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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Supreme Court of Canada
April 17, 2015
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Multilateral CSA Notice to Amendments to National Instrument 45-106 Prospectus Exemptions Relation to the Offering Memorandum Exemption

On October 29, 2015, the securities regulatory authorities in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan (the Participating Jurisdictions) published Multilateral CSA Notice of Amendments to National Instrument 45-106 Prospectus Exemptions Relating to the Offering Memorandum Exemption.

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CSA Multilateral Staff Notice 58-307 Staff Review of Women on Boards and in Executive Officer Positions – Compliance with NI 58-101 Disclosure of Corporate Governance Practices

Further to National Instrument 58-101 Disclosure of Corporate Governance Practices which required non-venture issuers to disclose certain information regarding representation of women on boards and in executive officer positions, on September 28, 2015 the Canadian Securities Administrators released staff notice 58-307 which summarized its findings of a review of corporate governance disclosure of a sample of issuers.

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TSX Staff Notice in respect of Emerging Market Issuers

On July 13, 2015, the Toronto Stock Exchange published a staff notice setting out guidance for emerging market issuers.

Summary of Caselaw, Legislative and Regulatory Developments 2015

The year 2015 included a Supreme Court of Canada decision setting out the evidence threshold in order for a secondary securities market liability class action to proceed, several cases dealing with good faith obligations and a landmark Ontario Securities Commission decision regarding tipping.

The Supreme Court of Canada ruling in Theratechnologies established a high threshold that plaintiffs must provide courts with “sufficient evidence” to show a “realistic chance” of success in order to proceed with a securities class action. The threshold makes it more difficult for investors to commence similar lawsuits in the future.

The Lavrisjsen decision extends the general obligation of the good faith principle set forth in last year’s Supreme Court of Canada decision in *Bhasin v. Hrynew* and highlights the fact that although a vendor may not intentionally set out to defraud a purchaser or intentionally misrepresent facts, selective disclosure of partial information and active withholding of important information will be viewed as an act of bad faith.

The Oracle decision should serve as warning that the new duty of honesty in contractual performance now means that a party terminating a long term arrangement cannot simply rely on a sole discretion renewal clause.

The Energy Fundamentals case demonstrated that although rare, a court will imply a term in a contract in order to give “business efficacy” to the contract.

In the Dunkin’ Brands decision, the Court of Appeal held that pursuant to the franchise agreements, the franchisee has a contractual duty to protect the brand; however, the case may also be used by franchisors in support of their efforts to terminate relationships with delinquent franchisees.

Although many owner-operators of a family run business may think that an informal agreement is sufficient, the Laval decision clarifies that commercial arrangements of a family-run business will not be held to a different standard compared with other corporations.

In the Ontario Securities Commission decision regarding Finkelstein et al., the OSC found the former high profile securities lawyer and four other individuals guilty of insider trading infractions and ruled that they pay more than $2.7 million in fines and penalties and banned them from trading for a period of 10 years.

The Dole stockholder litigation decision serves as a stern reminder to officers, directors and controlling shareholders that the requirements of the entire fairness test should be strictly adhered to when engaged in interested transaction such as a going private transaction.

The Lazard case clarifies buyer is a cautionary reminder that although an earn-out scenario may at first appear attractive to a vendor, the discretionary actions of the purchaser (which are out of the control of the vendor) can affect the vendor’s ability to obtain the higher purchase price and that the drafting of the earn-out provisions and acceptable purchaser actions are not to be taken lightly by vendors.

The Calma decision should serve as an admonishment with respect to the level of shareholder ratification for board compensation, a matter of particular interest in the context of "say on pay" votes.

During the year it was announced by the Canadian Securities Administrators that the offering memorandum exemption would become available in all jurisdictions of Canada which should enhance access to capital across the nation while simultaneously introducing key investor protection measures.

The Canadian Securities Administrators also conducted a review of a sample of issuers in connection with reviewing the extent to which non-venture issuers have women on their boards and in executive officer positions. The staff notice revealed that too few issuers have adopted written policies on identifying and selecting candidates for directorships, or took steps to implement such policies.

The Toronto Stock Exchange published a staff notice setting out guidance for emerging market issuers to deal with concerns regarding greater risks associated with emerging market issuers.

Certain Caselaw Developments

I. CANADIAN CASES

Theratechnologies Inc. v. 121851 Canada Inc.
2015 SCC 18
Supreme Court of Canada
April 17, 2015
The Supreme Court of Canada ruled for the first time on a case regarding relatively new secondary securities market liability regimes which have been adopted in most Canadian provinces. The Court confirmed that in order for a securities class action to proceed, the plaintiff must provide the Court with sufficient evidence to persuade the Court that there is a reasonable possibility of success.

The Facts
In the spring of 2010, Theratechnologies Inc. (Thera) awaited approval from the United States Food and Drug Administration (the FDA) with respect to Thera's new drug which was designed to reduce excess abdominal fat in HIV patients. During the application process, Thera had regularly updated its shareholders and the Commission des valeurs mobilières du Québec (the Québec securities regulatory authority) about developments in the FDA process. In addition, Thera also regularly publicly updated its shareholders regarding the results of its clinical trials which measured the safety and efficacy of its drugs, including potential side effects. In this case, the trials indicated that the benefits of the drug could be achieved without significant side effects.

During the drug approval process, the FDA referred a number of questions (including questions about potential side effects) about Thera's drug to an expert advisory committee. The questions raised by the FDA were made public on the FDA's website. Shortly after the FDA's questions were publicized by stock quotation enterprises, the trading price of Thera's shares dropped by more than 50%. Thera did not publicly comment on the statements and during this period, 121851 Canada Inc. (the Complaining Shareholder), a holding company which held shares in Thera's stock sold its Thera shares and suffered a loss. Notwithstanding the apparently negative situation, in a quick turn of events, the FDA approved the new drug application several days later and Thera's share price was also quick to recover.

The Complaining Shareholder sought authorization under Québec securities legislation to bring a class action for damages against Thera, claiming that the information regarding the potential side effects of the drugs and the FDA's questions about those side effects constituted a material change in Thera's business, operations or capital which in turn triggered the timely disclosure obligations.

