THE VALUATION LAW REVIEW

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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, 2013 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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I. CANADIAN CASES

Page 5
Bhasin v. Hrynew
Supreme Court of Canada
November 13, 2014
The Supreme Court of Canada recognized a new duty on parties to perform contractual obligations honestly. The case takes two important steps to: (i) acknowledge that good faith contractual performance is a general organizing principle of the common law of contract; and (ii) recognize a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

Page 7
United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corporation
Supreme Court of Canada
June 27, 2014
The Supreme Court of Canada confirmed that the collective dismissal of the employees of the Jonquière, Québec establishment was an illegal change in the conditions of their employment contrary to s.59 of the Labour Code which provides that, from the filing of a petition for certification, an employer may not change its employees' conditions of employment while the collective agreement is being negotiated without the written consent of the certified association.

Page 9
Sattva Capital Corp. v. Creston Moly Corp.
Supreme Court of Canada
August 1, 2014
The Supreme Court of Canada held that a court will usually defer to a commercial arbitrator's interpretation of an agreement. The case also established that it is now more difficult to appeal an arbitration decision.

Page 10
France v. Kumon
Ontario Superior Court of Justice
December 11, 2014 and December 16, 2014
In two related cases, the Ontario Superior Court held that it is appropriate to imply a right of unilateral termination with reasonable notice into an oral franchise agreement. The court also set out guidance to determine the period for reasonable notice, in this case being 18 months.

Page 12
ThyssenKrupp Elevator (Canada) Limited v. Amos et al.
Ontario Superior Court of Justice
June 26, 2014
The Ontario Superior Court of Justice dismissed an action by an employer against an entry level management employee in connection with a non-competition and non-solicitation provisions of his employment agreement as the parties were not commercial parties of equal bargaining strength and the employee was not considered a fiduciary.

Page 13
Jan Wong v. The Globe and Mail Inc.
Ontario Superior Court of Justice
November 3, 2014
The court ordered a former reporter of The Globe and Mail Inc. to pay back a $209,912 settlement with the newspaper after the reporter breached confidentiality provisions in their settlement agreement by publishing confidential terms in her "tell-all" book. shareholder was warranted and ordered: (i) the removal of the other directors; and (ii) a sale of the oppressive shareholder's shares to the minority shareholder at a price equal to the original price paid for his shares by the minority shareholder.

II. NON-CANADIAN CASES

Page 15
Re Rural Metro Corporation Stockholder Litigation, C.A. No. 6350-VCL slip op.
Delaware Chancery Court
March 7, 2014 and October 10, 2014
Royal Bank of Canada was ordered to pay $75.8 million in damages to former shareholders of the ambulance operator Rural/Metro Corporation because it failed to disclose conflicts of interest that tainted the $348 million buyout.

Page 16
C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust
Delaware Supreme Court
December 19, 2014
The Delaware Supreme Court reversed a decision of the Court of Chancery to permit a $2.86 billion merger wherein a pension fund

accused the board of not satisfying their fiduciary duties as the sale was only negotiated with one bidder and the business was not taken through an active auction process. The court was satisfied that there was a viable passive market check during the process.

Page 18

nClosures Inc. v. Block and Company, Inc.

7th Circuit Court of Appeals
October 22, 2014
The 7th Circuit Court of Appeals found that a signed confidentiality agreement may be insufficient to protect the confidentiality of information provided by a disclosing party if the disclosing party doesn't also take reasonable steps to protect the information.

Page 19

Re K R Hardy Estates Limited

Chancery Division, Companies Court
The Companies Court summarized the guiding principles to determine the valuation date for a court ordered sale of shares following a successful unfair prejudice petition. The date of the court order has the advantage of certainty and was considered the most fair compared to other valuation dates.

III. CERTAIN CANADIAN REGULATORY DEVELOPMENTS

Page 20

Canadian Securities Administrators introduce Rule Amendments Regarding Disclosure of Corporate Governance Practices

On October 15, 2014, various securities regulatory authorities announced the planned implementation of rule amendments to increase transparency regarding the representation of women on boards and in senior management of non-venture issuers. Among other things, issuers will need to disclose their policies with respect to representation of women on its board of directors and details regarding the board of directors' or nomination committee's consideration for the representation of women in the director identification and selection process.

Page 21

Ontario Securities Commission proceeds with new enforcement initiatives

On March 11, 2014, the Ontario Securities Commission announced that its staff would be proceeding with new enforcement initiatives including a new program to facilitate the settlement of appropriate enforcement cases in circumstances where the respondent does not make formal admissions respecting its misconduct (sometimes referred to as no-contest settlements).
On September 30, 2014, the OSC approved a no-contest settlement agreement in a hearing with respect to a settlement agreement between OSC staff and Ernst & Young LLP. Pursuant to the settlement, Ernst & Young LLP agreed to pay $8 million to settle allegations of negligence in regard to its audit work related to Sino-Forest Corp. and athletic shoe manufacturer Zungui Haixi Corp.

Page 22

Ontario Securities Reports on Statement of Priorities

In connection with the 2013-2014 fiscal year, the OSC progress report conceded that in connection with its goal of delivering strong investor protection, investor confidence has been shaken and that has resulted in reduced market participation. The OSC increased its visibility and awareness amongst key stakeholders across Ontario through its OSC in the Community initiative and the OSC reported on a registrant outreach program to promote compliance of registered firms. Other developments include the establishment of a new Joint Serious Offences Team (JSOT) to specifically target fraudulent and/or repeated criminal activity that harms retail investors. A number of members of the JSOT have been designated as special constables by the Ontario Provincial Police which empowers them to pursue offences and tools in the Canadian Criminal Code when working in conjunction with the police.

Summary of Caselaw, Legislative and Regulatory Developments 2014

2014 was a year in which the Supreme Court of Canada delivered three interesting judgments in the commercial world. In Bhasin, the country's highest court recognized a new duty on parties to perform contractual obligations honestly. In United Food and Commercial Workers, the court held that from the date of the filing of a petition for certification, an employer may not change its employees' conditions of employment while the collective agreement is being negotiated without the written consent of the certified association. Lastly, in Sattva Capital, the court reinforced the notion that the judiciary will usually defer to a commercial arbitrator's interpretation of an agreement and that confirmed that it is increasingly more difficult to appeal an arbitration decision.

