
CANADA / JUDGMENT

Jaguar Financial Corp. v. Alternative Earth Resources Inc.

2015 BCSC 2436

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 2436 Jaguar Financial Corp. v. Alternative Earth Resources Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jaguar Financial Corp. v. Alternative Earth Resources Inc.,

2015 BCSC 2436

Date: 20151210

Docket: S159732

Registry: Vancouver

Between:

Jaguar Financial Corporation

Petitioner

And

Alternative Earth Resources Inc.,

Gavin Cooper, Brian D. Fairbank,

and James E. Yates

Respondents

Corrected Judgment: The text of the judgment was corrected at
paragraph 104(a) on March 30, 2016.

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment**Counsel for Petitioner:**

M.A. Feder

S. D'Souza

R. Sorell

L. Burgess, Articled Student

Counsel for Respondents:

G.G. Plottel

A.N. Schalles

Place and Dates of Hearing:

Vancouver, B.C.

December 4 and 10, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 10, 2015

Introduction and Background Facts

- [1] The petitioner, Jaguar Financial Corporation ("Jaguar") is currently the largest shareholder of the respondent, Alternative Earth Resources Inc. ("AER"). Jaguar is a Canadian merchant bank. It and its affiliates own (directly or indirectly) approximately 18.55% of AER's common shares. AER is a publicly traded company and reporting issuer in British Columbia and Alberta. Its shares are traded on the TSX Venture Exchange. It was incorporated in British Columbia. The personal respondents, Gavin Cooper, Brian Fairbank, and James Yates, are directors of AER.
- [2] The genesis of this proceeding is a proposed transaction between AER and a company known as Black Sea Copper & Gold Corp. ("Black Sea"), a private, closely-held company that is not publicly traded, concerning the acquisition of purported mineral rights located in Turkey. That transaction, which I will refer to as the "Black Sea Transaction", includes terms that provide for, inter alia, in practical effect, a change in ownership of AER and dilution of the shareholdings of its existing shareholders, as well as a requirement, or as I have determined it to be, a condition precedent, that it not be subject to shareholder approval.

- [3] Jaguar has proven at the hearing of this petition that Black Sea owns no properties with proven mineral resources, is in debt with no working capital, and required a loan from AER to take many of the steps required by regulators to submit the Black Sea Transaction for TSX Venture Exchange approval.
- [4] Jaguar issued this petition seeking various types of relief, including declaratory and injunctive relief. In essence, Jaguar seeks to prevent the Black Sea Transaction from completing until AER's shareholders have an opportunity to vote on it at an annual general meeting ("AGM"). According to the Business Corporations Act, S.B.C. 2002, c. 57 (Act) and AER's articles of incorporation, the AGM should have taken place by no later than November 23, 2015. It has been postponed following a request made by AER to the Registrar of Companies.
- [5] There is urgency to this application because the Black Sea Transaction is due to close on December 18, 2015 (so long as regulatory approval is obtained). Hence, these oral reasons for judgment are being delivered shortly after the completion of the hearing of the petition.

The Positions of the Parties

- [6] Jaguar's position in its written submissions is that the Black Sea Transaction is in its essence a reverse take-over-transaction that seeks to benefit AER's existing officers and directors to its detriment. It claims that the Black Sea Transaction is tainted by conflicts of interest, was deliberately structured to avoid shareholder scrutiny, falls afoul of the Act, is not fair and reasonable, and is oppressive, or alternatively, unfairly prejudicial to its interests as a shareholder. Amongst the relief sought, Jaguar seeks an order that AER's directors be enjoined from engaging in any decision making that is not in the ordinary course of business, including selling or otherwise disposing of AER's assets, altering its shareholder rights plan, or adopting a new shareholder rights plan.
- [7] In response, AER and the personal respondents assert that the Black Sea Transaction is fully transparent and complies with all applicable legislation and the regulatory policies of the TSX Venture Exchange. They say that Jaguar's complaint that its position in AER will be diluted is not a basis to interfere with the Black Sea Transaction and does not afford a basis to assert a claim for oppression or unfair prejudice. As well, they submit that proper disclosure of conflicts of interest involving AER's management has been made. Further, they submit that the Black Sea Transaction is not a change in control of the company such that shareholder approval is required for it.

Findings of Facts

- [8] In this section, I set out my findings of fact that are in addition to those described in the Introduction section of these reasons.

[9] Until August 2014, AER's business concerned the acquisition and development of geo-thermal properties. With shareholder approval at AER's AGM that took place on August 22, 2014, AER changed the nature of its business to acquire mineral projects. It sold its assets to raise cash with which to do so. Although documents initially generated at the time AER changed its business purpose referred to mineral projects generally, subsequent documents issued by management, including press releases intended to be relied upon by existing and prospective shareholders, advised that AER's business objective was to acquire advanced or "late-stage" projects. For example, in press releases issued in late 2014 and in the first quarter of 2015, AER advised:

[AER] is contemplating a change of its business focus from renewable energy to mineral resource development. This change has been approved by the shareholders. With its strong cash position and greatly reduced overhead, the Company plans to pursue late-stage mining project acquisitions and/or merger opportunities.

In the normal course of business, the Company evaluates advanced stage projects for potential acquisitions which, if appropriate, would be presented to the Board for consideration. The Company will continue to assess opportunities as they arise.

Management will now focus on creating shareholder value by acquiring advanced stage projects.

[10] Although the term has not been defined in any of the documents that have been shown to me, I am satisfied that it refers to projects that are something more than speculative.

[11] AER presently holds cash reserves of approximately \$2.4 million.

[12] On October 20, 2015, AER announced via a press release ("Press Release") that it had signed a non-binding letter of intent with Black Sea. The Press Release described the terms of a transaction that called for AER to issue a large number of its own shares to acquire 100% of Black Sea's outstanding securities.

