Acquirors' shareholders do not have the right to vote on large share issuance in connection with M&A transaction

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McEwen v. Goldcorp Inc.(2006), 21 B.L.R. (4th) 306 (Ontario Divisional Court) – November 3, 2006

The Ontario Superior Court of Justice, in a ruling subsequently affirmed by the Divisional Court, has foiled the efforts of a disgruntled shareholder of an acquiror (Goldcorp Inc.) to force a shareholder vote in respect of a significant share-for-share transaction. The ruling confirms that courts will not generally be willing to characterize a multi-step acquisition structure as an “arrangement” under the “plan of arrangement” provisions of Ontario’s *Business Corporations Act* (OBCA) if the parties themselves do not so characterize it and if each of the steps they propose are within the law. Had the Court ruled otherwise, the Goldcorp shareholders would have been entitled, as of right, to vote on what would then have been a statutory plan of arrangement.

Goldcorp and target Glamis Gold Ltd. considered a number of transaction structures. Having originally intended to proceed by way of statutory amalgamation, they moved on to a two-step approach, under which Glamis would be acquired by a wholly-owned subsidiary of Goldcorp, which would then be acquired by its parent. However, after concluding that the automatic tax rollover that that would produce was not really necessary, the companies agreed to restructure the deal as a straightforward share exchange (plus nominal cash consideration), with the result that Glamis’ shareholders would own 40% of the enlarged Goldcorp while Goldcorp would hold 100% of Glamis. To complete the transaction and satisfy certain tax requirements of its U.S. shareholders, Goldcorp agreed that within 30 days of closing it would carry out a vertical short-form amalgamation between itself and (what would by then be) its wholly owned subsidiary Glamis.

One prerequisite of this transaction was that Glamis, which would be undergoing a change of control, would seek court approval under the “plan of arrangement” provision of the British Columbia *Business Corporations Act* (BCBCA). Proceeding this way required the approval of Glamis’ shareholders. (Plans of arrangement, available under most Canadian corporations law statutes, allow business corporations to obtain court approval for complex transactions in a single step, contingent on shareholder approval.) The Goldcorp litigation arose when Robert McEwen, the company’s largest individual shareholder, demanded that Goldcorp also hold a shareholder vote. The circumstances would not normally have obliged Goldcorp to seek the approval of its shareholders – for example, there was no change of control and no fundamental change to the nature of Goldcorp’s business – but McEwen argued that the transaction as proposed should be regarded as a plan of arrangement from Goldcorp’s point of view. He also argued that the transaction violated the OBCA’s provisions relating to fundamental changes and oppression – arguments which, if accepted, might independently have led to a shareholder vote.

Having failed to convince the Ontario Superior Court, McEwen appealed to the Divisional Court. However, the Divisional Court upheld the ruling of Madam Justice Pepall that s. 182 of the OBCA, which provides for plans of arrangements, is "facilitative and not mandatory". The wide variety of situations enumerated under the section (reorganizations, amalgamations, share exchanges, liquidation/dissolution, etc.) are simply situations in which a corporation *may* "propose" (the term used under s. 182(2)) to proceed in this manner. There is nothing to prevent it from proceeding by any other legal means to effect a transaction.

In light of this, McEwen's principal argument – that the transaction, regarded as a totality, was "effectively" a plan of arrangement requiring a shareholder vote – held no water. The *Goldcorp* ruling essentially establishes that the plan of arrangement provisions exist for the convenience of the company (typically, to give it a way to efficiently effect a complex multi-step M&A transaction) and not for the general protection of shareholders. In proposing a structure that avoided the uncertainties that would surround a Goldcorp shareholder vote, Glamis and Goldcorp had simply been trying to get their deal done and had not strayed outside the four corners of the OBCA.

In this case, Goldcorp could clearly achieve its objective without recourse to a statutory arrangement under the OBCA. It was entitled to issue shares under s. 23(1) of the Act, as it had to acquire Glamis, without submitting the decision to shareholders. The second stage of the transaction was also achievable without a shareholder vote, in this case via s. 177(1) of the OBCA, which permits corporations to amalgamate with wholly owned subsidiaries, as Glamis would become as a result of the share exchange.

McEwen's additional grounds – that the transaction was both a "fundamental change" and "oppressive" under the OBCA – were rejected on the original Superior Court application and were not reviewed by the Divisional Court. It is worth noting that the oppression claim was rejected by Pepall J. both because the board was entitled to exercise its business judgment so as to be able to choose from various possible deal structures the one that gave Glamis the certainty it required and because McEwen could have had no reasonable expectation of a shareholder vote given the absence of precedent for such a vote with respect to a proposal to issue new shares as part of an M&A deal.

Even if the transaction as proposed diluted the Goldcorp shareholders' equity, Pepall J. accepted expert testimony that the TSX, unlike the NYSE, does not require shareholder approval to dilute equity provided that there is no material effect on control of the acquiror, even where the issuance from treasury is numerically large (equivalent to 67% of the existing issue in this case).

The absence of a TSX requirement, together with the fact that most Canadian issuers have unlimited authorized share capital, makes it highly unlikely that an acquiror in a share-for-share transaction will seek approval of its shareholders – a significant difference between Canadian and U.S. deal dynamics.

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