Although agreements may not have a specified termination date, the Kumon case establishes that a right of unilateral termination with reasonable notice can be implied into an oral franchise agreement.

Employers must be careful not to be overzealous in trying to obtain and enforce non-competition and non-solicitation provisions with employees in non-fiduciary or entry level positions. In ThyssenKrupp Elevator, the court dismissed an attempt by an employer to enforce non-compete and non-solicitation provisions of an employment agreement against an employee who the court felt was not a party of equal bargaining strength and not a fiduciary.

Confidentiality agreements are commonly an aspect of any settlement agreement and the Jan Wong decision is the second widely reported case in the last couple of years in which an employee settled an employment dispute with its employer only to forfeit the award later due to breaching confidentiality obligations.

In another confidentiality agreement case, the nClosures Inc. decision is a reminder that if an entity wishes to disclose confidential information pursuant to a non-disclosure agreement and expects that agreement to be upheld, the discloser must also take reasonable steps to protect the confidential information and the discloser cannot simply rely upon a signed confidentiality agreement.

The Rural Metro case should serve as fair warning to investment bankers that conflicts of interest must be disclosed and the client's best interests must be served first.

Although it may be common for a board of directors to run an auction process in connection with the sale of a business, the C&J Energy Services case confirmed that a board can satisfy its fiduciary duties even if there is only one bidder as long as there is a viable passive market check during the process.

The KR Hardy Estates case establishes that the date of the court order is likely the fairest valuation date for a court ordered sale of shares following a successful unfair prejudice petition.

The Canadian securities regulators are taking steps to increase the transparency to investors regarding the representation of women on boards and in senior management of non-venture issuers.

The Ontario Securities Commission is flexing its regulatory muscle with new enforcement initiatives as evidenced by a no-contest settlement agreement with Ernst & Young LLP in which the well-known accounting firm agreed to pay $8 million to settle allegations of negligence in connection with its audit work related to Sino-Forest Corp. and Zungui Haixi Corp.

Finally, the OSC, in its annual report conceded that investor confidence has been shaken recently which has resulted in reduced market participation but the OSC is taking steps to reverse the trend by implementing various measures, including a registrant outreach program to promote compliance of registered firms and the establishment of a new Joint Serious Offences Team to specifically target fraudulent and/or repeated criminal activity that harms retail investors.

Certain Caselaw Developments

I. CANADIAN CASES

Bhasin v. Hrynew
Supreme Court of Canada
2014 SCC 71
November 13, 2014

The Supreme Court of Canada recognized a new duty on parties to perform contractual obligations honestly.

The Facts
From 1989 to 1999, Mr. Bhasin, though his business Bhasin & Associates was an enrollment director for Canadian American Financial Corp (Can-Am) which marketed education savings plans to investors through retail dealers known as enrollment directors, such as Mr. Bhasim.

Mr. Bhasin's and Can-Am's relationship was governed by an enrollment director's agreement (the Agreement) that took effect from 1998. The Agreement was a commercial dealership agreement as opposed to a franchise agreement and it was not covered by a statutory duty of fair dealing as provided for in the franchise legislation. Among other things, the Agreement provided that: (i) Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed Can-Am a fiduciary duty; (ii) Can-Am owned the client lists, was responsible for branding and implementing central policies that applied to all enrollment directors; (iii) Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably; (iv) the term of the Agreement was three years and it allowed termination on short notice for misconduct or other cause; however, the Agreement would also automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them. Mr. Hrynew, was in a strong position with Can-Am because he owned the largest agency in Alberta and also had a good working relationship with the Alberta Securities Commission which regulated Can-Am's business. Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business and pressured Can-Am not to renew its agreement with Mr. Bhasin.

The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer (PTO) to review its enrollment directors for compliance with securities laws. Can-Am appointed Mr. Hrynew to that position in September 1999.

When Mr. Hrynew moved his agency to Can-Am from one of its competitors, Can-Am promised Mr. Hrynew that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am.

Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business and Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions. In addition, Mr. Hrynew encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew.

Mr. Bhasin refused to participate in a merger with Mr. Hrynew and also refused to permit Mr. Hrynew to audit his records. Can-Am repeatedly misled Mr. Bhasin by advising him that Mr. Hrynew, as PTO, was under an obligation to treat information about Mr. Bhasin confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true. Can-Am also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal". When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the Agreement and in May 2001 gave notice of non-renewal under the Agreement.

At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce and the majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was ultimately forced to take less a less lucrative position with one of Can-Am's competitors.

The Trial Decision

Mr. Bhasin sued Can-Am and Mr. Hrynew. Justice Moen of the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held that: (i) Can-Am was in breach of the implied term of good faith; that Mr. Hrynew had intentionally induced breach of contract; and (iii) Can-Am and Mr. Hrynew were liable for civil conspiracy. In particular, the trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal, that it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta.

Importantly, the trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency."

The Court of Appeal Decision

The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found Mr. Bhasin's pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause.

The Supreme Court of Canada Decision

At the Supreme Court of Canada level, Justice Cromwell considered, among other things, the following issues:

(i) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(ii) If there was a breach, what is the appropriate measure of damages?

In reviewing the law regarding the duty of good faith, Justice Cromwell reasoned that "In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations....taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

With respect to the appropriate measure of damages, the Court concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. The Court therefore found Can-Am to be liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. But for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency", and the Court found that the value of the business around the time of non-renewal was $87,000.

United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corporation
Supreme Court of Canada
45, [2014] 2 S.C.R. 323
June 27, 2014

The Supreme Court of Canada confirmed that the collective dismissal of the employees of the Jonquière, Québec establishment was an illegal change in the conditions of their employment contrary to s.59 of the Labour Code which provides that, from the filing of a petition for certification, an employer may not change its employees' conditions of employment while the collective agreement is being negotiated without the written consent of the certified association.

