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observations from the eco oro proxy contest

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introduction

Introduction

Today marks the first anniversary of the start of what was likely the most acrimonious proxy fight in Canada in 2017. On February 10, 2017, Harrington Global Opportunities Fund Ltd. and Courtenay Wolfe[1] (collectively, the "**Shareholder Group**") requisitioned a shareholders' meeting to replace each of the six incumbent directors of Eco Oro Minerals Corp. ("**Eco Oro**" or the "**Company**"). On August 1, 2017, following nine separate proceedings[2] brought before courts and securities regulators, the parties announced a settlement agreement that put an end to the proxy contest. In this paper, we will highlight some of the key findings arising out of the various proceedings, relating to the Company's impugned issuance of common shares, and will discuss the main takeaways and the practical implications for issuers, investors and securities law practitioners.[3]

1 McMillan LLP represented the Shareholder Group.

2 These actions related to, among other things, allegations of acting jointly or in concert and defamation, relief sought to cease-trade options, relief sought under section 186 of the Business Corporations Act (British Columbia) SBC 2002, c 57 [the **BCBCA**] and separately under section 228 of the BCBCA and relief to reverse a share issuance.

3 The opinions expressed herein, particularly under the heading "Observations and Implications", are those of the authors and not McMillan LLP or its clients.

Background

Eco Oro is a publicly traded precious metals exploration and development company. During the period of the proxy contest, the common shares of the Company were listed on the Toronto Stock Exchange (the "**TSX**"). The principal regulator of the Company is the British Columbia Securities Commission (the "**BCSC**"). Eco Oro's activities had historically focused on the Angostura gold-silver project in Colombia in which Eco Oro had invested over US$250 million. However, actions taken by the Government of Colombia rendered the Angostura project unviable. In December 2016, Eco Oro filed a request for arbitration against Colombia with the World Bank's International Centre for Settlement of Investment Disputes in which it claimed damages for the loss of the Angostura project (the "**Arbitration**"). The Arbitration claim is now Eco Oro's main asset.

The Investment Agreement

In order to finance the Arbitration and ancillary expenses, the Company entered into an investment agreement with Trexs Investments, LLC ("**Trexs**") on July 21, 2016 (the "**Investment Agreement**"). The Investment Agreement contemplated an investment by Trexs in two tranches. Under the first tranche, Eco Oro issued to Trexs 9.99% of the then outstanding common shares in exchange for US$3 million, as well as the right to nominate a director to the board of Eco Oro (the "**Board**"). The first tranche closed concurrently with the execution of the Investment Agreement.

The Investment Agreement also provided for the right of certain Eco Oro shareholders to participate in the second tranche along with Trexs, as selected at the sole discretion of the Board. The Board granted participation rights to four shareholders: Anna Stylianides ("**Stylianides**"), Amber Capital LP ("**Amber**"), Paulson & Co. Inc. ("**Paulson**") and one other individual shareholder (collectively, the "**Participating Shareholders**"). Stylianides was the Executive Chair of the Company, and Amber and Paulson were insiders as a result of their shareholdings in the Company.

Under the second tranche, in exchange for an aggregate investment of approximately US$15 million, Eco Oro was to issue to Trexs and the

Participating Shareholders unsecured convertible notes in the principal amount of US$9,736,362 million (the "**Notes**") and either:

(i) an aggregate of 193,907,593 common shares at US$0.02869 per share (approximately 10% of the market price at the time), *subject to shareholder approval*; or

(ii) *failing shareholder approval*, secured contingent value rights ("**CVRs**"), entitling Trexs and the Participating Shareholders to an aggregate of 70.93% of the gross proceeds of the Arbitration.

The Notes were convertible at the market price at the time of conversion, solely at Eco Oro's option, on 30 days' notice.

At the Eco Oro special meeting of shareholders on November 3, 2016, 93.86% of the disinterested shareholders who voted, voted against the equity financing and the issuance of common shares on the conversion of the Notes. A group of shareholders – that did not include the Shareholder Group – then requested that the TSX and the BCSC require the Company to obtain shareholder approval prior to issuing the CVRs. The regulators declined to get involved. As a result, on November 9, 2016, Eco Oro closed the second tranche and issued the Notes and CVRs to Trexs and the Participating Shareholders.

On January 13, 2017, pursuant to the terms of the Investment Agreement, Eco Oro announced that it had implemented an incentive plan entitling certain "key personnel" to 7% of the gross proceeds of the Arbitration. Taken together, approximately 78% of the gross proceeds of the Arbitration had been reserved for Trexs, the Participating Shareholders and certain members of Eco Oro management.

The Proxy Contest

On February 10, 2017, the Shareholder Group formally requisitioned a shareholders' meeting to remove the incumbent directors and to elect six new independent directors to the Board. The Shareholder Group held approximately 9.99% of the then issued and outstanding common shares, which it had acquired between November 2016 and February 2017. On February 27, 2017, the Shareholder Group issued a press release noting the

"overwhelming support received to date for the reconstitution of the board of directors of the Company."

In response to the requisition, Eco Oro announced on March 2, 2017, that it had set April 25, 2017 as the date of its annual general and special meeting (the "**Meeting**"), and March 24, 2017 as the record date for determining the shareholders entitled to vote at the Meeting(the "**Record Date**").

Eco Oro began trying to lock up shareholder support for its directors. The Company or its representatives approached Trexs and the Participating Shareholders and asked them to sign letters to "reiterate [their] continuing support for the existing Board". On February 27, 2017, Trexs submitted its support letter. Later that same day, Eco Oro applied to the TSX for expedited approval to issue 6 million common shares only to Trexs by partially converting Trexs' Notes. On March 2, 2017, the TSX approved the issuance of up to 6.5 million common shares to Trexs upon the conversion of Notes.

On February 28, 2017, Eco Oro received support letters from Amber and Paulson. On the same day, the Board issued a press release stating that "based on discussions with the Company's shareholders, the Board believes that *close to a majority* of Eco Oro shareholders support the current Board and management team" [emphasis added].

On March 8, 2017, Eco Oro applied to the TSX to issue additional common shares to Amber, Paulson and Stylianides (collectively, and together with Trexs, the "**New Share Recipients**") to a total of 10.6 million common shares, or 9.98% of the then outstanding common shares (the "**New Shares**"), by partially converting their Notes.

Two days later, on March 10, 2017, the TSX conditionally approved the issuance of the New Shares. The TSX did not require a vote of the Eco Oro shareholders, and gave the Company until April 21, 2017 to complete the conversion (the "**TSX Decision**"). The one unidentified Participating Shareholder who declined to provide a support letter was not included in the New Share issuance.

When the TSX issued the TSX Decision, it was not aware of: the proxy contest, the Meeting, the impending Record Date, or the support letters

supplied by Trexs, Amber and Paulson.[4] Eco Oro did not issue a press release announcing the TSX Decision or the pending New Share issuance.

