SUPREME COURT OF NOVA SCOTIA

Citation: *Moose River Resources Incorporated v. Atlantic Mining NS Inc.*, 2020 NSSC 243

Date: 2020 09 16
Docket: Hfx No. 499547
Registry: Halifax

Between:

Moose River Resources Incorporated and Atlantic Mining NS Inc.

Applicants

v.

All Holders of Common Shares and Options to Acquire Common Shares of Moose River Resources Incorporated as of Close of Business on August 7, 2020

Respondents

LIBRARY HEADING

Judge: The Honourable Chief Justice Deborah K. Smith

Heard: August 10th, 2020 in Halifax, Nova Scotia

Oral Decision: August 10th, 2020 in Halifax, Nova Scotia

Written Decision: September 16th, 2020

Subject: Interim Order under s.130 of the *Companies Act*, RSNS 1989, c.81 as amended and s.3 of the Third Schedule of the said *Act*.

Summary: The Applicants applied for an order approving an Arrangement under s.130 of the *Companies Act*, *supra*. On August 10th, 2020 they brought an *ex parte* motion in chambers seeking advice and direction with respect to the calling and conduct of a special meeting in connection with the proposed Arrangement.

Counsel provided the court with a number of Nova Scotia precedents that supported the form of Order that they were seeking.

Issues: Should this interim motion proceed on an *ex parte* basis? If so, should the requested Order be granted?

Result: In the circumstances of this case, the court was satisfied to proceed on an *ex parte* basis. It was not, however, prepared to grant the Order as drafted. The court noted that as the shareholders had not been given notice of the motion or an opportunity to participate, it was imperative that counsel restrict the motion to procedural matters such as notice, how the meeting of shareholders is going to be conducted, etc. In addition, the court noted that with this type of *ex parte* motion counsel had an obligation to ensure that the proposed order is balanced and reasonable. The Order, as presented, did not satisfy this requirement. An amended Order was issued by the court.

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Judge: The Honourable Chief Justice Deborah K. Smith

Heard: August 10th, 2020 in Halifax, Nova Scotia

Counsel: Julie Robinson, for Moose River Resources Incorporated
Colleen P. Keyes, for Atlantic Mining NS Inc.

[1] Moose River Resources Incorporated (MRRI) and Atlantic Mining NS Inc. filed an Application in Chambers for an order approving an Arrangement under s.130 of the *Companies Act*, RSNS 1989, c.81 as amended (the *Act*).

[2] On August 10th, 2020, counsel for the Applicants brought an *ex parte* motion before me in chambers seeking advice and direction with respect to the calling and conduct of a special meeting of the holders of common shares of MRRI in connection with the proposed Arrangement. I allowed the motion to be heard *ex parte* but required amendments to the proposed Order. I reserved the right to provide reasons for the changes that I requested. These are my reasons.

[3] The motion before me was brought pursuant to s.130 of the *Act* and s.3 of the Third Schedule of the *Act*. Section 130 deals with compromises and arrangements. It provides:

> **Meeting of creditors or members**
>
> 130 (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up under the Companies Winding Up Act, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.
>
> (2) If a majority in number representing three fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be

> binding on all the creditors or class of creditors, or on the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up under the Companies Winding Up Act, on the liquidator, members and contributories of the company.
>
> (3) An order made under subsection (2) shall have no effect until a certified copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company. *R.S., c. 81, s.130*.

[4] Section 3 of the Third Schedule allows the court to make any interim or final order that it thinks fit in connection with an application under s.130. Section 3 provides:

> 3 In connection with an application for sanction of the court under Section 130 of the Act, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order determining the notice to be given to any interested person or dispensing with notice to any person;
>
> (b) an order appointing counsel, at the expense of the company, to represent the interests of the shareholders;
>
> (c) an order requiring the company to call, hold and conduct a meeting of holders of securities or options or rights to acquire securities in such manner as the court directs;
>
> (d) an order permitting a shareholder to dissent under Section 2 hereof.

[5] As indicated previously, this motion for an interim order was made *ex parte*. A party must make a motion on notice unless it satisfies the judge hearing the motion that it is properly made *ex parte* (CPR 22.02).

