Ontario Court Provides Guidance on Fairness Opinions when Seeking Court Approval for Plans of Arrangement

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The Ontario Superior Court of Justice released a decision on March 28, 2014 that provides practical insight for corporate lawyers and investment bankers in regards to the court process for plans of arrangement and the content of fairness opinions.

Justice Brown granted a final order approving the plan of arrangement among Champion Iron Mines, an Ontario ***Business Corporations Act*** corporation and TSX-listed, and its acquirer, Mamba Minerals, an Australian corporation listed on the Australian Securities Exchange (ASX). In issuing a set of reasons supporting the final order (which itself is not common), Justice Brown has reminded applicants, bankers and their counsel that in order to approve a plan of arrangement the courts have to consider (i) whether statutory procedures have been met; (ii) whether the application has been put forward in good faith; and (iii) whether the arrangement is fair and reasonable. It is on the latter point that Justice Brown focusses his comments, specifically in respect of the use of fairness opinions in the court approval process for a plan of arrangement.

As is the general practice, the fairness opinion of the financial adviser to Champion was included in Champion's Management Proxy Circular of Champion along with the usual references to it in various sections of the circular. While it was noted that the fairness opinion contained details of the engagement of the financial adviser, its credentials and independence, the scope of its review and its approach to fairness, Justice Brown took issue with the fact that it did not "*disclose the specifics of the actual analysis which [the financial adviser] had performed – the "number crunching", so to speak – which could inform a reader on the issue of whether the offered consideration was within a minimum range that otherwise could have been obtained in a market-based transaction process*." This became important when the court determined that the fairness opinion was not admissible expert evidence, and as a result no weight was placed on it by the Court in making its determination that the arrangement was fair and reasonable (there being other admissible evidence to support this conclusion.)

In coming to this conclusion, Justice Brown cited **Rule 53.03(2.1) of the Ontario Rules of Civil Procedure**, which governs the content of an expert's reports. That rule requires, among other things, (i) a description of any research conducted by the expert that led him or her to form the opinion; and (ii) a list of every document, if any, relied on by the expert in forming the opinion. Because *"[t]he Fairness Opinion simply asserted an opinion, without disclosing the reasons for it…*" it was not admitted into evidence for the final order hearing. In this respect, Justice Brown was careful to point out that while the fairness opinion might very well have been supported by substantive supportive reasoning, such reasoning was not apparent on its face, thereby rending it inadmissible from an evidentiary point of view. Resembling the form of opinion typically seen on plan of arrangement applications, he noted, it would not be unfair to characterize such opinions as "cookie cutter."

The Court's comments do not deviate much from the relevant **Investment Industry Regulatory Organization of Canada** rules governing the preparation of a fairness opinion, which apply in certain circumstances (**IIROC Deal Member Rule 29.21**). Among other items, IIROC requires its dealer members to disclose in an applicable fairness opinion:

- a description of the scope of the review conducted by the Dealer Member, including a summary of the type of information reviewed and relied upon (such as the documents reviewed, individuals interviewed, facilities visited, other expert reports considered and management representations concerning information requested and furnished to the Dealer Member);

- a description of the relevant business, assets or securities sufficient to allow the reader to understand the rationale of the Fairness Opinion and the approach and various factors influencing financial fairness that were considered;

- a description of the valuation or appraisal work performed or relied upon in support of the Dealer Member's opinion or conclusion;

- the key assumptions made by the Dealer Member; and

- the factors the Dealer Member considered important in performing its fairness analysis.

In addition to this caution on the admissibility of fairness opinions, Justice Brown also took the opportunity to remind corporate lawyers that the courts are not "rubber stamps" in the plan of arrangement process. Fundamental rules of evidence have to be observed and the Court has to be given enough time to review and consider the matter before it.

While Justice Brown's comments ultimately had no impact on the Champion plan of arrangement, it serves as a fair warning that the court approval process should not be treated as a "rubber stamp". Meanwhile, authors of fairness opinions may be well advised to consider a more fulsome description of their underlying analysis to ensure their opinions are admissible as expert evidence in fairness hearings on plans of arrangement.