

SUPREME COURT OF NOVA SCOTIA

Citation: *Weir v. Toronto Dominion Bank*, 2019 NSSC 257

Date: 20190131

Docket: Hfx No. 482578

Registry: Halifax

Between:

Lowell Weir

Applicant

v.

Toronto Dominion Bank, Bank of Nova Scotia,
Canadian Imperial Bank of Commerce, National Bank of Canada,
Royal Bank of Canada

Respondents

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: January 16 and 17, 2019, in Halifax, Nova Scotia

Oral Decision: January 31, 2019

Written Release: August 28, 2019

Counsel: Lowell Weir, self-represented applicant
Michelle Awad & Jeremy Devereux, for Royal Bank
William Mahody & Tammy Manning, for National Bank

This is the written release of the oral decision that I rendered on January 31, 2019

By the Court (orally):

Background

[1] This was an application in court heard before me on January 16 and 17, 2019. The process leading up to the hearing was expedited as there was some urgency in having a decision by January 31, 2019. This expedited timeframe has not affected my analysis nor conclusion in reaching my decision. At the conclusion of the hearing, the parties indicated they would be satisfied with a “yes” or “no” answer in relation to the issues before the court and the written reasons could follow. That is what I am prepared to do today except for one issue raised by National Bank requesting the court to comment on the comprehensive nature of the *Bank Act, S.C. 1991, c. 46*, and whether Mr. Weir’s application to this court was premature. That issue does not affect today’s decision and can be addressed in the written reasons.

[2] Mr. Weir filed an Amended Notice of Application on November 30, 2018, against the Royal Bank of Canada (RBC), Toronto Dominion Bank (TD Bank), Bank of Nova Scotia (BNS), Canadian Imperial Bank of Commerce (CIBC) and National Bank of Canada (NBC). Prior to the hearing, Mr. Weir’s application was dismissed by consent as against the remaining respondents, TD Bank, BNS and CIBC. The matter proceeded against RBC and NBC with Mr. Weir applying to the court for an order requiring the Respondents to include in each of their 2019 Management Proxy Circulars the applicable shareholder resolutions submitted by the Applicant, and should the matter not be decided by January 31, 2019 a further order restraining the holding of the 2019 Annual General Meeting (“AGM”) of each Respondent until a decision is made by the Court. I shall deal with his application against the remaining banks (RBC and NBC) separately, starting with RBC.

Mr. Weir’s application re: RBC

[3] RBC’s opposition to Mr. Weir’s application is set out in its Notice of Contest filed December 14, 2018.

[4] The February 8, 2018 management proxy circular for RBC's 2018 AGM advised that shareholder proposals for RBC's 2019 AGM must be submitted no later than November 12, 2018.

[5] Mr. Weir submitted five proposals to RBC on November 12, 2018. The proposals can be found at Exhibit Z of the Karen McCarthy affidavit. The relevant parts of the proposals are as follows:

(a) Proposal 1.0:

Amend Proxy Access Policy in accordance with Original Proxy Access By-law Proposal

THEREFORE BE IT RESOLVED that Management of the Bank hold discussions with the Proponent and other shareholder supporters of the Proxy Access Bylaw and further amend the Proxy Access Policy in accordance with the March 2017 Proxy Access Proposal.

(b) Proposal 2.0:

Shareholder Resolution – Addition of Bylaw – Reimbursement of Shareholder Expenses

BE IT RESOLVED THAT The Royal Bank of Canada institute a By-Law to reimburse all reasonable expenses incurred by:

(a) a shareholder nominator or nominating group in connection with the nomination of a proposed director under the Bank's "Proxy Access" By-law including proxy solicitation.

(b) The proponent of a shareholder proposal or resolution attending and presenting the proposal at the Annual General or Special Meeting.

Further the reimbursement shall take place within 30 days of the date of the Annual General Meeting.

(c) Proposal 3.0:

Shareholders Resolution to Implement a By-law Forbidding the Bank, Its Subsidiaries, Affiliates and Proxy Advisory Service from Paying Soliciting Dealer Fees in Proxy Contests ("Vote Buying")

THEREFORE BE IT RESOLVED that a By-law be added to the Bank's existing By-laws forbidding the Bank, its Subsidiaries, Affiliates and Proxy Advisory Services from paying or receiving Soliciting Deal Fees in such activities.

(d) Proposal 4.0:

Shareholder Resolution – Shareholders Designate Toronto Executive Office as Head Office of the Bank

NOW BE IT RESOLVED that the Montreal Head Office be eliminated, and all functions transferred to the Toronto Executive Offices, which by this Resolution will be designated as the Head Office of the Royal Bank of Canada.