The Facts

Wal-Mart opened its Jonquière, Québec establishment in 2001. In August 2004, United Food and Commercial Workers, Local 503 (the Union) was certified as the bargaining agent for the employees working at the location.

Wal-Mart and the Union met several times to negotiate the terms of a first collective agreement. No collective agreement was reached and on February 2, 2005, the Union applied to the Minister of Labour to appoint an arbitrator to settle the dispute that remained between the parties.

Soon after, Wal-Mart informed the Minister of Employment and Social Solidarity that it intended to cancel the contracts of employment of all of the approximately 200 employees who worked in its Jonquière establishment "for business reasons" on May 6, 2005. After advising the employees of this news, the business was closed on April 29, 2005.

Suspecting that the decision to close was based on anti-union motives as opposed to a closure decision made in the ordinary course of business, the employees and their union brought a series of proceedings against their former employer.

The Lower Court Decisions

On March 23, 2005, the Union submitted its grievance to contest the closure alleging that the dismissal of the employees constituted a change in their conditions of employment in contravention of s. 59 of the Labour Code which provides that, from the filing of a petition for certification, an employer may not change its employees' conditions of employment while the collective agreement is being negotiated without the written consent of the certified association.

As Wal-Mart had not proved that its decision to dismiss was made in the ordinary course of its business, the arbitrator concluded that the cancellation of the employee's contracts of employment constituted a unilateral change that was prohibited by s. 59. The arbitrator's award was affirmed by the Superior Court, but later overturned by the Court of Appeal. The judges of the Court of Appeal agreed that s.59 did not apply in the circumstances of the case.

The Supreme Court of Canada Decision

In a majority decision, the Supreme Court of Canada allowed the appeal and agreed with the arbitrator stating that the arbitrator's decision and reasoning were not unreasonable.

Justice Lebel opined that part of the purpose of s.59 of the Labour Code is to enable employees to exercise their right of association and to uphold good faith in the negotiation of a collective agreement. Justice Lebel also found that the maintenance of the employment relationship constitutes a condition of employment and that this condition is implicitly incorporated in to the contract of employment.

The Court further held that Wal-Mart must demonstrate it would have made the same decision to close the establishment in the absence of a petition for certification of the Union. In order to come to this conclusion, Wal-mart's decision must meet one of the following criteria—the decision must either be consistent with: (1) its past management practices; or (2) the decision that a reasonable employer would have made in the same circumstances.

The Court noted that deference is in order, and judicial review will be available only if the award was unreasonable. The Court commented that the arbitrator's statement that Wal-Mart had not shown the closure to have been made in the ordinary course of the company's business was grounded in his view that the Union had already presented sufficient evidence to satisfy him that the change was not consistent with the employer's past management practices or with those of a reasonable employer in the same circumstances. Moreover, it was in fact reasonable to find that a reasonable employer would not close an establishment that "was performing very well" and whose "objectives were being met" to such an extent that bonuses were being promised.

Accordingly, in the absence of appropriate justification from Wal-Mart, the Court held it was reasonable for the arbitrator to conclude that the collective dismissal of the employees at the Jonquière establishment was illegal and in contravention of s.59 of the Labour Code.

The Court allowed the appeal and remanded the case to the arbitrator to determine the appropriate remedy in accordance with the disposition of his award.

Sattva Capital Corp. v. Creston Moly Corp.
Supreme Court of Canada
53, [2014] 2 S.C.R. 633
August 1, 2014

The Supreme Court of Canada held that a court will usually defer to a commercial arbitrator's interpretation of an agreement. The case also established that it is now more difficult to appeal an arbitration decision.

The Facts

Creston Moly Corporation (Creston) entered into a finder's fee agreement with Sattva Capital Corporation (Sattva) pursuant to which Sattva would be entitled to a finder's fee of USD $1.5 million in the form of shares in the capital of Creston for Sattva making an opportunity to acquire a Mexican mining project known to Creston.

The parties did not agree on the date to be used to value the Creston shares which affected the number of shares to be issued to Sattva.

Sattva took the position that the share price was dictated by the date set out in the market price definition in the finder's fee agreement and therefore Sattva should receive approximately 11,460,000 shares priced at $0.15 (a finder's fee of $1,719,000 based on that market value). In contrast, Creston asserted that the finder's fee agreement contained a "maximum amount" provision which precluded Creston from receiving shares valued at more than $1,500,000 on the date the fee was payable, and therefore that Sattva should only receive approximately 2,454,000 shares priced at $0.70.

The Arbitrator's Decision

The parties entered into arbitration pursuant to the British Columbia *Arbitration Act* and the arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant but leave was denied on the basis that the question on appeal was not a question of law.

The Supreme Court's Decision

Following a series of appeals, the Supreme Court of Canada had to determine: (i) whether the arbitrator reasonably construed the agreement as a whole; and (ii) what the appropriate standard of appellate review to be applied to commercial arbitration decisions is.

In delivering the decision of the Court, Justice Rothstein held that courts should defer to an arbitrator's award on a standard of reasonableness. In particular, the Court held that in the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (i.e. a higher standard). The Court found that the question at issue before the arbitrator did not fall into one of those categories and therefore the lower standard of review of reasonableness was to be applied.

In applying that standard, the Court held that the arbitrator reasonably construed the agreement as a whole in determining that Sattva was entitled to be paid its finder's fee in shares priced at $0.15 per share. The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both that definition and the "maximum amount" provision and reconciled them in a manner the Court held "cannot be said to be unreasonable." Moreover, Justice Rothstein opined that the arbitrator's reasoning met the reasonableness threshold of justifiability, transparency and intelligibility.

France v. Kumon
Ontario Superior Court of Justice
ONSC 5890
ONSC 7181

December 11, 2014 and December 16, 2014

In two related cases, the Ontario Superior Court held that it is appropriate to imply a right of unilateral termination with reasonable notice into an oral franchise agreement. The Court also set out guidance to determine the period for reasonable notice, in this case being 18 months.

The Facts

In 1991, Ms. France became a Kumon franchisee pursuant to an oral agreement with Kumon. At the time, Kumon did not require formal written franchise agreements with their franchisees.

