
CANADA / JUDGMENT

Bingham v. Ashton Mining of Canada Inc.

2007 BCSC 281

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Supreme Court of British Columbia

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2007 BCSC 281 Bingham v. Ashton Mining of Canada Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bingham v. Ashton Mining of Canada Inc.,

2007 BCSC 281

Date: 20070301

Docket: S070345

Registry: Vancouver

Between:

Matthew S. Bingham

Petitioner

And

Ashton Mining of Canada Inc.

Respondent

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

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Date and Place of Hearing:

February 7-9 and 14, 2007

Vancouver, B.C.

Introduction

[1] The petitioner is seeking declarations and restraining orders which would collectively have the effect of cancelling the amalgamation of Ashton Mining of Canada Inc. with a wholly owned subsidiary of Stornoway Diamond Corporation. The petitioner owned a number of shares issued by Ashton. One consequence of the amalgamation was to terminate the petitioner's interest in Ashton and give him some consideration in return. The petitioner complains that the process that led to the amalgamation was flawed and that the court ought to reverse it. The center piece of the petitioner's case is his assertion that Stornoway should not have been permitted to participate in the vote by which the Ashton shareholders approved the amalgamation proposal.

The Facts

[2] Ashton was in the diamond exploration business. It was federally incorporated and publicly traded. The parties agree that the Canada Business Corporations Act, R.S.C. 1985, c. C-44, applies to the transactions which led the petitioner to start this proceeding. They also agree that to the extent that those transactions may be governed by provincial securities legislation, regulations and rules, the applicable provisions are found in the Ontario Securities Act, R.S.O. 1990, c. S-5; the Ontario Securities Commission; and that Commission's Rule 61-501.

[3] In or about the year 2000, a company or group of companies known as Rio Tinto acquired 52 percent (rounded) of the shares in Ashton. It may be that the entities which actually owned the Ashton shares were wholly owned subsidiaries or affiliates of Rio. Be that as it may, Rio was the entity that effectively controlled the Ashton shares. Rio acquired the shares as an incident to some larger transaction in which it was engaged at the time. Rio was interested in selling its shares in Ashton, and during the next number of years, Rio tried to attract interest in those shares. Rio's efforts were generally unsuccessful. No one showed marked interest in buying the shares until in or around 2004. Then Stornoway indicated to Rio that it

might be interested in buying Rio's shares.

- [4] Discussions between Rio and Stornoway continued for several years. Finally, on July 21, 2006, Rio and Stornoway made an agreement concerning the sale of Rio's shares in Ashton. This came to be known as the "lockup" agreement.

The Lockup Agreement

- [5] For the purpose of this proceeding, the lockup agreement provided that Stornoway would initiate a bid to acquire Ashton shares. The bid would be made to all Ashton shareholders. Stornoway would put two options for payment to the shareholders who tendered their shares in response to the bid. One option was to request consideration of \$1.25 cash per Ashton share tendered. The other option was to request that instead of cash, the tendering shareholder would receive one Stornoway share having a value of \$1.24 plus \$0.01 in cash. The plan was that Ashton shareholders who were willing to sell their shares to Stornoway could, at their option, receive \$1.25 cash or one Stornoway share plus one cent in cash.
- [6] There was a caveat on that first option for payment in cash. Stornoway stipulated that it had a pool of cash amounting to \$59.5 million which would be available to tendering Ashton shareholders. If it turned out that so many shares were tendered for cash that the \$59.5 million was not enough to pay for all the shares, then the bid stipulated that Stornoway could acquire all those shares by paying each shareholder a pro-rated portion of the cash pool plus a fraction of a Stornoway share.
- [7] There were other salient elements of the lockup agreement between Stornoway and Rio. Rio agreed that it was committed to selling to Stornoway at the price Stornoway and Rio had agreed upon. That commitment bound Rio to the deal even if Stornoway's bid sparked an offer from some other interested party who might offer more for Ashton shares than Stornoway was willing to pay. In high finance parlance, that commitment made the lockup a "hard" lockup. It was "hard" in the sense that having agreed to it, Rio was wedded to Stornoway's bid. It could not sell its shareholding to another party who might be prepared to pay more than \$1.25 for each of Rio's shares. In addition to that provision, Rio agreed that it would tell Stornoway about any such additional interest if such came to Rio's attention. Rio agreed that if it came to it, Rio would vote its Ashton shares against any proposal from another interested party and that Rio would vote its shares in favor of the Stornoway bid.
- [8] The lockup agreement's price of \$1.25 per share was 15 percent above the price for which Ashton shares were trading on the stock market.
- [9] Since Stornoway had secured Rio's shares with the lockup agreement, and since Rio had 52 percent of the Ashton shares, Stornoway would have become majority shareholder in Ashton by simply completing the lockup agreement. But Stornoway wanted to make a public bid to buy more Ashton shares. It follows that Stornoway was motivated by a desire to acquire all, or substantially all, of Ashton's issued shares.

