IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Muddy Waters Capital LLC v. Mayfair Gold Corp.,* 2024 BCSC 1233

Date: 20240604
Docket: S243437
Registry: Vancouver

Between:

Muddy Waters Capital LLC and MW Domino Management LLC

Petitioners

And:

Mayfair Gold Corp., XYZ LLP, Douglas Cater, Patrick Evans, Harry Pokrandt, Christopher Reynolds, Auruous Consulting LLC, Justin Byrd, Howard Bird, Matthew Evans, Wallace Smith, Paul Degagne, Alexandra Gelinas, Ryan Hoefs, and Ian Chappell

Respondents

Before: The Honourable Justice Loo

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	J.D. Virgin C.G.Y. Chiu
Counsel for Mayfair Gold Corp.:	S.T.C. Warnett L.D. Honywill
Counsel for Douglas Cater:	A. Dosanjh
Counsel for Patrick Evans:	R.J. Kaardal, KC P.D. Heisler K. Schatz (A.S.)

Place and Date of Hearing:	Vancouver, B.C. June 3, 2024
Place and Date of Judgment:	Vancouver, B.C. June 4, 2024

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[1] **THE COURT:** On this application, the corporate respondent Mayfair Gold Corp. seeks to set aside an *ex parte* order that I granted on May 27, 2024, in favour of the petitioners under s. 227 of the *Business Corporations Act,* S.B.C. 2002, c. 57.

[2] These are oral reasons for judgment. In the event that a transcript is ordered, I reserve the right to edit the reasons for clarity and grammar or to correct simple errors, but the result will not change.

[3] Further, due to the urgency of this matter, these reasons will not be as fulsome as they would be otherwise. Although not every point raised during the hearing will be specifically addressed in these reasons, I have considered all of the submissions made and the evidence specifically referred to by counsel.

Background

[4] Mayfair is a public company whose primary asset is a gold project in Ontario known as “Finn-Gib.”

[5] The underlying dispute in this matter is a proxy contest wherein the petitioners are seeking to replace the majority of the Mayfair board of directors. The injunction application arises in relation to certain employment agreements between Mayfair management employees and Mayfair.

[6] The employment agreements contain provisions stating that in the event of a change of control, the employees may elect to terminate their agreements at any time, and the company shall pay the employees amounts equal to 24 months' base salary.

[7] In February of 2024, the management of Mayfair expressed to Patrick Evans, the company's chief executive officer, and members of the company's compensation committee, that they were concerned that a change of control may occur in respect of the company. Later in February 2024, management and certain employees requested that the employment agreements be amended to insert the following language into the definition of "change of control":

> A Change of Control occurs following the sale of all or substantially all of the assets of the Corporation; by or into another corporation, entity or person; **the acquisition by any Person or Persons acting together of sufficient voting rights to affect the control of the Corporation**; any change in ownership of fifty percent (50%) or more of the voting capital stock of the Corporation; **or a change in the composition of the Board that results in the current directors of the Board constituting less than a majority members of the Board.**
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> [emphasis added to indicate insertions]

[8] On March 14, 2024, Harry Pokrandt, an independent director and the chairman of the board, received a telephone call from representatives of Muddy Waters advising that Muddy Waters would be seeking a reconstitution of the Mayfair board of directors.

[9] On March 27, 2024, Mayfair received a requisition notice from an entity affiliated with Muddy Waters calling for, among other things, a shareholders' meeting to consider a special resolution to remove and replace the directors of the company.

[10] On April 17, 2024, Mayfair announced that it had called an annual general and special meeting of its shareholders to be held on June 5, 2024, in response to the requisition. On April 19, 2024, Muddy Waters wrote a letter to Mayfair stating in part:

> As you are aware, Muddy Waters intends to reconstitute the board of directors of Mayfair. Muddy Waters has received support agreements evidencing an intention to support the reconstitution from shareholders holding at least 50.68 percent of the shares. Muddy Waters is at a loss as to why the company continues to resist the express will of a majority of its shareholders. It is only a matter of time until the reconstitution occurs.