In 1994, Kumon established its standard franchise agreement and asked Ms. France to sign it. Ms. France refused to sign the franchise agreement on the basis that she believed the terms of the franchise agreement were one-sided in favour of the franchisor.

In particular, Ms. France disapproved of the financial terms and the location requirements. Kumon was trying to present a more professional appearance with locations in commercial locations whereas Ms. France operated her franchise out of rented church basement.

Following several further requests by Kumon that Ms. France sign the franchise agreement and further refusals by Ms. France, the issue finally came to a head in 2009 when Kumon advised Ms. France that it was unwilling to continue the franchise arrangement unless Ms. France signed the form of franchise agreement. Kumon asked for an answer and extended its deadline several times before giving Ms. France 10 months to sign the franchise agreement. Following Ms. France's steadfast refusal to sign the agreement, Kumon provided her with 12 months' notice that it was unilaterally terminating the franchise arrangement.

Ms. France brought an action for breach of contract claiming that Kumon had entered into a perpetual arrangement with her and that they had no right to terminate it.

The Decisions

In its first decision the Court had to determine whether a unilateral termination right could be implied into the oral franchise agreement.

Notwithstanding Ms. France's claim that the oral agreement was a perpetual arrangement, the Court held that the franchise agreement was not a perpetual contract as

neither Kumon nor Ms. France acted as though that was the case. Moreover, Kumon's intent to treat franchise arrangements as having limited terms was also demonstrated by its action to impose finite terms on its frachisees in Kumon's form of written franchise agreement.

The Court further held that to determine whether a termination right can be implied, the specific terms of the contract must be analyzed using basic contractual interpretation principles; however, given the franchisor/franchisee relationship, the franchise agreement may require a different reasonable notice period to give effect to the duty of good faith.

The Court found that the facts presented a suitable case in which the Court could imply a right of unilateral termination with reasonable notice into the oral franchise agreement.

In its second decision, the Court had to determine the reasonable notice period. In making its determination, the Court reviewed commercial and employment law principles. When comparing the situation with an employment scenario, the Court found that notice periods in franchise relationships must be discounted to reflect the fact that a franchisee, unlike an employee, is an independent contractor and its relationship with the franchisor is not a fiduciary one.

The Court rejected Ms. France's position that the notice period should be determined by referring to the 3 year proposed term set out in Kumon's form of franchise agreement as Ms. France had previously declined to sign any written agreement and therefore, the written form of franchise agreement had no bearing on Ms. France's specific franchise. The Court instead held that Kumon and Ms. France continued to be bound by the terms of their oral agreement.

In trying to establish a reasonable notice period somewhere between a reasonable notice period in an employment situation and a reasonable notice period in a commercial distribution agreement situation, the Court set out the following factors that needed to be considered:

- the length of the relationship
- whether there was a history of oppressive conduct or bad faith on the part of Kumon
- whether there was a history of poor performance by Ms. France
- whether the parties acted in good faith throughout the relationship
- whether there were any violations of applicable franchise legislation
- the size and relative power of Ms. France vs. Kumon

Given the 20 year span of the parties' franchise relationship, the fact that Ms. France had performed her franchise duties faithfully during that period and that Kumon had always acted in good faith towards Ms. France, the Court held that Ms. France would have been entitled to between 20 to 24 months' notice in an employment context; however, given the need to discount the notice period due to the franchisor/franchisee relationship, the Court discounted the notice period to 18 months which gave Ms. France 6 months more than was originally provided to her by Kumon.

ThyssenKrupp Elevator (Canada) Limited v. Amos et al.
Ontario Superior Court of Justice
2014 ONSC 3910
June 26, 2014

The Ontario Superior Court of Justice dismissed an action by an employer against an entry level management employee in connection with a non-competition and non-solicitation provisions of his employment agreement as the parties were not commercial parties of equal bargaining strength and the employee was not considered a fiduciary.

The Facts

Prior to 2011, Scott Amos had been employed as a salesman for Skyline Elevator Inc. (Skyline). In 2011, ThyssenKrupp Elevator (Canada) Limited (ThyssenKrupp) posted a job opening for a Maintenance and Service Supervisor position at its London, Ontario branch. Mr. Amos' then position at Skyline was non-managerial and he was attracted by the opportunity to transition into a management role ThyssenKrupp.

Amos' employment agreement with ThyssenKrupp included the following clauses:

> "7.l Amos shall not, during the term of his employment hereunder and for a period of one (1) year from its termination, either directly, or indirectly, individually or in partnership, carry on or be engaged in, or concerned with, or interested in, in any capacity whatsoever (including that of principal, agent, shareholder, employee, lender or surety) any person, firm, association, syndicate, or company engaged in or concerned with or interested in, the conception, designing, development, fabrication, construction, modernisation, maintenance, marketing, distribution, advertising, franchising or sale of products or services similar to those conceived, designed, developed, fabricated, constructed, modernized, maintained, marketed, distributed, advertised, franchised or sold by the Corporation in the course of his employment with the Corporation, within the Province of Ontario.
>
> ...
>
> 7.3 During the period contemplated by Section 7.1, Amos shall not, directly or indirectly, solicit or attempt to solicit, interfere with or endeavour to entice away any business, client, prospective client or contract of the Corporation then existing or contemplated by the Corporation within 12 months prior to the termination of Amos. Amos shall perform his services for the Corporation from its offices located in London, Ontario."

Later, in the fall of 2013, Schindler Elevator Corporation (Schindler) acquired the business of Mr. Amos' former employer, Skyline. Soon after that acquisition, Schindler succeeded in convincing Mr. Amos to return as an employee of Schindler in the position of maintenance supervisor. Schindler also agreed to indemnify Mr. Amos in the event he was sued by ThyssenKrupp.

Indeed, ThyssenKrupp did sue Mr. Amos for breach of fiduciary duty and breach of the non-compete and non-solicitation clauses in his employment agreement. Mr. Amos denied any wrongdoing.

