IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Scion Capital* v. *Bolivar Gold Corp.*
2006 YKSC 17

Date: 20060224
Docket No.: S.C. No. 05-A0151
Registry: Whitehorse

IN THE MATTER OF AN APPLICATION FOR APPROVAL
OF AN ARRANGEMENT UNDER SECTION 195 OF
THE *BUSINESS CORPORATIONS ACT* OF THE YUKON TERRITORY
R.S.Y. 2002, C. 20 AND AMENDMENTS THERETO

BOLIVAR GOLD CORP.

AND

Docket No.: S.C. No. 05-A0182

IN THE MATTER OF BOLIVAR GOLD CORP., A CORPORATION INCORPORATED PURSUANT TO THE LAWS OF THE YUKON TERRITORY AND IN THE MATTER OF SECTIONS 124, 243 AND 249 OF THE *BUSINESS CORPORATIONS ACT* OF THE YUKON TERRITORY, R.S.Y. 2002, C. 20 AND AMENDMENTS THERETO.

Between:

SCION CAPITAL, LLC, SCION QUALIFIED VALUE FUND, A SERIES OF SCION QUALIFIED FUNDS, LLC, AND SCION VALUE FUND, A SERIES OF SCION FUNDS, LLC and THE CLINTON GROUP and ARNHOLD AND S. BLEICHROEDER ADVISERS, LLC

Petitioners

And

GOLD FIELDS LIMITED, 38978 YUKON INC., SERAFINO IACONO, MIGUEL DE LA CAMPA, JOSE FRANCISCO ARATA, ROBERT DOYLE, PETER VOLK, AND PERRY DELLELCE, BOLIVAR GOLD CORP.

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Edward Babin, Luis Sarabia, James Bunting and Alex Moore	Counsel for Scion Capital, LLC, Scion Qualified Value Fund, A Series of Scion Qualified Funds, LLC and Scion Value Fund, A Series of Scion Funds, LLC; the Clinton Group and Arnhold and S. Bleichroeder Advisors, LLC
Robyn Ryan-Bell and James Tucker	Counsel for Bolivar Gold Corp.
Katherine Kay and Jessica Bookman	Counsel for Gold Fields Ltd. and 38978 Yukon Inc.
Mark Gelowitz	Counsel for Serafino Iacono, Miguel De La Campa, Jose Francisco Arata, Robert Doyle, Peter Volk, Perry Dellelce

REASONS FOR JUDGMENT

INTRODUCTION

[1] Bolivar Gold Corp. (Bolivar) seeks the final approval of a plan of arrangement with Gold Fields Limited (Gold Fields) pursuant to s. 195 of the *Business Corporations Act*, R.S.Y. 2002, c. 20 (Y.B.C.A.).

[2] Scion Capital, LLC, Scion Qualified Value Fund, A Series of Scion Qualified Funds, LLC and Scion Value Fund, A Series of Scion Funds, LLC (Scion); the Clinton Group (Clinton) and Arnhold and S. Bleichroeder Advisors, LLC (ASBA) oppose the approval of the plan of arrangement and petition for an order that the actions of Gold Fields, Bolivar and the management directors personally, be found to be oppressive, pursuant to s. 243 of the Y.B.C.A. Among other remedies, they seek the removal of the directors and officers and the setting aside of the plan of arrangement.

[3] The bulk of the events took place in November, December 2005 and January 2006. The application to approve the plan of arrangement and the oppression

petition were heard at the same time on February 7, 8, 9 and 10, 2006. I am indebted to counsel for the timeliness and orderly manner in bringing this matter to court.

[4] The facts are not generally in dispute. It is the characterization of those facts that differs greatly. I will set out the background facts in a general way, the law, and my analysis of the issues.

[5] This judgment does not discuss the issues raised in the Ontario proceeding brought by Scion relating to the *Securities Act*, R.S.O. 1990, c. S. 5, which have been dealt with by Morawetz J. in *Scion Capital, LLC* v. *Gold Fields Ltd*., [2006] O.J. No. 466, dated February 6, 2006, (the Ontario proceeding).

[6] On February 17, 2006, on account of the urgency of this matter, I gave the terms of my order as follows:

(1) the plan of arrangement is approved;

(2) the application by ASBA for an extension of time to file a dissent notice is dismissed;

(3) the oppression petition is dismissed.

[7] The following are my reserved written reasons.

BACKGROUND

The Parties

[8] Bolivar is a gold exploration, development and production company continued under the Y.B.C.A. It is a reporting issuer under the securities law of certain Canadian

provinces and is listed on the Toronto Stock Exchange. Bolivar's primary exploration properties are located in El Callao, Venezuela, where it has a 95% interest in the Choco 4 and Choco 10 concessions. Bolivar commenced production at its Choco 10 concession in 2005.

[9] Bolivar has five executive officers, being Serafino Iacono (Chairman and CEO), Miguel de la Campa (President and COO), Jose Francisco Arata (Executive Vice-President of Exploration), Robert Doyle (CFO) and Peter Volk (General Counsel and Corporate Secretary). They are each named in the oppression petition.

[10] Bolivar has seven directors; Messrs Iacono, de la Campa, Arata, Perry Dellelce, Andres Carrera, Robert Hines and Stephen Wilkinson (the Bolivar board). Messrs Carrera, Hines and Wilkinson, who are directors but not officers (the non-management directors), are not named in the oppression petition. Perry Dellelce is a partner in Bolivar's external legal firm and is also named in the oppression petition.

