CITATION: Houghton v. Epcor Collingwood Distribution Corporation, 2019 ONSC 5568

COURT FILE NO.: CV-19-00623738

DATE: 20190919

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HOUGHTON HOUGHTON, Applicant

AND:

EPCOR COLLINGWOOD DISTRIBUTION CORPORATION, Respondent

APPLICATION UNDER section 136(5) of the Ontario Business Corporations Act, R.S.O. 1990, c. B.16, as amended.

APPLICATION UNDER Rule 14.05 (3)(d) and (h) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

BEFORE: KOEHNEN J.

COUNSEL: *Winston Fogarty, J. Reiterowski* for the Applicant

Julie Parla, Patrick Gajos for the Respondent

HEARD: September 3, 2019

ENDORSEMENT

[1] This is an application by Edwin Houghton for indemnity from Epcor Collingwood Distribution Corporation for past legal fees he has incurred as a result of participating in a judicial inquiry and for an advancement of costs he will incur as a result of his continued participation.

[2] The Inquiry is being conducted by Associate Chief Justice Marrocco. It is examining the sale by the Town of Collingwood of 50% of its interest in its electrical power utility and the subsequent use of those funds by the Town.

A. Background

[3] Until March 2012, Collingwood obtained its electricity from Collingwood Utility Services Corporation, a corporation of which Collingwood was the sole shareholder and of which Mr. Houghton was President and CEO.

[4] In March, 2012, Collingwood sold 50% interest of its interest in its electricity provider shares to PowerStream Inc. As a result of the sale, a new corporation was created, PowerStream Corporation ("PowerStream"). Collingwood held 50% of the shares of the PowerStream and PowerStream Inc. held the remaining 50%.

[5] Mr. Haughton acted as President and CEO of PowerStream.

[6] Between 2012 and 2013 when Collingwood was deciding how to spend the proceeds of the share sale, Mr. Houghton served as both CEO of PowerStream and as the Town's Acting Chief Administrative Officer. He received no income for serving in the latter capacity.

[7] Associate Chief Justice Marrocco is proceeding with the Inquiry in three parts: Part I is investigating the share sale transaction, and has concluded. Part II is investigating the allocation of proceeds from the transaction, and commenced on September 11, 2019. Mr. Houghton was granted participant standing for both Parts I and II as a result of his roles as PowerStream's former CEO, and as the Town's Acting Chief Administrative Officer. Part III will consider broader policy and governance issues arising from the findings related to both transactions.

[8] The parties agree that the respondent Epcor Electricity Distribution Ontario Inc. is the successor to the entity that is liable on the indemnity. For ease of reference I will refer to the obligor under the indemnity as Epcor.

B. Indemnity for Part I

[9] The bylaw pursuant to which Mr. Houghton claims indemnity provides:

> 7.01 (1) The Corporation shall indemnify a director or officer, a former director or officer or a person who acts or acted at the Corporation's request as a director or officer of a body corporate of which the Corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all **costs**, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably **incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party** by reason of being or having been a director or officer of the Corporation or such body corporate, if
>
> (a) he acted honestly and in good faith with a view to the best interests of the Corporation; and
>
> (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful. (Emphasis added)

[10] Epcor initially denied Mr. Haughton's request for indemnity on the basis that the Inquiry was not the sort of "proceeding" to which the indemnity responded because there was no "risk of

findings being made against the director, a judgment or penalty being ordered against him, or a settlement paid on the director's behalf."

[11] Based on the case law, as I read it, the Inquiry does trigger the indemnity obligations under the bylaw.

[12] The triggering language in section 7.01 (1) of the bylaw is "any civil, criminal or administrative action or proceeding to which [the director or officer] is made a party by reason of being or having been a director or officer of the Corporation…"

[13] Courts have held that the term "proceeding" should be given an expansive meaning, and is not limited to adversarial proceedings or court actions: *Markevich v. Canada*, [2003] 1 SCR 94, 2003 SCC 9 (CanLII) at para. 24.

[14] A liberal reading of indemnity provisions promotes business efficacy and gives purpose to their terms: *Holmes v. Keyes* [1958] 2 All E.R. 129 at 138.

