CITATION: Continental v. Singh, 2012 ONSC 7122
COURT FILE NO.: CV-12-9887-00CL
DATE: 20121219

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Continental Precious Minerals Inc., Applicant

AND:

Gurdass (Gary) Singh, Anthony G. Borg, Sajjad Ebrahim, Alli Ebrahim, Salman Ebrahim, The Par-Pak Companies Inc, and Grant V. Sawiak, Defendants

APPLICATION UNDER Section 105 of the *Securities Act* (Ontario), Section 99(9) of the *Business Corporations Act*, (Ontario), and Rule 14.05 of the *Rules of Civil Procedure*

BEFORE: L. A. Pattillo

COUNSEL: *Gary Sugar* and *Michael Watson*, for the Applicant

Jay Naster, for the Respondents, Sajjad Ebrahim, Ali Ebrahim, Salman Ebrahim and Par-Pak Companies Inc.

Gary Caplan and *Sarah Valair*, for the Respondents Anthony Borg and Grant Sawiak

Christopher Wirth and *Benjamin Kates*, for the Respondent Gurdass (Gary) Singh

HEARD: December 12, 2012

ENDORSEMENT

[1] The 2012 Annual General Meeting (the "2012 AGM") of the Applicant Continental Precious Metals' ("Continental") is scheduled for December 20, 2012. Mr. Sharad Mistry ("Mistry"), a Continental shareholder, has sent out a dissident proxy circular dated November 19, 2012 seeking to replace the incumbent board of directors.

[2] Continental alleges that the Respondents have engaged in two separate instances of illegal conduct which, if not remedied, threatens to prevent the proper transaction of business at the 2012 AGM.

[3] Specifically, Continental alleges:

a) The Respondents Sajjad Ebrahim (Sajjad), Ali Ebrahim (Ali) and Salman Ebrahim (Salman) (collectively the "Ebrahim Family") and The Par-Pak Companies Inc. ("Par-Pak"), a company controlled by Sajjad, acquired shares in Continental in contravention of the early warning requirements in s. 102.1 of Part XX of the *Securities Act* R.S.O. 1990, C S5, as amended (the Act). At issue are the voting rights for approximately 1,500,000 shares of Continental; and

b) The Mistry proxy solicitation is illegal being contrary to Part 9 of the Proxy Solicitation and Information Circular, National Instrument 51-102 ("NI 51-102") and ss. 32 and 33 of the Regulations pursuant to the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B.16, as amended ("*OBCA*").

[4] Continental seeks the following on this Application:

a) An order prohibiting the Ebrahim Family from exercising voting rights in respect of the shares purchased in contravention of the Act;

b) A declaration that a "flip-in event" has occurred under Continental's shareholders rights plan dated September 3,2010 by reasons of the Ebrahim Family acquiring over 20% of the shares; and

c) An order disallowing the Mistry proxy solicitation or in the alternative disallowing the Ebrahim Family and the Respondent Gurdass (Gary) Singh ("Singh") from voting their shares at the 2012 AGM or in the further alternative, vacating the AGM date, setting a new meeting date and requiring a proper proxy circular with proper disclosure.

Alleged Breach of the Early Warning Requirements

[5] Continental's allegations that the Ebrahim Family and Par-Pak violated the early warning requirements of the Act are not new. Continental says it first became aware of their purchases while preparing for its 2011 Annual General Meeting in September 2011. After that

meeting, and arising out of it, the Ebrahim Family and others launched an oppression application against Continental and its directors. On November 4, 2011, prior to the oppression application being commenced, counsel for the applicants wrote to the Ontario Securities Commission ("OSC") to advise it of the pending application. On November 8, 2011, counsel for Continental wrote to the OSC in response. The letter raised the issue of the Ebrahim Family failing to file early warning reports and stated "it is incumbent on the OSC to look into whether Mr. Ebrahim and his sons have breached their insider reporting and early warning disclosure obligations."

[6] In addition to Continental's request of the OSC to investigate the Ebrahim Family's share purchases prior to October 2011, on December 14, 2011, it commenced an application against the Ebrahim Family and Singh seeking, among other things, the exact same relief that noted in paragraph 4 (a) and (b) above (the "Counter-Application"). The oppression application and the Counter-Application came on for hearing before Brown J. on March 28, 2012. At the outset of the hearing, counsel for Continental advised the Court that in the event the oppression application was dismissed, it would withdraw the relief requested in the Counter-Application. On May 22, 2012, Justice Brown dismissed the oppression application and noted in his reasons that as a result of Continental's undertaking to the Court, he treated the Counter-Application as withdrawn.

