CITATION: Re Sherritt International Corporation 2020 ONSC 5822
COURT FILE NO.: CV-20-636938-00CL
DATE: 20200928

SUPERIOR COURT OF JUSTICE – ONTARIO

(Commercial List)

RE: IN THE MATTER OF AN APPLICATION UNDER SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND RULES 14.05(2) AND 14.05(3) OF THE RULES OF CIVIL PROCEDURE

AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF SHERRITT INTERNATIONAL CORPORATION AND 11722573 CANADA LTD., AND INVOLVING SHERRITT INTERNATIONAL OIL AND GAS LIMITED, SHERRITT INTERNATIONAL (BAHAMAS) INC., SHERRITT POWER (BAHAMAS) INC., SICOG OIL AND GAS LIMITED (FORMERLY SHERRITT INTERNATIONAL (CUBA) OIL AND GAS LIMITED), SHERRITT UTILITIES INC., CANADA NORTHWEST OILS (EUROPE) B.V., CNWL OIL (ESPANA) S.A., AND MADAGASCAR MINERAL INVESTMENTS LTD.

BEFORE: Koehnen J.

COUNSEL: *Robert J. Chadwick, Caroline Descours and Andrew Harmes,* for the Applicants

C Lara Jackson, Jane Dietrich and Jeffrey Roy for The Export-Import Bank of Korea and Korea Resources Corporation

HEARD: July 29, and August 3, 2020

ENDORSEMENT

Overview

[1] Sherritt International Corporation applies for final approval of a plan of arrangement under sections 192(3) and (4) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended. Final approval is opposed by Export-Import Bank of Korea and Korea Resources Corporation. The Bank and Korea Resources are corporations owned by the Republic of South Korea.

[2] Sherritt, is a publicly traded Canadian resource company engaged primarily in mining, oil and gas, and power generation businesses through various subsidiaries and joint ventures.

[3] Sherritt has struggled for many years with high debt, volatile commodity prices, and uncertainty arising from its Cuban operations resulting from the vagaries of the relationship between the United States and Cuba.

[4] The Bank and Korea Resources oppose the plan arrangement on two grounds. First, they submit that their interest in Sherritt cannot be arranged under the CBCA because it is a term loan which is not a "security" for purposes of the CBCA. Second, they submit that the arrangement is not fair and reasonable to them.

[5] Both the language of the statute and other cases have held that debt of the sort the Bank and Korea Resources hold are subject to arrangement under the CBCA.

[6] The fairness objection is based on a complaint that the Bank and Korea Resources were placed into the same voting category as noteholders. Generally speaking, voting classification is determined by the nature of the legal interest that the creditor has against the corporation. Here, the legal interest of the term lenders and of the noteholders was the same: both had unsecured claims against Sherritt. No basis was advanced to demonstrate any conflict between the term lenders and the noteholders that would warrant the creation of a separate class for the term lenders.

[7] The only other basis on which the Bank and Korea Resources objected to the proposed plan was that it required the term lenders to compromise their claim against Sherritt for "absolutely no consideration" while shareholders were not having their rights arranged. The unfortunate reality of almost all arrangements is that creditors are required to compromise their debt without consideration.

[8] Although the proportionate compromise between shareholders and debtholders can be an issue in arrangements, the unsecured creditors taken as a whole approved the plan by a margin of approximately 89%. The noteholders would have as strong a complaint about the shareholders not making a compromise as the term lenders would. Had the noteholders voted alone, they would have approved the plan by a margin of 98.82%. That suggests that an overwhelming majority of creditors who were potentially affected by the lack of compromise by shareholders nevertheless approved the plan. While not determinative, a vote of security holders is good evidence of the fairness and reasonableness of a plan.

[9] I advised the parties of the disposition of the application on August 8, 2020 with reasons to follow. I indicated that I would provide reasons within 7 days. Counsel for the Bank and Korea Resources then advised that they had instructions not to bring any appeal of the application as a result of which I am releasing these reasons in the ordinary course as opposed to releasing them on a more expedited basis.

[10] During oral argument, Sherritt's counsel asked me to review carefully the fairness opinion that Sherritt had obtained in respect of the proposed Plan. I did as counsel asked but give no weight to it in arriving at my conclusion.

