Date: 20021121
Docket No.: S.C. 02-A0138
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

In the matter of Section 156 of the
Business Corporations Act, R.S.Y. 1986, c.15, as amended

BETWEEN:

DIAMOND FIELDS INTERNATIONAL LTD.

PETITIONER

AND:

JEAN-RAYMOND BOULLE, MARK COLLINS,
STEPHEN MALOUF, NORMAN RODERIC BAKER,
GREGG SEDUN and MIL (INVESTMENTS) SARL

RESPONDENTS

Daniel Shier — For the Petitioner

Glen Thompson — For the Respondents

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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[1] HUDSON J. (Oral): These are my conclusions on this application. Diamond Fields International is a corporation which has been continued into the Yukon Territory pursuant to the *Yukon Business Corporations Act*, R.S.Y. 1986, c.15. It has petitioned the court to make declarations to invalidate solicitations and proxies and to generally invalidate the actions taken by a group of dissident shareholders, who, by the procedures they have taken pursuant to the *Yukon Business*

Corporations Act, *supra*, are attempting to assume management of the company.

(Discussion with clerk)

[2] The petitioner has an annual general meeting scheduled for November 21st in Vancouver, British Columbia. As of the record date, the company had issued a total of 52,941,000-odd shares. These shares are widely held.

[3] The respondents, Boulle, Collins, Malouf, Baker, Sedun and MIL, are acting together to solicit proxies of some shareholders to vote for their slate as directors of the company at the annual general meeting.

[4] Boulle, Malouf, Sedun and MIL are shareholders, together holding substantial shares. Boulle, in fact, holds 25 per cent of the issued shares of the company and is the largest shareholder.

[5] Notice of an annual general meeting was issued on October 22, 2002. On October 31st, the respondents issued a dissident proxy circular soliciting some of the shareholders for their proxies, to vote for their slate of candidates for the directors, the slate being composed of Boulle, Collins, Malouf, Baker, and Sedun.

[6] A statement of facts may be found in the affidavit of Horng Lee sworn on the 18th day of November, 2002. The dissidents' proxy circular was sent out to the petitioner on November 1, 2002, and to selected shareholders on or about November 12, 2002. The dissident circular was also accompanied by a letter dated October 31, 2002, from Mr. Boulle and MIL, which I consider to be part of the circular.

[7] On November 5, 2002, the petitioner issued a press release. It was quite aggressive, referring to the opportunistic, capricious, and unwarranted attack undertaken by the dissidents. It then recites a list of plans and programs which appear to attempt to match or better those recited in the dissident circular.

[8] This was followed by a further release of November 12th, issued by the petitioner, addressed to "Dear Fellow Shareholder". Much of this document is a negative commentary concerning Mr. Boulle. For instance:

> Whatever Mr. Boulle's plans are, it is clear that his immediate objective is to seize control of your company without paying you anything for the privilege.

[9] I am left to wonder what the authors of this statement, being directors of the company, had themselves paid for the privilege of managing the company.

[10] On November 15th, the dissident shareholders issued a news release addressed to business editors, which recites a *curriculum vitae* of Mr. Boulle and a statement of "current goals."

[11] This release is, in turn, responded to by the petitioner on the same day.

[12] On November 18th, arising out of the above facts, the petitioner has issued its petition seeking:

a) a declaration that the solicitation of proxies by the respondents for the annual general meeting of the shareholders of the petitioner is invalid,

b) a declaration that any proxy or form of proxy executed for or in favour of the nominees proposed by the respondents for election as directors at

the annual general meeting of the shareholders of the petitioner, is invalid,

c) an order restraining the respondents from soliciting any proxies until further order and for costs.

[13] This relief is sought pursuant to s. 156 of the *Yukon Business Corporations Act*, *supra*, which states as follows:

> If a form of proxy, management proxy circular or dissident's proxy circular contains an untrue statement of a material fact or omits to state a material fact required in it or necessary to make a statement contained in it not misleading in the light of the circumstances in which it was made, an interested person or, if the corporation is a distributing corporation the registrar of securities, may apply to the Supreme Court and the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any one or more of the following:
>
> (a) an order restraining the solicitation, the holding of the meeting or any person from implementing or acting on any resolution passed at the meeting to which the form of proxy, management proxy circular or dissident's proxy circular relates;
>
> (b) an order requiring correction of any form of proxy or proxy circular and a further solicitation;
>
> (c) an order adjourning the meeting.