[11] Gold Fields is one of the world's largest gold exploration, development and production companies. Its head office is located in South Africa and its securities are listed on the JSE Securities Exchange South Africa, the NYSE, the LSE, Euronext and the SWX Swiss Exchange. Gold Fields is not a reporting issuer in any jurisdiction in Canada.

[12] Gold Fields and Bolivar are independent, arm's length entities. Through its subsidiaries, Gold Fields owned approximately 13.2% of the issued and outstanding common shares of Bolivar and 13.2% of Bolivar warrants and options, at the time of the Interim Order. One of Gold Fields' subsidiaries is a joint venture partner with Bolivar in

acquiring, exploring and developing gold properties in a defined area of interest in El Callao, Venezuela.

[13] Scion is an investment advisory firm and currently has over $750 million USD in assets under management. It has a number of funds and began investing in Bolivar in January 2005. The Scion funds owned approximately 16% of the issued and outstanding shares of Bolivar and 2.5 % of the Bolivar warrants and options, at the time of the Interim Order.

[14] Clinton is an investment advisory firm headquartered in New York City. It manages over 1.2 billion USD in investment fund products and manages over $6 billion USD in other assets. It began to invest in Bolivar after the announcement of the plan arrangement. As at January 17, 2006, Clinton was the beneficial owner of 5,572,100 Bolivar shares.

[15] ASBA is an international investment management firm and has over $29.58 billion USD in assets under management. It began investing in Bolivar after the announcement of the plan of arrangement. By January 12, 2006, ASBA was the owner of 2,200,000 Bolivar shares.

[16] Bolivar's shareholder base is comprised of mostly sophisticated institutional investors. As at December 5, 2005, the record date for the special meeting of shareholders (the "Record Date"), Bolivar had the following issued and outstanding securities:

(a) 113,227,206 Bolivar common shares (Bolivar Shares);

(b) 9,478,468 common share purchase warrants of Bolivar, exercisable at $1.10 until March 17, 2008 (the Bolivar Initial Warrants);

(c) 19,421,588 common share purchase warrants of Bolivar, exercisable at $1.75 until August 25, 2008 (the Bolivar Series A Warrants);

(d) 9,040,910 common share purchase warrants of Bolivar exercisable at $3.25 until December 22, 2009 (the Bolivar Series B Warrants); and

(e) 8,947,832 Bolivar options (Bolivar Options).

The Plan of Arrangement

[17] Gold Fields first approached Bolivar to purchase its equity in November 2003. After entering into a confidentiality agreement with Bolivar, Gold Fields commenced a due diligence review.

[18] Discussions continued in 2004 but no agreement was reached, as Gold Fields' offer was too low for Bolivar, and Bolivar's demands were too high for Gold Fields.

[19] Discussions continued in the summer of 2005 when Gold Fields expressed an interest in purchasing Bolivar for $275 million. This offer was rejected by Mr. Iacono of Bolivar, who verbally asked for a price of $3.35 a share.

[20] There were also three other potential purchasers who conducted due diligence investigations after entering into confidentiality agreements with Bolivar. No agreements were reached.

[21] During the period 2003 to 2005, Bolivar was advised by GMP Securities Ltd. (GMP) to reject the offers received.

[22] On November 18, 2005, Gold Fields approached Bolivar with an offer. Gold Fields asked Bolivar to consider the offer over the course of the weekend and provide a response prior to the opening of trading on the following Monday, November 21, 2005.

The reason Gold Fields imposed this short time frame was out of fear that information about the offer would be leaked.

[23] Negotiations continued over the weekend for 20 – 24 hours per day.

[24] On November 21, 2005, Bolivar and Gold Fields signed a Letter Agreement (the Letter Agreement).

[25] The Letter Agreement was approved by the Bolivar board of directors on November 21, 2005, based on an oral opinion from GMP. The management members of the board and Perry Dellelce voted in favour of the transaction while the non-management directors abstained until an independent valuation was completed.

[26] The Letter Agreement contained, among other terms, a termination fee of $12 million representing approximately 2.9% of the total value of the transaction. The total transaction was estimated to be $330 million USD.

[27] The Letter Agreement also required the Bolivar board to give its unanimous approval of the arrangement after obtaining a valuation exemption or an independent valuation. The Bolivar board of directors was of the opinion that such an exemption would not be granted and would not have been appropriate. The board favoured obtaining an independent valuation. Gold Fields waived the exemption term.

[28] The management directors also entered into Voting Agreements to support the Letter Agreement.

[29] Gold Fields and Bolivar issued a news release on November 21, 2005, setting out the main terms of the Letter Agreement, but did not mention the termination fee or the Voting Agreements.

[30] On November 21, 2005, the Independent Committee, consisting of the non-management directors, was established. The Independent Committee was represented by independent counsel.

[31] The Independent Committee retained Sprott Securities Inc. to provide an independent valuation. The Sprott Securities valuation followed the usual procedure of considering the net value approach, the comparable trading approach and the comparable precedent transactions approach, as well as the Black-Scholes Option Pricing Formula. Sprott Securities used a range of gold prices from $400 - $550 US in its long-term gold price assumptions.