[15] In *Markevich*, the Supreme Court of Canada held that:

> "Though the word "proceeding" is often used in the context of an action in court, its definition is more expansive. The Manitoba Court of Appeal stated in *Royce v. MacDonald (Municipality)*, 1909 CanLII 256 (MBCA), 12 WLR 347, at p.350, that the word "proceeding" has a very wide meaning and includes steps or measures which are not in any way connected with actions or suits. In *Black's Law Dictionary, 96th ed.*, 1990, at p. 1204, the definition of "proceeding" includes, inter alia, an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right."

A judicial inquiry falls within the definition in *Black's Law Dictionary* cited by the Supreme Court of Canada.

[16] In *Legg v. Simcoe Muskoka Catholic School Board*, 2014 ONSC 3172 at para. 25 the court noted that what was most important in determining whether something was a proceeding in the context of an indemnity clause was whether the proceeding could result in an end that was possibly prejudicial to the director or officer. In interpreting the clause, the focus should be on the person who is the subject of the indemnity. Similar conclusions were also reached in *Balestreri v. Robert* [1985] CS 1038 (Que. Sup. Ct.), 30 B.L.R. 283 at para. 14-17 and in *Royal Newfoundland Constabulary Assn. v. Newfoundland and Labrador* [2004] N.L.L.A.A. No. 50 at para. 27.

[17] Based on these cases, it was clear from the outset that the Judicial Inquiry fell within this definition of proceeding. By way of example, Rules 42-44 of the Inquiry's Amended Rules of Procedure provide a process by which Marrocco ACJSC could make findings of misconduct against particular individuals; an end prejudicial to the individuals involved.

[18] Mr. Houghton should therefore have had his costs advanced to him from the outset, unless Epcor were able to establish that he had not acted honestly, in good faith or in the best interests of PowerStream. Epcor raised no such allegations when it denied Mr. Haughton indemnity.

[19] Nevertheless, I do not think it would be appropriate today to order Epcor to indemnify Mr. Houghton for the costs incurred in relation to Part I of the Inquiry. My decision in that regard is based on the manner in which the matter came before me and the purpose for which this hearing was held.

[20] The matter first came before me in August 2019 as a chambers appointment to set a timetable for the application. By that time Part I of Inquiry had concluded and Part II was about to begin on September 11, 2019. Mr. Houghton sought an urgent hearing to obtain indemnity for the fees he had incurred during Part I and advancement for the fees that he would incur during Part II of the Inquiry.

[21] During the chambers appointment, Epcor indicated that it been served with a very large application record, that it's counsel and principal witnesses had been away on vacation while they were served and that they would require substantial time to respond to the application record. The time Epcor said it needed to respond was such that it would not be possible to hear the application until Part II had concluded.

[22] During the chambers appointment, the only issues to which Epcor said it needed to respond were whether the Inquiry was the type of proceeding that triggered the indemnity and whether Mr. Haughton's legal fees for Part I were reasonable.

[23] The issue of whether this was the sort of Inquiry that triggered the indemnity struck me as a relatively discrete issue which was a matter of interpreting the bylaw in light of the terms of reference of the Inquiry and relevant case law. A hearing of that sort required neither a detailed evidentiary record nor much time to prepare or argue. Both parties agreed that the issue could be disposed of with a two-hour hearing.

[24] As a result, I ordered that the application be bifurcated. In the first part of the application I would determine whether the Inquiry was the sort of proceeding that triggered the indemnity. If I found that the indemnity did respond to the Inquiry then, Mr. Haughton would receive an advance of his legal fees for Part II of the inquiry and I would deal with issues surrounding the reasonableness of Mr. Houghton's fees for Part I at a later stage, after Epcor had a chance to file responding materials.

[25] I set September 3, 2019 for a two-hour hearing to address the first part of the application.

[26] That struck me as a fair balance between the potential prejudice that each side faced. Mr. Haughton was faced with additional legal costs for Part II. He had a right to a speedy determination about whether the Inquiry triggered the indemnity. At the same time, Epcor had the right to challenge the reasonableness of the costs Mr. Haughton had incurred during Part I. Any prejudice that Mr. Haughton suffered by virtue of a delay in having his costs for Part I

indemnified was a situation of his own making. Epcor had declined his request for indemnity on September 20, 2018. Mr. Haughton did not commence an application to determine the issue until late July 2019. Had Mr. Haughton brought an application shortly after Epcor declined his request for indemnity in September, 2018, the issue would have been long disposed of. In light of Mr. Haughton's delay in bringing this application I do not think it would be fair for him to force Epcor to respond to his application for past costs on an urgent basis.