The Decision

Relatively early in the litigation process, the defendants brought a motion for summary judgment, arguing that it had no case to answer. ThyssenKrupp argued a breach by

Amos could be inferred from ThyssenKrupp's loss of clientele, and that they needed the pre-trial discovery process to obtain the evidence required to prove their case.

A ThyssenKrupp representative had sworn an affidavit alleging wrongdoing by Mr. Amos; however, on cross-examination the representative admitted he had no hard evidence on which to base his allegations. From the time that Mr. Amos moved from ThyssenKrupp to Schindler, 3 customers had left ThyssenKrupp but there was no documentary evidence tying any contractual breach to the customer migrations.

Justice Myers found that the negotiation and agreement regarding non-competition and non-solicitation were not conducted between two sophisticated commercial parties of equal bargaining strength. The Court observed that there was no evidence of either party having independent legal advice and notwithstanding an acknowledgement by Mr. Amos in his employment agreement that the restrictive covenants were reasonable, the "circumstances of a prospective employee applying for a job call for a greater level of independent analysis of the reasonableness of the restrictive covenants."

Moreover, the Court held that "Mr. Amos can in one sense be seen to have been a fiduciary to the plaintiff. He supervised repairers in one geographic region. He held an entry-level management post. He had no executive authority or duties. He did not have exclusive contact with customers. In fact, he did not even have the lead role with dealing with customers whom his team serviced. He was a person who got the work done."

With respect to the non-compete provisions, the Court deemed it to be invalid as a "… naked restriction on competition with no apparent rationale for its breadth of scope and geography…"

Finally, with respect to the non-solicitation provisions, the Court found that given Mr. Amos' position as a supervisor of repairs, he did not deal exclusively with customers and was not privy to ThyssenKrupp's business plan with respect to customers, there was no way for Mr. Amos to know what business his former employer was contemplating at any time anywhere in Canada, nor could he have known all of the prospective customers across the country.

Ultimately, as there was no evidence that Mr. Amos had breached any duty of confidentiality or released any confidential information, the Court held that there were no material facts requiring a trial and dismissed the action.

Jan Wong v. The Globe and Mail Inc.
2014 ONSC 6372
Divisional Court File No. 465/13
November 3, 2014

The Court ordered a former reporter of The Globe and Mail Inc. to pay back a $209,912 settlement with the newspaper after the reporter breached confidentiality provisions in their settlement agreement by publishing confidential terms in her "tell-all" book.

The Facts

Jan Wong was a reporter with The Globe and Mail newspaper. In September, 2006, Ms. Wong was covering the story of the Dawson College shooting in Montreal. The newspaper published a story in which Ms. Wong linked the shooting to the marginalization of immigrants in Québec, because the shooter was not a so-called *pure laine* Québecker.

The story provoked significant controversy, including criticism from the then premier of the Province, Jean Charest.

Following the attacks against Ms. Wong, the reporter went into a severe depression and Ms. Wong was off work from October, 2006, until the spring of 2007. Soon after her return, she suffered a severe setback and left work again.

The newspaper refused to pay sick leave to Ms. Wong between June, 2007 and November, 2007. In May, 2008 Ms. Wong refused to return to work and the newspaper terminated her employment.

As a consequence of the termination, Ms. Wong's union launched unpaid sick leave and wrongful termination grievances. The grievances proceeded to arbitration in July, 2008 before an arbitrator.

The dispute was referred to a labour arbitrator and a confidential settlement was reached in 2008. In the settlement, the newspaper acknowledged that Ms. Wong was "ill and unable to work" from June, 2007 to November, 2007, and agreed to pay her the sick leave she was owed for that period, as well as a lump-sum payment of two years' pay, or $209,912.

The settlement was subject to a confidentiality agreement which included a provision that Ms. Wong was obligated to pay back any settlement payments if she breached her confidentiality and non-disparagement obligations.

In May 2012, Ms Wong's self-published her book entitled "Out of the Blue" which chronicled her experience suffering from depression in the workplace.

The book included 23 phrases which the newspaper took issue with including the following:

- … I can't disclose the amount of money I received
- I'd just been paid a pile of money to go away…
- Two weeks later a big fat check landed in my account
- Even with a vastly swollen bank account…

The Decision

Ms. Wong appealed the arbitrator's decision and the Ontario Divisional Court sided with The Globe and Mail and ordered the former reporter to pay back the $209,912 settlement with the newspaper after she revealed some of its confidential terms in her book.

Justice Nordheimer noted that Ms.Wong's interpretation that she could write about her settlement with the newspaper as long she never mentioned the actual amount she received was "indefensible." The Court agreed with the arbitrator that the agreement between the parties was in fact "clear and unambiguous" and did not permit Ms. Wong to disclose any of its terms.

In determining whether the forfeiture provision was unconscionable, the Court applied a two part test of reviewing whether there was an inequality of bargaining power and whether the terms of the agreement had a high degree of unfairness.

The Court held that there was no evidence that there was an inequality of bargaining power. The agreement was reached after much back and forth between the parties and numerous changes were made to the proposed terms. The Court also highlighted the fact that Ms. Wong insisted and eventually obtained a term that permitted her to disparage the newspaper after a certain point in time. Moreover, Ms. Wong was represented by experienced counsel provided by the union as well as counsel selected by her.

The Court further held that there was no evidence of a high degree of unfairness inherent in the repayment provision and agreed with the arbitrator's findings that confidentiality was the one thing that The Globe and Mail wanted out of the settlement. Quoting the arbitrator, the Court characterized the repayment provision as follows: "... it is an enforcement mechanism which seeks to ensure that the grievor lived up to a component of the deal the parties made which was key to the Employer."

Re Rural Metro Corporation Stockholder Litigation, C.A. No. 6350-VCL slip op.
Delaware Chancery Court
March 7, 2014 and October 10, 2014

Royal Bank of Canada was ordered to pay $75.8 million in damages to former shareholders of the ambulance operator Rural/Metro Corporation because it failed to disclose conflicts of interest that tainted the $348 million buyout.

The Facts

Rural/Metro Corporation (RMC) was an American for-profit emergency services organization, providing emergency medical transportation, non-emergency general medical transportation, fire protection services, and emergency-related training services to private and commercial enterprises.