[13] The Press Release informed its readers that:

- (a) Black Sea "holds interests" in various Eastern European mineral properties, but no details were provided.
- (b) AER would acquire all of the shares of Black Sea, including options, warrants, and convertible debt in exchange for AER issuing approximately 33 million shares, which, I will note, is much more than its existing current issued share capital of just over 26 million shares (including 1.288 million options).
- (c) AER would obtain a non-brokered private placement of eight million units (that included one common share and one warrant to purchase additional shares) in order to raise gross proceeds of \$480,000.
- (d) AER intended to close the transaction by December 18, 2015.

- [14] Thus, if the Black Sea Transaction completes, then AER's current shareholders will own only 38% of the company. Black Sea's shareholders and subscribers to an associated AER private placement will gain control of the company because they will own 62% of it.
- [15] Upon learning of the proposed transaction, Jaguar voiced its complaint.
- [16] The mineral property said to be encompassed by the Black Sea Transaction - known as the Alankoy property - is not owned directly by Black Sea, and instead appears to be a property owned by someone else, and in which Black Sea or its related companies have what is called an "earn-in" interest, or option. Moreover, the Alankoy property does not have any demonstrable mineral resources. A geologist's report in evidence demonstrates that the last exploration was carried out in the 1980s and further, that over US \$570,000 must be spent to determine whether further exploration is warranted.
- [17] If completion occurs, then following it, AER's board of directors will be reconstituted so that it will consist of four directors, with two nominees from AER and two from Black Sea. I agree with the submissions of Jaguar that if the Black Sea Transaction completes, those of AER's current officers and directors who remain are conflicted because they were involved in negotiating a transaction where they effectively keep their jobs and acquire a blocking position on the new board despite ownership and, at a minimum, de facto control of AER being transferred to Black Sea's shareholders. I am also satisfied that those of AER's management who resign their current positions in the Black Sea Transaction stand to benefit from consulting contracts and incentive bonuses such as stock options.
- [18] One of AER's current directors, the respondent Cooper, has a direct relationship with Black Sea. He is Black Sea's Chief Financial Officer and a minority shareholder. I agree with the respondents' submission that Mr. Cooper did sign the requisite documentation disclosing his conflict of interest to TSX Venture Exchange staff, however, neither his conflict, nor his role in advising the other members of AER's board of directors about the proposed merits of the transaction, were disclosed in the Press Release or to AER's shareholders, and was signed after efforts to pursue the Black Sea Transaction with Mr. Cooper's direct involvement were well underway.
- [19] I am mindful of the respondents' submission that once Mr. Cooper's conflict was disclosed, the board struck a special committee, to the exclusion of Mr. Cooper, to consider the merits of the Black Sea Transaction. With respect, I do not find that the two members of the special committee (which consisted of the only other directors on the board, the respondents, Fairbanks and Yates), acted independently because they acted after Mr. Cooper was allowed to influence them by making a full presentation to them about the merits of the transaction, including a comparison of the relative values of Black Sea and AER. I wish to note that the activities and considerations engaged in by the special committee are not in evidence.

- [20] On October 3, 2015, AER's board determined that the Black Sea Transaction was in the best interests of AER and its shareholders. The board reached this conclusion two days after the special committee commissioned a geologist to prepare a memo on the relative values of AER and Black Sea. Moreover, a fairness opinion was not completed until later, on December 1, 2015, after the board had already determined the merits of the Black Sea Transaction. The memo was not put into evidence by AER.
- [21] It is also concerning that the geologist, who concluded in the fairness opinion that the transaction was fair, used as a comparative value for assessing the transaction, a company known as Desert Star, which is related to Black Sea and one in which the respondent Mr. Cooper is the chief financial officer. It is also troubling that the geologist relied on a field trip memorandum for his opinion, even though that memo was prepared by two persons who are described (in the agreement I refer to in paragraph 26 of these reasons) as shareholders and owners of convertible securities of Black Sea.
- [22] The chief executive officer of Black Sea, Mr. Vince Sorace, is also directly involved with Desert Star. In correspondence that he sent to Jaguar's principal, Mr. Alboini dated April 10, 2015, Mr. Sorace described himself as president of Desert Star and described Desert Star's relationship with Black Sea in this manner:

I have also attached a recent presentation on Desert Star. Please also take a look at this short video on the DSR website at [url omitted]

The other company in our stable is Black Sea Copper & Gold. This is a private company, mostly financed in house to date. Same technical and management team

Black Sea Copper & Gold could be an avenue by which I could (if you wanted it) give you a 100% liquidity event on your shares in AER

[Emphasis in original]

- [23] The author of the fairness opinion also appears not to discount the fact that Black Sea does not, contrary to the Press Release, own an interest in the Alankoy property, but only some form of direct or indirect earn-in option. He also does not discount the impact of a loan from AER to Black Sea advanced on December 2, 2015, for \$100,000 for a three month term, and not to discount a report from another geologist revealing that no follow-up drilling has taken place on the property since the 1980s and that there "are no mineral resources or mineral reserves estimated" for the Alankoy property. Except for the loan, which was the subject of a press release issued on December 3, the day before the hearing of the petition commenced, none of this information has been disclosed to the shareholders other than to Jaguar, but only through its efforts in this litigation.
- [24] I will also note that as of October 3, 2015, the special committee and the board did not have in hand the fairness opinion or a technical report (called an "NI 43-101") required by the TSX Venture Exchange. I agree with Jaguar's submission that at that time, the evidence shows that Black Sea was still negotiating (as opposed to actually holding) an earn-in option with

the company that owns the Alankoy property. As well, AER did not wish to provide the results of the NI 43-101 report until after the Black Sea Transaction closed even though a draft of the report was provided to TSX Venture Exchange staff in late November 2015, but only in response to the regulator's request for a report on the Alankoy property.