C. Part II of the Judicial Inquiry

[27] Three issues arise with respect to Part II of the Inquiry.

[28] First, the by-law does not refer to advancement of costs. Although Epcor did not expressly raise this as an issue, I find it advisable to address it. Second, Epcor takes the position that the indemnity does not respond to Part II of the Judicial Inquiry because Part II deals with the Town's use of the proceeds of the share sale. Epcor submits that this involves Mr. Haughton in his capacity as Acting Chief Administrative Officer of the Town and not as an officer of the Corporation. Third, Epcor submits that there is a "triable issue" about the extent to which Mr. Haughton acted honestly, in good faith and of in the best interests of the corporation and that Mr. Haughton's costs should not be advanced until this issue is determined.

[29] In my view, none of these issues preclude advancement at this time.

(i) Silence of the By-law on Advancement

[30] In *Manitoba Securities Commission v. Crocus Investment Fund et al.*, 2007 MBCA 36 at paras 50-53, the Manitoba Court of Appeal held that the provisions of the *Manitoba Business Corporations Act* dealing with indemnity give the court the discretion to order advancement of costs even where the corporate bylaw in question does not provide for advancement.

[31] There are no material differences between section 119 of the *Manitoba Business Corporations Act* which was at issue in *Crocus Investment* and section 136 of the *Ontario Business Corporations Act ("OBCA*"). Both acts permit indemnification. As is the case here, the bylaw in *Crocus Investment* called for mandatory indemnification but was silent about advancement.

[32] At first instance, McCawley J. set out a number of policy reasons for which advancement was desirable:

(i) Failure to provide advancement in the absence of evidence to show that the director was not acting honestly would have a chilling effect and would hinder the retention of directors and recruitment of future directors: *Manitoba (Securities Commission) v. Crocus Investment Fund* 2006 MBQB 19 at para. 20. In my view, the same principles are applicable to officers.

(ii) Indemnities are meant to have real value: para. 37.

(iii) Indemnities are founded on legal *and* equitable principles: para. 38.

(iv) To conclude that allegations of dishonesty or bad faith disentitle directors to indemnification or advancement contravenes the principal that directors are assumed to be acting in good faith in the absence of evidence to the contrary: at para. 44.

(v) It is simply too easy for people with an inclination to avoid payment to assert misconduct at the outset of a proceeding. If such allegations could be used to avoid payment, indemnities would be denuded of any real value: at para. 44.

[33] In *Med-Chem*, the Ontario Court of Appeal voiced similar sentiments when it stated at para. 20:

> "In short, the legislature has made advancement a part of the statutory indemnification scheme, recognizing the reality that requiring an individual to fund his or her costs of litigation until its conclusion before being provided with indemnification would seriously impair the objective of indemnification itself. As described by the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*, 1995 CanLII 76 (SCC), [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 74: "Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurism."

[34] In addition, section 136 (5) of the *OBCA* allows Mr. Haughton to apply to the court for an order approving indemnity under section 136 and provides that "the court may so order and may make any further order it thinks fit." Any further order the court thinks fit would also include the concept of advancement.

[35] In my view, section 136 of the *OBCA*, like section 119 of the Manitoba Act gives the court discretionary authority to order advancement.

(ii) Does Part II Deal Only with Mr. Haughton's Status as a Town Employee?

[36] Epcor submits that advancement and indemnity are not available for Part II of the Inquiry because it deals solely with the Town's use of the funds after the share sale. Put another way, Part II might involve Mr. Haughton in his capacity as a Town employee but not as an officer of PowerStream.

[37] The degree to which this is correct must be assessed against the factual circumstances in which Mr. Haughton found himself and the Inquiry's terms of reference.

[38] Mr. Haughton was an officer of the corporate utility provider when the Town was its sole shareholder. He continued to be an officer of the new corporate utility provider after the share transaction.

[39] Shortly after the share transaction was completed, he began acting as the Town's Chief Administrative Officer. He received no remuneration for doing so and did so as a volunteer. At that point, Mr. Haughton acted as both President and CEO of PowerStream and as the Town's Acting Chief Administrative Officer.

[40] The bylaw provides indemnity:

> "for costs… incurred… in respect of any… proceeding to which he is made a party by reason of being or having been a director or officer of the Corporation…"

[41] Mr. Haughton is of interest to the Inquiry by virtue of having been a director or officer of PowerStream.