The power of the court is extremely broad, being stated as, "may make any order it thinks fit. " This is protected by the phrase, "...without limiting the generality of the foregoing" before specifying some particular matters.

[14] The Supreme Court of British Columbia, in the person of Mr. Justice Owen-Flood, dealt generally with the duty of the court in such matters, in *Ambassador*

Industries v. Camfrey Resources Ltd., [1991] B.C.J. No. 1073. He said:

> I find that in deciding whether or not this proxy is valid, the test I have to apply is whether under the circumstances of the information circulars sent out by the petitioner referring, as they do, to the circulars sent out by Camfrey, it can be said that there is sufficient information to conclude that a shareholder is in a position to come to an intelligent decision as to whether he should vote for or against the directors or their respective slates.

At page 8, he adopts the words of Mr. Justice Holland, in *Canadian Express Limited v. Blair* (1989), 46 B.C.R., as follows:

> "The disputed proxies must be construed in light of surrounding circumstances and where possible in a manner consistent with business common sense."

[15] Owen-Flood, J. said, as well, at page 10:

> I find that the effect of invalidating the proxies of Ambassador would be to disenfranchise a substantial number of shareholders. I bear in mind that in an active proxy fight, the Court should be slow to intervene and only do so in a clear case.

[16] The evidence is that the dissident shareholders have secured proxies representing over 24,000,000 shares, being approximately 40 per cent of the shares eligible to vote.

[17] It should also be kept in mind that the remedy of a declaration is generally one in which the court has a very broad discretion.

[18] Now, where a breach is found, it should not be taken to make fatal any statutorily regulated business activity. In *Pacifica Papers Inc.*, [2001] B.C.J. No. 1484 at paragraph 103, Mr. Justice Lowry stated:

> 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.

[19] It is necessary to consider and interpret the use of the words "material facts" as they appear in s. 156. The case of *Agbi v. Geosimm Integrated Technologies Corp.,* [1998] A. J. No. 1290, is helpful for two particular reasons. It is a Court of Appeal decision, and deals with s. 148 of the *Alberta Act,* which is identical to the *Yukon Act*. In that case, Justice Hunt there approved and adopted these words, from Kerans J.A. of the Court of Appeal in the case of *Universal Explorations v. Petrol* (1982), 37 A. R. 35 at paragraph 53:

> "...an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."

And these words:

> "whether there is a substantial likelihood that someone was misled."

[20] In approaching the matters raised by the petition, I bear in mind all of those matters which I have just recited. The petitioner cites several instances of either an untrue statement of a material fact, or an omission of a material fact necessary to make a statement in the circular not misleading. These are spelled out in the petitioner's brief, and I will deal with them as they appear there.

[21] It should be noted that the grounds raised by the petitioner fall into two classes,

> 1) matters raised in the November 15th release which disclose, it is alleged, facts not covered by the information circular, which facts are material and reflect an omission

> fatal to proxy solicitation or lead to a conclusion that some statement of material fact in the information circular is not true; and ,
>
> 2) conversations between a respondent and others, being shareholders, providing information to such shareholders not available to others and also showing that statements in the information circular are untrue or represent the type of omission which is negatively referred to in s. 156.

[22] Dealing with the alleged failures as they appear in the brief. Firstly, there is a debt of $2 million due to MIL from the petitioner, which MIL alleges is in default. It is asserted in the evidence before me that Mr. Sedun has told a shareholder that if the dissident slate is not elected, MIL will proceed to enforce its rights and thereby bankrupt the company. The precise words of this exchange are not admitted, but discussion was had to the effect that the debt is as described in the circular, and the creditors' position is that it is overdue. It is also stated that the company does not agree.

[23] The possibility that steps might be taken to enforce the creditors' rights is, in my mind, neither untrue nor material in the circumstances. That it might lead to bankruptcy, if that is what was said, is only common sense. In any event, the substance of the debtor/creditor relationship is clearly disclosed in the circular. This is not a ground upon which an order can be made under s. 156.

