THE VALUATION LAW REVIEW

Volume 20, Issue 2
July 2014

Corporate/Securities Decisions and Certain Canadian Regulatory Developments

The Valuation Law Review is a joint publication of The Canadian Institute of Chartered Business Valuators and Dickinson Wright LLP and this issue summarizes corporate/securities decisions and certain Canadian regulatory developments as of December 31, 2012 of interest to business valuators. The Valuation Law Review is not intended to provide legal advice and readers should not act on information in the publication without seeking particular advice on matters that are of concern to them. Readers are cautioned against relying upon the decision abstracts contained herein, which are edited and in outline form only, and are directed to the full report of the reasons of the court.

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September 12, 2013
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November 29, 2013
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Ontario Superior Court of Justice
2013 ONSC 4142
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A negotiated settlement on the day of an appeal hearing resulted in the former directors collectively agreeing to provide $4.75 million toward remediation of the polluted lands. In a statement released by the MOE, the MOE indicated "this is the first time the ministry has held corporate directors of a publicly traded company personally responsible for an environmental clean-up after a company has gone bankrupt."

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Effective August 13, 2013, the Canadian Securities Administrators amended National Instrument 41-101 General Prospectus Requirements and

National Instrument 44-101 Short Form Prospectus Distributions with respect to permissible prospectus pre-marketing and marketing activities.

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Review of Portfolio Managers and Exempt Market Dealers

On May 31, 2013, the Ontario Securities Commission published OSC Staff Notice 33-740 Report on the results of the 2012 targeted review of portfolio managers and exempt market dealers to assess compliance with the know-your-client, know-your-product and suitability obligations. The review focused on 87 portfolio managers and exempt market dealers and was the largest targeted review conducted by the Compliance and Registrant Regulation Branch of the OSC.

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Modernizing the Exempt Market

On August 28, 2013, the Ontario Securities Commission (OSC) published OSC Notice 45-713 Progress Report on Review of Prospectus Exemptions to Facilitate Capital Raising (the Report).

The Report sets out the next steps in the OSC's exempt market review and consideration of four prospectus exemptions. The OSC's objective in this regard is to facilitate capital raising for start-ups and small and medium-sized enterprises and to modernize Ontario's exempt market regulatory regime, while adequately protecting investors.

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Review of Technical Reports of Ontario Mining Issuers

On June 27, 2013, the Ontario Securities Commission (OSC) published Staff Notice 43-705 Report on Staff's Review of Technical Reports by Ontario Mining Issuers, which sets out results of its compliance review of technical reports and provides further guidance for complying with National Instrument 43-101 Standards of Disclosure for Mineral Projects (NI 43-101). In its review, OSC Staff identified an unacceptable level of compliance—80% of the total number of technical reports reviewed had some form of non-compliance with the disclosure requirements and approximately 40% had at least one major non-compliance concern.

Summary of Caselaw, Legislative and Regulatory Developments 2013

The year 2013 included a number of Canadian decisions dealing with restrictive covenants, franchises, directors' duties and directors' liabilities. 2013 also provided us with interesting cases dealing with indemnification of directors, agreements to negotiate in good faith and the business judgment rule.

In general, restrictive covenants will not be enforceable unless they are determined to be reasonable as between the parties. In *Payette*, the Supreme Court of Canada determined that a five year non-compete provision will be viewed as reasonable and therefore enforceable in the context of a commercial sale of a business involving a substantial purchase price with terms negotiated by parties with similar bargaining power and assisted by experienced legal counsel. In *Evans*, the Alberta Court of Appeal clarified that in order for a restrictive covenant to be enforceable, it is not necessary that the individual be a director or shareholder—acting as a fiduciary of an employer can be sufficient. Finally, in *Martin*, the Ontario Court of Appeal confirmed that in order for a restrictive covenant to be enforceable, there must be a clear outside limit for its duration.

2013 also included a couple of interesting franchise cases. In *Pet Valu Canada Inc.*, a former franchisee attempted to get around restrictive covenants contained in her franchise agreements by operating a competitive business not owned directly by her. In this case, the Ontario Superior Court of Justice made it clear that the former franchisee could not circumvent her restrictive covenants and accomplish indirectly what she could not do directly by operating a competing business owned by her spouse. In *Baton Rouge Restaurants Inc.*, the Ontario Court of Appeal highlighed the fact that the standard of disclosure for a prospective investor who ultimately becomes the franchisee with respect to a particular franchise will be a much higher one than where a prospective investor does not actually acquire the relevant franchise, even in the case of an existing franchise relationship.

Turning to valuation methodologies, the *Guang* case demonstrates that an appropriate probability-weighted discounted cash flow method to value in process research and development will be recognized by the courts.

In *Western Larch*, the Ontario Court of Appeal clarified that a buy/sell (shotgun) offer made pursuant to a partnership agreement will be enforceable if the offer contains an alternative offer, so long as the offer as a whole is made in strict compliance with the agreement.

With respect to director's liability, the *Baker* decision should put directors and officers on alert with respect to personal liability for environmental issues. Directors should also not simply assume that a corporation will provide advance funding for legal costs even if there are indemnification agreements or provisions in corporate by-laws. In the *Look* decision, the Ontario Court of Appeal ruled that former directors and officers who are sued directly by the corporation over which they used to preside, will be denied "advance funding" for legal costs if the corporation can make a strong *prima*

facie case that the directors acted in bad faith. Conversely, the United Kingdom's *Madoff* case demonstrates that directors will not be held liable if they can demonstrate that they carried out their duty to act in good faith in the interest of the company. Notwithstanding that the directors authorized consulting and other payments to, or for the benefit of, Bernard Madoff, the major shareholder and CEO, the court found that the directors did not breach their duties to act in good faith in the interest of the company because they honestly believed that the actions in question were in the best interest of the company.

In another case scrutinizing directors' decisions, the Delaware Court of Chancery, in *MFW Shareholders Litigation*, found that the business judgment rule review standard (as opposed to the more onerous entire fairness review) is the applicable standard to apply in the context of a going private transaction where the controlling shareholder's offer is conditional on the approval of both an independent special committee and a majority of the minority stockholder vote.

Although parties often include clauses requiring them to negotiate in good faith in their preliminary documents, such clauses should not be included without understanding the potential consequences. In *Siga Technologies*, the Delaware Supreme Court affirmed the Chancery Court's ruling that an obligation to negotiate in good faith according to a term sheet that stated it was non-binding can in fact be enforceable. The court also confirmed that expectation damages can be awarded if the trial court determines that the parties would have reached an agreement but for the defendant's breach.

During 2013 the Canadian Securities Administrators amended National Instrument 41-101 *General Prospectus Requirements* and National Instrument 44-101 *Short Form Prospectus Distributions* with respect to permissible prospectus pre-marketing and marketing activities.

The Ontario Securities Commission published a staff notice regarding the results of its 2012 targeted review of portfolio managers and exempt market dealers to assess compliance with the know-your-client, know-your-product and suitability obligations. The review focused on 87 portfolio managers and exempt market dealers and was the largest targeted review conducted by the Compliance and Registrant Regulation Branch of the OSC.

In an attempt to modernize the exempt market, the Ontario Securities Commission published a notice setting out next steps in the exempt market review and consideration of four prospectus exemptions. The Commission's objective in this regard is to facilitate capital raising for start-ups and small and medium-sized enterprises and to modernize Ontario's exempt market regulatory regime, while adequately protecting investors.

Lastly, the Ontario Securities Commission also published a review of technical reports of Ontario Mining Issuers which revealed that there was an unacceptable level of compliance—80% of the total number of technical reports reviewed had some form of non-compliance with the disclosure requirements and approximately 40% had at least one major non-compliance concern.

Certain Caselaw Developments

I. CANADIAN CASES

Yannick Payette et al. and Guay Inc.
Supreme Court of Canada
2013 SCC 45
September 12, 2013

The Supreme Court of Canada upheld non-competition and non-solicitation restrictions which prevented a vendor of a crane rental business from competing in the province of Quebec for a period of five years.

The Facts and Lower Level Decisions

Yannick Payette and his partner, Louis Pierre Lafortune controlled several companies that were in the crane rental business. In October 2004, a competitor, Guay Inc., purchased the assets of those companies for $26 million. The terms of the purchase agreements included non-competition and non-solicitation clauses which would apply for a period of five years running from the date on which Payette and his partner ceased to be employed directly or indirectly by the purchaser. The non-competition clause precluded Payette from being employed or otherwise involved in the crane rental industry anywhere in the province of Quebec throughout the five year period. In contrast, the non-solicitation clause precluded Payette from soliciting or doing business or attempting to do business with any former customer or the customers of Guay Inc. during the same period.

As part of the transaction, Payette and his partner were to be consultants for Guay Inc. for a period of six months. On May 26, 2005, at the end of the six month transitional period, Payette and Guay Inc. agreed upon an employment contract for Payette to be the operations manager.

On August 3, 2009, Guay Inc. dismissed Mr. Payette without a serious reason. On March 15, 2010, Payette commenced a new job as operations manager with Mammoet Crane Inc., a competitor of Guay Inc.

On April 27, 2010, Guay Inc. attempted to obtain an injunction to enforce Payette's non-competition provision; however, it was unsuccessful as the Quebec Superior Court held that the Civil Code of Quebec prevents the enforcement of restrictive covenants in an employment agreement where an employer has terminated the employee without serious reason.

In a subsequent appeal, the Quebec Court of Appeal overturned the Superior Court decision and ordered a permanent injunction on the basis that the restrictive covenants agreed to by Payette were in the context of a commercial transaction and not an employment situation.