The Lower Court Decision
Section 225.4 of the *Securities Act* (Québec) securities legislation effectively turns the court into a gatekeeper regarding class actions and grants authorization "if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff." The motions judge found sufficient evidence to support the conclusion that the Complaining Shareholder had a reasonable possibility of success. On appeal, the Court of Appeal agreed with the motions judge.

The Supreme Court of Canada Decision

In analyzing whether there was a "reasonable possibility" that the claim would be resolved in favour of the plaintiff, the Supreme Court of Canada noted that the Québec legislature mandates a meaningful screening mechanism in the securities contexts so that expensive strike suits and unmeritorious claims would be prevented. The threshold requires that there be a reasonable or realistic chance that the action will succeed.

The Court also found that it must undertake a reasoned consideration of the evidence to ensure that the action has some merit but in making that determination had to be cognizant of the fact that if the goal of the screening mechanism is to prevent costly strike suits and litigation that has little chance of success, it logically follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial and result in the authorization stage requiring a "mini trial."

The Court also focused on a material change having the following two components: (i) there must be a change in the business, operations or capital of the issuer; and (ii) the change must be material, meaning it would reasonably be expected to have a significant effect of the market price or value of the securities issuer.

The Complaining Shareholder submitted that when Thera received the FDA briefing materials for the advisory committee, Thera should have issued a responsive press release but it failed to do so. However, the Court held that the Complaining Shareholder did not point to any evidence that could qualify as a change in Thera's operations, capital or business and in fact the results of the clinical trials, including potential side effects had been disclosed to shareholders as they became available. Moreover, there was no new information about the side effects of the drug that required timely disclosure when the FDA mentioned those side effects in the briefing materials.

In dismissing the Complaining Shareholder's appeal, the Court concluded that the FDA's questions did not constitute a material change in Thera's business, but rather were part of a routine aspect of the approval process. Accordingly, the evidence did not credibly point to a material change that could have triggered disclosure obligations and therefore, there was no reasonable possibility that the Complaining Shareholder's action could succeed.

Lavrijsen Campgrounds Ltd. v. Eileen Reville, Steven Reville and Douglas Reville
2015 ONSC 103
Ontario Superior Court of Justice
January 15, 2015

Following the 2014 Supreme Court of Canada decision of *Bhasin v. Hrynew* which dealt with a general obligation of good faith in the performance of contracts and a duty of honest performance, the Ontario Superior Court of Justice held that a vendor's active non-disclosure is an intentional misrepresentation and breaches a duty of honesty.

The Facts

The plaintiffs entered into a share purchase agreement with the defendants pursuant to which the plaintiffs were to purchase the defendants' campground business. Prior to entering into the share purchase agreement, the parties negotiated the transaction as a real estate purchase involving the location of the campgrounds, together with all of the other assets of the business.

The original real estate offer provided that "all prepaid deposits and rentals for the 2004 season plus the deposits on the gate cards shall be to the credit of the buyer on closing. The sellers shall supply a list on closing of all deposits and rent that are due for the 2004 season."

Approximately a year after the closing, the plaintiffs were able to conduct a closer review of the company data and took the position that they were entitled to a much higher adjustment than they were originally credited with.

The Decision

Justice Kent found that the purchasers were particularly concerned about the prepaid deposits and prepaid rent and focused on a portion of the share purchase agreement that read:

> "10. That there are one hundred and sixty-five (165) prepaid camper rental deposits for allocated sites for this 2004 camping season and the amount and date of individual payments and name of each camper who has prepaid the deposit will be immediately given to or made available to purchasers. However, should the number of deposits be less than 165 as of June 1, 2004, the purchaser shall receive credit directly from the vendor for the number below 165 at the rate of $275.00 per deposit."

Although the vendors' warranty did not specifically address prepaid rentals in the same manner as it was addressed in the real estate offer, the plaintiffs were clearly concerned about prepaid rentals and specifically requested information concerning deposits and prepaid rentals.

The responses provided by the defendants were inadequate to enable the plaintiffs to know the total of deposits and rental payments in the hands of the defendants before closing. The Court found that although an adjustment was made upon closing for prepaid deposits, no adjustment was made for rentals.

At trial, Douglas Reville, testifying on behalf of the defendants, asserted that communications regarding what was requested was primarily conducted through the parties' respective agents and that there had been some discussion regarding prepaid deposits. He asked his brother to obtain information on what was prepaid and his brother prepared a handwritten document that was faxed to the purchasers. He further testified that he had provided what the purchasers were asking for; however, he conceded in cross-examination that he could have provided but did not give any customer balance details to the plaintiffs. He further agreed that he had the pertinent information and that if the purchasers had specifically asked for it, he would have provided it; however, he maintained that he did not deliberately withhold information.

Relying on the recent Supreme Court of Canada decision of *Bhasin v. Hrynew* Justice Kent had no hesitation concerning any distinction to be drawn between active non-disclosure and intentional misrepresentation. In particular, the Court emphasized the following from *Bhasin v. Hrynew*:

> "… there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance."

Accordingly, the Court found that while the vendors did not initially set out to defraud the purchasers or intentionally misrepresent the facts to them, when the opportunity arose, the vendors selectively disclosed partial information and actively withheld other important information concerning the prepaid rentals.

As a further defence, the defendants asserted that the plaintiffs' warranty claim was outside of the 12 month post -closing survival period set out in the share purchase agreement that read as follows:

> "…no Warranty Claim may be made or brought by the Purchaser after the date which is twelve months following the closing date. Any Warranty Claim which is based upon or relates to the title to the Purchased Shares or which is based upon intentional misrepresentation or fraud by the Vendor may be made or brought by the Purchaser at any time."

Defendants' counsel submitted that it was not a case of intentional misrepresentation or fraud and the claim is barred because it was not brought within the 12 -month period following the closing date. The Court rejected that argument and ruled that its finding of active non-disclosure constitutes intentional misrepresentation and therefore the defendants were not entitled to the protection of the 12 month survival period.

The plaintiffs were awarded judgment against the defendants in the amount of $73,856.00.

Dunkin' Brands Canada Ltd. v. Bertico Inc.
QCCA 624
Court of Appeal of Québec
April 15, 2015
In partially upholding the trial decision, the Québec Court of Appeal reduced the aggregate amount of damages awarded to franchisees who sued the Dunkin' Donuts franchisor by about $5.5 million due to the trial judge's failure to take into account the competition that Dunkin' Donuts would have faced from competitors such as Tim Hortons even if the franchisor had not committed a civil fault.

