014, Mr. Low's report concluded that it was an insufficient period of time to establish their value in a liquid market.
- [23] Mr. Low's report similarly did not assign much weight to the real evidence provided by the price in the Arrangement negotiated by Chaparral and approved by over 99 percent of its shareholders: Reasons at paras. 145-146. Furthermore, Mr. Low's report did not account for and assess the effect of Chaparral's potential EPA liability, and its disclosure in its SEDAR public filings, on the market price of Chaparral shares: Reasons at paras. 154-156.
- [24] The respondent's expert, Mr. Crosson, adopted a different approach. Rather than providing a comprehensive valuation report, Mr. Crosson was asked to consider whether the price of \$0.61 per share was established in the context of a fair market value transaction and to comment on both Paradigm's and Mr. Low's opinions: Reasons at para. 141. Mr. Crosson, in his report, summarized his conclusions as follows:

In my opinion, the Paradigm Valuation's \$0.45 to \$0.76 per Share conclusion reasonably estimates the fair value of the Shares at October 7, 2014. Paradigm's value range captures the \$0.60 per Share price indications obtained by Chaparral from "white knight" companies in April 2014, which supports the reasonableness of the Paradigm value range.

In my opinion, the Low Report's \$1.85 to \$2.13 per Share conclusion overstates the fair value of the Shares at December 11, 2014. Low's value range is more than three times the \$0.60 per Share "white knight" indications. It is roughly five times [the] last price at which Chaparral's shares traded prior to the Initial Hostile Bid.

- [25] In describing valuation approaches, Mr. Crosson expressed the opinion that where there are indicative market transactions in the subject shares, a direct approach that takes into account real evidence such as trading or transaction prices, offers to purchase or sell, and failed transactions is preferable.

- [26] It was also Mr. Crosson's opinion that Chaparral shares had been exposed to the market with sufficient information to inform potential purchasers as to the characteristics of the company's assets. Mr. Crosson disagreed with Mr. Low's opinion that the trading period was too short, explaining that the trading volume in that period equalled 22 percent of Chaparral's total outstanding shares. In his opinion, trading in Chaparral shares before the first hostile bid provided a reliable basis for estimating the fair value of the shares.
- [27] With respect to the price in the Arrangement, Mr. Crosson stated that it did not appear that any party was under compulsion. He noted that the respondent did not own a controlling interest in Chaparral prior to the acquisition and was dealing at arm's length with Chaparral. Mr. Crosson expressed the view that both the market in which the shares were exposed and the market in which potential acquirers could bid were open and competitive: Reasons at para. 151.
- [28] Mr. Crosson criticized various aspects of Mr. Low's opinion, including his methodology for establishing value, his selection of comparable companies and transactions, and his application of a takeover premium. He also disagreed with Mr. Low's decision to allocate a nil value to the potential EPA liability. In Mr. Crosson's opinion, it was reasonable to assume that an en bloc purchaser of Chaparral would "recognize a material allowance for the potential EPA liability".

IV. Chambers Judgment

- [29] The judge found the deal price represented the fair value of the shares.
- [30] He commenced his analysis by summarizing what he considered to be the appropriate legal framework. This included recognizing that:
- no party bears the onus of proving the fair value of the dissenter's shares, as the "ultimate onus is on the court to arrive at a fair value based upon an assessment of the evidence presented": *Ashton Mining of Canada Inc. v. Kwantes*, 2007 BCSC 1374 at para. 18, aff'd 2008 BCCA 248;
 - the court's obligation is to consider all relevant evidence;
 - "[t]he value attributed to the shares by the plan of arrangement is but one piece of evidence to be considered", along with other evidence such as the history of the transacting companies, the trading price of the shares, the context of the plan of arrangement and the negotiated price per share, and expert opinions: *Grandison v. NovaGold Resources Inc.*, 2007 BCSC 1780 at para. 5;
 - the focus is the en bloc value--that is, the fair market value of all issued shares of the company--not the fair market value of the dissenter's shares: *Grandison* at para. 152;
 - fair market value is the price that an informed buyer and seller, acting rationally, at arm's length, and under no compulsion to act, would accept in an open market transaction;
 - fair market value is preferably established by an actual transaction, rather than a hypothetical estimate;

- theoretical valuations are necessary where the right of dissent is engaged and there is no truly open market transaction from which to establish a fair value for the shares (e.g., where the corporate action does not involve a disposition of shares, or involves a non-arm's length transaction): Grandison at paras. 163-165; and
- where the right of dissent is engaged in the context of a broadly-based open market transaction involving an independent third-party, the market transaction provides the starting point, and in some circumstances, may be the best evidence of fair value: Grandison at para. 165.