[32] Sprott Securities concluded in a written report that as of November 30, 2005, the transaction was fair from a financial point of view. Sprott stated that the Bolivar Shares had a fair market value of $2.65 to $3.25 per share.

[33] Based on the fact that Goldfields was a shareholder and significant joint venture partner of Bolivar, Sprott Securities also concluded that this combination of interests would act as a deterrent to other prospective bidders.

[34] The definitive Arrangement Agreement was executed and publicly announced on December 1, 2005, (the Arrangement Agreement). On the same date, the Bolivar board voted unanimously to approve the Plan of Arrangement as set out in the Arrangement Agreement. The Independent Committee was disbanded.

[35] It should be noted that the Bolivar board was aware of Scion’s disagreement with the proposed transaction based upon a Scion letter dated November 21, 2005, to Mr. Iacono and a letter dated November 23, 2005, to Mr. Hines, who chaired the

Independent Committee. The essence of the Scion disagreement was that $3.00 per Bolivar share was not adequate consideration.

[36] Gold Fields agreed to pay the following amounts to Bolivar securities holders:

(a) $3.00 per Bolivar share;

(b) $1.90 per Bolivar Initial Warrant;

(c) $1.25 per Bolivar Series A Warrant;

(d) $0.40 per Bolivar Series B Warrant; and

(e) $3.00 in cash less the exercise price for each Bolivar Option.

[37] The Arrangement Agreement contained the termination fee as well as the right of shareholders to dissent pursuant to s. 193 of the Y.B.C.A. and obtain a court appraisal of the fair value of their Bolivar shares.

[38] On December 8, 2005, this court made an Interim Order ordering, among other things, that Bolivar hold a Special Meeting of the Bolivar security holders. It requires a 66 2/3 majority vote of the shares and a 66 2/3 majority vote of the warrants and options together as a single class in order for the plan of arrangement to be approved. Ontario Securities Commission Rule 61-501 also has a requirement known as “the majority of the minority” rule. This requires that the majority of the Bolivar shareholders other than Gold Fields and related parties, and any joint actor as defined by O.S.C. Rule 61-501, approve the Arrangement Resolution.

[39] The Interim Order required the Management Information Circular to be dated December 8, 2005, and set a Record Date of December 5, 2005, to determine the Shareholders, Warrant holders and Option holders entitled to vote at the Special Meeting.

[40] Bolivar mailed the Management Information Circular to all security holders on December 12, 2005. It provided copies of the Arrangement Resolution, the Interim Order, the Arrangement Agreement, the GMP fairness opinion, the Sprott Securities valuation and the dissent procedures of the Y.B.C.A.

[41] The Management Information Circular contained detailed information consisting of 59 pages plus Appendices attaching the documents mentioned above. It included detailed information about the background and reasons for the arrangement as well as the process used to reach the Arrangement Agreement. It included information on the Bolivar Debentures, which could be converted into shares. It included the terms and amount of the termination fee. It also included the entire compensation, all of which was in place before the Letter Agreement, to be received by the Executive Officers of Bolivar. This compensation consisted of their annual compensation, benefits, and values of unexercised stock options, termination payments and bonus payments. The following are the termination payments and bonus payments which will be paid on the approval of the Arrangement Agreement and are at issue in this hearing:

Name	**Position**	**Termination** (3 x annual salary)	**Bonus**	**Option Value**
Serafino Iacono	Chairman & CEO	$870,000 USD	n/a	$5,099,500 CAD
Miguel de la Campa	President & COO	$696,000 USD	$4,275,000 CAD	$5,099,500 CAD
Francisco Jose Arata	Executive VP, Exploration	$591,600 USD	$3,450,000 CAD	$2,252,365 CAD
Robert Doyle	CFO	$720,000 CAD	$1,350,000 CAD	$2,432,700 CAD
Peter Volk	General Counsel & Secretary	$570,000 CAD	$990,000 CAD	$1,208,633 CAD

[42] The Management Information Circular did not mention the personal interests of management in other outside interests, such as Coalcorp. Coalcorp is a company seeking to acquire certain coal assets. Messrs Iacono, de la Campa, Doyle, Arata and Volk are all listed as executives of Coalcorp. In September 2005, GMP and Sprott Securities Inc. advised Coalcorp management about a proposed $150 million equity offering. A Preliminary Short Form Prospectus was filed on January 18, 2006 and a Final Short Form Prospectus on February 1, 2006. The employment contracts of each member of management permit involvement in Coalcorp and other outside interests.

[43] The price of gold is a major issue for the parties. The price of gold at November 30, 2005, was $493. It rose to $547 per ounce on January 11, 2006, which was 11% higher than it was on November 30, 2005.

[44] The parties began to purchase additional shares as early as November 21, 2005, the date the plan of arrangement was announced. On that date, Scion purchased 5 million Bolivar shares and ASBA purchased 1 million Bolivar shares. Gold Fields also purchased Bolivar shares. In the result, Gold Fields purchased an additional 5,186,000 Bolivar shares and Scion purchased an additional 21,676,400 Bolivar shares. All of these were voting shares.

[45] Mr. Iacono repeatedly urged Gold Fields to increase its offer.

[46] Scion distributed a Dissident Proxy Circular dated December 15, 2005, and issued numerous news releases to pursue its objective of defeating the plan of arrangement.