The Bid

- [10] On August 10, 2006, Stornoway published its bid to acquire Ashton shares. The bid was Stornoway's work - Ashton did not participate in its preparation. The bid was communicated to Ashton's shareholders.
- [11] The bid contained the same consideration scheme as the lockup agreement. The bid also noted the lockup agreement.
- [12] The bid specified that the price Stornoway was offering was a 15 percent premium over the trading price of Ashton shares. The bid made reference to certain provisions of the OSA that govern takeover bids, where the share purchase involves not more than five sellers. The bid explained that in order to remain within those provisions, the purchaser - Stornoway - could not offer the sellers more than 115 percent of the market price of their shares.
- [13] The bid also contained language describing the process by which Stornoway planned to proceed if it turned out that the bid delivered to it less than 90 percent of Ashton's issued shares. The 90 percent threshold was important. According to the OSA and the OSC's Rules, if Stornoway got 90 percent or more of the shares with its bid, it could oust the remaining shareholders without further ado. Stornoway would have to pay for the shares, of course, but the shareholders would have no choice but to accept the payment and hand over their shares. (Well, that is not the whole story: unhappy shareholders could invoke a right to dissent in order to reassess the price for the shares, but they would have no choice, in the end, to transfer their shares to Stornoway.)
- [14] The process would be different, however, if at the end of the bid, fewer than 90 percent of the shares wound up under Stornoway's control. In that case, Stornoway had to take a second step in its project of obtaining all the Ashton shares. That second step was to propose to the Ashton shareholders that Ashton amalgamate with the Stornoway-controlled entity that held however many Ashton shares that had been tendered to Stornoway's bid. If the Ashton membership approved the amalgamation, then the Stornoway-controlled entity would purchase all the Ashton shares on the same terms as the bid. Ashton would amalgamate with the controlled entity, and Stornoway would wind up effectively owning Ashton outright. Under the provisions of the OSA and the OSC's Rules, the amalgamation process would be essentially democratic - if the will of the shareholders met the statutory threshold of a simple majority for approval, then the amalgamation would proceed, and those shareholders who voted against the amalgamation would have no choice but to trade their Ashton shares for the compensation specified in the bid (or if they dissented, whatever compensation the dissent process produced).

- [15] The bid was open ended - it could be extended at Stornoway's option for however long Stornoway wished to prolong it. Its initial expiry was set for mid-September 2006. Stornoway exercised its option to extend the bid, and the bid stayed open until October 18, 2006. When the bid expired on October 18th, Ashton shareholders had tendered to Stornoway a total of 68 percent (rounded) of Ashton's issued shares. That 68 percent included the 52 percent that had been owned by Rio.
- [16] The bid also provided that Stornoway could, when the bid ended, decide not to acquire any of the tendered shares. If it decided to not take up the shares, it was obliged to pay the tendering shareholders their pro-rata share of \$2 million. This provision acted as an incentive to keep Stornoway from simply walking away from the takeover effort.
- [17] Finally, the bid advised the Ashton shareholders that if the second step was necessary, then Stornoway planned to vote the shares it expected to acquire from Rio, plus any additional shares tendered to by other shareholders, in favor of the amalgamation question. It is this representation, and the fact that Stornoway did vote the shares, that bottoms the petitioner's complaints about the amalgamation process.

Events Leading to the Amalgamation Vote

- [18] When Stornoway first issued its bid, Ashton's response was negative. Ashton's board of directors told to their shareholders that the price Stornoway was offering was too low. At this point only Stornoway's bid was in play. Ashton's directors were concerned to maximize their shareholder's value by, among other things, trying to drum up interest from other prospective purchasers. As a part of that effort, Ashton commissioned an inadequacy report from the National Bank Financial Inc. The inadequacy report was not an expert opinion on the value of Ashton's shares. It was prepared by the National Bank in order to assess whether, given certain assumptions, Stornoway's offer was adequate. The upshot of the National Bank report was that the offer was not adequate. Ashton made the inadequacy report available to its shareholders.
- [19] As noted earlier, when the bid expired, 68 percent of Ashton's shares had been tendered to it. Ashton began to prepare for the amalgamation vote that Stornoway had promised to convene. Ashton created an independent committee of its directors, and that committee commissioned an expert evaluation of the market value of Ashton's shares. That expert report was prepared by Sprott Securities Inc. Sprott reviewed the data relating to Ashton's business and to Stornoway's offer. Sprott opined that \$1.25 per share was within the reasonable range of market values for Ashton's shares. Ashton's independent committee of directors also retained legal counsel to advise it with respect to, among other things, the legality of Stornoway's plan to vote the Rio shares in a minority vote on the amalgamation question.

- [20] On October 18, 2006, Stornoway requisitioned a special meeting of Ashton's shareholders so that they could consider Stornoway's proposal to amalgamate with Ashton. At this special meeting, the shareholders would vote on the second step in Stornoway's takeover process. The special meeting was originally scheduled for December 19, 2006. At Ashton's request, the special meeting was delayed to January 15, 2007.
- [21] Between August and mid-December 2006, the petitioner corresponded and communicated numerous times with other parties interested in Stornoway's bid to take over Ashton. He also corresponded and communicated with the OSC and the B.C. Securities Commission. Those communications reveal that the petitioner was vitally concerned about the takeover bid and that he was staunchly against Stornoway acquiring his shares at the price the bid stipulated. On October 19, 2006, the petitioner wrote to another shareholder:

Anyways...for those of you who think this is a done deal take a look at Policy 9.1 from the OSC. It ain't easy to get rid of minority shareholders...And, I for one, am going to make sure I'm not going except at a healthy premium.

