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OSC Hits Pause, and Potentially Rewinds, Eco Oro's Share Issuance

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Introduction

On April 23, 2017, the Ontario Securities Commission (the "OSC") issued an order (the "Order") with potentially broad implications regarding the acceptable actions that a board of directors may undertake in the context of a proxy battle. The Order, among other things, set aside the Toronto Stock Exchange's ("TSX") conditional approval (the "TSX Decision") of Eco Oro Minerals Corp.'s ("Eco Oro") issuance of common shares (the "Issuance") in the midst of a proxy battle for control of Eco Oro's board. The Issuance resulted from the conversion of unsecured convertible notes (the "Notes") held by certain investors of Eco Oro (the "Note Holders"). Certain dissident shareholders alleged that the Issuance was used to place more votes in the management-friendly hands of the Note Holders prior to Eco Oro's contested shareholders' meeting.

Key Facts and Timeline

On February 10, 2017, Courtenay Wolfe and Harrington Global Opportunities Fund Ltd. (together, the "Dissidents") requisitioned a shareholders' meeting for the purpose of replacing Eco Oro's board of directors.

On March 16, 2017, eight days prior to the record date for the requisitioned meeting, Eco Oro converted a portion of the Notes and thereby issued 10,600,000 common shares to the Note Holders. Eco Oro's management justified the conversion as being in the best interest of the company as it reduced the company's debt load. The conversion resulted in Trexs Investments, LLC increasing its ownership from approximately 9.9% to 15.7%, with other Note Holders, who were insiders prior to the conversion, retaining their pro rata ownership.

On March 22, 2017, the Dissidents filed a petition, which was ultimately unsuccessful, with the Supreme Court of British Columbia to overturn the Issuance on the ground that it constituted oppression under corporate law.² The Honourable Justice G.P. Weatherill held that there was no oppression as there were *bona fide* reasons for the Issuance and there was insufficient evidence that the Issuance was not in the best interests of the corporation.³ Shortly thereafter, on March 27, 2017, the Dissidents applied to the OSC for the Order.

The Order

On April 23, 2017, the OSC granted the Order. Among other things, the Order provided the following:

1. The TSX's conditional approval regarding the Issuance was set aside;
2. Eco Oro must seek shareholder approval for the Issuance;
3. the shareholder approval under paragraph two above is to be calculated in accordance with the TSX Company Manual and must give shareholders the option to either: (a) ratify the issuance, or (b) instruct the board of directors of Eco Oro to take all steps necessary to reverse the Issuance; and
4. until the requisite shareholder approval is obtained, the shares issued pursuant to the Issuance are cease traded and the holders thereof shall not be entitled to vote such shares at any meeting of the shareholders of Eco Oro.

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² *Harrington Global Opportunities Fund Ltd. v. Eco Oro Minerals Corp.*, 2017 BCSC 664.

³ *Ibid.*, at paras 76-77 and 85.

Analysis

The OSC has yet to provide reasons for the Order. Regardless, we believe the Order is indicative of the OSC's desire to protect the public interest and its willingness to review the decisions of Canadian stock exchanges. When released, it is expected that the OSC's reasons will provide additional direction regarding the extent to which the regulator will balance the interests of shareholders in the context of a proxy battle with the discretion afforded to management. The reasons may also discuss parameters surrounding shareholder approval requirements in the TSX Company Manual, specifically pertaining to Section 604.

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