[47] Scion’s Dissident Proxy Circular and news releases advised security holders of, among other things, Scion’s view that the price was too low, the process for accepting

the offer was flawed, the management of Bolivar was conflicted (because of golden parachutes and outside interests like Coalcorp) and the Venezuelan government looked favourably on Bolivar's mining in the country.

[48] On January 11, 2006, Gold Fields and Bolivar jointly announced they had agreed to increase the consideration Gold Fields would pay to the Security holders as follows:

(a) $3.20 per Bolivar share (an increase from $3.00);

(b) $2.20 per Bolivar Initial Warrant (an increase from $1.90);

(c) $1.65 per Bolivar Series A Warrant (an increase from $1.25);

(d) $1.00 per Bolivar Series B Warrant (an increase from $0.40); and

(e) $3.20 in cash less the exercise price for each Bolivar Option (an increase from $3.00).

[49] Scion continued to oppose the plan of Arrangement as amended and applied unsuccessfully in both the Ontario proceeding and this action, on January 11, 2006, to adjourn the Special Meeting.

[50] In addition to the increase in the offer, announced January 11, 2006, Bolivar amended the proxy solicitation deadline from 5 p.m. on January 10, 2006, to 8 a.m. January 12, 2006, as permitted by the Interim Order. Scion did not receive notification of the amendment until the public announcement on the morning of January 11, 2006, before the TSX opened.

[51] The Special Meeting was chaired by Mr. Iacono who was advised by independent counsel. Scion moved that the meeting be adjourned. Mr. Iacono put the motion to a vote; it was defeated.

[52] Scion objected to Mr. Iacono as Chair stating that an apprehension of bias would arise. On advice from independent counsel, Mr. Iacono ruled he should not step down because the Interim Order and Bolivar's By-laws provided that he was entitled to chair the meeting.

[53] Scion alleged that Gold Fields was not entitled to vote certain Disputed Shares which Scion alleged were acquired in contravention of the Securities Act (Ontario). On legal advice, Mr. Iacono allowed the Disputed Shares to be voted. This issue is dealt with in the Ontario proceeding.

[54] Following the announcement of the increased offer on January 11, 2006, certain registered holders of Bolivar debentures exercised their conversion rights to acquire Bolivar shares (the Conversion Shares) from treasury. Prior to the commencement of the meeting, Mr. Iacono, on the advice of independent counsel, ruled that the Conversion Shares were eligible to vote at the Special Meeting. His ruling was based on independent legal advice. Although Scion had requested Bolivar to provide a list of debenture holders on December 2, 2005, Bolivar had not done so.

[55] The Security holders voted on the Arrangement Resolution. At the Special Meeting, 161 Bolivar shareholders were present in person or by proxy, holding 108,818,930 Bolivar shares, and representing 92% of the outstanding Bolivar shares at the date of the meeting. One hundred and six Bolivar warrant holders and option holders were present in person or by proxy, holding 38,196,186 Bolivar Warrants and Options, and representing 81% of the Bolivar Warrants and Options outstanding as at the Record Date.

[56] Of the shareholders voting, 76.65% voted in favour of the Arrangement Resolution and 23.33% opposed. Of the Warrant holders and Option holders, 82% voted in favour and 18% opposed. When the Disputed Shares and Conversion Shares are backed out, 74.39% of the shareholders voted in favour and 26.65% opposed.

[57] With respect to the “majority of the minority” shareholders, after backing out the Disputed Shares and the Conversion Shares, 70.69% voted in favour and 29.31% opposed the Arrangement Resolution.

[58] In this proceeding, I admitted Scion’s independent expert evaluation prepared by Blair Franklin Capital Partners Inc. dated January 17, 2006, after the Special Meeting of January 12, 2006. Blair Franklin rendered its opinion based on the business conditions as at January 11, 2006, and information contained in the Management Information Circular dated December 8, 2005.

[59] Blair Franklin opined that the fair market value of the Bolivar shares was between $3.70 to $4.40 per share.

[60] I also admitted a report from LECG Canada Limited dated January 17, 2006. LECG was critical of the warrant analysis in the report of Sprott Securities Inc. dated November 30, 2005.

THE LAW

The Plan of Arrangement

[61] Plans of arrangements are submitted to the court for approval under s. 195 of the Y.B.C.A. The Court begins the procedure by making an Interim Order pursuant to s. 194(4) requiring, among other things, a meeting of the class of shareholders, the class

of warrant and option holders, and the majority required to pass a resolution (not to be less than 66 2/3). Section 195(5) requires the following:

> 195(5) The notice of a meeting referred to in paragraph (4)(a) or (b) shall contain or be accompanied by
>
> (a) a statement explaining the effect of the arrangement; and
>
> (b) if the application is made by the corporation, a statement of any material interests of the directors of the corporation, whether as directors, security holders or creditors, and the effect of the arrangement on those interests.

[62] Once the meeting of security holders has been held, the applicant applies pursuant to s. 195(9) for a final order approving the arrangement. The court may approve the arrangement as proposed, approve it as amended by the court or refuse to approve the arrangement. This application is often referred to as the fairness hearing.

[63] The test for approving an arrangement is well settled in the case law. The court must be satisfied that:

(1) The statutory provisions have been complied with;

(2) The class was fairly represented;

(3) The arrangement must be such as a person of business would reasonably approve; and

(4) The arrangement must be compatible with the section under which it is to be approved.