The Facts
In the early 1990s Dunkin' Donuts was a successful quick service restaurant chain in the Province of Québec with over 200 locations; however, from the mid-1990s to 2012, the number of Dunkin' Donuts locations dropped from over 200 to just 13. In contrast, from 1995 to 2005, Tim Horton's extended its network from 60 to more than 300.

Recognizing the threat posed by the increasing popularity and competitiveness of Tim Hortons, the plaintiff Dunkin' Donuts franchisees alerted their franchisor and requested a "rescue plan.". The franchisor convened a 3- day meeting response to concerns voiced by a number of the franchisees who complained that the franchisor was insufficiently attentive to their needs, citing in particular the lack of support and collaboration offered to contend with this newfound source of competition.

In addition, the franchisees alleged that the franchisor had repeatedly failed to properly enforce the standards associated with the Dunkin' Donuts "system" across the Québec network, in particular through the franchisor's tolerance of underperforming franchisees.

The franchisor contemplated an expensive remodeling program which ultimately failed to secure the minimum number of participants and also required a general release in favour of the franchisor.

In May 2003, a group of disgruntled Dunkin' Donuts franchisees sued the franchisor for breach of its duties under the franchise agreements and claimed millions of dollars of lost profits for the previous 3 years as well as the loss of investment value that resulted from the closure of their locations.

The Trial Decision

The trial judge accepted the plaintiffs' allegations that the franchisor had failed to meet its contractual obligations to take proper measures in support of the brand that were explicitly provided for in the franchise agreements or that flowed implicitly from the general nature of the franchise arrangement.

The trial judge determined that the most important explicit obligation agreed to by the franchisor was its promise "to protect and enhance both its reputation and the 'demand for the products of the Dunkin' Donuts System'; in sum, the brand."

The trial judge held that the franchisor had done neither and the plaintiff franchisees were successful for the full amount of their claim and were awarded damages of $16,407,143.

The Dunkin' Donuts franchisor appealed.

The Court of Appeal Decision

The Court of Appeal noted that in the franchisor's factum on appeal, the franchisor submitted that the trial court mistakenly imposed on the franchisor "a new unintended obligation to protect and enhance the brand, outperform the competition and maintain the market share indefinitely." The Court further noted that after having "almost completely ignored" the evidence it adduced over a lengthy trial, the franchisor submitted the trial judge wrongly characterized the franchisor's contractual obligations as having an intensity of "result," which "effectively guarantees the financial success of all Dunkin' Donut franchisees."

In rejecting the franchisor's arguments, the Court of Appeal noted that the franchisor's role was to oversee the ongoing operation of the network and the uniform system of standards. Moreovoer, the Court concluded that the franchisor's obligation to undertake reasonable efforts to protect and enhance the Dunkin' Donuts brand also stemmed from the franchise agreements. In particular, the Court of Appeal noted that "not only would each franchisee receive assistance and benefit from the collaboration of the franchisor, but the franchisees were entitled to count on the franchisor to see that the system would be supervised and that the weaker links in the chain of franchisees be corrected or excised." Accordingly, for the overall benefit of the network of franchisees, the franchisor had an obligation to deal with delinquent franchisees and, if necessary, take appropriate steps to ensure compliance.

Although the Court of Appeal ultimately upheld the trial decision, it ultimately reduced the damages from $16,407,143 to $10, 908,513.25 for the following reasons:

1. Although the Court of Appeal held the "comparable" method applied by the trial judge to be a reasonable approach to the calculation of loss of profits (i.e. the trial judge used Tim Hortons as the comparable), the Court of Appeal reduced the franchisees' claim for lost profits by 10% to allow for external factors.

2. The Court of Appeal further reduced the lost profits by 15% as it held the trial judge neglected to factor in the competition that Dunkin' Donuts would have faced from Tim Hortons even if the franchisor had not committed a civil fault.
3. The Court of Appeal deducted from the damages the royalties and other fees the franchisees would have paid to the franchisor had the franchisor performed its obligations.
4. The Court of Appeal limited the franchisees' claim to the limitation period of 3 years.
5. Applying the same principles as above, the Court of Appeal also reduced the franchisees' compensation for lost investments by 25%.

Interestingly, the Court of Appeal also rejected the franchisor's argument that the business judgment rule should prevent the Court from second guessing business decisions made in good faith by the franchisor. The Court of Appeal held that in the circumstances, the business judgment rule which protects corporate directors would not shield the franchisor from its contractual liability to franchisees.

Energy Fundamentals Group Inc. v. Veresen Inc.
2015 ONCA 514
Ontario Court of Appeal
May 27, 2015

The Court of Appeal confirmed that although rare, a court will imply a term in a contract in order to give "business efficacy" to the contract.

The Facts

Energy Fundamentals Group Inc. (EFG), an investment bank and Veresen Inc. (Veresen) entered into a letter agreement pursuant to which EFG agreed to assist Veresen in developing a natural gas terminal in Oregon.

The letter agreement also provided EFG with an option to acquire up to a 20% stake in the project. If EFG were to exercise its option, EFG would be obligated to fund a proportionate share of all development equity contributed by Veresen as well as a return on that equity. In addition, if EFG exercised the option it would have to pay a proportionate share of future project costs.

Subsequent to the parties entering into the letter agreement, the price of natural gas changed and Veresen determined that it was going to build an export facility instead of an import facility and took the position that such a fundamental change to the nature of the project effectively rendered EFG's option meaningless.

Veresen indicated to EFG that the cost of exercising the option would outweigh any economic benefit and refused to provide EFG with documents which would have permitted EFG to conduct due diligence to verify the pricing of the option and its economic value.

EFG brought an application to the Ontario Superior Court to require Veresen to provide the information requested by EFG.

The Application Judge's Decision

The application judge implied a contractual duty that required Veresen to disclose relevant information to EFG to allow EFG to ascertain whether it should exercise its option. The Court held that EFG's right to such value and price disclosure was essential to give "business efficacy" to the letter agreement.

The Court of Appeal Decision

On appeal, Veresen argued that it was not legally obliged to provide either the value or the price information. Veresen argued that the application judge should not have implied terms requiring value and price disclosure as EFG and Veresen were sophisticated parties and EFG chose not to bargain for a contractual right to disclosure even though it had done so in another context when it desired that right.

