COURT OF APPEAL FOR YUKON

Citation: *Certain Shareholders of Crew Gold Corporation v. Crew Gold Corporation*, 2012 YKCA 9

Date: 20121012
Docket: YU687

Between:

Certain Shareholders of Crew Gold Corporation, Namely Jostein Matre, Rolf Matre, Bjorn Bremnes, Bjorn Rygge, Cahe Finans As, Dag Vidar Lorgen, Davilo Nuf, Frank Holmen, Geir Atle Leirvik, Gunnar H. Eide, Hans Petter Trondsen, Harald Lindahl, Marius Husby, Otto Bragge, Rune Sagebakken, Simon Brendhagen Jensen, Sky High Risk As, Stiftelsen P22 and Thure Trykk As

Respondents
(Petitioners)

And

Crew Gold Corporation

Appellant
(Respondent)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of Yukon, October 14, 2011
(*Matre et al. v. Crew Gold Corporation*, 2011 YKSC 75,
Whitehorse Docket No. 10-A0157)

Counsel for the Appellant: B. Kaplan, Q.C.
S. Boyle

Counsel for the Respondents: K. Carteri
M. Harmer

Place and Date of Hearing: Vancouver, British Columbia
September 7, 2012

Place and Date of Judgment: Vancouver, British Columbia
October 12, 2012

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Overview

[1] A right of dissent may only be exercised by a registered shareholder. The common law, however, has carved out "a very limited category of cases" where strict compliance with this requirement has been relaxed for beneficial shareholders who are not registered on the corporation's share register. Judicial exceptions have been granted in two discrete circumstances: where the corporation has made a material misrepresentation in instructions to its shareholders (*Lake & Co. v. Calex Resources Ltd.* (1996), 187 A.R. 128, 139 D.L.R. (4th) 35 (C.A.) [*Calex*]), and where the corporation's conduct has amounted to an estoppel (*Lay v. Genevest Inc.*, 2005 ABQB 140, 49 Alta. L.R. (4th) 40 [*Genevest*]). This appeal raises the issue of whether the current scope of these judicial exceptions should be extended to circumstances where: (i) the corporation has clearly instructed its shareholders of the registration requirement for valid dissent; (ii) the beneficial shareholders, for various reasons not attributable to the corporation, fail to become registered; and (iii) the corporation is nonetheless aware that the shareholders wish to exercise their right to dissent but does not take steps to expressly outline the process to become registered.

[2] Section 193(4) of the Yukon *Business Corporations Act,* R.S.Y 2002, c. 20 (*YBCA*) provides that "[a] dissenting shareholder may only claim under this section with respect to all the shares of a class held by the dissenting shareholder or on behalf of any one beneficial owner and registered in the name of the dissenting shareholder." Most provinces have similar provisions for dissent rights. While the provision does not expressly state that only registered shareholders may "claim" a right of dissent, the settled jurisprudence has established that reference to a shareholder in the legislative provision means a registered shareholder and, as such, that only registered shareholders (i.e., those whose names appear on the share register of a company) may exercise dissent rights: *Manitoba (Securities Commission) v. Versatile Cornat Corporation*, 97 D.L.R. (3d) 45, [1979] 2 W.W.W.

714 (M.B.Q.B.) [*Versatile*] (approved in *Calex* and followed in *Westmin Resources Ltd. v. Hamilton* (1990), 52 B.C.L.R. (2d) 333 , [1991] 3 W.W.R. 716 (S.C.) [*Westmin*]).

[3] In this case, the appellant mining company, Crew Gold Corporation ("Crew"), submits that the chambers judge erred in granting the respondents, 19 beneficial and minority shareholders of Crew, dissent rights under s. 193 of the *YBCA* when they had failed to register their shares. The respondents were opposed to the share price fixed by Crew's board of directors in a plan of arrangement under the *YBCA* and sought to exercise their dissent rights at a special meeting convened for the purpose of passing a resolution to adopt the plan of arrangement. Although the resolution to adopt the plan of arrangement was expected to pass, the respondents' notices of dissent would have given them the right to apply to the court to have the fair value of the shares assessed. The respondents failed to register their shares, however, and their notices of dissent went unrecognized. The resolution passed with the appropriate majority and the plan of arrangement received court approval with the Final Order under the *YBCA*. At the same time, the chambers judge granted leave to the respondents to seek relief in relation to their unrecognized notices of dissent by way of amended or fresh application.