[64] See *Re Francisco Gold Corp.,* 2002 BCSC 1054 at paras. 28 – 34. (*Re Francisco Gold Corp.)*; *Pacifica Papers Inc.* v. *Johnstone*, 2001 BCSC 1069 at para. 20 (aff'd 2001 BCCA 486, appeal to SCC abandoned, [2001] S.C.C.A. No. 400), at para. 20. (*Pacifica No. 2*); *ID Biomedical Corp*. v. *GlaxoSmithKline PLC,* 2005 BCSC 1748 at para

8. (*ID Biomedical*); *Re Gold Texas Resources Ltd*., [1989] B.C.J. No. 167 (S.C.). (*Re Gold Texas Resources).*

[65] There is no issue with respect to the second and fourth parts of the test. The focus of this case has been on the compliance or lack thereof with the Y.B.C.A. statutory provisions and whether the arrangement is one that a business person would reasonably approve.

The Business Judgment Rule

[66] I use the above title as a short form for the third part of the test stated above. There are a number of principles that are encompassed in this test. I will summarize some of them as follows:

(1) In determining what a business person would reasonably approve, the court will pay deference to the business judgment of the majority. See *Re Gold Texas Resources Ltd,* cited above; *Trizec Corp. (Re)* 1994, 20 B.L.R. (2d) 202 at para. 31 (Alta. Q.B.); *Re Francisco Gold Corp*, at para. 30.

(2) The business judgment rule recognizes that while votes of security holders are not conclusive, the views of security holders are to be given great weight in determining their own interests. See *Re St. Lawrence and Hudson Railway Co.*, [1998] O.J. No. 3934 at para. 27 (Gen. Div.) (QL); *Canadian Pacific Ltd (Re)* (1996), 30 O.R. (3d) 110 at 132 (Gen. Div.); *Re Francisco Gold Corp,* at para. 31.

(3) However, the business judgment rule, as it applies to the actions of directors of a company, is a rebuttable presumption that operates to shield from court intervention business decisions that were made honestly,

prudently, in good faith and on a reasonable belief that the transaction was in the best interest of the company. *Corporacion Americana de Equipamientos Urbanos S.L.* v. *Olifas Marketing Group Inc.* (2003), 66 O.R. (3d) 352 at paras. 12 – 14 (Sup. Ct. .J.); *C.W. Shareholdings Inc.* v. *WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Gen. Div.) at 150 – 151; *Ford Motor Co. of Canada* v. *Ontario (Municipal Employees Retirement Board)*, [2006] O.J. No. 27 (Ont. C.A.) (Q.L.) at paras. 58 – 59.

(4) In a fairness hearing, the court must not enter into a searching inquiry as to whether the proposed arrangement is perfect, but rather, must determine whether the directors have acted reasonably and fairly. The decision must be within the range of reasonableness. See *Maple Leaf Foods Inc.* v. *Schneider Corp.* (1998), 42 O.R. (3d) 177 at 192 (Ont. C.A.); *Re Francisco Gold Corp* at para. 33.

(5) The court itself will not judge upon the commercial merits of a plan of arrangement. See *Gold Texas Resources Ltd.*, cited above.

(6) For an arrangement to be fair and reasonable, adequate disclosure of material interests is required, to enable the security holders to make an informed decision; *Re Francisco Gold Corp,* at para. 33.

(7) The onus on the applicant under s. 195 of the Y.B.C.A. is not specified, but courts have stated that the onus is a heavy one in circumstances where the arrangement is not a necessity; *Re Canadian Pacific Ltd.* (1990), 70 D.L.R. (4th) 349 (Ont. H.C.J.) at 359; *Pacifica No. 2*, at para. 24.

(8) “A circular is deficient when it contains an untrue statement or material fact or omits a statement of material fact in a manner which is misleading. A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote”, *Re Francisco Gold Corp,* at para. 39; *Pacifica Papers Inc (Re)*, 2001 701 at para. 40 (*Pacifica No*. 1).

(9) Management is not required to set out opposing views. *Re Francisco Gold Corp* at para 42; *Pacifica No. 1* at para 86.

[67] Finally, in determining that a board of directors has acted fairly and reasonably, the court must examine its conduct from both a procedural and a substantive viewpoint.

Compliance with Statutory Conditions

[68] There is no doubt that the directors and a plan of arrangement must be in compliance with the statutory conditions set out in s. 195 of the Y.B.C.A. The question arises as to whether the actions of the directors must be in compliance with every section of the Y.B.C.A and general corporate law in order to obtain court approval.

[69] I am of the view that the courts must take a flexible approach. I concur with the view expressed by Holmes J. in *Re Francisco Gold Corp* at para. 73, that, if scrupulous adherence to the Y.B.C.A. is required there is a risk that the fairness hearing will become a full scale inquiry into the corporate history of the applicant and its directors as it may apply directly or indirectly to the proposed arrangement. See also *Pacifica No. 2* at paras. 101 – 103 and *Re Olympia and York Developments Ltd* (1993), 102 D.L.R. (4th) 149 (Ont. Gen. Div.) at pp. 165 – 166.