(emphasis added)

- [22] Several others of the petitioner's writings during this period demonstrate that he was of the opinion that Stornoway and Ashton had failed to make material disclosures in their publications. He was also concerned by Stornoway's plan to vote the shares that had been tendered to it. The petitioner characterized Stornoway's position on voting the shares as "bogus".
- [23] There can be little doubt but that between August 2006 and January 2007, the petitioner tracked developments in the Stornoway bid to take over Ashton, that he followed those events with great interest, that he was opposed to receiving \$1.25 per share for his Ashton shares, and that he applied his mind to the arguments and methods that might be brought to bear upon Stornoway and Ashton to achieve a higher price for those shares. The petitioner clearly considered taking legal action to address those concerns, and he clearly had thoughts of initiating a legal challenge before the amalgamation vote took place.
- [24] On December 18, 2006, Ashton issued an information circular to its shareholders. That circular was also posted to an Internet web site called SEDAR.com. The circular advised that in Sprott's expert opinion, each Ashton share was worth between \$0.91 and \$1.35. Ashton recommended that its shareholders accept the Stornoway bid. Ashton also advised its shareholders that so far as it was concerned, Stornoway was entitled to vote the shares tendered to it in a minority shareholder vote on Stornoway's plan to amalgamate Ashton with Stornoway. The petitioner knew or ought to have known of the Ashton circular shortly after it was published.
- [25] On or about January 5, 2007, the petitioner advised various other Ashton shareholders that he had just finished meeting with a lawyer. The context of the communication makes it clear that the petitioner was aware of the impending special meeting. The message makes it

equally clear that the petitioner had decided as of that date that he would not initiate a court challenge of the takeover process until after the meeting had taken place. It follows that, as of January 5, 2007, the petitioner had decided to eschew whatever alternative remedies he might have had about disclosure and about Stornoway's position that it was entitled to vote shares tendered to it in the minority vote, in favor of launching a court action after the vote was held.

[26] One alternative remedy available to the petitioner prior to the minority vote was an order under s. 154(1)(b) of the CBCA requiring the correction of the Information Circular:

154. (1) If a form of proxy, management proxy circular or dissident's proxy circular contains an untrue statement of a material fact or omits to state a material fact required therein or necessary to make a statement contained therein not misleading in the light of the circumstances in which it was made, an interested person or the Director may apply to a court and the court may make any order it thinks fit including, without limiting the generality of the foregoing,

(a an order restraining the solicitation, the holding of the meeting, or any person from implementing or acting on any resolution passed at the meeting to which the form of proxy, management proxy circular or dissident's proxy circular relates;

(b an order requiring correction of any form of proxy or proxy circular and a further solicitation; and

(c) an order adjourning the meeting.

Minority Vote

[27] To reiterate: the question concerning the minority vote was germane because, according to the OSA, Stornoway's plan to take over Ashton could have resulted in it obtaining fewer than 90 percent of Ashton's shares. In that case, before the proposed amalgamation could proceed, it had to be approved by a majority of the Ashton shareholders entitled to vote on the question. The petitioner takes the position that Stornoway could not vote the shares it acquired from Rio or from other persons who tendered because, for various reasons that will be discussed later, those shares did not qualify as "minority" shares. The petitioner says that the fact that Stornoway did vote those shares spoiled the vote entirely and that the only thing for the court to do under such circumstances is to declare the vote void, cancel corporate actions that were taken after the vote, and essentially roll the transaction back so as to restore the parties to their respective positions immediately before January 15, 2007.

The Amalgamation Vote and Subsequent Events

- [28] The amalgamation vote was held on January 15, 2007. The question posed was whether Ashton should amalgamate with Stornoway. If the answer was yes, then the shareholders who voted no would nevertheless be obliged to accept consideration from Stornoway for their Ashton shares.
- [29] The answer to the amalgamation question was an overwhelming yes. Approximately 96.5 percent of the shareholders voted in favor amalgamation. Only approximately 3.5 percent of the shareholders voted against the proposition. After taking out the votes cast by Stornoway on its Rio shares, the remaining votes were still approximately 90 percent in favor of amalgamation. After taking out all of the shares that Stornoway voted, which included the Rio shares and shares tendered by non-Rio shareholders before the bid expired, the vote was 54 percent against the proposition.
- [30] Immediately after the special meeting, Ashton filed articles of amalgamation with the office of the CBCA Director. The newly amalgamated company was wholly owned by Stornoway and was not publicly listed on a stock exchange. Ashton's shares were de-listed from the Toronto Stock Exchange on January 19, 2007. Since that date, Stornoway has delivered pro-rated cash payments and pro-rated volumes of Stornoway stock to various entities in consideration for their Ashton shares. In particular, since the amalgamation vote, Stornoway has paid out approximately \$8.9 million in cash and approximately 21 million Stornoway shares to various parties in return for their Ashton shares. Since January 16, 2007, at least 4.5 million Stornoway shares have traded on the Toronto Stock Exchange. It follows that there is a substantial risk that parties who received Stornoway shares in return for their Ashton shares have since sold those shares to third parties.

Issues and Discussion

Going Private

- [31] The first issue to determine here is whether the Stornoway deal was a "going private" transaction within the meaning of that term in the CBCA. If it was not a going private transaction then all that was required to effect the amalgamation was a 66-percent vote in favor with no special provision for a vote by minority shareholders: CBCA, s. 183. If there is no need for minority approval, then the petitioner's arguments relating to Stornoway's participation in the minority vote become moot.