[11] On or about May 1, 2024, certain employees delivered notices to the board terminating their respective employment agreements. The terminating employees took the position that the facts stated by Muddy Waters in the April 19 letter and elsewhere constituted a change in control.

[12] Over the next several days, counsel for the company and counsel to the terminating employees drew up terms of settlement agreements whereby the terminating employees agreed to hold in abeyance their terminating notices and continue their employment with the company until the June 5 meeting. There are nine employees who are parties to settlement agreements, three of whom are shareholders. Two of the shareholders will receive approximately $570,000 each if they accept the termination payments, and Mr. Evans will receive $1.5 million. Non-shareholder employees will receive the balance.

[13] The settlement agreements provide that the termination notices delivered by the employees will have no legal effect until the June 5 meeting. They require the company to deliver the sum of $3.998 million, which is the total amount of the termination payments payable to the employees, into trust. The agreements provide that if there is a change of control of the board as a result of motions passed at the meeting, the payments will be immediately released to the employees. If there is no change of control, the terminating employees may still elect to terminate their employment agreements and thereby receive the termination payments, or to resend their termination notices.

[14] At the *ex parte* hearing, the petitioners argued that Mayfair and its directors had conducted themselves in an oppressive or unfairly prejudicial manner in the context of the proxy contest with Muddy Waters. The petition lists a number of allegedly oppressive actions, including that the company entered into the settlement agreements with the employees and that it disclosed the new definition of "change of control" that was "unprecedented in scope" and vague.

[15] On the *ex parte* hearing, I granted an order restraining the disposition of the termination payments to the employees. I ordered Mayfair to disclose certain information to the petitioners, including the location of the funds and the addresses of the respondent employees to be served. The deadline in respect of these disclosure orders has been extended by consent pending the issuance of these reasons.

Issues

[16] In these reasons, I will address three primary issues: (1) should the *ex parte* order be set aside on the basis of non-disclosure; (2) if so, should this Court consider the issuance of a new injunction; and (3) if the answer to the first two questions is yes, should a new injunction be granted?

Analysis

Should the *ex parte* order be set aside on the basis of non-disclosure?

[17] In *Canadian Western Bank v. John Doe*, 2024 BCSC 555, I held as follows at paragraphs 11 and 12:

> [11] It is trite law that on an *ex parte* application, the applicant must make full and frank disclosure of all material facts. An *ex parte* applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defences may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made: *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 37–38.
>
> [12] Where the *ex parte* applicant fails to provide full and frank disclosure, a court may set aside the order without regard to the merits of the application.

[18] In the case at bar, Mayfair alleges non-disclosure regarding a variety of issues. It asserts that the petitioners misstated the test for an injunction. It alleges that no undertaking was dealt with on the *ex parte* hearing. It argues that the applicants did not adequately point out what defences might be available to the opposing party.

[19] Upon consideration of the submissions advanced at the *ex parte* hearing, I am satisfied that the petitioners did fail to deal with the undertaking adequately and that they ought to have brought to the Court's attention certain arguments available to Mayfair: for example, that change-of-control provisions in executive employment agreements are commonplace, and that there would be a serious factual dispute as to whether or not the change-of-control amendments were made as a direct result of Muddy Waters' attempts to gain control of the board.

[20] Further, in my view, it would have been important for me to have been advised that the settlement agreements do not require a change of control of the board at the June 5 meeting in order for the termination payments to be released.

[21] In the result, I am satisfied that there was material non-disclosure on the *ex parte* hearing and that the *ex parte* injunction ought to be set aside.

Should this Court consider the issuance of a new injunction?

[22] Even where there has been a material non-disclosure, the Court retains a discretion to consider whether the injunction should stand in light of additional evidence on the set-aside application. *Save-A-Lot Holdings Corp. v. Christensen*, 2019 BCSC 115.

[23] As I indicated to counsel during the hearing, I cannot find that any of the non-disclosures in this case were intentional or deliberate, and there are no specific allegations of non-disclosure which are so severe or egregious that a new injunction ought to be denied without considering the merits of the application anew. I will therefore turn now to the core of the analysis on this application, in which I consider *de novo* whether the test for an injunction is met.