(Reasons at paras. 13-19)

- [31] In applying this framework to the circumstances of the proceeding itself, the judge decided the appropriate starting point was the deal price itself. He found that, although the respondent held nearly 20 percent of Chaparral's shares during negotiations, "the thresholds for shareholder Approval of the arrangement were not directly affected or constrained": Reasons at para. 80. The requisite approval for the Arrangement was an affirmative vote of two thirds of the votes cast, as well as a simple majority excluding the respondent, any related party, and Stephen Kay, the Executive Chairman and a director of Chaparral. The latter ensured that shareholders could vote independently of the respondent: Reasons at paras. 83-84.
- [32] The judge also found that the potential EPA liability did not force the shareholders to sell their shares. However, it was a material development negatively affecting share price that could factor into the shareholders' decision when voting on the Arrangement: Reasons at para. 85.
- [33] The judge then addressed other factors that he found supported using the deal price. He reviewed the evolution of the arrangement, including the various offer prices during the hostile bids. He found that the spin-out transaction in November 2013, and Paradigm's valuation of a Chaparral share in the range of \$0.58 to \$0.85 at that time, provided real evidence of fair value: Reasons at paras. 98-100. He also took into consideration the prices at which Chaparral shares traded on the TSX from December 30, 2013 to February 18, 2014, finding that the trading volume "provided sufficient liquidity to warrant analysis of the trading price": Reasons at para. 151. Furthermore, he found that the offers provided by the white knights provided real evidence that the en bloc fair market value was approximately \$0.60 per share at the relevant time: Reasons at para. 112. The judge concluded that all of these factors confirmed the fair value of the deal price.
- [34] The judge also noted that, even after excluding shares held by the respondent, any related party, and Mr. Kay, the arrangement was approved by 99.19 percent of shareholders: Reasons at para. 62. He reasoned that if the fair value were in the range alleged by the appellant, then dissent rights would have been exercised by a far larger percentage of shareholders: Reasons at para. 125.

- [35] Another important consideration for the judge was that Chaparral received an independent valuation from Paradigm, which had no incentive to inaccurately value Chaparral: Reasons at para. 130.
- [36] The judge did not accept Mr. Low's evidence on behalf of the appellant, finding as follows:
- [146] Mr. Low discards too readily the real evidence provided by the market forces which included both the Arrangement negotiated by Chaparral and the respondent and the market trading price. For the purpose of determining fair value, where open and unrestricted market forces are engaged, a valuator should use the real evidence that may be obtained from such market forces and then adjust (e.g., minority discount), where necessary, for the particular valuation task.
- [159] The essence of Mr. Low's report and his comments on Mr. Crosson's report is that they illustrate approaches that may have been taken by a hypothetical market participant in determining what price a market participant may have theoretically paid (or sold) for a Chaparral share. In the matter at bar, there is real evidence provided by the engaged market forces.
- [37] From these findings, the judge concluded that the \$0.61 per share deal price represented the en bloc fair value of the Chaparral shares and dismissed the appellant's petition.

V. The Issues

- [38] Two alleged errors are raised by the appellant. Specifically, did the judge:
- err in law by failing to apply the established legal framework for determining the fair value of a dissenting shareholder's shares pursuant to s. 245(2)(a) of the BCBCA?; and/or
 - commit palpable and overriding errors in relation to certain findings of fact in his analysis of market forces?

VI. Analysis and Decision

First Issue: Did the Judge Err in Law by Failing to Apply the Established Legal Framework for Determining the Fair Value of a Dissenting Shareholder's Shares Pursuant to s. 245(2)(a) of the BCBCA?

- [39] The question of what legal test applies is a question of law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43. The applicable standard of review on a question of law is correctness, meaning this court is free to substitute its own view for that of the judge: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.
- [40] The appellant's position is that the judge applied the wrong legal framework to his analysis of what constituted fair value. In particular, he submits that the judge erred in:

- not following the governing jurisprudence and the established legal test for determining fair value;
- relying on market forces as a "confirmatory check" that the deal price was fair value, effectively creating an unfair and unprecedented "deal price presumption";
- applying a market-based analysis, where market price was an unreliable indicator of fair value because Chaparral's mining assets were undeveloped;
- failing to apply one of the generally accepted and recognized valuation approaches and conduct a de novo valuation; and
- only superficially considering Mr. Low's expert valuation evidence, even though it was the only de novo opinion on fair value, as Mr. Crosson was instead asked whether the price of \$0.61 per share was established in the context of a fair market value transaction.