- [32] Section 3(1) of the CBCA Regulations defines a going private transaction thus:

3 (1) For the purpose of the definition "going-private transaction" in subsection 2(1) of the Act, "going-private transaction" means an amalgamation, arrangement, consolidation or other transaction involving a distributing corporation, other than an acquisition of shares under section 206 of the Act, that results in the interest of a holder of participating securities of the corporation being terminated without the consent of the holder and without the substitution of

an interest of equivalent value in participating securities of the corporation or of a body corporate that succeeds to the business of the corporation, which participating securities have rights and privileges that are equal to or greater than the affected participating securities.

- (2) For the purpose of subsection (1), "participating securities" means securities of a body corporate that give the holder of the securities a right to share in the earnings of the body corporate and after the liquidation, dissolution or winding up of the body corporate, a right to share in its assets.

(emphasis added)

- [33] The amalgamation did have the effect of terminating the interest of the nay-saying Ashton shareholders without their consent. The deal therefore fits within the first leg of the going private definition.
- [34] The second leg of the test is a negative and requires examination of the consideration paid for the terminated interest. I note that Stornoway's takeover bid was structured in such a way that if it succeeded, Stornoway would have to pay for the Ashton shares partly in cash and partly in Stornoway stock. There was no evidence before me that the Stornoway stock alone was worth \$1.25 each. In fact, the evidence was to the contrary - Stornoway's bid stipulated that an Ashton share was worth \$1.25 cash under the first payment option, or \$0.01 plus one Stornoway share under the second payment option. For the purposes of this transaction, then, one Stornoway share must have been worth \$1.24. On the face of the deal, Stornoway shares did not have an equivalent value to Ashton shares. The Regulations stipulate "equivalent value", not "substantially equivalent value". Webster's Dictionary defines "equivalent" as "equal in force, amount, or value". Equal means the same. No party led evidence to the effect that the Stornoway shares were, in fact worth, \$1.25 each. It follows that there is no evidentiary basis on which I could conclude that Stornoway effected a substitution of an interest of equivalent value in participating securities in return for the Ashton shares.
- [35] There is an alternative interpretation of "equivalent value" in s. 3.1. It may mean nothing more than a trade of one share for one share; in which case "equivalent value" is a measure of the voting rights attached to the share and has nothing at all to do with how much the share is worth. If that is the correct interpretation of the phrase, I would still find that the test has not been satisfied. That is because there were so many Ashton shares to be acquired that if the takeover succeeded, the Ashton shareholders who opted for all-cash consideration would necessarily receive a pro-rated cash payment and a fraction of a Stornoway share. A fraction of a Stornoway share is not the voting equivalent of a whole Ashton share.

- [36] I find that the negative test in the second leg of the going private definition has not been satisfied. Ashton shareholders did not necessarily receive securities of an equivalent monetary or voting value in return for their terminated interests. The transaction was not, therefore, exempted from the definition. It was a going private deal.
- [37] The consequence of that designation is that the transaction had to comply with the applicable provincial securities laws relating to going private transactions as required by s. 93 of the CBCA.

Applicable Provincial Laws

- [38] The parties agreed that if the transaction was governed by provincial securities laws, then the applicable laws were the laws of the Province of Ontario. The applicable legislation is the OSA. The OSA sets up the OSC, and the Commission has the authority to create rules that govern securities transactions involving corporations that fall within its jurisdiction.
- [39] Of interest in this case is the Commission's Rule 61-501.
- [40] Rule 61-501, s. 4.5, says:

4.5 Minority Approval - Subject to section 4.6, an issuer shall not carry out a business combination unless the issuer has obtained minority approval for the business combination under Part 8.

For the purposes of this proceeding, the parties treated the transaction in issue as a business combination within the meaning of Rule 61-501, s. 4.5.

- [41] Part 8 of the Rule 61-501 governs how minority approval may be obtained. The portions of Part 8 relevant to this proceeding are:

8.1 General

- (1) If minority approval is required for a business combination or related party transaction, it shall be obtained from the holders of every class of affected securities of the issuer, in each case voting separately as a class.
- (2) Subject to section 8.2, in determining minority approval for a business combination or related party transaction, an issuer shall exclude the votes attached to affected securities that, to the knowledge of the issuer or any interested party or their respective directors or senior officers, after reasonable inquiry, are beneficially owned or over which control or direction is exercised by
 - (a) the issuer;
 - (b) an interested party;

- (c) a related party of an interested party, unless the related party meets that description solely in its capacity as a director or senior officer of one or more entities that are neither interested parties nor issuer insiders of the issuer; or
- (d) a joint actor with a person or company referred to in paragraph (b) or (c) in respect of the transaction.

8.2 Second Step Business Combination - Despite subsection 8.1(2), the votes attached to securities acquired under a formal bid may be included as votes in favour of a subsequent business combination in determining whether minority approval has been obtained if

- (a) the security holder that tendered the securities to the bid was not a joint actor with the offeror in respect of the bid;

...

- (f) the disclosure document for the formal bid

...