[7] At the hearing before me, counsel advised that the OSC investigation into whether the Ebrahim Family breached the early warning requirements of the Act is still ongoing. In the circumstances, I do not consider it appropriate to deal with the issue of whether the Ebrahim Family breached the early warning requirements of the Act. Having instituted the OSC complaint and subsequently withdrawn the Counter-Application, the matter is before the OSC. It is no answer for Continental to say that nothing has happened at the OSC. More than a year has

elapsed since its complaint. Continental was aware that the Ebrahim Family could vote the impugned shares at some time. In my view, it was incumbent on Continental to pursue the OSC complaint to finalization.

[8] Even if I considered it appropriate for this Court to deal with the issue of whether the Ebrahim Family breached the early warning requirements of the Act and so concluded, having regard to the circumstances, I would not grant the relief requested of prohibiting the Ebrahim Family from voting their shares acquired after December 23, 2009.

[9] In my view, if Continental required an order of the court disallowing the Ebrahim Family from voting the shares in issue, it should have proceeded with its Counter-Application. The parties were prepared to argue the issues before Justice Brown. I do not accept that it was withdrawn because it was moot. The issues were completely separate from those raised in the oppression application. Continental elected to withdraw for tactical reasons. It was also obvious to all that the Ebrahim Family would want to vote their alleged impugned shares at sometime in the future. Continental cannot, in effect, park its claim on the sidelines and wait until the next time the shareholders vote to resurrect it.

[10] Further, and even accepting that the Ebrahim family was acting jointly or in concert when they purchased their Continental shares, which is not agreed by them, I do not consider their actions in retrospect to have violated the purpose of the early warning provisions.

[11] After the filing of the last early warning report by Sajjad in May, 2009, the Ebrahim Family could acquire up to 18.4% of Continental's shares without having to file a further early warning report. In December of 2009, they exceeded that amount. While their collective shareholdings eventually exceeded 20%, in January 2012, the Ebrahim Family sold

some of their shares in Continental to bring their collective shareholdings to 19.9% of the issued shares. Since then, Continental has issued additional shares from treasury diluting their shareholdings down to 18.2%. As a result, at the present, the Ebrahim Family shareholdings have reduced to the level where an early warning report is not required.

[12] The purpose of the early warning report is to ensure the market is advised of accumulations of significant blocks of securities that may influence control of a public company. Accumulation of shares may signal an imminent take-over bid. That has not occurred here. Further, and while the Ebrahim Family did not file an early warning report when their shares collectively exceeded 18.4%, Continental's shareholders are aware of their current shareholdings in advance of the 2012 AGM. In its information circular for the 2012 AGM, Continental has set forth the shares and percentage of outstanding shares for each of Sajjad, Ali and Salman. In my view, while they may have been offside the Act in 2010 and 2011, they are not now and there is no evidence any harm has resulted from it.

[13] As a result, and even if I were to conclude that the Ebrahim Family breached the early warning requirements of the Act, in the above circumstances I would not exercise the broad discretion provided by s. 105 of the Act to prohibit them from voting their shares at the 2012 AGM. As Morawetz J. stated in *Echo Energy Canada Inc. v. Challenge Gas Holding AB*, [2008] O.J. No. 4843 (S.C.J.) at para. 88 in respect of the remedy prohibiting the voting of securities: "A shareholder's right to vote is both a necessary and fundamental right in corporate democracy. While s. 105 of the Act permits such a remedy, it must be an order that the court "thinks fit."

The "flip-in event"

[14] This issue also involves the question of the Ebrahim Family's shareholdings prior to January 2012. The relief requested by Continental in this Application was also requested by it in the Counter-Application. For the above reasons, I would also not grant Continental's request for the declaration concerning the "flip-in event" set out in paragraph 4(b) herein.

The Mistry Proxy Solicitation

[15] Continental alleges that Singh, who is a broker with Canaccord Wealth Management and the Respondent Grant V. Sawiak ("Sawiak"), a lawyer with Fogler Rubinoff, are the real promoters of the Mistry proxy solicitation. It alleges that Sawiak, together with Singh and his clients, especially the Ebrahim Family, have worked jointly or in concert to take control of Continental using Singh's clients at Canaccord, including the Ebrahim Family. Failure to disclose their role in the Mistry proxy circular renders it illegal contrary to NI 51-102 and the regulations under the *OBCA*.

