CITATION: Bayliss v. Plethora Exploration Corp., 2023 ONSC 7211
COURT FILE NO.: CV-23-702131-00CL
DATE: 20231221

2023 ONSC 7211 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jack Bayliss, Applicant

AND:

Plethora Exploration Corp., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Ian Matthews and Alicia Krausewitz*, for the Applicant

Michael L. Byers and Rachel Tu, for the Respondent

HEARD: December 7, 2023

ENDORSEMENT

Introduction

[1] The applicant, Jack Bayliss, brings this application for an order (i) declaring that he owned 900,000 common shares in Superior Nickel Inc. ("Superior") as at March 22, 2023; (ii) fixing the fair value of his shares as at this date and requiring the respondent, Plethora Exploration Corp. ("Plethora") to pay the fair value of these shares to him as a dissenting shareholder; and (iii) declaring that Plethora acted oppressively toward him through its response to his notice of dissent.

[2] For the following reasons, Mr. Bayliss application for the relief claimed in (i) and (ii) is allowed. His application for the relief claimed in (iii) is dismissed.

Background Facts

[3] Mr. Bayliss is a geologist living in the United Kingdom.

[4] Plethora is an Ontario company. Plethora was formed on May 3, 2023 through an amalgamation of Superior and three other Ontario companies.

[5] Prior to the amalgamation, Superior was a junior mining exploration company.

[6] Superior focused on exploring for nickel in Manitoba. The other amalgamated entities focused on other metals and minerals in other areas.

[7] Plethora Private Equity ("Plethora PE") is a private equity firm based in the Netherlands. Its fund was a controlling shareholder of Superior and the other amalgamated entities, which were all privately held.

[8] Mr. Bayliss acquired his shares in Superior through "Project 2021", a geological competition. Mr. Bayliss and two other geologists won the contest. The prize was equity of 3% of a new company which became Superior.

[9] In connection with the issuance of shares of Superior, Mr. Bayliss executed an "Anti-Dilution Agreement" ("ADA"). The ADA is between Superior, Mr. Bayliss, and Peterson McVicker LLP (Superior's solicitors) as "Trustee". The ADA is relevant to the issues on this application and I address it more fully below.

[10] On October 4, 2022, Plethora PE announced the proposed amalgamation and its intent to amend the ADA (and other such agreements). On December 13, 2022, Mr. Bayliss executed and returned the amendment agreement to the ADA (the "ADA Amendment"). The effect of the ADA Amendment was to make the amalgamation a "Liquidity Event" under the ADA which would trigger certain contractual rights thereunder.

[11] On or about February 27, 2023 Mr. Bayliss received a document from Superior entitled "Notice of Annual and Special Meetings and Joint Management Information Circular and Proxy Statement" notifying him that a meeting of Superior shareholders was being convened for March 23, 2023 to consider and vote on a resolution approving an amalgamation of Superior with other companies and with the amalgamated entity to be named Plethora Exploration Corp.

[12] On March 20, 2023, Mr. Bayliss sent a "Notice of Dissent: Re: Amalgamation of Superior Nickel" to Superior. This Notice reads:

> I, the undersigned, a shareholder of Superior Nickel hereby dissents and disapproves to the amalgamation of Superior Nickel Inc. with Da Venda Gold Inc., 2617818 Ontario Inc., and Kumo Resources Inc.
>
> I hereby demand fair value for all my shares in Superior Nickel, of which I only own non-dilutable common shares.
>
> - Number of shares: 900,000
> - Class of shares: Common shares (Trust shares)
>
> Dated this 20th day of March, 2023

[13] On March 23, 2023, the amalgamation was approved by resolution.

2023 ONSC 7211 (CanLII)

[14] On May 4, 2023, Superior adjusted Mr. Bayliss' shares pursuant to section 6 of the ADA. Plethora's position is that as a result of this adjustment, Mr. Bayliss was left with 423,471 shares or 3% of the total issued and outstanding shares of Superior.

[15] By letter dated May 4, 2023, legal counsel for Superior provided certain financial and other information in relation to Superior and advised:

> Considering the above and such other matters that the Board of Directors of the Corporation deem relevant to determining the fair value of the Shares, the Board of Directors of the Corporation have determined that on March 23, 2023, the date of the Meeting, fair value of the Shares, on a standalone and pre-amalgamation basis, is zero.
>
> Nevertheless, as a gesture of goodwill, the Corporation will offer Mr. Bayliss the sum of C$1,000. In accordance with section 185(17) of the OBCA, this offer lapses if not accepted within 30 days after the date hereof.

[16] Mr. Bayliss commenced this application by Notice of Application issued on June 30, 2023.

<u>Analysis</u>

[17] The following issues arise on this application:

a. Was Mr. Bayliss the holder of shares of Superior entitled to vote on the resolution for approval of the amalgamation such that he has a statutory right to dissent under s. 185(1) of the *Ontario Business Corporations Act* ("*OBCA*")?

b. If Mr. Bayliss has a statutory right to dissent, do Mr. Bayliss' contractual rights under the ADA attach to the shares in respect of which he exercised dissent rights?

c. If Mr. Bayliss had a right to dissent, what is the fair value of the shares of Superior held by Mr. Bayliss determined as of March 22, 2023, the day before the resolution approving the amalgamation?

d. Did Plethora acted oppressively?

[18] I address each issue in turn.

Does Mr. Bayliss have a right to dissent under s. 185(1) of the OBCA?

[19] Subsection 185(1) of the *OBCA* provides that subject to certain provisions, if a corporation resolves to amalgamate with another corporation under sections 175

2023 ONSC 7211 (CanLII)

and 176, a holder of shares of any class or series entitled to vote on the resolution may dissent.

[20] Mr. Bayliss' evidence is that he acquired 900,000 shares in Superior in June 2021 for $900.00. He attaches as an exhibit to his affidavit the invoice from Superior for $900.00.

[21] In the Plethora's factum, the Plethora submits that Bayliss was not "a holder of shares of any class or series entitled to vote" and, therefore, he does not have a statutory right to dissent pursuant to s. 185 of the *OBCA*. In support of this submission, Plethora relies on the ADA.

[22] The ADA includes the following recitals:

> AND WHEREAS the Company has issued the Holder [Mr. Bayliss] a total of 900,000 fully paid common shares (the "Trust Shares") as an incentive for the Holder;
>
> AND WHEREAS the Trust Share (sic) are being held pursuant to the terms and conditions of this Agreement, including certain restriction on voting and cancellation in accordance with the terms hereof;

[23] The ADA, in its operative terms, provides:

> 1. During the period this Agreement is in force the Trustee will hold the Trust Shares in its name or in the name of its nominee and the Trustee will vote or cause to be voted the Trust Shares in the manner herein provided.
>
> 2. The Trustee shall vote the Trust Shares and each proxy in relation thereto as directed by the Board of Directors of the Company in writing.
>
> 3. The Holder may not assign or convey any interest in the Trust Shares.
>
> 4. This agreement shall terminate on the earlier of (i) the effective date of a Liquidity Event (as defined below), and (ii) June 10, 2031 (the "**Expiry Date**"), at which time the Trustee shall cause the Trust Shares less any Excess Shares (as defined below) to be registered in the name of the Holder, and the certificate evidencing the Trust Share shall be delivered to the Holder subject to, for greater certainty, (i) a Share Adjustment (as defined below), and (ii) any escrow obligations of applicable securities regulations.