[4] After the Final Order was granted, the respondents commenced the within petition in which they sought a declaration that they: (i) were dissenting shareholders within the meaning of s. 193 of the *YBCA*; (ii) were relieved from strict compliance with the requirement that they be registered shareholders; and (iii) had validly exercised their dissent rights at the special meeting. The chambers judge, relying on "the common principle that form does not trump substance", held that the respondents should not be disentitled from their dissent rights where they had made an honest effort to become dissenting shareholders: *Matre et al. v. Crew Gold Corporation*, 2011 YKSC 75 at para. 48. In the result, he declared that the respondents were dissenting shareholders with dissent rights under s. 193 of the *YBCA.*

[5] With respect, I am of the view that in the circumstances of this case, the chambers judge erred in relieving the respondents from the requirement that they be registered shareholders in order to exercise a right of dissent. Accordingly, for the reasons that follow, I would allow the appeal.

Background

Crew's Corporate History

[6] Crew is a gold mining company that was incorporated in the Province of British Columbia in 1980. Its business has focused largely on operations and exploration projects in Guinea. In 1999 it acquired a Norwegian mining company, which brought with it many Norwegian investors including the 19 respondents.

[7] While it operated as a public company, its shares were listed on the Toronto Stock Exchange (TSE) and the Oslo Stock Exchange (OSE) under the trading symbol CRU. On January 28, 2000, it was registered as a corporation in the Yukon. On January 7, 2011, it ceased to be a reporting issuer.

Shareholding Structure

[8] In today's capital markets, shareholdings in public companies are commonly registered in the name of an intermediary (an internet brokerage, bank or trust company), which then operates as a link between the beneficial shareholder and the issuing corporation. It is not uncommon for there to be additional layers of intermediaries between the registered owner and the ultimate beneficial owner. The *YBCA* defines "beneficial ownership" as including "ownership through a trustee, legal representative, agent or other intermediary". A registered shareholder is the legal holder of the shares that appears on the company's share register: *Versatile* at 54. As dissent rights may only be exercised by registered shareholders, it is the responsibility of the beneficial shareholders and their intermediaries to ensure compliance with the registration requirement in order to exercise a right of dissent.

[9] In this case, the respondents' shares were registered on Crew's share register in the name of the Royal Bank of Canada ("RBC"), which acted as the Canadian custodian of the shares. A Norwegian bank, DnB NOR Bank ASA ("DnB NOR"), acted as an intermediary between the respondent beneficial shareholders and Crew.

[10] Adding to this already complex shareholding structure, both Canada and Norway have laws requiring that publicly traded shareholdings be registered in a central securities depository. As such, RBC had registered the Crew shares with the Canadian Depository of Securities Limited (the "CDS") and DnB NOR had registered the Crew shares with the Norwegian Central Securities Depository, known as the Verdipapirsentralen (the "VPS").

[11] As is often the case in these arrangements, Crew and DnB NOR are parties to a written agreement (the "Registrars Agreement") that requires Crew to forward any materials for the beneficial shareholders to DnB NOR. DnB NOR in turn must ensure those materials are delivered to the beneficial shareholders and must act on the directions of the beneficial shareholders. In this context, DnB NOR is the agent of the beneficial shareholders.

The Plan of Arrangement and Interim Order

[12] In 2009 Crew was experiencing financial difficulties and undertook a restructuring under the *YBCA*. The restructuring resulted in 93% of its shares becoming concentrated in its two largest shareholders: Nord Gold and Endeavour Mining Corporation. In August 2010 Endeavour sold its shares to Nord Gold for $4.65 per share.

[13] On November 5, 2010, the Crew board of directors approved a plan of arrangement whereby Nord Gold would acquire all of the issued and outstanding common shares of Crew at a share purchase price of $4.65 (the "Plan of Arrangement"). In order for the Plan of Arrangement to become effective, the *YBCA*

required that it be approved by 66⅔% of Crew's shareholders at a special meeting scheduled for that purpose (the "Special Meeting").

[14] On the same day that the directors approved the Plan of Arrangement, Crew applied for and was granted an interim order under the *YBCA* that directed Crew to hold a special meeting of its shareholders to consider and vote on a special resolution approving the Plan of Arrangement (the "Interim Order").

