

GALWAY DECISION – THE BRITISH COLUMBIA SECURITIES COMMISSION CONFIRMS STANDARD OF REVIEW FOR STOCK EXCHANGE DECISIONS

Posted on November 26, 2014

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Introduction The October 27, 2014 decision by the British Columbia Securities Commission (BCSC) involving Galway Metals Inc. (Galway) is significant in that the BCSC confirmed the appropriate standard of review for decisions of the TSX Venture Exchange (TSXV). The Galway Decision arose out of an application by Jaguar Financial Corporation (Jaguar), a major shareholder of Galway, for a review by the BCSC of a TSXV decision made in April 2014 (the TSXV Decision). The TSXV Decision arose from the approval of a private placement (Financing) of units that closed on April 16, 2014. In addition to upholding the TSXV's internal protocol of investigating the appropriateness of private placements, the Galway Decision clarified the test for determining when a party has standing to make an application for a hearing and review of a decision rendered by the TSXV.

Background Facts

On March 31, 2014, Galway announced that it was proceeding with the Financing and that two thirds of the Financing would be available to insiders as an inducement for continued service. Following the announcement, Jaguar, being concerned with its share ownership position in Galway, raised its concerns with respect to the Financing to the TSXV. Prior to the completion of the Financing, Jaguar was Galway's largest shareholder holding 7.7% of the outstanding common shares. Following the Financing, Jaguar's interest in Galway was diluted to 6.8% of the outstanding common shares and the Chief Executive Officer of Galway increased his interest from 5.8% to 15.5%, making him the largest shareholder of Galway.

Jaguar believed that the Financing was an improper defensive tactic in relation to an unspecified takeover bid and that Galway's stated intent of offering its insiders a right to participate in the Financing was an inappropriate purpose. Prior to the completion of the Financing, Galway had a cash balance of approximately \$11.3 million, this cash amount was significantly in excess of Galway's annual overhead and committed legal obligations. Jaguar argued that Galway did not need the funds at the time of the offering, supporting the proposition that the Financing was an improper defensive tactic. Pursuant to section 1.16 of the TSXV Policy 4.1, Jaguar submitted that the TSXV has discretion to reject a private placement "if the notice does not provide

adequate information on the allocation of funds or if allocated funds are excessive."

The TSXV did not find that the Financing resulted in excess unallocated funds such that it should not approve the Financing. The TSXV opined that "it was common to see a significant amount of unallocated funds for business opportunities and since a mining exploration issuer does not have any other source of funds than equity or debt, a well-funded issuer with a large amount of unallocated funds is not generally problematic." In coming to its conclusion, the TSXV posed several questions to Galway and Jaguar with respect to the Financing. Based on the responses that the TSXV received from Galway and Jaguar, the TSXV did not find that the Financing was improper or inappropriate and the Financing was approved.

On May 8, 2014, Jaguar applied for a hearing and review of the TSXV Decision. A panel of three commissioners of the BCSC dismissed the application on the following grounds:

- the TSXV did not make an error in law or apply the wrong principles in failing to exercise its discretion to reject the private placement;
- the TSXV did not overlook any material evidence in reaching its decision; and
- the TSXV's process in gathering information to reach its decision was not unreasonable and was not conducted in a manner that should cause the BCSC to exercise its public interest jurisdiction to interfere with the TSXV's decision.

Significance of the Galway Decision

Deference to the TSXV

The Galway Decision is an example of how the BCSC generally defers to the judgment of the TSXV, particularly in areas that are within the TSXV's expertise. It will not substitute its own view for that of the TSXV simply because the BCSC might have reached a different decision in the circumstances. In its decision, the BCSC continuously emphasized that the standard of review is reasonableness and it found no fault with the decisions the TSXV made during the course of its dealings with Galway and Jaguar. In particular, the BCSC approved the TSXV's internal process of investigating the appropriateness of private placements.

Jaguar submitted, among many other arguments, that the TSXV did not conduct its investigation thoroughly. Specifically, Jaguar critiqued the questions that the TSXV posed to Galway and Jaguar and the process that the TSXV followed. Throughout the BCSC's reasons, the BCSC deferred to the decision of the TSXV, specifically:

- the type of information the TSXV sought;
- how the information should have been interpreted; and
- what further information the TSXV required to make its decision.

The Galway Decision illustrates the deference the BCSC affords to the TSXV, particularly in areas that are within the TSXV's expertise.

Standing of Jaguar

The TSXV objected to Jaguar's application for a hearing and review, arguing that Jaguar did not have standing to make the application. The TSXV argued that Jaguar was not directly affected by the TSXV Decision. Rather, Jaguar was only incidentally affected by it and dilution of share ownership in an issuer is not sufficient to establish that Jaguar was directly affected by the TSXV Decision. While the BCSC agreed with the TSXV that relatively de minimus dilution of a share ownership position, in and of itself, would be insufficient to establish that a person was directly affected by a TSXV decision, the BCSC ultimately determined that there are a number of differentiating factors, namely:

- Jaguar was the largest shareholder in Galway; and
- the voting dynamics in Galway had been materially changed to the detriment of Jaguar as a result of the Financing.

The BCSC was careful to distinguish the reasons for granting Jaguar standing and emphasized that the decision to grant Jaguar standing did not expand the class of persons who can seek hearings and reviews.

Standing of the TSXV

Jaguar also objected to the TSXV's participation in the hearing and review on the basis that it would be unseemly and inappropriate for the TSXV to argue the merits of its own decision. The BCSC disagreed with Jaguar and turned to section 165(8) of the *Securities Act*, which provides that the TSXV has a right to be a party to a hearing and review of its decision. Further, the BCSC held that it is in the public interest to not limit the participation of the TSXV in a review of a decision made under its policies as the TSXV is in the best position to draw the attention of the BCSC to the considerations rooted in its decision. Because the TSXV is able to speak to the reasonableness of its decision, the BCSC granted the TSXV full standing on the hearing and review of the TSXV Decision.

Conclusion

The Galway Decision confirms the differential approach that the BCSC takes in reviewing stock exchange decisions. Even if the BCSC might have come to a different decision, it will not substitute its own view for that of the TSXV, unless the decision of the TSXV is unreasonable.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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