2023 ONSC 7211 (CanLII)

[24] In the ADA, the term "Liquidity Event" is given a defined meaning. Under the ADA, as amended by the ADA Amendment, the amalgamation is a Liquidity Event.

[25] In the ADA, the term "Share Adjustment" means "a reduction, if any, of that number of Trust Shares which exceed 3.0% of the issued at (sic) outstanding Common Shares on a non-diluted basis on the effective date of the Liquidity Event (the "**Excess Shares**"). In the event there are Excess Shares, the Company shall purchase such shares for cancellation at a price of $0.001 per Common Share payable in cash".

[26] The ADA plainly provides that the 900,000 common shares defined as Trust Shares are to be held by the Trustee in its name or in the name of its nominee and that the Trustee shall vote the Trust Shares as directed by the Board of Directors of Superior. If the parties acted in accordance with the ADA, Mr. Bayliss would not have been the holder of common shares of Superior entitled to vote on the resolution to approve the amalgamation. He would not have had a statutory right to dissent pursuant to s. 185(1) of the *OBCA*.

[27] In opposition to this application, the Plethora relies on the affidavit of Douwe van Hees, a director of Plethora. He is also a Fund Manager and Managing Director at Plethora PE which has a controlling stake in Plethora. In his affidavit, Mr. van Hees summarizes Plethora's position on the application:

a. Mr. Bayliss contention that he owns 900,000 shares in Superior is contrary to the plain wording, intention and commercial purpose of the ADA - which clearly states that he is entitled to no more than 3% of outstanding Superior shares upon any liquidity event – and would cause Mr. Bayliss to enjoy a substantial and unjustified windfall; and

b. The valuation report obtained by Mr. Bayliss' overvalues his shares in Superior.

[28] When he was cross-examined, Mr. van Hees, through Plethora's counsel, took the position that Mr. Bayliss is not entitled to dissent under section 185 of the *OBCA*. In response to an undertaking given on this examination, Plethora answered that this position was conveyed to Mr. Bayliss prior to the cross-examination, but without providing further particulars.

[29] As noted, Plethora's position in its factum is that Mr. Bayliss does not have a statutory right to dissent pursuant to s. 185 of the *OBCA*. Plethora submits that Mr. Bayliss, as a party to the ADA, never had the right to be a shareholder of Superior except as expressly provided by the terms and conditions of the ADA.

[30] In his reply factum, Mr. Bayliss submits that he has a statutory right to dissent under s. 185(1) of the OBCA. He submits that the evidence shows that he was the registered holder of 900,000 common shares of Superior when the shareholders resolution for approval of the amalgamation came to a vote.

2023 ONSC 7211 (CanLII)

[31] Mr. Bayliss relies on a document named "Total Holder Capital Transfer Agency" dated June 28, 2021 that was put into evidence by Plethora. Mr. van Hees deposes that Mr. Bayliss "was issued his shares on June 18, 2021, after he had signed the Anti-Dilution Agreement". Mr. van Hees attaches this document as an exhibit to his affidavit that, Mr. van Hees deposes, confirms the date of share issuance. This document shows the "Account Name" of Mr. Bayliss and "Total Position Shares" of 900,000. The "Issue Date" is shown to be June 18, 2021. This document does not show that the 900,000 shares were issued to the Trustee and held in its name.

[32] Mr. van Hees' evidence, and the document he appends as an exhibit to his affidavit, support the position of Mr. Bayliss that he was issued 900,000 shares of Superior.

[33] The Information Circular sent to Mr. Bayliss on February 27, 2023 advised him that "[r]egistered shareholders of Superior have the right to dissent with respect to the Amalgamation Resolution and, if the Amalgamation becomes effective, to be paid the fair value of the common shares of Superior they hold in accordance with the provisions of Section 185 of the Business Corporations Act (Ontario)". A proxy form was included with the Information Circular. The proxy form states that Mr. Bayliss is a shareholder of Superior. His name is inserted as the shareholder of 900,000 shares. The form states that the proxy is solicited by management of Superior and if no instructions are given, the proxy will be voted in favour of the matters listed in the proxy.

[34] I am satisfied that Mr. Bayliss has shown that notwithstanding the terms of the ADA, he was the registered holder of 900,000 common shares issued by Superior. This finding is supported by Mr. van Hees' evidence that Superior issued shares to Mr. Bayliss on June 18, 2021. It is also supported by the transfer agent document and the Information Circular and form of proxy sent therewith. If, contrary to this evidence, the 900,000 shares were, in fact, registered in the name of the Trustee, it was open to Plethora to introduce evidence proving this fact, such as a share certificate in the name of the Trustee or Superior's shareholder register showing the registration of the shares in the name of the Trustee. It did not do so.

[35] Subsection 22(3) of the *OBCA* provides that where a corporation has only one class of shares, the rights of the holders thereof include the rights to vote at all meetings of shareholders. There is no evidence that Superior had more than one class of shares.

[36] I am satisfied that Mr. Bayliss has shown that on March 20, 2023, when he sent a Notice of Dissent, he was the holder of shares of Superior entitled to vote on the resolution approving the amalgamation. As such, Mr. Bayliss had a statutory right to dissent pursuant to s. 185(1) of the *OBCA*.

[37] Mr. Bayliss submits that if it is held that he was not the holder of common shares of Superior entitled to vote on the resolution to approve the amalgamation, Plethora is, nevertheless, estopped from denying that Mr. Bayliss has s. 185 dissent rights.

2023 ONSC 7211 (CanLII)

Mr. Bayliss relies on the doctrines of estoppel by convention and estoppel by representation. Mr. Bayliss submits that over the past several months, both parties conducted themselves in a manner consistent with Mr. Bayliss having properly exercised a statutory right of dissent.

[38] Given my finding that Mr. Bayliss was the holder of 900,000 common shares of Superior entitled to vote on the resolution to approve the amalgamation, it is not necessary for me to address the estoppel issue. If I am held to have erred in so finding, I address this issue.

2023 ONSC 7211 (CanLII)

[39] In *Ryan v. Moore*, 2005 SCC 38, the Supreme Court of Canada, at para. 59, addressed the doctrine of estoppel by convention and held that the following criteria form the basis of this doctrine:

(1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).

(2) A party must have conducted itself, i.e. acted, in reliance on such a shared assumption, its actions resulting in a change of its legal position.

(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[40] In *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ON CA 499, the Court of Appeal for Ontario, at para. 54, addressed the doctrine of estoppel by convention and held:

> Although the doctrine of estoppel cannot vary the terms of a contract, it may operate to prevent a party from relying on the terms of the contract to the extent necessary to protect the reasonable reliance of the other party. Thus, the doctrine has the potential to undermine the certainty of contract and must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel. Estoppel is a fact-specific doctrine and the concern noted by Bastarache J. in *Moore* at para. 50 remains apposite: "estoppels are to be received with caution and applied with care", citing *Harper v. Cameron* (1892), 2 B.C.R. 365 (Div. Ct.) at p. 383.

[41] On March 20, 2023, Mr. Bayliss sent a "Notice of Dissent: Re: Amalgamation of Superior Nickel" to Superior. On March 21, 2023, Mr. Bayliss received a message from Douwe van Hees of Plethora PE via WhatsApp in which he noted "We received your notice of dissent in good order".

