

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *T.E.A.P. International Inc. v. Murphy*,
2004 YKSC 73

Date: 20041029
Docket: S.C. No. 04-A0106
Registry: Whitehorse

Between:

T.E.A.P. INTERNATIONAL INC.

Petitioner

And:

**PETER MURPHY
and
SHAUN MELVILLE**

Respondents

Before: Mr. Justice R. Veale

Appearances:

James R. Tucker and Gareth C. Howells
Sean M. Kelly and Rodney A. Snow

For the Petitioner
For the Respondents

**REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): This is an application by T.E.A.P. International Inc. under s.156 of the *Business Corporations Act*, R.S.Y. 2002, c.20 to restrain the holding of a meeting called by the respondents under s.144 of the Act. Section 144 permits holders of not less than five per cent of the issued shares of a corporation to call a meeting when the directors fail to do so.

[2] T.E.A.P. has applied under s.156 to restrain the holding of a meeting based on the failure of the respondents to state the required information in its proxy solicitation.

[3] On August 20, 2004, the directors of T.E.A.P. delivered a letter to Messrs. Murphy and Melville indicating a meeting date was set for October 14, 2004, which was subsequently changed to October 25, 2004.

[4] On September 29, 2004, I ordered that the meeting called by the respondent shareholders to be held on September 29, 2004, be restrained on terms to be approved by the Court.

[5] The facts are as follows:

1. T.E.A.P. is incorporated under the *Yukon Business Corporations Act* and carries on business in Perth, Australia, among other places. I say this because the numerous affidavits filed in this application were sworn at Perth.

2. On July 26, 2004, the respondents, Murphy and Melville, delivered a requisition to the directors of T.E.A.P. calling for a shareholders' meeting to be held at Whitehorse, Yukon, to consider the following resolutions:

- (1) That having been previously consented and not being disqualified from being a director, Graham Leslie Keys, be appointed as a director of the corporation with immediate effect.

(2) That having previously consented and not being disqualified from being a director, John Roderick Brooksby be appointed as a director of the corporation with immediate effect.

(3) That having previously consented and not being disqualified from being a director, Denise Elaine Young be appointed as a director of the corporation with immediate effect.

(4) That Terry Howard Solomon be removed as a director of the corporation with immediate effect.

(5) That Kester Howard Solomon be removed as a director of the corporation with immediate effect.

(6) Any director appointed by the directors since the last annual general meeting of the corporation be removed as a director of the corporation with immediate effect.

[6] However, Messrs. Murphy and Melville proceeded to give notice of a general meeting to be held at the office of Davis & Co., a law office in Whitehorse, for 3:30 PM, September 29, 2004.

[7] The notice of general meeting also included a proxy solicitation and form of proxy.

[8] It is not disputed that the proxy solicitation does not conform with the requirements of the dissident's proxy circular regulations found in Order in Council, 1984/172, dated June 29, 1984, pursuant to the *Business Corporations Act*.

[9] In the first affidavit of Kester Solomon, he alleged that some shareholders did not receive notice of a shareholder's meeting called for September 29, 2004.

[10] The dispute between T.E.A.P. and the respondents was brewing for some months before the requisition dated July 26, 2004, for a meeting of the shareholders.

[11] By letter dated June 29, 2004, Kester Solomon, one of the three directors of T.E.A.P. advised Peter Murphy that there were approximately 30 million shares of T.E.A.P. issued. I note that there are presently three directors of T.E.A.P., Kester Solomon, Terry Solomon and Marcus Augustin de Verny Remta.

[12] In Affidavit No. 3 of Kester Solomon, he provided an updated shareholder register for T.E.A.P., indicating a total of 37,968,168 shares issued.

[13] As a result of this discrepancy, I ordered the parties to file further affidavits concerning the discrepancy.

[14] Kester Solomon filed Affidavit No. 6 explaining the apparent discrepancy arose because the additional shares were issued at a directors' meeting dated June 30, 2004.

[15] Mr. Solomon provided an excerpt from the directors' meeting held on Wednesday, June 30, 2004 at Wangara which indicated that the additional shares in

excess of the 30 million as of June 29, 2004, were issued to various directors in lieu of directors' fees, and employees, including himself, without cost to the employees.

[16] The respondents allege that the June 30, 2004 directors' meeting is not valid as the only independent director, Marcus Augustin de Verny Remta, was not notified of the meeting.