(iv) identified the securities, if known to the offeror after reasonable inquiry, the votes attached to which would be required to be excluded in determining whether minority approval for the business combination had been obtained,

[42] Section 1.1 of the Rule 61-501 defines joint actors thus:

"joint actors", when used to describe the relationship between two or more entities, means persons or companies "acting jointly or in concert" as defined in section 91 of the Act, with necessary modifications where the term is used in the context of a transaction that is not a take-over bid or issuer bid, but a security holder is not considered to be a joint actor with an offeror making a formal bid, or with a person or company involved in a business combination or related party transaction, solely because there is an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction;

[43] The petitioner asserts that Stornoway and Rio were joint actors within the meaning of Part 8 and were therefore excluded from participating in the minority vote, and further that they did not re-qualify as legitimate voters under s. 8.2. According to the petitioner, it was illegal for Stornoway to have voted the shares it got from Rio in the minority vote.

Discussion

[44] The OSC Rule 61-501 is a complex piece of work. As I understand it, Rule 61-501 is meant to facilitate the OSA's stated purpose of protecting investors from unfair, improper or fraudulent practices and fostering fair and efficient capital markets and confidence in capital markets (OSA, s. 1.1). It attempts to balance the right to structure financially advantageous transactions on the one hand with the need to protect against unscrupulous transactions on the other.

- [45] Rule 61-501, Part 8, operates to strike that balance in the context of transactions where a shareholder's interest is terminated without his consent. Part 8 says that the shareholders of a takeover target may approve the takeover by voting in favor of the proposal. Without their approval, the takeover cannot proceed. Rule 61-501 goes on to say that, as a general proposition, the party who initiated the takeover cannot vote any of the target's shares that he controls.
- [46] However, that general exclusion is subject to exceptions. The exceptions are laid out in s. 8.2. In this case, Stornoway, as the takeover proponent, asserts that it fits within the exceptions and that it was proper for it to vote the Ashton shares it controlled. The petitioner says otherwise - he argues that Stornoway and Rio were joint actors, and so they cannot take advantage of re-qualification of their shares pursuant to s. 8.2.
- [47] I found it useful to reflect on the rationale for re-qualifying votes tackling that issue in the context of the facts of this case. The general rule is that the proponent of a takeover should not be allowed to vote shares he controls. If he cannot vote, then the question of whether the takeover may proceed will be left to be decided by those shareholders whose interests will be terminated by a successful takeover. However, what if the proponent has, as a result of the bid and before the vote, acquired shares from shareholders who are happy to sell to the proponent at the price offered? Surely those shareholders must have been in favor of the takeover - why else would they sell their shares to the proponent? It would therefore be manifestly unfair to the proponent to exclude all the shares he has managed to accumulate after his bid. It follows that the proponent ought to be allowed to cast the votes attached to the shares he acquires in the course of the bid in favor of the takeover question when the matter comes on for a vote of the target's shareholders. Section 8.2 codifies that proposition.
- [48] However, a takeover proponent will not necessarily have clear sailing to vote shares he gets in response to his bid. He can still lose that right if, as s. 8.2(a) stipulates, he was a joint actor with the shareholder who sold shares to him. He can also lose the right to vote shares if, as s. 8.2(f)(iv) stipulates, he fails to disclose to the target's shareholders which of the shares he holds would be excluded from a vote on a takeover question.

Rule 61-501 - Section 8.2(a)

- [49] As noted above, the petitioner says that Stornoway and Rio were joint actors and that because of that, Stornoway was caught by s. 8.2(a) and it ought not to have voted the Rio shares on the takeover question. The first issue to decide, then, is whether Stornoway and Rio were joint actors.
- [50] The petitioner points to the lockup agreement as the sole source of evidence in support of his argument that Stornoway and Rio were joint actors. To recap, the lockup agreement stipulated that Stornoway offered to buy Rio's shares for cash or a combination of cash plus Stornoway stock. Stornoway was not required to buy Rio's shares, but if it backed out then, it would have to pay Rio and any other tendering shareholders a pro-rata share of \$2 million.

The agreement required Rio to sell its shares to no one other than Stornoway and on no terms other than those set out in the bid. It also required Rio to tell Stornoway about third parties who might compete to buy Ashton shares, to vote against any proposals by such third parties, and to vote in favor of the Stornoway proposal.

- [51] One would think that a shareholder who makes a lockup deal like that must be taken to have been acting jointly with the proponent. However, if you make that assumption and if as a consequence of it, takeover proponents are not allowed vote shares acquired through such agreements, then the assumption could stifle enthusiasm for takeover bids.
- [52] And that might not be a good thing: lockup agreements serve a useful purpose - they can give takeover proponents some certainty that the deals they propose have a chance of success. Absent the comfort and assurance provided by a lockup agreement, fewer takeover bids might be launched; and since takeover bids are not necessarily bad, that could inhibit the fostering of an efficient capital market.
- [53] The OSC recognized that risk and guarded against it by specifically exempting lockup agreements as indicia of joint actorship. That specific exemption was quoted earlier, and it bears repeating here (Rule 61-501, s. 1.1):

"joint actors", when used to describe the relationship between two or more entities, means persons or companies "acting jointly or in concert" as defined in section 91 of the Act, with necessary modifications where the term is used in the context of a transaction that is not a takeover bid or issuer bid, but a security holder is not considered to be a joint actor with an offeror making a formal bid, or with a person or company involved in a business combination or related party transaction, solely because there is an agreement, commitment or understanding that the security holder will tender to the bid or vote in favour of the transaction;

(emphasis added)

- [54] The Rule 61-501's definition includes by reference the definition of joint actor contained in s. 91 of the OSA. That provision reads:

91. (1) For purposes of this Part, it is a question of fact as to whether a person or company is acting jointly or in concert with an offeror and, without limiting the generality of the foregoing, the following shall be presumed to be acting jointly or in concert with an offeror:

...