Veresen's submissions went on to argue that the application judge did not give sufficient weight to the evidence of a Veresen executive who asserted that the company would never have agreed to such undefined disclosure terms and that for the court to imply such terms would effectively rewrite and improve the contract for EFG's benefit.

In contrast, EFG submitted that EFG and Veresen were allies in pursuit of a common goal being the project and contemplated that they could become partners.

In dismissing the appeal, the Justice Pardu noted that the application judge found it was "clear beyond peradventure" that a potential 20% investor in the project would require access to financial documents before making an investment that could amount to several hundred million dollars and that the obligation to disclose the valuation information was "a necessary incident to the existence of the option right itself as, without it, the option right is really no right at all."

The Court held that the application judge was correct to conclude that:

> "the option right would have been illusory without the right to information, and that implication of the terms was necessary to give business efficacy to the letter agreement. The application judge concluded on the whole of the evidence that the parties must have intended that EFG would have the right to this disclosure. There is no suggestion on the evidence that anyone other than EFG would become a limited partner."

The Court also payed deference to the application judge by citing the application judge's observation that a contractual term may be implied "on the basis of the presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the 'officious bystander test.'"

The Court further elaborated that "Implication of a contractual term does not require a finding that a party actually thought about a term or expressly agreed to it. Often terms are implied to fill gaps to which the parties did not turn their minds."

Finally, the Court observed that "It is apparent that the letter agreement was not intended to comprehensively define the relationship between the parties. In a commercial setting, there may be contracts "where the parties to a contract may have been content to express only the most important terms of their agreement, leaving the remaining details to be understood."

Data & Scientific Inc. v. Oracle Corp.
2015 ONSC 4178
Ontario Superior Court of Justice
June 18, 2015

In dismissing a motion to strike pleadings, the Ontario Superior Court of Justice ruled that the new duty of honesty in contractual performance flows directly from the general organizing principle of good faith and that a party terminating a long term arrangement cannot simply rely on a sole discretion renewal clause.

The Facts

Data & Scientific Inc. (Data) was a long term member of Oracle Corporation's partner network from 1994 until 2015. During those years, Oracle renewed the annual agreement without interruption or incident and accordingly Data's business and reliance on its relationship with Oracle increased over the period.

The Oracle Partner Network Agreement which was renewed annually at Oracle's sole discretion specifically stated:

> "Any renewal of this agreement shall be subject to Oracle's standard terms and fees…and shall be at Oracle's sole discretion. You may apply for renewal of your membership in OPN by on-line electronic acceptance of the terms of the then current OPN agreement and Oracle will notify you if it accepts your application for renewal."

In 2014, Oracle invited Data to renew the agreement as in previous years and Data attempted to do so on-line without success. Data subsequently sent Oracle a letter requesting a renewal and later received Oracle's response that the OPN agreement was not being renewed by Oracle. Oracle had not sent any prior notice of an intention not to renew the OPN agreement.

Data then sued Oracle claiming damages including punitive damages for failing to give reasonable notice of non-renewal.

The Motion Decision

Oracle brought a motion to strike Data's claim altogether for failing to disclose a reasonable cause of action.

At the motion, Data argued that Oracle was obliged to exercise its discretionary renewal power reasonably and that Oracle, in effect, terminated a 20 year relationship without notice, let alone reasonable notice.

In response, Oracle argued that the reasonable exercise of discretionary contractual powers does not apply in cases of contractual renewal.

In dismissing the motion, the Court held that:

> "…The Supreme Court has not (yet) decided that the long-standing requirement that discretionary contractual power must be exercised reasonably can never apply in contract renewal situations where, as here, the contractual agreement bestows a "sole discretion" non-renewal power and requires no notice of any kind."

Moreover, Justice Belobaba noted that in its reasons for judgment, the Supreme Court of Canada in *Bhasin v Hrynew* held that "the list of situations and relationships that

can attract good faith obligations is not closed and that the application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting."

In particular, Justice Belobaba honed in on the Supreme Court of Canada's comment that the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual co-operation than it would in a more transactional exchange and that in his view, the comments of the Supreme Court of Canada applied to the facts in this motion.

In deciding whether or not to grant Oracle's motion to strike Data's statement of claim, the Court had to apply a legal test of whether it was plain and obvious that Data's claim based as it was on the principle that discretionary powers must be exercised reasonably was certain to fail and had no chance of success.

Applying the above reasoning to the facts at hand, the Court held "I am not suggesting for a moment that the plaintiff will necessarily prevail at trial or that it would survive a summary judgment motion. Only that it is not plain and obvious that it has no cause of action."

Accordingly, Oracle's motion to strike Data's claim was dismissed.

1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.
2015 ONSC 2664
Supreme Court of Ontario
May 22, 2015

The Ontario Superior Court dismissed the claims of a family member who supplied professional services to his deceased father's family-run business as there was no agreement with respect to payment and the two year limitation period to commence an action had passed.

The Facts

Loreto Azzopardi founded a family run business Laval Tool & Mould Ltd. which specialized in mould manufacturing.

Six of Loreto's adult children held key management positions and one of his sons, Emmanuel left the company to pursue other interests but later returned to assist the company with tax consulting related to the company's application for federal and provincial tax credits for the period from 1999 to 2010. As a result of Emmanuel's services, the company obtained approximately $2.6 million in scientific research and experimental development (SRED) credits.

During his consulting period Emmanuel was not paid and no formal agreement was entered into with the corporation.

However, subsequent to Loreto's passing, Emmanuel requested that the corporation pay him almost $420,000 to cover 25% of the tax benefits the company received due to his tax consulting efforts. Emmanuel's request was denied by management and he subsequently sued the corporation under an implied contract. Emmanuel also asserted a *quantum meruit* (payment of a reasonable amount for work performed) claim.

Emmanuel advanced his claims notwithstanding the lack of a formal agreement.

Moreover, Emmanuel conceded that for years no request for payment was made until 2011 when he presented the corporation with his invoice.

The Decision

Justice Verbeem dismissed Emmanuel's action for several reasons.

First, Justice Verbeem found that although Emmanuel was authorized by the corporation to advance the corporation's SRED claims, there was insufficient evidence to establish that the corporation had entered into an agreement to pay Emmanuel an amount equal to 25% of the tax benefits received.