(e) Proposal 5.0:

Review of Accounting Policies with Regards to Accounting for Goodwill and/or Intangible Assets on Acquisitions

THEREFORE BE IT RESOLVED that the Board of Directors engage an Independent Third Party to conduct a review of the City National Acquisition as well as a review of the accounting policies of the Bank with regard to Acquisitions and the Impairment of Goodwill and provide Shareholder a report by October 30, 2019.

[6] Prior to today, Mr. Weir wrote to this court advising that he was withdrawing proposal 1.0 the “Proxy Access Proposal” as it relates to both Respondents, and as a result, it need not be considered further by the court.

Issues

[7] The issues before the court as it relates to Mr. Weir and RBC are as follows:

1. Does Mr. Weir meet the requirements to submit shareholder proposals to RBC pursuant to section 143 of the *Bank Act*, and thus have standing to bring this Application, on the basis that he has the support of his wife who has an enduring power of attorney over 100 common shares of RBC which are beneficially owned by her mother?
2. Does Mr. Weir meet the requirements to submit shareholder proposals to RBC pursuant to section 143 of the *Bank Act*, and thus have standing to bring this Application, based on the holding of RBC shares by mutual funds held by Mr. Weir?
3. If Mr. Weir meets the requirements to submit shareholder proposals to RBC pursuant to section 143 of the *Bank Act*, is RBC entitled to exclude the four proposals, or any part thereof, in the management proxy circular for its 2019 AGM pursuant to one or more of the exemptions in subsection 143(5) of the *Bank Act* or other lawful reason?
4. Is RBC bound by the doctrine of judicial estoppel based on a statement made by RBC in a Notice of Application filed with the Ontario Superior Court in August 2011 that Mr. Weir had “requisite

status under subparagraph 143(5)(1.1) of the *Bank Act* to make shareholder proposals for inclusion in Royal Bank's proxy circular" based on having the support of his wife as the holder of a power of attorney from her mother who was a registered shareholder?

Issue #1 – Standing based on support of spouse

[8] Mr. Weir admits in his affidavit of January 7, 2019 at paragraph 12, that he is not a registered shareholder of RBC.

[9] However, he has previously submitted shareholder proposals for inclusion in the management proxy circulars for RBC's AGMs, in each case claiming that the support of his wife combined with his wife's enduring power of attorney brings him within section 143 of the *Bank Act* to make such shareholder proposals.

[10] This prior consideration by the bank, along with the pleading from RBC's Notice of Application, forms Mr. Weir's basis for his judicial estoppel argument. RBC's response, through Ms. McCarthy's evidence is RBC never turned its mind to the standing issue until this application. I shall speak more on this later when addressing the judicial estoppel issue.

[11] On November 23, 2018, RBC wrote to Mr. Weir asking him to provide proof of his eligibility to submit shareholder proposals for RBC's 2019 AGM.

[12] Mr. Weir responded to RBC's request on November 27, 2018, attaching a copy of the enduring power of attorney held by his wife for the management of property of her mother, Marjorie Mott, who held 100 common shares of RBC, to demonstrate his eligibility.

[13] Mr. Weir filed a further affidavit on January 7, 2019, after the Respondents had responded to his Application, where he asserted, for the first time, that he was eligible to submit shareholder proposals pursuant to section 143 of the *Bank Act* because he is personally a beneficial owner of RBC shares because he holds units of mutual funds that hold RBC shares.

[14] Section 143 of the *Bank Act* governs shareholder proposals to a bank.

[15] Section 143(1) requires the person submitting a proposal to be a shareholder and section 143(1.1) requires the shareholder to either own the prescribed number of shares for the prescribed period, or they need to have the support of persons

who, in the aggregate, have for at least the prescribed period been shareholders of the prescribed number of shares. Mr. Weir's position is anyone (including non-shareholders) can submit a shareholder proposal as long as they have support from a shareholder or shareholders. He relies on section 143(1.1)(b) for this position.

[16] Subsection 143(1) states that it is a "registered holder or a beneficial owner of shares of a bank" that is eligible to submit a shareholder proposal and that eligibility is subject to subsections (1.1) and (1.2).

[17] I accept RBC's interpretation of section 143(1) and the words "subject to". In order to be eligible to submit a shareholder proposal, a person must be a registered holder or beneficial owner of shares of the bank and must also meet the requirements of subsection 143(1.1). The provisions are cumulative. The person submitting the proposal may rely on supporters to satisfy the prescribed minimum time period and quantity for holding, or beneficially owning shares pursuant to subsection 143(1.1), but that subsection does not remove the requirement in subsection 143(1) that the person submitting the proposal also be a registered shareholder or beneficial owner of shares. Mr. Weir does not meet the eligibility requirements under subsection 143(1) as he is not a registered owner of RBC shares. Having the support through his mother-in-law's shares is not enough. The legislative purpose and history of section 143 support this interpretation.