3. Every associate or affiliate of the offeror.

The petitioner argues that Stornoway and Rio were joint actors on three grounds:

1. Rio tendered to the Bid pursuant to an auction-inhibiting "hard" lockup agreement with Stornoway;
2. Rio was an "associate" of Stornoway within the meaning of the OSA, s. 91(1)(3);

3. Rio received consideration under the Bid in the form of shares in Stornoway, giving it a vested interest in the completion of the Amalgamation...
- [55] I can give no credence to the petitioner's first argument. In the first place, there was nothing "auction-inhibiting" about the lockup agreement. The agreement did not require shareholders other than Rio to tender their shares. A third party interested in acquiring the remaining Ashton shares would have been free to make a bid for them at a higher price than Stornoway was offering. While that might not be an auction, it does look like healthy competition. In the second place, I can draw no particular inference from the fact that no third party appeared on the scene to offer more money than Stornoway. It seems to me that, if anything, the lack of interest from other buyers demonstrates that Stornoway's offer was "on the money" in terms of value, and that Ashton was simply not worth more than Stornoway was prepared to pay. In the third place, the information sharing provisions in the lockup agreement would not have had any real impact on the development of competition for Ashton shares. That is because any competing bid would almost certainly have had to be public, and so information relating to it would be in the public sphere in any event. The advent of a third party's interest in making a competing bid, if communicated by Rio to Stornoway, might have led to Stornoway enhancing its bid. There is therefore no merit in the idea that the lockup agreement inhibited competition for Ashton shares. In the fourth and final place, the petitioner's argument that the lockup agreement required Rio to vote against competing bids is, in my view, simply a corollary of voting for Stornoway's takeover. The mere fact that a party has agreed to vote in favor of a transaction and its corollary that the party will vote against other transactions is not, according to Rule 61-501, s. 1.1, in itself sufficient to underwrite a finding that parties are acting jointly.
- [56] The lockup agreement was, in my opinion, precisely the type of agreement which the OSC has decreed in its Rule 61-501 could not, in and of itself, lead to a finding that Stornoway and Rio were joint actors. This leg of the petitioner's argument must fail.
- [57] The second leg of the petitioner's argument that Stornoway and Rio were joint actors relies on the definition of "associate" as that word is used in the OSA, s. 91(1)(3). The OSA defines "associate" in s. 1.1 as:
- "associate", where used to indicate a relationship with any person or company, means,
- (a) any company of which such person or company beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights attached to all voting securities of the company for the time being outstanding...
- [58] The petitioner says that Rio must be deemed to have beneficially owned Stornoway shares because under the terms of the lockup agreement and the bid, Rio received Stornoway shares in partial consideration for selling its Ashton shares to Stornoway. The petitioner points out that s. 91(1) of the OSA decrees that beneficial ownership means:

90. (1) For the purposes of this Part, in determining the beneficial ownership of securities of an offeror or of any person or company acting jointly or in concert with the offeror, at any given date, the offeror, person or company shall be deemed to have acquired and be the beneficial owner of a security, including an unissued security, if the offeror, person or company is the beneficial owner of any security convertible within sixty days following such date into such a security or has the right or obligation, whether or not on conditions, to acquire within such sixty days beneficial ownership of the security whether through the exercise of an option, warrant, right or subscription privilege or otherwise...
- [59] The petitioner says that if you plug the total volume of Rio's shares into the bid's proration formula, it works out that at the end of the day Rio winds up owning about 17 percent of Stornoway's shares. That is more than 10 percent and so, according to the petitioner, Rio fell within the deeming provision of s. 90(1) making Rio a beneficial owner of Stornoway shares. The petitioner says that as a beneficial owner of those shares, Rio was an associate of Stornoway within the meaning of s. 1.1, and as an associate, it was also a joint actor.
- [60] The flaw in this second leg of the petitioner's joint actor argument is that the lockup agreement and the bid provided that Rio might end up with some indeterminate volume of Stornoway stock. That is because Rio opted to be paid for its Ashton shares in cash. It would receive Stornoway shares only if so many other Ashton shareholders tendered to the bid that the \$59.5 million pool was exhausted and Stornoway shares had to be issued as part of the purchase price. The answer to how many Stornoway shares Rio might get lay in the number of Ashton shareholders who ultimately tendered to the bid, and that answer could not have been known until the bid closed. It happened that the bid closed on October 16, 2006. I make that to be 66 days after the bid was published. There was, therefore, no way to know whether, on the 60th day after the bid was issued, Rio would have had control of any particular percentage of Stornoway's stock. It follows that I cannot confidently determine that 60 days after the bid Rio had, in fact, the right to obtain 10 percent or more of Stornoway's stock. Rio cannot be deemed to have been a beneficial owner of at least 10 percent of Stornoway's stock, and therefore it was not an associate of Stornoway within the meaning of s. 1.1 of the OSA definition of that term. The second leg of the petitioner's argument that Rio was a joint actor with Stornoway must fail.
- [61] The third and final leg of the petitioner's joint actor argument was that Rio had a vested interest in the completion of Stornoway's takeover because it was in line to receive Stornoway shares. The petitioner maintains that, leaving aside any concept of joint actorship as defined in the OSA or Rule 61-501, when Rio agreed to accept Stornoway shares, it hitched its economic fortune to Stornoway's star. According to the petitioner, this fact demonstrates that Rio's interests were not aligned with the rest of Ashton's shareholders. He says that if Rio was motivated by some consideration different from the other Ashton shareholders, and that consideration was Stornoway's well-being, then Rio must have been acting jointly with Stornoway.