[42] On March 27, 2023, Mr. Bayliss was notified by Superior that the amalgamation resolution had been adopted by the shareholders of Superior. On April 11, 2023, legal counsel for Mr. Bayliss sent a letter to Superior advising that he holds 900,000 common shares and was dissenting in respect of the shares. The letter demanded payment of fair value for his 900,000 shares. The letter also requested that his share certificates be endorsed to reflect his dissent and returned to him.

[43] On May 3, 2023, legal counsel for Mr. Bayliss received a package from Capital Transfer Agency that included a share certificate from Superior dated May 2, 2023 that certifies that Mr. Bayliss is the registered owner of 423,471 common shares in the capital stock of Superior. The share certificate includes an endorsement of "Restrictions" that reads: "The holder of this share certificate is a dissenting shareholder pursuant to section 185 of the Business Corporations Act (Ontario)."

[44] On May 4, 2023, Superior's legal counsel sent two letters to Mr. Bayliss' legal counsel.

[45] In the first letter, legal counsel for Superior advised that the amalgamation became effective on May 3, 2023 and stated that pursuant to the ADA and the ADA Amendment, a "Share Adjustment occurred immediately prior to the Effective Date", leaving him with 423,471 shares in Superior representing 3.0% of the common shares of Superior on a non-diluted basis.

[46] In the second letter, legal counsel for Superior provided certain financial and other information in relation to Superior and advised:

> Considering the above and such other matters that the Board of Directors of the Corporation deem relevant to determining the fair value of the Shares, the Board of Directors of the Corporation have determined that on March 23, 2023, the date of the Meeting, fair value of the Shares, on a standalone and pre-amalgamation basis, is zero.
>
> Nevertheless, as a gesture of goodwill, the Corporation will offer Mr. Bayliss the sum of C$1,000. In accordance with section 185(17) of the OBCA, this offer lapses if not accepted within 30 days after the date hereof.

[47] Mr. Bayliss' legal counsel responded to Superior's legal counsel on May 25, 2023 and advised, among other things, that Superior had failed to comply with section 185(15) of the *OBCA*. Superior's legal counsel replied to this letter on June 15, 2023.

[48] Bayliss submits that over the past several months, both parties conducted themselves in a manner consistent with Mr. Bayliss having properly exercised a statutory right of dissent. Mr. Bayliss submits that the information provided to him by Superior constitutes a representation that he had a right to vote on the proposed

2023 ONSC 7211 (CanLII)

amalgamation and a corresponding right to dissent. Mr. Bayliss submits that he relied on the shared assumption and representations and committed significant resources to his application.

[49] In the evidence delivered in opposition to this application, Plethora did not assert that Mr. Bayliss lacked a statutory right to dissent from the resolution to approve the amalgamation.

[50] The evidence is abundantly clear that both Mr. Bayliss and Superior dealt with each other based on a shared assumption that Mr. Bayliss was the holder of shares of Superior entitled to vote on the resolution for approval of the amalgamation and, therefore, had a statutory right of dissent. Mr. Bayliss acted in reliance on this shared assumption, including by sending a Notice of Dissent and by commencing this application for an order fixing the fair value for his shares. Mr. Bayliss committed resources to his application.

[51] Given this sequence of events, and that Mr. Bayliss commenced this application and committed resources to pursue it, it would be unfair to allow Plethora to depart from the shared assumption that Mr. Bayliss has a statutory right to dissent in respect of the proposed amalgamation.

[52] I am satisfied that Mr. Bayliss has shown that the requirements for estoppel by convention are satisfied.

[53] If I had held that Mr. Bayliss had failed to establish that he was the holder of 900,000 common shares of Superior entitled to vote on the resolution, I would conclude that by application of the doctrine of estoppel by convention, Plethora is estopped from denying that Mr. Bayliss has the statutory right to dissent under s. 185(1) of the *OBCA*.

If Mr. Bayliss has a statutory right to dissent, do Mr. Bayliss' contractual rights under the ADA attach to the shares in respect of which he exercised dissent rights?

[54] Subsection 185(4) of the *OBCA* provides:

> In addition to any other right the shareholder may have, but subject to subsection (30), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents becomes effective, to be paid by the corporation the fair value of the shares held by the shareholder in respect of which the shareholder dissents, *determined as of the close of business on the day before the resolution was adopted*. [emphasis added]

[55] Plethora submits that even if Mr. Bayliss is "technically" entitled to exercise dissent rights in respect of 900,000 shares, the fair value of his shares must consider the

2023 ONSC 7211 (CanLII)

contractual attributes and rights that they possessed. Superior submits that when Mr. Bayliss sought to dissent, those attributes and rights included that: (a) the shares were held in trust for Mr. Bayliss; (b) he could not vote those shares; (c) Mr. Bayliss would only ever receive shares if the ADA terminated; and (d) at the time that Mr. Bayliss exercised his dissent rights: (i) Plethora PE (as a controlling shareholder) was going to vote to complete the amalgamation, which would result in Mr. Bayliss' shares being reduced to 3%; and (ii) Mr. Bayliss' agreement was going to imminently terminate (by the termination of his engagement with Superior).

2023 ONSC 7211 (CanLII)

[56] Plethora submits that Mr. Bayliss cannot, by purporting to exercise dissent rights on non-voting shares that are not conferred by the ADA, rely on an interpretation of the ADA that is premised on an unfettered ability to exercise a dissent right he never had.

[57] Mr. Bayliss does not rely on an interpretation of the ADA to support his statutory dissent right. He concedes that if he had not exercised the statutory right to dissent and the amalgamation was approved, his shares would have been diluted to 3% of the common shares of Superior just before the effective date of the amalgamation. Mr. Bayliss relies on s. 185 of the *OBCA* and on the evidence that shows that on March 22, 2023, he was the holder of 900,000 shares of Superior entitled to vote on the resolution to approve the amalgamation.

[58] I turn to Plethora's argument that the rights and attributes carried by and attached to the 900,000 shares held by Mr. Bayliss must take into account his contractual rights and obligations under the ADA, as amended.

[59] Section 22(3) of the *OBCA* provides:

> Where a corporation has only one class of shares, the rights of the holders thereof are equal in all respects and include the rights,
>
> (a) to vote at all meetings of shareholders; and
>
> (b) to receive the remaining property of the corporation upon dissolution.

[60] Plethora submits that shareholder rights may be altered by contract. In support of this submission, Plethora relies on *McClurg v. Canada*, 1990 CanLII 28. In *McClurg*, Dickson C.J., writing for the majority, at p. 1041, addressed a fundamental issue of corporate law concerning rights attached to shares:

> Having reviewed the legal basis for the payment of a dividend by a company, another fundamental principle of corporate law can be restated. The appellant argues, and it is conceded by the Respondent, that the rights carried by all shares to receive a dividend declared by a company are equal unless otherwise provided in the Articles of Incorporation. This principle, like the managerial power to declare dividends, has been well accepted at common law. The principle, or more

accurately, the presumption of equality amongst shares and the prerequisites required to rebut that presumption, are described in Schmitthoff, *Palmer's Company Law*, 23rd ed., vol. 1, at p. 387, para. 33-06:

> Prima facie the rights carried by the shares rank *pari passu*, i.e. the shareholders participate in the benefits of membership equally. It is only when a company divides its share capital into different classes with different rights attached to them that the prima facie presumption of equality of shares may be displaced.