- [25] Therefore, I am satisfied on the evidence before me that AER's board was clearly keen to approve the Black Sea Transaction, in a rush, without properly considering the conflicts inherent in its processes and activities, the speculative nature of Black Sea's interest in the Alankoy property, and the comparative value of the two companies. I infer from the condition precedent to the Black Sea Transaction - that shareholder approval must not be required - that the board intended to avoid disclosure of the details of the transaction to shareholders if at all possible. Although the parties could not contract out of regulatory approval, I find that AER's board and Black Sea intentionally sought to structure the transaction in a manner so as to avoid putting it before AER's shareholders.
- [26] Following execution of the letter of intent, and in the face of this petition, which was issued on November 24, 2015, AER's board signed what the parties call the "definitive agreement", which is entitled "Securities Exchange Agreement", with Black Sea on December 2, 2015. Jaguar received a copy of that agreement only through this litigation.
- [27] When this petition was issued, Jaguar complained that AER was in breach of its articles and the Act because it had not held its AGM within the prescribed deadline. Jaguar did not know until the hearing of the petition commenced that AER had obtained an extension from the Registrar of Companies to March 28, 2016. It is important to note that the evidence of Jaguar's principal, Mr. Alboini, is that AER's chief executive officer told him on October 20, 2015, that he did not intend to hold a meeting of AER's shareholders to approve the Black Sea Transaction. Thus, when Jaguar issued the petition, its principal thought that AER's articles and the Act had been breached.
- [28] The correspondence sent by AER on its behalf to the Registrar was provided to me with the consent of all parties to be considered it as if it had been put into evidence in the application record. I find the letter to be curious because in requesting the extension, it gives the reader what I find to be the misleading impression that an extension is required because AER is considering a transaction that "may" require shareholder approval. The letter is misleading because the only circumstances in which shareholder approval would be required is if the TSX Venture Exchange required it, and if it did, then the condition precedent would not be satisfied such that the transaction would be at an end.
- [29] I will also observe that the only manner in which the transaction could proceed if the TSX Venture Exchange required shareholder approval, would be if the condition precedent was waived by the parties or was capable of being waived unilaterally by one of them. There is no evidence to support a finding that a waiver was contemplated. To the contrary, the evidence supports my finding that AER's board was intent on completing the Black Sea Transaction before the next AGM could be held on terms that effectively meant that the

rights of any dissident shareholders would be sufficiently diluted so as to minimize their ability to seek redress.

[30] The letter that was sent to the Registrar of Companies on behalf of AER is dated November 5, 2015, a month after the letter of intent was signed. It is short, and in my opinion, bears repeating in these reasons:

Registrar of Companies

2nd Floor, 940 Blanshard Street

Victoria, BC

Dear Sirs/Mesdames:

Re: Alternative Earth Resources Inc. (the "Company")

We are the solicitors for the Company, which is a reporting BC corporation the shares of which are listed for trading on the TSX Venture Exchange (the "Exchange"). The Company is due to hold its next annual general meeting on or before November 22, 2015. However, the Company is contemplating a transaction that may require shareholder approval at a special general meeting of its shareholders. In the event that the transaction proceeds in a manner that will require shareholder approval under Exchange policy, the Company would like to combine its annual general meeting with this special general meeting.

We therefore request on behalf of the Company that you grant an extension of time for holding the next annual general meeting to February 28, 2016.

[Emphasis added]

- [31] In submissions, the respondents sought to justify the bona fides of the letter and of its author, and of the routine manner in which the Registrar grants extension requests, without any evidence in hand to support the submissions. It is not necessary for me to comment on the intent of the person who wrote the letter to determine the outcome of this petition. It may well have been sent with bona fide intentions. Nonetheless, and unfortunately, although the letter is put forward as the basis for the extension, it did not reflect the actual circumstances extant at the time.
- [32] One of the reasons proffered by the respondents for AER's desire to avoid holding an AGM before the Black Sea Transaction completed was the cost of it, said to be in excess of \$30,000. Yet, in my opinion, that submission has no merit because it is a cost the company must occur in any event, and also because it has substantial cash reserves on hand. I also find the submission without merit when I consider that AER's desire to complete the transaction with Black Sea, a company with a negative cash position who did not own the Alankoy property (a property with no identifiable mineral reserves), was so keen that it loaned Black Sea \$100,000 to cover the latter's costs to meet TSX Venture Exchange requirements, some two days before the hearing of the petition.

- [33] Although I must, I nonetheless have great difficulty in acceding to the respondents' position that AER is not in breach of its articles or the Act because it obtained an extension to hold the AGM. It is true that AER obtained the extension, but it did so without appropriate disclosure to the Registrar of Companies. Having said that, however, I will also pause in my discussion of my findings of fact to say that I have not decided the petition based on the extension issue for reasons that I will go on to explain. I will also note that AER is now taking steps to set the AGM to be held in late February 2016.
- [34] Before I turn to the issues, I wish to set out my determination that while the Black Sea Transaction could be characterized, as the respondents do in their submissions, as a merger, thus falling within the scope of the company's business objectives approved by shareholders, it is a transaction that does not comply with the company's stated objectives and calls for a significant change in ownership and control of the company to the detriment of shareholders who do not hold board or management positions.
- [35] Lastly, I wish to remark on Jaguar's motives, which were questioned at one point during submissions. I was advised that Jaguar has failed to attract the cooperation of other shareholders to this litigation and that this should bear on my decision. I will observe that there is nothing untoward or illicit in Jaguar's motive. Jaguar openly concedes that it intends to commence a take-over bid for all of AER's outstanding shares. Its plan is to inject liquidity into the company and to prevent it from entering into what it says are improvident transactions such as the Black Sea Transaction.
- [36] The participation of other shareholders is not relevant to the outcome of the petition. I note that many of the shareholders are represented by brokerage firms who hold legal ownership (in trust) and signing authority for their clients. I do not know the extent to which the proposed terms of the Black Sea Transaction are known to shareholders.
- [37] I also wish to set out my finding that there is not, as the respondents submit, any undue delay on Jaguar's part in seeking relief. Jaguar did not delay in expressing its concern and complaints about the Black Sea Transaction. It sought information about it but did not obtain key documents until the hearing of the petition commenced. And, until the hearing began, Jaguar thought AER was in breach of its articles and the Act.