On March 16, 2017, six days after the TSX Decision and eight days before the Record Date, Eco Oro announced that it had converted approximately US$4.7 million of Notes into 10.6 million New Shares for the purpose of reducing indebtedness. As a result of the partial conversion, the shareholdings of the New Share Recipients increased from approximately 41% to 46% of the then issued and outstanding common shares.

On March 22, 2017, the Shareholder Group filed a petition with the Supreme Court of British Columbia (the "**Court**") seeking an order that the issuance of the New Shares be set aside and cancelled on the basis of oppression or, in the alternative, that the New Shares not be voted at the Meeting (the "**Petition**"). The Petition was heard by Justice G.P. Weatherill on April 12, 2017.

On March 27, 2017, the Shareholder Group also commenced an application before the Ontario Securities Commission (the "**OSC**"). The OSC proceeding was an appeal from the TSX Decision approving the New Share issuance and, alternatively, a free standing application under the public interest provisions of the *Securities Act* (Ontario).[5] The OSC heard the application between April 19-21, 2017.

On April 23, 2017, the OSC issued an order (with reasons to follow) setting aside the TSX Decision. The OSC order required that Eco Oro obtain the approval of disinterested shareholders for the New Shares it issued by no later than September 30, 2017, failing which, the issuance of the New Shares was to be reversed. The OSC also cease traded the New Shares and prevented the New Shares from being voted at any Eco Oro shareholders' meeting (including at the Meeting) unless and until shareholder ratification of the issuance had been obtained. The following day, Eco Oro filed a notice of appeal to the Ontario Superior Court of Justice (Divisional Court) from the order of the OSC. On June 16, 2017,

4 The listings manager responsible for the TSX Decision admitted that he was either unaware of the information about the requisitioned Meeting or he failed to absorb it.

5 RSO 1990, c S5, as amended [the **Ontario Act**]. In light of the fact that the BCSC is the principal regulator of the Company, a public interest application was also made to the BCSC, but was later abandoned with the consent of Staff of the BCSC.

the OSC issued the reasons for its April 23 order (the "**OSC Decision**").[6]

On April 24, 2017, Justice Weatherill released two decisions. The first dismissed the Petition (the "**Oppression Decision**").[7] The second decision adjourned the Meeting to a date to be set by the Board before September 30, 2017 (the "**Adjournment Decision**").[8] The adjournment was ordered on the Court's own motion and without notice to any party. On April 28, 2017, the Shareholder Group filed a notice of appeal to the British Columbia Court of Appeal (the "**Court of Appeal**") from the Oppression Decision and the Adjournment Decision. The appeal of the Adjournment Decision was heard on an expedited basis and, on May 25, 2017, the Court of Appeal set aside the Adjournment Decision.

In early June 2017, legal counsel for the Company, the Shareholder Group and Trexs discussed the possibility of a potential resolution of the outstanding litigation among the parties. Over the course of the following two months, representatives of Trexs, the Participating Shareholders, the Company, the Shareholder Group and certain other shareholders and their respective legal counsel negotiated the terms of a settlement and, on July 31, 2017, the parties entered into a settlement agreement. The settlement agreement resolved all outstanding litigation relating to the Company's Board composition, the Investment Agreement and the Meeting. In addition, it provided for the reversal of the issuance of the New Shares.

6 Re Eco Oro Minerals Corp., 2017 ONSEC 23 [***Eco Oro***].
7 *Harrington Global Opportunities Fund Ltd. v Eco Oro Minerals Corp.*, 2017 BCSC 664.
8 *Harrington Global Opportunities Fund Ltd. v Eco Oro Minerals Corp.*, 2017 BCSC 669.

Oppression

Oppression

The Petition

Section 227 of the BCBCA deals with oppression. This section, and analogous sections in business corporations statutes elsewhere in Canada, is to be interpreted in accordance with the guidance from the Supreme Court of Canada in *BCE Inc v 1976 Debentureholders*:[9]

> [I]n assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?[10]

It is well established that oppression is a fact-specific remedy. What is just and equitable is judged by the reasonable expectations of the applicant(s) in the factual context of the case at bar.

9 2008 SCC 69 [***BCE***].
10 BCE at para 95.

The onus was on the petitioners, the Shareholder Group, to show that the Board acted oppressively or unfairly by violating their reasonable expectations without good reason.[11]

Findings of the Court

(1) Importance of Factual Context

The Court looked not only at the Board's actions after the Shareholder Group requisitioned the Meeting, but it also placed much emphasis on the events leading up to the requisition and the dire financial situation that Eco Oro found itself in at the time of the Investment Agreement.

The Court emphasized the chronology of events and factual context, and noted that Eco Oro was in "desperate financial straits and needed a significant cash injection to keep operating and to fund the Arbitration". Hence the need for the funding agreements with Trexs, Amber and Paulson.[12]

The Court found that Eco Oro's intention from the outset was to have Trexs, Amber and Paulson as equity participants in the Company, and that it was "entirely reasonable that they would want the Conversion to occur before the Record Date so that the shareholders of the New Shares could participate in the vote to replace the Board."[13]

(2) Reasonable Expectations

As we have seen in other decisions on oppression, the Court here examined the timing of the petitioners' investment in the Company, and that timing informed the Court's analysis on reasonable expectations. The Court noted that members of the Shareholder Group purchased their shares and invested in Eco Oro with full knowledge of the Investment Agreement and the awareness that conversion of the Notes was possible at any time.[14]

11 Oppression Decision at para 68, citing to *BCE* at para 119.
12 Oppression Decision at paras 71-72.
13 *Ibid* at para 74.
14 Oppression Decision at para 75.

The Shareholder Group asserted that they had a reasonable expectation that the Board would not dilute their shares by issuing additional shares in an effort to avert the reconstitution of the Board.[15] The Court did not agree and instead found as follows:

> An objective view of the evidence supports a reasonable expectation on the petitioners' part that the Board would time the issuance to coincide with increased share price to take advantage of the best share-for-debt exchange and that the issuance could occur at any time.[16]

(3) Business Judgment Rule

The business judgment rule requires courts to defer to the business judgment of directors, so long as the directors made a reasonable decision after exercising an appropriate degree of prudence and diligence.

The proper way to frame the inquiry, according to the Court, was to ask whether, "at the time the issuance was done, was the Board permitted to do it and was it a reasonable exercise of the Board's discretion. If so, that decision is entitled to deference." [17] The question was not whether the Board could have entertained the issuance at a later date.

In applying the business judgment rule, the Court indicated that the Shareholder Group was required to "prove the issuance was unreasonable in all the circumstances."[18] The Court was unconvinced that the primary purpose of the issuance was to "quell the shareholder uprising spearheaded by [the petitioners]", and instead held that "the evidence suggests that the primary purpose of the issuance was debt reduction through the Conversion."[19]

15 *Ibid* at para 70.
16 *Ibid* at para 80.
17 *Ibid* at para 78.
18 *Ibid* at para 77.
19 *Ibid*.

