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1. *Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2006] O.J. No. 2818*

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Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2006] O.J. No. 2818

Ontario Judgments

Ontario Superior Court of Justice
C.L. Campbell J.
Heard: June 15-16, 2006.
Judgment: July 12, 2006.
Court File No. 04-CL-5563

[2006] O.J. No. 2818 | 20 B.L.R. (4th) 249 | 149 A.C.W.S. (3d) 873 | 2006 CarswellOnt 4263

Between Catalyst Fund General Partner I Inc., (Applicant), and Hollinger Inc., Lord Conrad Black, Peter White, David Radler, Jack Boultbee and Barbara Amiel-Black, Gordon Walker, Paul Carroll and Donald Vale, (Respondents)

(61 paras.)

Case Summary

Civil procedure — Judgments and orders — Setting aside judgments or orders — Motion by the company to set aside a portion of a consent order in order to pursue relief against certain former directors allowed — The company contended that the directors breached certain obligations in approving severance and termination payments — The court found that the order did not adjudicate the appropriateness of the parties' settlement, or operate as a contract — The order did not determine the merits of the payments in question sufficient to amount to issue estoppel — The company raised an issue that required a determination of the merits of the approved payments.

Corporations and associations law — Corporations — Directors — Liability — Indemnity clauses — Motion by the company to set aside a portion of a consent order in order to pursue relief against certain former directors allowed — The company contended that the directors breached certain obligations in approving severance and termination payments — The directors contended that they were entitled to indemnification of legal costs if the order was set aside — The court found that the nature of the allegations meant that the directors were not entitled to indemnification until a determination of the claim against them.

Motion by Hollinger to vary or set aside a portion of a consent order -- The consent order was the product of settlement negotiations that among other things, resulted in a reconstituted board of directors for Hollinger -- Hollinger sought to vary the order in order to seek relief against certain former directors in respect of severance and termination payments approved by the former directors -- Hollinger contended that the directors placed their own interests before those of the company in approving the payments -- The respondent directors submitted that the consent order represented a contractual entitlement that operated as either res judicata, or an estoppel against Hollinger -- The directors maintained that they were entitled to indemnification from Hollinger for legal fees if the relief sought was granted -- Hollinger submitted that the foundation of the consent order was negated because the directors were in breach of their statutory good faith obligations at the time of its negotiation.

HELD: Motion allowed.

The approval of the consent order did not operate as an adjudication of the appropriateness of the parties' agreement, nor did it operate as a contract -- The order acted as a res judicata to nothing more than the causes of action it settled -- There was no adjudication on the merits of the issue raised by Hollinger concerning the

financial arrangements approved by the directors -- Hollinger raised an issue for reconsideration of the consent order that required a factual determination of the fairness and reasonableness of the payments in question -- The nature of the allegations meant that the directors were not entitled to indemnification until a determination of the claim against them.

Statutes, Regulations and Rules Cited

Canada Business Corporations Act, R.S.C. 1985 c. C-44, s. 120(7), s. 229

Ontario Rules of Civil Procedure, Rule 1.03(1)

Counsel

Samuel R. Rickett for Hollinger Inc.

John Longo for Aird & Berlis

H. James Marin, Diane L. Evans for Gordon Walker, Paul Carroll, Robert Metcalfe and Allan Wakefield

Douglas Gordon Garbig for Donald Vale

REASONS FOR DECISION

C.L. CAMPBELL J.

1 Hollinger Inc. ("Inc.") seeks to vary or set aside at least a portion of the Consent Order made in this Court on July 8, 2005. The purpose of the relief sought is to enable Inc. to seek relief against certain former directors of Inc. in respect of severance and termination payments, which they as the directors of Inc. approved.

2 Messrs Walker, Carroll, Metcalfe and Wakefield, the respondent directors, submit that the Consent Order followed negotiation and agreement between various parties associated with Inc. and represents a contractual entitlement that operates as either a *res judicata* or an estoppel against Inc., as the particulars of their agreements were fully disclosed to the Court.

3 There are three issues raised in the motion material before the Court, which can be summarized as follows:

(a) Is the Consent Order at issue in the circumstances in which it was granted one that can or should be varied?

(b) Does the material before the Court exhibit at least a *prima facie* case to question the business judgment of the respondent directors in the circumstances?