[15] The Interim Order allowed Crew to apply to the court for final approval of the Plan of Arrangement on December 10, 2010. The Special Meeting was scheduled for December 7, 2010 in Vancouver.

[16] The Interim Order set out the rights of dissent for registered shareholders. It directed that notice of the Special Meeting was to be sent to the remaining 44 minority shareholders and was to include an information circular (the "Information Circular") and a voting instruction form (the "Form of Proxy"). Shareholders wishing to dissent to the Plan of Arrangement were in turn required to submit a written notice of dissent to Crew's legal counsel at the Vancouver office of McCarthy Tétrault LLP. The notice had to be delivered at least two clear business days before the Special Meeting.

[17] Pursuant to the Registrars Agreement, Crew forwarded a package of documents to DnB NOR that included a notice of Special Meeting, the Information Circular and a copy of the Interim Order. DnB NOR also sent a letter to all of the beneficial shareholders of Crew listed on the VPS outlining the details of the Special Meeting and enclosing a Form of Proxy (to indicate voting instructions).

Notice of Special Meeting and Information Circular

[18] The notice of the Special Meeting forwarded to the respondents set out the following:

> Pursuant to the Interim Order, each registered Shareholder has been granted the right to dissent in respect of the Arrangement Resolution and, if the Arrangement becomes effective, to be paid fair value of such holder's CG

shares in accordance with Section 193 of the YBCA (as modified by the Interim Order and the Plan of Arrangement).

...

If you are a non-registered holder of CG Shares and received these materials through your broker or through an intermediary, please complete and return the form of proxy or the voting instruction form or other authorization ... provided to you in accordance with the instructions provided to you by your broker or intermediary.

[Emphasis added.]

[19] The Information Circular included in the package contained the following provisions (bolded as illustrated):

Explanation of Voting Rights for Beneficial Owners of CG Shares:

Only Registered Shareholders or the persons they appoint as their proxies are permitted to vote at the Meeting. However, in many cases, CG Shares beneficially owned by a Non-Registered Holder are registered either:

(a) in the name of an Intermediary ...

(b) in the name of a clearing agency (such as CDS ...)

...

Intermediaries are required to forward the Meeting Materials to Non-Registered Holders ... [and Non-Registered holder] will either:

(a) be given a form of proxy which has already been signed by the Intermediary ... or

(b) ... be given a form which, when properly completed and signed by the Non-Registered Holder and returned to the Intermediary ... will constituted voting instructions (often called a "voting instruction form") which the Intermediary must follow.

In either case, the purpose of this procedure is to permit Non-Registered Holders to direct the voting of the shares which they beneficially own.

[Emphasis added.]

...

Rights of Dissenting Shareholders

Shareholders who wish to dissent should take note that strict compliance with the Dissent Procedures is required.

... A Dissenting shareholder who intends to exercise the Dissent Rights should carefully consider and comply with the provisions of Section 193 of the YBCA, as modified by the Interim Order. Failure to comply strictly with the provisions of the YBCA, as modified by the Interim Order, and to

> adhere to the procedures established therein may result in the loss of all rights thereunder.
>
> ...
>
> Shareholders should consult their legal advisors with respect to strictly complying with the Dissent Procedures and the legal rights available to them in relation to the arrangement and the Dissent Rights.

[20] The Interim Order, attached as an appendix to the Information Circular, provided the following under the bolded heading "**Dissent Rights**":

> 17. Each registered Shareholder will be granted the following rights of dissent (the "Dissent Rights") in respect of the Arrangement Resolution, provided that such registered Shareholder otherwise complies strictly with the requirements of Section 193 of the Business Corporations Act and Article 3 of the Plan of Arrangement. The Dissent Rights are modified by this Interim Order as follows:
>
> (a) a registered Shareholder intending to exercise Dissent Rights must give a written notice of dissent to the Arrangement Resolution to Crew Gold at c/o McCarthy Tétrault LLP at 1300 - 777 Dunsmuir Street, Vancouver, British Columbia, V7Y 1K2, Fax: (604) 622-5657 Attention: Michael Stephens, to be received by Crew Gold no later than 4:00 p.m. (Vancouver time) on: (i) the day that is two Business Days preceding the Meeting; (ii) the Business Day prior to the date on which any adjournment of the Meeting is held and must otherwise comply with this paragraph 17;
>
> (b) any registered shareholder (a "Dissenting Shareholder") who exercises Dissent Rights in respect of the Arrangement Resolution in strict compliance with the requirements of Section 193 of the Business Corporations Act, as modified by the Interim Order and Article 3 of the Plan of Arrangement) (the "Dissent Procedures"), will be entitled, in the event that the Arrangement becomes effective, to be paid by SubCo the fair value of the Common Shares held by such Dissenting Shareholder in respect of which the Dissenting Shareholder has exercised Dissent Rights determined as at the point in time immediately prior to approval of the Arrangement Resolution;
>
> ...
>
> (f) registered Shareholders shall be the only persons with a right to dissent in respect of the Arrangement Resolution;...
>
> [Emphasis added.]