Should a new injunction be granted?

The Applicable Test

[24] As indicated above, the petitioners seek injunctive relief under s. 227 of the *Business Corporations Act*. As is well known, on an application for an injunction, the Court must first consider the merits of the applicant's case. If the applicable merits threshold is met, the Court will then go on to consider the issues of irreparable harm and balance of convenience.

[25] In this case, there is a dispute between the parties regarding the applicable threshold to be applied at the first stage of the three-part test.

[26] In this regard, at the *ex parte* hearing, I relied upon the decision in *Sunner v. A-Z Foam Ltd.*, 2018 BCSC 1113, to which I was referred by the petitioners. That case involved a shareholders' dispute among family members. Certain shareholders sought interim orders appointing an auditor and restraining the operation of the company. In that context, the Court asked whether there was a serious question to be tried.

[27] Similarly, in *McIsaac v. David*, 2019 BCSC 931, the court dealt with a dispute between two directors of a company. One sought an injunction that the other be removed as a director and provide accounting records, and the other sought orders that the other not enter into transactions beyond a certain amount, be restrained from entering the company's lands at any time, and be restrained from using corporate funds for personal reasons. Again, in that context, this Court held that the test for an interim order in oppression proceeding is the same generally as on an application for an interlocutory injunction - that is, whether there is a serious question to be tried.

[28] By contrast, however, in *Powell v. Paquette*, 2021 BCSC 2007, Justice Funt made a distinction between the types of interlocutory injunctions sought in *Sunner* and *McIsaac* and orders in the nature of a Mareva injunction. He held that the interim order under s. 227 sought by the petitioner before him was in the nature of a

Mareva injunction and that therefore, at the first stage of the test, the petitioner was required to establish a strong *prima facie* case on the merits.

[29] In my view, the case law establishes that the test to be employed on an application for injunctive relief under s. 227 will depend on whether the order sought is in the nature of a Mareva injunction. In distinguishing between these categories, I find helpful the decision of Justice Gray in *Osooli-Talesh v. Emami*, 2003 BCSC 1924. In that case, Justice Gray outlined the distinctions among the tests applicable to traditional interim injunctions, orders for the preservation of property, under what is now Rule 10-1 of the *Rules of Court*, and Mareva injunctions.

[30] She held that the serious question test applies to the first two types of injunctions, and she observed that before being entitled to a preservation of property order, an applicant must establish a proprietary interest to the assets or fund at issue. She then held at paragraph 54:

> [54] It is appropriate for the more onerous "Mareva" test to apply to cases where the applicant does not directly claim an interest in specific property, instead claiming judgment which may be executed against the property to be the subject of the injunction. In such cases, the court is protecting the viability of a judgment, rather than protecting an applicant's claim for specific performance of a right to particular property.

[31] The applicants in this case argue that the injunction is simply an order prohibiting the directors of the company from acting in a certain way. However, in my view, when the prohibition relates to the disposition of funds and there is no proprietary interest claimed in those funds, the Mareva test must apply.

[32] In the case at bar, the applicants do not directly claim an interest in specific property, and in my view, the Court is being asked to protect the viability of a judgment. Therefore, the applicants must establish a strong *prima facie* case before the issues of irreparable harm and balance of convenience will be considered.

Strong Prima Facie Case

[33] In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (CanLII), [2018] 1 SCR 196, at paragraph 17, the Supreme Court held that the strong *prima facie* test

requires that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[34] As discussed above, the underlying petition in this proceeding sounds in oppression. Central to the petitioner's allegations of oppression and unfair prejudice are the amendments to the change of control provisions in the employment agreements, the company's decision to enter into the settlement agreements, and the transfer of the termination payments into trust pursuant to the settlement agreements.

[35] As I understand the petitioner's claim, their attacks on these acts of the company have two legal aspects which might be illustrated by reference to a sentence in their application response. In that response, they state as follows:

> What is at issue is whether the $4 million payment triggered by the February amendments to the Change of Control definition – which Mayfair admits "will deplete the treasury of funds that could be better spent on advancing the Fenn-Gib project and may necessitate additional, potentially dilutive, financing" – was made in the best interests of Mayfair in mind or were targeted at thwarting Muddy Waters.