The Supreme Court of Canada Decision

In dismissing the appeal, the Supreme Court of Canada held that the non-competition and non-solicitation provisions were enforceable as they were considered reasonable

given the specific context of a commercial sale of a business involving a substantial purchase price with terms negotiated by parties with similar bargaining power who were aided by experienced legal counsel.

In particular, the Court held:

- The rules applicable to restrictive covenants relating to employment differ depending on whether the covenants are linked to a contract for the sale of a business or to a contract of employment
- The application of different rules in the context of a contract of employment is a response to the imbalance of power that generally characterizes the employer–employee relationship when an individual contract of employment is negotiated, and its purpose is to protect the employee
- The inclusion of non-competition and non-solicitation clauses in a contract for the sale of a business is usually intended to protect the purchaser's investment. In limiting the vendor's right to compete with the purchaser and preventing the vendor from working for a competitor of the purchaser for a certain time after the transaction, such clauses enable the purchaser to protect its investment by building strong ties with its new customers without fearing, for a given period, completion from the vendor which had previously established a relationship with its customers, suppliers and employees

Justice Wagner confirmed that the "common law rules for restrictive covenants relating to employment do not apply with the same rigour or intensity where the obligations are assumed in the context of a commercial context. This is especially true where the evidence shows that the parties negotiated on equal terms and were advised by competent professionals, and that the contract does not create an imbalance between them."

Applying the foregoing analysis to the case at hand, the Court noted that the entire province of Quebec was a reasonable territory for the non-competition provision given that the activities of the crane rental business depend heavily on the location of the customers' sites as opposed to the crane rental company's place of business.

The Court also held that the fact that the non-solicitation clause did not contain a territorial limitation was not fatal to it being reasonable and therefore enforceable. This is in contrast to a non-competition clause which does require a reasonable territorial limitation.

Evans v. The Sports Corporation
Alberta Court of Appeal
Docket 1103-0298-AC
January 18, 2013

The Alberta Court of Appeal dismissed an appeal by a former sports agent employee who appealed a trial decision against him which upheld a restrictive covenant and found him to be a fiduciary of his employer notwithstanding the facts that the employee was not a director or shareholder and the employee did not have the authority to hire or fire other employees of the company.

The Facts and Trial Decision

Richard Evans was a sports agent who spent six years as an employee of a sports agency business called The Sports Corporation (TSC). TSC represents a number of NHL hockey players and had developed a "Czech-Slovak Pipeline" of hockey players who were primarily recruited by two other TSC employees, Jaromir Henys and Peter Kadlecek.

Evans took over the Czech-Slovak Pipeline and although he was successful at servicing these clients he had limited success in recruiting clients other than those that were sent to him by Henys and Kadlecek.

Evans left his employment in April 2006 and ultimately set up his own sports agency business that had a number of clients from the Czech-Slovak Pipeline who were initially recruited by Henys and Kadlececk. Prior to leaving his employment, Evans also had understandings or arrangements with Henys and Kadlececk that they would join Evans' new sports agency after his departure from TSC.

Evans' employment agreement with TSC contained restrictive covenants that provided Evans would not:

(i) either during the continuance of his employment under the employment agreement or for a period of 24 months thereafter, obtain or attempt to obtain the withdrawl from TSC of any of its employees; and

(ii) either during the continuance of his employment or for a period of 24 months therafter, directly or indirectly through others, call on, solicit, divert or take away or attempt to call on, solicit, divert or take away any TSC client which had been a TSC client.

After leaving his employment, Evans sued TSC for certain wages and bonuses he alleged were still owed to him. TSC countersued and alleged that Evans had breached the restrictive covenant in his employment agreement and that he had also breached his fiduciary obligations to TSC by competing in the industry and soliciting TSC's employees and clients. The trial judge found in favour of TSC's counterclaim and held that Evans had solicited TSC's employees and clients and breached both the restrictive covenant in his employment agreement and his fiduciary duty to TSC.

The Court of Appeal Decision

The Court of Appeal had to determine whether the trial judge erred in concluding: (i) the restrictive covenant was enforceable; and (ii) Evans was a fiduciary.

On the first point, the court referred to Shafron v. KRG Insurance Brokers (Western) Inc., a 2009 Supreme Court of Canada decision in which the Court held that "a restrictive covenant is *prima facie* unenforceable unless it is shown to be reasonable. However, if the covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable."

In the present case, the court held that the restrictive covenant was in fact ambiguous; however, this finding was not tragic to the success of TSC's counterclaim as the court upheld the trial judge's finding that the damages flowing from the breaches, whether from the breach of the restrictive covenant or the breach of a fiduciary obligation are

the same. Therefore, the key question became whether or not Evans owed TSC a fiduciary duty. Evans argued that he was not a fiduciary of TSC as he was only a minor cog in TSC's operation and that he had little or no discretion when it came to accepting or not accepting clients. Evans also submitted that he was not a fiduciary as he was neither a director nor shareholder of TSC and he did not have the authority to hire or promote any employee.

In rejecting this argument, the court pointed out that "the status of a fiduciary does not emanate from holding corporate office. Rather, it relates to the responsibilities entrusted to an employee, including any attendant power to affect the economic interests of the company. In this case, while the Eastern European market was merely a segment of the overall business operations of TSC, Evans was entrusted with primary responsibility for its successful operations."

The court agreed with the trial judge's ruling that Evans had satisfied all elements of the test for a fiduciary relationship; namely, that he had the scope for the exercise of some discretion or power, that he could unilaterally exercise that power or discretion so as to affect TSC's legal or practical interests, and that TSC was peculiarly vulnerable to Evans' holding the discretion or power."

The appellant court also agreed with the trial judge's finding that the damages for breach of fiduciary duty were identical and overlapped entirely with the quantum of damages assessed for breach of the contractual non-solicitation obligation. Accordingly, Evans' appeal of the damages award of $207,463.47 in favour of TLC was dismissed.

Pet Valu Canada Inc. v. 1381114 Ontario Limited, et al.
Ontario Superior Court of Justice
ONSC 5361
August 19, 2013

The Ontario Superior Court of Justice granted an injunction in favour of Pet Valu Canada Inc. (the Franchisor) who sought an interim injunction against the defendants to preclude them from operating a pet supply store on the basis that the actions of the defendants (who were related to a principal of a franchisee) breached a non-competition covenant in the franchise agreement.

The Facts

Robin Martin (Martin) was the sole officer and director of 1381114 Ontario Limited (the Franchisee), which entered into a franchise agreement with the Franchisor. Pursuant to the franchise agreement which was entered into and renewed by Martin, the Franchisor gave the Franchisee certain benefits by way of royalty and rent reductions with respect to a Pet Valu store located at 3227 Eglinton Avenue East, Scarborough, Ontario (the Eglinton Pet Valu Location).

Martin personally operated the Eglinton Pet Valu Store until the termination of the franchise agreement on July 3, 2013. The franchise agreement contained non-competition and non-solicitation provisions that: (i) restricted the Franchisee and Martin from operating or participating in a competing business for two years after the end of the franchise agreement within a 20 kilometer radius of a Pet Value store; and (ii) precluded the Franchisee and Martin from hiring or seeking to hire an employee of a Pet Value franchise for one year after the end of the franchise agreement.

The franchise agreement also contained various provisions concerning the Franchisee's and Martin's confidentiality obligations as well as their obligation to return the telephone number and all customer lists, and their obligations to cease using all fixtures, signs and equipment that display distinct features associated with Pet Value.

Pursuant to the franchise agreement, Pet Valu also had the option to purchase assets from the Franchisee upon the termination of the franchise agreement and the Franchisee was not permitted to sell its assets without Pet Value's consent and approval.

On June 20, 2013, a paralegal purporting to represent Martin advised the Franchisor that the Franchisee had transferred its assets (without the plaintiff's consent) to a numbered corporation notwithstanding Ms. Martin's prior agreement to sell the assets to the Franchisor. Moreover, the Franchisee refused to return to the Franchisor the telephone number associated with the Eglinton Pet Valu Location and customer rewards cards.

Martin's spouse was Mark Fingarson (Fingarson). Fingarson owned and operated a security services company called Alpha Security Systems. Fingarson incorporated 2347687 Ontario Limited (Fingarson's Corporation) in October 2012 and in June 2013, Fingarson caused the corporation to register the business names "Pet Stuff & Supplies" and "Alpha Systems."

The Franchisor sought an interim injunction against the defendants from operating a pet supply store called Pet Stuff & Supplies (the Pet Stuff Store) which it alleged breached the non-competition covenant in the Franchisee's franchise agreement.