Second, the Court held that *quantum meruit* failed because it failed the test of whether there was a valid contract found to exist in fact and in law, but there is no clause expressly setting out the consideration for the contract.

Third, with respect to Emmanuel's unjust enrichment claim, not all of the elements of the doctrine were present.

In particular, although it was clear that the corporation received a tax benefit from Emmanuel's tax consulting services and it was also clear that Emmanuel suffered a deprivation with respect to the time and effort he expended pursuing the SRED claims on behalf of the corporation, the third element being a "juristic reason" was not satisfied. That is, it was not within the reasonable contemplation of the parties that Emmanuel's tax consulting services would give rise to a claim for compensation. The Court noted that Emmanuel did not send the corporation a formal request for compensation and when he proposed compensation the corporation refused.

On that point, Emmanuel explained to the Court that he decided to withhold asking for compensation because he was dealing with family, and because he believed he would eventually become an owner of the company. Emmanuel also claimed that he knew that the corporation had insufficient cash to pay him during those years, and that he was relying on his father's prior promise to pay him.

The Court did not accept Emmanuel's evidence and also found some of his evidence to be "incredible" as Emmanuel did not ask for payment even during periods when the corporation was flush with cash.

In dismissing his action, the Court also noted that in any event, his claim was too late as the 2 year limitation period for commencing an action had already passed.

Re: Finkelstein et al.
Ontario Securities Commission
August 25, 2015

The Ontario Securities Commission (the OSC) found former Bay Street lawyer Mitchell Finkelstein and four other individuals guilty of insider trading infractions. The OSC ruled that Finkelstein and the others pay more than $2.7 million in fines and penalties and also banned them from trading for 10 years.

The Facts

Mitchell Finkelstein attended high school in Montreal and later attended the University of Western Ontario where he earned his Bachelor of Business Administration and Commerce degree in 1990. During his time at university, Mr. Finkelstein became

friends with, and a fraternity brother of Paul Azeff who was also a former Montreal resident.

Mr. Finkelstein subsequently attended law school at the University of Ottawa, receiving his law degree in 1994 and practiced law from 1997 to 2010 with a focus on corporate/commercial involving financings, securities, mergers and acquisitions, takeovers and plans of arrangement.

Paul Azeff obtained his Bachelor of Arts in Literature in 1991 and subsequently became a sales manager at CIBC Wood Gundy where he had developed a large book of business.

OSC Staff's Allegations

OSC staff alleged that Mitchell Finkelstein tipped Paul Azeff who was an investment advisor and friend about material, non-public information regarding a number of large and imminent take-over deals that Mr. Finkelstein's firm was involved in. OSC staff further alleged that Mr. Azeff shared the information with others who were also guilty of tipping. OSC staff alleged that Mr. Azeff and the other individuals who were tipped bought a large number of shares in the target companies for themselves, family members and clients.

In particular, OSC staff alleged Mr. Finkelstein was guilty of tipping with respect to the following deals:

- Kohlberg Kravis Robers & Co.'s takeover of Masonite for $40.20 announced on December 22, 2014 which represented a premium of approximately 20%
- Vista Equity Fund LLP's takeover of MDSI for USD $8 per share announced on July 29, 2005 which represented a premium of 60%
- Barrick Gold Corp.'s offer to acquire Placer Dome Inc. for USD $9.2 billion announced on October 31, 2005 which represented a premium of 27%
- An investment group's offer (led by Caisse de dépôt et placement du Québec) to acquire Legacy Hotels Real Estate Investment Trust announced on July 12, 2007 which represented a premium of 20%
- Behringer Harvard REIT Inc.'s takeover offer to IPC US REIT for USD $1.4 million announced August 14, 2007 which represented a modest premium

OSC staff alleged that Mr. Finkelstein who was then a partner with the law firm of Davies Ward Phillips & Vineberg LLP learned about these transactions either because he was working on them personally or by accessing them through his law firm's internal document management system.

The Decision

Upon reviewing the evidence of: (i) the cross-referencing of law firm computer records that showed when Mr. Finkelstein accessed law-firm files on certain deals; (ii) phone records that showed calls between him or his house and Mr. Azeff; and (iii) large trading in the stocks in question just before the corporate deals became public, the OSC found that:

- Mr. Finkelstein was a person in a special relationship with the reporting issuers involved in the transactions
- Mr. Finkelstein was aware of material facts that would reasonably be expected to

have a significant effect on the market price or value of the securities and were therefore material facts within the meaning of Ontario securities legislation

- Mr. Finkelstein informed Mr. Azeff who in turn informed others (other than in the necessary course of business) of material facts
- Each of the securities purchasers involved in the case learned of the material facts from a person who the purchasers knew or ought reasonably to have known was in a special relationship with the reporting issuers
- Each of the securities purchasers involved in the case purchased securities with knowledge of the material facts that had not been generally disclosed, contrary to securities legislation and contrary to the public interest

Although OSC staff did not accuse Mr. Finkelstein himself of trading on the inside information; the OSC alleged that a number of cash deposits Mr. Finkelstein made were linked to information tips he provided to Mr. Azeff. In response to a line of questioning regarding the deposits Mr. Finkelstein responded that he stored cash amounts of up to $30,000 in tin boxes in his residence. Notwithstanding the apparently strange habit of keeping such high levels of cash in his home, the OSC held that there can be no reason to disbelieve Mr. Finkelstein on his explanations and accounting as OSC staff did not ask any relevant questions regarding the cash allegations in its cross-examination of Mr. Finkelstein.

In the subsequent sanction decision, Mr. Finkelstein: (i) was given a 10-year trading ban (other than his registered accounts); was permanently banned from being a director or officer of a public company; and (iii) has a 10 year ban from being an investor industry registrant. Financial penalties included a $450,000 administrative penalty and $125,000 in OSC costs.

Re: Dole Food Co. Inc. Stockholder Litigation
C.A. No. 9079-VCL
Delaware Court of Chancery
August 27, 2015

The Delaware Court of Chancery awarded significant damages against a controlling shareholder and his puppet President with respect to a going private transaction that involved fraud and was unfair to the shareholders. It did not involve fair dealing or a fair price.

The Facts

In 2009 Dole Food Company completed an initial public offering spearheaded by its sole shareholder Mr. Murdock. Approximately 41% of the shares were offered to the public and Murdock retained the balance.