(4) Best Interests of the Company

The Court rejected the Shareholder Group's argument that the primary reason for the issuance of the New Shares prior to the Record Date was for the improper purpose of entrenching the Board. The Court instead found that there was no evidence that the conversion of the Notes was not in Eco Oro's best interests.[20] In so finding, the Court relied on the uncontroverted evidence of Eco Oro's Executive Chair and held that the timing of the Board's decision to issue the New Shares was in the best interests of the Company.[21]

The Court's findings on whether the Eco Oro Board acted in the best interests of the Company make for an interesting parallel with a 2010 decision of the Court in *Icahn Partners LP v Lions Gate Entertainment Corp.*[22] In *Icahn*, the Court upheld the decision of the board of Lions Gate Entertainment Corp. ("**Lions Gate**") to complete a financing transaction which had the effect of diluting the dissident's shareholdings but also deleveraging the issuer. The Court found in that case that the financing transaction had objective benefits for the company and the primary purpose of the transaction was to deleverage the company.[23]

Notably, there was evidence before the Court in *Icahn* regarding the decision-making process and the nature of the discussions that the board and its special committee engaged in before arriving at the decision to issue shares that diluted the dissident's holdings. In Eco Oro's case, the Court had before it the affidavit evidence of the Eco Oro Executive Chair and one other director who both stated that they were acting in the best interests of the Company. Unlike in *Icahn*, there was no corroborative, contemporaneous or documentary evidence regarding the Board's decision-making process, yet the Court nonetheless concluded that the Board was acting in the Company's best interests.

20 Oppression Decision at para 75.

21 *Ibid* at paras 75, 79.

22 2010 BCSC 1547 [***Icahn***]. Decision upheld on appeal: 2011 BCCA 228.

23 It is of interest to note that this finding by the Court was later put into doubt by the settlement order between Lions Gate and the United States Securities and Exchange Commission (*Re Lions Gate Entertainment Corp.*, SEC No. 71717 (C D Cal March 13, 2014)), which settled administrative proceedings by the Securities and Exchange Commission against Lions Gate for, among other things, failing to disclose material information pertaining to the financing transaction that was the subject of the litigation before the Court. In particular, Lions Gate agreed that its public statement when announcing the financing that the financing was consistent with its previously announced plan to reduce its total debt was incorrect, since it had never made any such prior disclosure.

Forum Shopping

Forum Shopping

Seeking Similar Remedy before the Court and the OSC

The Shareholder Group was criticized by the opposing parties for bringing proceedings both in the Court and before the OSC. The Court of Appeal expressed its views on the issue of forum shopping and very clearly indicated that the Shareholder Group was justified in proceeding in both forums.

In the Adjournment Decision, Justice Weatherill adjourned the Meeting because he perceived there to be a "conflict" between his decision dismissing the Petition and the OSC Decision setting aside the share issuance and ordering that the New Shares not be voted at the Meeting. He saw the two decisions as being "at odds" and said that, in his view, it was not realistic for the Meeting to proceed as scheduled on April 25.[24]

The Shareholder Group appealed the Adjournment Decision and took the position that the orders of the Court and the OSC were essentially unrelated because they were based on different statutes, each of which has different objectives.[25] Eco Oro and the other respondents pointed to the fact that the Shareholder Group sought substantially the same

24 Adjournment Decision at paras 2-3, 5.

25 *Harrington Global Opportunities Fund Ltd. v Eco Oro Minerals Corp.*, 2017 BCCA 224 [**BCCA Decision**].

relief in both proceedings. Amber and Paulson took the position that the Shareholder Group should not be rewarded for "forum shopping and cherry-picking the outcome" by "permitting [the Shareholder Group] to take advantage of the favourable result achieved in one forum and foreclose the unfavourable result received in another forum".[26]

The Court of Appeal held that the Shareholder Group had both avenues open to it and made the following findings:

- The statutory provisions in the BCBCA and the Ontario Act are in "a very real sense … like apples and oranges."[27]
- The BCBCA is concerned with corporate governance and does not purport to regulate the public market.[28]
- Conversely, the Ontario Act and the rules governing the TSX are regulatory in nature and are designed to ensure that public markets operate efficiently and fairly in the public interest.[29]
- The petitioners' simultaneous pursuit of both proceedings was not abusive or otherwise improper. Our federal system required the petitioners to sue in British Columbia for breaches of their private rights as shareholders, and at the same time, to seek compliance with Ontario securities regulations by proceeding before the OSC.[30]
- Although the petitioners' objectives in bringing both proceedings may have been similar, the orders issued by the two bodies were unrelated. The Court's dismissal of the Petition had no implication for market regulation.[31]

The decision of the Court of Appeal represents a strong rebuttal to the forum shopping argument. However, it does not address the circumstance where the remedy sought before a securities regulatory authority rests entirely on its public interest jurisdiction, and a similar remedy is being sought from a court. In such circumstances, the private party seeking a public interest remedy could be denied standing to pursue its action.

26 BCCA Decision at paras 31, 33.
27 *Ibid* at para 30.
28 *Ibid*.
29 *Ibid*.
30 *Ibid* at para 34.
31 BCCA Decision at paras 32, 34.

Standing under the Public Interest Jurisdiction of the OSC

Section 127 of the Ontario Act, and similar provisions in corresponding provincial and territorial securities legislation, do not permit an affected party to pursue relief as of right.[32] Where a private party seeks to have a securities regulatory authority exercise its public interest discretion, it must apply for standing. While the OSC has discretion to permit a private party to bring an application under section 127 of the Ontario Act,[33] that discretion is to be exercised in extraordinary circumstances where the hearing would be in the public interest.[34]

The OSC will consider the following factors, as set out in *MI* Developments, in deciding whether to exercise its discretion in favour of permitting an application by a private party:

(i) the application relates to both past and future conduct regulated by Ontario securities law;
(ii) the application is not, at its core, enforcement in nature;
(iii) the relief sought is future looking;
(iv) the OSC has the authority to grant an appropriate remedy;
(v) the applicant is directly affected by the conduct (past and future); and
(vi) the OSC concludes it is in the public interest to hear the application.[35]

The Supreme Court of Canada has confirmed that the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so.[36] Intervention on this basis is permitted even where there is no breach of the Ontario Act, the regulations or any policy statement.[37] The scope of this jurisdiction is limited by a consideration of capital market efficiencies, public confidence in the capital markets and

32 *Eco Oro* at para 69 and *Re Severstal Gold NV et al.*, 2010 BCSECCOM 181 at para 29 [***Severstal Gold***].
33 *Re MI Developments Inc.* (2009), 32 OSCB 126 at paras 107-108 [***MI Developments***].
34 *Re Catalyst Capital Group Inc.* (2016), 39 OSCB 4079 at para 56 [***Catalyst***].
35 *MI Developments* at para 110.
36 *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 45 [***Asbestos***].
37 *Canadian Tire Corp. v CTC Dealer Holdings Ltd.* (1987), 10 OSCB 857 at para 130; *Re Patheon Inc.* (2009), 32 OSCB 6445 at para 114; *Re Carnes*, 2015 BCSECCOM 187 at para 105; *Re Red Eagle*, 2015 BCSECCOM 401 at para 87.

the fair treatment of investors.[38] As a result, an application for standing before the OSC will also be impacted by timeliness of the application, the justified expectations of participants in the marketplace,[39] expertise (including the ability of the OSC to solve a complex legal or policy issue)[40] and, therefore, potentially, the availability of remedies in other forums.