The Decision

In hearing the motion, the court took specific note of evidence that established the following:

- Fingarson's Corporation was operating the Pet Stuff Store at 4218 Lawrence Avenue East, Unit 13, Scarborough, Ontario, a mere 450 meters from a Pet Valu store
- Martin's former manager was employed at the Pet Stuff Store
- shelving, racking and inventory with distinctive labels, price tags and product codes from the Eglinton Pet Valu Location were being used at the Pet Stuff Store
- Martin, Fingarson and Martin's former manager set up the Pet Stuff Store
- Fingarson advised one of Pet Valu's business consultants that Fingarson had set up the Pet Stuff Store in his own name and that Martin would only be working there once or twice per week

In his submissions, Fingarson asserted that:

- the Eglinton Pet Valu Location had declining sales
- he was not bound by the franchise agreement
- the Franchisor did not make a reasonable offer to buy the assets of the Franchisee
- he determined it was necessary to shift the business of the Eglinton Pet Valu Location or Martin would lose money
- there were no documents to indicate that Martin was the controlling mind of the Pet Stuff Store

- the Pet Stuff Store was quite different from Pet Value franchises as it also sold spy equipment and skateboards
- Martin was in the Pet Stuff Store because she was friends with her former manager
- the Pet Stuff Store had been sold to a third party
- to grant an injunction would provide serious damage to the third party

The court found that while Fingarson was not a signatory to the franchise agreement, the evidence established that:

- he incorporated Fingarson's Corporation for the purpose of assisting Martin to compete with the Franchisor and its franchisees when she had undertaken not to do so
- it was obvious that Fingarson's Corporation was incorporated to hide Martin's involvement
- Martin was involved in the operation of Pet Stuff

Justice Backhouse wrote "I am satisfied for the purposes of this motion that there is a transparent effort by all of the defendants to avoid the restrictive covenants. Mr. Fingarson's allegation that Pet Stuff has been sold is unsupported by any documentation, all of which would have been within his power to produce, and lacks credibility. It is no more than a feeble attempt to avoid the consequences of the restrictive covenant. Pet Stuff is a competing business within the meaning of the restrictive covenant notwithstanding its sidelines of spy equipment and skateboards.

A fundamental aspect of any franchise system is the protection of its method of operation, goodwill, products and services. Where there is a clear breach of a non-competition provision which is a negative covenant, the elements of irreparable harm and balance of convenience are not required. The defendants are *prima facie* in breach of a non-competition clause, non-solicitation clause and other post-termination obligations, which are serious issues to be tried. Although I have found that irreparable harm and the balance of convenience need not be established, there is an abundance of evidence to satisfy these elements."

Accordingly, the court granted the injunction in favour of the Franchisor.

Martin v. ConCreate USL Limited Partnership
Ontario Court of Appeal
Docket C55361
February 5, 2013

The Ontario Court of Appeal held certain restrictive covenants unenforceable due to the fact that, notwithstanding an ostensible term of 24 months after the appellant disposes of his indirect interest in the respondents, such disposition could not take place without approvals from third party lenders. The result was a term that did not contain a clear outside limit for its duration which rendered the restrictive covenants unreasonable and therefore unenforceable.

The Facts and Trial Decision

Derek Martin was a 20-year employee of ConCreate USL Ltd. (ConCreate). During his employment with ConCreate, Martin acquired a minority interest in ConCreate and a related business, Steel Designed & Fabricators Ltd. (SDF).

The businesses were subsequently sold to entities controlled by TriWest Construction Limited Partnership (TriWest LP). In conjunction with the sale transaction: (i) Martin's holding company received a 25% interest in the limited partnership units of TriWest LP; (ii) Martin was appointed President; and (iii) Martin entered an employment agreement. The employment arrangement included non-competition and non-solicitation covenants that were to end 24 months after Martin disposed of his indirect interest; however, changes in the ownership of his holding company were restricted by a partnership agreement that required the consent of third party lenders.

Less than six months after the change in ownership, the respondents terminated Martin's employment as President for cause. Martin disputed the respondent's claim for cause and eight days following his termination, Martin started a company that allegedly competed with the respondents and employed a number of former ConCreate employees, including two former management team members.

The respondents commenced an action against Martin claiming that he had breached the restrictive covenants and his fiduciary duties. They sought significant damages, and an interlocutory and permanent injunction.

Martin applied for a declaration that the restrictive covenants were void and unenforceable as being unlawful restraints of trade.

The application judge held that the covenants were reasonable as between the parties and in particular noted the following:

- The agreements were part of a commercial transaction, and not connected only to Martin's employment. Therefore, the agreements "should be scrutinized, giving deference to the contractual autonomy of the parties"
- The respondents had a "legitimate business interest that needs the protections of a restraint of trade"
- The scope of the prohibited activities was reasonable since the purpose of the covenants was to prevent Martin from competing in activities that the respondents "had already staked out for themselves"
- Martin's agreement that the restrictions in the agreements are reasonable is not to be ignored

The Court of Appeal Decision

Martin appealed the application and the Court of Appeal was of the view that the central issue on appeal was whether the duration of the restrictive covenants was reasonable, given the trial judge's analysis.

Prior to delivering its decision, the Court of Appeal confirmed the following:

- Covenants in restraint of trade are contrary to public policy because they interfere with individual liberty and the exercise of trade; they are *prima facie* unenforceable and will only be upheld if it is reasonable in reference to the interests of the parties concerned and the interests of the public
- The party that seeks to enforce a restrictive covenant has the onus of demonstrating that the covenants are reasonable as between the parties
- The party seeking to avoid enforcement of a restrictive covenant has the onus of demonstrating that it is not reasonable with respect to the public interest

- If a covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable
- The law distinguishes between a restrictive covenant in connection with the sale of a business, and one between an employer and an employee; a less rigorous test is applied in determining the reasonableness of a restrictive covenant given in connection with the sale of a business

However, notwithstanding the foregoing and the application judge's observations noted above, the Court of Appeal opined that a restrictive covenant cannot be viewed as reasonable if an outside time limit for the term of its duration cannot be clearly ascertained.

Applying the foregoing analysis that certainty is required, the court allowed the appeal. In particular, Justice Hoy held "the duration is unreasonable because it depends on any required consents of third parties, [it] is therefore for an indeterminate period, and there is no fixed, outside limit. Notably, the required consents are not limited to third parties whose consent was required at the time that the covenants were entered into. As the definition of "Lenders" in s.1.1 of the Partnership Agreement, and the definitions incorporated therein, make clear, the duration is potentially tied to the consent of unascertainable future third parties."

3574423 Canada Inc. v. Baton Rouge Restaurants Inc.
Ontario Court of Appeal
2013 ONCA 39
January 24, 2013

The Ontario Court of Appeal dismissed an appeal by a franchisee who had unsuccessfully alleged at trial a breach of a right of first refusal for an additional location and breach of disclosure obligations under the Arthur Wishart Act (Franchise Disclosure) (Ontario) (the Franchise Legislation). This case highlights the difference in the standard of disclosure required under franchise legislation for parties who become franchisees and for those who do not.

The Facts

3574423 Canada Inc. (the Franchisee) became a Baton Rouge franchisee in 1999 when it assumed ownership of the franchise located at the Eaton Centre in the City of Toronto. The Franchisee had a contractual right of first refusal over the next franchise in the Greater Toronto Area.

Over the years, Baton Rouge Restaurants Inc. (the Franchisor) offered the Franchisee a number of new franchise locations pursuant to the right of first refusal, including a franchise to be located in Thornhill which was offered in 2000. Each new franchise opportunity that was offered to the Franchisee was turned down by the Franchisee, including the Thornhill location. The Franchisee was also offered a second opportunity to acquire the Thornhill location in 2001 and again the Franchisee turned it down.

The Thornhill location franchise was later granted to another franchisee.

The Franchisee commenced an action for damages on the basis of:

- breach of a contractual duty of good faith
- breach of the statutory duty of fair dealing pursuant to the Franchise Legislation

The Trial Level Decision

The Franchisee took the position that when it was given the opportunity in 2001 to acquire the franchise at the revived Thornhill location, the Franchisor failed in its obligation to properly and fully notify the Franchisee in accordance with the Franchise Legislation.

The Franchisee also claimed that the Franchisor's notification was premature and that it withheld critical information. As a result, the Franchisee claimed that it waived its right of first refusal on a franchise that, with full disclosure, it would otherwise have purchased.

The trial judge disagreed with the Franchisee and held that the Franchisee had sufficient information to waive its right of first refusal at the time it made its decision.

The trial judge also rejected the Franchisee's arguments that the Franchisor had failed to make full disclosure regarding the details of the Thornhill location, and that it was a "prospective franchisee" with respect to the new franchise location. The court held that as the Franchisee was not a franchisee in respect of the Thornhill franchise, it was not entitled to rely on the statutory remedies for inadequate disclosure and that such remedies were only available to a party who had in fact become a franchisee on the basis of the level of disclosure.

The Court of Appeal Decision

The Court of Appeal's focus was on the trial judge's finding that the Franchisor had not breached the duty of good faith and fair dealing by failing to provide certain information to the Franchisee in respect of its decision as to whether to exercise its right of first refusal and invest in the new franchise location as required by s.3.(1) of the Franchise Legislation which provides that "Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement."

The court opined that "extensive prior dealings between the parties in this case inform the standard of fair dealing between them..." the appellant's principals were, as the trial judge repeatedly observed, sophisticated and practical businessmen. They had considerable experience in the restaurant business and in managing an existing Baton Rouge franchise, and had sufficient information upon which to make their decision about Thornhill. They were not interested in the Thornhill opportunity for other reasons.

Further, as it turns out, the terms of the final lease document relating to Thornhill were not materially different from those contained in the offer and amended offer to lease. The final lease had all of the same basic provisions, namely term, rent, square footage, renewal terms, minimum rent-free period and tenant allowances. Having regard to commercial sense, the changes were minor and would not have made any difference to the appellant.

As the trial judge found, the appellant's principals made their own determination to pass on the Thornhill location in 2001 because they were not in a financial position to pursue the franchise at that time and, in any event, they had no confidence in the landlord's ability to meet construction deadlines. Accordingly, the fact that the final lease pushed back the possession date by a further period of three months would not have enhanced the appellant's confidence in this landlord."

Accordingly, the court dismissed the appeal which highlights the fact that the standard of disclosure for a prospective investor who ultimately becomes the franchisee with respect to a particular franchise will be a much higher one than where a prospective investor does not acquire the relevant franchise, even in the case of an existing franchise relationship.