On March 28, 2011, RMC announced that it was being acquired by Warburg Pincus LLP (Warburg) for $17.25 in cash per share with an aggregate transaction value of $437.8 million.

Stockholders of RMC later sued RMC, RMC's directors and RMC's financial advisors, Royal Bank of Canada (Royal Bank) and Moelis & Company LLC (Moelis) alleging that the director defendants had breached their fiduciary duties and that Royal Bank and Moelis had aided and abbeted those breaches.

The plaintiffs claimed that RMC's board of directors submitted an offer well below fair market value after receiving advice from conflicted Royal Bank advisors who did not properly auction RMC to the highest bidder.

The plaintiffs further submitted that Royal Bank advisors inappropriately encouraged RMC's executives to put the business up for sale so that Royal Bank could collect as much as $60 million in fees while touting their work as the company's financial adviser to other entities considering similar transactions.

For example, Royal Bank was accused of using their efforts in the RMC sale to persuade Clayton Dubilier & Rice in 2011 to allow the bank to provide $10 million in financing as part of the $3.2 billion acquisition of Emergency Medical Services Corp.
Prior to the trial, all of the defendants other than Royal Bank settled with the plaintiffs.

The Decision

The plaintiffs contended that Royal Bank's financial interests in convincing RMC's directors to sell the company so they could secure a role in financing the deal put them in a conflicted status. The bankers' decision not to disclose their interests in the RMC deal raised issues regarding the impartiality of their advice.

During the trial it became evident that RBC bankers talked to the purchaser about providing financing for the buyout while RMC's board was still deciding whether to sell and that those discussions weren't disclosed to RMC's directors.

The Court found that Royal Bank put on a "full-court press" to persuade Warburg officials to include the bank in its financing package for the RMC buyout while telling RMC they weren't part of the buyer's lender group.

Judge Laster concluded that bankers at RBC Capital Markets misled RMC directors in 2011 about the company's value to push the board into a quick sale to Warburg. The court also found that Royal Bank officials also didn't tell RMC's directors that they were touting their financial-adviser work on the deal to secure financing roles on other acquisitions.

The Court also noted that "The combination of RBC's behind-the-scenes maneuvering'' and its bankers' failure to disclose their conflicting interests resulted in a flawed process ''For improper motives of its own.''

The Court concluded that those conflicts led RMC investors to be shortchanged. Importantly, the court held that the defendant directors' decision making process and actions with respect to RMC's sale process were outside the range of reasonableness and that Royal Bank knowingly participated in the directors' breaches of their duty of care by creating the unreasonable process and gaps in information that led to the breaches.

The Court found that the value of RMC shares were $21.42 at the time of the sale, above the $17.25 per share paid by Warburg and that the difference of $4.17 per share was the damage to shareholders.

The Court subsequently reduced the damage award by 17% to account for settlements worth $11.6 million that shareholders reached with directors and Moelis which advised RMC on its sale.

C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust
Delaware Supreme Court
December 19, 2014

The Delaware Supreme Court reversed a decision of the Court of Chancery to permit a $2.86 billion merger wherein a pension fund accused the board of not satisfying their fiduciary duties as the sale was only negotiated with one bidder and the business was not taken through an active auction process. The Court was satisfied that there was a viable passive market check during the process.

The Facts

C&J Energy Services, Inc. (C&J) owned a large fleet of trucks used in hydraulic fracturing, or fracking.

In an effort to follow other United States oilfield services companies who exited from the U.S. tax system, C&J entered into a merger agreement with Nabors Industries Ltd. (Nabors) which had been incorporated in tax-free Bermuda since 2002, while its executives ran the business from Houston. However, before C&J's shareholders could approve the merger agreement the City of Miami General Employees' and Sanitation Employees' Retirement Trust (the Pension Fund) brought a class action on behalf of itself and other shareholders to enjoin the merger claiming that: (i) the transaction was effectively a secret sale of the business as Nabors would end up owning a controlling share of the new entity; and (ii) the board of directors did not execute its fiduciary duties in this improperly entered into change of control transaction.

The plaintiff Pension Fund also argued that there were conflicts of interest in the deal as C&J's chairman and C.E.O., Josh Comstock demanded five-year employment contracts for himself and other C&J executives with the new company. In addition: (i) Comstock required Nabors officials to pay him a $19.1 million success bonus for completing the merger; and (ii) Comstock's proposed package included a $170 million severance payment in the event his employment was to be terminated within 5 years.

The proposed merger involved only one bidder and there was a "no shop" provision in the deal that prohibited C & J from soliciting other bids. However, the agreement contained a "fiduciary out" provision which allowed C&J to abort the merger if a superior proposal was presented during a lengthy passive market check of the transaction. The agreement also involved a break fee of 2.27%.

The Delaware Court of Chancery Decision

Delaware Chancery Court Judge Noble reviewed the proposed merger and the process C&J's board of directors undertook. Although the court found that the board had no conflict of interest in entering into the merger agreement, it did find that was a "plausible" violation of the board's duties under the Revlon standard (*Revlon v. MacAndrews & Forbes Holdings, Inc.*) as no auction process had been carried out. Consequently, the Court of Chancery ordered a preliminary injunction enjoining the shareholder vote on the merger for 30 days and ordered C&J to solicit competing bids for additional bidders to come forward.

The Delaware Supreme Court Decision

The Supreme Court reversed the decision of the lower court and confirmed that, in carrying out its Revlon duties, a board of directors, even in a change of control situation does not need to actively shop a company before or after signing a merger agreement and can negotiate with only a single bidder in seeking a sale, provided that the board "exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal."

The Court further noted that "a market check does not have to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal. The ability of the stockholders themselves to freely accept or reject the board's preferred course of action is also of great importance in this context."

Moreover, the Court wrote "The shareholders can reject the deal for themselves if they do not find its terms to be value-maximizing." Although it was permitting the shareholder vote on the merger, disgruntled C&J shareholders still had the opportunity to seek damages after the deal closed but the Court conceded that "We are mindful that an after-the-fact damages case is an imperfect tool" for addressing investors' concerns about the deal.