[21] The chambers judge found that the Information Circular clearly indicated that that "only registered shareholders were entitled to dissent" and was not "deficient or misleading" (para. 38).

The DnB NOR Letter

[22] By letter dated November 15, 2010, DnB NOR provided the following voting instructions to its beneficial shareholders (including the respondents):

> **USE OF VOTING INSTRUCTIONS FORMS**
>
> We refer to the Agreement (the Registrars Agreement) dated 9th Day of December 1999, between Crew Gold Corporation (The 'Company') and DnB Nor Bank ASA (DnB NOR). In order to comply with the requirements of the Registrars Agreement and Norwegian law, all of the shares of the Company registered in the VPS are registered on the register of shareholders of the Company in the name of DNB NOR. DnB NOR has agreed that, whenever it receives a notice that a shareholders' meeting of the Company is called, it shall dispatch to each beneficial owner of shares of the Company whose interest in such shares is registered in the VPS, a copy of the notice, and seek instructions regarding the voting of such shares from the beneficial owner thereof. Furthermore, DnB NOR has agreed not to attend or vote at any such meeting other than in accordance with directions received from such beneficial owners.
>
> As a beneficial owner of shares of the Company whose interest in such shares is registered in the VPS, you will have received, by mail, notice of a Special Meeting (the "Meeting"), as well as a voting instruction form and other documents from Crew Gold Corporation. ...
>
> If you have any questions regarding the above or how to exercise your rights as beneficial owner of the shares of the Company, please contact Irene Johansen at ...
>
> Please complete and return your proxy form to DnB NOR by mail or by fax ...
>
> Yours sincerely,
>
> for DnB NOR Bank ASA
>
> Registrars Department
>
> Irene Johansen
>
> [Emphasis added.]

The Respondents' Attempts to Exercise Their Dissent Rights

[23] The respondents deposed that they were confused as to what they had to do in order to exercise their dissent rights. Jostein Matre, one of the respondents, assumed a leadership role on behalf of a number of the other respondents, in an attempt to clarify the steps that had to be taken by them in order to register their dissents.

[24] In an email sent by Mr. Matre to Crew's counsel at McCarthy Tétrault, he attached a draft copy of his dissent and asked if his dissent was in compliance with the dissent procedure. Counsel for Crew responded by advising Mr. Matre that it would be a conflict of interest for them to advise him on the form and content of his dissent and they referred him to the Information Circular.

[25] In addition to contacting Crew's counsel, Mr. Matre instructed a Norwegian lawyer to forward his notice of dissent to the Vancouver office of McCarthy Tétrault. He also travelled from Norway to Vancouver to attend the Special Meeting. In Vancouver, he retained a lawyer with Lang Michener LLP (now McMillan LLP) some nine days before the Special Meeting. Together, he and the lawyer attended the Special Meeting.

[26] At no point during his inquiries before the Special Meeting did Mr. Matre, or any of the other respondents, make any attempt to contact Ms. Johansen at the address and phone number provided for in the DnB NOR letter to inquire about how to exercise their dissent rights.

[27] It was not until five days after the Special Meeting that Mr. Matre sought Ms. Johansen's guidance. At that time, Ms. Johansen instructed Mr. Matre as to the correct way to become a registered shareholder: he should contact the custodian in Canada (RBC) who would, upon request, transfer the shares into his name. Taking this action would have given the respondents status as registered shareholders, which in turn would have given them a right to dissent to the Plan of Arrangement. A right to dissent to the Plan of Arrangement would have given them the right to apply to court to have the fair value of the shares assessed under s. 193(6)(b) of the *YCBA.*

The Final Order

[28] After the resolution passed with the appropriate majority, the Plan of Arrangement received court approval with the Final Order under the *YBCA*, providing: "The terms and conditions of the exchange and cancellation of securities

[at the share price proposed by the board] are procedurally and substantively fair and reasonable to such persons and the Petitioner [Crew] and such terms and conditions are hereby approved."

