# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Fox-Davies* v. *CEP International Petroleum Ltd. et al.,* 2007 YKSC 21

Date: 20070423
S.C. No. 06-A0129
Registry: Whitehorse

Between:

**FOX-DAVIES CAPITAL LIMITED**

Petitioner

And

**CEP INTERNATIONAL PETROLEUM LTD.**
**ROBERT J. MAXWELL**
**KHUSRO MIRZA and**
**HOEUN JUNG**

Respondents

Before: Mr. Justice P. J. McIntyre

Appearances:

| | |
|---|---|
| John T. Morin, QC, and Peter Morawsky | Counsel for the petitioner |
| John R. Shewfelt | Counsel for the respondents |

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] A dissident shareholder complains of the actions of the Chair at an annual general meeting that prevented the dissident slate of directors from being elected. The Respondents say that even if errors were made, this Court should enforce the terms of a shareholders agreement so that there would be no change in the election results.

**NATURE OF PROCEEDING**

[2] Fox-Davies Capital Limited ("Fox-Davies") has applied under s. 146 of the Yukon *Business Corporations Act*, R.S.Y. 2002, c. 20, (the "YBCA") for the Court to review the conduct of the CEP International Petroleum Ltd. ("CEP") Annual General Meeting held on November 28, 2006 (the "AGM"). Specifically, Fox-Davies seeks to invalidate the election of directors proposed by management and substitute a panel of directors proposed by itself.

[3] Fox-Davies also applied for relief based on oppression or unfairness under s. 243 of the YBCA, but this was not pursued in argument before me. I will not comment further on it. In addition, the last section of the Respondents' written argument complained of inadmissible portions of affidavits filed by the Petitioner. During the course of oral argument, it became clear that no arguably inadmissible portions of the affidavits were relied on or necessary to the Petitioner's argument. I agree generally with the principle that because this was not an interlocutory proceeding, hearsay was not permissible, nor were statements admissible that might be described as opinion, adjectival descriptions, or argument, but it would not be a useful exercise to refer to and rule on objectionable portions of the affidavit.

[4] CEP is a Yukon corporation with a head office in Calgary, Alberta. It explores for Canadian and international petroleum assets. The Petitioner, Fox-Davies is a minority shareholder. The individual respondent Robert J. Maxwell is the President, CEO, and a director of CEP. The individual respondents Khusro Mirza and Hoeun Jung, along with Maxwell, comprised a slate of three candidates who were nominated and ultimately elected at the AGM.

**APPROACH**

[5] Section 146 of the YBCA permits a corporation, shareholder, or director to apply to the Supreme Court to determine any controversy with respect to an election of a director. It gives wide discretion to the court as to the type of relief to be granted:

> **Supreme Court review of election**
>
> 146(1) A corporation or a shareholder or director may apply to the Supreme Court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation.
>
> (2) On an application under this section, the Supreme 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 a director or auditor whose election or appointment is challenged from acting until determination of the dispute;
>
> (b) an order declaring the result of the disputed election or appointment;
>
> (c) an order requiring a new election or appointment, and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made;
>
> (d) an order determining the voting rights of shareholders and of persons claiming to own shares.

[6] I use the heading “Approach” for this section to avoid the use of the phrase “standard of review” which is better left to questions of appeal or judicial review. This is similar to an appeal and so questions of law are to be decided on the basis of correctness, tempered by an understanding of the surrounding business circumstances. I agree with Holland J.’s comments in *Canadian Express Ltd. v. Blair et al*. (1989), 46

B.L.R. 92, where, in considering disputed proxies, he held at p. 94: “the disputed proxies must be construed in light of surrounding circumstances and where possible in a manner consistent with business common sense.” I also take guidance from Clarke J.’s statement at para. 55 of *Mercury Partners & Co. v. Cybersurf Corp*., [2003] A.J. No. 1741 that he was “reluctant to intervene as a political arbiter to settle internal political struggles of the… shareholders”. Courts are generally reticent to interfere with the internal decisions of corporations, barring genuine errors of law or oppressive conduct. Exercise of discretion founded on correct principles of law will not be lightly overturned.