Issues

- [38] Jaguar submits that there are four issues to be determined in deciding the relief sought in its petition. I agree. They are:
- [39] First, do AER's directors and officers have a disclosable interest in the Black Sea Transaction?
- [40] Second, is the Black Sea Transaction fair and reasonable to AER and its shareholders?
- [41] Third, have AER's directors acted in a manner that is oppressive or unfairly prejudicial to Jaguar?

[42] Fourth, what is the appropriate remedy in the circumstances?

Determination

Do AER's directors and officers have a disclosable interest in the Black Sea Transaction?

[43] The respondents submit that Jaguar's first ground must fail because AER's officers and directors do not have a disclosable interest. They also submit that AER's articles permit the company to fill board vacancies, which will result when the Black Sea Transaction closes. Thus, they say, there is no need to consider the second issue concerning fairness and reasonableness.

[44] I disagree. It does not matter for the purpose of this litigation whether the board has the authority to fill vacancies; the question, as I see it, is whether the Black Sea Transaction itself, which creates the vacancies, is subject to attack.

[45] The issue is governed by s. 147 of the Act, which sets out a three-part test for determining whether a disclosable interest exists:

147 (1) For the purposes of this Division, a director or senior officer of a company holds a disclosable interest in a contract or transaction if

- (a) the contract or transaction is material to the company,
- (b) the company has entered, or proposes to enter, into the contract or transaction, and
- .. (i) the director or senior officer has a material interest in the contract or transaction.

[46] As for the first two parts of the test, I find the Black Sea Transaction, which is a contract set to close on December 18, 2015, to be material to AER for several reasons. It changes the agreed upon objectives of AER to acquire advanced or late stage mineral projects to include projects that are highly speculative. AER's management and board structure will change. It also significantly alters the landscape for existing shareholders, diluting the value of their shareholdings to own, collectively, 38% of the company.

[47] As for the third part of the test, I find that AER's current directors and management have a material interest in closing the Black Sea Transaction because: (a) it will, for some, mean they keep their jobs with the company, (b) others will remain as directors, (c) Mr. Cooper (who is directly associated with Black Sea through Desert Star) will become AER's new chief financial officer, and (d) others who resign their management positions will continue to serve as paid consultants for AER with stock option incentives. In addition, the Black Sea Transaction will facilitate a blocking position on the reconstituted board that benefits existing directors and management.

[48] The current directors are the three personal respondents, Brian Fairbank, Gavin Cooper, and James Yates. They will remain as directors under a reconstituted board, with Mr. Cooper being one of two directors representing Black Sea and Messrs. Fairbanks and Yates representing AER. Mr. Cooper will become the chief financial officer of the company. Thus, AER's existing directors remain and benefit from the transaction. They have disclosable interests.

[49] As I see it, the respondents' submission that there is no disclosable interest arises in part from the following section of the (non-binding) letter of intent dated October 15, 2015:

Upon completion of the Proposed Transaction the directors and officers of AER will be reconstituted to consist of four (4) directors, two (2) of which shall be nominees of [Black Sea], and two (2) of which shall be nominees of AER.

AER's directors and officers whom shall not continue to serve AER after closing of the Proposed Transaction shall resign and release AER from any further liabilities. All employment and consulting arrangements will be terminated, unless [Black Sea] wishes to continue such arrangements after completion of the Proposed Transaction.

Incentive stock options held by directors, officers and employees of AER who will not carry on in such capacities after the Proposed Transaction will expire in accordance with the terms of the governing stock option plan and the rules of the TSXV.

Current management of AER shall continue to serve as consultants to AER and be entitled to participate in future grants of incentive stock options[.]

[50] The respondents' submission, however, overlooks the terms of the definitive agreement. The definitive agreement provides that effective as of closing, and prior to TSX Venture Exchange approval, the personal respondents will continue to serve as directors of AER. As for former members of AER's management, the definitive agreement states:

Former members of the management team of AER shall continue to serve as consultants to the Resulting Issuer and be entitled to participate in future grants of incentive stock options.
[Emphasis added]

[51] The term "Resulting Issuer" is defined in the definitive agreement to mean AER following completion of the Black Sea Transaction, "having [Black Sea] as a wholly-owned subsidiary thereof". Thus, AER's current management team will benefit from the Black Sea Transaction with consulting agreements and stock option incentives.

[52] Accordingly, I conclude that AER's existing directors and officers have a disclosable interest.

[53] Before I turn to the next issue, I wish to remark on some of the respondents' other submissions.

- [54] For the reasons I discussed previously concerning the events that led to what I have determined was the special committee's lack of independence and the benefits to existing management and directors from the transaction, I reject the respondent's assertion that a special committee of "disinterested directors was formed."
- [55] I also do not find any merit in the respondent's submission that once the Black Sea Transaction is completed, AER's reconstituted board will resign at the next AGM because the current board and management will have ensured that a transaction that is material to AER, one in which they have a material interest, will have completed.
- [56] Finally, it is no answer to the petition to say, as the respondents do, that this Court should not interfere and instead leave approval decisions to the regulators. This Court's role to ensure compliance with the Act and to provide relief for acts of oppression or unfair prejudice, especially in fast moving circumstances, is not defined by, nor dependant on, regulators whose policy objectives and technical requirements may, but not always, overlap.
- [57] Thus, the respondents' submissions that the TSX Venture Exchange policy shows that there is no change in control resulting from the Black Sea Transaction because there is no one shareholder or group of shareholders holding more than 20% of the voting shares is without consequence to the factual and legal issues that must be determined on this application. Even if the TSX Venture Exchange policy was relevant, I will note that contained within the respondents' application materials is a reference to TSX Venture Exchange policy defining a reverse takeover to mean a transaction that results in new shareholders holding more than 50% of the outstanding voting securities of the issuer (AER). That will be the result if the Black Sea Transaction completes. TSX Venture Exchange policy also defines a reverse takeover to require a minimum of 20% of shareholders acting in concert. In this case, the evidence demonstrates that some of the shareholders of Black Sea are acting in concert with Mr. Sorace, who holds the right to sign on their behalf. It is evident that on a combined basis, he holds signing authority of over 14% of what is contemplated to be newly constituted shareholdings of AER if the transaction completes. The evidence, I find, raises reasonable inferences and concerns that the combined value of shareholders acting in concert will, in fact, exceed 20%. Thus, the Black Sea Transaction comes close to being a reverse takeover as defined by TSX Venture Exchange policy and is one that I find to be material to AER and its existing shareholders.