[29] In the proceedings for the Final Order, the respondents had made a cross-application, seeking relief in relation to their unrecognized dissent rights. While the chambers judge dismissed the respondents' application in those proceedings, he granted them leave to pursue relief in an amended application or a fresh proceeding. That order resulted in the respondents commencing the within petition.

The Decision Below

[30] The chambers judge found that there were two main sources of confusion for the respondents. First, the respondents deposed that they had understood from the DnB NOR letter that the registration of their shares in the VPS meant that they were "registered shareholders" in Crew. Second, Mr. Matre deposed that he believed he was a registered shareholder because his name (along with that of another respondent) was listed on Crew's website as one of their top 50 shareholders and the list did not differentiate between registered and unregistered shareholders.

[31] The chambers judge listed three additional factors that he found contributed to the respondents' confusion: (i) there was no meaningful instruction in the Information Circular or in the DnB NOR letter on how the respondents could exercise their right of dissent; (ii) despite Mr. Matre's email request for direction on the validity of his dissent, McCarthy Tétrault did not advise him that he was not a registered shareholder; and (iii) despite the respondents having delivered their notices of dissent to McCarthy Tétrault in the allotted time, they were not advised of any deficiencies in their notices (para. 39).

[32] The respondents acknowledge that they omitted to follow the directions in the DnB NOR letter to contact Irene Johansen in regard to any questions they may have had about how to exercise their dissent rights as a beneficial owner. The chambers judge, however, found:

> [40] I find, here, that Crew Gold itself was the source of much of the shareholders' confusion. As per *Calex,* Crew Gold has an obligation to inform shareholders in a manner that is not misleading. I do not consider that Crew Gold was misleading, so much as evasive, however Crew Gold was on notice that a number of identified shareholders holding a discrete and readily quantifiable number of shares objected to the buy-out. [Emphasis added.]

[33] The judge concluded:

> [40] ... In my view, there was an obligation on Crew Gold, prior to the special meeting on December 7, 2010, to take steps to address the obvious concerns held by a number of their minority shareholders, given their diligence in pursuing their dissenting rights and their attempts to contact the company either directly, or via a lawyer.
>
> ...
>
> [48] ...The management of a corporation has a duty of fairness to all its shareholders including those who wish to exercise dissent rights. Section 193 of the *YBCA* is intended to ensure some fairness to those shareholders who wish to dissent and they should not be prohibited from doing so based on a technicality. The complexity of the share trading system which is designed to benefit corporations who wish to market their shares should not be used to disentitle shareholders from their dissent rights. The purpose of requiring registered shareholders to file dissent notices is for the benefit of a corporation in knowing the number of dissenters for voting purposes. In this case, there was no uncertainty in whether the arrangement would be approved. It was a *fait accompli.* It should not be used to disentitle those who are otherwise entitled to dissent but for the failure of the company to inform them they were not registered.
>
> [49] The circumstances of the Norwegian shareholders are exceptional, and Crew Gold should not be able to succeed on its technical objection...
>
> [Emphasis added.]

[34] The chambers judge concluded that the respondents' circumstances, wherein they failed to register their shares despite their intention to do so, were "exceptional" and fell within "the very limited category of cases" where beneficial shareholders should be relieved from compliance with the registration requirement for the exercise of dissent rights. It is this finding that Crew appeals.

Discussion

The Registration Requirement

[35] It is common ground that as a matter of law only registered shareholders are entitled to exercise dissent rights. This is not a "technicality" but a legislative requirement to the exercise of a right of dissent. The burden lies with the shareholder who seeks to exercise the right of dissent to ensure this requirement is met. Shareholders have been judicially relieved from this requirement only in exceptional circumstances where the conduct of a corporation has misled or amounted to a form of estoppel. The stated rationales for this rule are to: (i) prevent uncertainty; and (ii) avoid the undue burden that would be placed on corporations if they were unable to rely on their share register to determine who is entitled to exercise dissent rights.