[6] A practice has developed in this court[1], and in other jurisdictions, to allow a motion seeking advice and direction with respect to a proposed arrangement to be made *ex parte*. Courts recognize that the purpose of such a motion is to simply provide direction in relation to the meeting where the arrangement will be considered. In *Re First Marathon Inc.*, [1999] O.J. No. 2805 (Ont. S.C.J.) Blair J. recognized this at ¶ 9 where he stated:

> The purpose of such Orders is simply to set the wheels in motion for the application process relating to the arrangement and to establish the parameters for the holding of shareholder meetings to consider approval of the arrangement in accordance with the statute ……

[7] He further stated at ¶ 8:

> …….. To require the corporation to serve notice on all shareholders before taking any steps seems to me to introduce unnecessary expense, duplication and delay into the procedure.

[8] Similarly, *In the Matter of Section 192 (Pacifica Papers Inc.)*, 2001 BCSC 701 the court stated at ¶ 36:

> The application for an interim order under s. 192 for directions related to calling a shareholders' meeting is characteristically the first of three steps required to approve an arrangement under the *Act*. It usually proceeds *ex parte*, due to the administrative burden of notifying all shareholders of the application …….

[1] See, for example, Hfx.No. 332023 and Hfx.No. 316157

[9] On an *ex parte* motion, counsel have a heightened obligation to advise the court of any material fact relating to the matter (see, for example, *Civil Procedure Rules* 22.05(1) and 22.05(2)). In the context of a motion for an interim order pursuant to s. 130 and s. 3 of the Third Schedule of the *Act*, that would include an obligation to inform the court if there is any indication of shareholder opposition to the proposed arrangement.

[10] The affidavit filed in support of this interim motion indicates that on July 28th, 2020 an email was sent to all MRRI shareholders (other than the Purchaser) announcing the Arrangement. I was not advised of any indication of shareholder opposition to the proposed Plan. In the circumstances, I was content to proceed with the interim motion on an *ex parte* basis.[2]

[11] Along with the ability to bring this type of motion on an *ex parte* basis (if the judge hearing the matter determines that it is appropriate) comes certain responsibilities.

[12] In my view, there is an obligation on counsel to request an order that is balanced and reasonable. In light of the fact that the shareholders have not been given notice of this motion, nor were they given an opportunity to participate, it is

[2] It should be noted that a party who is affected by an *ex parte* order may require the motion to be heard again in chambers (see CPR 22.06(2)).

imperative, in my view, that counsel restrict the motion to procedural matters such as notice, how the meeting of shareholders is going to be conducted, the delivery of proxies, etc. The Order that is issued should not affect the substantive rights of the shareholders as they have not had an opportunity to be heard. This is in keeping with the suggestion by our Court of Appeal that *ex parte* orders that affect substantive rights should only be granted in exceptional circumstances.[3]

[13] I turn now to the Order that was requested by the Applicants. Some of the changes that I required to the Order were minor and do not warrant comment here. I will restrict my remarks to those aspects of the Order that caused me particular concern.

[14] The Applicants proposed that a copy of the Notice of Application, the Interim Order and the Meeting Materials were to be distributed to MRRI Shareholders, Optionholders, the Directors and the Auditor at least twenty-one (21) days prior to the proposed meeting. The Meeting Materials included a circular which attached a copy of the Plan of Arrangement.

[15] Paragraph 9 of the proposed Order read:

> **ARRANGEMENT AMENDMENTS**

[3] *Nova Scotia (Attorney General) v. Lohnes* (1982), 55 NSR (2d) 592 (CA).

> MRRI and the Purchaser are authorized to make such amendments, revisions or supplements to the Arrangement (including the Plan of Arrangement) as they may determine are appropriate, subject to the terms of the arrangement agreement between MRRI and the Purchaser dated July 24, 2020 (the "**Arrangement Agreement**") and this Interim Order, without any additional notice to the MRRI Shareholders or the MRRI Optionholders and the Arrangement as so amended, revised or supplemented, shall be the Arrangement to be submitted to the Meeting and the subject of the Arrangement Resolution.

