Unable to Unwind: Despite finding error, Alberta Court of Appeal unable to unwind plan of arrangement

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In *Taiga Gold Corp v Munday*, 2023 ABCA 12, the Alberta Court of Appeal recently declined a request to unwind a plan of arrangement despite finding that the lower court erred in approving the arrangement. The decision makes clear that if a party has concerns that a court should not have approved a plan of arrangement, it must seek a stay of proceedings of the court's approval order as it may be impossible to unwind a transaction after it has been completed.

What you need to know

The Court of Appeal affirmed that a court has no discretionary authority to approve a plan of arrangement if the procedural requirements prescribed by the Alberta *Business Corporations Act* (*ABCA*) are not strictly met. Despite finding that the lower court erred in approving the plan of arrangement, in this case, the Court of Appeal held that it was "far from clear" that it has authority to unwind a completed transaction, and it was unwilling to amend the terms of the Arrangement Agreement retroactively to provide dissent rights to warrant holders. Accordingly, if approval of a plan of arrangement is being challenged, it is necessary to file an application for a stay pending appeal in order to preserve an effective remedy on appeal.

Background

Taiga Gold Corp. (Taiga) was a mineral exploration company incorporated under the *ABCA*. On January 14, 2022, Taiga sought an *ex parte* interim order setting a date for shareholders to vote to approve a proposed plan of arrangement. The Court issued an interim order setting a meeting for February 22, 2022 for the shareholders to vote on the proposed transaction, and the Court provided directions regarding notice to be provided to shareholders, the conduct of the meeting, and dissent rights. The interim order, however, did not set a meeting of Taiga's warrant holders, nor did it impose any requirement that the warrant holders vote on the plan of arrangement.

On February 22, 2022, the shareholder meeting took place and approximately 85% of the shareholders voted to approve the plan of arrangement. At the hearing to consider a final order approving the plan of arrangement, the warrant holders opposed the application on the basis that Taiga had not met the test for approving plans of arrangement from *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 (*BCE*). In particular, in *BCE*, the Supreme Court of Canada held that before a plan of arrangement can be approved, the corporate applicant must satisfy the court that: (1) the statutory procedures have been met; (2) the application was put forward in good faith; and (3) the arrangement is fair and reasonable. In this case, the warrant holders raised concerns that, among other things, the statutory procedures were not met because a meeting of warrant holders had not been held as required by section 193(4)(b) of the *ABCA*.

The chambers judge agreed that section 193(4)(b) of the *ABCA* required that a meeting of warrant holders be held prior to approving the plan of arrangement. However, the Court concluded that the failure to hold the meeting of warrant holders was not an impediment to the court approving the plan of arrangement, as the meeting would not have affected the vote's outcome given the overwhelming number of shareholders who voted in favour of the plan of arrangement. Even if all of the warrant holders had voted against the plan of arrangement, it would still have been approved by the required two-thirds majority of security holders.

Decision

On appeal, the Court of Appeal was required to determine, among other things, whether the chambers judge erred in concluding that the *ABCA*'s procedural requirements were met; specifically, whether the court could waive the requirement under section 193(4)(b) of the *ABCA* to hold a meeting of warrant holders at which they could vote on the plan of arrangement.

The Court of Appeal held that the language of section 193(4)(b) of the *ABCA* is mandatory, not permissive, and the chambers judge therefore had no discretionary authority to approve the plan of arrangement if the statutory requirements were not met. The chambers judge therefore erred in allowing the transaction to proceed without the statutorily required meeting of warrant holders. The Court reasoned that it did not matter if the outcome of the vote was a "foregone conclusion" – without the meeting, the warrant holders lost their opportunity to try to convince shareholders to vote against the plan of arrangement, and the democratic process enshrined in the *ABCA* was thereby frustrated.

As to the appropriate remedy, the warrant holders asked the Court of Appeal to either amend the plan of arrangement to give warrant holders dissent rights to allow them to be paid the full value of their warrants (to be determined with evidence in a separate hearing), or to carve out an exception from the release in article 6.2(c) of the Arrangement Agreement[1] to allow the warrant holders to sue on the warrants.

The Court, however, refused to grant this relief, as it found that it was far from clear that it had authority to partially unwind the transaction, and it was not willing to make any changes to the terms of the Arrangement Agreement that may have been critical to the parties. Accordingly, although the Court of Appeal found the lower court committed an error in approving the plan of arrangement, the appeal was dismissed.

The Court noted that if the appellants wanted to preserve their ability to receive an effective remedy on appeal, they should have applied to the chambers judge or a justice of the Court of Appeal for a stay pending appeal, irrespective of the tight timelines involved.

Takeaway

This decision serves as a cautionary tale both for applicants for approval of plans of arrangement, and for opposing parties. To obtain a final order approving a plan of arrangement, it must be demonstrated that the procedural requirements of the *ABCA* were rigidly adhered to, which may include securing the votes of all classes of stakeholder irrespective of their size. Parties seeking to appeal final approval of a plan of arrangement must act extremely quickly to secure a stay pending appeal, potentially from the judge approving the final order given that many plans of arrangement close on the same day as the final order application. Parties failing to obtain a stay pending appeal risk being left without a remedy due to the Court of Appeal's inability to unwind the completed transaction or unwillingness to retroactively amend the terms of the plan of arrangement.

For more information, please contact one of the key contacts listed below.

[1] Article 6.2(c) of the Arrangement Agreement provided that "all actions, causes of action, claims or proceedings (actual or contingent, and whether or not previously asserted) based on or in any away relating to Company Shares or any Company Incentive Securities shall be deemed to have been settled, compromised, released and determined without any liability except as set forth herein."

By

Laura Poppel, Garrett Finegan, Clay Jacobson, Andrew Pozzobon

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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