**FACTS**

[7] CEP was founded in May 1998 by Robert Maxwell, Khusro Mirza, and two other parties who are not involved in this litigation. On April 26, 2002, a Shareholders Agreement was executed by a core group of founding or controlling shareholders. Article 5.1 reads:

> Directors. The Shareholders shall exercise the voting rights in respect of their Shares so that the following individuals will be directors of the Company: Olivier Lerolle, Robert Maxwell, Khusro Mirza, Lawrence Payne, two nominees of 33104 Yukon Inc., one of whom shall be Ashok Puri, and one nominee of 34347 Yukon Inc., in each case for so long as such person continues to be a Shareholder. The Shareholders may elect further directors in accordance with the Articles and By-laws of the Company.

[8] Starting roughly in 2006, tensions began to build between members of Fox-Davies and Maxwell, which culminated in a series of resignations, elections, and further resignations from the CEP Board. By the fall of 2006, in the wake of this confusion, only two active directors remained on the CEP Board, one of whom was Maxwell.

[9] By October 10, 2006, Fox-Davies submitted a package of requisitions for a meeting signed by 46% of the company's shareholders. Shortly after October 10, 2006, CEP sent all shareholders a package giving notice of the AGM, at which new directors would be elected. This package contained a form of proxy and an information circular. The management circular nominated a slate of candidates (the "management slate") including the respondents, Maxwell, Mirza and Jung.

[10] The management circular included two clauses, that are important to this case. The first clause (the "Record Date Clause") concerns the record date and entitlement to vote:

> VOTING SHARES AND PRINCIPAL HOLDERS THEREOF
>
> The Corporation is authorized to issue an unlimited number of Class A Common Shares without nominal or par value (the "**common shares**" or the "**shares**"), of which 36,445,035 common shares are issued and outstanding as at October 10, 2006. Persons who are registered shareholders at the close of business on October 10, 2006 will be entitled to receive notice of and vote at the Meeting and will be entitled to one vote for each share held. [emphasis added]

[11] The second clause (the "Proxy Deadline Clause") concerns the proxy deposit deadline:

> Completed forms of proxy must be deposited at the office of the Corporation by facsimile…or by mail or hand to [CEP's Calgary office], not later than 48 hours, excluding Saturday's, Sundays and holidays, prior to the time of the Meeting, unless the chairman of the Meeting elects to exercise his discretion to accept proxies received subsequently. [emphasis added]

It is common ground that the deadline pursuant to this clause is 2:00 p.m. on November 24, 2006.

[12] On November 6, 2006, Fox-Davies mailed a dissident proxy information circular to all CEP shareholders. In its circular, Fox-Davies included a proxy form nominating Mr. Morley-Kirk, Mr. Christie, and Mr. Baron as directors (the "Fox-Davies slate"), and stating the intention of this slate of directors to remove Maxwell and appoint Baron as Interim CEO.

[13] Fox-Davies also sent a letter to CEP requesting that Maxwell not act as chair at the AGM due to the anticipated conflict of interest. This suggestion was rejected by CEP who replied that special procedures would not be necessary since the issues would not be difficult, complex or out of the ordinary.

[14] CEP continued to issue shares for the company after the management circular was sent out, and accepted votes from these new shares. CEP also received proxies that were submitted after the November deadline. Fox-Davies takes the position that as a matter of law, none of these shares can be counted.

[15] At the AGM, Maxwell, acting as chair, heard submissions on the issues of the shares issued after the record date and the late proxies. These submissions were read by Mirza, from a text prepared in consultation with Maxwell and CEP legal counsel, complete with legal citations. Counsel for Fox-Davies was not permitted to see a copy of these submissions. After hearing the submissions, Maxwell recessed to seek legal advice from CEP's counsel, notably the same counsel that had helped prepare Mirza's submission, and then ruled that (1) proxies in respect of shares issued after October 10, 2006, were valid; and (2) proxies received after 2:00 p.m. on November 24, 2006, were valid.

[16] After making these rulings, Maxwell heard submissions contesting the validity of certain proxies, which were submitted by parties to the Shareholders Agreement that were not voted in favour of the management slate. These submissions were again read by Mirza, from a script prepared in consultation with Maxwell and CEP counsel. Counsel for Fox-Davies objected, stating that Fox-Davies had been taken by surprise as it was not aware of the Agreement. Mr. Maxwell again recessed to seek advice from counsel. He then ruled that the proxies against the management slate were invalid because the shareholders were attempting to vote their respective shares contrary to the terms of the Shareholder Agreement. He ruled that the proxies by the parties to the Shareholders Agreement in favour of the management slate were valid because the shareholders were voting their respective shares in accordance with the terms of the Shareholder Agreement.