Is the Black Sea Transaction fair and reasonable to AER and its shareholders?

- [58] This issue is governed by s. 150(2) of the Act. That section provides that where a director or officer has a disclosable interest in a transaction, the Court is empowered to enjoin or set aside a transaction, or make any other order it considers appropriate, unless that transaction (a) has been approved by a special resolution of the current shareholders pursuant to s. 148(2) once they have received proper disclosure of the disclosable interests, and (b) is fair and reasonable to the AER.

- [59] No such disclosure has been made; nor has a special resolution been obtained, let alone sought.
- [60] Is the Black Sea Transaction fair and reasonable? Jaguar submits that it is not and argues, based on *Western Canadian Coal Corp. v. Fawcett*, 2006 BCSC 463 at para. 44, that the onus to show that it is rests upon AER. In that case, the reasons for judgment appear to be founded on the parties' agreement concerning onus. For reasons that will become evident, I do not need to decide who bears the onus in this case.
- [61] The Black Sea Transaction must be shown to be procedurally and substantively fair and reasonable, taking into account the surrounding facts and circumstances, including the purpose of the transaction and its possible ramifications: *Western Canadian Coal* at para. 38; *Cannaday v. Sun Peaks Resort Corp.* (1998), 44 B.C.L.R. (3d) 195 at para. 32 (B.C.C.A.).
- [62] Regardless of who bears the onus, I have determined that the Black Sea Transaction fails to meet both tests.
- [63] In assessing procedural fairness, "questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to directors and how the directors' approval was obtained" are considered: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412 (O.N.C.J.) at para. 195, *aff'd* [2004] O.J. No. 636 (O.N.C.A.); *Western Canadian Coal* at para. 38. A transaction will not be procedurally fair and reasonable where, for example, it proceeds with undue haste, it is not negotiated at arm's length, and the board was not provided with all of the material information prior to approving the transaction: see, *UPM* at para. 196; *Randhawa v. Gateway Building Management Ltd.*, 2013 BCSC 1662 at para. 113. That is what occurred in this case. The transaction was, I find, concluded and approved by the board in haste, was (due to Mr. Cooper's involvement) not negotiated at arm's length, and when the board approved the letter of intent and then signed the contract, it had not been provided with all material information concerning the Alankoy property. The board made up its mind to proceed with the Black Sea Transaction by no later than October 3, 2015, and most likely sooner, in September, well before it received the geologist's fairness opinion and other information concerning the lack of exploration and the costs of considering the feasibility of future development. It is evident that the board was intent to proceed with the transaction without that information and that it only requested an NI 43-101 report because the TSX Venture Exchange requested one.
- [64] The Black Sea Transaction is also not substantively fair and reasonable. The commercial merits of the transaction are assessed at the time the transaction was entered into and not in light of subsequent events: *Western Canadian Coal* at para. 43. According to UPM, a transaction is not fair and reasonable where the liabilities to the corporation associated with the transaction outweigh the benefits, or existing shareholders' interests are significantly diluted: *UPM* at para. 197; see also *Rooney v. Cree Lake Resources Corp.*, 1998 CarswellOnt 3059 at para. 56 (O.N.C.J. Gen. Div.).

- [65] Contrary to AER's public statements that it intends to acquire advanced stage mineral properties, the Black Sea Transaction does not involve an advanced stage mining project. It does not own the Alankoy property, its earn-in interest may only be indirect, and there is no indication that there are any mineral reserves or deposits on the property or that it is economically feasible to carry out exploration. The effect of the transaction is to transfer majority ownership to Black Sea's shareholders so that they gain control of a now cash-rich AER, in circumstances where AER's existing board and management will also benefit, all to the expense of third party shareholders who will see their interests diluted.
- [66] I have considered the report of the geologist who prepared the fairness opinion dated December 1, 2015, despite the submission of Jaguar that it is inadmissible because an expert report that complies with the Rules of Court is required to prove fairness: see, e.g., *Champion Iron Mines Ltd. Re*, 2014 ONSC 1988 at para. 16; *Royal Host Inc., Re*, 2014 ONSC 3323 at para. 8. I have done that because the respondents submit that given the short notice in this case, they have not had sufficient opportunity to obtain the requisite report (even though the petition was issued on November 24, 2015 and the respondents were aware that this litigation was imminent before it was commenced).
- [67] I am not satisfied that the fairness report has taken into account all appropriate evidence, such as the appropriate context of the advice contained in the geologist's NI 43-101 report ultimately obtained and dated November 30, 2015, concerning lack of mineral deposits, lack of exploration since the 1980s, and the need to spend over US \$570,000 to determine if further exploration is warranted.
- [68] The fairness opinion reports that the NI 43-101 "recommended a first-stage exploration program (costing an estimated US \$570,000) which would include geological mapping," surveys, geochemical sampling, and 3,000 metres of drilling. A cursory review of the NI 43-101 report, however, shows that remark is not accorded its appropriate context. Although the author of the NI 43-101 reports his view that further exploration is warranted based on his interpretation of previous exploration results, he clearly states that his interpretation is also based on the results of a field visit carried out by two of Black Sea's shareholders.
- [69] The author of the NI 43-101 also makes it clear that no "mineral processing or metallurgical testing" has been done on the Alankoy property and further, that the cost of US \$570,000 is to carry out sufficient exploration "to determine if subsequent work programs are justified to further follow up on the property." [Emphasis added]
- [70] Nor am I satisfied that the fairness report properly takes into account the following information contained in the NI 43-101, that there are no mineral resources or reserves for the Alankoy property:

14.0 MINERAL RESOURCE AND MINERAL RESERVE ESTIMATES

There are no mineral resources or mineral reserves estimated for the Alankoy Property.