[70] In *Pacifica No. 2* the court states:

> "I do not consider it can be said that any breach of the CBCA in the course of negotiating and completing an arrangement is fatal to its being approved. It is necessary to consider the breach in the context of the transaction as a whole in determining whether the arrangement is fair and reasonable."

[71] Non-compliance with the Y.B.C.A. and general corporate law is relevant if it demonstrates that the arrangement is unfair; it does not, by itself, create unfairness.

The Oppression Remedy

[72] The petition for oppression has been heard at the same time as the application for approval of the plan of arrangement. There is some relationship between the two proceedings in that a plan of arrangement cannot be approved if it is oppressive. However, if the oppression proceeding fails, it does not automatically result in approval of the proposed arrangement; the applicant must demonstrate that the requirements of s. 195 of the Y.B.C.A have been met; *Re Canadian Pacific Ltd.*, cited above.

[73] Section 243 of the Y.B.C.A. states

> 243(1) A complainant may apply to the Supreme Court for an order under this section.
>
> (2) If, on an application under subsection (1), the Supreme Court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Supreme Court may make an order to rectify the matters complained of.

[74] The oppression remedy is designed to protect shareholders' reasonable expectations. It is not designed to grant relief to a dissident shareholder. As stated by Lowry J., the word "oppression" should focus on the character of the conduct complained of while the words "unfairly prejudicial" should focus on the effect of the impugned shareholder; *Urquhart* v. *Technovision Systems Inc.* 2002 BSCS 172 at para. 37, aff'd, 2003 BCCA 45. See also *Themadel Foundation* v. *Third Canadian Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (C.A.) at pp. 754 – 755; *Naneff* v. *Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.); *Walker* v. *Betts*, 2006 BCSC 128, at paras. 87 – 88; *Ford Motor Co. of Canada* v. *Ontario Municipal Employees Retirement Board,* [2006] O.J. No. 27 (C.A.) at para. 100.

[75] Once again, the business judgment rule applies; the courts will not intervene or usurp the board's function so long as the business decisions have been made honestly, prudently, in good faith and on reasonable grounds; *CW Shareholdings Inc*. v. *WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div.) at p. 150.

[76] There is also a principle that the reasonable expectations of a shareholder commence at the time they purchase the shares. In other words, to the extent that a shareholder is aware of the circumstances alleged to constitute oppression, the court retains a discretion to deny the status to bring an oppression proceeding. See *Royal Trust Corp. of Canada* v. *Hord*o (1993), 10 B.L.R. (2d) 86 at para. 6 (Ont. Gen. Div.).

[77] However, if there is oppressive conduct, a court would be reluctant to deny a remedy to security holders even if the timing of the purchase by the petitioner was suspect. As a result, the timing of the purchase of a security may be an additional factor in determining the merits of an oppression proceeding.

[78] The onus in an oppression proceeding is on the applicant. Oppression proceedings are most commonly pursued against directors of a corporation or the corporation in which the security holder owns shares. Thus, the inclusion of Gold Fields in this oppression proceeding is somewhat unusual. However, there is some authority for the proposition that the oppression may be from another shareholder.

[79] In *Stern* v. *Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. Sup. Ct. J.), British American Tobacco PLC (BAT) and Imasco Ltd. were proposing an amalgamation of BAT and Imasco in which BAT would acquire all the shares of Imasco and become a private company. The amalgamation required the requisite majority approval of Imasco shareholders. Stern, a shareholder of Imasco brought, among other actions, an oppression proceeding against BAT.

[80] BAT moved to strike the oppression proceeding as disclosing no reasonable cause of action. Cumming J. ordered that the oppression proceeding against BAT be dismissed. However, in so ruling, he stated at para. 95:

> "… The intent and language of s. 241(1) is to give status to a complainant shareholder of a corporation in bringing an oppression application whenever the oppressive conduct affects adversely his reasonable expectations as a shareholder of that corporation. The source of the oppression will be from within the corporation. However, the source of the oppression can conceivably be from someone who is merely a shareholder. For example, it might be that a shareholder effectively controls corporate decision-making in a closely-held corporation through a shareholders' agreement

> such as to cause the wrongdoing. However, in respect of a public corporation, such as Imasco, it is the board of directors that is the sole directing mind of the corporation. …"

ANALYSIS

[81] I now turn to my analysis of the multiplicity of issues raised in this proceeding.

The Plan of Arrangement

[82] I have categorized the issues under general headings. I recognize, however, that some allegations or facts cut across issues and must be considered in different contexts. At the end of the day, there must be a decision that takes into account the totality of issues raised as to whether the arrangement has been fair and reasonable both procedurally and substantively.

Issue 1: Are the management directors conflicted?

[83] The submission of Scion on this issue is threefold. Firstly, counsel for Scion submit that the management directors are in a position of conflict because of the benefits they receive if the arrangement is approved.

[84] The benefits they will receive are the severance and bonus payments which Scion says amount to approximately $11,411,500 CAD and $2,352,433 USD. In addition, these directors will receive in excess of $15,000,000 CAD from exercising their stock options.

[85] Secondly, Scion says that the management directors will all have similar positions in Coalcorp. They submit that this places the management directors in conflict with their positions in Bolivar. They also allege that these outside interests are in conflict with their employment contracts with Bolivar.

[86] Thirdly, Scion says that the Voting Agreements entered into by the management directors obligated them to vote for the arrangement.