[16] NI 51-102 provides, among other things in item 3.2 that if the solicitation is made by someone other than by or on behalf of management (as the Mistry proxy solicitation is), it must be stated along with the name of the person or company on whose behalf it's made. Item 5 (b) requires that the beneficial ownership of securities of "each person or company by whom, or on whose behalf, directly or indirectly, the solicitation is made" be listed in the circular.

[17] Section 32 of Regulation 62, R.R.O. 1990 under the *OBCA* defines "dissident" as a person ... by or on behalf of whom a solicitation is made, and includes a committee or group that solicits proxies, any members of the committee or group, and any person whether or not named as a member, who acting alone or with one or more other persons, directly or indirectly,

engages in organizing, directing or financing any such committee or group, except...". It then goes on to list five categories of exceptions, including (b) a broker that does not otherwise participate in the solicitation and (e) a person employed in the capacity of lawyer and whose activities are limited to the performance of duties in the course of such employment.

[18] Sawiak's evidence is that at all times acting as a lawyer. He owns no shares in Continental. Although he acts for some of the shareholders of Continental, including the Ebrahim Family, he does not act for Mistry. Another lawyer at Fogler Rubinoff does. He acted for the Respondent Anthony G. Borg ("Borg"), a shareholder of Continental, in respect of a proposal to liquidate the company which was started on August 1, 2012. Borg withdrew his proposal on November 5, 2012.

[19] Borg retained Sawiak to act in respect of the liquidation proposal only. He did not know the Ebrahim Family. He did not speak to Singh about it.

[20] Singh's evidence is that he acts for a number of clients who own shares in Continental, including the Ebrahim Family. He and his family own shares. His business partner, Margaret Barron, acts for Borg. He had no involvement in the Borg proposal. He has acted as Mistry's investment advisor for more than 10 years and has had no involvement in organizing the slate of directors put forward in the Mistry proxy solicitation.

[21] The Ebrahim Family acknowledges they have received legal advice from Sawiak and investment advice from Singh concerning their frustration with Continental. They do not know and have never spoken to either Borg or Mistry.

[27] Whether individuals are acting jointly or in concert is a question of fact: s. 91 (1) of the Act. In my view, the evidence simply does not support Continentals' submissions that the Respondents were acting jointly or in concert in respect of the Mistry proxy solicitation.

[28] In *Seel Mortgage Investment Corporation* (1992), 15 OSCB 4287, the OSC commented as follows in respect of the definition of jointly or in concert in s. 91 of the Act:

> These provisions indicate that acting in an advisory or administrative role alone for customary remuneration should not be construed as acting jointly or in concert. However, the provisions also indicate that relationships that go beyond an advisory or administrative role may, nonetheless result in an advisor being construed as acting jointly or in concert.

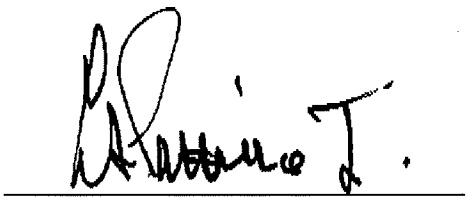
[29] There is no evidence that Sawiak has done anything in respect of Continental other than as a lawyer advising clients. Nor is there any evidence that Singh was acting other than an investment advisor or in his personal capacity as a shareholder. I am not prepared to find they were acting jointly or in concert in respect of the Mistry proxy solicitation.

[30] Nor am I prepared to find, on the evidence, that the Ebrahim Family was acting jointly or in concert with either Sawiak or Singh or any other shareholder of Continental in respect of the Mistry proxy solicitation. While the Ebrahim Family clearly has a like interest with Mistry in effecting change at Continental, that by itself is not enough to establish they are acting jointly or in concert.

[31] As a result, I find that the Mistry proxy circular was not misleading.

[32] For the above reasons, therefore, Continental's Application is dismissed in its entirety. The Respondents are entitled to their costs. In the absence of agreement within 20 days, the respondents shall submit written cost submissions of no more than three pages plus a costs

outline. Continental shall have 7 days to respond with submissions of similar length. If it disputes the quantum, it shall also submit a costs outline.



L. A. Pattillo J.

Released: December 19, 2012