[17] The Chair declared Maxwell, Mirza, and Jung elected as the three directors for the coming year. Had the shares issued after the record date not been counted, or if the Chair had not declared that shares could not be voted contrary to the provisions of the Share Agreement, the dissident slate would have been elected. Had the Chair ruled that dissident shareholders could only vote in accordance with the Shareholders Agreement, and rather than declaring proxies invalid declared them to be votes for management (as the Respondents would have me declare), then the management slate would win even if the Chair was incorrect as to the record date and acceptance of late proxies.

**ISSUES**

[18] The issues in this case are:

(1) Could shares issued after October 10, 2006, be voted at the AGM?

(2) Could the chair exercise his discretion to count proxies submitted after the Proxy Deadline of 2:00 p.m. on November 24, 2006?

(3) What was the impact of the voting restrictions in the Shareholders Agreement?

**ANALYSIS**

**(1) Could shares issued after October 10, 2006 be voted at the AGM?**

[19] Sections 135 and 139 of the YBCA set out the relevant law relating to record dates in the Yukon and provide:

> **Record dates**
>
> 135(1) For the purpose of determining shareholders
>
> (a) entitled to receive payment of a dividend;
>
> (b) entitled to participate in a liquidation distribution; or
>
> (c) for any other purpose except the right to receive notice of or to vote at a meeting,
>
> the directors may set in advance a date as the record date for that determination of shareholders, but the record date shall not precede by more than 50 days the particular action to be taken.
>
> (2) For the purpose of determining shareholders entitled to receive notice of a meeting of shareholders, the directors may set in advance a date as the record date for that determination of shareholders, but that record date shall not precede by more than 50 days or by less than 21 days the date on which the meeting is to be held.
>
> (3) If no record date is set,
>
> (a) the record date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be

(i) at the close of business on the last business day preceding the day on which the notice is sent, or,

(ii) if no notice is sent, the day on which the meeting is held; and

(b) the record date for the determination of shareholders for any purpose other than to establish a shareholder's right to receive notice of a meeting or to vote, shall be at the close of business on the day on which the directors pass the resolution relating to that purpose… [emphasis added]

**Shareholder list**

139(1) A corporation having more than 15 shareholders entitled to vote at a meeting of shareholders shall prepare a list of shareholders entitled to receive notice of a meeting, arranged in alphabetical order and showing the number of shares held by each shareholder,

(a) if a record date is set under subsection 135(2), not later than ten days after that date; or

(b) if no record date is set,

(i) at the close of business on the last business day preceding the day on which the notice is given, or

(ii) if no notice is given, on the day on which the meeting is held.

(2) If a corporation sets a record date under subsection 135(2), a person named in the list prepared under paragraph (1)(a) is entitled to vote the shares shown opposite the person's name at the meeting to which the list relates, except to the extent that

(a) the person has transferred the ownership of any of their shares after the record date; and

(b) the transferee of those shares

(i) produces properly endorsed share certificates, or

(ii) otherwise establishes that the transferee owns the shares,

and demands, not later than 10 days before the meeting, or any shorter period before the meeting that the bylaws of the corporation may provide, that the transferee's name be included in the list before the meeting,

in which case the transferee is entitled to vote the shares at the meeting.

(3) If a corporation does not set a record date under subsection 135(2), a person named in a list prepared under subparagraph (1)(b)(i) is entitled to vote the shares shown opposite the person's name at the meeting to which the list relates except to the extent that

(a) the person has transferred the ownership of any of the person's shares after the date on which a list referred to in subparagraph(1)(b)(i) is prepared; and

(b) the transferee of those shares

(i) produces properly endorsed share certificates, or

(ii) otherwise establishes that the transferee owns the shares, and demands, not later than ten days before the meeting or any shorter period before the meeting that the bylaws of the corporation may provide, that the transferee's name be included in the list before the meeting,

in which case the transferee is entitled to vote the shares at the meeting.

(4) A shareholder may examine the list of shareholders

(a) during usual business hours at the records office of the corporation or at the place where its central securities register is maintained; and

(b) at the meeting of shareholders for which the list was prepared.

[20] Fox-Davies argues that the Record Date Clause set a record date of October 10, 2006, and thus restricted the shares that could be validly voted at CEP's AGM to shares issued and outstanding as at October 10, 2006, unless there was satisfactory proof that the shares had been transferred after that date. (It is agreed no such shares were transferred.)