Section 189 of the *Bank Act*

[18] Before moving on to Issue #2, I must discuss section 189 of the *Bank Act* and the effect it has on Mr. Weir's four proposals regarding RBC. Section 189 reads:

A shareholder entitled to vote at an annual meeting of shareholders may, in accordance with sections 143 and 144, make a proposal to make, amend or repeal a by-law.

[19] The term shareholder is defined in section 7 of the *Bank Act* as the person who, according to the securities register of a body corporate, is:

the owner of one or more shares of the body corporate or is entitled to be entered in the securities register or like record of the body corporate as the owner of the share or shares.

[20] Mr. Weir, by admission, is not a shareholder of RBC shares and is therefore unable to make proposals under section 189 of the *Bank Act*. This provision prevents Mr. Weir from submitting proposals 2 and 3 because they relate directly

to the bylaws of RBC. Therefore, Mr. Weir's beneficial ownership argument can only relate to proposals 4 and 5.

Issue #2 - Does Mr. Weir meet the eligibility requirements under section 143 as a beneficial owner of RBC shares?

[21] Mr. Weir asserts in his affidavit of January 7, 2019 at paragraph 12 that he is personally a beneficial owner of RBC shares because he holds units of a mutual fund called *RBC Select Conservative Portfolio* that in turn holds units of other mutual funds that hold shares of RBC.

[22] This argument was first raised by Mr. Weir in his affidavit of January 7, 2019. RBC and NBC take the position that Mr. Weir cannot rely on this information to support his eligibility to make these shareholder proposals as this information was submitted after the Respondents had responded to Mr. Weir's Application.

[23] Regarding Mr. Weir's new argument, I have considered the prejudice to the respondents and am prepared to consider his argument.

[24] The current regulation applicable to the trustee of the *RBC Select Conservative Portfolio* (which trustee is RBC Global Asset Management Inc.), has been in effect since June 30, 2016, and specifies that the *RBC Select Conservative Portfolio* is governed by the *Master Declaration of Trust* signed by RBC Global Asset Management Inc.

[25] The current *Master Declaration of Trust*, which has been in effect since September 5, 2017, contains the following relevant provisions:

Section 2 - Ownership of Assets

All assets of a Fund shall, at all times, be considered as assets held in trust by the Trustee, as trustee of the Fund, and the Trustee shall exercise in its discretion all the rights and powers of an owner of the investments and any other assets of the Fund.

...

Section 4 - Interest of Participants

No Participant in a Fund shall have or be deemed to have any individual ownership interest in any asset of the Fund, but, in respect of each Unit, the interest of a Participant shall consist only of the right to receive payment from the Trustee...

[26] After reading these provisions from the *Declaration of Trust* it is clear Mr. Weir has no right to require the trustee to let him have possession of the units of the other mutual funds held by the *RBC Select Conservative Portfolio* or to require

the trustee to transfer title of those units to him. In fact, participants have no individual ownership interest in assets of the fund, and no interest at all other than the right to receive payment from the trustee as specified.

[27] I find Mr. Weir is not the beneficial owner of any RBC shares that may be held by the mutual funds held by the *RBC Select Conservative Portfolio*.

[28] With respect to issues #1 and 2, I find that Mr. Weir does not have standing to submit proposals pursuant to section 143 of the *Bank Act*, or to bring this Application in Court.

[29] Given my findings on issues #1 and 2 regarding Mr. Weir's standing, it is not necessary for me to address the specific grounds for the exclusion of proposals.

Mr. Weir's argument on Judicial Estoppel

[30] Mr. Weir's primary argument is that RBC is bound by the doctrine of judicial estoppel based on a statement made by RBC in a Notice of Application filed with the Ontario Superior Court in August 2011 that Mr. Weir had "requisite status under subparagraph 143(5)(1.1) of the *Bank Act* to make shareholder proposals for inclusion in RBC's proxy circular". His secondary argument is that historically RBC has considered his proposals under section 143 of the *Bank Act*.

[31] Mr. Weir has provided no authority to support this argument. In any event, both respondents addressed this argument during their submissions to the court. I find if judicial estoppel is available in Canada, the doctrine does not apply to the facts in this case. In reviewing the test from the American jurisprudence, judicial estoppel is similar to the Canadian concept of an abuse of process of the court. Whether you apply the American test or the Canadian principles for an abuse of process, neither is met in this fact scenario.