[11] Fairness opinions are a common feature of judicial proceedings to approve steps a corporation proposes to take. They are, as they were in this case, often referred to with almost religious reverence as if they were the definitive answer to questions about fairness. Regrettably, fairness opinions can be fundamentally flawed as was the one in this case.

[12] It is in some respects easier to examine the limitations of the fairness opinion when it does not matter to the outcome of a case than it is to do so in circumstances where those limitations may be determinative. I do so in the hope of offering guidance about which forms of fairness opinion are helpful to courts and which are not.

A. Are the Interests Capable of Arrangement?

[13] The interests of the Bank and Korea Resources in the plan arise out of a term loan that the parties have referred to as the Carry Finance Agreement or the CFA loan.

[14] The CFA loan arose as follows. Sherritt and two others, Korea Resources and Sumitomo Corporation formed a joint venture to build one of the world's largest lateritic nickel mining, processing and refining operations. The project is known as Ambatovy and is located in Madagascar. Sherritt participated in Ambatovy through a wholly owned, single purpose subsidiary known as Madagascar Minerals Investments Limited. The joint venture agreement governing Ambatovy provided that, if Madagascar Minerals did not meet its financial obligations towards Ambatovy, then the other two joint venture partners were obliged to satisfy the obligation in exchange for which Madagascar Minerals would be indebted to the other joint venturers and/or in exchange for which Madagascar Minerals would surrender a portion of its interest in Ambatovy to Korea Resources and Sumitomo. Madagascar Minerals defaulted on its contributions as a result of which Korea Resources and Sumitomo lent it funds and, over time, began to acquire a portion of its interest in Ambatovy.

[15] When Korea Resources was called on to fund the contributions of Madagascar Minerals, it sought assistance from the Bank. As part of those arrangements, the Bank advanced money to Madagascar Minerals. That debt was guaranteed by Sherritt and was secured by Sherritt's shares in Madagascar Mineral's and the latter's interest in Ambatovy. As a further part of those arrangements, Korea Resources, over time, paid down some of the debt owed to the Bank, in exchange for which Korea Resources acquired some of Madagascar Mineral's interest in Ambatovy.

[16] By the time of the plan of arrangement, the CFA lenders were owed approximately $152,000,000 and Madagascar Minerals' interest in Ambatovy had been reduced to approximately 12%. The CFA loans mature in 2023.

[17] Under the plan, Sherritt's guarantee of the CFA debt will be extinguished. Instead, the CFA lenders will receive each lender's pro rata share of Sherritt's interest in Ambatovy.

[18] The Bank and Korea Resources submit that a term loan is not capable of arrangement under the CBCA.

[19] The plan of arrangement is advanced under section 192(f) of the CBCA which includes within the definition of arrangement "an exchange of securities of a corporation for property, money or other securities of the corporation or property, money or securities of another body corporate".

[20] The bank and Korea Resources submit that a loan is not a security under this definition.

[21] In support of this proposition, the Bank and Korea Resources rely on footnote 1 in *Policy Statement 15.1* of Industry Canada (Corporations Canada), "*Policy concerning Arrangements under section 192 of the CBCA*", (4 January 2010) which states:

> While "security holder" is not defined in the Act, the term "security"
> means a share of any class or series of shares or a debt obligation of a corporation. *"Debt obligation" is defined to mean a bond, debenture, note* ***or other evidence of indebtedness*** or guarantee of a corporation, whether secured or unsecured. A "holder" as defined in Part VII of the CBCA, which governs the transfer or transmission
> of a security, means a person in possession of a security issued or endorsed relying on the ejusdem generis principle of interpretation, the Director's position is that the term "security holder" would include debtholders such as debenture and bond holders but not ordinary unsecured creditors… (emphasis added)

[22] The Bank and Korea Resources similarly rely on the *ejusdem generis* principle and argue that "other evidence of indebtedness" is limited to debt obligations that have the same essential characteristics as a bond, debenture or note. That is to say, they are freestanding instruments that have value in and of themselves, can be freely transferred or exchanged and are enforceable without the need for evidence.

[23] The policy statement on which the Bank and Korea Resources rely, speaks of security holders not including "ordinary unsecured creditors." That is a broad group which, for example, would include trade suppliers. The debt owed to a trade supplier may well not fall into the definition of "security" for purposes of a plan of arrangement. A term loan agreement is, however, more akin to a debenture than it is to a trade supplier.