[16] In my view, this clause as drafted, was inappropriate. The Shareholders and Optionholders would rely on the Meeting Materials (including the Plan of Arrangement) to determine whether they wish to attend the meeting called to consider the Arrangement and what position they will take in relation to the Arrangement. Why would the Applicants be entitled to revise the Arrangement without any additional notice to the Shareholders and Optionholders? This, in my view, would be a breach of natural of justice. I therefore required that this clause be amended to read:

> **ARRANGEMENT AMENDMENTS**
>
> MRRI and the Purchaser are authorized to make such amendments, revisions or supplements to the Arrangement (including the Plan of Arrangement) as they may determine are appropriate, subject to the terms of the arrangement agreement between MRRI and the Purchaser dated July 24, 2020 (the "**Arrangement Agreement**") and this Interim Order, with notice to the MRRI Shareholders, the MRRI Optionholders, the Directors and the Auditor as specified in paragraphs 10(a), (b), (c) and (d) of this Interim Order at least five (5) business days before the Meeting, and the Arrangement as so amended, revised or supplemented, shall be the Arrangement to be submitted to the Meeting and the subject of the Arrangement Resolution.

[17] Further, the draft Order required that completed proxies must be deposited with McInnes Cooper no later than 48 hours before the time of the Meeting *subject to MRRI's discretion, should it deem it advisable to do so, to waive such time limits*.

[18] The court has been asked to set time limits for the delivery of proxies. Why would MRRI be granted the ability to waive those time limits should it decide that it is advisable to do so? What is the point of asking the court to set a time limit for the filing of proxies if one of the Applicants can unilaterally waive that time limit? Further, why should the Shareholders be bound by a time limit in relation to proxies while MRRI has the ability to waive it? The Order that I issued did not grant MRRI the discretion to waive the time limit for the delivery of proxies.

[19] In relation to dissent rights, the draft Order provided as follows:

> **DISSENT RIGHTS**
>
> 22. Registered Selling Shareholders may exercise dissent rights with respect to the Shares held by such Selling Shareholders in connection with the Arrangement pursuant to and in the manner set forth in Section 2 of the Third Schedule to the Act, as modified by this Interim Order, the Final Order and Section 3.1 of the Plan of Arrangement ("**Dissent Rights**") provided that, notwithstanding the Act, the Notice of Dissent is received by MRRI not later than 5:00 p.m. (Atlantic) two Business Days immediately preceding the date of the Meeting (as it may be adjourned or postponed from time to time in accordance with the Arrangement Agreement). Dissenting Holders who validly exercise their Dissent Rights shall be deemed to have transferred the Dissent Shares held by them in respect of which the Dissent Rights are so exercised, as of the Effective Time without any further act or formality, to MRRI (free and clear of all Liens) as

provided in Section 2.4(b) of the Plan of Arrangement and if the Dissenting Holders ultimately are:

(a) entitled to be paid fair value for their Dissent Shares: (i) will be entitled to a cash payment equal to such fair value which shall be paid by MRRI following the determination thereof and which shall be funded from the Dissent Value held in escrow by the Purchaser's Legal Counsel and (ii) will not be entitled to any other payment or consideration, including any payment that would be payable under the Arrangement had such Dissenting Holders not exercised their Dissent Rights in respect of such Dissent Shares, and:

i. if the aggregate fair value of the Dissent Shares is determined to be less than the Dissent Value, the balance of the Dissent Value remaining after the fair value has been paid by MRRI to the Dissenting Holders shall be added to and form part of the Holdback; and

ii. if the aggregate fair value of the Dissent Shares is determined to be greater than the Dissent Value, MRRI shall pay any remaining amount due to the Dissenting Holders and the Purchaser shall be entitled to make a Claim (as defined in the Arrangement Agreement) from the Holdback in accordance with Article 7 of the Arrangement Agreement for the excess amount,

and all such Dissent Shares shall be cancelled; or

(b) not entitled, for any reason, to be paid fair value for their Dissent Shares:

i. the Dissent Shares transferred to MRRI pursuant to Section 2.4(b) of the Plan of Arrangement of the Plan of Arrangement [sic] shall be deemed to have been transferred to the Purchaser as of the Effective Date, without any required further act or formality on the part of the Dissenting Holder, MRRI or the Purchaser;

ii. the Purchaser's Legal Counsel will deposit the Dissent Value with the Despositary within ten (10) Business Days of the determination that the Dissenting Holder is not entitled to be paid fair value for their Dissent Shares; and

> iii. the Depositary shall pay the Dissent Value to the Dissenting Holders.