Accordingly, in circumstances where a private party seeks relief via the public interest power of a securities regulatory body, while simultaneously seeking a similar remedy before a court, the forum shopping argument may carry some weight.[41]

38 *Asbestos* at para 60 and 41 aff'd in *Catalyst* at para 27.

39 *Catalyst* at para 60.

40 *Re CW Shareholdings Inc.* (1998), 21 OSCB 2910 at para 32.

41 In fact, in other provinces, there may be additional restrictions on private parties seeking standing. In *Severstal Gold*, the BCSC held that private parties may obtain standing for public interest applications only "in connection with a take-over bid" (para 30).

The OSC Decision

The OSC Decision

Type of Review

The Shareholder Group's principal application was for a hearing and review of the TSX Decision under section 21.7 of the Ontario Act, which provides that section 8 of the Ontario Act applies to the hearing. In particular, section 8(3) of the Ontario Act provides that the OSC "may by order confirm the decision under review or make such other decision as the Commission considers proper".

A preliminary issue that the OSC considered was whether the TSX Decision should be considered *de novo* (which would permit the OSC to substitute its own judgment for that of the TSX through a hearing and review). The OSC found in this case that there were fundamental concerns with the TSX Decision and a hearing *de novo* was warranted.[42]

The core question that the OSC considered was whether the issuance of the New Shares materially affected control of Eco Oro, such that the TSX should have required shareholder approval for purposes of

42 *Eco Oro* at para 11.

section 603[43] or 604(a)(i)[44] of the TSX Company Manual (the "**Manual**") as a precondition to the issuance of the New Shares. The OSC concluded that the TSX should have required Eco Oro to obtain shareholder approval before the New Shares were issued. It then fashioned a remedy to give effect to its determination.

Grounds for Intervention

In *Re Canada Malting Co.*,[45] the OSC identified five possible grounds for interfering with a decision of the TSX:

1. the TSX proceeded on an incorrect principle;
2. the TSX erred in law;
3. the TSX overlooked material evidence;
4. new and compelling evidence was presented to the OSC that was not presented to the TSX; and
5. the TSX's perception of the public interest conflicted with that of the OSC.46

Analysis

In the *Eco Oro* case, the OSC found that each of the grounds identified in *Canada Malting* justified its intervention and permitted it to consider the evidence in its entirety without deference to the TSX Decision. In particular, the OSC noted two fundamental concerns with the TSX Decision: first, the TSX's failure to consider the relevant circumstances surrounding the New Share issuance; and, second, the TSX's narrow interpretation of "materially affect control".

43 Section 603 of the Manual provides that the TSX has discretion to impose conditions on transactions (such as requiring shareholder approval). In exercising its discretion under section 603, the TSX is required to consider the effect of the transaction on the quality of the TSX marketplace based on a number of factors, including the material effect on control of the listed issuer.

44 Subsection 604(a)(i) of the Manual provides that the TSX generally requires shareholder approval of a share issuance if the transaction "materially affects control of the listed issuer".

45 (1986), 9 OSCB 3566 [*Canada Malting*].

46 *Ibid* at para 24.

(1) The Failure to Consider Relevant Circumstances

The material circumstances surrounding Eco Oro's decision to issue the New Shares — the proxy contest, the requisitioned Meeting and the impending Record Date immediately prior to the share issuance — were overlooked by the TSX. In addition, the support letters solicited by Eco Oro and obtained from each of Amber, Paulson and Trexs were not considered by the TSX and were presented to the OSC as new and compelling evidence. The foregoing engaged both the third and fourth grounds of the *Canada Malting* test for intervention.

The reason that the TSX did not consider the context in which the New Shares were issued was because, in the OSC's view, Eco Oro did not adequately inform the TSX of material facts in its Form 11 – *Notice of Private Placement* ("**Form 11**"). Question 11 of Form 11 specifically asks whether the private placement could potentially materially affect control, and Question 12 requires applicants to disclose any significant information regarding the proposed private placement. Eco Oro failed to mention either the ongoing proxy contest or the pending requisitioned Meeting in the Form 11 it submitted.

At the hearing and review application before the OSC, the listings manager responsible for the TSX Decision admitted that he was either unaware of the information about the requisitioned Meeting or he failed to absorb it. Also unknown to the listings manager was the existence, timing and effect of the support letters. Taken together, there was new and compelling evidence (the fourth ground under *Canada Malting*) and other material evidence that was overlooked by the TSX (the third ground under *Canada Malting*) that properly should have been considered by the TSX.

(2) Interpretation of "Materially Affect Control"

The second issue identified by the OSC related to the TSX's interpretation of "materially affect control", which invoked the first, second and fifth *Canada Malting* grounds for intervention (those being: that the TSX proceeded on an incorrect principle, erred in law, and perceived the public interest in a manner that conflicted with the OSC's view of the public interest).

Part I of the Manual defines "materially affect control" as follows:

> means the ability of any security holder or combination of security holders acting together to influence the outcome of a vote of security holders, including the ability to block significant transactions. Such an ability will be affected by the circumstances of a particular case, including the presence or absence of other large security holdings, the pattern of voting behaviour by other holders at previous security holders meetings and the distribution of the voting securities. A transaction that results, or could result, in a new holding of more than 20% of the voting securities by one security holder or combination of security holders acting together will be considered to materially affect control, unless the circumstances indicate otherwise. Transactions resulting in a new holding of less than 20% of the voting securities may also materially affect control, depending on the circumstances outlined above.

In interpreting the definition of "materially affect control", the TSX exclusively applied the concept of "enduring control", limiting its analysis to whether a new 20% shareholder was created or a voting trust among shareholders holding 20% was put into effect. The TSX's interpretation of materially affect control was therefore strictly limited to the ability to consistently influence control rather than allowing for a *de facto* case-specific analysis. This definition, which precludes consideration of the effect of a share issuance on a transient vote at an upcoming meeting, represents an approach that has been rejected by the TSX in the past.[47] On this point, the OSC concluded that the TSX proceeded on incorrect principles (the first ground under *Canada Malting*) in conditionally approving the transaction without shareholder approval and permitting its accelerated closing prior to the Record Date.

47 *Request for Comments – Amendments to Parts V, VI and VII of the Toronto Stock Exchange Company Manual in Respect of Non-Exempt Issuers, Changes in Structure of Issuers' Capital and Delisting Procedures* (2004), 270 OSCB 249 at 319.