In my view, a precondition to the derogation from the presumption of equality, both with respect to entitlement to dividends and other shareholder entitlements, is the division of shares into different "classes". The rationale for this rule can be traced to the principle that shareholder rights attach to the shares themselves and not to shareholders. The division of shares into separate classes, then, is the means by which shares (as opposed to shareholders) are distinguished, and in turn allows for the derogation from the presumption of equality: *Bowater Canadian Ltd. v. R.L. Crain Inc*. (1987), 1987 CanLII 4037 (ON CA), 62 O.R. (2d) 752 (C.A.), at p. 754 (per Houlden J.A.).

[61] Plethora submits that *McClurg* is authority for the proposition that the presumed equality of treatment of shareholders can be altered by contract and that such an alteration is not confined to articles of incorporation.

[62] Plethora also relies on *White v. Colliers Macaulay Nicholls Inc*., 2009 ONCA 444 (CanLII). In *White*, a shareholder was a party to a shareholders' agreement which required him to sell his shares to the company at a price to be determined in accordance with a formula set out in the shareholders' agreement. The shareholder entered into a retirement agreement with the company but the company did not pay the amounts due under this agreement in a timely way. The shareholder sued the company claiming damages consisting primarily of compensation for his shares at the price determined according to the shareholders' agreement. The shareholder settled the suit. The shareholder sued again, alleging that he was induced to enter into the settlement agreement by misrepresentations because he was not told that the company was engaged in a recapitalization process that resulted in a transaction by which another company acquired 70% of the shares of the company at a price per share that was substantially higher than the price per share under the shareholders' agreement. The shareholder alleged that had he known of the potential transaction, he would have continued his first suit to trial and asserted a right to have his shares purchased at the higher price per share under the control transaction, rather than the amount calculated under the shareholders' agreement. The shareholder alleged that he was entitled to be paid for his shares on the same basis as other non-active shareholders on the principle that all shareholders of the same class are to be treated equally.

2023 ONSC 7211 (CanLII)

[63] Blair J.A., writing for the Court, addressed this argument and, at para. 43, held that from a legal perspective, the shareholder is not in the same position as other common shareholders of his class because, through the retirement agreement, the shareholder is in a debtor-creditor relationship with the company. Blair J.A., at para. 44, addressed the common law presumption of equality amongst shares:

> The common law recognizes a presumption of equality amongst shares and the right of shareholders to participate in the benefits of membership equally: *McClurg v. Canada*, 1990 CanLII 28 (SCC), [1990] 3 S.C.R. 1020, [1990] S.C.J. No. 134. The common-law rule is carried forward in statutory form in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 24, and its various provincial counterparts: see, e.g., *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 22. These statutes stipulate that where a corporation has only one class of shares, the rights of the holders of those shares are to be equal in all respects. However, while shareholders within the same class are required to be treated proportionately and equally, they do not necessarily have to be dealt with in the same fashion. Different treatment is acceptable, so long as it is justifiable and not disproportionate and unequal: see, e.g., *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934, 76 O.T.C. 115 (Gen. Div.), at paras. 36-37.

[64] Blair J.A. held that the different treatment of the shareholder was justified from a legal perspective and not disproportionate or unequal because of the shareholders' agreement and the retirement agreement to which the shareholder freely subscribed.

[65] Plethora submits that *White* also supports the principle that shareholder rights may be altered by contract. Plethora submits that the reasoning of Blair J.A. in *White* is analogous to the circumstances of this application and is authority for its submission that general corporate law principles should not be applied to avoid contractual provisions agreed to outside of a shareholder's capacity as a shareholder. Plethora submits that under the ADA, Mr. Bayliss, who entered into the ADA as a geologist, did not have the right to be a shareholder of Superior except as expressly contemplated by and pursuant to the ADA and his rights, as such, were never subject to the articles of incorporation of Superior.

[66] In *White*, the shareholder did not exercise a statutory right to dissent and be paid the fair value of shares held by the shareholder. The shareholder made a claim in tort. The rights of a shareholder may be altered by contract, as they were in *White*, and this may result in the shareholder being treated differently than other shareholders. However, the rights carried by, or attached to, shares of a given class (as opposed to contractual rights of a shareholder) are, pursuant to s. 22(3) of the *OBCA* and the principles set out in *McClurg* and *White*, required to be equal in all respects. The terms and conditions of the ADA are not rights or attributes that attach to Superior's common shares. If the terms and conditions of the ADA attached to

2023 ONSC 7211 (CanLII)

Mr. Bayliss' shares, all shareholders within the same class would not be treated equally. For example, if, in addition to Mr. Bayliss, another shareholder who was not subject to a contract like the ADA dissented from the resolution to approve the amalgamation and sought payment of fair value of their shares, Mr. Bayliss' rights as a holder of Superior shares would not be equal to the rights of the other dissenting shareholder. This would be contrary to s. 22(3) of the *OBCA* and a fundamental principle of corporate law.

[67] Plethora submits that because the ADA provides that Mr. Bayliss is not entitled to become a shareholder of Superior (or an amalgamated entity) except upon a liquidity event as provided for by the ADA (where his shareholdings would be limited to 3% of such shares), he will receive an unjustified windfall if he is held to have a dissent right at all, and a greater windfall if he is entitled to receive the fair value of 900,000 shares of Superior (instead of a lower number equal to 3% of the shares of Superior prior to the amalgamation that, had he not dissented, he was entitled to receive under the ADA).

[68] The difficulty with this argument is that Mr. Bayliss' statutory right to dissent arises because Superior did not, itself, act in compliance with the ADA. Superior did not issue the 900,000 shares to be held by the Trustee as the registered owner, as provided for by the ADA. If it had done so, Mr. Bayliss would not have had a right to dissent under s. 185(1) of the *OBCA*. Instead, Superior issued 900,000 shares to Mr. Bayliss to which, by statute, voting rights attached. It is not open to me to disregard s. 185(1) of the *OBCA* because Superior failed to issue the shares in question to be held by the Trustee, as it was permitted to do under the ADA and, instead, issued the shares to Mr. Bayliss to be held in his name.

[69] Plethora submits that, in any event, Mr. Bayliss is only able to exercise dissent rights under s. 185 of the *OBCA* in relation to 3% of the shares of Superior which, it calculates, is 423,471 shares. Superior issued to Mr. Bayliss a share certificate for this number of shares dated May 2, 2023, immediately before the effective date of the amalgamation. Plethora submits that Mr. Bayliss is only entitled to exercise dissent rights in relation to this number of shares because he agreed in the ADA that on the effective date of the amalgamation he would become entitled to 3% of the shares of Superior, which is 423,471 shares.

[70] The resolution approving the amalgamation was adopted on March 23, 2023. Under s. 185(4) of the *OBCA*, the date on which the fair value of the shares held by Mr. Bayliss in respect of which he dissents is determined as of the close of business on March 22, 2023. On this day, Mr. Bayliss held 900,000 common shares of Superior. I reject Superior's submission that Mr. Bayliss is only entitled to exercise dissent rights in respect of a lower number of shares determined by the number of shares that Mr. Bayliss would have received under the ADA if he had not dissented.

[71] Under s. 185(4) of the *OBCA*, the fair value of the 900,000 shares of Superior held by Mr. Bayliss on March 22, 2023 must be determined based on the rights and

2023 ONSC 7211 (CanLII)

attributes of these shares on that day, without consideration of the terms and conditions of the ADA, which do not attach to these shares.

What is the fair value of the shares of Superior held by Mr. Bayliss in respect of which he dissents?