[87] Bolivar and the management directors respond that the benefits that the management directors will receive have been in existence since before the agreement was reached with Gold Fields and validly approved by the compensation committee.

[88] Bolivar submits that all benefits to the management directors have been fully disclosed in the Management Information Circular. Moreover, there can be no conflict between the directors and shareholders, as the values of the bonuses and stock options will be based upon share value. They further submit that outside interests are allowed in the employment contracts of each employee. Finally, Bolivar and the management directors say that voting arrangements are customary in these transactions and the decision should be left up to the decision of the security holders.

[89] It is my view that the benefits that will accrue to the management directors have been in place for some time and were not created overnight in anticipation of the Gold Fields offer. They are fully disclosed in the Management Information Circular and thus it was open to the security holders to determine whether they are excessive or putting management in a position of conflict.

[90] I reject the submission of Scion about the activities of Coalcorp. The employment contracts clearly permit the management directors to be involved in Coalcorp. More importantly, it is a collateral issue that has no evidentiary connection to the sale of Bolivar to Gold Fields. It would truly sidetrack this fairness hearing to begin to interpret employment contracts and outside interests that have only a speculative connection to the transaction with Gold Fields.

Issue 2: Was the process from the Letter Agreement to the Arrangement Agreement flawed?

[91] Scion submits that the Letter Agreement was signed too quickly, without proper consideration as it was agreed to over a weekend. It submits that the management directors should never have signed the Letter Agreement, as it committed Bolivar to a termination fee of $12 million before it was subjected to the scrutiny of the Independent Committee of directors. Scion submits that the Independent Committee began its work too late and finished too early. Scion objects to the fact that the Letter Agreement was never disclosed. In addition, it alleges that the News Release of November 21, 2005, was misleading and incomplete, as it did not mention the termination fee. Scion has furthermore questioned the independence of GMP and Sprott Securities.

[92] Bolivar and the management directors respond that the negotiations with Gold Fields took place over a two-year period. Their objective was to obtain an acceptable offer to be submitted to the security holders of Bolivar for their acceptance or rejection. They say that the Letter Agreement was a compromise that permitted the Independent Committee to do its work. Bolivar rejects any suggestion that GMP and Sprott Securities were compromised in any way.

[93] In my view, the procedure that arrived at the Letter Agreement was by no means perfect. However, I find no evidence that suggests GMP or Sprott Securities were in any way tainted or conflicted in the way they gave their opinions to the management directors and the Independent Committee. It would no doubt have been preferable for Sprott Securities to have given an independent opinion before the Letter Agreement was signed. However, given the protracted negotiations with Gold Fields, the management

directors' desire to conclude an agreement was understandable. It does not, furthermore, pre-judge the work of the Independent Committee, whose work was beyond any reproach. The complaint of Scion about the News Release and the Letter Agreement must be given little weight when the Arrangement Agreement, unanimously approved by all the directors of Bolivar, is really the issue to be considered.

Issue 3: Did the Management Information Circular provide full and fair disclosure?

[94] Scion submits that the Management Information Circular is deficient as follows:

(a) It failed to disclose that the Letter Agreement contained a termination fee that had to be paid if a definitive Arrangement Agreement was not reached.

(b) It failed to disclose that the Independent Committee was not overseeing the whole process.

(c) It failed to disclose that the termination fee of $12 million was payable regardless of the advice of the Independent Committee.

(d) It failed to disclose that Gold Fields had made an offer for $3.00 per Bolivar share six months earlier.

(e) It failed to disclose a previous offer by Hecla at $2.90 - $3.40 per share.

(f) If failed to disclose the Coalcorp venture.

(g) It failed to disclose the terms of the Bolivar management employment contracts which Scion says does not permit the Coalcorp activity of the management directors.

(h) It failed to disclose that amendments to the Bolivar management employment contracts were made by Mr. Iacono without board approval.

(i) It failed to disclose the business conflicts of GMP and Sprott Securities, thus raising serious questions about the fairness opinion and the Sprott Securities valuation.

[95] As I have stated earlier there is no obligation on Bolivar to give the complete corporate history of Bolivar and its management in the Management Information Circular. It must, rather, include material interests of the directors of the corporation and the effect of the arrangement on those interests. It must also explain the effect of the arrangement. In my view, these objectives were achieved by the Management Information Circular.

[96] As to the specific issues of alleged non-disclosure by Scion in regards to items (a), (b) and (c), I find that the termination fee was fully explained. The role of the Independent Committee was also explained in a detailed manner.

[97] I have found no support for the allegations that there were previous offers as set out in (d) and (e).

[98] With respect to (f), (g) and (h), which all involve Coalcorp, I find that this is a collateral issue that is not required to be disclosed. I note that Scion has raised these allegations in its Dissident Proxy Circular for security holders to consider.

[99] As to item (i), I do not find that allegations of business conflicts for GMP and Sprott Securities to have any merit.

Issue 4: Was the Special Meeting manipulated by the events that occurred on January 10 and 11, 2005?

[100] Scion submits that the announcement by Bolivar and Gold Fields to increase its offer on January 11, 2006, was designed to manipulate the vote at the Special Meeting because of its last minute timing and the failure to include an independent valuation as at January 11, 2006. Scion further submits that the extension of time for proxy filings was unfair as it gave an edge to Bolivar in its proxy solicitation.