The OSC pointed the TSX to its own comments on amendments to Part VI of the Manual in January 2004, in which the TSX expressly rejected precluding consideration of the effect of a share issuance on a transient vote at an upcoming meeting.[48] In light of the TSX's prior public comment process, which specifically addressed this very issue, the OSC concluded that this type of change in interpretation raised fundamental public interest questions which would require further rule-making by the TSX to be effective. Therefore, the OSC found that the TSX erred in law (the second ground under *Canada Malting*) by applying a "revised" definition of material affect on control that was not adopted pursuant to its rule-making process.

In addition, the OSC found that the TSX's failure to consider the effect of the share issuance on a pending vote during a proxy contest was inconsistent with its view of the public interest (the fifth ground under *Canada Malting*), stating: "the public interest requires an evaluation of whether an issuance of shares by a listed issuer is for the purpose of entrenching management in the face of a proxy contest."[49]

On the facts before it, the OSC concluded that there was "overwhelming" evidence of a tactical motivation underlying the timing of the New Share issuance and the accelerated closing. The OSC found that the evidence established that the New Shares were not issued until the support letters were obtained and, based on the proximity in time to the Meeting at which the Board faced potential removal, the issuance of the New Shares to the New Share Recipients "was clearly designed to have a material effect on the Meeting."[50]

Furthermore, the OSC found that "there was no compelling business objective for the transaction to close prior to the Record Date that would negate the tactical motive to tip the vote in favour of management."[51] And, to the extent that the share issuance supported the objective of debt reduction, it had minimal practical positive effect for the Company on the basis that: the interest rate on the Notes was nominal, no new funds were provided to Eco Oro and none of the negative covenants

48 *Ibid.*
49 *Eco Oro* at para 125.
50 *Ibid* at para 151.
51 *Ibid* at para 150.

restricting Eco Oro were diminished in any way as US$4,951,470 principal amount of the Notes remained outstanding.

Remedy

Having concluded that the TSX Decision could not be confirmed, the OSC focused on crafting an order "so as to give effect to the requirement of a shareholder vote on the issuance of the New Shares, despite the fact that they [had] already been issued."[52] Section 8(3) of the Ontario Act grants the OSC broad powers "to make such other decision as the Commission considers proper". The OSC sought to craft the "least intrusive"[53] decision it could, and reviewed the factors that it considered relevant in seeking to reverse a transaction. These factors included:

- whether the Company had afforded those that it knew were likely to object to the share issuance (the Shareholder Group) an opportunity to raise their objections to the decision maker (the TSX), in advance of the transaction closing, including by means of a press release sufficiently in advance of closing;
- whether those directly affected by the reversal of the transaction (the New Share Recipients) entered into the transaction knowing of the likelihood of objections;
- whether those directly affected by the reversal of the transaction had an opportunity to be heard and/or make submissions; and
- whether it was impractical for the transaction to be reversed in the circumstances.[54]

Eco Oro knew that the Shareholder Group would object to the transaction (based in part because shareholders had previously objected to the securities issuance without shareholder approval in 2016)[55] and moved to close the transaction without prior notice to any shareholder. In addition, Amber, Trexs and Paulson were granted full standing at the hearing[56] and were well aware of the proxy contest at the time of

52 *Eco Oro* at para 158.
53 *Ibid* at para 164 citing *MI Developments* at para 127.
54 *Eco Oro* at para 169.
55 *Ibid* at para 170.
56 *Ibid* at para 171.

conversion (and in fact provided support letters in favour of the Board) and could have reasonably been expected to be aware of the possibility that if a transaction were to have an effect on control, it may be subject to regulatory review and possible intervention by the TSX or the OSC.[57] Furthermore, the Notes were convertible at the sole option of the Company[58] and the reversal of the transaction would have minimal practical effect since no cash was transferred.[59]

As a result, the OSC set aside the TSX Decision and ordered that Eco Oro hold a shareholder vote to approve or reverse the issuance of the New Shares. The OSC further ordered that unless and until the shareholders ratified the issuance of the New Shares, the New Shares were to be cease traded in order to ensure that the order to reverse the transaction was not circumvented by transferring the New Shares to a third party.

In addition, the OSC ordered that, until the shareholders ratified the share issuance, the New Shares could not properly be considered to be issued and outstanding, and therefore could not be voted at any meeting of shareholders of Eco Oro. The key factors that led to this decision were: (1) the respondents' unwillingness to inform the OSC at the hearing of whether they intended to vote the New Shares at the Meeting or not,[60] and (2) if the TSX had required prior shareholder approval, the New Shares could not have been voted at the Meeting. The OSC imposed this condition in order to ensure that Eco Oro shareholders would be provided with "an appropriate vote on the issuance of the New Shares".[61] The OSC gave Eco Oro until September 30, 2017 to hold a meeting of shareholders to seek approval for the issuance of New Shares.[62]

57 *Ibid* at para 177.
58 *Eco Oro* at para 174.
59 *Ibid* at para 178.
60 *Eco Oro* at para 195.
61 *Ibid* at para 192.
62 Pursuant to an Order dated August 28, 2017, the OSC varied the initial order in the OSC Decision on April 23, 2017 to extend the time limit to hold a shareholders' meeting to October 30, 2017 with the consent of all parties. This variation was done in order to enable the parties to give effect to the transactions contemplated by the July 31, 2017 settlement agreement (*Re Eco Oro Minerals Corp.* (2017), 40 OSCB 7410).

Jurisdiction

At the hearing and review, the respondents argued that the OSC lacked the authority under section 8(3) of the Ontario Act to impose the terms and conditions that it imposed. The respondents argued that the OSC lacked the jurisdiction to reverse the transaction or order that the New Shares not be considered to be issued and outstanding for the purpose of voting at any meeting of shareholders of Eco Oro.[63] It was the respondents submission that the OSC could only exercise the powers of the TSX – the power to delist the shares of Eco Oro or suspend trading – since the OSC stood "in [the TSX's] shoes in a *de novo* hearing and review."[64]

The respondents' argument was based in part on the doctrine of jurisdiction by necessary implication.[65] In *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*,[66] the Supreme Court of Canada provided guidance on this doctrine and found there was no explicit or implicit legislative authority for the Alberta Energy & Utilities Board (as it then was) ("**ATCO**") to reallocate a portion of the proceeds of sale from shareholders of ATCO to rate-paying customers. The OSC distinguished *ATCO Gas* in *Eco Oro*, noting that the power to order the terms and conditions was a practical necessity for the OSC to accomplish its prescribed legislated objectives.[67] In other words, the doctrine of jurisdiction of necessity implication can be invoked to ensure that administrative bodies can accomplish their statutory mandate.[68] In this situation, the OSC concluded that its remedy cannot be empty and it must be empowered to take the necessary steps to prevent an incorrect decision of the TSX from harming investors or impairing confidence in the capital markets.[69] The authority of the OSC must be read in a contextual and purposive way, considering the purpose and objectives of the Ontario Act and against the backdrop of the securities regime as a whole.[70]