[36] It appears, therefore, that the first aspect of the petitioner's case is that the February amendments were not made in the best interests of the company, that the termination payments could have and should have been better spent to advance the company's mining business, and that the $4 million payment will necessitate additional potentially diluted financing.

[37] In their application response, the petitioners further argue that if the order is not continued and the $4 million payment is made, Mayfair may be unable to successfully recover those payments should this Court ultimately determine that the February amendments and the settlement agreement were oppressive. Moreover, the petitioners assert that by means of the impugned termination payments, nine employees, of which at least three are shareholders of Mayfair, will take at least 40 percent of the funds in Mayfair's treasury.

[38] In response to these arguments, the company argues that change-of-control provisions are standard in the industry and that they are important for various reasons. In *Montreal Trust Co. of Canada v. Call-Net Enterprises Inc.*, 2002 CanLII 49409 (ON SC), 57 OR (3d) 775, Justice Lax held at paragraph 16:

> [16] A Change of Control Agreement is thus a protective mechanism for both the corporation and the executive and has a legitimate business purpose. It is intended to retain executives and ensure their loyalty to the corporation in a time of uncertainty. It offers financial security to an executive who is either terminated or resigns after a change in control.

[39] In this case, there were submissions advanced by both parties as to whether the payments were in the best interests of Mayfair and whether the business judgment rule shields the directors in these circumstances, but those issues do not have to be determined on this application.

[40] In my view, the important point for the purpose of this hearing is that the petitioner's claims, which seek to prevent the depletion of $4 million from the company's cash reserves are, as a matter of law in the context of a publicly traded company, claims of that company and not claims of a subset of its shareholders.

[41] In *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193, at paragraph 179, the Court of Appeal held:

> [179] In my view the authorities require a shareholder to show it suffered harm that is "direct and special", "peculiar", or "separate and distinct" from the harm suffered generally by all of the shareholders. In other words, a shareholder need not be the only shareholder oppressed in order to claim oppression, nor suffer a different harm than the corporation does, but it must show peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly.

[42] Similarly, in *Rea v. Wildeboer*, 2015 ONCA 373, at paragraph 29, the Ontario Court of Appeal held:

> [29] While this debate is interesting, it is not necessary to resolve it here. On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the

> indirect effect of the conduct on similarly placed complainants. And most, if not all, involve small closely held corporations, not public companies.

[43] To the extent the petitioner's claim is that the $4 million payment will be dissipated absent an order or that the company will be worse off by making the termination payments to the nine employees, they have not established that they will suffer harm which is direct and special or separate and distinct from the harm suffered by the company or generally by all shareholders.

[44] As these allegations concern harm to the company, they may not be advanced by shareholders in an oppression proceeding. Rather, the remedy is an action by the company against the directors for breach of fiduciary duty either by way of derivative action or brought directly by the company when or if the petitioners gain control of the board.

[45] The second aspect of the petitioners' case is that the amendments to the change-in-control provisions and the making of the settlement agreement were "targeted at thwarting Muddy Waters." The petitioners' case in this regard rests on the sequence of events leading up to the amendments and the settlement agreements, and some evidence from two of the employees which suggests that the change-of-control provisions in the employment agreements were amended because the employees became aware that efforts were being made to change the board of directors.

[46] In particular, Mr. Pokrandt deposed that in or around February 2024, Mayfair's management expressed to Mr. Evans and others that they were concerned that a change in control may occur. The petitioners also rely on an affidavit of Mr. Evans, wherein he deposes that he requested that the additional language be added to the change-of-control provisions in his employment agreement because he wanted to better protect himself against a change of control.

[47] The petitioners argue that I should read these words as an admission that Mr. Evans wanted to entrench himself on the board. However, he also deposed in the same affidavit that he had serious concerns about serving as CEO of a company

with a non-independent and inexperienced board of directors that had a different vision than him for the company. It is evident, in my view, that the protection he was seeking was not protection which would preclude him from being ousted. Rather, he was seeking financial protection which would entitle him to a severance payment should he resign or be terminated in the context of a change of control.