[42] The Inquiry's terms of reference make clear that its overriding subject of investigation is the potential intertwining of private and public interests arising out of the share sale. Included among the topics that the Inquiry is anticipated to review is:

> "An investigation and inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the Town of Collingwood, Collingwood Utility Services Corporation and PowerStream Inc."

[43] This includes Mr. Haughton among the subjects of interest.

[44] Of the 14 potential topics of examination found throughout the terms of reference, only two do not directly refer to the relationship between the Town and PowerStream or its affiliates:

> "The allocation of the proceeds of the transaction to the construction of the recreational facility at Central Park and Heritage Park.
>
> The payment of any fee or benefit of any kind on behalf of any person of the entity involved in the creation or construction of the recreational facility at Central Park and Heritage Park."

[45] Both of these issues will be examined in Part II of the Inquiry.

[46] It is by no means clear to me from the terms of reference that the allocation of the proceeds of the transaction is as clearly severable from the conflict of interest issues examined in Part I as Epcor submits.

[47] The manner in which the proceeds of the transaction were allocated may, for example, be one reason for which the transaction was entered into. That would link the use of proceeds (Part II) directly to the conflict of interest issues (Part I).

[48] In addition, one can readily anticipate that one focus of Part II may be the propriety of having an Acting Chief Administrative Officer make decisions about the allocation of proceeds when that person is not a full time or even part time employee of the Town but is in fact a director and officer of a private corporation with whom the Town has a business arrangement. In that light, Mr. Haughton's participation in Part II arises "by reason of being or having been a director" of PowerStream.

[49] Moreover, it is unlikely that any lawyer examining a witness in chief or in cross-examination would feel themselves constrained during Part II from covering issues that were strictly speaking relevant to Part I if they felt it useful or opportune to do so.

[50] As a result of the foregoing, in my view, Mr. Haughton's participation even in Part II of the Inquiry is related to his role as an officer of PowerStream.

(iii) Acting Honestly, in Good Faith and in the Best Interests of the Corporation

[51] Epcor submits that it should not be required to advance legal fees for Part II of the Inquiry because there is a "triable issue" about the extent to which Mr. Haughton was acting honestly, in good faith and in the best interests of the corporation. For ease of reference I will refer to this standard as "honesty".

[52] Epcor says there is a "triable issue" about Mr. Haughton's honesty because the Inquiry has recently sent Mr. Haughton a confidential notice advising him that the Inquiry *might* make a finding of misconduct against him.

[53] Epcor's position puts Mr. Haughton into a classic Catch-22 situation. On the one hand, Epcor had taken the position until just before the hearing on September 3, 2019 that indemnity was not available because the Inquiry was not a proceeding that could adversely impact Mr. Haughton and, as a result, did not trigger the indemnity. Epcor now concedes that, in light of the Notice of Possible Misconduct, the Inquiry is the type of proceeding that could trigger the indemnity. Yet at the same time, Epcor submits that the Notice of Possible Misconduct should deprive Mr. Haughton of indemnity because it creates a triable issue about the extent to which he acted honestly.

[54] I cannot accept this argument.

[55] An officer or director is deemed to be acting honestly until proven otherwise: *Med-Chem* at para. 25. So far, Epcor has introduced no evidence to suggest that Mr. Haughton was acting improperly.

[56] The Notice of Possible Misconduct is, at this stage, no more than a statement of allegations. In this sense, it is like a statement of claim. A corporation could not, without more,

successfully take the position that a statement of claim denied an officer indemnity because it raised a triable issue about the extent to which the officer had acted honestly. If it were otherwise, advancement would have little or no utility.

[57] During the hearing of September 3, Epcor advised me that it required an additional 6 to 8 weeks to file responding materials on the issues of honesty and reasonableness of past expenses. Mr. Haughton would need time to reply, there would presumably be cross examination on affidavits and an exchange of factums. This would take us well beyond the termination of Part II and perhaps well beyond the conclusion of the Inquiry.

[58] I have reviewed the Inquiry's notice carefully. The allegations it contains could, if true, result in findings that Mr. Haughton was not acting honestly. On the other hand, they could also result in findings that might fall short of the ideal to which we aspire in municipal government, but not fall short of honesty.