Guang v. WEX Pharmaceuticals Inc.
Supreme Court of British Columbia
2013 BCSC 1949
October 28, 2013

The Supreme Court of British Columbia had to determine the court's authority to set the fair value of the petitioners' shares in the respondent, WEX Pharmaceuticals Inc. (WEX), in the context of a "going private" or "squeeze-out" transaction.

The court found that registered shareholders were entitled to the partial relief that they were seeking in the dissent proceeding and awarded them 18 cents per share following the squeeze out rather than the 14 cents per share previously offered. The court held that Ernst & Young LLP (EY) used an appropriate probability-weighted discounted cash flow method to value in process research and development, but also found that the probability of success factor used by EY was too conservative.

The Facts

WEX, a former public company which traded on the Toronto Stock Exchange developed drug products for pain management using naturally occurring toxins obtained primarily from puffer fish. WEX's business was built around the research and development of clinical uses of one of WEX's products, tetrodoxtin (TTX). Its principal publically disclosed assets were its intellectual property relating to TTX, including approximately 62 patents or patent applications and its in-progress research and development. Clinical trials with respect to TTX had been unsuccessful.

In July 2010, WEX received a letter from a designee of CK Life Sciences Inc. (CKLS) advising WEX that CKLS had an intention to make a take-over bid for all of the outstanding restricted voting shares of WEX at 13 cents per share.

WEX's board of directors convened a meeting to review the proposed transaction and passed a resolution establishing a special committee (the Special Committee) to review the proposed transaction. The Special Committee considered 15 valuation firms, requested credentials from ten of them and produced a short list of three candidates, with Ernst & Young LLP ultimately being the valuation firm that was retained in October 2010. EY provided the Special Committee with a draft of its valuation which determined that the fair market value of WEX shares was 14 cents to 16 cents per share.

Following a series of transactions that concluded in January 2011, Pharmagesic Inc. (Pharmagesic), a CKLS subsidiary acquired over 90% of WEX's common shares. Pharmagesic then exercised its rights under the Canada Business Corporations Act (CBCA) to effect a "squeeze-out" transaction of all remaining shareholders in order to take WEX private.

The registered and beneficial shareholders of WEX were offered 14 cents per share. The offer was structured through an amalgamation transaction in which each WEX

shareholder would receive a share in a Pharmagesic subsidiary which was immediately redeemed at that price.

In contrast with an amalgamation of two corporations where shareholders can elect to continue participating in the newly formed entity, a “squeeze-out” transaction eliminates this option for shareholders. Accordingly, WEX’s registered and beneficial shareholders who were the petitioners in this matter were not offered the opportunity to participate in the amalgamated corporation’s future and the only options open to them were to: (i) accept the 14 cents per share compensation offered to them by Pharmagesic; or (ii) exercise their dissent rights under s.190 of the CBCA.

The petitioners commenced a dissent proceeding seeking an order that the Court fix the fair value of their shares.

The Decision

The court noted that in determining the value of the petitioners’ shares, it would have to consider the following:

- the probability of success of WEX’s clinical trials
- the discount rate which EY applied to cash flow
- the value, if any, to be attributed to WEX’s inventory of TTX

The court further indicated that “the right to dissent protects a shareholder when faced with a fundamental change to the corporation. It serves two purposes, namely to provide minority shareholders with a market for their shares when the corporation undergoes fundamental structural change and assurance of a fair price for those shares.”

In particular, the court noted that:

- the role of the court is to determine the fair value of the petitioners’ shares. No party bears the onus of proving fair value
- “fair value” and “fair market value” are not necessarily synonymous. This is because it is not the market value of the dissenter’s shares that is under consideration. Rather the focus is the determination of the *en bloc* value of all the shares in the company and the allocation of a proportionate share to the dissenter. Accordingly, the minority discount that would ordinarily be applied when determining the fair market value of a minority interest is ignored. Notwithstanding these differences, the *en bloc* value is of the fair market value of all issued shares of the company
- the court may accept all or part of the evidence, expert or otherwise, in order to finally decide, on an assessment of all the evidence, what it considers to be a fair value
- reliance on market price may be misplaced if the shares are, for example, thinly traded or held by a large majority shareholder
- hindsight evidence of trends or occurrences taking place after the valuation date should not be admitted, except in limited circumstances
- where the offer is made by part of a group that effectively controls the target, the evidence produced in support of the offer should be examined with particular scrutiny

In conducting its valuation, EY used the probability-weighted discounted cash flow method to value the in-process research and development, which according to other expert evidence, was the appropriate methodology; however, the Court found that the 13% probability of success factor used by EY was conservative and should have been between 15% to 20%.

Applying the principles and analysis summarized above, the Court granted partial relief to the petitioners who were registered shareholders and found that they should receive 18 cents per share as the fair value.

Western Larch Ltd. v. Di Poce Management Ltd.
Ontario Court of Appeal
2013 ONCA 722
November 29, 2013

The Ontario Court of Appeal upheld a motion judge's findings that a buy/sell (shotgun) offer made pursuant to a partnership agreement is enforceable if it is made in compliance with that agreement, even if it contains an alternative offer open for acceptance on different terms. The court will not interfere with the reasonable expectations of the parties entering into the agreement and will not require that such offers be made at fair market value, absent such a requirement in the agreement. In addition, minor calculation errors will not invalidate a buy/sell offer.

The Facts

Alpa Partnership was in the business of manufacturing and distributing wood products for the low-rise residential building industry in Ontario. The partners in the partnership were Di Poce Management Limited (DPM), Western Larch Limited (WL), Large Tooth Aspen Limited (LTA), Red Alder Limited (RA), and Eastern Hemlock Limited (EH). A partnership agreement contained two relevant methods by which a partner could be removed from the partnership. The first exit mechanism could be triggered upon the death of a principal of a partner and the other exit mechanism was a buy/sell (shotgun) provision.

RA's principal died and the partners other than WL wanted RA to remain in the partnership. WL was the only dissenter and wanted the partnership to buy out RA's interest as provided for in the partnership agreement. In response, each of DPM, LTA, and EH provided WL with a shotgun buy/sell offer which forced WL to either: (i) buy out DPM, LTA and EH; or (ii) sell WL's partnership interest to them.

The shotgun buy/sell offer contained two alternatives, each of which allowed WL to accept the alternative as a buyer or seller and the offer stated that WL's failure to respond would result in WL being deemed to agree to be bought out on the terms set out in the first alternative. If WL agreed to sell its partnership interest in accordance with the buy/sell offer, DPM, LTA and EH anticipated allowing RA to participate in a restructured partnership. WL attempted to secure financing to buy out DPM, LTA and EH, but was unsuccessful. WL then applied to the Court for an interim and interlocutory injunction to restrain DPM, LTA, and EH from implementing or attempting to implement the shotgun buy/sell offer. The application was unsuccessful and WL was eventually bought out and paid $33 million in accordance with the first alternative set out in the shotgun buy/sell offer.

The Motion

WL subsequently sought a declaration that the shotgun buy/sell offer was invalid and sought damages (as all parties acknowledged that WL could not be brought back into the partnership) for the forced sale of its partnership interest. WL also claimed that it should have received fair market value for its partnership interest.

The motions judge, sitting as a judge on the Commercial List, found that the shotgun buy/sell offer was made in compliance with the partnership agreement, and was thus enforceable even though it did not perfectly comply with the terms of the partnership agreement.

The judge directed a trial on the following matters: (i) although the first alternative was found to be not compliant with the partnership agreement, the second alternative was found to be compliant and therefore WL could have accepted the second alternative offer as either a buyer or a seller. Accordingly, WL was deemed to accept the second alternative and WL may be entitled to damages based on the difference between the two alternatives; (ii) net earnings were calculated using the wrong reference date (it was 2 weeks off); and (iii) net earning interest was improperly calculated.

The Court of Appeal Decision

The Ontario Court of Appeal dismissed WL's appeal. The court reviewed the law on buy/sell provisions and stated that they are generally seen as "a draconian remedy" which has led courts to require that buy/sell offers "strictly comply" with the buy/sell provisions in the relevant contract. However, "strict compliance is not perfect compliance" and the reasonable expectations of the parties in the particular factual context must be considered. In this case, all of the parties involved were sophisticated parties.

The court also found that DPM, LTA and EH were permitted to offer other alternatives with their shotgun buy/sell offer; however, absent a response, they could only enforce the partnership agreement compliant shotgun buy/sell offer, and not the alternative. Had the shotgun buy/sell offer been conditional on some matter not specifically addressed in the partnership agreement, the court would not have allowed the deemed sale pursuant to the shotgun buy/sell offer.

Moreover, the court held that the amount of the inaccurate calculation of net earnings and net interest earnings were minor matters which did not invalidate the shotgun buy/sell offer, but could result in damages in favour of WL, pending the determination of the issues at trial.

Finally, unless otherwise specified in the partnership agreement, the court found that a buy/sell provision operates to obviate the need for a valuation as it is the very purpose of these types of provisions and the intention of the parties at the time they entered into the Partnership Agreement. Accordingly, the court will not interfere by requiring that buy/sell offers involve purchases at fair market value.

Baker et al. v. Director, Ministry of the Environment
Ontario Superior Court of Justice
2013 ONSC 4142
June 19, 2013

The Ontario Divisional Court upheld a decision of the Ontario Environmental Review Tribunal (the Tribunal) that dismissed a motion to stay a Director's order issued by the Ontario Ministry of the Environment (MOE) against former directors and officers of Northstar Aerospace (Canada) Inc. The directors and officers were held personally liable for costs associated with an order by the MOE even while that order was being appealed.