[41] The respondent submits that the judge correctly set out the applicable legal framework and was entitled to consider the deal price as evidence of fair value established in an open market. The respondent's position is that the appellant is simply attempting to reargue the case from the court below.

The Legislative Provisions

[42] The key statutory provision in question is s. 245(2)(a) of the BCBCA, which reads:

245 (2) A dissenter who has not entered into an agreement with the company under subsection (1) or the company may apply to the court and the court may

- (a) determine the payout value of the notice shares of those dissenters who have not entered into an agreement with the company under subsection (1), or order that the payout value of those notice shares be established by arbitration or by reference to the registrar, or a referee, of the court,

[43] Section 237(1) defines "dissenter", "notice shares" and "payout value":

237 (1) In this Division:

"dissenter" means a shareholder who, being entitled to do so, sends written notice of dissent when and as required by section 242;

"notice shares" means, in relation to a notice of dissent, the shares in respect of which dissent is being exercised under the notice of dissent;

"payout value" means,

- (a) in the case of a dissent in respect of a resolution, the fair value that the notice shares had immediately before the passing of the resolution,

- (b) in the case of a dissent in respect of an arrangement approved by a court order made under section 291 (2) (c) that permits dissent, the fair value that the notice shares had immediately before the passing of the resolution adopting the arrangement,
- (c) in the case of a dissent in respect of a matter approved or authorized by any other court order that permits dissent, the fair value that the notice shares had at the time specified by the court order, or

excluding any appreciation or depreciation in anticipation of the corporate action approved or authorized by the resolution or court order unless exclusion would be inequitable.

Carlock v. ExxonMobile Canada Holdings ULC, 2020 YKCA 4

- [44] Following the parties filing their factums and prior to the hearing of the appeal, the Court of Appeal of Yukon rendered its decision in *Carlock v. ExxonMobile Canada Holdings ULC*, 2020 YKCA 4 [Carlock].
- [45] Carlock involved an application under s. 193 of the Yukon Business Corporations Act, R.S.Y. 2002, c. 20 to have the Court set the fair value of shares owned by dissenting shareholders in InterOil Corporation ("InterOil"). ExxonMobil Canada Holdings ULC ("Exxon") agreed to purchase the shares of InterOil by means of an exchange of InterOil shares for Exxon shares, leading to InterOil becoming a wholly owned subsidiary of Exxon.
- [46] In the initial proposed plan of arrangement, Exxon agreed to buy all of the shares of InterOil for USD \$45 per share, paid in Exxon shares, plus a contingent resource payment estimated at \$7.04 per share: Carlock at para. 29. The plan of arrangement was approved at a special meeting of the shareholders, although some shareholders with approximately 10 percent of the common outstanding shares voted against it: Carlock at para. 30. The Yukon Supreme Court approved the proposed plan of arrangement, but the Court of Appeal set aside that order based on procedural deficiencies or 'red flags' that called into question whether the arrangement was fair and reasonable: *InterOil Corporation v. Mulacek*, 2016 YKCA 14 at para. 40. Notwithstanding the decision, the parties reached a second proposed plan of arrangement on substantially the same terms including the transaction price, which was later calculated to total \$49.98 per share: Carlock at paras. 31-32.
- [47] The second proposed plan of arrangement was approved at a shareholder meeting, with less than 0.5 percent of shareholders exercising their dissent rights: Carlock at para. 33. In determining the fair value of the dissenter's shares, the chambers judge failed to give weight to the transaction price as evidence of fair value and instead relied on a theoretical valuation. In reasons indexed at 2019 YKSC 10, the judge found as follows:
- [62] I conclude that the transaction price was established in a flawed corporate governance process. The fact that the corporate governance process to establish a fair and reasonable arrangement was enhanced does not change the findings of the Court of Appeal on the original arrangement. These findings included a CEO in a position of conflict, an

"independent" special committee that was not independent of management and the lack of necessity for the deal. In my view, the transaction price, borne of a flawed process, cannot be resurrected as the "fair value" as defined by the experts.

[48] On appeal, Justice Harris found that the chambers judge erred in principle by finding that the Court of Appeal's decision on the first plan of arrangement meant that the transaction price agreed to in both arrangements could not be relied upon as evidence of fair value: Carlock at para. 35. In reaching this conclusion, Harris J.A. set out the following principles at paras. 7-13:

- fair market value is defined as "the highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act": 2019 YKSC 10 at para. 57;
- in determining the fair value of a dissenter's shares, the focus is not on the dissenter's shares but the en bloc value of all issued shares in the company: Grandison at para. 152; and
- the "one true rule" is that the court must consider all of the evidence, the relevant factors in the particular case, and exercise its best judgment: Cyprus Anvil Mining Corp. v. Dickson, 33 D.L.R. (4th) 641 at para. 51 (B.C.C.A.) [Cyprus].

