

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Li v. Global Chinese Press Inc.*,
2014 BCCA 53

Date: 20140129
Docket: CA040756

Between:

Bolun Li

Respondent
(Petitioner)

And

Global Chinese Press Inc.

Appellant
(Respondent)

Corrected Judgment: The cover page was corrected on February 19, 2014.

Before: The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Goepel

On appeal from: Supreme Court of British Columbia, February 26, 2013
(*Li v. Global Chinese Press Inc.*, 2013 BCSC 700, Vancouver Registry S126640)

Oral Reasons for Judgment

Counsel for the Appellant:	D.L. Cayley
Counsel for the Respondent:	D. Cowper
Place and Date of Hearing:	Vancouver, British Columbia January 29, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 29, 2014

Summary:

An appeal by a company from an order of a chambers judge made pursuant to the provisions of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 that it produce audited financial statements. The company submits that the chambers judge erred in finding that the production of audited financial statements was mandatory. Held: Appeal dismissed.

The CBCA sets out a comprehensive legislative scheme to provide financial information to shareholders. The scheme requires the appointment of an auditor and the production audited financial statements unless the shareholders of a company unanimously determine otherwise. If a Company fails to comply with the statutory requirements, the legislation empowers the Court to

appoint an auditor and order production of the required documentation.

[1] **GOEPEL J.A.:** Global Chinese Press Inc. (the “Company”) appeals a decision pronounced in chambers on the 26th day of February, 2013 pursuant to which the chambers judge ordered the Company to produce audited financial statements for the years 2009, 2010, 2011 and 2012. The order required the Company to pay the costs of the audit and directed that its management and employees fully cooperate with the auditor and answer any questions the auditor may have and provide the auditor with full access to all its records.

BACKGROUND

[2] The Company is a privately owned Chinese language newspaper that is published in both Vancouver and Toronto. It was incorporated on September 21, 2000 pursuant to the provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the “CBCA”).

[3] Since May of 2006, the respondent Bolun Li has been the registered owner of 50% of the Company’s outstanding shares. In 2007 and again in 2008, Mr. Li signed a consent shareholders resolution waiving the appointment of an auditor. He did not, however, in subsequent years again waive the appointment of an auditor.

[4] On September 21, 2012, Mr. Li filed a petition seeking an order that the Company provide audited financial statements for the years 2006-2011. The application was brought pursuant to the provisions of ss.145(1), 167(1), and 248 of the *CBCA*.

[5] The Company resisted the application. It submitted that the order was discretionary in nature and that in the circumstances the court should not make the order sought because of the Company’s precarious financial position. Financial documents contained in the affidavits before the court indicated that the Company had, over the last several years, suffered significant losses and the Company claimed it could not afford the costs of an audit.

[6] The chambers judge held at paras. 11-13 that the order was not discretionary and that the *CBCA* mandated the production of audited financial statements. In reaching his decision, he relied on the comments of Justice Smith in *Merrill v. AFAB Security*, [2007] O.J. 1133 at para. 21 (Ont. S.C.J.) [*Merrill*]:

Section 162 of the *CBCA* is very similar to the combined sections 148 and 149 of the *OBCA*, as it requires the shareholders to appoint an auditor at the first annual meeting of shareholders, unless a resolution is passed to dispense with the appointment of an auditor which is consented to by all shareholders, including the non-voting shareholders. As a result I find that a shareholder’s right to receive financial statements and an auditor’s report is a mandatory right as prescribed by the provisions of the *CBCA*.

GROUNDS OF APPEAL

[7] The Company submits that the chambers judge erred in law in ordering that the Company produce audited financial statements. It submits the legislation is discretionary and that the chambers judge erred in failing to consider the financial circumstances of the Company and the reasons why Mr. Li was seeking audited statements.

DISCUSSION

[8] The appeal requires consideration of ss. 155(1), 158, 162, 163, 167 of the *CBCA*. Those sections read as follows:

155. (1) Subject to section 156, the directors of a corporation shall place before the shareholders at every annual meeting

(a) comparative financial statements as prescribed relating separately to

(i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and

(ii) the immediately preceding financial year;

(b) the report of the auditor, if any; and

(c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.

...

158. (1) The directors of a corporation shall approve the financial statements referred to in section 155 and the approval shall be evidenced by the manual signature of one or more directors or a facsimile of the signatures reproduced in the statements.