A negotiated settlement on the day of an appeal hearing resulted in the former directors collectively agreeing to provide $4.75 million toward remediation of the polluted lands. In a statement released by the MOE, the MOE indicated "this is the first time the ministry has held corporate directors of a publicly traded company personally responsible for an environmental clean-up after a company has gone bankrupt."

The Facts and Decision of the Environmental Review Tribunal

Northstar Aerospace (Canada) Inc. (Northstar Canada) owned a property on Bishop Street in Cambridge. The Cambridge lands had a long history of industrial use and evidence of Trichloroethylene (TCE) contamination of the site dating back to the 1970s even prior to Northstar Canada's existence.

In 2004, a Phase I and Phase II Environmental Site Assessment revealed levels of TCE well above MOE standards, in the groundwater on the site. It was also determined that the contamination had migrated offsite and had affected numerous homeowners in the nearby Bishop Street community.

To address the necessary remediation actions, Northstar Canada submitted an Interim Remedial Action Plan to the MOE in July 2006 which the MOE deemed acceptable and remediation commenced in 2009. The cost of remediation activities was estimated to be approximately $1.4 million per year for ten years.

In 2009, Northstar Canada's Cambridge plant was decommissioned and a new facility was opened in Milton, Ontario. Notwithstanding this closure, Northstar Canada continued its Cambridge mediation program.

In September 2009, Neil Baker became a significant shareholder and was asked to become a director of Northstar Aerospace Inc., the U.S. parent company of Northstar Canada.

From 2004 to 2012, Northstar Canada carried out investigations, mitigation and remediation on a voluntary basis and without the MOE issuing any orders. However, in early 2012, disclosures about Northstar's grave financial situation caused the MOE to become concerned about Northstar Canada's ongoing solvency and ability to continue the clean-up.

In June 2012, both Northstar Canada and Northstar Aerospace Inc. filed for protection under the Companies' Creditors Arrangement Act (CCAA) and the directors of the companies resigned effective upon the issuance of the initial CCAA order.

The CCAA Court ultimately approved a sale process with respect to all of the assets of Northstar Aerospace Inc. and Northstar Canada. The process culminated in the sale of the majority of the assets of both companies to a third party which was approved by the CCAA court. The closing took place in August 2012; however, the sale transaction did not include a sale of the contaminated site.

Following the sale and the insolvency of the Northstar entities, in November 2012, the MOE issued a Director's order (the Directors Order) against the former directors and officers requiring them to personally assume responsibility for the remediation activities at the site and in the surrounding community.

The former directors and officers appealed the Director's Order to the Tribunal. The appellant former directors and officers also brought a motion to have the Superior Court of Justice (Commercial List) assume jurisdiction for their appeal from the Director's Order. In connection with their appeal, the appellant former directors and officers requested a stay and interim stay of the Director's Order pending the hearing of their appeal. The stay motion was heard by the Tribunal on February 8, 2013 and on February 15, 2013, the Tribunal issued an order dismissing the motion.

In its reasons for dismissing the stay motion, the Tribunal found that although the appellant former directors and officers had raised a serious issue in their appeals, they could not establish irreparable harm because the harm to the appellant former directors was "strictly financial," whereas granting a stay would cause harm to the public interest.

The Superior Court Decision

Following the Tribunal's refusal to grant a stay to the Director's Order, the appellant former directors and officers brought a motion to appeal and an application to judicially review the Tribunal's stay decision.

In response, the MOE brought a motion for an order to quash the statutory appeals on the basis that there is no right of appeal with respect to interlocutory decisions under the Environmental Protection Act.

In dismissing the appeal, the court essentially agreed with the MOE that the Tribunal's stay decision was an interlocutory decision and that the statutory right of appeal in the Environmental Protection Act is limited to appeals from final orders. The court also agreed with the MOE that the applications for judicial review were manifestly premature and that the appellant former directors were required to exhaust their administrative remedies before applying to the court for intervention.

Cytrynbaum v. Look Communications Inc.
2013 ONCA 455
Ontario Court of Appeal
July 4, 2013

The Ontario Court of Appeal affirmed a lower court ruling that former directors and officers who are sued directly by the corporation over which they used to preside, will be denied "advance funding" for legal costs, despite any indemnification agreements or provisions in corporate by-laws, if the corporation can make a strong *prima facie* case that they acted in bad faith.

The Facts and Lower Court Decision

Look Communications Inc. (Look) was a Canadian corporation carrying on business as a wireless communications, internet and cable service provider. In 2009, after facing a decline in its business, Look's Board of Directors (the Board) decided to sell the company's key assets pursuant to a Canada Business Corporations Act plan of arrangement. By May 2009, a deal was arranged for an $80 million sale of Look's assets to a partnership between Bell and Rogers called Inukshuk. The deal closed on September 11, 2009; however in June of that year prior to the closing, the Board held two key votes that later became the subject matter of litigation:

- setting aside $11 million dollars for severance pay and retention bonuses; and
- authorizing payment to terminate the Share Appreciation Rights Plan (SAR) as well as Option Plans at a per share value which the Board set at $0.40 as opposed to the fair market value which the payments were required to be based on pursuant to the terms of the SAR and Option Plans.

The result of these two votes was $20,008,709 in compensation paid to certain of Look's officers, directors, employees and consultants by way of bonuses and equity cancellation payments (the Payments).

Most of the individual appellants in this case were members of the Board and/or officers of Look and collectively, the appellants received the bulk of the Payments.

The Payments were not disclosed until January 2010 which resulted in significant shareholder criticism. In anticipation of litigation, the Board voted to authorize Look to pay up to $1,550,000 as retainers to three law firms representing the appellants, in their personal capacity. Immediately thereafter, the appellants resigned from the Board.

In July 2011, under new leadership, Look commenced a claim against the appellants for breach of fiduciary duty, breach of statutory duty, negligence and unjust enrichment stemming from the Payments.

In addition, Look refused to advance the funding which the Board had previously bestowed upon the appellants to cover their legal costs. In response, the appellants brought applications attempting to force Look to indemnify them for their legal costs. The applications judge refused to grant the relief sought and the appellants launched an appeal to the Ontario Court of Appeal.

The Court of Appeal Decision

The appellants based their entitlement to indemnity and advanced funding on Look's by-laws and indemnification agreements. However, the Court of Appeal affirmed the lower court's decision and focused on subsection 124(4) of the Canada Business Corporations Act which, "in respect of an action by or on behalf of the corporation," requires court approval prior to an officer or director being indemnified or receiving advanced funding for legal costs.

The appellants challenged the court's role in providing judicial oversight of indemnity and advances under subsection 124(4) arguing that the provision is only meant to apply to derivative actions. Justice Sharpe disagreed, stating that the marginal note which appears beside subsection 124(4)—"Indemnification in derivative action"—is not determinative. The court found that subsection 124(4) applies both to actions initiated

by the corporation as well as derivative actions. Consequently, the appellants were subject to the limiting provisions of subsection 124(3) which refuses indemnification and advancement in instances where officers and directors have not “acted honestly and in good faith with a view to the best interests of the corporation.”

It was further ruled that although the appellants were entitled to the benefit of a presumption of good faith, Look successfully led evidence which rebutted this presumption and instead established a strong *prima facie* case that the appellants had acted in bad faith. The Court of Appeal accepted the findings of the applications judge with regard to appellants’ *mal fide* actions that:

- the share valuation of $0.40 bore no relation to the market value of the shares at the time of the sale
- the appellants had authorized the retainer payments without proper legal advice immediately prior to resigning their positions

These two factors coupled with the disappointing return garnered under the sale, of which the appellants paid themselves approximately 25%, were taken as clear acts of bad faith. The appellants attacked the finding with regard to the share valuation on the basis that the Board had relied on the advice of their lawyers in making the Payments, which has been found to be a defence to allegations of bad faith. However, the Court of Appeal noted that the evidence showed that the legal advice received was exclusively with respect to the authority of the Board to make the Payments, and did not condone the decision to set the share value far in excess of the fair market value.

In upholding the applications judge’s decision, the Court of Appeal has broadened the scope of subsection 124(4) of the CBCA and established that the right of officers and directors to advanced funding for legal costs under indemnities will be subject to judicial oversight and ineffective against a finding of a strong *prima facie* case of bad faith.

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401
Supreme Court of Canada
2013 SCC 62
November 15, 2013

The Supreme Court of Canada declared that Alberta’s Personal Information Protection Act was invalid as it infringes the right to freedom of expression as set out in the Canadian Charter of Rights and Freedoms. In order to allow the Alberta legislature sufficient time to revise the statute, the Court suspended the declaration of invalidity for 12 months.

The Facts and Lower Level Decisions

With the goal of enhancing an individual’s control over the collection, use and disclosure of his or her personal information, Alberta’s Personal Information Protection Act (PIPA) imposes a general restriction that organizations cannot collect, use or disclose personal information without an individual’s consent.

In 2006, employees of Palace Casino at Alberta’s West Edmonton Mall went on a lawful strike that lasted 305 days. During the strike, both United Food and Commercial Workers, Local 401 Union (which represents the employees) and a security company engaged by the employer video-taped and photographed the picketline near the main

entrance to the Casino. As part of its efforts to deter employees from crossing the picketline, the Union posted signs in the picketing area which stated that images of persons crossing the picketline might be placed on the website www.casinoscabs.ca.

A number of individuals who were recorded crossing the picketline subsequently filed complaints with the Alberta Information and Privacy Commissioner. The Commissioner in turn appointed an adjudicator to decide whether the Union had contravened PIPA.