[24] On closer review of the language of the CBCA, the CFA loan does appear to fall within the scope of interests that are capable of arrangement under the statute.

[25] Security is defined by section 2 of the CBCA as

> "security means a share of any class or series of shares **or a debt obligation** of a corporation and includes a certificate evidencing such a share or debt obligation;" (emphasis added)

[26] Debt obligation is in turn defined by the same section as:

> debt obligation means a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured.

[27] The broad definition of debt obligation to include a "note" or "other indebtedness" of the corporation would, on its face, include a term loan. While I was not taken to a "note" in the record, almost all term loans would entail some sort of document that constitutes what one would commonly understand as a note, that is to say a document that evidences an agreement by one person to pay another a stated amount on a particular date or dates at a particular rate of interest, perhaps with additional related terms. In addition, a loan agreement would also appear to amount to "evidence of indebtedness": *45133541 Canada Inc., Re*, 2009 QCCS 6440 at paras. 67-69.

[28] In addition, section 192 of the CBCA has been interpreted, in the context of a debt restructuring, as providing a "broad procedure aimed at facilitating the restructuring of corporations" and, as such, ought to be broadly and liberally interpreted: *45133541 Canada Inc., Re,* 2009 QCCS 6440 at paras. 61 and 120; *RGL Reservoir Management Inc., (Re),* 2017 ONSC 7496 [Commercial List] at para. 17.

[29] In the circumstances of this case, I see no reason to depart from a plain reading of the statute and find that the CFA debt is capable of being arranged under s. 192 of the CBCA.

B. Fairness of the Plan

[30] The Bank and Korea Resources submit that the plan is unfair for two reasons: (i) they were unfairly placed into the same voting category as other unsecured creditors; and (ii) the plan is substantively unfair.

(i) Voting Categories

[31] The CFA lenders were placed into the same voting category as other unsecured noteholders of Sherritt. Those creditors approved the plan of arrangement by a vote of 89.02%, well above the two thirds majority for which the interim order provides.

[32] The Bank and Korea Resources point out that if the CFA lenders had been put into a separate voting class, approval of the plan of arrangement within that group would have been only 54.24%, well below the two thirds majority for which the interim order provides.

[33] Sherritt submits that it was appropriate to classify the CFA lenders together with unsecured noteholders because both have unsecured claims as against Sherritt.

[34] The commonly cited starting point of an analysis of voter classification in arrangements is the statement of Bowen, L.J. in *Sovereign Life Assurance Co. v Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.) at page 583 to the effect that:

> The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

[35] The legal principles surrounding consultation and voting classification were most usefully summarized by Paperny J. (as she then was) in *Re Canadian Airlines Corp*., [2000] A.J. No. 1693 (Alta. Q.B.), leave to appeal refused 2000 ABCA 149. In that case Justice Paperny canvassed the history of voting classification and distilled from the following relevant principles at para. 31:

(i) Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test.

(ii) The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation.

(iii) The commonality of these interests is to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible.

(iv) In placing a broad and purposive interpretation on the *C.C.A.A.*, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.[1]

(v) Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

(vi) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

Ontario authorities have applied these principles consistently since: *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]), aff'd (2005), 78 O.R. (3d) 241; *Canwest Global Communications Corp.*, 2010 ONSC 4209 [Commercial List].

[36] Three key principles emerge from *Canadian Airlines* that have particular relevance to this case.

[37] First, securityholders with similar *legal* rights as against the applicant should vote in a single class: *Canadian Airlines* at paras. 31, 38; *Savage v. Amoco Acquisition Co.*, [1988] A.J. No. 330 (C.A.) at paras 19 and 23; Re. As Farley J. noted in *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at paras. 13-14, aff'd on this point (2005), 78 O.R. (3d) 241 at paras. 13-14 and 30-36: "absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class."

[38] Before the plan of arrangement, the noteholders had an unsecured claim against Sherritt and those of its subsidiaries who had guaranteed a particular tranche of notes. The CFA lenders also had an unsecured claim against Sherritt.