- [62] This argument is, with the greatest of respect to the petitioner, contrary to the facts. The facts are that Rio opted to receive cash for its Ashton shares and that it did not want Stornoway shares. To say that Rio acted in concert with Stornoway because, contrary to its demonstrated desire to get cash, in the end it wound up with some Stornoway stock is to entirely misconstrue the circumstances of the case. In any event, the evidence was that Stornoway stock was publicly traded on the stock market. Rio could sell those shares when and if it liked. There was nothing in the evidence to suggest that Rio was intent on realizing anything more than \$1.24 from the Stornoway shares that it might be obliged to receive in the takeover process. If Rio's ultimate goal was to convert shares to cash (and that is the only conclusion of fact that I can come to on the evidence here), then it could easily achieve that goal by simply selling its Stornoway shares on the open market. The evidence did not, therefore, support the notion that Rio had, as the petitioner's argument asserted, "saddled its economic fortunes to Stornoway in the most fundamental manner". The third leg of the petitioner's joint actor argument must fail.
- [63] In the result, I find that Stornoway and Rio were not joint actors within the meaning of the OSA or Rule 61-501. Since they were not joint actors, Rule 61-501, s. 8.2(a), operated to entitle Stornoway to vote the Rio shares in the takeover question on January 15, 2007.

Rule 61-501 - Section 8.2(f)(iv)

- [64] The petitioner takes the position that Rule 61-501, s. 8.2(f)(iv), also operates to exclude Stornoway's right to vote the non-Rio shares that were tendered to it. Those shares amounted to about 24 percent of the whole of Ashton's stock. The petitioner says that there are three reasons why Rule 61-501, s. 8.2(f)(iv), prevents re-qualification of those shares. The reasons are:
1. The bid circular failed to advise Ashton shareholders that Stornoway could not vote the Rio shares it acquired under the lockup agreement;
 2. The bid circular failed to identify which shares Stornoway could legitimately vote on the takeover question; and
 3. The bid circular misinformed the Ashton shareholders that the price that could be paid for their shares was limited to 115 percent of the share's trading price.
- [65] The petitioner's first argument on this point fails because Stornoway was entitled to vote the Rio shares.
- [66] The petitioner's second argument is simply a restatement of the first. It is as flawed as the first and fails for the same reason.
- [67] The petitioner's third argument amounts to an assertion that Stornoway's bid mislead the Ashton shareholders into believing that they could not receive more than 115 percent of trading value for their shares.

[68] The bid referred to the 115 percent price in this way:

ACPL and QIT [i.e. Rio] hold 49,037,982, or approximately 52%, of the outstanding Ashton Shares. Stornoway could have sought to acquire all of ACPL and QIT's Ashton Shares and thereby acquire control of Ashton without making the Offer to all Ashton Shareholders. However, Stornoway believed it was in the best interests of the minority Ashton Shareholders to allow them to receive the Offer and have an opportunity to accept and receive the same consideration as ACPL and QIT.

Under applicable Canadian securities laws, an offeror can offer to acquire 20 per cent or more of the outstanding voting or equity securities of a company without making a formal takeover bid to all holders of such voting securities, provided that, among other things, the value of the consideration paid for any securities, including brokerage fees or commissions, does not exceed 115 per cent of the "market price" of securities of that class at the date of the offer. The "market price" of the Ashton Shares (as calculated in accordance with applicable Canadian securities laws) on the date Stornoway entered into the Lock-Up Agreement was \$1.0880 and 115 per cent of such price was \$1.2512, which is higher than the cash consideration per Ashton Share offered under the Cash Alternative.

[69] The petitioner says Stornoway misled the Ashton shareholders by implying that there was a cap on the price that Stornoway could pay for Ashton shares, when in fact the price cap had no application at all to the transaction that Stornoway proposed. Quoting the petitioner's argument on this issue:

The passage from the Bid Circular above is misleading because it positions the Bid Price just below the 115% cap without clarifying that the 115% cap did not apply. The implication is that, under "applicable securities laws", Stornoway could offer no more than \$1.2512 under the Bid, in the same way that it would have been so limited if it had proceeded privately under the s. 93(1)(c) exemption. This simply has no application or relevance to the Bid conducted in this case. There is simply no purpose to including a statement of the limitation applicable to a privately negotiated purchase in a document outlining the consideration available on a general bid.

...

This was a further component to Stornoway's message "tender now or be expropriated later", and it fundamentally undermines the proposition that the 24% shareholders who tendered to the Bid did so in free and informed endorsement of the price offered.