However, soon after going public, Murdock considered taking the company private again as he was dissatisfied with the constraints of being a public company. Murdock investigated a number of transactions including a spin-off transaction to be followed by a buyout of the company.

In 2012 the corporation announced a strategic business re-organization involving a sale of the company's Asian operations and following this transaction the board of directors appointed Murdock as C.E.O. and Mr. Carter as the President and C.O.O.

In the following months Mr. Carter (who the court referred to as Murdock's "right hand man" took various actions that depressed the corporation's stock price. For example, in early 2013, Mr. Carter revised the earnings guidance to lower the anticipated cost savings associated with the sale transaction. Mr. Carter also cancelled a stock repurchase program citing the need to secure funding for the acquisition of new company ships.

In 2013 Mr. Murdock made a proposal for a going private transaction. The proposal was conditioned on the approval of a special committee of independent and disinterested directors and of the majority of the minority of the shareholders.

The special committee, with the assistance of its financial and legal advisors, negotiated with Murdock for a price of $13.50 from the original $12 offer. Following the special committee's recommendation, the board of directors approved the offer, which included a nominal break-fee and a 30-day go-shop period. The transaction was also approved by 50.9% of the minority shareholders.

Following the transaction, the plaintiff shareholders commenced an appraisal suit and an action claiming damages for breach of the duty of loyalty, claiming that the transaction was not entirely fair.

The Decision

The Court of Chancery found that the going private transaction was subject to the entire fairness test as it was an interested transaction involving the corporation's controlling shareholder. Therefore, the corporation's board had the onus of demonstrating that the transaction was fair to the stockholders.

To do so requires both fair dealing and a fair price; however, the Court found that the burden was not met as it concluded that there was neither fair dealing nor a fair price.

With respect to the fair dealing test, the Court highlighted that the fair dealing requirement incorporates the principle that the transaction must be free of fraud or misrepresentation. The Court found the President's actions were fraudulent and tainted the process rendering "useless and ineffective the highly commendable efforts of the Committee and its advisors to negotiate a fair transaction that they subjectively believed was in the best interest of Dole's stockholders."

The Court found that the President's actions resulted in "the negotiation of the Merger was the antithesis of a fair process." In particular, the Court noted that the President attempted to depress the market price of the corporation's stock by providing updated management forecasts to the Committee that included inaccurate numbers that made the corporation's prospects appear worse than they actually were.

The Court also found that the President interfered with and obstructed the Committee's efforts to manage the process and negotiate with the controlling shareholder in other ways, including by attempting to restrict the Committee's mandate and resisting the Committee's engagement of an independent financial advisor.

With respect to the fair price test, the transaction must be one "that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept."

The Court held that setting aside the President's fraudulent actions, the Committee's

negotiations, the investment bank's fairness opinions and market indications supported a price that fell within the range of fairness; however, once the impact of the fraud was factored in, the price of $13.50 "may have fallen within the lower end of a range of fairness."

The Court found Murdock to be liable as a director in that he breached his duty of loyalty by orchestrating an unfair, self-interested transaction from which he derived an improper personal benefit.

The Court also found the President to be liable having breached his duty of loyalty to the shareholders. In fact, the Court noted that "Carter demonstrated that his primary loyalty was to Murdock, not to Dole or to its unaffiliated stockholders."

Moreover, the Court also held that the President was not entitled to exculpation from personal liability as director under Delaware corporate law since he had breached his duty of loyalty and his acts and omissions were not in good faith.

For the above reasons, the Court awarded damages of $148,190,590 against Murdock and Carter jointly and severally.

Lazard Technology Partners, LLC v. Qinetiq North America Operation
C.A. No. 6815-VCL
Delaware Supreme Court
April 23, 2015

The Delaware Supreme Court interpreted earn-out provisions in a merger agreement where the buyer was prohibited from taking any action to divert or defer revenue from the target company with the intent of reducing or limiting the seller's earn-out payment.

The Facts

The buyer and seller entered into a merger agreement pursuant to which the buyer agreed to pay $40 million at closing and conditional upon certain revenue targets being achieved, additional earn-out amounts of up to another $40 million.

The agreement's earn-out provisions precluded the buyer from taking any action to divert or defer revenue with the intent of reducing or limiting an earn-out payment.

No earn-out payment was triggered and the seller sued the buyer claiming that the buyer violated the earn-out provisions of the merger agreement and the implied covenant of good faith and fair dealing by failing to take certain actions that the seller contended would have resulted in the achievement of revenue sufficient to generate an earn-out payment.

The Court of Chancery Decision

In dismissing the seller's claims, the Court of Chancery focused on the wording of the merger agreement which indicated that in order for the buyer to breach its obligations with respect to the earn-out, it had to have acted with the intent of reducing or liming the earn-out payment. The Court found that the seller had not proven that any business decision of the buyer was motivated by a desire to avoid an earn-out payment.

The Court of Chancery also rejected the seller's implied covenant claim. The Court reasoned that as to whether conduct not prohibited under the contract was precluded because it might result in a reduced earn-out payment or no earn-out payment, applying

the language of the agreement, the buyer had a duty to refrain from that conduct only if it was taken with the intent to reduce or avoid an earn-out altogether.

The Delaware Supreme Court Decision

In the appeal, the seller argued that the Court of Chancery erred because it should have recognized that the merger agreement precluded any conduct by the buyer that it knew would have the effect of compromising the seller's ability to receive an earn-out. The seller also claimed that the Court of Chancery erred when it held that the implied covenant must be read consistently with the agreement because the specific standard in that contractual term reflected the parties' agreement about how the seller would be protected from post-closing conduct that could jeopardize an earn-out payment.

The Delaware Supreme Court dismissed the seller's appeal and held that the Court of Chancery acted properly in giving the merger agreement its plain meaning. The Court noted that the merger agreement's terms were unambiguous and that the agreement only limited the buyer from taking action intended to reduce or limit an earn-out payment.

The Supreme Court focused on the word "intent" and indicated that the seller sought to avoid its own contractual bargain by claiming that the agreement had in fact used a "knowledge" standard instead of an "intent" standard.

The Supreme Court also rejected the seller's argument that it could rely on the implied covenant of good faith and fair dealing to avoid the burden to prove that the buyer intentionally violated the merger agreement.