[21] Fox-Davies relies on *Langset v. Langtec Capital Corp.,* [1997] B.C.J. No. 137 (S.C.) at para. 63 to support its interpretation of the YBCA. In that case, the B.C. Supreme Court held that the record date "establishes the point prior to a meeting when the shares that may be voted at a meeting is established, presumably to prevent late manipulations of the number of issued shares, among other things".

[22] In the alternative, Fox-Davies argues that even if the Record Date Clause did not have the effect of setting a record date, the same result would occur since ss. 139(1) and (3) of the YBCA required CEP to prepare a list of shareholders entitled to receive notice at the close of business on the last day preceding the day on which notice was given. Since the notice was given on or about October 10, 2006, only shares issued as of that date should be permitted to vote.

[23] The Respondents point out that the statutory language used in the YBCA is substantially different than that used in all other Canadian jurisdictions except Alberta. For example, the BC Act provides in s. 72 that the directors may set a record date for "the purpose of determining members, or members of a class of members, entitled to notice of, or to vote at, a general meeting…" (my emphasis). As a result, the

Respondents argue that the case law provided by the Petitioner is of limited value. The Respondents urge the Court to find that the wording of the YBCA does not clearly disenfranchise shares issued after the “record date” and that the section should be limited to determining shareholders entitled to *receive notice*. They cite the wording of the YBCA as evidence that the Yukon legislature intended to provide a more voter-friendly regime to corporations registered in the Yukon than that enjoyed by other jurisdictions in Canada.

[24] I am in substantial agreement with the interpretation of the Petitioner in this case. The record date is a date by which voting is determined. The use of the word “may” in s. 135 refers to the fact that the directors of a company have the option of setting a specific date. However, if they choose not to set a date, then a record date is provided by law in s. 139. Either way the *Act* ensures that a record date will be set. There is a policy reason for this: the record date provides certainty to shareholders regarding how many individuals will be voting and allows them to make strategic decisions on how they themselves will vote. I am in agreement with the B.C. Supreme Court in *Langset* that a record date can prevent late manipulation of the voting process by diluting the shares. The Respondents have offered no support for their position that the Yukon legislature intended to create a different statutory regime than the rest of the country. There have been no references to Hansard, learned authors or Law Reform Commission reports. I find that although the wording is organized differently than in most jurisdictions, these words achieve the same result. I therefore find that, as a matter of law, shares issued after the record date of October 10, 2006, could not be voted at the AGM.

**(2) Could the chair exercise his discretion to count proxies submitted after the Proxy Deadline of 2:00 p.m. on November 24, 2006?**

[25] The number of proxies submitted after the Proxy Deadline on November 24, 2006, is too few to affect the outcome of the vote, and so this issue is somewhat moot. However, were it necessary to decide I would rule that, as a matter of law, the Respondents were not permitted to count proxies submitted after the deadline.

[26] Essentially Fox-Davies has argued that while the CEP management circular purported to reserve discretion for the chairman to accept late proxies, no such discretion is provided for in CEP's By-Laws. Article 10.15 of the By-Laws states: "A proxy shall be acted upon only if, prior to the time so specified, it shall have been deposited by written instrument … with the corporation." Since Maxwell was obliged to conduct the AGM in accordance with the rules and procedures prescribed in the YBCA and in CEP's By-Laws he did not enjoy discretion to accept proxies deposited after the deadline.

[27] The Respondents submit that both section 150(5) of the YBCA, which deals with the appointment of proxyholders, and By-Law 10.15 employs permissive language. Section 150(5) states that "the directors <u>may</u> specify in a notice calling a meeting of shareholders a time … before which time proxies to be used at such meetings must be deposited." (my emphasis) By-Law 10.15 uses similar language. The Respondents have argued that by reserving a discretion, the directors introduced an element of uncertainty into whether proxies would be accepted after the deadline and thus could not be said to have specified a time by which proxies "must" be deposited. I do not agree with this interpretation of the law and find that the Proxy Deadline Clause did set a deadline after which proxies could not be counted, and that Maxwell, in accordance

with the YBCA and By-Laws did not retain any discretion to count late proxies. Maxwell's decision was therefore wrong in law.