[36] The source of this accepted rule appears to be the Manitoba Queen's Bench case of *Versatile*. There, Mr. Justice Hewak, after reviewing a number of American authorities, concluded that the term "shareholders" in the Manitoba *Corporations Act*, S.M. 1976, c. 40 referred to shareholders "of record as they appear on the register of the company books" (at 54). In denying the applicant respondent his right of dissent because his shares were not registered, Hewak J. observed that: "It would cause utter chaos in the world of commerce to hold otherwise and to expect corporations to deal with past shareholders, prospective shareholders, or simply share 'holders' in their attempt to run the business of the companies" (at 54). He explained at 55:

> ... in order for a person to have the right to dissent from any action contemplated by a corporation, he must first of all be a person who is the registered shareholder on the books of a company. Only if he falls squarely within that category can he then avail himself of all the rights, duties and obligations that flow therefrom ...
>
> ...
>
> It would be absurd to expect the corporation to go behind each registration of shares to determine whether the registered owner is really the owner or merely a trustee holding the shares in his name on behalf of someone else.

[37] The British Columbia Supreme Court in *Westmin* adopted Hewak J.'s reasoning from *Versatile* and his definition of "shareholder" for the purposes of the exercise of dissent rights under s. 190 of the British Columbia *Company Act*, R.S.B.C. 1979, c. 59. In that case, Cohen J. granted the petitioner company an order that the respondent could only exercise his right of dissent in respect to those common shares for which he was the "registered" shareholder.

[38] Thereafter, the Alberta Court of Appeal in *Calex* cited with approval the comments of Hewak J. in *Versatile* in regard to the meaning of "shareholder" in the dissent provisions of the Alberta *Business Corporations Act,* S.A. 1981, c. B-15. For the court, Madam Justice Hunt stated:

> [47] I agree with the authorities that have interpreted "shareholder" in similar legislation to mean a *registered* shareholder. I accept the reasoning of Hewak, J., referred to above. I think it would place too heavy a burden on corporations, given the current legislation, to have to deviate from the register in sending out notices. There is an obvious reason why a registered owner/trustee who holds on behalf of more than one shareholder should be permitted to dissent on behalf of one owner but not on behalf of another owner: the trustee is bound to follow the instructions of each owner, some of whom may wish to dissent and others of whom may not wish to dissent. But in either case, it is only the *registered* shareholder who should be permitted to exercise these rights.
>
> ...
>
> [49] Further, it is apparent that recent commercial practice (in particular, the growing use of depositories) has left many gaps in the legislation. This is partly why National Policy #41 sets up an obligation on intermediaries to ensure that notices are duly sent to beneficial owners. ... <u>But if the legislation does not reflect commercial reality, the problem should be addressed by the Legislature, not by the courts. To deal with this legislative lacuna in a piecemeal fashion (through a case-by-case determination in the courts) could exacerbate present problems rather than resolve them</u>.
>
> [50] I appreciate that the interpretation I have accepted may work a hardship on the many shareholders who are *not* registered. But in my view this is a problem that should be addressed comprehensively by the Legislature and by those in the securities industry.
>
> [Emphasis added.]

[39] In 2002 the British Columbia legislature made express provision for the definition of "shareholder" in s. 1 of the *Business Corporations Act*, S.B.C. 2002, c. 57 as follows:

> " **"shareholder"**...means a person whose name is entered in a securities register of the company as a registered owner of a share of the company..."

Judicial Exceptions to the Rule

[40] In *Calex,* the Alberta Court of Appeal created an exception to the legal requirement that only registered shareholders may exercise dissent rights. In that case, the corporation had issued a circular that the court found was "inadequate and misleading" (para. 53): the circular made no specific reference to who was entitled to exercise dissent rights or the need for beneficial shareholders to be registered in order to exercise those rights even though the corporation knew that many of its shares were held by a registered owner who held the shares in trust for brokers and beneficial owners. Despite having received adequate and timely notification from the beneficial shareholders of their intention to dissent, the corporation did not recognize their notices of dissent. In order to remedy what it viewed as an unfair result, the chambers judge granted the beneficial shareholders an order that compelled the corporation to purchase their shares at fair value. The order was upheld on appeal, with Hunt J.A. offering the following comments that are now relied upon by the respondents to support an expansion of the narrowly circumscribed judicial exception to the rule:

> [51] I also accept that there may be a very limited category of cases where the totally strict application of this interpretation of s. 184(4) [similar to s. 193(4) of the *YBCA*] would amount to complete form over substance and lead to an intolerably unfair result. One such example might occur when a corporation is fixed with the knowledge that a particular registered owner is the bare trustee of a precise number of shares beneficially owned by the individual who dissents. But this would be an exceptional situation and it is not the situation here (where, for example, some of the dissent letters did not indicate the number of shares held by the dissenting beneficial shareholder and where others referred to two different numbers of shares and where still others mentioned numbers of shares that did not correspond to the numbers contained in the records of Research). In general, the corporation should be entitled to rely on its register so that it can ascertain with certainty the number of shares held by dissenting shareholders. [Emphasis added.]