(c) In any event of the determination of issues (a) and (b), are the respondent directors able to call on Inc. to indemnify them for legal fees that have and may be incurred?

The Consent Order

4 This Court appointed Ernst & Young as Inspector of Inc. under s. 229 of the *Canada Business Corporations Act* in September of 2004. At the time of the appointment of the Inspector, Messrs Walker, Carroll and Vale were already directors of Inc. Subsequently Messrs Metcalfe and Wakefield were appointed to replace certain directors whom the Court had removed.

5 At the time of the events that gave rise to this motion, voting control in Inc. rested with the Ravelston Corporation ("Ravelston"), which in turn was controlled by Lord Black through a holding corporation.

6 In March 2006, this Court was apprised of a proposed "going private" transaction in Inc., initiated by Ravelston. The Court was neither asked nor did it approve that transaction.

7 By endorsement dated March 7, 2006, the Court became aware of proposed indemnity for the Board of Directors in the event of the success of the "going private" transaction. Again there was no approval sought or granted for the proposed indemnity; rather, a direction was made that any party could return to Court for directions, if appropriate. The matter was left to the Board of Directors in the first instance.

8 During June 2006, the parties to this Catalyst Application were apparently involved in settlement negotiations. Among other matters, the Application questioned the financial arrangements between the respondent directors and Inc.

9 I accept the characterization of what preceded the July 8 appearance before me, as set out in the factum of the respondent directors in paragraph 64, as follows:

> The Consent Order was the subject of significant negotiation and discussion amongst counsel for the various parties, and the ultimate settlement contemplated a reconstituted board in return for, among other things, the dismissal with prejudice of the allegations in Catalyst's application, releases (which were embodied in the July 7th resolutions in accordance with the settlement and the terms of the Consent Order and were once again known to all), a prohibition placed on Hollinger from challenging the March 7, 2005, resolutions which included the release, and the payment of severance to the Independent Directors. These terms were all included in the Consent Order. The parties to the Consent Order were fully aware of the allegations made against the Independent Directors and elected to compromise all issues.

10 The position now taken by Inc. is, given the issue (remuneration of independent directors) and the fact that there was no outside objective review of their approval, there was no one who was disinterested who could be said to have only the interests of Inc. in mind in the approval process.

11 Inc. now submits that each of Catalyst, Ravelston and McLaren (an individual representing certain shareholders) had their own interests involved in the negotiations that led up to the agreement that became the Consent Order and did not represent only the interests of Inc.

12 This is neither the time nor place to make any finding with respect to the fairness of the financial agreements reached, except to say there does not appear to be evidence (at least at this stage) to support the proposition that Inc., apart from the respondent directors, was independently advised on the appropriate quantum of remuneration of those directors, nor was the decision they made supported by disinterested third parties with objective criteria.

13 It may well be that the remuneration is independently and objectively justifiable but one does not need to look beyond newspaper reports and common sense to suggest that it needs further explanation for its justification.

14 Counsel for the respondent directors urges a restrictive basis on which a Court can re-open a Consent Order.

15 The general proposition relied on is that a Consent Order that follows on Minutes of Settlement between parties represents a binding contract between those parties that will only be re-opened where a settlement is manifestly unfair or resulted from mistake.

16 In *Mohammed v. York Fire & Casualty Insurance Co.*, *[2006] O.J. No. 547* (C.A.), the plaintiff's counsel had settled on his behalf a fire loss claim where the defence was that he intentionally set the fire. Following a successful appeal from a criminal conviction of arson with respect to the fire, the plaintiff sought to set aside the Minutes of Settlement and Consent Order.

17 Lang J.A., speaking for a unanimous appellate panel, summarized the operative principles for the setting aside of a Consent Order in the following paragraphs of their reasons, which I adopt:

> [34] Minutes of settlement are a contract. A consent judgment is binding. Both are final, subject to reasons to set them aside. Finality is important in litigation. This is so for the sake of the parties who reached their bargain on the premise of an allocation of risk, and with an implicit understanding that they will accept the consequences of their settlement. Finality is also important for society at large, which recognizes the need to limit the burdens placed on justice resources by re-litigation, a limitation reflected in the doctrine of *res judicata*: See *Tsaoussis (Litigation Guardian of) v. Baetz*, *1998 CanLII 5454* (ON C.A.), *(1998), 165 D.L.R. (4th) 268* at paras. 15, 17, 18 (Ont. C.A.).
>
> [35] For these reasons, the avenues to set aside a settlement and consent dismissal are restricted. Rule 59.06 sets out the procedure for setting aside such an order. It provides that a party may bring a motion in the original proceeding to "have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made".
>
> [36] However, this court has said that the rule, while providing an expeditious procedure to determine whether an order should be set aside, does not prescribe or delineate a particular test: *Tsaoussis* at para. 39. Rather, to succeed, "[t]he appellant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line" (para. 20).
>
> [37] This case is analogous to *Tsaoussis*, which also considered the consequences of a change in circumstances following a judgment. There, two years after a judgment approving the settlement of a minor's personal injury claim, a motion was brought on behalf of the minor to set aside the judgment on the basis that the child's injuries were more extensive than had been expected. The minor's motion was dismissed.
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> [38] In *Tsaoussis*, this court confirmed the importance of finality in litigation at para. 20:
>
> > Attempts, whatever their form, to reopen matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant

must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of litigation.

[39] In terms of rule 59.06(2)(a), the court in *Tsaoussis* stated at para. 44:

> These and numerous other authorities (e.g. *Whitehall Development Corp. v. Walker*, *(1977), 17 O.R. (2d) 241*) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus [citations omitted].

18 For its part, Inc. now urges that the actions of the respondent directors in context represent a breach by those directors of their obligations imposed under the *Canada Business Corporations Act*, *R.S.C. 1985 c. C-44, s. 122* (the "CBCA").

19 Counsel for Inc. submits in paragraph 209 of its factum, as follows:

> Directors are entitled, and indeed encouraged, to retain independent advisers and subsection 123(5) of the CBCA deems compliance with subsection 122(1) duties if the director relied on good faith on a report of a person whose profession lends credibility to the report. However, good faith reliance requires both reasonable oversight and that the directors must comply with the professional advice.

20 Inc. relies on the proposition that since a consent order depends upon the existence of a valid underlying agreement between the parties, a consent order founded upon a contract or term that is ineffective by statute is liable to be set aside or varied. See *Re Wright*, *[1949] O.J. No. 3* (H.C.) at paragraph 8.

21 Further reliance is placed on the decision of the Court of Appeal of England in *Great North-West Central Railway Co. v. Charlebois*, *[1899] A.C. 114* at 124 (P.C.) in which Lord Hobhouse wrote the following:

> It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross-action, were equally insisting on the contract. The president, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the court should not decrees that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded. [emphasis added]

22 A more recent authority applying *Great North-West Central* is the decision of the Court of Appeal of Alberta in *Angus v. R. Angus Alberta Ltd.* (1988), *58 Alta. L.R. (2d) 76* at 84-85 (C.A.) In that case, the defendant corporation had agreed to repurchase the shares of certain shareholders in a manner that contravened the provisions of the Alberta *Companies Act*. The selling shareholders commenced an action seeking specific performance, which the company did not defend against. A consent order in favour of the selling shareholders was obtained without the

illegality of the company's actions being brought to the court's attention. In a subsequent action seeking to set aside the transactions, the court held that the agreements and the consent order founded upon the agreements were void. Belzil J.A. held:

> The company could not do what was legally beyond its powers by a simple expedient of an unopposed specific performance action. That such a consent judgment has no legal efficacy to validate what was beyond the power of the company itself was settled by the Privy Council on appeal from the Supreme Court of Canada in *Great North-West Central Railway Co. v. Charlebois*[.]

23 Counsel for the respondent directors submits that the conditions required for remedies such as rectification, recession and reputation amounting to fraud have not been met, nor has Inc. shown the "precise form" in which the Consent Order can be made to express a prior intention. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, *[2002] 1 S.C.R. 678* at pp. 692-702 is relied on, but in my view is to be distinguished. The question in that case concerned whether a written document reflected a prior oral agreement. That is not the issue here.

24 In my view, the submission on behalf of the respondent directors misses the point urged by Inc., which simply is that in the absence of objective evidence from disinterested sources of the fairness and reasonableness of the remunerative package voted on by only those individuals, there may be a breach of statutory duties. The issue goes to the capacity of the respondent directors to contract on behalf of Inc., not whether the agreement reflected the intention of the respondent directors.