In March 2008, the adjudicator found that the Union's actions were not authorized under PIPA for any of the purposes of collection provided by the Union other than the purpose of gathering evidence. The adjudicator further found that a party must ensure that use or disclosure of information collected for the "evidence-gathering" purpose must not be used for any other purpose and further indicated that the Union's collection of information for other purposes was not conducted with the individuals' consent nor was it authorized by PIPA.

The Union sought a judicial review of the adjudicator's order and pursuant to the review, PIPA was found to violate the Union's right to freedom of expression enshrined in s.2(b) of the Canadian Charter of Rights and Freedoms (the Charter). The Court of Appeal agreed with the assessment and granted the Union a constitutional exemption from the application of PIPA.

The Union then appealed the decision to the Supreme Court of Canada.

The Supreme Court of Canada Decision

The Supreme Court of Canada substantially dismissed the appeal and held that to the extent PIPA restricts the collection of personal information for legitimate labour relations purposes, it is in breach of s. 2(b) of the Charter (the right to freedom of expression) and cannot be justified.

The Court noted that one of the Union's main purposes for collecting personal information during picketing was to discourage individuals from crossing the picketline and to encourage individuals to support the Union. This constituted an expressive activity which was restricted by PIPA.

The Court then had to examine whether PIPA has a constitutionally acceptable balance between the interests of individuals protecting their personal information on the one hand and the Union's freedom of expression on the other hand. The Court noted that "we must determine whether PIPA serves a pressing and substantial objective and, if so, whether its provisions are rationally connected to that objective, whether it impairs the right to freedom of expression no more than is necessary, and whether its effects are proportionate to the government's objective."

The Court found that the personal information collected by the Union was not extremely sensitive information and suggested that the impact on the individual was not as significant as it would be if more sensitive information had been collected, used and disclosed. The Court opined that "The personal information was collected by the Union at an open political demonstration where it was readily and publicly observable. Those crossing the picketline would reasonably expect that their image could be caught and disseminated by others such as journalists, for example. Moreover, the personal information collected, used and disclosed by the Union was limited to images of individuals crossing a picketline and did not include intimate biographical details.

No intimate details of the lifestyle or personal choices of the individuals were revealed.

Finding that the impact on the Union was unjustifiably greater than the impact on the individuals, the Court ultimately held that PIPA violated S. 2(b) of the Charter (the right to freedom of expression) and that the infringement was not justified under the Charter. In particular, the Court stated that "While PIPA is rationally connected to a pressing and substantial objective, its broad limitations on freedom of expression are not demonstrably justified because its limitations on expression are disproportionate to the benefits the legislation seeks to promote."

At the request of both the Information and Privacy Commissioner of Alberta and the Attorney General of Alberta, the Court agreed to strike down PIPA in its entirety as opposed to ordering specific amendments, to allow the Alberta Legislature to consider amendments to PIPA as a whole. The Court also suspended the declaration of invalidity for 12 months in order give the Alberta legislature time to revise PIPA appropriately.

Pursuant to this decision, it is now incumbent upon the Alberta legislature to review and update PIPA to ensure that an individual's right to protection of his or her personal information under PIPA is proportionate to the rights of organizations to engage in expressive activities.

Siga Technologies, Inc. v. Pharmathene, Inc.
Delaware Supreme Court
May 24, 2013

The Delaware Supreme Court affirmed the Chancery Court's ruling that an obligation to negotiate in good faith according to a term sheet that stated it was non-binding can in fact be enforceable. The court also confirmed that expectation damages can be awarded if the trial court determines that the parties would have reached an agreement but for the defendant's breach.

The Facts

In 2005, Siga was conducting research and development on an antiviral drug (ST-246) for the treatment of smallpox; however, as its viability was still uncertain, SIGA faced significant challenges obtaining the requisite investor financing for the drug's development.

To collaborate on the development of ST-246 and to address its cash requirements, Siga entered into discussions with one of its competitors, PharmAthene, Inc. (PharmAthene). Although PharmAthene was interested in a merger of the two drug companies, Siga resisted the idea because of a previously failed merger attempt between them.

Siga counter-proposed a license agreement that would shore up its cash needs while still providing PharmAthene with potential for profits participation if ST-246 became successful. These negotiations led to a January, 2006 license agreement term sheet (the Term Sheet) which set forth the basic terms of the collaboration and which also stated that its terms were non-binding.

In March 2006, the Siga and PharmAthene entered into a merger letter of intent with the term sheet attached. PharmAthene desired to simultaneously enter into a merger agreement and a license agreement that would become effective in the event that the merger was not consummated.

Given Siga's immediate cash requirements, the parties did not draft a definitive license agreement in furtherance of the business terms outlined in the term sheet and they instead entered into a bridge loan agreement that provided Siga with working capital. Siga and PharmAthene subsequently also entered into a merger agreement in June 2006.

Both the bridge loan agreement and the merger agreement contained provisions obligating the parties to negotiate in good faith in accordance with the Term Sheet which was an attachment to both documents.

In a surprising turn of events, soon after signing the merger agreement, Siga received over $20 million in funding from the National Institute of Health and Siga then began to reconsider the benefits of a merger with PharmAthene as its cash position was now much improved.

In September 2006, PharmAthene requested that Siga extend the looming drop-dead date but Siga refused and terminated the merger agreement in early October 2006. In response, PharmAthene sought to finalize the formal license agreement for ST-246.

To that end, the companies engaged in several discussions regarding the terms of the proposed license agreement; however, Siga's proposed terms were now materially different from the terms set out in the Term Sheet. PharmAthene took the position that the parties needed to follow the terms set out in the Term Sheet and Siga disputed that the Term Sheet was binding because of the "non-binding terms" footer contained in the document.

The Court of Chancery Decision

In December 2006, PharmAthene filed suit in the Court of Chancery to enforce the obligation to negotiate in good faith. Applying Delaware law, the court held that Siga was in breach of its obligation to negotiate in good faith a license agreement in accordance with the terms embodied in the Term Sheet. In particular, the court opined that Siga was also liable under the doctrine of promissory estoppel and that Siga was required to pay damages equal to an "equitable payment stream approximating the terms of the license agreement."

The Delaware Supreme Court Decision

On appeal, Siga submitted to the court that it was inconsistent to conclude that Siga was bound to negotiate in good faith if the Term Sheet was non-binding. The court disagreed with Siga and reaffirmed that "an express contractual obligation to negotiate in good faith is binding on the contracting parties."

The court referred to VS & A Communications Partners, L.P. v. Palmer Broadcasting Limited Partnership, wherein a Chancellor applying New York law concluded that obligations to negotiate in good faith are unenforceable where material aspects of the contract remain open to negotiation. In distinguishing the case at hand, the court highlighted the fact that the letter of intent at issue in VS & A Communications did not include express provisions requiring good faith negotiations in any attempts to reach a final agreement.

The court also looked to the express contractual language in both the bridge loan agreement and the merger agreement to determine the intent of the parties.

As both the bridge loan agreement and the merger agreement specifically required good faith negotiations with the intention of reaching a definitive license agreement in accordance with the terms set forth in the Term Sheet, the court viewed the main issue to be whether Siga and PharmAthene had a duty to conduct their negotiations in a manner consistent with the economic terms embodied by the Term Sheet.

Notwithstanding the fact that the Term Sheet was not signed and that it included a “non-binding terms” footer, the court ultimately concluded that: (i) the parties did in fact intend to negotiate towards a license agreement with economic terms substantially similar to the terms of the Term Sheet if the merger was not consummated as the Term Sheet was incorporated into both the bridge loan agreement and the merger agreement; and (ii) Siga had breached its obligations under the merger agreement and the bridge loan agreement to negotiate in a definitive license agreement in good faith.

SIGA argued that requiring the parties to reach an agreement with terms substantially similar to those in the Term Sheet would introduce uncertainty and potential litigation risks into negotiations; however, the court rejected this argument and found that in order for such an obligation to be enforceable, Delaware law also requires an element of bad faith, being the conscious doing of a wrong.

The court found that the bad faith threshold had been met as Siga’s proposed terms “differed dramatically” from the terms of the Term Sheet and virtually disregarded the economic terms in the Term Sheet. The court also made note of evidence of “seller’s remorse” and the conduct of the negotiations by persons who had no prior involvement in the Term Sheet as being indicators of bad faith.

Finally, the court concluded its analysis by addressing the proper remedy for breach of an agreement to negotiate in good faith where the court finds that the parties, had they negotiated in good faith, would have reached an agreement.

The court concluded that if a trial judge finds that the parties would have reached an agreement but for the defendant’s breach, a trial court may impose expectation damages. Consequently, the court remanded the matter on the issue of damages.

Madoff Securities International Limited v. Raven et al.
2013 EWHC 3147
The High Court of Justice Queen’s Bench Division Commercial Court
October 18, 2013

The United Kingdom’s High Court of Justice examined the scope of a director’s duty to act in what he or she believes in good faith to be in the interests of the company in the context of claims brought against 5 former directors of Madoff Securities International Limited (Madoff Securities) for breach of directors’ duties relating to payments, certain consulting payments, and other payments made to, or for the benefit of, Bernard Madoff, its major shareholder and CEO. The court found that the directors did not breach their duties to act in good faith in the interest of the company because they honestly believed that the actions in question were in the best interest of the company.

The Facts

Madoff Securities International Limited (Madoff London) was based in London and authorised by the Financial Services Authority to carry on investment business. Bernard Madoff was its main shareholder and chief executive officer.