[Emphasis added]

[71] At the same time, as I have noted, the fairness report relies on the field report that is not independent of Black Sea and in addition, purports to use comparative values from, inter alia, Desert Star, with whom Mr. Cooper and Mr. Sorace are directly involved.

[72] I am also troubled by the vagueness in the following remark in the fairness opinion, that the author considers the transaction fair: "Based upon and subject to the limitations stated in this Fairness Opinion, and such other matters as Glanville [the author] has considered relevant " [Emphasis added]. As well, the fairness opinion candidly states it is predicated on the veracity and reliability of the information provided to the author without any independent inquiry or verification.

[73] Finally, I am troubled by the reliability of the fairness report for the purpose of establishing that the Black Sea Transaction is fair and reasonable given the following disclaimers contained in the report:

[AER] has acknowledged that the services provided by Glanville were provided in an advisory capacity only, and that Glanville is not liable for losses, damages, or other claims that may result from or be alleged to result from any application or use that [AER] and/or others may make of such information, data and opinions of Glanville. [AER] has waived, released, and indemnified and agreed to hold Glanville harmless from any and all liability for losses, damages, legal costs, and other claims arising from the Opinion and/or related issues. Glanville has not conducted a review of the mineral titles, ownership, or environmental obligations, and consequently Glanville has not expressed any opinion on the subjects. Glanville does not accept any responsibility for errors or omissions pertaining to information provided by [AER], Black Sea, or their lawyers, advisors, directors, agents, or other related parties.

It should be emphasized that this Fairness Opinion is not a technical report nor a formal valuation as defined in The Canadian Institute of Mining, Metallurgy and Petroleum publication of February 2003 [citations omitted]. Glanville has not been asked to prepare (and has not prepared) a valuation of [AER] or Black Sea (or any of the securities or assets thereof), and this Fairness Opinion should not be construed as a formal valuation

[74] Accordingly, I am unable to conclude that the fairness opinion can be relied upon to support the proposition advanced by the respondents that the Black Sea Transaction is commercially fair and reasonable.

[75] Thus, after considering the whole of the evidence before me, I have determined that the transaction is not commercially fair and reasonable.

[76] Based on the foregoing findings and determinations, Jaguar is entitled to some of the declaratory relief sought as well as an order enjoining the Black Sea Transaction from proceeding until shareholder approval is sought at an AGM.

[77] Nonetheless, I will go on to consider the two remaining issues raised in the petition, which are advanced by Jaguar as alternative forms of relief.

Have AER's directors acted in a manner that is oppressive or unfairly prejudicial to Jaguar?

[78] Jaguar submits that AER's directors have conducted the affairs of the company in a manner that is oppressive and unfairly prejudicial to Jaguar, contrary to s. 227 of the Act.

[79] The oppression remedy is provided for in s. 227(2)(a). That section provides a means for an aggrieved shareholder to seek relief if the "affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant."

[80] Another ground for relief is provided in s. 227(2)(b), where the impugned conduct is said to be unfairly prejudicial to the shareholder. The aggrieved shareholder may apply to court for relief where "some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant."

[81] A starting point in the analysis is to determine whether the respondents have breached the reasonable expectations of AER's shareholders. If so, then I must turn to consider whether the impugned conduct amounts to oppression or unfair prejudice: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 56, 58-59, 82-84.

[82] The overriding consideration is "fairness". The Court has the equitable jurisdiction to enforce not just what is legal, but also what is fair in the context of the case before it. I agree with the respondents' submission that what is just and equitable is judged by the reasonable expectations of the shareholders. In *BCE*, the Court said at para. 82:

the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[83] Reasonable expectations can arise from general commercial practice, the nature of the company's business, the company's past practice, as well as its representations (to shareholders, including representations contained in promotional materials, press releases, prospectuses, and offering circulars) and agreements: *BCE* at paras. 72 and 80. The Court must also consider the steps a claimant such as Jaguar could have taken to protect itself and the fair resolution of conflicting interests between corporate stakeholders: *BCE* at para. 72.

[84] An act constitutes oppression where the impugned conduct is harsh, burdensome, wrongful, or lacking in probity or fair dealing; *BCE* at paras. 67 and 92; *Nystad v. Harcrest Apartments Ltd.* (1983), 3 B.C.L.R. (2d) 39 (B.C.S.C.) at paras. 13-17. In *BCE*, the Court defined it as follows at para. 67:

Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

- [85] Unfairly prejudicial conduct is that which is unjustly or inequitably detrimental to the legitimate interests of a shareholder, and has unfair consequences: BCE at para. 67; *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C.S.C.) at paras. 23-24, 31-32, 37.
- [86] As pointed out in BCE, unfair prejudice involves less offensive conduct. A prime example is where "corporate machinery" is being "manipulated" for what may be ulterior motives to benefit a few: *Brio Industries Inc. v. Clearly Canadian Beverage Corp.*, [1995] B.C.J. No. 1441 (B.C.S.C.) at para. 15. Other examples include steps taken to squeeze out a minority shareholder, failing to disclose related party transactions, changing the corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, and preferring some shareholders with management fees: BCE at paras. 93-94.
- [87] I find that the respondents have acted in a manner that is contrary to the reasonable expectations of Jaguar and other third party shareholders for several reasons.
- [88] First, AER has not held the AGM within the requisite 15 months, contrary to its past practice and the regime applicable to publicly traded companies stipulated in the Act. Instead, AER obtained an extension from the Registrar of Companies in circumstances where an inaccurate and misleading basis for the request was given. The terms contained in the Black Sea Transaction documents make it clear that it has never been the intention of the respondents and Black Sea to obtain shareholder approval and instead, it is clear that their intention was to avoid it by making it a condition precedent to the transaction that it must not be subject to shareholder approval. As a result of the untoward extension, AER's board has extended its tenure beyond the statutory deadline and is able to continue to act on behalf of the company without shareholder review.
- [89] Second, the Black Sea Transaction is off-side the stated business objectives of AER to pursue acquisition of advanced or late-stage mineral projects, including possible merger opportunities. I will also note that AER has, in the past, made efforts for a significant acquisition for an advanced stage mineral project subject to shareholder approval, and took steps to ensure the project was subject to independent valuation and scrutiny.

- [90] Third, if the Black Sea Transaction completes, existing shareholders interests will be significantly diluted and their corresponding ability to take issue with the transaction significantly weakened.
- [91] Fourth, the extension is inconsistent with shareholders' expectations concerning AER's shareholders' rights plan adopted at the AGM held on July 24, 2012, because at that time, AER's shareholders approved a plan that specifically required it to be reconfirmed at the AGM "to be held in 2015".
- [92] With those findings in mind, I turn now to consider whether the impugned conduct is oppressive or unfairly prejudicial.
- [93] The respondents submit that the conduct cannot be oppressive or unfairly prejudicial merely because the Black Sea Transaction dilutes the interests of existing shareholders. Relying on *Samra v. Bel Air Taxi Ltd.*, 2009 BCSC 548 (at para. 38) and *Walker v. Betts*, 2006 BCSC 128 (at paras. 81, 89-90), they say that something more is required, that Jaguar must establish harm to its interest distinct from the other shareholders. Citing *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 (at para. 51) the respondents submit that mere shareholding dilution is not sufficient to warrant relief under s. 227 of the Act.
- [94] I disagree that Jaguar must show that only its unique interests are affected. With respect, that misinterprets the holding in *BCE* and in other cases, such as *Urquhart v. Technovision Systems Inc.*, 2002 BCSC 172, aff'd 2003 BCCA 45 and *Scottish Co-op Wholesale Soc. Ltd. v. Meyer*, [1958] 3 All E.R. 66, where Lord Keith said at 78 that oppression means "conduct that lacks probity and fair dealing in the affairs of the company to the prejudice of some of its members." [Emphasis added]
- [95] Even if the respondents' submissions are holding, they overlook what I find can be readily inferred in this case, that some of the respondents' efforts are directed towards preventing Jaguar from putting forth a takeover bid, and in that sense, their conduct is, I am satisfied, tantamount, to borrow the language from *BCE*, to "adopting a poison pill" to prevent it, and in the process, maintain as much as possible the benefits to the existing board and management.
- [96] In all, I am satisfied that the impugned conduct of the respondents in respect of the Black Sea Transaction is oppressive and unfairly prejudicial. The transaction is not merely a dilution of shareholder value. It changes the company's business objectives to acquire a possible earn-in option for questionable mineral property contrary to shareholders' expectations, results in a change of ownership of the company and in effect, control for the company, facilitates benefits to members of the board and management, is structured to prevent shareholder scrutiny and approval, and given the board's efforts to fast track the Black Sea Transaction, their conduct facilitates their efforts to block Jaguar's right to put forward a proposal intended to offer a different approach to providing liquidity to AER.

- [97] I will also say that I do not find there to be merit in the submission that Jaguar has failed to take appropriate steps to protect itself. Once it learned of the Black Sea Transaction, it complained. In the face of its complaints and questions, the respondents proceeded on with the transaction and, in the face of the issued petition, signed the definitive agreement with Black Sea. I find that Jaguar has taken necessary steps to protect itself and, for that matter, other shareholders who do not stand to benefit from the transaction. Jaguar has sought to ensure that AER complies with shareholders' reasonable expectations and its statutory requirements.
- [98] I agree with the petitioner's submission that Black Sea's future intentions (should the Black Sea Transaction not complete on December 18, 2015) should not guide the outcome. The statement in one affidavit filed on behalf of the respondents expressing his "serious concerns" that shareholders "may not enjoy the potential benefits from the transaction" is purely speculative. The consequences of delay do not rest with Jaguar, but instead, with AER's board and management. The board intended by October 3, 2015 to close the transaction by December 18, and proceeded in the absence of regulatory approval and in the face of this litigation to pursue its objective.

What is the appropriate remedy in the circumstances?

- [99] Section 150(2) of the Act provides jurisdiction to enjoin AER from completing the Black Sea Transaction or to "make any other order that the court considers appropriate": s. 150(2) (a) and (c). Similar jurisdiction is set out in s. 227(3), which states that the court may make any interim or final order that it considers appropriate, including an order
- (a) directing or prohibiting any act,
 - (b) regulating the conduct of the company's affairs,
 - (j) varying or setting aside a transaction to which the Company is a party and directing any party to the transaction to compensate any other party to the transaction,
 - (k) varying or setting aside a resolution,
 - (l) requiring the company, within a time specified by the court, to produce to the court or to any interested person financial statements or an accounting in any form the court may determine,
- [100] I agree with the submission of respondents' counsel that shareholders invest in companies because they trust management. At the same time, their trust is maintained through proper disclosure. Directors in turn must act in the best interests of their company. As the Court explained in BCE, at paras. 64-67, the requirement that directors are to act in accordance with shareholders' reasonable expectations is another way of stating that obligation. The corporation and shareholders are entitled to maximize profit and share value, but not through unfair treatment of shareholders who are entitled to fair treatment. In this case, shareholders should have the opportunity to consider and to vote on the transaction with

full knowledge of its effect on the company, the manner in which it purports to change the company's objectives towards mineral projects, and the conflicts involved in the transaction.