[39] Under the plan of arrangement, the unsecured noteholders would continue to have an unsecured claim against Sherritt and certain of its subsidiaries. Their claim would, however, be reduced from approximately $628,000,000 to $433,000,000. The maturity date of the reduced debt would then be extended by several years. In addition, $75,000,000 of the debt would be placed into a more junior position than the current notes hold. The CFA lenders would not take any reduction on their debt but would lose the right to claim against Sherritt. Instead, the CFA lenders would receive Sherritt's interest in the Ambatovy joint venture.

[40] The second classification principle from *Canadian Airlines* with particular relevance here is that classes should be organized in a manner that is consistent with the facultative purpose of the arrangement provisions under the CBCA: *Canadian Airlines; CBCA Policy Statement*, at

[1] While the *C.C.A.A.* was at issue in *Canadian Airlines*, neither side took issue with the proposition that similar principles were applicable to the compromise of creditor rights under the *CBCA*

section 1.02 Creditors should not be fragmented into groups that would defeat the plan unless there is good reason to do so. Here, the Bank and Korea Resources urge me to place the CFA lenders into a separate voting class after the fact. That would result in the CFA lenders having approved the proposed plan by a margin of only 54% which the Bank and Korea Resources submit should lead me to reject the plan. Given the similarity of legal entitlements among the noteholders and the CFA lenders, it strikes me that acceding to that request would amount to fragmentation as opposed to creating classes of creditors whose interests are legitimately different.

[41] The third classification principle relevant here is that creditors should vote as a common class so long as their rights "are not so dissimilar as to make it impossible for them to consult together with the view to their common interest:" *CBCA Policy Statement* at section 3.10; *Canadian Airlines Corp*., at para. 17.

[42] In their factum, the CFA lenders underscored the differences between the two categories of debt. They note that the CFA Lenders' rights are based in contract and relate to Sherritt's interest in Ambatovy while the noteholders have no interest in Ambatovy. In addition, although the CFA debt is unsecured as against Sherritt, is secured as against Sherritt's interest in Ambatovy. This contrasts with the noteholders who are unsecured but enjoy the benefit of guarantees of certain Sherritt subsidiaries. Finally they note that the remedies of each group in the absence of a plan are different. The noteholders have an unsecured claim against Sherritt and its subsidiary guarantors while the CFA lenders have an unsecured claim against Sherritt and have a secured claim against Sherritt's interest in Ambatovy.

[43] Beyond describing these differences, the CFA lenders have advanced no reason to demonstrate that it would be impossible for the CFA lenders to consult with the unsecured noteholders with a view to their common interest. Although it might not be possible to demonstrate impossibility conclusively, the CFA lenders have not even pointed to conceptual issues that might arise that make it difficult or impossible for the CFA lenders and the noteholders to consult together.

[44] Indeed, if anything, I would have thought that any differences between the noteholders and the CFA lenders are ones that would give rise to a complaint by the noteholders given that the CFA lenders are not compromising the face amount of their debt while the noteholders are.

(ii) Substantive Fairness of the Plan

[45] The applicant bears the burden of satisfying the Court that an arrangement is fair and reasonable: *BCE,* at para. 119.

[46] In assessing the fairness and reasonableness of an arrangement, a court must be satisfied (a) that the arrangement has a valid business purpose, and (b) that the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. The Court need not determine that the proposed arrangement is the "most fair" or "best" proposal possible. Rather,

the Court need only determine that it is fair and reasonable in the circumstances: *RGL*, at paras. 47 and 49; *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at paras. 138, 143, 155.

[47] No one disputes that the proposed plan has a valid purpose. The issue is whether the rights of the CFA lenders are being arranged in a fair and balanced way.

[48] Strong support by security holders is generally a good, but not conclusive, indicator of fairness. As Blair J., as he then was, stated in *St. Lawrence & Hudson Railway Co., Re,* [1998] O.J. No. 3934 (Ct. J. [Gen. Div. – Commercial List]) at para. 27

> What better litmus test, then – barring such things as fraud, or a clearly overwhelming majority, which prevents the true expression of the minority's will, or similar considerations of that nature – for assessing whether in the circumstances of a given arrangement "an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve the plan", than the votes of those whose interests are actually at stake? The votes of security holders at meetings to consider a proposed Plan are not conclusive, but a substantial vote in favour of the proposed plan of arrangement by the security holders affected is an important factor in the court's considerations. The "business judgment" of the security holders in determining their own interests is to be given great weight.