**(3) What was the impact of the voting restrictions in the Shareholders Agreement?**

[28] Section 147 of the YBCA states:

> **Voting Agreement**
>
> A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as provided in the agreement.

[29] I accept that as chair, Maxwell was not entitled to go behind the share register to determine voting rights not apparent on the face of the register, and therefore had no authority to invalidate proxies on the ground of non-compliance with the Shareholders Agreement. The Ontario High Court in *Marshall v. Marshall Boston Iron Mines Ltd.* (1981), 129 D.L.R. (3d) 378 (Ont. H.C.) and the B.C. Supreme Court in *Heil v. T.E.N. Private Cable Systems Inc.* (1993), 11 B.L.R. (2d) 54, have both held that the chair of a meeting should not deal with private arrangements that a registered shareholder may enter with other parties. The reason behind this principle is that the chair of a meeting will not normally have the time or capacity to decide complex legal questions at the meeting. See also *Kluwak* v. *Pasternak*, [2006] O.J. No. 4910 (Sup. Ct.) and the emphasis on preserving the integrity of voting procedures (para. 31). The result is that Maxwell did not have the discretion to invalidate the proxies submitted by parties to the Shareholders Agreement that did not comply with Shareholders Agreement. More particularly, he did not enjoy the discretion to *selectively invalidate* only those votes that were cast in favour of the opposing Fox-Davies slate and count those cast in favour of his own slate.

[30] There are many legal issues associated with the Shareholders Agreement that could not be dealt with by the Chair. These include whether the Shareholders Agreement was still in full force and effect, as there is an obvious argument that the shareholder signatories had abandoned Clause 5.1 of the agreement, or terminated it, questions raised in *Motherwell* v. *Schoof,* [1949] 4 D.L.R. 812 (Alta. S.C.). This arises because the management slate itself did not include all 7 of the individuals listed in 5.1 of the Shareholders Agreement, even though they remained shareholders. Nor was there evidence they had refused to stand.

[31] Further, without adjudicating on the merits, there are arguments as to whether the Shareholders Agreement should have been included in the CEP circular; and whether the rights in 5.1 could be specifically enforced as opposed to there being a damage award.

[32] As to whether this Court would decide these issues on this application, my view is that the question of enforceability of the Shareholders Agreement is a matter essentially between the signatories (see, e.g. *CIPC* v. *Churchill*, 2006 BCSC 1127 at paras. 27 – 38) that would require specific notice to them that the terms were being sought to be enforced by way of mandatory injunction, and there might well be a need for oral evidence, rather than dealing with this in a Chambers setting. I do not consider that any notice given by the Respondents to the shareholders is sufficient to found a declaration that they breached the Shareholders Agreement, nor am I prepared to hold that there is “privity” between the allegedly breaching shareholders and the Petitioner to treat them as if they were formal parties to the litigation. There are too many issues

outstanding about the Shareholders Agreement to accept the suggestion that the dissident directors be declared elected.

[33] My decision on this point should not be taken as a finding as to whether Maxwell lived up to his responsibilities as chair. The proposition that the chair of a meeting is required to act in a quasi-judicial manner has been modified by the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, in which Iacobucci J., writing for the Supreme Court of Canada, held at para. 45 that the term "quasi-judicial" is "in a certain sense, inappropriate to describe the duty of a chairman when that chairman is also (as will often be the case in the corporate world) interested in the affairs that are being deliberated before him or her." He described the chair's duty in a slightly different way, stating that "the duty under which chairmen labour is 'one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company'" (para. 47). In assessing whether a chair has met this standard, the court must use a contextual approach and "focus on the actual conduct of the chairman". A chair will therefore be permitted to be interested in the matters before him, but will be in a conflict of interest where he uses the position of chair to further his own agenda. In this case, it is unnecessary to decide whether Maxwell's actions gave rise to a conflict of interest as his decisions were clearly wrong in law and the matter can be decided on that basis. As to whether he should chair the next meeting, it was clear from the record that the Petitioner was highly critical of Maxwell's management skills and wanted him out of a management role. He resisted, and made decisions that benefited his position. He should not be placed in that situation again.

**REMEDY**

[34] In this case, I declare the election to have been invalid. The appropriate remedy is, and I order that there be, a new election at a new AGM with an independent chair. If the parties cannot agree on an independent chair, they have leave to obtain a direction from the Court.

[35] If necessary, costs may be spoken to.

McIntyre J.