

SUPREME COURT OF YUKON

Citation: *Mulacek v. Interoil Corporation*, 2017 YKSC 10

Date: 20170213
S.C. No. 16-A0035
Registry: Whitehorse

BETWEEN

PHILIPPE E. MULACEK

PETITIONER

AND

INTEROIL CORPORATION

RESPONDENT

Before Mr. Justice R.S. Veale

Appearances:

Daniel Bennett and Meagan Hannam
Gregory A. Fekete and Geoffrey Holub

Counsel for the Petitioner
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] On June 9, 2016, I dismissed the application of Phillippe E. Mulacek (“Mr. Mulacek”) for an order postponing the June 14, 2016 Annual General Meeting (“AGM”) of Interoil Corporation (“Interoil”), established by Consent Order of this Court dated April 22, 2016. These are my reasons for so doing.

[2] Mr. Mulacek objected to the June 14, 2016 meeting date on the ground that Interoil, on May 20, 2016, announced a plan of arrangement with Oil Search Ltd. whereby Oil Search would acquire the issued and outstanding shares of Interoil in exchange for the common shares of Interoil or a cash payment alternative. The plan of

arrangement has its own statutory scheme for approval by shareholders pursuant to the Yukon *Business Corporation Act*, R.S.Y. 2002, c. 20 (the “YBCA”).

[3] The issue is whether it is a reasonable exercise of Interoil’s business judgment to not postpone the AGM until shareholders have received the information to form a reasoned judgment on the Oil Search transaction. Or, put differently, whether it is a reasonable exercise of business judgment to proceed with the June 14, 2016 meeting in light of the Oil Search proposed plan of arrangement.

BACKGROUND

[4] The following, generally taken from the Outline of Interoil, filed June 8, 2016, sets out the background:

1. Interoil is an independent oil and gas company continued under the YBCA on August 24, 2007 with its head office in Singapore. It trades on the New York Stock Exchange (“NYSE”) and the Port Moresby Stock Exchange (“PoMSOX”) in Papua New Guinea. It presently has ten directors (the “Directors”) on its board of directors (the “Board”), resident in six different countries.
2. On November 11, 2015, the Interoil Board set a record date of April 25, 2016, for its AGM and set the meeting date for June 14, 2016.
3. On March 21, 2016, Mr. Mulacek, Five Sterling LP, Sterling Mulacek Trust and Petroleum Independent & Exploration LLC (collectively the “Requisitioners”) delivered a requisition for a special meeting of the shareholders of Interoil (the “Requisition”) to the registered office of Interoil.

4. On March 23, 2016, the Requisitioners advised Interoil that they had sent the Requisition to each of the Directors.
5. On March 23, 2016, Interoil gave notice of the AGM on June 14, 2016, to PoMSOX. On March 24, 2016, Interoil gave notice of the AGM and record date to the NYSE. On March 24, 2016, a notice of the AGM and record date was published in both the Wall Street Journal and the Globe & Mail.
6. On April 12, 2016, Mr. Mulacek brought a petition in this Court requesting that the Court order a special meeting of Interoil to consider the matters outlined in the Requisition and alleging that the Directors have failed to call a meeting (the “First Petition”). The First Petition was brought despite the fact that the 21 day period afforded the Directors by the *Act* subsection 144(4) had not yet passed.
7. On April 21, 2016, the evening before the First Petition was to be heard, counsel for Mr. Mulacek indicated by telephone that they were prepared to enter into a consent order reflecting terms previously and repeatedly offered by Interoil.
8. On April 22, 2016, Interoil and Mr. Mulacek agreed to, and this Court granted, the Consent Order.
9. The terms of the Consent Order were read into court at the April 22 application requiring that:
 - (a) the proposals set forth in the Requisition be considered at the AGM of the shareholders, to be held on or before June 30, 2016;

- (b) the proposals be included in the information circular for the AGM;
and
 - (c) the proposals be voted on prior to the ordinary business of the AGM.
10. The language in the Consent Order requiring Interoil to hold the AGM on or before June 30 was included because it tracked precisely the language of the Requisition and Interoil's April 20 offer letter.
 11. The parties also entered into a Consent Order on April 22, 2016, dismissing the First Petition, S.C. No. 16-A0002, without costs (the "Consent Dismissal").
 12. In reliance on the Consent Order and Consent Dismissal Order, both Interoil and Mr. Mulacek have prepared for the AGM on June 14, 2016.
 13. On May 4, 2016, Interoil published its management information circular and form of proxy in respect of the AGM.
 14. On May 12, 2016, Mr. Mulacek provided Interoil with notice of its intended director nominees, which included himself and filed a dissident information circular in respect of same on May 17, 2016.
 15. On May 20, 2016, Interoil and Oil Search announced a proposed plan of arrangement whereby Oil Search would acquire the issued and outstanding common shares of Interoil in exchange for common shares of Oil Search, or a cash payment alternative, and contingent value rights linked to the volume of gas certified in the Elk-Antelope field in Papua New Guinea.

16. On May 31, 2016, Mr. Mulacek petitioned the Court for an order as follows:
- (a) the AGM currently scheduled for June 14, 2016, be postponed until after the transaction involving Oil Search is approved or rejected by shareholders.
 - (b) Interoil may set a new record date and date for the rescheduled AGM at its discretion, provided that it take place after the transaction involving Oil Search is approved or rejected by shareholders and before October 31, 2016.

Business Judgment Rule

[5] Section 145 of the *YBCA* gives the court the jurisdiction to order a meeting to be called, held and conducted in the manner the court directs “for any other reason the Supreme court thinks fit”. This discretion is exercised according to the business judgment rule which accords deference to a business decision so long as it lies within a range of reasonable alternatives.

[6] In considering what is in the best interests of the corporation, directors look at the interests of shareholders, employees, creditors, consumers, governments and the environment to inform their decision. See *BCE Inc. Re*, 2008 SCC 69, at para. 40.

DISPOSITION

[7] Counsel for Mr. Mulacek submits that the AGM currently scheduled for June 14, 2016, be postponed until after the transaction involving the Oil Search plan of arrangement is approved or rejected by shareholders.

[8] Counsel submitted the following reasons:

1. shareholders would fear voting for a director who did not support the Oil Search plan of arrangement as it would require paying the \$60 million break fee;
2. there would be insufficient information to determine the reasonableness of paying the break fee;
3. Interoil has taken advantage of the announcement of the Oil Search plan of arrangement by advocating that the election of new Directors would interfere with the transaction.

[9] There is no doubt that the announcement of the Oil Search transaction would come into play with the election of new directors. However, I find that it cuts both ways in the sense that a shareholder might want an independent director to be involved in the process rather than being elected after the approval or rejection of the Oil Search transaction. In other words, there is an equally strong argument that holding the election of directors after the vote on the Oil Search transaction deprives the shareholders of an opportunity to elect a new Board of Directors before the vote of the Oil Search transaction.

[10] The fact that the AGM has been court-ordered for the specific purpose of the election of Directors also favours the judgment of Interoil to proceed with the meeting. Indeed, the result of not proceeding with the meeting to elect the Board of Directors could deprive the shareholders of any opportunity to vote for a new Board of Directors at all, should the Oil Search transaction be approved.

[11] I conclude that given the Consent Order for the AGM to be held on or before June 30, 2016, it was clearly within the range of reasonable alternatives for the Board to proceed with the court-ordered AGM.

[12] Mr. Mulacek's petition is dismissed.

VEALE J.