[72] In *1843208 Ontario Inc. v. Baffinland Iron Mines Corporation*, 2023 ONSC 4906, Osborne J. discussed the factors to be considered on an application to determine the fair value of shares under s. 185 of the *OBCA*. In his reasons, Osborne J. cites the decision of the British Columbia Court of Appeal in *Cypress Anvil Mining Corp. v. Dickson*, 1986 CanLII 811 (BC CA) and, at para. 21, describes the proper approach to determining fair value:

The court then went on to describe, following a review of the jurisprudence, the proper approach to value in this way, with which I agree:

> It is not necessary for me to analyse those cases or to quote from them. The point that they emphasize is that the problem of finding fair value of stock is a special problem in every particular instance. It defies being reduced to a set of rules for selecting a method of valuation, or to a formula or equation to produce an answer with the illusion of mathematical certainty. Each case must be examined on its own facts, and each presents its own difficulties. Factors which may be critically important in one case may be meaningless in another. Calculations which may be accurate guides for one stock may be entirely flawed when applied to another stock.

[73] In *Baffinland*, Osborne J., at para. 22, cited the decision of D.M. Brown J. (as he then was) in *Glass v. 618717 Ontario Inc.*, 2012 ONSC 535, following a quote with approval from *Cyprus* as above:

[246] A helpful summary of the particulars underlying the application of the "one true rule" can be found in the article by Hunter & Pearce, "*Fair Value" - A Common Issue with Surprisingly Sparse Canadian Authority*:

> The following basic principles appear to be well-established by the authorities:
>
> 1. **Valuation of shares pursuant to a legislative appraisal remedy is a fact-based assessment, which requires "an important element of judgment" by the court.**
>
> 2. **In exercising its judgment, "a court is advised to be prudent - to proceed not on the basis of the most optimistic approach ..." Dissenting shareholders are not entitled to a better value than other shareholders simply because they are dissenting. The appraisal remedy is a "safeguard, not a bonus."**

2023 ONSC 7211 (CanLII)

3. Neither party bears the burden of proving the fair value of the shares. Although each party who asserts a proposition must prove it on the balance of probabilities, by a preponderance of the evidence, it is the court that must ultimately make the assessment of fair value. **While expert evidence is commonly put forward to assist in establishing fair value, the court is not obliged to accept it.**

4. Complicating the court's task is the frequently expressed admonition that judges should exercise caution in attempting to mix and match portions of competing expert reports and thereby cast themselves in the role of performing their own valuation. **As the trial judge put it in the *Brant Investments* case:**

> **In arriving at my valuation I do not propose to go through the valuation exercise followed by the expert, substituting my own conclusion as to the basic ingredients for theirs. The wide disparity exhibited by them in the application of their technique does not inspire me with any confidence in the result which I would achieve as an amateur in its application**.

5. Market value "is the highest price expressed in money obtainable in an open and unrestricted market between knowledgeable, prudent, and willing parties dealing at arm's length, who are fully informed and under no compulsion to transact". However, "market value" is not equivalent to "fair value", although ... fair market value can be an important part of the fair value determinate depending on the circumstances.

6. Fair value is a value that is "just and equitable" - one which provides "adequate compensation (indemnity), consistent with the requirements of justice and equity." One important implication of the distinction between market and fair value is that, in general, no minority discount can be applied in determining "fair value" ...

7. Generally, neither the parties nor the court may rely on hindsight evidence. Events that were not known as of the valuation date are not relevant to determination of fair value on the valuation date. However, while hindsight is generally excluded, there are some limited but potentially significant exceptions to this principle ...

Now, while the authors discussed those principles in the context of statutory appraisal remedies, for the most part they apply with equal

2023 ONSC 7211 (CanLII)

force to the task of fixing the fair value of shares when ordering a buy-out of securities under the oppression remedy. [emphasis added [by Osborne J.]]

[74] In *Baffinland*, Osborne J., at para. 27, concluded:

In short, it seems to me that the task before me can be fairly summarized as follows:

a. it is a matter of judgment, specifically reserved by the legislature to the judge hearing the matter;

b. it is not the application of a fixed formula or calculation;

c. neither the list of factors to be applied nor the relative weight of those factors are fixed, and both necessarily vary from case to case;

d. all relevant evidence should be considered, but the court is not obliged to accept any or all expert evidence tendered;

e. evidence of an efficient, open market, consisting of multiple informed participants, is likely the best and most objective evidence of value and is more reliable than theoretical analysis based on assumptions about what a real market might do;

f. the court must be conscious of the difference between market value and fair value, the latter of which is generally not subject to any minority discount;

g. the court should be prudent, particularly when considering hypothetical values. The exercise is a safeguard, not a bonus; and

h. the reasons should inform the parties as to how the court arrived at the result, including the evidence relied upon, any assumptions applied and, in sum, how the value determined is fair in all the circumstances of that particular case.

[75] I adopt the approach to determining fair value as set out by Osborne J. in *Baffinland*.

[76] Each of Mr. Bayliss and Plethora relies on reports from an expert valuator. Each valuator gave an opinion as to the fair value of the shares of Superior as at March 22, 2023. Neither expert was cross-examined.

[77] Edward Tobis provided two expert affidavits on behalf of Mr. Bayliss concerning the fair value of the Mr. Bayliss' ownership interest in the shares of Superior as at March 22, 2023.

[78] Mr. Tobis is a Chartered Professional Accountant, Chartered Accountant (CPA, CA), Chartered Business Valuator, and a Qualified Valuator under the Canadian

2023 ONSC 7211 (CanLII)

Institute of Mining's Valuation Standards and Guidelines. He specializes in the preparation of business valuation and economic damages reports for commercial litigation and international trade and investment disputes. Mr. Tobis is a Qualified Valuator under the Standards and Guidelines for Valuation of Mineral Properties promulgated by the Canadian Institute of Mining and Petroleum on the Valuation of Mineral Properties ("CIMVAL"). I accept that Mr. Tobis is qualified to give expert opinion evidence concerning the fair value of Mr. Bayliss' shares of Superior.

2023 ONSC 7211 (CanLII)

[79] Michael Fowler provided an expert report dated October 6, 2023 and a second expert report dated November 16, 2023. These reports were prepared at the request of counsel for Plethora. At the hearing, counsel for the parties agreed that these reports should be treated as evidence and, with their agreement, I do so. Mr. Fowler is a senior mining analyst with many years of experience in determining mineral resource company valuations. He served on the committee which developed and wrote the Canadian Institute of Mining Code for CIMVAL. I accept that Mr. Fowler is qualified to give expert opinion evidence concerning the fair value of Mr. Bayliss' shares of Superior.

[80] Both experts rely on evidence that Superior acquired its interest in four mineral properties from Kenorland Minerals Ltd. on June 22, 2021. The purchase price paid by Superior to Kenorland in exchange for the mineral properties was 2,665,000 common shares of Superior with a deemed value of $266,600 (or $0.10 per share); and the grant of a 2% net smelter royalty in favour of Kenorland on a specified number of hectares of two of the mineral properties. Mr. Tobis considered this transaction (and other financing transactions around the same time for the same implied price per share) to represent a fair value transaction. Mr. Tobis then considered certain movements of selected data to reflect changes in the macroeconomic environment between June 22, 2021 and the valuation date. Mr. Tobis also took into account that Superior capitalized $258,389 towards its exploration and evaluation assets on its balance sheet and it raised an additional $120,000 which, he concludes, implies further investment in and development of the mineral properties since June 2021.