[49] Sherritt notes that the plan was approved by 89.02% of the security holders. The CFA lenders note that, had they constituted a separate voting class, only 54.24% of the CFA lenders would have approved the plan. In *BCE* the Supreme Court of Canada noted at para 150 that the absence of a majority or the presence of only a slim majority may give rise to doubts about whether the plan is fair and reasonable.

[50] Although votes are an indicator of fairness, they are not determinative. Just as courts must be alive to the possibility of a large majority being unfair to a minority, they must also be alive to the possibility of a tyranny of the minority. Although the approval of the CFA lenders did not reach a two thirds majority, they nevertheless approved the plan. It is worth noting that there is no statutory requirement for a two thirds majority.

[51] In *BCE,* the Supreme Court went on to note at para 152 – 154 that other indicia of fairness include the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights. This in turn is assessed against a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence.

[52] Taking these factors into account, I am satisfied that the plan is fair and reasonable to the CFA lenders. As noted earlier, the CFA lenders are not compromising the face value of their

debt. They also continue to enjoy the same security after the plan of arrangement that they enjoyed before the plan.

[53] This contrasts markedly with the noteholders. They have reduced face value of their debt by approximately $195,000,000, have extended its maturity and have subordinated approximately $75,000,000 of their debt.

[54] The essence of the complaint by the Bank and Korea Resources is that the plan forces them to release Sherritt's guarantee for "absolutely no consideration" while the equity holders remain whole. The Bank and Korea Resources point out that this would not be the case in a liquidation, where the equity holders would receive nothing unless all the debt were paid in full. The noteholders, however, would have the same complaint, have made a more serious compromise of their rights yet approved the plan by a margin of 98.82%.

[55] It is also relevant to examine the true value of the guarantee that the CFA lenders are giving up. As noted, the CFA lenders had security in Sherritt's interest in Ambatovy. As a result of the plan of arrangement, each CFA lender will now receive its pro rata share of Sherritt's interest in Ambatovy. That puts them into the position they would have been in had they enforced the debt without putting them to the cost or inconvenience of enforcement.

[56] Sherritt's guarantee has limited value. It could not be called upon until the CFA debt matured in 2023. Even then it was a guarantee by Sherritt. Sherritt is a holding company. The productive assets of the Sherritt group are held in various subsidiaries. Those subsidiaries are located in different countries. In the absence of a voluntary payment by Sherritt, enforcement on the guarantee would require a judgment against Sherritt (assuming a judgment has not been precluded by a CCAA or similar proceeding) and then taking steps to seize Sherritt's interest in subsidiaries in a variety of countries. While some of the subsidiaries are located in countries associated with relatively low enforcement risk such as Canada, the United States and Australia; others are located in countries with higher enforcement challenges such as Cuba, China, and Zimbabwe. Moreover, many of the subsidiaries have guaranteed the noteholder debt. In those circumstances, the CFA lenders would rank ratably as unsecured creditors with the noteholders.

[57] In light of these factors, the guarantee falls considerably short of ensuring full recovery on the CFA loan.

[58] When I assess the proportionality of the compromise of the CFA lenders with the noteholders, it strikes me that the CFA lenders have come out considerably ahead of the noteholders who will have to sacrifice $195,000,000 of debt.

[59] I then compare this against the necessity for the arrangement. While neither party put in express evidence about the necessity of the arrangement, the undisputed evidence was that Sherritt experienced considerable challenges in servicing its debt. As one of the noteholders' counsel put it in argument, if the noteholders felt there were any better option available to them that sacrificing $195,000,000 in principal, they would take it.

[60] In assessing the substantive fairness of the plan, I underscore that the objection of the Bank and Korea Resources was limited to the absence of consideration for loss of the guarantee. Regrettably, the compromise of most interests in an arrangement is done without consideration. This was not a case in which the Bank and Korea Resources suggested that Sherritt's interest in Ambatovy was inadequate to satisfy the debt. Nor was it a case in which the Bank complained that it was being repaid its loan by way of shares rather than cash. It appears that arrangements had been made from the outset between the Bank and Korea Resources that the latter would be buying out the Bank's shareholder interests. Given that Korea Resources is owned by the Republic of South Korea the bank faces relatively little exposure for default. Moreover, it was known to all participants in Ambatovy from the outset that, if one partner failed to make contributions as required, the others would be obliged to make those contributions and take a proportionate interest of the defaulting partner's share in return. As a result, the fact that Korea Resources that may be "obliged" to take a greater share in Ambatovy than it might want is a result of contractual arrangements, not a result of the plan.