[32] This is the first time that Mr. Weir's standing to submit shareholder proposals to a bank under section 143 of the *Bank Act* has been considered by a Nova Scotia court. I accept the evidence of Ms. McCarthy and Mr. Brind'Amour that this is the first time either bank has turned their mind to the issue of Mr. Weir's eligibility to submit shareholder proposals through a supporter who owns shares in the bank. I see no abuse of process by either respondent in seeking a determination of this question.

Mr. Weir's Application re: National Bank of Canada

[33] I will now discuss Mr. Weir's application against NBC. Mr. Weir commenced this Application in Court on November 21, 2018, and filed an amended Notice of Application on November 30, 2018, seeking an order requiring NBC to include his proposals in its 2019 Management Proxy Circular and an order restraining NBC from holding its Annual Meeting of Shareholders if the matter is not decided by January 31, 2019.

[34] On November 23, 2018, NBC received an email from Mr. Weir submitting the following three proposals for inclusion in NBC's 2019 Management Proxy Circular (Affidavit of Denis Brind'Amour filed January 8, 2019 at para. 6). The proposals are as follows:

1.0 Amend Proxy Access Policy in accordance with the Original Proxy Access By-law Proposal Submitted to the Bank:

WHEREAS in November 2016, the Proponent (Lowell Weir) submitted to the Bank a Proxy Access Proposal under Sections 144 & 189 of the Bank Act for inclusion in the 2017 Management Proxy Circular of the Bank. The Proposal requested the Directors to take the necessary steps to add a new "Proxy Access" By-Law to the By-laws of the Bank. The proposal detailed the key elements and terms of the Proxy Access By-law and

WHEREAS the Proponent agreed after being threatened with court action to withdraw his proposal for the 2017 Management Proxy Circular, and

FURTHER WHEREAS the Management of the Bank, met with a shareholder group friendly to the Bank and agreed on a "Sweetheart" Proxy Access Policy, which I should point out was "night and day" different from the Proponent's March 30, 2017 proposal. The Bank's "Proxy Access Policy" is in fact a "**NO ACCESS PROXY POLICY**" as it effectively prevents (though various Bank added terms and condition) shareholders from having the ability to utilize "Proxy Access" to nominate directors; and

WHEREAS Management of the Bank have suffered a complete loss of credibility with the Proponent and other Supporting Shareholders though their actions on the Proxy Access Bylaw Proposal; now

THEREFORE BE IT RESOLVED that Management of the Bank hold discussions with the Proponent and other shareholder supporters of the Proxy Access Bylaw and amend the Proxy Access Policy in accordance with the original Proxy Access Proposal.

Shareholder Statement

I am most disappointed with the conduct of Bank Management in handling the “Proxy Access” matter. First Management misled the Proponent by not dealing in “Good Faith” and later adopted a “Proxy Access Policy” which simply **DOES NOT PROVIDE PROXY ACCESS**. This proposed Proxy Access Policy is purely a cleverly designed ploy to end any possibility of shareholders nominating a director. Finally, shame on the Office of the Superintendent of Financial Institutions and the Canadian Coalition for Corporate Governance for their participation in this charade.

2.0 Shareholder Resolution – Addition for Bylaw – Reimbursement of Shareholder Expenses

BE IT RESOLVED THAT the National Bank of Canada institute a By-law to reimburse all reasonable expenses incurred by:

- (a) a shareholder nominator or nominating group in connection with the nomination of the proposed director under the Bank’s “Proxy Access” By-law including proxy solicitation.
- (b) the proponent of a shareholder proposal or resolution attending and presenting the proposal at the Annual General or Special Meeting.

Further the reimbursement shall take place within 30 days of the date of the Annual General Meeting.

Shareholder Statement

Shareholders are the owners of the Bank and when voluntarily participating in the corporate governance process they do not receive remuneration; however, I believe like most other volunteers, they should have their expenses covered.

3.0 Shareholder Resolution to Implement a By-Law Forbidding the Bank, Its Subsidiaries, Affiliates and Proxy Advisory Service from Paving Soliciting Dealer Fees in Proxy Contests (“Vote Buying”)

WHEREAS it is important to Shareholders of the Bank that Contested Proxy Votes be conducted in an honest and fair manner; and

WHEREAS the practice of “Vote Buying” is being actively pursued by Canadian Brokerages, Reporting Issuers and Proponents; and

THEREFORE BE IT RESOLVED that the By-Law be added to the Bank’s existing By-Laws forbidding the Bank, its Subsidiaries, Affiliates and Proxy Advisory Services from paying or receiving Soliciting Dealer Fees in such activities.