Following the well publicized case of Bernard L. Madoff Investment Securities (Madoff New York) and the Bernard Madoff Ponzi scheme, Bernard Madoff was sentenced by a Court of the Southern District of New York to 150 years in prison and ordered to forfeit US$170 billion. Madoff London had also collapsed, and its liquidators took proceedings against certain of its former directors and against Mrs. Sonja Kohn, an Austrian businesswoman who was well connected with a range of influential individuals and institutions in the European financial and political world. Mrs. Kohn's introductions led to billions of dollars of investments in Madoff New York in what turned out to be the Ponzi scheme. The essence of the claims was that the directors had not complied with their fiduciary duties but had let Madoff do whatever he wanted to without challenge and that the directors knowingly permitting payments to Madoff and his family that were unlawful distributions and in breach of the rules on maintenance of capital.

The Decision

In reviewing the law on the duties of directors and what may constitute a breach of those duties, the court identified the following three main duties:

- to act in good faith in the interests of the company
- to exercise power for the purposes for which they are conferred
- to exercise reasonable care, skill and diligence

The court also confirmed that "it is trite law that a director owes a duty to the company to act in what he honestly considers to be the interest of the company. This may be regarded as the core duty of a director. It is a fiduciary duty because it is a duty of loyalty."

The payments in question included millions of dollars that had been paid in fees for research and other services provided by Mrs. Kohn. The liquidators alleged that the directors knew such research and services were worthless and therefore the approval of such payments constituted a breach of the directors' duties. In addition, significant payments and lavish gifts had been made to Madoff and his family. The liquidators alleged that such lifestyle payments were an improper use of company funds. Moreover, the directors had approved borrowings of millions of dollars from Bernard Madoff that bore interest which the liquidators claimed were not actually required by the company.

Interestingly, all the payments made by the company were funded by Madoff or at his direction, so the commercial reality was that there was never any real cost to Madoff London. There was no secrecy regarding this arrangement and at all times Madoff London appeared to the other directors, the auditors and the regulators to be solvent. The liquidators' case was therefore heavily based on hindsight as none of the other directors had any reason to suspect that monies received from Madoff were actually proceeds of fraud from the Ponzi scheme.

Bearing in mind that "hindsight is 20/20," the court noted that "It is necessary to keep firmly in mind that the conduct and state of mind of the Defendants in this case falls to be judged against the widespread contemporary perception of Bernard Madoff as a

man of integrity, whose honesty in all his business dealings was taken for granted; and as a man whose success and high standing in the financial world caused his views on financial matters to command widespread deference and respect. Mrs Kohn and the directors had no reason to suspect Bernard Madoff's fraud, and none for a moment did so. In common with the rest of the financial world, they believed Bernard Madoff to be a man of unquestioned probity whose high reputation and status was justified by his apparently formidable history of financial trading and investment."

In reviewing the directors' actions the court held:

- part of the duty is to listen to the views of fellow directors and take account of them. Corporate management often requires the exercise of judgement on which opinions may legitimately differ, and requires some give and take. A director may legitimately defer to his fellow directors' views if he thinks they believe they are acting in the best interests of the company, even if he is not himself persuaded
- board decision-making is by majority. A director is not in breach of the duty merely because, if left to himself, he would do things differently. He doesn't have to resign or refuse to implement the board's decision
- even if the director fails to apply his mind to whether a transaction is in the interests of the company, it does not automatically follow that he is liable for the consequences of the transaction. The court will ask whether an honest and intelligent person in his position could, in all the circumstances, have reasonably believed that the transaction was for the benefit of the company

The court also made the following important observations:

- a director owes a duty to the company to inform himself of the company's affairs and join his fellow directors in supervising them. It is therefore a breach of duty for a director to allow himself to be dominated, bamboozled or manipulated by a dominant fellow director where such involved a total abrogation of this responsibility
- a director who has knowledge of his fellow director's misapplication of company property and stands idly by, taking no steps to prevent it, will thus not only breach the duty of reasonable care and skill, but will himself be treated as party to the breach of fiduciary duty by his fellow director in respect of that misapplication by having authorized or permitted it
- in fulfilling a director's personal fiduciary responsibility, the director is entitled to rely upon the judgment, information and advice of a fellow director whose integrity, skill and competence he has no reason to suspect

Applying these concepts to the case, the court reiterated that "Directors bring different experience and expertise to the joint exercise of corporate management. Whilst each is required to exercise his independent judgment, he may legitimately defer to the views of those with greater experience or expertise than him. Where there is a director who has a record and reputation for outstanding skill and experience in the company's business activity, his fellow directors are entitled to accord a high degree of deference and trust to his views as to what is in the company's best interests. It would be unfair and unrealistic to expect Mr. Flax, or any of the other directors, to have done anything other than attach great weight to the views of Bernard Madoff in deciding what was in the interests of MSIL. To take the view, as Mr. Flax to some extent did, that Bernard Madoff knew best, was not a dereliction of the duty to exercise independent

judgment. It was a legitimate recognition that Bernard Madoff's high standing in the financial world reflected a level of skill and experience which did indeed equip him to know what was best for the company, and put him in a much better position to make that judgment than Mr. Flax or any other director."

Accordingly, the court found that none of the directors were in breach of their duties to act in good faith in the interest of the company and that the directors honestly believed the payments to Mrs. Kohn were in the best interest of the company.

In Re MFW Shareholders Litigation
C.A. No. 6566-CS
Delaware Court of Chancery
May 29, 2013

The Delaware Court of Chancery found that the business judgment rule review standard (as opposed to the more onerous entire fairness review) was the applicable standard to apply in the context of a going private transaction where the controlling shareholder's offer was conditional on the approval of both an independent special committee and a majority of the minority stockholder vote.

The Facts

M&F Worldwide Corp. (MFW) was a NYSE listed public company. MacAndrews & Forbes, a holding company of Ronald Perelman owned 43% of MFW and was the controlling shareholder. In June 2011, the controlling shareholder offered to purchase the remaining shares of MFW's equity in a going private transaction for USD $24 per share in cash and conditioned its offer on obtaining: (i) approval of the transaction by an independent special committee; and (ii) a favourable vote of a majority of the stockholders unaffiliated with the controlling shareholder (the other shareholders).

A special committee was formed and the special committee engaged its own legal and financial advisors. The special committee met 8 times over 3 months and negotiated with the controlling shareholder to ultimately have the controlling shareholder increase its bid to USD $25 per share.

Subsequently, the going private transaction was approved by an affirmative vote of 65% (i.e. greater than a majority) of the other shareholders.

Notwithstanding the foregoing, the stockholders sued the controlling shareholder, Ronald Perelman and the other directors of MFW, alleging that the going private transaction was unfair.

The Decision

The defendants moved for summary judgment of the claim. In particular, the defendants focused on the following facts:

- the special committee was comprised of independent directors
- the special committee was fully empowered to negotiate with the controlling shareholder over the terms of the offer and to refuse the offer if it did not believe the ultimate terms were fair to the other shareholders
- after an extensive period of deliberation and negotiations, the special committee approved the going private transaction

- with full disclosure and without coercion, a majority of the other shareholders supported the going private transaction

The court had to determine what standard of review should apply given that the going private transaction was conditional upon receiving approval by both a properly empowered, independent committee and an informed, uncoerced majority of the minority vote.

Chancellor Strine opined "From inception, the controlling stockholder knows that it cannot bypass the special committee's ability to say no. And the controlling stockholder knows it cannot dangle a majority-of-the-minority vote before the special committee late in the process as a deal-closer rather than having to make a price move. From inception, the controller has had to accept that any deal agreed to by the special committee will also have to be supported by a majority of the minority shareholders. That understanding also affects the incentives of the special committee in an important way. The special committee will understand that those for whom it is bargaining will get a chance to express whether they think the special committee did a good or poor job."

The court further held that it believed the approach most consistent with Delaware's corporate law tradition is the one best for investors in Delaware corporations, which is the application of the business judgment rule. Chancellor Strine further noted that "approach will provide a strong incentive for the wide employment of a transactional structure highly beneficial to minority investors, a benefit that seems to far exceed any cost to investors, given the conditions a controller must meet in order to qualify for business judgment rule protection."

Canadian Securities Administrators Provide New Rules for Prospectus Pre-marketing and Marketing Activities

Effective August 13, 2013, the Canadian Securities Administrators amended National Instrument 41-101 *General Prospectus Requirements* (NI 41-101) and National Instrument 44-101 *Short Form Prospectus Distributions* (NI 44 101) with respect to permissible prospectus pre-marketing and marketing activities.

Background

Investment dealers and issuers are engaged in pre-marketing activities when they communicate with potential investors before a public offering. Pre-marketing also includes other promotional activity before a preliminary prospectus is filed and receipted by the relevant securities regulatory authorities.

Prior to the new rules, pre-marketing activities were restricted to bought deal offerings conducted by way of short form prospectus, provided that certain conditions were satisfied. The new rules introduce a new exemption for new IPO issuers and add some conditions to the bought deal exemption.

New Exemption—Testing of the waters exemption for IPO issuers

The new rules permit non-reporting issuers that have a reasonable expectation of filing a preliminary long form prospectus in connection with an initial public offering (IPO) in Canada, to solicit expressions of interest provided that:

- the issuer is not a public issuer before the date of the preliminary long form prospectus
- an investment dealer makes the solicitation on behalf of the issuer

- the issuer provides written authorization to the investment dealer to act on its behalf before the investment dealer makes the solicitation
- the solicitation is made to an accredited investor

To avail itself of this new exemption, an investment dealer must maintain a written record of all accredited investors from whom it solicited an expression of interest. In addition, an issuer is prohibited from filing a prospectus within 15 days of the last date on which an investment dealer solicited an expression of interest from an accredited investor.