[61] In the circumstances described above, I am satisfied that Sherritt has met its burden and that the plan arranges the CFA lenders in a proportionate and substantively fair manner.

C. Fairness Opinion

[62] In paragraph 152 of *BCE* the Supreme Court noted that it was also relevant for courts to take into account fairness opinions from reputable experts.

[63] Sherritt filed a fairness opinion from Paradigm Capital in support of the arrangement. The Bank and Korea Resources made no submissions about the reliability of the fairness opinion. During oral argument, Sherritt's counsel placed heavy reliance on it and urged me to read it to gain comfort about the fairness of the proposal.

[64] I have read the fairness opinion as Sherritt's counsel asked me to. Regrettably it gives me no comfort.

[65] Fairness opinions are often presented to the court, as it was here, as being the product of a very particular form of expertise that the court does not have and on which the court must rely. They are often invoked with veneration and treated like an all-powerful talisman that should resolve any questions about fairness. The power of a talisman, however, lies more in the faith of the believer than the substance of the object.

[66] The simple presence of something called a fairness opinion is meaningless. Like any other evidence, its force lies entirely in its content and substance which, as this case demonstrates, must be carefully reviewed.

[67] Sherritt's counsel urged me to review pages 8-9 of the fairness opinion. Those are the two pages of the opinion that actually discuss fairness. The degree, however, to which one can

rely on the opinion depends not just on the two pages of fairness analysis but also on the "fine print" in the preceding seven pages. It requires careful reading because it often contains limitations and qualifications that affect the utility of the opinion. Such is the case here.

[68] I begin my review with the author of fairness opinion. The opinion was prepared by Paradigm Capital. Paradigm describes itself in the opinion as

> "an independent Canadian investment banking firm with a sales, trading, research and corporate finance focus, providing services for institutional investors and corporations… Paradigm Capital has extensive advisory, valuation, merger & acquisition and corporate governance experience."

[69] Section 4.04 of Corporations Canada's *Policy on Arrangements* states that the author of a fairness opinions for arrangements

> "..should generally be an accountant or person with a financial background who has experience in assessing liquidation values."

[70] While investment bankers may have experience with valuations in certain contexts, liquidation is not necessarily the context in which they typically operate. There is nothing in the fairness opinion that provides any support for Paradigm's expertise other than that stated in paragraph 68 above. There is no description of any expertise in assessing liquidation values

[71] Moreover, Paradigm describes itself in the fairness opinion as independent.

[72] I have considerable doubts about the degree to which Paradigm would constitute an independent witness on whose expertise the court can rely. The letter points out that one of the directors of Sherritt, John Warwick, is also a former investment banker at Paradigm and remains a special advisor to and shareholder of Paradigm. Sherritt's website describes Mr. Warwick as the former "Managing Director, Investment Banking, founding partner and Head of Corporate Finance of Paradigm." The opinion notes further that:

> "Paradigm Capital may, in the ordinary course of its business, provide financial advisory or investment banking services to Sherritt from time to time. Additionally, in the ordinary course of its business, Paradigm Capital may actively trade common shares and other securities of Sherritt for its own account and for its client accounts, and, accordingly, may at any time hold a long or short position in such securities."

[73] It is difficult to see how an investment banking firm that has one of its founding partners, former Managing Directors, and current advisor and shareholder on the Sherritt board and that provides financial advisory and investment banking services to Sherritt can qualify as a source of independent expertise.

[74] I appreciate that a fairness opinion is not, technically speaking, an expert report under rule 53.03 of the Rules of Civil Procedure. There is no doubt, however, that fairness opinions are provided to courts as the evidence of independent experts. Anyone with any business experience would understand that an employee of Paradigm who, in the circumstances described above, proposed to provide an opinion other than one that was favourable to Sherritt would face overwhelming direct or indirect pressure. The simple fact of being retained as an expert contains its own implicit pressure. The dynamic is clear from the outset that the client wants an opinion favourable to itself. It is far easier to resist that pressure when the firm being retained has no long-term economic interest to pursue with the client. It is far more difficult to maintain that independence when there are personal and financial connections between the expert of the client.