[49] With respect to valuation methods, Harris J.A. added the following:

[15] It is common ground that, broadly speaking, value is approached drawing on five valuation methods: (a) the quoted market price on the stock exchange ("market value approach"); (b) the valuation of the net assets of the company at fair value ("assets approach"); (c) the capitalization of maintainable earnings ("earnings of investment value approach"); (d) the "discounted cash flow" ("DCF") method taking into account a capitalization of future profits; and (e) a combination of approaches.

[16] I pause to observe that viewing the market value approach simply as valuation based on stock market prices may be unduly restrictive where other objective market based evidence is available demonstrating the actual behaviour of market participants in a real market. Where the evidence supports the conclusion that the market is efficient, consisting of multiple informed participants capable of acting in their own self-interest, and there are no material market failures, the result of the market is likely the best and most objective evidence of value. It is rooted in reality and not based on assumptions, theory or predictions.

[Emphasis added.]

[50] In language mirroring that used by the chambers judge in this case, Harris J.A. distinguished cases where theoretical valuations are necessary from those where an actual transaction is indicative of fair value:

[19] Commonly, the determination of fair value in the reported cases occurs where there is no broadly based open market transaction because, for example, the transaction might not involve a disposition of shares or is not arms-length. In those kinds of circumstances, it is often necessary to resort to a theoretical search for value that attempts to estimate the value that would be the product of a hypothetical market. Where, however, there is an open market for shares or other evidence indicative of arms-length conduct of numerous market participants acting in their own self-interest and settling on a price, such evidence is particularly reliable as an indicator of fair value, as I have already explained. Objective market evidence, in the absence of evidence of market failure, is more reliable than theoretical analysis that attempts to derive a value based on assumptions about what a real market would disclose, if there were one. The behaviour of a real market is better evidence of value than a theoretical market.

[Underlined emphasis added; italicized emphasis in original.]

Analysis

[51] In my view, Carlock provides a complete answer to this first ground of appeal. While the judge did not have the benefit of this decision, it is clear that the legal framework he applied, as summarized above, was entirely consistent with Carlock.

[52] In particular, the judge did not start with a "presumption" that the deal price was fair, that term being neither expressly stated nor implied in the Reasons. Rather, he correctly used the deal price as a starting point and then referred to other market-based factors to ascertain whether the price was fair to the dissenting shareholder.

[53] He also considered all relevant evidence and exercised judgment in the determination of fair value, including:

- the history of the acquiring and target company;
- the trading price of the shares in the public market;
- the evolution and formulation of the plan of arrangement;
- the value of the shares specified in the plan of arrangement; and
- the opinions regarding value of the expert witnesses.

See Grandison at para. 5, cited with approval in Carlock at para. 14.

[54] Furthermore, he was correct in relying on the negotiated deal price. As explained by Harris J.A. in Carlock at para. 17, "that price was the outcome of the behaviour of participants in a real market [and] is of immediate and direct probative value". In a functioning open market, as existed in this case, the transaction price is more probative of value than a theoretically derived value: Carlock at para. 19.

[55] Contrary to the appellant's assertion that the judge failed to conduct a de novo assessment of fair value, I am satisfied that the judge considered all of the evidence and the relevant market-based factors to conclude that the deal price was equivalent to the fair value of the shares. Furthermore, the judge thoroughly reviewed Mr. Low's expert report and exercised his discretion in assigning it little weight for reasons including Mr. Low's failure to assess the real evidence provided by market forces and the effect of Chaparral's potential EPA liability. The judge did, as the appellant submits, rely on market-based evidence including the Arrangement and the trading price of Chaparral shares on the TSX as a "confirmatory check" as to the fair value of the deal price: Reasons at para. 164. However, as Carlock makes clear, the judge was entitled to consider this evidence as indicative of fair value.

[56] Accordingly, I would not accede to this first ground of appeal.

[57] While the appellant focussed on the judge's alleged errors in his analytical approach, it is my view that the core motivation for this appeal was dissatisfaction with many of the judge's findings of fact, matters to which I shall now turn.

Second Issue: Did the Judge Commit Palpable and Overriding Errors in Relation to Certain Findings of Fact in His Analysis of Market Forces?