[81] Mr. Fowler also relies on the Kenorland transaction as evidence showing an implied share price on the date of that transaction of $0.10. Mr. Fowler also used other data (not the data used by Mr. Tobis) to adjust this implied share price to reflect the difference in share value between June 2021 and the valuation date of March 22, 2023.

[82] In his first affidavit, Mr. Tobis states that to reflect changes in the macroeconomic environment between June 2021 and the valuation date, he considered the movements in the spot price of nickel. Mr. Tobis uses data that shows that between June 28, 2021 and the valuation date, the spot price of nickel grew by 47%. Mr. Tobis states that, in his view, this index provides a reasonable measure to use to adjust the values obtained from comparable transactions on account of changes in

the macroeconomic environment between the date of each transaction (June 28, 2021) and the valuation date. This would imply a value per share of Superior's shares at the valuation date of $0.15. This price per share is the high end of the range that Mr. Tobis concludes represents fair value of the shares.

[83] Mr. Tobis also uses the S&P Canada BMI Materials Total Return Index as a measure to adjust the value of the Superior shares between June 2021 and March 2023. This index tracks the movement in the market capitalization of approximately 90 Canadian metals and mining companies. This index showed a total growth of 10.6% over this time period which implies a share price for shares of Superior in March 2023 of $0.11. This price per share is the low end of the range that Mr. Tobis concludes represents the fair value of the shares.

[84] Mr. Fowler disagrees that the change in nickel price per tonne is a proper benchmark to used to adjust the value of Superior's shares from June 2021 to March 2023. In Mr. Fowler's first report, he states that the share prices of senior resource companies have a degree of correlation with underlying commodity prices as they hold reserves of the underlying minerals. Junior mineral exploration mining companies, on the other hand, typically do not hold reserves. Mr. Fowler's opinion is that their share prices are more correlated to exploration success and associated investor sentiment/demand. Mr. Fowler used two different measures to reflect the movement in share value from June 28, 2021 to the valuation date.

[85] In his second report, Mr. Tobis expresses his disagreement with the indexation approach proposed by Mr. Fowler and reiterates that, in his view, the more appropriate data to used to reflect changes in the macroeconomic environment between the date of the Kenorland transaction (and other comparable transactions) and the valuation date are the movements in the spot price of nickel and in the S&P Canada BMI Materials Index.

[86] I note that Mr. Tobis does not explain in his affidavits, other than by saying so, why he considers the spot price of nickel to be an appropriate measure to use to determine the effect of changes in the macroeconomic environment between June 2021 and March 2022. He does not address in his second affidavit the substance of Mr. Fowler's criticism of the use of this data. He does not rely on any data showing how the spot price of nickel correlates with the value of a junior nickel exploration company like Superior, with no reserves of nickel. In the absence of information supporting Mr. Tobis' statements, I am not persuaded that this measure is a proper one. I prefer the report of Mr. Fowler in this respect because he explains why the spot price of nickel should not be used. His reasons for his opinion take into account that Superior, unlike established senior mining companies, does not hold any reserves of nickel. I find his reasons persuasive.

[87] In his first report, Mr. Fowler states that the BMI Canada Materials Index tracks 89 large capitalization stocks with a mean company market capitalization of approximately $3 billion. He expresses his opinion that this index is not

2023 ONSC 7211 (CanLII)

representative of junior mineral exploration companies with micro market capitalizations and few if any mineral resources. I am persuaded by Mr. Fowler's reasons for his opinion and conclude that the BMI Canada Materials Index is not an appropriate measure to use to reflect changes in the macroeconomic environment between June 22, 2021 and the valuation date.

[88] Mr. Fowler selected a group of publicly listed junior nickel exploration companies that he believes are comparable to Superior. He tabulates their returns over the period from June 2021 to March 2023. The share prices showed an average decline of 47% over this period.

[89] Mr. Fowler also uses the TSX Venture Exchange which tracks the share values of junior companies listed on the TSX Venture Exchange - TMX Group. Mr. Fowler states that this index declined by 38% over the period between June 22, 2021 and March 22, 2023.

[90] Mr. Fowler's opinion is that using Mr. Tobis' valuation methodology and adjusting the value of the Superior shares using the TSX Venture Index or the basket of comparable junior nickel exploration companies, the derived Superior value per share is in the range of $0.05 to $0.06.

[91] In his second report, Mr. Tobis comments on the selection of publicly listed junior exploration companies by Mr. Fowler which he considered to be comparable to Superior. He notes that Mr. Fowler does not state the methodology he used to select six of the companies (the other five were also used by Mr. Tobis in his analysis). Mr. Tobis identifies certain data entry errors which affected Mr. Fowler's calculations. Mr. Tobis notes that one of the companies does not own any nickel exploration companies. He points out that Mr. Fowler does not use data for two other junior nickel exploration companies whose share prices increased between June 22, 2021 and the valuation date. Mr. Tobis explains that had Mr. Fowler consistently used the same companies in his indexation analysis and his "EV/MPI" (Enterprise Value / Mineral Property Investment) approach, this would have resulted in a higher valuation of Superior's shares in the range of $0.06 to $0.08 per share under the "EV/MPI" approach (compared to $0.04 to $0.05 per share which was relied on by Mr. Fowler for this approach).

[92] Mr. Tobis also explains in his second report why, in his opinion, Mr. Fowler's use of the TSX – Venture Exchange index is not appropriate. Mr. Tobis states, first, that the decline of the TSX Venture Exchange is 35%, and not 37% as Mr. Fowler had calculated. He explains that the TSX Venture Index is impacted by companies operating across a diverse set of industries such as aerospace and defence, advertising, healthcare, industrials, and other industries which are not related to the mining industry. Mr. Tobis expresses the opinion that the TSX Venture Diversified Metals & Mining (Sub Industry) Index which tracks the performance of all companies that are classified within the S&P/TSX Venture Composite as

2023 ONSC 7211 (CanLII)

diversified metals & mining is a more appropriate index. This index declined only 6.9% over the period from June 22, 2021 to March 22, 2022.

[93] Mr. Tobis states that there is a relatively strong positive correlation (a correlation coefficient of 0.53) between the TSX Diversified Metals and Mining Index and the S&P Canada BMI Materials Index between June 21, 2021 and the valuation date. A decrease of 6.9% over the relevant period would lead to a derived price per share for Superior of $0.09 at the valuation date.

[94] Mr. Tobis notes that this index is calculated based on a float-adjusted market capitalization weighting method that means the return is based on a weighted average of the returns of companies included within the index, whereby the larger companies are given more weight, as well as an adjustment of each company's total shares outstanding for long-term, strategic shareholders, whose holdings are not considered to be available to the market. Mr. Tobis then uses Mr. Fowler's method based on eleven junior exploration companies (the simple average indexation methodology) and calculates that this would result in a growth factor of 116.2% which would imply a value per share of $0.22 as at the valuation date. Mr. Tobis does not, when making this calculation, state that the simple average indexation method, as opposed to the weighted average method, is appropriate for this index where the companies in the index include larger companies that are not comparable to Superior. I do not regard this calculation (which far exceeds even the outside of Mr. Tobis' range) to be helpful.