The Supreme Court observed that the merger agreement specifically addressed the requirements for an earn-out payment and left the buyer free to conduct its business post-closing in any way it chose so long as it did not act with the intent to reduce or limit the earn-out payment.

The Supreme Court recited the law that clear and unambiguous language in a contract should be given its ordinary and usual meaning and that when the language of an agreement is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.

In particular, the Supreme Court noted that certain affirmative post-closing covenants that the seller sought but did not obtain during the negotiations included obligations on the part of the buyer to act in good faith to maintain existing or greater levels of business, to preserve relationships of customers and cause the target company to have adequate amounts of capital required to achieve the earn-out payment, make reasonable commercial efforts to recruit and employ sufficient employees to achieve the earn-out payments, market and bid for new contracts consistent with past practice, and not divert any contracts or business opportunities from the target company to any other entity.

The earn-out, given the specificity of the merger agreement on that subject, and the negotiating history that showed that the seller had sought objective standards for limiting the buyer's conduct but lost at the bargaining table, was correctly concluded by the Court of Chancery that the implied covenant did not inhibit the buyer's conduct unless the buyer acted with the intent to deprive the seller of an earn-out payment.

The Supreme Court concluded that when conducting its analysis, it must assess the parties' reasonable expectations at the time they negotiated and entered into the contract and not rewrite the contract to appease a party who later wishes to rewrite the contract because it later believes to have entered into a bad deal.

Calma v. Templeton et al.
C.A. No. 9579-CB
Delaware Court of Chancery
April 30, 2015

The Delaware Court of Chancery decided that the awarding of restricted stock units in accordance with a company's compensation plan is subject to the "entire fairness" test.

The Facts

In 2005, Citrix Systems, Inc. adopted a compensation plan to advance the best interests of the company by encouraging stock ownership including the attribution of restricted stock units to outside directors.

Pursuant to the plan, the compensation committee had complete authority to make all decisions with respect to each award to be granted.

Although the plan did not specify the compensation that outside directors would receive annually, it did limit the total number of shares covered by an award that any beneficiary could receive in a calendar year to 1,000,000 shares.

Over the years, the plan was regularly amended, and those amendments were approved by a majority of Citrix's disinterested shareholders in informed and un-coerced votes.

The plaintiff shareholder commenced a derivative lawsuit challenging the awarding of restricted stock units granted to eight outside directors arguing that, when combined with the cash payments that the corporation's outside directors received, the restricted stock unit awards were excessive when compared to the compensation received by directors of the corporation's industry competitors.

The plaintiff also asserted that the 1,000,000 share limit on awards per person per calendar year was not a genuine limit as at the time the complaint was filed, 1,000,000 shares of the corporation were worth over $55 million.

The Decision

The defendants brought a motion to dismiss the plaintiff's claim. In considering whether it should do so, the Court of Chancery held that since the directors' compensation decisions regarding themselves are conflicted transactions, the business judgment rule did not apply. Accordingly, the Court held that those decisions would have to pass the onerous "entire fairness" test.

In order to do so, the directors would have to demonstrate that the shareholders had ratified the compensation decisions.

The Court went on to identify the following two key principles regarding the role of ratification as a defence:

- Ratification requires that a majority of informed, un-coerced, and disinterested stockholders vote in favor of a specific decision of the board of directors
- If ratification is found to have occurred, then the standard of review is the "waste" meaning majority shareholder approval serves to ratify most board decisions but not those that are so egregious as to constitute corporate waste

Applying the principles to the facts at hand, the Court found that although the compensation plan and its amendments had been approved by a majority vote of informed, un-coerced and disinterested stockholders, the stockholders were never asked to approve any action on the specific degree of compensation for the corporation's outside directors.

Effectively, although the stockholders may have voted on a corporation level compensation policy, the vote did not deal with any effect that was specific to the outside directors. Specifically, the vote did not establish a director specific maximum beyond the 1,000,000 share limit that applied to all eligible persons. Therefore, the vote did not amount to "ratification" of a board decision relating to directors' compensation because no such decision was reflected in the compensation plan that was voted on.

The Court ultimately held that in the circumstances, the appropriate standard to apply is the "entire fairness" test and that it was reasonably conceivable that the restricted stock unit awards were not entirely fair and that the board had breached its fiduciary duty.

Consequently, the motion to dismiss the plaintiff's claim was denied with respect to the fiduciary duty claim.

Multilateral CSA Notice to Amendments to National Instrument 45-106 Prospectus Exemptions Relation to the Offering Memorandum Exemption

On October 29, 2015, the securities regulatory authorities in Alberta, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan (the Participating Jurisdictions) published Multilateral CSA Notice of Amendments to National Instrument 45-106 Prospectus Exemptions Relating to the Offering Memorandum Exemption.

The amendments are significant in that they finally introduce an offering memorandum prospectus exemption in Ontario and modify the existing offering memorandum exemption in the other Participating Jurisdictions to augment the level of investor protection. As a result, the offering memorandum exemption will be available in all jurisdictions of Canada which should enhance access to capital across Canada while simultaneously introducing key investor protection measures.

The following are some of the key investor protection measures included in the offering memorandum exemption:

- Non-reporting issuers will be required to, among other measures, provide investors with audited annual financial statements and an annual notice describing how the proceeds raised under the offering memorandum exemption were used
- Any marketing materials will be required to be incorporated by reference in the offering memorandum so that they are subject to the same liability as the disclosure provided in the offering memorandum in the event of a misrepresentation
- Individual investors relying on the offering memorandum exemption will be subject

to investment limits in most cases

- All investors will be required to sign a risk acknowledgement form

Individual investors will be limited in the amount that they can invest in any 12-month period under the offering memorandum exemption in the Participating Jurisdictions.

In particular, during any 12 month period:

- An individual investor:
  - who is a not an "eligible investor," because the investor does not meet a threshold of income or assets, may invest a maximum of $10,000
  - who is an eligible investor may invest a maximum of $30,000
  - who is an eligible investor and who receives suitability advice from a registered professional may invest a maximum of $100,000

Aside from the per investor limitations, there is no maximum aggregate amount of funds that an issuer may raise under the offering memorandum exemption in the Participating Jurisdictions.

The amendments also introduce some continuous disclosure obligations for non-reporting issuers that avail themselves of the offering memorandum exemption in the Participating Jurisdictions as they will need to make audited annual financial statements reasonably available to investors under the offering memorandum exemption within 120 days of the issuer's year-end, together with a description of the use of proceeds.