[20] This proposed clause, in my view, deals with much more than procedural matters and affects shareholders rights under the Third Schedule of the *Act*. Counsel for the Applicants acknowledged this in their pre-hearing brief stating:

> The Applicants seek the direction of this Honourable Court to provide that notwithstanding anything to the contrary contained in subsection 2(12) of the Third Schedule, in no case shall MRRI, the Purchaser or any other person be required to recognize dissenting MRRI Shareholders as being the holders of Shares after the Effective Time.
>
> The Applicants also seek the direction of this Honourable Court to require registered Selling Shareholders who wish to dissent to provide a written objection ("**Notice of Dissent**"), in accordance with the Dissent Procedures, to MRRI by 5:00 p.m. (Atlantic Time) two Business Days immediately preceding the Meeting.
>
> The imposition of this deadline departs from the statutory dissent provisions under the Act that would otherwise permit a Notice of Dissent to be provided prior to or at the Meeting. The Applicants submit that this variation will advance the orderly and efficient conduct of the Meeting by permitting MRRI to assess the number of MRRI Shareholders that will exercise the Dissent Rights prior to the Meeting, while sill providing MRRI Shareholders with sufficient and reasonable notice to exercise their Dissent Rights under Section 2 of the Third Schedule to the Act.

[21] While setting time limits to provide notice of dissent is procedural in nature (rather than substantive) the proposed Order nevertheless altered the rights of the Shareholders under the Third Schedule of the *Act* which allows them to provide notice of dissent either prior to or at the time of the Meeting. In addition, the

Applicants asked the court to order that notwithstanding anything contained in s.2 (12) of the Third Schedule, in no case shall MRRI, the Purchaser or any other person be required to recognize dissenting MRRI shareholders as being the holders of shares after the Effective Time. In order words, the Applicants asked the court to alter shareholders' rights under the Third Schedule of the *Act* without any notice to or input from the affected shareholders. In my view, this was inappropriate.

[22] The Third Schedule of the *Act* provides protections for minority shareholders. It seeks to ensure that the interests of minority shareholders are considered and treated fairly. The court should not be asked to issue an *ex parte* interim order which affects the rights granted to shareholders under the Third Schedule of the *Act*. I required that the order be amended to read:

> **DISSENT RIGHTS**
>
> 22. Shareholders' dissent rights shall be as set forth in the Third Schedule to the Act.

[23] Finally, the Applicants sought the following in the proposed Order:

> **SUFFICIENCY OF NOTICE**
>
> 24. Substantial compliance with paragraph 10 of this Interim Order shall constitute good and sufficient notice of the Meeting and the application for the Final Order.
>
> 25. Accidental failure or omission by MRRI to give notice of the Meeting and the Final Application for the Final Order to any one or more MRRI Shareholders, or

> the non-receipt of such notice, shall not invalidate the giving of notice under paragraph 10 of this Interim Order, shall not invalidate any resolution passed or proceedings taken at the Meeting, and shall not constitute a breach of this Interim Order.

[24] Clause 10 of the Order required that a copy of the Notice of Application, a copy of the Interim Order and the Meeting Materials be distributed to MMRI Shareholders, MRRI Optionholders, the Directors and the Auditor at least twenty-one days prior to the date of the Meeting. The form of distribution was not onerous. For example, in the case of a Registered Shareholder distribution was to be by ordinary mail, courier, email or delivery in person. Why would the court order delivery of this documentation to the shareholders only to indicate later in the Order that substantial compliance with paragraph 10 will constitute good and sufficient notice of the meeting? Further, why would it order that accidental failure or omission by MRRI to give notice of the meeting and the Final Application for the Final Order to any of the shareholders shall not invalidate the giving of notice under paragraph 10? What is the purpose of ordering notice if, in the same order, the court indicates that failure to give notice will not invalidate the giving of notice or constitute a breach of the Interim Order? As I explained to counsel at the time of the hearing, if a problem develops in relation to notice, counsel should bring it to the attention of the judge dealing with the Application. That judge will decide the effect of any failure to give notice.

[25] *Ex parte* orders are the exception rather than the rule. Counsel bringing this type of *ex parte* motion must appreciate the obligation upon them to ensure that the proposed order is balanced and reasonable. Allowing the Applicants to amend the Arrangement without further notice to the Shareholders; putting a time limit on the filing of proxies for shareholders, but allowing one of the Applicants to ignore it; changing shareholders' rights under the Third Schedule of the *Act*; and asking the court to set out the manner of distribution of documentation to the shareholders, only to suggest that a failure to distribute will not have any effect on the proceeding, in my view, are not balanced and reasonable components of such an order. For these reasons, I required that the Order be amended.

Deborah K. Smith
Chief Justice