(2) A corporation shall not issue, publish or circulate copies of the financial statements referred to in section 155 unless the financial statements are

(a) approved and signed in accordance with subsection (1); and

(b) accompanied by the report of the auditor of the corporation, if any.

...

162. (1) Subject to section 163, shareholders of a corporation shall, by ordinary resolution, at the first annual meeting of shareholders and at each succeeding annual meeting, appoint an auditor to hold office until the close of the next annual meeting.

(2) An auditor appointed under section 104 is eligible for appointment under subsection (1).

(3) Notwithstanding subsection (1), if an auditor is not appointed at a meeting of shareholders, the incumbent auditor continues in office until a successor is appointed.

(4) The remuneration of an auditor may be fixed by ordinary resolution of the shareholders or, if not so fixed, may be fixed by the directors.

163. (1) The shareholders of a corporation that is not a distributing corporation may resolve not to appoint an auditor.

(2) A resolution under subsection (1) is valid only until the next succeeding annual meeting of shareholders.

...

167. (1) If a corporation does not have an auditor, the court may, on the application of a shareholder or the Director, appoint and fix the remuneration of an auditor who holds office until an auditor is appointed by the shareholders.

(2) Subsection (1) does not apply if the shareholders have resolved under section 163 not to appoint an auditor.

[9] The Company submits that in finding that the production of audited financial statements was mandatory, the chambers judge erred. The Company relies on s. 155(1)(b) which sets out that the directors of a corporation shall place before the shareholders at every annual meeting the report of the auditor, if any and the word “may” in s. 167. It cites *Kiar v. Compas Inc.*, [2004] O.J. 2783 (Ont. S.C.J.) [*Kiar*] and *Cosgrove v. L & C Canada Coastal Aviation Inc.*, 2008 BCSC 973 [*Cosgrove*] in support of its submission that the production of audited financial statements is a matter of discretion.

[10] A similar submission concerning the words “if any” was made before Justice Smith in *Merrill*. In rejecting that submission he said at para. 19:

The fact that section 155(1)(b) of the CBCA states the directors are to place before the shareholders at every annual meeting, the report of the auditor, if any, does not remove the requirement for the shareholders [to] appoint an auditor at the annual meeting as set out in s. 162 of the CBCA. The use of the words “if any” in s. 155(b), would apply to the situation where all of the shareholders consented to dispense with the appointment of an auditor, pursuant to s. 163 of the CBCA and therefore a report of the auditor would not be one of the documents that was required to be placed before the shareholders in this situation. This interpretation is consistent with the two possibilities, firstly the requirement for production of audited financial statements and a report of the auditor where all of the shareholders have not waived the appointment of the auditor, and secondly the possibility that there is no auditor's report, if all of the shareholders have consented to dispense with the requirement to appoint an auditor. As a result I do not find that the use of the words “if any” in s. 155(1) (b) removes the requirement for the shareholders to appoint an auditor at the annual meeting as set out in section 162 of the CBCA.

[11] I agree with that analysis. It is a complete answer to the company's submission. The words “if any” found in s. 155(1)(b) only apply when the shareholders have by resolution consented to dispense with the appointment of an auditor.

[12] I do not accept the submission that the use of the word “may” in s. 167 indicates the court has a discretion as to whether to appoint an auditor. The appointment of an auditor is mandated by s. 162 and s. 167 does not give the Court the power to ignore that mandate.

[13] The chambers judge did not err in failing to consider the financial circumstances of the company or the reasons why Mr. Li sought the appointment of an auditor. The decisions in *Kiar* and *Cosgrove* are both distinguishable. Neither case concerned an application under s. 167 of the CBCA.

[14] The *CBCA* sets out a comprehensive legislative scheme to provide financial information to shareholders. The scheme requires the appointment of an auditor and the production audited financial statements unless the shareholders of a company unanimously determine otherwise. If a Company fails to comply with the statutory requirements, the legislation empowers the Court to appoint an auditor and order production of the required documentation.

[15] I would dismiss the appeal.

[16] **TYSOE J.A.:** I agree.

[17] **BENNETT J.A.:** I agree.

[18] **TYSOE J.A.:** The appeal is dismissed.

“The Honourable Mr. Justice Goepel”