25 The Consent Order in question did not arise from the usual two party adversarial action. Catalyst brought an application under the oppression remedy section of the CBCA, alleging director misconduct, as it had done previously with respect to the previous Board, which resulted in the appointment of the Inspector.

26 As a result of the appointment of the Inspector, and later the Receivership of Ravelston (the majority voting shareholder of Inc.) and the continuing supervision by the Court, Inc. has not had the management and governance it would otherwise have had.

27 The circumstances of the approval by this Court of the terms of the Consent Order did not in any way operate as an adjudication of the appropriateness or otherwise of the agreement that had been reached by the parties before the Court, except to record the parties' agreement. Indeed, as is unusual in many Court orders but not uncommon in matters where continuing Court supervision is envisaged, the Order in question permitted any party to return to Court for further direction if circumstances warranted. The Consent Order did not operate as a contract in the sense referred to in a number of the authorities.

28 I accept that the respondent directors are of the view that they honestly and openly brought all aspects of their agreements before the Court, which approved them.

29 Neither the approval of the Consent Order nor the lack of adjudication in respect of the agreements should be taken as a conclusion other than there is no objective evidence of the appropriateness of directors' remuneration being in the interests of Inc. apart from that presented by interested parties and the other parties to the settlement, the respondent directors.

30 A Consent Order may operate as a *res judicata* with respect to the causes of action settled by the Consent Order. Issue estoppel, however, does not apply where there has been no adjudication on the merits. See *Lawyers Professional Indemnity Company v. Geto Investments Ltd.*, *[2001] O.J. No. 2616*, *54 O.R. (3d) 795* (S.C.J.) In my view neither of these principles are applicable to validate the Consent Order in this matter.

The Test for the Exercise of Business Judgment

31 The growing jurisprudence on the test to be employed on the business judgment of self-interested directors

points to both a subjective as well as an objective test. A decision must be fair and reasonable to the company when it was approved.

32 The following sections of the CBCA create the statutory duty:

> 120(7) A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the director or officer is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, because of the director's or officer's interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or committee of directors that considered the contract or transaction, if
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> (a) disclosure of the interest was made in accordance with subsections (1) to (6);
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> (b) the directors approved the contract or transaction; and
>
> (c) the contract or transaction was reasonable and fair to the corporation when it was approved. [Emphasis added]
>
> ***Canada Business Corporations Act*, *R.S.C. 1985, c. C-44, s. 120*(7)**

33 The following passages from *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* *(2002), 27 B.L.R. (3d) 53* (Ont. S.C.J.), a judgment of Lax J. of this Court, affirmed by the Court of Appeal *(2004), 42 B.L.R. (3d) 34* (Ont. C.A.), state the test:

> [187] Section 120 of the CBCA presumes the invalidity of a contract or transaction between a director or officer and the corporation unless approval of the directors is obtained, the disclosure requirements are met and the contract was reasonable and fair to the company when it was approved. The section appears to contemplate that the contract must meet all three parts of the test, but there is little to guide me on its interpretation.
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> ...
>
> [194] The purpose of section 120 of the CBCA is to mitigate the strictness of the common law principle relating to contracts between a director and a corporation. In Cannaday, the court appears to be concerned that in setting aside a contract, a party could be unjustly enriched if benefits are obtained for which no consideration is required. I do not regard this as a serious concern here. In any event, a court is normally quite capable of weighing the equities to arrive at a just result. For example, in Rooney, the court found the "golden parachute" provision was unenforceable, but then went on to award damages against the corporation for wrongful dismissal.
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> ...
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> [209] UPM has satisfied me that it is entitled to a remedy under section 241(3)(h) of the CBCA. I conclude that the appropriate remedy in this case is to set aside the Agreement. There are also grounds for doing this under section 120(7) of the CBCA.

34 I am satisfied on the authorities cited in the above decision that under s. 120(7) of the CBCA, both the substance of the contract and the process by which it was made must be reasonable and fair to the corporation.

35 The *subjective* belief of a self-interested director that he is acting in the best interests of the corporation is insufficient where objectively that is not the case and the subjective belief is unreasonable. See *Catalyst Fund*

General Partner I Inc. v. Hollinger Inc., et al., [2006] O.J. No. 944, 2006 CanLII 7392 (Ont C.A.) at paragraphs 104-106.