[59] Whether the Inquiry's findings are such as to deny Mr. Haughton indemnity depends first on whether the Inquiry makes any findings against him, and second, on a detailed analysis of any such findings. Even then one may not be able to determine whether Mr. Haughton acted honestly. Recall that the purpose of the Inquiry is not to determine whether Mr. Haughton acted honestly but to make findings and recommendations relevant to municipal governance. Such findings may have nothing to do with standards of honesty applicable to officers of private share corporations.

[60] Epcor concedes that Mr. Haughton should not be required to wait until the Inquiry publishes its report before indemnity is determined. Rather, Epcor submits that advancement should be determined only after a full hearing of this application. The time Epcor says it needs to put in its case would, however, deprive Mr. Haughton of any advancement because Part II will be over by the time this court has addressed the issue of honesty.

D. Balancing the Equities

[61] As noted earlier, indemnities are governed in part by equitable principles and the court has discretion to order advancement even where a bylaw is silent on the issue.

[62] In my view the appropriate equitable balance is to have Epcor advance Mr. Haughton's fees for Part II subject to an obligation by Mr. Haughton to repay those fees if he is ultimately found not to have acted honestly, in good faith or the best interests of the corporation or if Mr. Haughton's participation in Part II turns out not to have arisen by reason of his "being or having been a director or officer of" PowerStream.

[63] The court must be alert to its process having the incidental effect of depriving people of their rights or, worse, its process being used strategically to deprive people of their rights.

[64] As noted above, the Inquiry, in principle, triggers the indemnity. That was also the case in September 2018 when Epcor denied indemnity. As a result, had Epcor acted in a legally

appropriate manner in September 2018, Mr. Haughton would have had his legal fees advanced to him during the course of Part I without any suggestion that he had acted other than honestly.

[65] While Epcor should have the time to bring forward whatever arguments and evidence it wishes to establish that Mr. Haughton was not acting honestly, the time it needs to do so should not prejudice Mr. Haughton's right to advancement.

[66] An indemnitor should not be able to use the delay occasioned by its desire to establish an officer's lack of honesty as a basis to deny advancement; particularly when, as here, the indemnitor had turned its mind to its indemnity obligation in the past and had never put the officer's conduct into question.

[67] Mr. Haughton has a legitimate interest in participating in the Inquiry. He has a legitimate need for legal representation. His legal costs are already significant and will continue to be significant as the Inquiry proceeds. The mere allegation of dishonesty cannot tip the equitable balance against Mr. Haughton. Particularly not in circumstances where Epcor has been aware of or has had the opportunity to be aware of Mr. Haughton's conduct for several years and never raised the issue of honesty. At the same time there is no suggestion in the Inquiry's notice that Mr. Haughton concealed his conduct.

[68] It is important to underscore in this regard that, when Epcor rejected Mr. Haughton's request for indemnity in September, 2018 it did so only because it took the position that the Inquiry was not the type of proceeding that triggered the indemnity. Epcor did not allege that Mr. Haughton was not acting honestly.

[69] The only new piece of information Epcor has at this point is the Inquiry's Notice. As set out above, the Notice is merely a set of allegations and does not provide evidence of lack of honesty.

Conclusion

[70] As a result of the foregoing I order as follows:

(a) Epcor shall pay Mr. Houghton's legal costs of Part II of the Inquiry as he incurs them.

(b) The order in paragraph (a) above is without prejudice to Epcor's ability to seek repayment of those fees if they are able to demonstrate that Mr. Haughton was not acting honestly, in good faith or the best interests of PowerStream or if Epcor is able to establish that at Mr. Haughton's participation in Part II of the Inquiry does not arise "by reason of being or having been a director or officer of" PowerStream.

(c) The parties shall endeavor to agree on a timetable for the balance of this application but which they should submit to me for approval. If the parties are

unable to agree on a timetable, either party may contact me to arrange a case conference to set a timetable.

[71] I shall remain seized of both the application and any proceeding arising out of this application and out of paragraph 70 (b) above because there are substantial judicial efficiencies to be gained by having one judge address the issues arising out of the dispute between Mr. Houghton and Epcor.

[72] If parties have any submissions with respect to costs, Mr. Haughton can provide written submissions not exceeding five pages in length within 10 days of receipt of these reasons. Epcor shall have 10 days to file a response, not exceeding five pages in length. Mr. Haughton shall have two days to reply which reply shall not exceed three pages.

Koehnen J.

Date: September 16, 2019.