[70] In my view, the petitioner overestimates the effect that the impugned language would have on a reasonable reader. The bid clearly states that Stornoway was offering less than 115 percent of market price for the Ashton shares. The impugned language appears in a section of the bid that deals with equal treatment of shareholders. The language points out to Ashton shareholders that had Stornoway wanted to limit its acquisition to a simple majority of Ashton shares and if it had not wanted to bother with a public bid for all of the shares, it could have limited itself to making a deal to buy Rio's shares alone. The circular tells readers that if Stornoway had chosen to make a simple one-to-one deal with Rio, it could have

purchased all of Rio's shares without making a public bid so long as it paid no more than 115 percent of the market price for the shares. The circular tells the reader that Stornoway considered it best to give all Ashton shareholders the opportunity to divest themselves of their shares in return for the same consideration Stornoway had offered to Rio.

- [71] The language does not give the reasonable reader an impression that Stornoway had fixed the price it offered for Ashton shares in order to qualify the transaction as a one-to-one deal which was exempt from a public bid. The language simply highlights for the reader the fact that Stornoway could have acquired control of Ashton without making a public bid. The language points out that Stornoway felt it best that all Ashton shareholders should have an opportunity to sell for the same price as Stornoway had offered to Rio. The circular makes plain, therefore, that what Stornoway was doing was not a one-to-one deal and that the 115 percent price cap had no application to its public bid for control. The language does not leave the impression that Stornoway had settled on \$1.25 per share because that price was below the threshold which would allow Stornoway a controlling interest without making a public bid.
- [72] A reasonable reader of the bid would conclude that Stornoway was prepared to pay \$1.25 for each Ashton share tendered to its bid. A reasonable reader would not have been misled into thinking that Stornoway had undervalued the shares or had based its offering price on any consideration other than what it thought the shares were worth to it. There is, therefore, no merit in the petitioner's position on this point.
- [73] The petitioner's argument on this third and last point under Rule 61-501, s. 8.2(f)(iv), must fail.

Oppression

- [74] The petitioner submits that if the Ashton, Stornoway and Rio cabal failed to comply with the legislation, regulations, and Rule 61-501 relating to the bid and the amalgamation vote, then their actions must be viewed as oppressive and a remedy must accrue to him pursuant to s. 241 of the CBCA.
- [75] There is no foundation for a finding of oppression here. That is because the bid, Ashton's response to the bid, and the amalgamation vote were all carried out blamelessly.
- [76] Having reached that conclusion, it is not necessary for me to rule on whether the petitioner's actions (or rather his inaction by choosing not to sue) to stop the amalgamation vote before it was held, disentitles him from relief from oppression.
- [77] However, if I am wrong and there were disclosure failings amounting to oppression, I would nevertheless decline to exercise my discretion in the petitioner's favor. That is because the evidence convinced me that, well in advance of the special meeting in January 2007, the petitioner had fully formed his opinion about what he perceived to be inadequate disclosure by the corporate parties. The petitioner knew the grounds upon which he thought that

Ashton and Stornoway were behaving badly. The petitioner is a reasonably sophisticated individual - he was aware of the statutory scheme under which these corporations were operating. He sought and received legal advice about his complaints. The petitioner must have known that if the amalgamation question passed the minority vote, then amalgamation would proceed. The petitioner knew or could have reasonably predicted that upon amalgamation, Ashton would be delisted from public trading, Stornoway shares would be publicly traded at least partly on the strength of the transaction, and that many, many persons, previous shareholders and newcomers alike, would engage in transactions involving the corporations in issue. The petitioner must, therefore, have known or anticipated that it would be extremely difficult and disruptive to undo the amalgamation after it passed the vote and had been acted upon.

- [78] Further, the petitioner knew or, because he received legal advice, ought to have known that the procedure and remedies stipulated in s. 154(1) of the CBCA were available to him before the meeting. The petitioner could have made an application under that section for orders correcting the disclosure failings he perceived, or delaying the meeting or restraining it from being held altogether. It is obvious that it would have been vastly more efficient for the court to make an order putting non-disclosure right before the meeting than for the court to try to reverse hundreds or thousands of post-meeting transactions. The homily "an ounce of prevention is worth a pound of cure" is apt here.
- [79] There is another reason that I would have declined to exercise my discretion in the petitioner's favor. That is because the petitioner's purpose here is to get more money for his shares. It is not at all necessary to roll the amalgamation back in order for the petitioner to make a case for additional compensation. He can make that case under the dissent provisions of the CBCA, and if he is successful there, he will in fact receive more than \$1.25 for each of his Ashton shares. In my view, it would be contrary to the public good to generate widespread uncertainty and turmoil among the investing public in order to address this one shareholder's desire for better pay.

Conclusion

- [80] The petition must be dismissed.

Costs

- [81] This matter involved complex and difficult legal issues. Although only three parties appeared at the hearing, there can be no doubt that hundreds if not thousands of other persons who hold or held shares in the corporations in play will be affected by the outcome of this litigation. I find that this was a matter of more than ordinary difficulty and was of interest to more people than the parties alone. Scale C is the appropriate measure of costs in this case. The respondents Ashton and Stornoway are, therefore, each entitled to their costs against the petitioner on Scale C. That is, of course, subject to any submissions the parties may wish to make with respect to formal offers to settle made under Rules 37 or 37A.

"P.J. Rogers, J."

The Honourable Mr. Justice P.J. Rogers

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