The respondents also pointed to section 128 of the Ontario Act to argue

63 *Eco Oro* at para 199.
64 *Ibid* at para 202.
65 *Ibid* at para 236.
66 2006 SCC 4 [***ATCO Gas***].
67 *Eco Oro* at para 272.
68 *Ibid* at para 241.
69 *Eco Oro* at para 257.
70 *Ibid* at para 231.

that the OSC must, pursuant to that section (and the specific grant of power to the courts to rescind the issuance of securities or prohibit the voting of securities), go to the court for remedial orders like the ones sought in this proceeding by the Shareholder Group[71] as the implied exclusion principle of statutory interpretation must apply.[72] The OSC noted that if the legislature had wanted to limit or fetter the OSC's discretion in making such other decision it considers proper under section 8(3) of the Ontario Act, it could have added appropriate limiting language to achieve that effect.[73] The legislature did not do so.

Moreover, the OSC observed that the OSC Decision cannot be read as a standalone order to rescind the issue of shares or to prohibit a vote[74] but must be viewed in the context in which it was issued. Section 128 was not engaged because the hearing and review was not an enforcement case (since there had been no breach of Ontario securities laws, and section 128 is predicated on such a breach).[75] Rather, the OSC Decision provides a remedy for addressing an error of the TSX in approving a transaction without a shareholder vote and permitting an expedited closing in circumstances where the issuer was not fully candid with the TSX, despite materially affecting control of Eco Oro. The OSC further noted that section 128 of the Ontario Act is only available to enforce a pre-existing order. In other words, a remedy under that section is not available without the issuance of the decision of the OSC in this proceeding. If the OSC was rendered unable to make orders disregarding the New Shares for the vote and requiring measures to reverse a transaction, there would be no order in respect of which the OSC could apply to the court for enforcement under section 128 of the Ontario Act.[76]

The OSC also considered whether the implied exclusion principle of statutory interpretation precludes an interpretation of section 8(3) of the Ontario Act that authorizes the OSC to impose terms and conditions more generally[77] and held it has the authority notwithstanding that other sections of the Ontario Act grant the authority to impose terms

71 *Ibid* at para 255.
72 *Ibid* at para 268.
73 *Ibid* at para 257.
74 *Ibid* at para 220.
75 *Ibid* at para 218.
76 *Ibid* at para 233.
77 *Ibid* at para 225.

and conditions expressly. Moreover, the language in section 8(3) of the Ontario Act provides that the OSC may make the decision it considers proper on a hearing and review and therefore the OSC must have the ability to correct a flawed stock exchange process.

History of Reversing a Transaction

The decision in *Eco Oro* builds on previous decisions where securities regulatory authorities have ordered the parties to: (i) preserve the ability to reverse a transaction; or (ii) reverse a transaction.

In *Canada Malting*, a group of minority shareholders appealed to the OSC from a decision of the TSX where the TSX allowed the issuer to issue common shares to its two largest shareholders. Vice-Chair Salter dissented from the majority and questioned the timing of a private placement as being a hurried response to a take-over bid. Vice-Chair Salter indicated that the factors requiring shareholder approval of the private placement were all present since: (a) control was materially affected; (b) the private placement was not at arm's length; and (c) by its nature, the private placement made any possible take-over bid unlikely and deprived the shareholders of a possible premium for their shares. In addition, Vice-Chair Salter supported the view that the OSC should substitute its own decision for that of the exchange, where its view of the public interest differed from that of the exchange.[78] He considered the uncertainty that might result from a system where the regulator has discretion to act in the public interest, but felt that any such uncertainty was defensible in furtherance of important public interests.[79] Accordingly, Vice-Chair Salter took the view that the OSC should have reversed the decision of the exchange and ordered a vote on the private placement by disinterested shareholders; if the private placement was not approved through that vote, the board should reverse the transaction.

In *Re Mercury Partners & Co.*,[80] the BCSC found that the then Canadian Venture Exchange (which is now the TSX Venture Exchange ("**TSX-V**")) erred when it did not require the company to obtain shareholder approval

78 *Canada Malting* at para 51; *Williams v Toronto Stock Exchange* [1972] OSCB 87.
79 *Eco Oro* at para 52.
80 2002 BCSECCOM 173 [***Mercury Partners***].

for a private placement. Similar to the facts of *Eco Oro*, shares in that case were issued after shareholders delivered a requisition. The BCSC relied upon the dissenting opinion of Vice-Chair Salter in *Canada Malting*[81] and ordered the reversal of the exchange decision and a shareholder vote. It further ordered that, in the event the shareholders did not ratify the transaction (which had already taken place), the company should take all necessary steps to reverse the issuance of shares. The BCSC therefore took all appropriate steps on the facts of that case to reverse the decision of the exchange and potentially unwind the transaction.[82]

In *Re Geosam Investments Limited,*[83] the applicant asked the BCSC to order a stay of the decision of the TSX-V to approve a share issuance that involved significant dilution and control issues. The TSX-V had not required shareholder approval of the issuance. The BCSC considered both the harm to the public interest as well as harm to the applicant. Factors relevant to the court's public interest analysis in that case included the fairness of the private placement to all shareholders of the issuer, and the integrity of the TSX-V.[84] The BCSC ordered the stay and ordered that monies paid for the shares be held in trust so that the remedy of unwinding a private placement could be preserved pending a full hearing.[85]

Public Interest Commentary of the OSC

The Shareholder Group advanced an alternative basis for a remedy under the public interest jurisdiction of the OSC under section 127 of the Ontario Act. The OSC declined to consider this ground because the OSC's other holdings provided the relief sought by the Shareholder Group. It is nevertheless important to consider the public interest analysis undertaken by the OSC as this may have far-reaching implications.

In reviewing the public interest grounds for reversing the TSX Decision in *Canada Malting* (the fifth ground), the OSC made important findings regarding public interest. In this regard, the OSC noted as follows:

81 *Mercury Partners* at para 97 citing *Canada Malting* at para 37.
82 *Mercury Partners* at paras 96-104.
83 2009 BCSECCOM 695 [***Geosam***].
84 *Ibid* at para 18.
85 *Ibid* at paras 18-21.