36 All of the foregoing should be taken as nothing more than at this stage, Inc. has raised an issue for the reconsideration of the Consent Order, concerning transactions involving self-interested directors dealing with (a) the $500-per-hour compensation; (b) the termination bonuses; (c) the resolutions purporting to authorize or grant releases; and (d) the second indemnification trust.

37 There will have to be a factual determination of the fairness and reasonability to Inc. of those commitments. How and by what process that inquiry takes place will require further submissions from the parties and directions from the Court.

38 Inc. proposes that the inquiry proceed by ordinary action. Given the time and expense already incurred by the parties, I would think there might be a more expeditious trial of issue, which would be in the interests of all parties.

39 I note that none of the other parties interested in the Consent Order, other than Inc. and the respondent directors, appeared on this Application. It remains to be determined whether they wish or may be ordered to provide evidence on the issue.

40 This decision should not be taken as any determination of the merits. Inc. has raised a serious question as to whether or not the Consent Order should be vacated. A factual inquiry answering the questions raised is necessary to determine whether the Consent Order should stand. A further appointment will be required to deal with the process for that inquiry.

Indemnity Agreement

41 The third issue raised by the respondent directors dealt with their entitlement to indemnity in respect of exposure to legal costs incurred.

42 As Inc. was unable to obtain directors' and officers' insurance for the respondent directors, indemnification trusts were set up to provide for reimbursement for legal costs incurred in respect of certain claims, should they be made against them.

43 Each of the respondent directors entered into Indemnification Agreements funded by the trusts under certain conditions set out in the Agreements.

44 The first sentence of section 3.2 of the First Indenture and section 3.3 of the Second Indenture provide as follows [with differences in wording in square brackets]:

> If an Independent Director wishes to make any claim for payment of an Indemnified Amount which Hollinger is obligated to pay pursuant to the [Hollinger Indemnification Agreement/Indemnification Agreement] between such Independent Director and Hollinger, the Independent Director shall deliver a copy of the Indemnification Notice to the Trustee, together with reasonable details and supporting documentation with respect to such claim.

45 The definitions of "Indemnified Amount" and "Indemnification Agreements" are set out in s. 1.1 of the two documents.

> "Indemnified Amount" means an amount which Hollinger is obliged to pay pursuant to the Hollinger Indemnification Agreements in accordance with the terms thereof.
>
> "Indemnification Agreements" means, collectively, (i) the indemnification agreements between Hollinger and each of the Independent Directors (the "Hollinger Indemnification Agreements"); (ii) such

indemnification agreements as may exist between Argus and the Independent Directors; and (iii) the indemnification agreements between Ravelston and each of the Independent Directors, a copy of each of which is attached as Schedule "A".

46 Section 3 of each Indemnification Agreement requires Inc. to seek court approval for payment of the director's legal expenses "if the director's conduct complied with the Standards of Conduct." The "Standards of Conduct" are defined in section 1 to mean, in this circumstance, that the director acted honestly and in good faith with a view to the best interests of Inc. The relevant portion of section 1 defining "Standards of Conduct" and section 3 provide as follows:

1. Except in respect of an action by or on behalf of the Corporation to procure a judgment in its favour, the Corporation will indemnify and save harmless the Director and his heirs and legal personal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation or Other Entity, if (a) the Director acted honestly and in good faith with a view to the best interests of the Corporation, and (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the Director had reasonable grounds for believing that this conduct was lawful (both (a) and (b) being hereinafter referred to as the "Standards of Conduct").

3. In respect of an action by or on behalf of the Corporation or Other Entity to procure judgment in its favour to which the Director is made a party by reason of being or having been a director or officer of the Corporation or a director or officer of the Other Entity, the Corporation will make application for approval of the court having jurisdiction to indemnify the Director and his heirs and legal personal representatives, against all costs, charges and expenses reasonably incurred by him in connection with such action if the Director's conduct complied with the Standards of Conduct. [Emphasis added.]

47 The operative portions of the Indemnification Agreements are paragraphs 3, 5 and 6, as follows:

3. In respect of an action by or on behalf of [Inc.] ... to procure judgment in its favour to which the director is made a party by reason of being or having been a director or officer of [Inc.] ... [Inc.] will make application for approval of the court having jurisdiction to indemnify the Director and his heirs and legal personal representatives, against all costs, charges and expenses reasonably incurred by him in connection with such action if the Director's conduct complied with the Standard of Conduct.