[41] This *dicta* in *Calex* was also relied on in *Genevest* to extend dissent rights to a beneficial shareholder in circumstances where the corporation had conducted itself in a manner that led a beneficial shareholder to believe that his right of dissent would

be recognized even though he was not a registered shareholder. The beneficial shareholder's belief was based on a history of seeking and receiving advice from the corporation, and on one prior occasion having had his notice of dissent considered even though he was not a registered shareholder. In essence, the conduct of the corporation amounted to a form of estoppel from which, the court found, it could not resile by falling back on the registration requirement to exercise a dissent right. In these circumstances, Madam Justice Romaine held that "it would be inequitable for Genevest [the corporation] to rely on a strict interpretation of the *Act* [the equivalent of s. 193(4) of the *YBCA*]" (para. 29). She added:

> [31] A corporation is responsible for advising shareholders of dissent rights when they arise, together with an adequate description of how to exercise those rights. Corporations must be scrupulously fair in ensuring shareholders are properly advised, and this duty extends to circumstances where an individual shareholder contacts the corporation for further clarification and direction. It is not overly onerous to expect a corporation, even a public corporation with many shareholders, to respond to shareholder inquiries, particularly where it has previously responded when its own interests were at stake. [Emphasis added.]

[42] With respect, I do not agree with the application of such a broad statement to the legal duty of a corporation, absent specific legislation that might impose such a duty. Section 193 of the *YBCA* is clear in its intent: shareholders bear the responsibility for the registration of their shares. Absent conduct on the part of the corporation that may amount to a misrepresentation or estoppel, and provided the corporation has discharged any duty to clearly and accurately inform shareholders of their dissent rights, the corporation does not have a duty to provide shareholders with specific advice on how to register his or her shares. In each instance, that advice may be different depending on the nature and form in which the shareholdings are held. Advice that might extend beyond referring shareholders to information already disseminated to them or to their legal advisor and/or intermediary(ies), who are expressly tasked with the responsibility of advising the beneficial shareholders on this issue, in my view, would result in the imposition of a positive or affirmative duty on a corporation that could give rise to potential liability

for inaccurate advice and would undermine the clear intention of the legislation that this burden lies with the shareholder.

Expansion of the Judicial Exception

[43] The respondents rely on the *dicta* from *Calex* to argue that this is one of the "very limited category of cases" where an overly strict adherence to the legislative requirements leads to an intolerably unfair result. They argue that these are exceptional circumstances in which the respondents should not be disentitled from exercising their dissent rights on the basis of a mere technicality. They invite this Court to take an equitable approach to remedy the unfairness of this result, on the basis that there has been a general trend in the case law to afford parties relief when they will otherwise lose their rights on a technicality.

[44] In support of this trend the respondents refer to, among other cases, a recent decision of this Court in *Wahlla v. Delta Sunshine Taxi (1992) Ltd*., 2012 BCCA 80, in which the Court allowed an appeal from a decision that shareholders had been rightly disqualified from voting because they had submitted proxies at an annual general meeting of the respondent company rather than in advance of the meeting as required. The evidence in that case demonstrated that the company had previously accepted proxies at the general meeting. The shareholders relied on s. 229 of the British Columbia *Business Corporations Act,* S.B.C. 2002, c. 57 and were granted an order that the corporation's failure to recognize their proxies was a "corporate mistake" within the context of that provisions. Section 229 provides a discretionary statutory remedy for a "corporate mistake" which it defines as "an omission, defect, error or irregularity that has occurred in the conduct of the business or affairs of a company..." that has resulted in "...a breach of a provision of this Act ...". Although the *YBCA* has no similar provision, the respondents rely on this decision to argue the increasing willingness of courts to remedy unfair results in the context of shareholder's rights.