> In our view, the public interest requires an evaluation of whether an issuance of shares by a listed issuer is for the purpose of entrenching management in the face of a proxy contest, thwarting the justified expectations of shareholders trusting in a system that appropriately promotes shareholder democracy and board accountability.[86]

The OSC concluded as follows:

> This evidence of tactical motivation, in turn, demonstrates that Eco Oro's management sought to influence the vote at the upcoming Meeting that would decide whether the Board would be removed. Since the competing press releases issued during the proxy contest show a close vote, a view that was not contradicted by the parties at the hearing, it is reasonable for us to infer that a tipping of the balance was sought and could reasonably have been accomplished if the New Shares could be voted. The TSX's rules require a vote to consider whether this effect on control is supported by the shareholders overall, not just by management and certain handpicked shareholders.
>
> Even if the effect on control was not so apparent, in the context of a close vote on a board election such as this, the TSX should generally exercise its discretion to require a vote to promote the fair treatment of shareholders and the quality and integrity of Ontario capital markets, an approach that is consistent with the Commission's decision in *HudBay*.

86 *Eco Oro* at para 125.

> Whether management is pursuing the best course of action for Eco Oro or whether the Eco Oro Board should be reconstituted is for the shareholders to decide without management's ability to manipulate the vote. Allowing such conduct would directly affect the integrity of Ontario capital markets contrary to the Commission's mandate and the public interest [emphasis added].[87]

It is clear from the above that, at least in the context of evaluating the fifth *Canada Malting* standard, the issuance of shares to tilt the vote in favour of the incumbent directors raises significant public interest concerns.

The OSC further clarified its views on its public interest jurisdiction in the context of its discussion on *ATCO Gas*:

> [T]he jurisdiction we assert in the present case is necessary to accomplish the purposes of the Act. Whether management is pursuing the best course of action for Eco Oro or whether the Board should be reconstituted is for the shareholders to decide without management being permitted to manipulate the vote. To allow a vote to proceed that has been affected by such conduct would directly affect the integrity of Ontario capital markets, contrary to the Commission's mandate and the public interest.
>
> The public interest is served by respecting the right of shareholders of TSX-listed issuers to have a fairly conducted vote to determine the composition of their boards of directors.[88]

87 *Eco Oro* at paras 152-154.
88 *Ibid* at paras 244-245.

The OSC also drew an analogy to the exercise of its public interest jurisdiction in respect of defensive tactics to take-over bids under National Policy 62-202 – *Take-Over Bids – Defensive Tactics* ("**NP 62-202**"). The OSC took the view that the use of a private placement as a defensive tactic in a take-over bid gives rise to the same considerations as when the issuance of shares is used as a defensive tactic in a proxy contest. The OSC noted that the consideration of the public interest "whether under section 8(3) or section 127 of the Act … may well yield the same result" in both circumstances.[89] The policy considerations applicable to take-over bids under the Ontario Act as reflected in NP 62-202 and the decision in *Re Hecla Mining Co.*[90] may well be equally applicable to proxy contests.

The OSC confirmed (albeit in obiter) that, whether under the *Canada Malting* standard or its public interest jurisdiction, the public interest in promoting fairness to shareholders must clearly extend to ensuring fair contests for control pursued through the proxy solicitation process for contested shareholder meetings.[91] A circumstance where shareholders are stripped of their ability to fairly vote for the election of directors because management has hand-picked a few shareholders to make such determination is abusive.

It is noteworthy that the OSC provided reasons in a manner that demonstrated its awareness that, in order to fulfil its mandate of investor protection and promoting confidence in the capital markets, it needs to be nimble in its application of existing instruments and policies.[92] The OSC did not however address the question of which powers it could exercise in circumstances where it was forced to craft a remedy solely under its public interest jurisdiction.

89 *Ibid* at para 249.

90 (2016), 39 OSCB 8927 [***Hecla***]. In *Hecla* the OSC and the BCSC provided a framework for considering whether a share issuance is a defensive tactic in the context of a takeover bid.

91 *Eco Oro* at para 250. We do not take from this statement that the public interest ground in *Canada Malting* and the public interest jurisdiction of the OSC under section 127 of the Ontario Act are in all cases similar. We expect that the underlying policy rationale may differ therefore leading to differing results depending on the factual circumstances.

92 *Ibid* at para 256.

Comparing Apples and Oranges: Court vs. OSC

Comparing Apples and Oranges: Court vs. OSC

In light of the Court of Appeal's comments that the Shareholder Group was justified in proceeding in both forums (see "Forum Shopping" above), it is worthwhile to compare the findings made in each proceeding to see how they stack up against one another. In several instances, the factual findings of the Court and the OSC were diametrically opposed. The differences between the findings in each proceeding are of particular import since it has been argued by some that a hearing before a court is superior to a hearing before a securities regulatory authority as a means of discerning the truth.[93]

93 *Re CW Shareholdings Inc.* (1998), 21 OSCB 2910 at para 48 citing *Re Canadian Tire Corp.*(1987), 10 OSCB 857 at para 950.

Supreme Court of British Columbia	Ontario Securities Commission
· A one day hearing in Chambers; 15 affidavits; no cross-examination of affidavits	· More than two day hearing before panel of three adjudicators; 13 affidavits (plus the affidavits from the Petition which were attached as exhibits); no cross-examination of affidavits
· New Share issuance upheld	· Shareholder approval must be obtained for the New Share issuance. Until then, the New Shares are cease-traded and cannot be considered for voting purposes
· Decisions are based on corporate law · Per the Court of Appeal: the purpose of the oppression section of the BCBCA is to protect the private rights and reasonable expectations of minority shareholders	· Decisions are based on securities law · OSC's role is to ensure that listing standards are properly administered and consistent with the public interest · Decisions of the OSC are not based on corporate considerations or oppression
· Primary purpose of the New Share issuance was debt reduction through conversion	· Primary purpose of the New Share issuance was to manipulate the vote in favour of management · At best, the Board's motivation was a mixed one
· The timing of the conversion of the Notes was not based on an improper purpose · It was entirely reasonable that the Company would want the conversion to occur before the Record Date so that the New Share Recipients could participate in the vote to replace the Board	· There was overwhelming evidence of a tactical motivation by the Company to influence the upcoming shareholder vote · There was no compelling business objective for the private placement to be completed prior to the Record Date · The New Shares were issued only after the Company received letters of support from the New Share Recipients
· Gives deference to Board's decision to issue New Shares	· Shareholders are justified in expecting to be treated fairly · TSX should order a shareholder vote in the context of close votes in board elections because voting promotes the fair treatment of shareholders and the quality and integrity of the capital markets · New Shares are cease-traded until such time as the shareholders have voted on the New Share issuance

Observations and Implications

Observations and Implications

The Eco Oro saga will have a number of implications going forward in connection with proxy contests and other contested transactions:

Seeking Remedies Before Courts

The view that courts may provide the better forum to discern the truth, particularly for hostile bidders and dissidents, may not hold as much weight especially where expedited hearings are pursued. The Court's findings serve as a warning to dissidents regarding the difficulties of seeking relief before courts in contested transactions when challenging the conduct of directors. These difficulties are in part due to the evidentiary onus placed on dissident shareholders as complainants under the corporate oppression remedy. Dissidents also face an uphill battle when challenging boards' decisions as a result of the business judgment rule.

