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**THE USE OF FAIRNESS OPINIONS IN A PROXY CIRCULAR**

**BRETT HARRISON**

Partner  
McMillan LLP  
[Brett.Harrison@mcmillan.ca](mailto:Brett.Harrison@mcmillan.ca)  
416-865-7932

**PAUL D. DAVIS**

Partner  
McMillan LLP  
[paul.davis@mcmillan.ca](mailto:paul.davis@mcmillan.ca)  
416-307-4137

It is standard practice for the board of directors of a target company to obtain a fairness opinion stating that the transaction is fair from a financial perspective. However, in *Champion Iron Mines Limited*, Brown J., in determining whether a transaction was fair and reasonable, placed no weight on the fairness opinion that was included in that case in a management proxy circular. He pointed out that the fairness opinion did not disclose the specifics of the actual analysis per-

formed by the financial advisor, which could "inform a reader on the issue of whether the offered consideration was within a minimum range that otherwise could have been obtained in a market-based transaction process." Brown J. held that the fairness opinion did not comply with many of the content requirements of an expert report pursuant to Rule 53.03(2.1) of the *Rules of Civil Procedure*. Brown J. found that the fairness opinion simply asserted an opinion without disclosing the reasons for it and, accordingly, was inadmissible.

In *Bear Lake Gold Ltd.*, Wilton-Siegel J. appears to limit the applicability of *Champion Iron*. He noted that, in such circumstances, a fairness opinion was relevant for two reasons: (a) the use of a fairness opinion by a special

committee of a board is evidence that the committee considered the fairness and reasonableness of a transaction "on the basis of objective criteria to the extent possible;" and (b) the publication of a fairness opinion in a circular (even without the detailed analysis underlying the fairness opinion) allows the shareholders to assess for themselves the "integrity of the directors' recommendations and ... the fairness of the transaction to them from a market perspective".

*The Bear Lake* decision supports the current practice of using fairness opinions to provide assistance to boards of directors in reaching an informed decision on a proposed arrangement, as part of the proper exercise of their fiduciary duty. This decision-making process should include a presentation

to the board by the financial advisor rendering the fairness opinion, where further details and financial analyses underlying the opinion are presented to supplement the board's understanding. We continue to emphasize that affidavits supporting an application for a final order approving a plan of arrangement should make reference to the fact that financial analyses underlying the opinion was presented to a board.

We would caution, however, that Wilton-Siegel J. noted that this current practice may not be appropriate for contested transactions. Accordingly, in plans of arrangement, which may be or are contested, issuers should consider including in proxy circulars summaries of the underlying financial analyses performed by the investment bankers and presented to boards.