Shareholder Statement:

I cannot think of any reason by the Bank would be against this proposal other than a shareholder proposed it. I can say that in my twenty years of submitting over 400 shareholder proposals, only one proposal (a trick one) was initially recommend by a Bank so the odds are quite high that the Bank will find a reason to recommend against it.

I urge shareholders to vote FOR this common sense proposal.

[35] As mentioned earlier, Mr. Weir wrote to the Court advising he was withdrawing proposal #1, the Proxy Access Proposal, as it relates to the respondents. Therefore, the court need only consider proposals #2 and 3 as it relates to NBC. These proposals relate to by-laws and therefore involve section 189 of the *Bank Act*.

[36] The issues relating to Mr. Weir's application against NBC are like those of RBC and are as follows:

1. Does Mr. Weir meet the requirements to submit shareholder proposals to NBC pursuant to section 143 of the *Bank Act*, and thus have standing to bring this Application?
2. Is the Application premature and contrary to the statutory requirements of the *Bank Act*?
3. If Mr. Weir meets the requirements to submit shareholder proposals to NBC pursuant to section 143 of the *Bank Act*, is NBC entitled to exclude the two proposals, or any part thereof, for its 2019 Management Proxy Circular, pursuant to one or more of the exemptions in subsection 143(5) of the *Bank Act*, or other lawful reason?
4. Is NBC bound by the doctrine of judicial estoppel, as they have historically considered shareholder proposals from Mr. Weir in the past?
5. If Mr. Weir meets the eligibility requirements under section 143 of the *Bank Act* is NBC required to include Mr. Weir's two proposals in its 2019 Management Information Circular as it failed to notify Mr. Weir of its refusal to include the proposals within the prescribed period pursuant to section 144(1) of the *Bank Act*?

Issue 1 - Does Mr. Weir meet the requirements to submit shareholder proposals to NBC pursuant to section 143 of the *Bank Act*.

[37] I find Mr. Weir is not eligible to submit proposals pursuant to section 143 of the *Bank Act* because he is not a registered holder as admitted in his affidavit of January 7, 2019, at paragraph 12.

[38] I find he is not a beneficial owner of NBC shares because he has not provided proof that he is a beneficial owner of shares that are entitled to vote at NBC's Annual Meeting of Shareholders.

[39] My analysis regarding RBC and Mr. Weir's beneficial ownership argument based on owning units of a mutual fund of RBC applies equally to his argument regarding NBC. The fact that Mr. Weir owns units of an RBC mutual fund, which own units in other RBC funds, which own shares in NBC, does not make him a beneficial owner of the NBC shares held by the fund. It does not give Mr. Weir beneficial ownership for the purpose of putting forward a shareholder proposal pursuant to section 143 of the *Bank Act*.

[40] As both of Mr. Weir's remaining shareholder proposals relate to the adoption or amendment of by-laws, section 189 of the *Bank Act* applies. Mr. Weir is not a shareholder entitled to vote at an annual meeting and, therefore, not eligible to submit a proposal to make or amend a by-law under the *Bank Act*. If I am wrong in my analysis in classifying these proposals as amendments or adoptions of by-laws, I find Mr. Weir is not a shareholder or beneficial owner of NBC shares and is not eligible to submit proposals under section 143(1), based on the same reasoning I found in my earlier discussion above relating to RBC.

[41] Given my finding on the standing issue raised by NBC, there is no need for me to address whether NBC is entitled to omit the proposals based on the exemptions under section 143(5) of the *Bank Act*. Likewise, there is no need to address Mr. Weir's issue that NBC failed to notify Mr. Weir of its refusal to include the proposals within the prescribed period under section 144(1) of the *Bank Act*.

[42] My earlier finding above with respect to judicial estoppel regarding RBC applies equally to the Application against NBC.

Conclusion

[43] I do not accept Mr. Weir's ultimate position that non-shareholders can submit shareholder proposals with the support of one or more shareholders. The legislative purpose and history behind section 143 of the *Bank Act* does not support such a broad interpretation.

[44] Mr. Weir's Application against RBC and NBC is dismissed with costs.

[45] After receipt of this decision, if the parties cannot agree on costs arising from this Application they are directed to contact the court.

[46] Thank you, Counsel, and thank you Mr. Weir.

[47] Addendum: Given that I have found that Mr. Weir does not have standing to bring the application it is unnecessary for me to decide whether Mr. Weir's application was premature.

Bodurtha, J.