Forum Shopping

The right to bring simultaneous hearings before courts and securities regulators for the same remedy will, in most circumstances, not be successfully challenged. However, where a dissident brings a court action and also seeks a hearing before a securities regulatory authority solely to exercise its public interest discretion to achieve the same or similar remedy,

the dissident may face challenges obtaining standing before the securities regulatory authority.

OSC Intervention in Decisions of Self-Regulatory Organizations

It is clear from *Eco Oro* that the OSC will not hesitate to intervene in circumstances where the TSX has made a decision that does not warrant deference. The mandate of the OSC to protect the quality of the marketplace, which is interpreted to include the fair treatment of shareholders, is alive and well. The TSX will be questioned in circumstances where: (i) it does not follow its own rules; (ii) it fails to consider the impact of its decisions on shareholders; and (iii) its perception of the public interest differs from that of the OSC. Another cautionary reminder that arises from the OSC Decision is that listed issuers must comply with the securities regime including laws, rules and policies of the exchanges on which they may be listed and the importance of disclosure can never be underestimated.

Jurisdiction of OSC under section 8(3) of Ontario Act

The OSC took significant latitude in exercising its jurisdiction under section 8(3) of the Ontario Act which has caused some trepidation. We note, however, that the facts before the OSC in *Eco Oro* were unique, including findings that the issuer was less than candid with the TSX[94] and the Board acted to tilt the vote in its favour by completing a transaction for which there was no compelling business objective prior to the Record Date.[95] In addition, the factors outlined by the OSC for it to exercise its jurisdiction to seek to reverse a transaction ensure that such remedy will rarely be granted.

Public Interest Jurisdiction

We expect that the public policy principles underlying NP 62-202 and *Hecla* will be equally applicable to the issuance of shares as a defensive tactic in the context of proxy contests. Under the *Hecla* standard adopted for a proxy contest, we expect the following factors to be considered when determining whether the public interest jurisdiction should be exercised:[96]

94 *Eco Oro* at para 234.
95 *Ibid* at para 150.
96 *Hecla* at paras 93-100.

- The applicant will need to prove that the impact of the defensive tactic is material to the vote.[97]
- The issuer will then have the onus to prove that the private placement was not used as a defensive tactic based on various considerations, such as whether:[98]
  - the issuer had a serious and immediate need for the financing;
  - there was evidence of a bona fide business strategy related to the financing; and
  - the financing was made or amended in response to the proxy contest.
- If the issuer meets this onus, then other factors may be considered by the panel, including whether:[99]
  - the financing was for the benefit of shareholders and the company;
  - the financing was arm's length or, more importantly, offered to supporters of the board; and
  - other shareholders were supportive.

Nevertheless, it is not readily apparent how the OSC might fashion a remedy similar to the one granted in *Eco Oro* solely under its public interest jurisdiction. The potential difficulties in fashioning such a remedy highlight the need to ensure that a disputed share issuance transaction does not close before relief can be sought by affected parties. In this regard, the TSX and TSX-V are now likely to be allies of dissidents as a result of the *Eco Oro* decision in that, at the very least, public disclosure of a disputed transaction should be made prior to closing.

There are circumstances, however, where stock exchange intervention will not be a pre-condition to a share issuance – for example, the issue of stock options and the exercise thereof. In the wake of the OSC Decision, we expect that the issuance of options during an ongoing proxy contest, like tactical private placements, will be subject to enhanced regulatory scrutiny. Similar to an issuance of common shares in the context of a pending shareholders' meeting requisitioned to elect directors, a company facing a likely defeat in

97 *Ibid* at para 96.
98 *Ibid* at para 97.
99 *Eco Oro* at para 100.

a proxy contest can simply issue options prior to a record date to influence the outcome in management's favour. Options could even be issued after the record date (and exercised prior to the shareholders' meeting) in an attempt to reverse a decision of shareholders at a future meeting.

Implications on the TSX

Following the OSC Decision, the TSX issued TSX Staff Notice 2017-0010 ("**TSX Notice**"), a bulletin regarding completion of Form 11, followed by an updated Form 11 (as of February 1, 2018).

The TSX Notice reminds listed issuers of their disclosure obligations in a Form 11. These obligations require an individual to certify on behalf of the issuer that the form does not contain any untrue statement of material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of circumstances in which it was made.

The TSX Notice and updated Form 11 provide a list of the type of significant matters the TSX would expect a listed issuer to disclose on its Form 11, including upcoming shareholders' meetings, pending M&A transactions, takeover bids or other significant transactions and any details regarding potential dissident shareholders and/or anticipated proxy contests. In addition, the updated Form 11 questions whether the private placement could potentially "materially affect control" as compared to the prior wording which did not mirror the language in section 604 of the Manual.

The OSC Decision stated that it is imperative for the fair and efficient functioning of capital markets and public confidence in those markets that regulators and self-regulatory organizations are provided with complete information relevant to the matters at issue by market participants and their counsel. In other words, "[m]aterial facts should not be left as unverifiable discussions, as this poses an increased risk of information being overlooked or not absorbed by the decision maker." [100] The OSC noted that the written record before the TSX was not amended to include material information (including any oral discussions).[101]

100 *Eco Oro* at para 96.
101 *Ibid* at para 94.

The OSC Decision emphasizes the role and responsibilities of listed issuers. The TSX Notice serves to confirm the TSX's expectation that it be fully informed of all relevant facts. The OSC also noted the failure of the TSX to review the public disclosure record of Eco Oro, and observed that "in the context of the adverse shareholder vote in 2016" a "scan of recent public filings relating to the issuer on SEDAR by the TSX would not unduly affect the efficiency of the TSX's processes".[102] This is consistent with past regulatory proceedings that have established that, in situations where there are "red flags", a stock exchange has additional diligence obligations in conducting its review of requests for approval.[103] This puts a burden on the TSX to seek fulsome disclosure in circumstances where it is aware of recent disputes which could be impacted by a transaction for which approval is being sought. Going forward, we expect the TSX will likely demand more information than it has in the past.

Based on informal discussions with practitioners and regulators, we understand there have been delays in obtaining approval of the TSX in a variety of transactions since *Eco Oro*, including transactions where counsel has provided what they believe to be all relevant disclosure. We understand delays have been caused by listing managers raising additional inquiries, conducting research and requesting supplementary materials from a listed issuer. While these delays are concerning, the TSX may simply pause to consider objections by requiring the issuer to publicly disclose relevant information before closing, thereby shifting, at least partially, the burden on potential dissidents.

The onus to be candid and provide all disclosure is on the listed issuer. However, going forward, dissidents in proxy fights may be inclined to contact the TSX directly to alert them to a contested transaction.

Lastly, it is interesting to note that, since the release of the OSC Decision, the TSX has not publicly released any information on its internal practices, including whether or not they have been modified since *Eco Oro*.

102 *Ibid* at para 134.
103 *Re Hemostemix*, 2017 ABASC 14 at para 103.

The foregoing provides only an overview. Readers are cautioned against making decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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