[24] The company has been in a joint venture with a company called Trans Hex pursuant to which diamonds have been mined in Namibia, and profits made. The

management has accepted an apparent repudiation of the agreement by Trans Hex and production has been suspended. A lawsuit has resulted in which the petitioner has sued Trans Hex and Trans Hex has counter-claimed. Trans Hex, incidentally, is a shareholder of DFI.

[25] The November 15th release indicates an intent by the dissidents to negotiate a resolution of the litigation and to restart diamond production. This is said by the petitioner to indicate an omission in the circular fatal to the proxies.

[26] The information circular refers to an intention to establish profitability in its operation by restarting production at its off-shore Namibian operations.

[27] I cannot see that the failure to use, in the circular, those words that are found in the November 15th release on the same subject is the establishment of an omission of a material fact. The statement in the release flows naturally from the circular and is, of course, prompted by the aggressive opposition of the petitioner in its releases. It goes against common sense to cite this as a breach of the *Act* in the form of an untrue statement or fatal omission. Also the concept of a consensual resolution of the dispute, instead of a bitterly obtained and costly judgment, only makes sense and would not come as a surprise to any shareholder.

[28] The petitioner's brief appears to proceed on the basis that the dissidents' information circular must be sent to all shareholders. This is not so, as it is only required to be sent to the shareholders whose proxies are sought.

[29] In my view, the requirement to deliver a copy to the corporation does not require that the corporation be told all of the information that later passed on in general

conversations by the respondents with other shareholders. There is also the concept to consider that there is nothing to prevent the dissidents from persuading shareholders to attend the meeting and vote their shares in any particular way rather than by proxy.

[30] In my view, the evidence concerning conversations with other shareholders neither constitutes a material statement which is untrue, or the omission of a material fact which is necessary to show the truth of the statement. These then, likewise do not merit a negative finding pursuant to s. 156, and do not form a ground for the relief sought.

[31] The petitioner cites the reference in the release of November 15th, regarding Mr. Boulle's interests in other African countries, such as Sierra Leone, Congo and Angola. The circular did mention the dissident board's goal to identify and evaluate new opportunities for DFI to pursue with a view to maximizing shareholder value.

[32] I cannot find that neither this reference to exploring opportunities in Angola, Congo, et cetera, makes untrue anything in the circular, nor do these words in the release disclose an omission in the circular of a material fact. It should be noted, as well, that Mr. Boulle's interests in these places are clearly referred to in the background information provided in the circular.

[33] The petitioner also refers to a conversation where it is alleged that Mr. Boulle told another shareholder that the slate proposed would be short term and that an independent board would be built. These discussions are specifically denied in evidence before me, by affidavit. The evidence shows that there was an indication of the possibility of other directors to be brought on board, and also, that Mr. Boulle

intended, if elected, to function as CEO until a fulltime CEO could be found. This is stated in the circular. In my opinion these facts, if they were contained in conversations, are not material facts as contemplated by s. 156, but are, rather, discussions of possible future events, so that even if they were believed, they would not form the basis for an order under s. 156.

[34] In considering the circumstances as they exist, such discussions, I find, constitute good business common sense. They explain contradictions in the exchange of publicity releases, particularly those issued by the petitioner. It would be unfair to suggest that the dissidents are to be muzzled and not permitted to respond to allegations they reasonably consider to be scurrilous.

[35] I have reviewed all the evidence, closely examined the dissidents' information circular and the publicity releases, particularly that of November 15th. If I have not mentioned any particular items about which the petitioner complains in these reasons, I state now that such items have been considered, but I do not find that there are untrue statements of material fact or omissions to state material facts necessary to make a statement not misleading which would justify an order under s. 156 of the *Yukon Business Corporations Act, supra*.

[36] Regulation number 8(1) is cited as a legislative provision which has been breached and gives rise to a claim for declaratory relief. I do not agree.

[37] I cannot find a clear indication of a breach, and if I did, because of the view that I take, that it would not show a substantial likelihood of being misleading, it does not have merit.

[38] The petition is denied. Counsel may speak to costs, if they so desire

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HUDSON J.