[75] The next potential limitation on the utility of a fairness opinion turns on the question in respect of which the author is opining. Here, Paradigm gave an opinion about:

(i) whether the noteholders and the CFA lenders would be in a better position from a financial point of view under the arrangement than if the company were liquidated; and

(ii) an opinion as to the fairness of the arrangement from a financial point of view the company.

[76] A closer read of the opinion discloses that paradigm answered question number (i) by reviewing a liquidation analysis provided by management of Sherritt. Under the heading Assumptions and Limitations Paradigm states that it "has relied upon without independent verification" on information, including the liquidation analysis, received from Sherritt and has "not conducted any independent investigation to verify the completeness or accuracy of such information."

[77] Although the opinion portion of the letter states that it has "analysed the Company's management's estimated ranges of recoveries from the various assets of Sherritt in a liquidation process," it provides no further discussion or description of the liquidation analysis Sherritt provided or the analysis Paradigm brought to bear.

[78] Given the content of the letter, the exercise could have been as simple as taking a liquidation number provided by management, comparing it to a plan of arrangement number provided by management and concluding that one number was larger than the other, thereby leading to the opinion that the result under a plan of arrangement was preferable to the result under a liquidation. I am not sure a court requires an expert opinion for that level of analysis.

[79] The second question Paradigm was asked to answer was whether the arrangement was fair from a financial point of view to the company. The fairness opinion does not define the

company. By way of example it does not suggest that company was being defined as all of its stakeholders and that Paradigm was engaging in an exercise to determine whether the compromises amongst the various stakeholders were fair and reasonable. On the contrary, the assumptions and limitations section of the opinion points out that Paradigm is not providing an opinion "as to the fairness of the Arrangement, from a financial point of view, to the Noteholders and/or the CFA lenders." In that context fairness to the company would appear to mean fairness to Sherritt as a debtor. It is self-evident that any arrangement that decreases the amount of debt the debtor owes is fair to the debtor. The issue on a plan of arrangement is not whether reducing debt is fair to the debtor but whether it is fair to creditors.

[80] As just noted, the assumptions and limitations section of the opinion states that Paradigm is not providing opinion "as to the fairness of the Arrangement, from a financial point of view, to the Noteholders and/or the CFA lenders." Section 4.05 of Corporations Canada's Policy on Arrangements states:

> … the Director believes that, ordinarily, for the fairness opinion to be meaningful, the person providing the opinion must be in a position to state that the arrangement is fair to each class of security holders affected by the arrangement.

[81] The Paradigm opinion expressly does not do that. That makes it of little value.

[82] I apologize if I am being mischaracterizing what Paradigm actually did in coming to its view. The difficulty is that all I have is the opinion itself and, when read carefully, stripped of its verbal ornamentation, the opinion can be summarized as saying, I am an expert, I have done analysis (that I am not going to explain or tell you about), I conclude the plan is fair, just trust me.

[83] In making these comments I do not intend any criticism of Paradigm. It described the nature of its opinions, disclosed its relationship with Sherritt and set out the limitations under which it operated. I am merely saying that conclusory fairness opinions with limitations of the sort set out above are of no help and are not a productive use of the court's time.

Disposition

[84] Despite my comments about the fairness opinion, I approve the plan of arrangement for the reasons set out earlier in these reasons.

[85] There was no dispute that Sherritt's debt posed a considerable challenge going forward. There was no suggestion that what the Bank and Korea Resources received was inadequate to satisfy the debt owing to them or alternatively that they were making a larger proportionate compromise than the noteholders. The only complaint was that the Bank and Korea Resources

were surrendering their guarantee without consideration when shareholders were not being compromised. The absence of consideration is a common feature of compromises in creditor arrangements. The noteholders were subject to the same disadvantage yet approved the plan by an overwhelming majority. In those circumstances, the security holder vote should be given considerable weight. To permit the objections of the Bank and Korea Resources to prevail in these circumstances would give way to the tyranny of the minority.

Koehnen J.

Date: September 28, 2020