With respect to marketing materials, issuers using the offering memorandum exemption will have to incorporate by reference any marketing materials used in connection with the distribution.

Marketing materials will also have to be filed with or delivered to the applicable securities regulators.

CSA Multilateral Staff Notice 58-307
Staff Review of Women on Boards and in Executive Officer Positions—
Compliance with NI 58-101 Disclosure of Corporate Governance Practices

Further to National Instrument 58-101 Disclosure of Corporate Governance Practices which required non-venture issuers to disclose certain information regarding representation of women on boards and in executive officer positions, on September 28, 2015 the Canadian Securities Administrators released staff notice 58-307 which summarized its findings of a review of corporate governance disclosure of a sample of issuers.

NI 58-101 requires disclosure regarding:

- the number and percentage of women on the issuer's board of directors (the board) and in executive officer positions
- director term limits or other mechanisms of board renewal
- policies relating to the identification and nomination of women directors
- consideration of the representation of women in the director identification and nomination
- process and executive officer appointments

- targets for women on boards and in executive officer positions

In the staff notice the CSA noted that:

- 49% of the issuers have at least one woman on their board
- 60% of the issuers have at least one woman in an executive officer position
- 15% of the issuers have added one or more women to their board this year
- over 30% of the issuers with a market capitalization above $2 billion have adopted a written policy for identifying and nominating women directors
- of those issuers with written policies, 48% disclosed that they were adopted or updated in 2015
- 60% of the issuers with a market capitalization above $2 billion have two or more female directors
- 19% of the issuers adopted director term limits, while 56% adopted other mechanisms of board renewal

According to the notice, the results of the CSA's review did not vary significantly by region; however, issuer size and industry were the most significant indicators of whether issuers adopted initiatives to increase the representation of women on their board or in executive officer positions.

The CSA commented that it was evident that too few issuers adopted written policies on identifying and selecting candidates for directorships, or took steps to implement such policies. In particular, certain business sectors, such as oil and gas, technology, biotechnology, hospitals and environmental industries had the lowest adoption rates at less than 10%.

Toronto Stock Exchange issues Staff Notice regarding Emerging Market Issuers

Introduction

On July 13, 2015, the Toronto Stock Exchange (the TSX) published a staff notice setting out guidance for emerging market issuers.

Background and Purpose

Focusing on a narrower group of applicants and issuers that have a higher risk profile as a result of significant connections to emerging market jurisdictions (emerging market issuers in jurisdictions outside of Canada, the United States, the United Kingdom, Western Europe, Australia and New Zealand) the staff notice is designed to improve transparency in respect of TSX practices and procedures with the principal purpose of providing a better understanding of listing requirements in relation to listing emerging market issuers, and the rationale underlying such requirements.

What makes an issuer an Emerging Market Issuer

The staff notice clarifies that the TSX will consider the following factors in determining whether an applicant or an issuer is considered an emerging market issuer:

- residency of the issuer's "mind and management"
- jurisdiction of the principal business operations and assets
- jurisdiction of incorporation
- nature of the business
- corporate structure

Potential Risks Associated with Listing Emerging Market Issuers

The staff notice identified the following principal areas relevant to listing in which there may be greater risks associated with Emerging Market Issuers:

- Management and Corporate Governance
  - lack of knowledge of Canadian regulatory requirements
  - lack of local business knowledge
- Financial Reporting
  - if the issuer's Canadian auditors lack sufficient experience and expertise in the applicable jurisdiction, the likelihood of errors or oversights in the audit process, and correspondingly the issuer's financial statements and related disclosure, may increase
- Non-Traditional Corporate/Capital Structures
- Legal Matters Relating to Title and Ability to Conduct Operations
  - validity of title to principal operating assets
  - legal right to conduct operations

Guidance

Amongst the guidance provided by the staff notice are the following:

- Emerging market issuers should arrange a pre-filing meeting with the TSX which will allow the TSX and the applicant to communicate directly and identify concerns (and how to address them) at an early stage
- In order to be satisfied that officers, directors and significant security holders will conduct the business of the company with integrity as well as in the best interest of security holders and the investing public, the TSX takes into consideration the public company experience of management and the board, the independence of the board in relation to management and the significant security holder (if any), local business knowledge and experience in the jurisdiction of the applicant's principal business operations, and the qualifications of the CFO and audit committee members
- The TSX considers independent oversight of management by the board a key component in support of the business of the applicant. Where an applicant has a significant or controlling security holder who also holds a key position in management, adequate independent oversight is of particular importance
- The TSX considers it essential that there be at least one director with significant knowledge and experience regarding the jurisdiction where the issuer principally conducts its business
- Where management and board members are not all fluent in a common language or present in similar time zones, TSX may require that the Emerging Market Issuer present a communication plan to satisfactorily demonstrate how effective communication will occur
- The suitability of the CFO will be scrutinized including looking at the experience applying International Financial Reporting Standards and the level of understanding of Canadian Securities laws related to financial reporting matters
- The appropriateness of audit committee members will be scrutinized including an

evaluation of relevant Canadian financial reporting skills and general familiarity with Canadian securities regulations related to continuous disclosure obligations

- In exceptional circumstances where the TSX is not satisfied that an auditor will be able to adequately discharge its responsibilities for a particular issuer, the TSX may require a change of auditors as a condition of listing
- The TSX expects applicants to have a comprehensive internal control system in place prior to listing on the TSX. The TSX may request that the CEO and CFO confirm to the TSX in writing that the issuer's internal control over financial reporting provides reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with IFRS or GAAP
- Sponsorship by a participating organization of the TSX may be an important factor in considering whether an applicant is suitable for listing. When evaluating applications from Emerging Market Issuers, the TSX is more likely to rely on the sponsor to provide relevant information in respect of the business environment and key risks in the jurisdiction where the applicant principally operates
- In its discretion, the TSX may take an expanded approach to reviewing transactions which may not strictly meet the definition of "related party transactions" under securities law, but where the transaction does not appear to have been negotiated at arm's length
- Where a complex or non-traditional corporate structure is used, the applicant must provide the TSX with a satisfactory explanation as to why such a structure is necessary and the TSX needs to be satisfied that security holders will be adequately protected