[17] Mr. de Verny Remta swears that he has never been at a meeting of the directors that issued shares since his appointment as a director in March 2000.

[18] He further swears that the purported share issue of June 30, 2004, was recorded as a result of the proposed meeting set for September 29, 2004.

[19] The respondents are seeking the following relief which is set out in full on their response dated October 26, 2004 as follows:

1. That T.E.A.P. call a special meeting of the shareholders to be held in Perth, Australia.
2. That the shareholders eligible to vote at the shareholders' meeting shall be those persons holding validly issued shares of T.E.A.P. as of July 26, 2004.
3. That the sole business to be conducted at the shareholders' meeting shall be the business proposed by the respondents for the meeting which they, as requisitionists, called for September 29, 2004.

4. That Hall Chadwick be appointed as a monitor for the limited purpose of determining the list of shareholders of T.E.A.P. eligible to vote at the shareholders' meeting. (That is followed by five paragraphs indicating the terms of the appointment of the monitor.)
5. Forthwith after the monitor files its report with the Court, T.E.A.P. shall deliver notice of the shareholders' meeting to all shareholders if the monitor determines they are eligible to vote.
6. W.R.B. Hassell, of Dalkeith, Western Australia, be and is hereby appointed to serve as the independent chair of the shareholders' meeting in Perth, Australia. (That is followed by three paragraphs indicating powers of the chair.)
7. The respondents seek their costs of requisitioning and calling the shareholders' meeting on a solicitor and client basis, to be paid by T.E.A.P.
8. That T.E.A.P. is authorized to carry on business in the ordinary course, however, any transaction outside the ordinary course of business, including the issue of shares, would be prohibited without the consent of the respondents or leave of this court.

[20] T.E.A.P., by its counsel at this hearing, has consented to the holding of a meeting so long as it has an independent chair and scrutineer and that the agenda include the items that management wishes to put forward.

[21] The issue for this Court is to determine what remedies can be ordered under

s. 156. Section 156 of the Yukon *Business Corporations Act* 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.

[22] Counsel for the respondents, Murphy and Melville, submit that s.156 gives a broad power to the court similar to those powers found under the oppression section 243 of the Yukon *Business Corporations Act*.

[23] I do not interpret s.156 to give this court the powers set out in s. 243. In my view, the powers under s.156 are limited by issues that pertain to the solicitation of proxies. However, the words "the court may make any order it thinks fit" do give the court some residual power relating to the shareholders' meeting which the respondents are seeking. Nevertheless, s. 156 does not empower me to rectify the securities register or

shareholders' record put forward by T.E.A.P., nor do I have the power to appoint a monitor as sought by the respondents.

[24] To be frank, I have grave doubts about the validity of the shares issued at the purported directors' meeting of June 30, 2004, but the respondents did not apply under s. 243 for an oppression remedy.

[25] In my view, I am empowered under s.156 to do the following, and I so order:

1. That T.E.A.P. call a special meeting of the shareholders to be held in Perth, Australia, no later than December 17, 2004. As an aside, you can make submissions about that date and whether it is an appropriate date for the holding of the meeting.
2. That the shareholders eligible to vote at the shareholders' meeting shall be those persons holding validly issued shares of T.E.A.P. as of July 26, 2004.
3. That the sole business to be conducted at the shareholders' meeting shall be the business set out by the respondents in the requisition calling for a meeting of shareholders dated July 26, 2004.
4. That W.R.B. Haskell of Dalkeith of Western Australia is hereby appointed to be the independent chair of the shareholders' meeting, with the following powers:
 - (a) that he be at liberty to call on the assistance of independent legal counsel at any time and from time to time as the independent

chair may deem necessary or appropriate, and that such legal counsel be entitled to attend the shareholders' meeting for this purpose;

(b) that the independent chair be paid and indemnified by T.E.A.P. for the chair's fees, costs, charges and expenses, including those of the chair's independent legal counsel, in connection with serving as the independent chair of the shareholders' meeting, and relating to the chair's involvement in any corporate, judicial or other proceeding arising from the shareholders' meeting; and

(c) a court reporter attend and record the proceedings of the shareholders' meeting under instructions from the chair of the said meeting.

[26] That is my Order, counsel.

VEALE J.