[48] The petitioners argue that Muddy Waters' reasonable and legitimate expectations were that the current board will not take steps to entrench themselves and that the shareholders ought to be allowed to consider reconstitution of the board on its merits and without coercion. They submit that the amended or new change of control definition entrenches the current board members. They say that the settlement agreement places the board's coercive finger on the scale.

[49] The expectations described may well be legitimate and reasonable, but the petitioners do not explain, and it is difficult to understand, how the allegations of entrenchment or coercion are made out on the facts of this case.

[50] There is a dispute on the evidence as to whether the amendments to the change-in-control provisions were made specifically because of a concern about a reconstitution of the board by Muddy Waters, or because of a more generalized concern about a potential change of control. This dispute does not have to be resolved on this application, but even taking the petitioner's case at its highest, that the amendments were made as a direct response to Muddy Waters' efforts to obtain the support of a majority of Mayfair's shareholders and to reconstitute the board, I am still unable to find a strong *prima facie* case that the amendments, the settlement agreement, or the potential termination payments will have the effect at the June 5 meeting of supporting the entrenchment of the present board. This is particularly because the settlement agreements, as discussed above, allow the employees to elect to take the termination payments whether or not there is a change in control of the board.

[51] The petitioners characterize the change-of-control amendments as a poison pill, which I understand to be a corporate instrument triggered by a change in control

of the company that is so harmful to the company or its shareholders that it makes an unwanted takeover prohibitively expensive or less desirable. Often poison pills will involve the triggering of a massive issuance of shares at a heavily discounted price, diluting the present shareholders.

[52] However, in my view, the $4 million change-of-control payments in this case are vastly different in kind and in scale. As indicated, the company has adduced evidence showing that change-of-control provisions are commonplace. There is no allegation that the spectre of this payment will dissuade Muddy Waters from its attempt to reconstitute the board.

Conclusion and Summary

[53] For all of these reasons, I have concluded that the petitioners have not established a strong *prima facie* case on the evidence before this Court that the amendments, the settlement agreements, or the potential payout of $4 million to the employees constitute oppression or unfair prejudice within the meaning of s. 227 of the *Business Corporations Act*. As a result, it is not necessary to consider the issues of irreparable harm or balance of convenience. The petitioner's *de novo* application for injunctive relief is dismissed.

[54] Further, the disclosure orders made on the *ex parte* hearing were corollary to the injunctive relief granted at that time. Those disclosure orders are set aside.

[55] Finally, Mayfair seeks special costs of this application, which might be awarded in a case such as this if the degree and extent of the non-disclosure on the *ex parte* application were intentional or sufficiently severe or egregious, or if the application were so utterly lacking in merit so as to deserve reproof or rebuke. In my view, none of these conditions is satisfied in the circumstances of this case, and I am not prepared to order special costs. The respondents' costs of this application shall be paid by the applicants at Scale B.

[56] Counsel, thank you for your very helpful submissions on this application.

(SUBMISSIONS ON COSTS)

[57] THE COURT: The respondents have sought costs payable forthwith. Really, the only question is whether costs get paid now or they await the further advancement of the petition.

[58] Counsel for the respondent referred me to the case of *Down (Bankruptcy of)*, 2001 BCSC 1303, for the proposition that in certain circumstances, costs can be awarded forthwith following an interlocutory proceeding, where the interlocutory dismissal is not merely one ruling in the course of prehearing proceedings but goes to the very heart of the petitioner's case.

[59] In my view, looking at this case, an order for costs payable forthwith may also be made where it is unlikely that the petition will ever proceed.

[60] This set-aside application was argued over the course of a day and decided over the course of an evening, and I hope I have made it clear in my reasons that my decision today is based only on the evidence before this Court. I am not able to determine what might happen next, and in those circumstances, the costs will remain as I have originally ordered. They will be costs at Scale B in the ordinary course.

"Loo, J."