The Court also found that the C&J directors knew what Nabors investors would get from the deal and took steps to address potential problems resulting from the change in control of the firm. Of significance, the transaction also permitted C&J's directors to consider a higher offer if one emerged. The Court held that this satisfied the board's legal duties to insure shareholders were protected in the deal.

As a result of this decision, the Supreme Court confirmed there is no exact roadmap or checklist for a board of directors to comply with to execute their duties under the Revlon standard in the selling of a company. The key analysis that must be undertaken is whether the board in exercising its business judgment has made a reasonable decision in seeking to maximize the value of the company during a sale.

nClosures Inc. v. Block and Company, Inc.
7th Circuit Court of Appeals, No. 1303906 and 14-1097
October 22, 2014

The 7th Circuit Court of Appeals found that a signed confidentiality agreement may be insufficient to protect the confidentiality of information provided by a disclosing party if the disclosing party doesn't also take reasonable steps to protect the information.
The Facts

nClosures Inc. (nClosures) developed metal cases for electronic tablets including the Apple iPad. One of nClosures case models known as the Rhino Elite had been designed in 2011 by an independent contractor engaged by nClosures.

A prototype of the Rhino Elite case was displayed at a trade show in Chicago and discussions took place between nClosures and Block and Company, Inc (Block) which contemplated Block manufacturing the Rhino Elite cases for nClosures.

Pursuant to these discussions, the parties entered into a mutual confidentiality agreement pursuant to which the parties agreed that confidential information received by one party from the other would only be used for the purposes of engaging in discussions and evaluating the objective of a potential business relationship with respect to iPad enclosures.

After the confidentiality agreement was signed, nClosures gave Block the design files for the Rhino Elite case. No formal manufacturing agreement was entered into but the parties had agreed orally that Block would manufacture and sell the Rhine Elite cases to nClosures.

The Rhino Elite case was sold in the market in 2011. Later, in 2012, Block designed its own tablet case called the Atrio and subsequently terminated its relationship with nClosures.

nClosures then commenced its legal suit claiming, among other things, that Block had breached the terms of its confidentiality agreement.

The Decision

Applying Illinois law which governed the dispute at hand, the Court observed that in order to enforce the confidentiality agreement between nClosures and Block, the Court had to find that nClosures took reasonable steps to keep its proprietary information confidential.

The Court highlighted the following observations:

- the design drawings were not kept secure in a vault or otherwise nor were they under lock and key
- the computer files on which the design drawings were stored did not incorporate restricted access
- aside from the base confidentiality agreement between nClosures and Block, no individuals who had access to the design files signed confidentiality agreements
- the product drawings were not marked "confidential" with markings or protective words
- the independent contractor who designed the Rhino Elite case did not execute a confidentiality agreement
- nClosure's manufacturers that produced versions of the product prior to the one manufactured by Block did not sign confidentiality agreements

The Court also contrasted the nClosures' fact situation with another Seventh Circuit decision where the confidential information in question was kept in a vault and marked as proprietary and the relevant engineers and vendors who dealt with the sensitive information were also required to sign non-disclosure agreements.
Given the foregoing facts, the Court held that the confidentiality agreement was not enforceable.

Re K R Hardy Estates Limited
2014 EWHC 4001 (Ch)
Chancery Division, Companies Court

The Companies Court summarised the guiding principles to determine the valuation date for a court ordered sale of shares following a successful unfair prejudice petition.

The Facts

The petitioner, a shareholder in K R Hardy Estates Limited alleged that the defendants had conducted the affairs of the company in a manner that was unfairly prejudicial to the interests of its members and sought an order of the Court pursuant to the *Companies Act 2006* requiring the defendants to purchase her shares in the company at a fair value to be determined by the Court.

The Decision and Valuation Date

The *Companies Act 2006* contains provisions intended to protect minority shareholders from suffering damages as a result of conduct that is unfairly prejudicial. The legislation also permits a minority shareholder to petition the Court to order a compulsory share buy-out by either the company or the other shareholders.

In granting such an order, the Court is also required to determine the date on which the shares should be valued in order to set the purchase price.

Justice Mann considered a number of potential dates as possibilities for the valuation date including:

- the date on which the unfairly prejudicial conduct occurred
- the date on which the value of the shares was affected
- the date on which the court was petitioned
- the date of the order for the shares to be purchased

Justice Mann found that the valuation should take place as at the date of the order for purchase. That date had the advantage of certainty and was considered the most fair out of the possible valuation dates.

Although the Court recognized that such a valuation date could in principle allow a majority shareholder to manipulate the value of the shares between the date on which an action arises and the date on which a court order is made, the Court made it clear that the overriding requirement is that the valuation should be fair in the given individual case. This overriding requirement might justify an earlier valuation date where a company has been deprived of its business, it has been reconstructed or the business has changed significantly, so that the business has a new economic identity.

Justice Mann also commented that a Court will not direct an early valuation date simply to give the claimant the most advantageous exit and that the decision may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of proceedings.

In the case at hand, Justice Mann having considered the various options and concluding that there was no reason to depart from the default valuation date position ultimately ordered that the shares should be valued as at the date of his order.

III. CERTAIN CANADIAN REGULATORY DEVELOPMENTS

Canadian Securities Administrators Introduce Rule Amendments Regarding Disclosure of Corporate Governance Practices

On October 15, 2014, the securities regulatory authorities in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec and Saskatchewan announced the planned implementation of rule amendments regarding disclosure of corporate governance practices (i.e. amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* and Form 58101F1 *Corporate Governance Disclosure*).

The significant aspects of the rule amendments require non-venture issuers to provide disclosure regarding the following matters on an annual basis:

- director term limits and other mechanisms of renewal of the board of directors
- policies regarding the issuer's representation of women on its board of directors
- the board of directors' or nominating committee's consideration for the representation of women in the director identification and selection process
- the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments
- the issuer's targets regarding the representation of women on its board of

directors and in executive officer positions

- the number of women on the issuer's board of directors and in executive officer positions

These rule amendments are intended to increase transparency for investors and other stakeholders regarding the representation of women on boards and in senior management of non-venture issuers. This additional information is also intended to assist investors when making investment and voting decisions.