[58] Fixing the fair value of a dissenting shareholder's shares is "a matter of discretionary judgment": Ashton Mining of Canada Inc. v. Vesuna, 2008 BCCA 248 at para. 15. This court may not interfere unless the chamber judge erred in law or in principle, or the judgment is "clearly and palpably wrong" with respect to matters of fact: Cyprus at para. 58.

The Impugned Findings

[59] The appellant takes issue with many of the judge's findings of fact, several of which are alleged to be speculative. The impugned findings include that:

- shareholder approval of the Arrangement is real evidence that prudent and informed shareholders viewed the deal price as fair value;
- the small percentage of dissenting shares and shareholders is real evidence that there was no coercion or compulsion to act;
- the EPA liability did not compel the Chaparral shareholders to sell their shares;
- if fair value were in the range of USD \$1.60 to \$1.85 per share, a superior proposal would have been forthcoming; and
- a prudent shareholder would recognize Paradigm's self-interest to provide a reasonably accurate valuation to protect its business reputation.

[60] The appellant submits that the judge's findings with respect to shareholder approval, and the small percentage of dissenting shares, were in error. The appellant says that broad shareholder approval of the Arrangement is not indicative of fair value because of free-rider

and collective action problems, noting that only 58 percent of shareholders voted.

Furthermore, the appellant submits that there are a range of reasons shareholders may sell their shares at a particular price or decline to exercise their dissent rights, even if the deal price were not fair value.

- [61] The appellant challenges several of the judge's findings, including the latter three listed at para. 59 above, as speculative and lacking any evidentiary basis. With respect to the judge's consideration of Paradigm's valuation of Chaparral, the appellant says the judge erred by relying on market forces and failing to address Mr. Low's concerns with the Paradigm valuation.
- [62] Finally, the appellant argues that the judge erred by ignoring evidence of market failure. The appellant submits that the deal price was only nominally in excess of Chaparral's cash value, thereby ascribing no value to its mining assets. Moreover, the inopportune timing of the EPA's complaint impaired the Board's ability to fully canvass the market, obtain multiple bids, and arrive at the highest possible offer.

Analysis

- [63] Absent palpable and overriding error affecting the assessment of facts, findings of fact cannot be overturned on appeal: *Housen* at para. 10. A palpable error is an error that is "plainly seen", while an overriding error is one that is "determinative of the outcome of the case": *Housen* at para. 6; *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.
- [64] A judge's findings regarding the weight to be given to expert evidence, including preferring one expert over another, is entitled to deference, absent a palpable and overriding error: *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1997), 143 D.L.R. (4th) 635 at paras. 18-19 (B.C.C.A.), citing *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121-122 (S.C.C.). While it is open to a judge to prefer one expert over another, it is necessary to provide sound reasons for dismissing or according less weight to one of the experts' evidence: *Gill v. Lai*, 2019 BCCA 103 at paras. 46-48.
- [65] I have reviewed the judge's findings in some detail above. In essence, the appellant challenges the judge's weighing of the evidence, conclusions on contentious factual matters, and preference of one expert (Mr. Crosson) over another (Mr. Low).
- [66] There is simply no basis, in my view, for the appellant's submissions on these issues. There was a solid evidentiary foundation for the judge's findings that are impugned in this court. As such, there is no justification for this court to intervene.
- [67] With respect to the expert evidence, the judge was careful to delineate in his Reasons the rationale for his preference of Mr. Crosson's opinions to those of Mr. Low, which included the latter's failure to adequately consider:

- the overwhelming shareholder approval of the Arrangement;

- the deal price, which was negotiated between arm's length parties, where open and unrestricted market forces were engaged;
- the fact that the deal price, in comparison to the original hostile bid offers, included a valuation of Chaparral's mining properties;
- the trading price of Chaparral shares on the TSX; and
- the effect of Chaparral's potential EPA liability, and its disclosure in its SEDAR public filings, on the fair market price of Chaparral shares.

[68] The judge provided sound reasons for preferring Mr. Crosson's market-based analysis over Mr. Low's hypothetical valuations, which are entirely consistent with the approach subsequently affirmed in Carlock. Although Mr. Crosson was asked to evaluate whether the deal price was established in the context of a fair market value transaction, rather than providing a comprehensive independent valuation, the judge was entitled to rely on his analysis of market forces in assessing whether the deal price was equivalent to fair value. I can find no error in the judge's approach, nor in his findings of fact with respect to the real evidence provided by market forces.

[69] Accordingly, I would not accede to this ground of appeal.

VII. Disposition

[70] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Grauer"

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