[95] Although Mr. Tobis states in his second report that using the TSX Venture Diversified Metals and Mining Index is an appropriate and objective approach to adjust values derived from comparable transactions (in addition to the nickel spot price and the S&P Canada BMI Materials Index) on account of changes in the macroeconomic environment impacting nickel mines, it does not appear that he used this approach to inform his opinion of fair value of the Superior shares at the valuation date.

[96] Mr. Tobis states in his second report that, overall, his view is that the analysis carried out by Mr. Fowler on publicly listed junior exploration companies is not reliable. In reaching this conclusion, Mr. Tobis accepts that it is appropriate to use the shares prices of comparable junior mining companies to derive market values in an EV/MPI valuation approach. He does not, however, consider the group of companies selected by Mr. Fowler to provide an appropriate basis to index valuations derived from the comparable transactions ($0.10 per share) on account of changes in the macroeconomic environment to the valuation date.

[97] In his second report, Mr. Fowler states that the TSX Venture Diversified Metals and Mining Index is inappropriate because its major components tend to be lithium related and lithium metals shares performed much better than nickel in the relevant period due to positive sentiment towards the lithium battery market. Mr. Fowler also states that the mean market capitalization of this sub-index is C$297 million

2023 ONSC 7211 (CanLII)

and the median is C$155 million which is significantly larger than that of micro-capitalization nickel explorers like Superior. I am persuaded by this explanation and conclude that the TSX Venture Diversified Metals and Mining Index is not an appropriate measure to use to determine the value of the Superior shares as at the valuation date.

2023 ONSC 7211 (CanLII)

[98] In his second report, Mr. Fowler addresses the criticisms of Mr. Tobis concerning Mr. Fowler's selection of publicly listed junior exploration companies. Mr. Fowler explains that when he started to analyze the share price based on a basket of comparable junior nickel exploration stocks, he intended to use the eight companies that were considered as comparable companies by both Mr. Tobis and the firm that did a fairness opinion for the amalgamation transaction. However, he found that only four of these companies had traded during the whole period in question. As a result, Mr. Fowler identified additional representative companies for inclusion in order to derive a more realistic conclusion.

[99] Mr. Fowler expresses his concurrence with Mr. Tobis that one of the companies should be removed because it sold its nickel assets in the intervening period. Mr. Fowler explains why he did not include the two junior nickel exploration companies (identified by Mr. Tobis) where the share prices increased over the relevant period of time. This, he states, is because both companies hit specific and excellent drill intersections "which excited their markets in late 2022". Superior had no such results.

[100] According to Mr. Fowler's second report, the average decline in the price per share for the remaining 10 junior public exploration companies from June 21, 2021 to March 22, 2023 was 47%.

[101] Mr. Fowler maintains that he used a basket of junior nickel exploration companies that is more reliable and less subjective than the general indices proposed by Mr. Tobis. He states in his second report that all methods used in forecasting Superior's share value suggest a range of $0.03 to $0.06 per share.

[102] In his first report, Mr. Tobis refers to an offer that Superior received from Teck Resources Limited on August 19, 2022 whereby Superior would grant to Teck the option to acquire a 100% interest in the mineral properties upon meeting certain conditions. Superior rejected Teck's offer because the valuation was below expectations of management. Mr. Tobis explains (using increases in the spot price of nickel and the Canada BMI Materials Index) that had the Teck offer been made as of the valuation date, it would have been 15% to 17% higher, implying a value that translates to $0.06 per Superior share to reflect improvement in the macroeconomic environment for Superior's mineral properties as at the valuation date compared with August 2022.

[103] I have considered the contents of both of Mr. Tobis' reports and both of Mr. Fowler's reports. I accept the opinions of both experts that as of June 28, 2021,

there were market transactions that imply a value per share of $0.10. I am not satisfied that either the spot price of nickel or the S&P Canada BMI Materials Index is an appropriate measure to use to show the movement in the macroeconomic environment as it relates to the Superior shares up to the valuation date. I am persuaded by the reasons given by Mr. Fowler reports that these measures are not appropriate to reflect an upward movement in the value of Superior's shares from June 2021 to the valuation date.

2023 ONSC 7211 (CanLII)

[104] I accept Mr. Fowler's opinion that the most effective and accurate means of simulating or forecasting the change in Superior's share value over the period in question is to research and create a basket of comparable junior nickel exploration company stocks and to use the data from this basket to assess the general market sentiment for junior nickel explorers. Mr. Tobis does not suggest that the use of data for comparable junior nickel exploration companies is inappropriate. Mr. Tobis was critical of Mr. Fowler's use of one company (Quebec Nickel) because it did not begin trading until July of 2021. Other than this company (and another company that does not own any nickel exploration projects) Mr. Tobis does not say that any of the other eight companies is not an appropriate comparable company to use.

[105] There were ten stocks included in Mr. Fowler's basket (after excluding one that, he agreed, should not be used). Although Mr. Tobis contends that these companies were selected subjectively, he does not suggest an alternative and more objective basket, other than to say that two additional companies whose stocks increased in value should have been included. I accept Mr. Fowler's explanation for why these two companies should not be included.

[106] I find that the basket of ten companies selected by Mr. Fowler is an appropriate group to use to assess the general market sentiment for junior nickel exploration companies over the relevant period. In Table 2 of Mr. Fowler's second report, he records data with respect to the changes in price for these ten stocks over the relevant period of time which all show significant decreases ranging from -19% to -63%. The average decline is 47% and the median decline is 48%. This average or median decline, if applied to Superior, translates to a decrease in the price per share from $0.10 in June 2021 to $0.05 on the valuation date.

[107] Mr. Tobis agrees that it is appropriate to use the share prices of comparable junior mining companies to derive market values in an EV/MPI valuation approach. Mr. Tobis calculates the implied value per share for Superior under the EV/MPI approach to be in the range of $0.06 to $0.08 using the companies selected by Mr. Fowler (excluding the one company that did not have any nickel exploration projects). The mid-point of this range is $0.07. Mr. Tobis does not use this calculation (because he does not consider that the group of junior exploration companies selected by Mr. Fowler provides an appropriate basis to index valuations). As noted, I have concluded that Mr. Fowler's selection of ten companies (reduced from eleven) is appropriate.

[108] I am mindful of the caution expressed in *Baffinland* and other jurisprudence that determination of fair value is a matter of judgment and is not the application of a fixed formula or calculation. I am satisfied that the data from the basket of comparable companies shows a consistent pattern of decreases in share values over the relevant period. I find that the value of the common shares of Superior also decreased during this period of time. I also take into account other information, including that Superior appears to have raised capital for investment in its exploration activities (which would have a positive impact on share value) and the statements by Plethora PE in its Q4 2022 quarterly report indicating a $0.15 per share value for its holding in Superior throughout 2022.

[109] I conclude that the decline in the value of the shares of Superior over the relevant period is at the low end of the range of declining values (expressed as a percentage) for the ten comparable companies.

[110] When I consider all of the relevant evidence and apply a discount (at the low end of the range) to the value of $0.10 per share to reflect changes in the macroeconomic environment from June 28, 2021 to March 22, 2023, I conclude that the fair value per common share of Superior determined as at March 22, 2023 is $0.07. This is also the mid-point of the range calculated by Mr. Tobis (using the companies selected by Mr., Fowler) using the EV/MPI approach, one that he regarded as appropriate.

[111] I conclude that using this value per share will provide just and equitable compensation to Mr. Bayliss for his shares of Superior.

Did Plethora act oppressively toward Mr. Bayliss in the exercise of his dissent right?