Changes to the bought deal exemption

Previously, investment dealers could solicit expressions of interest for a bought deal short form prospectus offering during the four day period prior to the preliminary prospectus being receipted, provided that certain conditions had been met.

The new rules keep the bought deal exemption and add certain provisions. In particular:

- the bought deal agreement between the issuer and the underwriter(s) cannot contain a "market-out clause," an option to increase the offering other than an over-allotment option, or be conditional upon syndication
- the size of a bought deal may be increased by up to 100% of the original offering, provided other conditions have been met
- the preliminary prospectus for the bought deal must be filed within four days of the date of the bought deal agreement (note that it is no longer necessary to have obtained a receipt for the preliminary prospectus within the four day period)
- changes to the syndicate of underwriters and terms of the offering may take place so long as the amount of the bought deal remains the same
- the size of the bought deal or the price of the securities may be reduced only after four days have passed since the date of the bought deal agreement

Standard Term Sheets

The new rules also permit standard term sheets to be provided by investment dealers in connection with a prospectus offering. In addition to providing prescribed cautionary language, a standard term sheet may include the following information:

- name
- jurisdiction of incorporation and head office of the issuer
- a brief description of the business and securities of the issuer
- the price of the offered securities
- the offering size
- the name of, contact information for, and fees payable to the underwriter(s)
- the expected closing date
- a brief description of the use of proceeds from the offering; the stock exchange upon which the issuer's securities are listed; a brief description (up to 3 lines of text) of any unique securities
- the RRSP/TFSA eligibility of the offered securities (in cases where an opinion on such eligibility is provided in the prospectus)
- contact information for the investment dealer

Other than the investment dealer's contact information, all information contained in a standard term sheet must be sourced from the relevant prospectus.

If the offering is a bought deal, the information in the standard term sheet must be disclosed in or sourced from the bought deal news release, the issuer's continuous disclosure record on SEDAR or the relevant prospectus.

Ontario Securities Commission Reports on Targeted Review of Portfolio Managers and Exempt Market Dealers

On May 31, 2013, the Ontario Securities Commission published OSC Staff Notice 33-740 Report on the results of the 2012 targeted review of portfolio managers and exempt market dealers to assess compliance with the know-your-client, know-your-product and suitability obligations (the Notice).

The review focused on 87 portfolio managers and exempt market dealers and was the largest targeted review conducted by the Compliance and Registrant Regulation Branch of the OSC. These registrants are under the direct oversight of the OSC and the targeted review was considered critical in highlighting regulatory breaches and in highlighting to registrants the fundamental importance of these obligations.

Portfolio Manager statistics

Of the 42 portfolio managers included in the review:

- 21 (50%) were small-sized firms, 17 (40%) were medium-sized firms, and 4 (10%) were large-sized firms
- the firms collectively had 31,345 clients and $35 billion in assets under management
- 16 firms (38%) were registered in another category of registration (such as exempt market dealer or investment fund manager) and 26 firms (62%) were sole portfolio managers
- 606 client files were reviewed and 99 clients were contacted as part of OSC Staff's new approach of calling clients to confirm the information provided by their registrant firm

Exempt Market Dealer statistics

Of the 45 EMDs included in the review:

- 33 (73%) were small-sized firms and 12 (27%) were medium-sized firms,
- 159 different products were distributed, of which 25 were products of related issuers and 20 were real estate products
- 582 client files were reviewed and 111 clients were contacted

Major Findings

The major findings from the review detail substantive issues with registrants' compliance practices that are considered unacceptable by OSC Staff.

Major findings on reviews of exempt market dealers included the following:

- EMDs selling securities to one or more clients that were non-accredited investors (without another exemption being available) (18% of exempt market dealers reviewed)

- inadequate suitability assessments due to over-concentration (i.e., investors investing a significant percentage of their portfolio in one security) (15%)
- inadequate suitability assessments due to inadequate documentation on how suitability determination made (22%)
- misuse of a client-directed trade instruction (2%)
- inappropriate disclaimer language in client documentation (4%)
- improper delegation of KYC and suitability obligation to third parties (6%)
- inadequate relationship disclosure information (45%)
- no or inadequate policies and procedures (45%)
- inadequate processes for the collection, documentation and maintenance of KYC information (75%)

Major findings on reviews of the portfolio managers included the following:

- inadequate suitability assessments (5%)
- inadequate relationship disclosure information (45%)
- inadequate processes for the collection, documentation and maintenance of KYC information (70%)
- inadequate policies and procedures (35%)

Of the registrants reviewed, most were issued deficiency reports and OSC Staff will continue monitoring for corrective action, conduct follow-up reviews and further regulatory action as appropriate.

In an accompanying press release, Howard Wetston, Q.C., Chair and CEO of the OSC commented that "Know-your-client, know-your-product and suitability determinations are fundamental obligations owed by registrants to their clients."

Mr. Wetston further noted that "Enhancing compliance among portfolio managers and exempt market dealers is critically important and we are taking appropriate regulatory action where we identified significant compliance issues."

The OSC encouraged registrants to use the results of the review as a self-assessment tool.

Ontario Securities Commission Attempting to Modernize Exempt Market

On August 28, 2013 the Ontario Securities Commission (OSC) published OSC Notice 45-713 Progress Report on Review of Prospectus Exemptions to Facilitate Capital Raising (the Report).

The Report sets out the next steps in the OSC's exempt market review and consideration of four prospectus exemptions. The OSC's objective in this regard is to facilitate capital raising for start-ups and small and medium-sized enterprises (SMEs) and to modernize Ontario's exempt market regulatory regime, while adequately protecting investors.

The OSC reported that after reviewing feedback from a broad range of stakeholders, the OSC had determined to consider further the following capital raising prospectus exemptions:

- a crowdfunding exemption
- a family, friends and business associates exemption
- an offering memorandum exemption
- a streamlined version of the existing rights offering exemption currently available across Canada

The OSC's work to modernize the exempt market is a priority for the OSC and the Report highlighted the following facts for 2012:

- the total amount of capital raised in Ontario increased by 20 per cent to approximately $104 billion (2011: $87 billion)
- of this amount, approximately $37 billion was raised by issuers other than investment funds
- as the most frequently used prospectus exemption, the accredited investor exemption accounted for approximately $94 billion or 90 per cent of the total capital raised in Ontario's exempt market
- approximately $7 billion was raised under the $150,000 minimum amount prospectus exemption

The report disclosed the following goals with respect to the identified capital raising prospectus exemptions:

Crowdfunding exemption

- Develop a crowdfunding regulatory framework with a particular focus on investing through online funding portals

Family, friends and business associates exemption

- Consider a version of the family, friends and business associates exemption currently available in other Canadian jurisdictions with conditions that could mitigate any concerns identified with the existing exemption

Offering memorandum exemption

- Propose an offering memorandum exemption that is substantially harmonized with the existing model available in Alberta and certain other Canadian jurisdictions, while considering whether there is a need for additional measures to protect investors

Exemptions based on existing security holder base

- Consider whether the existing rights offering exemption could be streamlined to improve its efficiency and effectiveness

Ontario Securities Commission Reports on Review of Technical Reports by Ontario Mining Issuers

On June 27, 2013, the Ontario Securities Commission (OSC) published Staff Notice 43-705 Report on Staff's Review of Technical Reports by Ontario Mining Issuers, which sets out results of its compliance review of technical reports and provides further guidance for complying with National Instrument 43-101 Standards of Disclosure for Mineral Projects (NI 43-101).

OSC Staff conducted a review of 50 technical reports filed by Ontario mining issuers to assess whether they complied with recent revisions to NI 43-101 which were adopted by the Canadian Securities Administrators on June 30, 2011.

In its review, OSC Staff identified an unacceptable level of compliance. In particular, 80% of the total number of technical reports reviewed had some form of non-compliance with the disclosure requirements and approximately 40% had at least one major non-compliance concern.

The Report further disclosed that:

- 25% of the technical reports disclosing mineral resource estimates did not provide the required information. In some cases the technical reports did not include disclosure as to how "reasonable prospects for economic extraction" were established or what cut-off grade was used to estimate the mineral resource
- 32% of the technical reports on advanced properties did not adequately disclose information related to environmental permits or the social or community impacts of developing the mineral project
- some technical reports did not disclose how surface rights issues would be addressed or whether there was an exploration agreement in place or under negotiation with local First Nation communities
- some technical reports on advanced properties did not provide the main components of the capital cost estimate
- 37% of the technical reports on advanced properties did not sufficiently disclose the required economic analysis information
- 36% of the technical reports did not disclose project specific risks and uncertainties such as the availability of water rights, use of a novel mineral processing technology or the potential impact of a civil war in the region

In an accompanying press release, Huston Loke, Director, Corporate Finance stated "Technical reports are fundamental disclosure documents and ensuring compliance among mining issuers is critical." Moreover, Mr. Loke espoused one of the OSC's goals of ensuring appropriate disclosure and commented that "It is important that investors have accurate and meaningful information about material mineral properties in order to make informed investment decisions."

OSC Staff also confirmed that they will continue to monitor technical reports filed by Ontario mining issuers as part of the OSC's continuous disclosure program and it will take regulatory action as appropriate where securities requirements are not met.

OSC Staff also reminded mining issuers that the results set out in the Notice and the guidance provided therein should be used as a tool by mining issuers when preparing their technical reports.