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ADVANCE NOTICE POLICIES: A TOOL TO CONSIDER WITH REGARD TO SHAREHOLDER NOMINATIONS FOR ELECTING DIRECTORS

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On July 20, 2012, the Supreme Court of British Columbia (the "Court") rendered a judgment that sheds new light on the shareholder nomination process for electing the directors of a business corporation.[1] In fact, the Court confirmed that a corporation's policy, which aimed to impose an advance nomination process at a shareholders' meeting, was reasonable and did not infringe shareholder rights with respect to electing the directors of a corporation.

Although such policies and their integration into a corporation's by-laws are currently not standard practice for reporting issuers in Canada, the *Mundoro* case could prompt issuers to amend their by-laws. In all likelihood, this policy would strengthen the directors nomination process by requiring a shareholder to send the issuer an advance notice, affording him sufficient time to analyze and respond in an informed manner to the proposed nominations. This tool could prevent nominations which are sometimes enforced by ambush or by proxy contest during annual shareholders meetings called by an issuer.

THE FACTS AND THE JUDGMENT

On May 22, 2012, Mundoro Capital Inc. ("Mundoro"), a corporation governed by the *Business Corporations Act* (British Columbia) (the "Act"), filed and issued its management information circular for its shareholders' Annual General Meeting ("AGM") scheduled for June 26, 2012. The circular stated, *inter alia*, that shareholders would vote to elect directors to Mundoro's board.

On June 11, 2012, Mundoro issued a press release announcing that the board of directors had approved an advance notice policy, which included a deadline by which time shareholders were required to submit, in writing, nominations for directors to be elected during the AGM. In particular, any proposal had to be received at least 30 days before and no more than 65 days prior to the AGM. Only such nominated persons would be eligible for election as directors.

On June 14, 2012, Northern Minerals Investment Corp. ("Northern"), one of Mundoro's shareholders, brought an action against Mundoro, alleging namely that there was no legal basis for such a policy. Northern argued that the policy constituted an attempt to limit the fundamental right of shareholders to elect directors. In addition, Northern maintained that the Act required that the election and removal of directors be done in accordance with Mundoro's articles.

The Court concluded that the directors acted in good faith and that the advance policy notice was reasonable based on the following grounds:

- both the Act and Mundoro's articles authorized the board of directors to adopt an advance notice policy;
- the purpose of the policy had never been to influence or preclude potential proxy contests;
- even though the policy stated that the board of directors had the discretionary and absolute power to waive any requirement of the advance notice policy, this sole discretion could be reviewed by a court;
- this policy required the approval and confirmation of Mundoro's shareholders during the AGM (although following the election of directors).

By ruling that the advance policy notice did not breach shareholder rights, the Court recognized that such a policy authorized the implementation of an orderly nomination process, which would enable shareholders to make an informed decision. In this regard, the Court argues:

> "[i]n this case it has not been established that the Policy is one that infringes shareholder rights. Rather, the Policy in fact ensures an orderly nomination process and that the shareholders are informed in advance of an AGM what is in issue. In doing so the Policy prevents a group of shareholders from taking advantage of a poorly attended shareholders meeting to impose their slate of directors on what could be a majority of shareholders unaware of such a possibility arising." [2]

Before the judgment was rendered, Mundoro had plans to establish its advance notice requirement through a policy of its board of directors. The corporation subsequently issued a new press release prior to its AGM, announcing that it would include the new policy into the corporation's articles. It should be noted that the by-laws of corporations governed by the *Canada Business Corporations Act* or by the *Business Corporations Act* (Quebec) are similar to those articles of a corporation that is incorporated under the Act. In this regard, the Court's decision remains relevant with respect to its interpretation.

During the AGM this past August 27, 2012, Mundoro's shareholders rejected the proposed amendment to its articles, with respect to the advance notice policy. Nevertheless, other listed issuers in Canada have begun to approve their own advance notice policies without any significant shareholder opposition.

CONCLUSION

The Court's decision suggests that advance notice policies or the addition of a provision to that effect in a corporation's by-laws should be carefully drafted and established to strike a reasonable balance between the rights of shareholders to elect directors, and the responsibilities of the board to make sure that the nomination process for electing directors is respected.

This judgment will undoubtedly have an impact on the adoption and implementation of such provisions by other corporations. Moreover, it will be interesting to see how courts in other jurisdictions will interpret these provisions, including with regard to corporations governed by the *Canada Business Corporations Act* or by the *Business Corporations Act* (Quebec). An advance notice policy pertaining to the nomination process for electing directors can represent an important tool for a reporting issuer to ensure that all shareholders are treated equitably and that, in a timely manner, they are provided with any relevant information with respect to the nomination of directors.

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[1] *Northern Minerals Investment Corp.* v *Mundoro Capital Inc.*, 2012 BCSC 1090 [Mundoro Capital].
[2] Idem note 1, par. 47.