OSC Approves No-contest Settlement with Ernst & Young for $8 million
September 30, 2014

On March 11, 2014, the Ontario Securities Commission (OSC) announced that its Staff would be proceeding with four enforcement initiatives as follows:

- A new program to facilitate the settlement of appropriate enforcement cases in circumstances where the respondent does not make formal admissions respecting its misconduct (sometimes referred to as no-contest settlements);
- A new program for explicit no-enforcement action agreements;
- A clarified process for self-reporting under Staff's credit for cooperation program; and
- Enhanced public disclosure by Staff of credit granted to persons for their cooperation during enforcement investigations.

As part of that initiative, no-contest settlements were introduced by OSC Staff to allow, in limited circumstances for OSC Staff to settle with alleged wrongdoers, without the alleged wrongdoers having to admit to any facts or liability.

On September 30, 2014, the OSC approved a no-contest settlement agreement in a hearing with respect to a settlement agreement between OSC Staff and Ernst & Young LLP (E&Y). Pursuant to the settlement, E&Y agreed to pay $8 million to settle allegations of negligence in regard to its audit work related to Sino-Forest Corp. (Sino-Forest) and athletic shoe manufacturer Zungui Haixi Corp (Zungui Haixi). Both Sino-Forest and Zungui Haixi were public companies trading on Canadian stock exchanges until their collapses following accusations of improper accounting.

The OSC submitted that E&Y didn't show enough "professional skepticism" in conducting its audits, that it overlooked flaws in its clients' accounting and didn't conduct proper reviews. In particular, the OSC claimed that E&Y failed to adequately review or question documentation related to Sino-Forest's ownership of standing timber reserves in China and in respect of the Zungui Haixi audit, E&Y failed to treat "multiple red flags" in the shoe company's finances with sufficient skepticism, the OSC said. However, the OSC did not make any allegations of dishonest conduct on the part of E&Y.

In addition to the $8 million financial payment, Ernst & Young has advised the OSC that it has established new policies for auditing companies that have significant operations in emerging markets, and it has completed a "focused assessment" of audits on companies based in China. E&Y did not admit to any wrongdoing in its audits.

In determining the amount for the E&Y settlement in, OSC Staff considered the fact

that E&Y had agreed to pay $119 million to settle shareholder class action claims in regard to Sino-Forest and $2 million to Zungui Haixi investors.

The following also factored into the decision:

- OSC Staff found no evidence of dishonest conduct on the part of E&Y
- E&Y subsequently implemented enhanced auditing procedures for companies in emerging, high risk markets
- E&Y cooperated with OSC Staff during the investigation and the ongoing hearing against Sino-Forest.

The OSC stated that about $2.1-million of the $8-million payment to the OSC will be used to cover its investigative expenses, while the rest will go to "third parties."

OSC vice-chairman James Turner approved the settlement and stated that it underlines the vital "gate keeping" role that auditors play, and that auditors need to show sufficient scrutiny, skepticism and diligence.

It is important to note that the OSC has warned that it will not offer no-contest settlements to anyone who has: (i) engaged in abusive, fraudulent or criminal conduct; (ii) failed to address any losses caused to investors; or (iii) obstructed or misled investigators.

Ontario Securities Reports on Statement of Priorities for fiscal 2013–2014

Every year, the Ontario Securities Commission publishes a Statement of Priorities for the current fiscal year. The Statement of Priorities serves as the guide for the OSC's ongoing operations and sets out the OSC's priorities in connection with the administration of *Ontario Securities Act*. The OSC also publishes a report on its progress against the matters identified in the Statement of Priorities from the previous fiscal year.

In connection with the 2013–2014 fiscal year, the OSC progress report made the following notable disclosure.

In connection with its goal of delivering strong investor protection, the OSC ceded that recently, investor confidence has been shaken and that has resulted in reduced market participation. The OSC commented that it must reach out to investors to determine the next steps to protect their interests. In response, the OSC increased its visibility and awareness amongst key stakeholders across Ontario through its OSC in the Community initiative which held events in 10 cities featuring educational seminars with staff speakers, as well as meetings with local officials, law enforcement and community organizations such as chambers of commerce.

In addition, the OSC reported on a registrant outreach program to promote compliance of registered firms. The OSC conducted online and in-person educational seminars on topics on Client Relationship Model Phase 2 implementation and know your client and suitability obligations.

The OSC identified that an expectation gap exists if investors incorrectly assume that their advisor/dealer must always give advice that is in their client's best interests. The OSC warned that the current standard of conduct applicable to advisors and dealers may not adequately protect retail investors. The OSC reported that research was completed on proficiency standards in Canada, the U.S., the U.K. and Australia to inform their thinking on potential changes to their standards. As well, a Canadian Securities

Administrators committee on which the OSC participates launched a pilot research project focused on examining advisor compensation.

In connection with its goal of delivering responsive regulation, the OSC observed that businesses and investors may not have adequate access to capital or investment opportunities in the exempt market. As part of its application plan, the OSC is engaging businesses and business associations on access to capital through outreach programmes such as the OSC in the Community initiative which included OSC staff holding several one-on-one meetings with stakeholders which included industry associations and crowdfunding associations. The OSC also participated in a town hall meeting at the MaRS Discovery District and at the Prospectors and Developers Association of Canada's annual conference.

The OSC also reported on its enforcement branch having established a new Joint Serious Offences Team (JSOT) to specifically target fraudulent and/or repeated criminal activity that harms retail investors. A number of members of the JSOT have been designated as special constables by the Ontario Provincial Police which empowers them to pursue offences and tools in the Canadian *Criminal Code* when working in conjunction with the police. As well, the OSC is leveraging its enforcement reosources through arrangements with the Royal Canadian Mounted Police, the Ontario Provincial Police, the Ministry of the Attorney General and the Ministry of Finance's Forensic Data Recovery Unit. During the year, the OSC commenced 24 enforcement proceedings proceeding including 4 quasi-criminal proceedings and 3 criminal proceedings under the purview of JSOT.