[101] There is no doubt that Bolivar and Gold Fields made a strategic decision at the last minute to increase its offer and extend proxy solicitation for a short period. However, these procedures were permitted by the Interim Order and the increased offer was no doubt exactly what Scion had been urging, albeit it was not high enough to satisfy Scion.

[102] Scion applied to both the Superior Court of Ontario and this Court to adjourn the Special Meeting to allow Bolivar security holders further time to consider these changes. Both courts refused to adjourn the Special Meeting. In doing so, Morawetz J., of the Ontario Superior Court of Justice stated:

> "There is, in my view, adequate information in the hands of security holders to allow them to make an informed decision at tomorrow's meeting."

[103] I concur. Bolivar security holders were capable of considering the latest developments. They declined to adjourn the meeting.

Issue 5: Was the Special Meeting manipulated by the Chair, Serafino Iacono?

[104] There are a number of issues to consider. I have no difficulty with Mr. Iacono being the Chair, as it was certainly permissible in the Interim Order and the By-laws of Bolivar.

[105] As I have previously stated, the issue of the Disputed Shares is not before this court and, in any event, it did not affect the outcome of the vote.

[106] The issue of the Conversion Shares is more complex. The decision of Mr. Iacono to allow these shares to be voted was made upon receiving advice from independent legal counsel prior to the Special Meeting. My view is that this ruling is not correct as the Record Date was set on December 5, 2005, so that all concerned would know the security holders entitled to vote. On the face of the Interim Order, there was no provision that would suggest that Conversion Shares, newly issued after the Record Date, would be permitted to vote. Presumably, it is because the Record Date was December 5, 2005, that Bolivar did not provide the list of debentures as Scion had requested on December 2, 2005. If such an interpretation could be made to allow Conversion Shares to vote, to be fair, all parties should have known that at the outset of the process in early December 2005.

[107] However, my finding on this issue does not result in a refusal to approve the plan of arrangement. The voting of the Conversion Shares did not affect the outcome.

[108] The Bolivar Debentures were disclosed in the Management Information Circular so their existence was not secret. The fact that I disagree with the decision of the Chair does not detract from the fact that the decision was made in good faith acting on independent legal advice that concluded the better judgment was to favour enfranchisement. See *Blair* v. *Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at paras. 35 and 57.

[109] I conclude that the Special Meeting was not unfairly manipulated.

Issue 6: Is the Arrangement Agreement, in the context of the increased offer, substantially fair?

[110] To this point, I have found that the plan of arrangement has been procedurally fair and reasonable. But that is not the end of the matter. Although the court should not pass judgment on the commercial merit of the plan of arrangement, it must be substantially fair.

[111] The real issue in this dispute is the price to be paid for the shares, warrants and options. Scion does not agree with value that Gold Fields and Bolivar have agreed upon. Scion's view is based upon a number of factors such as the rise in the price of gold prior to the Arrangement Agreement, the rise in the price of gold during the time between the Arrangement Agreement and the Special Meeting, and the positive comments from the Venezuelan government about Bolivar's mining claims.

[112] On the one hand, Scion's view is supported by its expert valuators. However, Scion was in a position to place its valuations, obtained after the Special Meeting, before Bolivar security holders to defeat the plan of arrangement. It did not see fit to do so. Scion will have every opportunity pursuant to its Dissent Notice under s. 193 of the Y.B.C.A. to establish fair value for its shares.

[113] On the other hand, the price of gold continued to rise after the Sprott valuation. There is no statutory obligation on Bolivar to provide a more current valuation to Bolivar security holders. Indeed the Interim Order sets a tight time frame to avoid events overtaking the plan of arrangement.

[114] The expert valuations discuss a range of shares prices based upon their respective assumptions and opinions. I am satisfied that the Sprott Securities valuation was reasonable and within the range of values.

[115] Moreover, one of the important indicators that the share value is in the range of fair value is the business judgment of the security holders at the special meeting. A substantial majority in both classes have voted to approve the plan of arrangement. The business judgment of security holders should prevail.

[116] I conclude that the plan of arrangement and Arrangement Agreement between Bolivar and Gold Fields is procedurally and substantively fair. I therefore approve the plan of arrangement and authorize its implementation.

The Oppression Proceeding

[117] Scion's oppression claim has been brought against Bolivar and its management directors, the usual parties to an oppression proceeding. However, Scion has also included Gold Fields and its subsidiary 38978 Yukon Inc. as respondent. Gold Fields is an arm's length corporation from Bolivar. It is not a controlling shareholder. At the time of this hearing, Scion owned slightly more Bolivar shares than Gold Fields and its affiliates. In this proceeding there was little, if any, evidence to suggest that Gold Fields acted in an oppressive manner. Gold Fields is not the kind of shareholder against whom oppression proceedings should be brought, as contemplated in *Stern.* As such, the oppression proceeding fails against Gold Fields.

[118] In regards to Bolivar and the individually named respondents, a plan of arrangement that is procedurally and substantively fair cannot be oppressive. The facts underlying the oppression proceeding are virtually identical to those in the fairness

hearing. Given my conclusion that the plan of arrangement was procedurally and substantively fair, Scion's claim fails.

[119] I ask counsel to file written submissions on costs, if necessary, to be filed within 14 days of the date of these Reasons.

VEALE J.