- [101] In my opinion, the appropriate remedy is to enjoin AER from completing the Black Sea Transaction, or any form of it, directly or indirectly, unless and until shareholder approval is obtained at its next AGM in accordance with its articles and the requirements of the Act, and I issue an order to that effect.
- [102] I note that AER is taking steps to schedule an AGM for late February 2016, but I would direct AER to take all reasonable and necessary steps to hold it sooner if possible in order to, inter alia, allow shareholders the opportunity to vote on the transaction and to vote on whether the incumbent board should be re-elected.
- [103] In view of the conflicts and conduct of members of the board and management that I have spoken of in these reasons, I am also of the opinion that other orders should be issued to avoid any attempts to dissipate shareholder value. Consequently, I make the following additional orders:
- (a) Until the AGM is held, AER and its directors and officers shall not make any decision or engage in any activity that is not within the ordinary course of AER's business to acquire late or advanced stage mineral projects, and shall not sell or otherwise dispose of AER's assets (including its property, rights, interests, and cash) or make loans to third parties unless it is in its ordinary course of business;
 - (b) AER shall disclose to its current shareholders, through an appropriate press release and other means available through the TSX Venture Exchange, as well as SEDAR (the site that provides access to most public securities documents and information filed by issuers with the securities regulators for each province and territory), the letter of intent and the definitive agreement that were signed by, or on behalf of AER as part of the Black Sea Transaction, the geologist's memo reviewed by the board in early October, the fairness opinion, the NI 43-101 report, the letter requesting an extension of the AGM, and these reasons if transcribed;
 - (c) Until the AGM is held, AER and its directors and officers shall not alter AER's shareholder rights plan or adopt a new one;
 - (d) AER shall publish on SEDAR, as soon as it is reasonably practicable to do so, particulars of AER's then extant unencumbered cash reserves on a bi-weekly basis.
- [104] When the form of the order is drafted, it shall also include the following declarations that are consequent on these reasons:
- (a) AER's directors and officers have a disclosable interest pursuant to section 147 of the Act in respect of the Black Sea Transaction.

- (b) The Black Sea Transaction is not fair and reasonable to AER.
- (c) AER's directors have acted in a manner that is oppressive and unfairly prejudicial to Jaguar for the reasons set out herein, including,
 - (i) seeking to complete the Black Sea Transaction without shareholder approval despite AER's officers and directors having a disclosable interest;
 - (ii) entering into the letter of intent and definitive agreement contrary to the reasonable expectations of AER's shareholders; and
 - (iii) seeking to advance their interests, as directors and shareholders, to the detriment of other shareholders, including Jaguar, by proceeding to rush completion of the Black Sea Transaction without proper disclosure to AER's shareholders, and to the deliberate exclusion of approval of AER's shareholders.

[105] The other relief sought by Jaguar is raised in its amended petition, which it filed during the hearing. The claim concerns the \$100,000 loan made by AER to Black Sea shortly before the hearing of the petition commenced. Jaguar complains that the loan falls outside of AER's ordinary course of business and that it was imprudent because it was designed to facilitate a cash-strapped Black Sea to comply with TSX Venture Exchange requirements in order to ensure the Black Sea Transaction completed on or before December 18, 2015. In addition, Jaguar complains that the details of the loan have not been disclosed, which in turn raises questions about the propriety of the conduct of the board in agreeing to the loan.

[106] I have already found that the Black Sea Transaction falls outside shareholders' reasonable expectations concerning AER's business objectives. A loan to facilitate regulatory approval of that transaction would also defy those expectations. There has been some disclosure of some of the particulars of the loan in a press release issued on December 3, 2015, which was the day before the hearing began. There is no reference to the loan in the definitive agreement. Without knowing more, the loan appears highly suspect, and one that appears to be improvident and in breach of shareholders' expectations (and therefore oppressive and unfairly prejudicial). It dissipates some of AER's cash reserves with seemingly no ready prospect of repayment by Black Sea (who currently suffers from a negative cash position exceeding \$400,000), all to facilitate an expeditious completion of the Black Sea Transaction before it can be scrutinized by shareholders at the AGM.

[107] Jaguar seeks orders (and ancillary declaratory relief) that require the directors of AER to take all steps necessary to immediately recover the loan amount from Black Sea, failing which they are jointly and severally liable for the sum owing under the loan agreement. It also seeks a condition to be imposed on AER that it cannot complete the Black Sea Transaction even with shareholder approval at an AGM unless the loan amount is paid in full prior to the AGM.

- [108] In response, the respondents object to Jaguar's characterization of the loan and the relief sought, and complained that they have not been afforded sufficient time to adduce evidence to defend against the amended claims.
- [109] In my opinion, the respondents should be allowed the opportunity to deliver the materials they believe are necessary to defend against the amended claims. I am not prepared to entertain an application for an order declaring contingent liability on a joint and several basis without affording the respondents a full opportunity to defend. To that end, I will permit the respondents further time to deliver those materials, time for Jaguar to respond, and from there, to receive further submissions. Those dates for delivery of materials shall be set immediately following these reasons. In the meantime, I order the respondents to forthwith produce the loan agreement and all documents in their possession, custody, and control concerning it, including communications, board minutes, minutes of meetings, and notes, to Jaguar.
- [110] Lastly, unless there is some matter over which I am unaware, Jaguar shall have the costs of this petition.

Summary

- [111] Jaguar has satisfied the tests set out in the Act to prove that the Black Sea Transaction is both procedurally and substantively unfair and unreasonable. It has also established oppression and unfair prejudice. The transaction shall not complete without shareholder approval. AER plans to hold its AGM late February 2016 and I encourage it to take all reasonable steps to hold its AGM sooner if possible.

"Walker J."

The Honourable Mr. Justice Walker

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