5. Subject as hereinafter provided, [Inc.] will pay all expenses covered by this indemnity agreement and incurred by the Director and his heirs and legal personal representatives, in defending any civil, criminal or administrative action or proceeding to which the Director and his heirs and legal personal representatives are made a party by reason of the Director being or having been a director or officer of [Inc.] ... in advance of the final disposition of such action or proceeding. In respect of an action by or on behalf of [Inc.] to procure judgment in its favour and in respect of which [Inc.] is obligated by section 3 hereof to make application for approval of the court having jurisdiction to indemnify the Director and his heirs and legal personal representatives, [Inc.] shall pay all such expenses only after obtaining approval of the court having jurisdiction.

6. If the Director wishes to make any claim for payment of an amount (an Indemnified Amount) which [Inc.] is obliged to pay pursuant to this Agreement, the Director shall deliver a written notice of such claim for payment to [Inc.], together with reasonable details and supporting documentation with respect to such claim (such written noticed referred to herein as an Indemnification Notice). [Inc.] shall promptly pay all Indemnified Amounts to the Director (or as the Director may direct). The Director shall repay to [Inc.], upon demand, all Indemnified Amounts if and to the extent that it is

> determined by a court of competent jurisdiction that the Director's conduct did not comply with the Standards of Conduct or is otherwise not entitled to Indemnification.

48 The respondent directors take the position that they have delivered notice under the Agreements but Inc. has refused to indemnify or failed to take steps to apply to the Court for authorization to make such payments.

49 Two issues arise from the directions sought by Inc. The first is whether the requirement to indemnify can be triggered before the directors have been subject to a final judicial determination of whether or not they acted in good faith. The second question is whether the indemnity can arise when the claim is one by the corporation itself as opposed to a third party.

50 The opening words, both of s. 1 defining "Standards of Conduct" and of s. 3 of each Indemnification Agreement, commence, "Except in respect of an action by or on behalf of the Corporation."

51 Counsel for the respondent directors urges that a distinction should be made between an action and a motion within this application that seeks to set aside a Consent Order.

52 Black's Law Dictionary, 6th ed., the West Group, states in respect of the word "action:"

> [The] term in its usual legal sense means a lawsuit brought in a Court; a formal complaint within the jurisdiction of a court of law.

53 *The Rules of Civil Procedure* in Rule 1.03(1) distinguishes between an "action" and an "application" for the purpose of administering two different processes by which a matter may be brought before the Court.

54 I am of the view that the word "action" as set out in the Indemnification Agreement uses the word in its more generic sense rather than procedural definition under the Rules. There would be no reason that I am aware of to prefer the procedural to the generic use of the word in the context now before the Court.

55 It would be contrary to common sense to require the Corporation to indemnify directors against whom the allegation is made by the Corporation of "lack of good faith without a view to the best interests of the Corporation." At this stage, there is simply an allegation. If the directors are successful, they will be entitled to be reimbursed for the legal fees they have incurred.

56 Section 5 of the Indemnification Agreement does contemplate that where a proceeding has been commenced against a director by a party other than the Corporation, a director may expect payment of legal costs "in advance of final disposition." The absence of those words from the clause where it is the Corporation commencing the proceeding adds force to the argument that indemnity is not available in such a case until it is concluded.

57 For the foregoing reasons, the Court directs that the respondent directors are not entitled to recover legal expenses at this time and until there has been a determination of the "claim" of Inc. against them.

Donald Vale

58 A motion for summary judgment on behalf of Donald Vale was returnable at the same time as the above relief sought.

59 Counsel for Vale acknowledged that in the event of the disposition above-noted on the two issues, the motion would not succeed and would be abandoned or adjourned to the judge hearing the other relief.

60 In summary, a trial of issue will be directed following further submissions dealing with vacating the Consent Order. The respondent directors are not entitled to be indemnified with respect to the legal costs of that proceeding until it is finally determined in their favour.

61 I would have thought that the issue of costs might best be left to the judge hearing the motion by Inc. If any counsel feels otherwise, written submissions should be made within the next three weeks.

C.L. CAMPBELL J.

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