[112] A claim for remedies for oppression can be brought concurrently with a proceeding involving dissenting shareholder rights. See *Paul v. 1433295 Ontario Limited*, 2013 ONSC 7002, at para. 96.

[113] In the letter dated May 4, 2023 from Plethora SE's lawyers, they wrote that they are providing a written offer to pay for Mr. Bayliss' shares in an amount considered by the directors of Superior to be fair value thereof, accompanied by a statement showing how the fair value was determined. In this letter, the lawyers wrote that the Board of Directors of Superior have determined that on March 23, 2023, the fair value of the common shares of Superior which Mr. Bayliss is entitled to dissent pursuant to section 185 of the *OBCA*, on a standalone and pre-amalgamation basis, is zero.

[114] Mr. Bayliss submits that the conduct of Plethora in response to his notice of dissent was unfairly prejudicial to his reasonable expectation that the company would offer to pay him fair value for the number of shares he held as at the valuation date. Mr. Bayliss submits that, by purporting to reduce his shareholdings to 423,471 shares,

2023 ONSC 7211 (CanLII)

and then asserting that the "fair value" that it was prepared to offer for his shares was "zero", Plethora acted in an effort to unfairly expropriate the value of Mr. Bayliss' shares for its benefit and visibly departed from standards of fair dealing. Mr. Bayliss submits that in so acting, Plethora acted oppressively toward him.

2023 ONSC 7211 (CanLII)

[115] Mr. Bayliss relies on Mr. Fowler's report where he states that at the valuation date, Superior had value. Mr. Bayliss notes that in a presentation to investors following the amalgamation, Plethora PE wrote that it had "bundled [its] most exciting projects in Plethora Exploration Corp."

[116] As remedies for Plethora's alleged oppressive conduct, Mr. Bayliss seeks (a) an order requiring Plethora to provide Mr. Bayliss with a share certificate for 900,000 shares and directing that Superior's share register be rectified accordingly; and (b) an order requiring Plethora to pay full indemnity costs of this application.

[117] Plethora submits that it has not acted oppressively by relying on the ADA and disagreeing with Mr. Bayliss on the value of his shares. Plethora submits it was entitled to take the position, informed by financial analysis and valuation principles, that Mr. Bayliss' shares had no standalone equity value.

[118] Where a conflict arises between a corporate stakeholder and a corporation that involves the interests of the corporation, it falls to the directors of the corporation to resolve the conflict in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen. The duty of directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. See *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at paras. 81-82.

[119] As the Court wrote in *BCE*, at para. 84: "Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way".

[120] In his affidavit, Mr. van Hees explains that Plethora's position that the fair value of Superior was zero was based, most significantly, on the following points:

a. Superior had a net working capital deficit of a minimum of $639,145 as of March 22, 2023;

b. The significant cost of taking exploration steps that could potentially lead to a viable mine;

c. Superior's estimate of the net present value of the potential offer from Teck of $150,000-$200,000 was less than the amount of its working capital deficit;

d. Superior had to pay Kenorland Minerals Ltd. an option payment of $125,000 in June 2023 to keep its option in good standing (and had no capital to do it);

e. In Plethora PE's opinion, there was only meaningful value in Superior when it was part of a larger, amalgamated entity that would have the scale to possibly attract capital to advance the assets (and pay the amount due to Kenorland). On its own Superior had a 6.1% weight in Plethora.

f. Attempts to attract interest from other major parties in Superior were unsuccessful.

g. A deteriorating market for junior exploration companies in 2022/2023.

[121] When he was cross-examined, it was put to Mr. van Hees that the position taken by Plethora that the fair value of Mr. Bayliss' shares was zero was in conflict with the opinion of Mr. Fowler, and he was asked to confirm his agreement with Mr. Fowler's opinion. Mr. van Hees responded that he respected Mr. Fowler's opinion and methodology but, when he sees the current market conditions and the market capital deficit, his opinion is that the value offered to Mr. Bayliss, zero, reflects fair value for his shares.

[122] The experts who provided evidence on this application disagreed with each other about the proper methodology to value Mr. Bayliss' shares of Superior, and the values in their reports ranged from a low value per share of $0.03 to a high value per share of $0.15. This shows the difficulty in valuing these shares, even for professional valuators. I am satisfied from the difficulty in valuing the shares of Superior with precision that the directors of Plethora must be afforded reasonable latitude when they determine the fair value of the shares held by Mr. Bayliss.

[123] When I consider all the circumstances, including Mr. van Hees' evidence of the factors he identifies that, he deposes, informed his opinion of the value of the shares of Superior, I conclude that Mr. Bayliss has not established that the directors of Plethora failed to exercise their business judgment in a responsible way in the best interests of Plethora and commensurate with its duties as a responsible corporate citizen.

[124] I conclude that Mr. Bayliss has failed to establish that Plethora acted oppressively toward him.

2023 ONSC 7211 (CanLII)

Motion to strike out paragraph 36 of affidavit of Mr. van Hees sworn October 11, 2023

[125] Mr. Bayliss brought a motion for an order striking out paragraph 36 of the affidavit of Mr. van Hees sworn October 11, 2023 on the ground that it is scandalous and may prejudice the fair hearing of the application.

[126] In this paragraph of his affidavit, Mr. van Hees makes statements that refer to dissatisfaction by management of Superior and Plethora with Mr. Bayliss' performance of his duties as an independent contractor.

[127] This evidence was tendered to show the existence of a dispute between Superior and Mr. Bayliss about his engagement as an independent contractor. Plethora submits that this is relevant because under the ADA, the termination of Mr. Bayliss engagement is a liquidity event. Plethora submits that the evidence shows that before his engagement could be terminated, Mr. Bayliss dissented, thereby avoiding the occurrence of a liquidity event. Plethora submits that by dissenting in these circumstances, Mr. Bayliss received an unjustified windfall.

[128] Given the purpose for this evidence, I do not agree that paragraph 36 of Mr. van Hees' affidavit is irrelevant to the issues raised on this application.

[129] I do not, in any event, find it necessary to refer to this evidence to decide the issues on this application.

[130] Mr. Bayliss' motion is dismissed.

<u>Disposition</u>

[131] For these reasons, I allow Mr. Bayliss' application, in part, and:

a. Declare that (i) Mr. Bayliss is the holder of 900,000 common shares of Superior entitled to vote on the resolution for approval of the amalgamation, and (ii) Mr. Bayliss is a dissenting shareholder with a right to be paid the fair value of these shares in respect of which he dissents;

b. Order that the fair value of the 900,000 shares of Superior held by Mr. Bayliss as at March 22, 2023 is fixed at $0.07 per share;

c. Order that Plethora shall pay Mr. Bayliss the amount of $63,000 as fair value for his shares of Superior; and

d. Order that Mr. Bayliss' application for a declaration that Plethora acted oppressively toward him is dismissed.

2023 ONSC 7211 (CanLII)

[132] I ask counsel to provide me with an approved form of judgment that is consistent with this endorsement. If there is disagreement about prejudgment interest, I may be spoken to.

[133] If counsel are unable to resolve costs, they make written submissions. The Applicant may make written submissions within 14 days (not longer than 4 pages excluding costs outline). The Respondent may make written responding submissions (also not longer than 4 pages) within 10 days thereafter. Reply submissions, if any (2 pages), within 5 days thereafter.

____

Cavanagh J.

Date: December 21, 2023

2023 ONSC 7211 (CanLII)