[45] The respondents also directed us to National Instrument No. 54-101, which replaced National Policy No. 41, referred to in *Calex, supra*, in 1987. National Instrument No. 54-101 is titled "Companion Policy 54-101CP To National Instrument 54-101: Communications With Beneficial Owners Of Securities Of a Reporting Issuer". Companion Policy 54-101 outlines some of the difficulties experienced by beneficial shareholders in modern capital markets and sets out the "fundamental principles" of the new instrument:

> **1.1 History**
>
> (1) Obligations imposed on reporting issuers under corporate law and securities legislation to communicate with securityholders are typically cast as obligations in respect of registered holders and not in respect of beneficial owners. For purposes of market efficiency, securities are increasingly not registered in the names of the beneficial owners but rather in the names of depositories, or their nominees, who hold on behalf of intermediaries, such as dealers, trust companies or banks, who, in turn, hold on behalf of the beneficial owners. Securities may also be registered directly in the names of intermediaries who hold on behalf of the beneficial owners.
>
> (2) Corporate law and securities legislation requires reporting issuers to send to their registered holders information and materials that enable such holders to exercise their right to vote. To address concerns that beneficial owners who hold their securities through intermediaries or their nominees may not receive the information and materials, in 1987, the CSA approved National Policy Statement No. 41 ("NP41"), which has since been replaced by National Instrument 54-101 (the "Instrument").
>
> ...
>
> **1.2 Fundamental Principles** – The following fundamental principles have guided the preparation of the Instrument:
>
> (a) all securityholders of a reporting issuer, whether registered holders or beneficial owners, should have the opportunity to be treated alike as far as is practicable;
>
> (b) efficiency should be encouraged; and
>
> (c) the obligations of each party in the securityholder communication process should be equitable and clearly defined.

[46] Companion Policy 54-101 was adopted in response to the difficulties encountered by beneficial shareholders seeking to rely on proxy materials for voting. It does not address the issue of the registration requirement for beneficial shareholders in the exercise of their dissent rights. However, the respondents rely

on these policy statements as illustrative of a “new direction” taken by policy makers toward a more equitable approach to the rights of beneficial shareholders.

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[47] With respect, in my view neither the cases relied on by the respondent nor Companion Policy 54-101 is of assistance to this discrete issue. They speak to situations in which shareholders hold valid rights and are disqualified from exercising them based on mere technicality. The requirement that only registered shareholders are entitled to dissent is not a mere “technicality” but a matter of law. The respondents were not disqualified from exercising validly held rights; rather, they failed to acquire those rights by failing to become registered shareholders.

[48] The importance of this legal requirement for registration was communicated throughout the materials forwarded by Crew to DnB NOR and in the letter from DnB NOR to the respondents. If the respondents were confused as to DnB NOR’s statement that their shares were registered with the VPS, it was imperative for them to have contacted DnB NOR for clarification as they were directed so to do. Crew cannot be faulted for that omission.

[49] As previously noted, the complexity of today’s capital markets offer a myriad of forms for the holding of shares including, in some cases, a myriad of intermediaries. Requiring a corporation to have full knowledge of the nature and form of all its shareholdings is the very undue burden the registration requirement is meant to avoid. In the absence of that knowledge, the best and only advice Crew could give its beneficial shareholders was to direct them to the Information Circular which in turn urged shareholders wishing to dissent to consult their legal advisors. Again, the fact that the respondents did not follow this advice cannot be laid at the feet of Crew.

[50] While a very narrow judicial exception has been carved out in regard to this legal requirement, short of misleading and inaccurate information or conduct amounting to estoppel, in my view any gap in the legislation that results in an

outcome that may be perceived as unfair is more appropriately dealt with by the legislature itself.

[51] In these circumstances, I am satisfied that Crew fulfilled its responsibilities to the respondents by forwarding to their intermediary clear and accurate materials on the need for the beneficial shareholders to register their shares in order to exercise their dissent rights, and in referring Mr. Matre to the Information Circular for advice on how to register his shares in order to exercise his dissent rights. Crew's advice cannot be said to have been misleading or reprehensible in some other way, nor can it be said to have amounted to estoppel such as to permit this Court to relieve Mr. Matre and the other respondents from compliance with the legislation.

[52] In the result, I am not persuaded the respondents have made out a case for an expansion beyond the existing "very limited category of cases" and I would allow the appeal and dismiss the petition.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Low"