

IN THE MATTER OF
ACASTA ENTERPRISES INC.

APPLICATION

(For a Hearing and Review of a Decision Under Sections 8, 21.7 and 127
of the *Securities Act*, R.S.O. 1990, C. S.5)

A. ORDER SOUGHT

The applicant, Ewing Morris & Co. Investment Partners Ltd., applies to the Ontario Securities Commission for the following orders:

1. An order under sections 8 and 21.7 of the *Securities Act*, R.S.O. 1990, c S.5 (the “Act”) (i) reversing the decision of the Toronto Stock Exchange made on or about February 20, 2018 (the “**TSX Decision**”), and (ii) requiring the respondent Acasta Enterprises Inc. to obtain approval from a majority of the disinterested holders of the Class B shares (the “**Shares**”) of Acasta (the “**Minority Shareholders**”) for a debt to equity transaction between Acasta and WFI Inc. (the “**Transaction**”).
2. An order under sections 8(4) and 21.7(2) of the Act staying the TSX Decision until the issues raised in this application have been determined.
3. An order under section 127(1) of the Act to cease trading the Shares issued under the Transaction until it has been approved by the Minority Shareholders.

B. GROUNDS

The grounds for the application and the reasons for seeking a hearing and review are:

The Parties

1. Ewing manages Broadview Dark Horse LP, a fund with ownership or control of 1.92 million Shares (approximately 3% of the total).

2. Acasta is incorporated under the *Business Corporations Act* (Ontario). Acasta's shares are traded on the TSX under the symbol "AEF". Acasta owns only one subsidiary, Apollo Health and Beauty Care Inc.

Proposed Sale of Apollo

3. In or around the fall of 2018, Acasta's elected, three-member board of directors (the "**Board**") considered selling Apollo for a price that would have generated sufficient revenue to repay Acasta's debt fully and provide \$1.48 of value per Share.

Reconstitution of Acasta's Board

4. As or after the Board considered the possible sale of Apollo, it found itself in disagreement with Richard and Charles Wachsberg, who had founded Apollo and beneficially own 36% of the outstanding Shares.

5. In view of that disagreement, the members of the Board resigned on December 21, 2018 and were replaced by the Wachsbergs and three other unelected directors. No prior consultation or disclosure was provided to the Minority Shareholders regarding the members of the reconstituted Board.

6. The reconstituted Board named the Wachsbergs as co-chief executive officers of Acasta.

Proposed Transaction

7. On February 8, 2019, Acasta announced that, under the Transaction, it had agreed with WFI to convert \$4,783,578 of high yield secured debt into 6,499,426 Shares at a deemed price of \$0.736 per share.

8. Acasta described the rationale for the Transaction as being to further a plan to "urgently reduce" its outstanding debt. But the characteristics of Acasta's indebtedness cast doubt on that supposed rationale:

(a) Acasta has provided no evidence of notices of default on any debt obligations.

- (b) The proceeds of the Transaction (in the form of eliminated debt to WFI) will amount to under \$4.8 million, whereas Acasta's general indebtedness totals \$73 million.
- (c) Of the \$73 million total debt of Acasta, approximately \$62 million is owed to a bank as senior debt holder and will in no way be reduced by the Transaction.
- (d) Acasta's bank debt will not mature until June 1, 2019, and its other debt is subordinated. It follows that Acasta's debt obligations to WFI will not mature until an unknown date *after* June 1, 2019.

9. Several other characteristics of the Transaction raise serious concerns and leave little doubt that it serves to transfer value and control from the Minority Shareholders to the Wachsbergs, rather than serving any legitimate business purpose of Acasta:

- (a) The Wachsbergs control WFI. The Transaction will materially affect control of Acasta by increasing the Wachsbergs' direct or indirect holdings in Acasta from 36% to 41.8% in a context of low historical turnout at shareholder meetings. The Wachsbergs' control is liable to increase further, and possibly surpass 50%, given the indication from Acasta that a rights offering will follow the Transaction and the probability that not all minority shareholders will participate in that rights offering.
- (b) The deemed price of the Shares is significantly discounted relative to their market price. On February 7, 2019, the closing price of the Shares was \$0.91, or 20% higher than the deemed price under the Transaction. More strikingly, the fair value of the Shares under the proposed Apollo transaction described above (which the Wachsbergs stopped Acasta from pursuing) was 50% higher than the deemed price under the Transaction, better reflecting the value of Acasta.
- (c) Neither Acasta's February 8, 2019 news release nor its subsequent Material Change Report provide adequate disclosure regarding the basis on which the Board determined the Transaction to be in Acasta's best interest. Such disclosure is particularly important in circumstances where Acasta is understood to have had access to financing on terms more favourable than those of the Transaction.

- (d) The Transaction takes place against the backdrop of a reconstituted Board without elected, independent members.
 - (e) The Transaction was announced on the same day as the adoption of an advance notice bylaw imposing specific notice periods for Board nominations by shareholders, effectively complicating efforts by Minority Shareholder to replace members of the Board.
10. In view of these concerns, on February 15, 2019, Ewing wrote to the TSX asking that it exercise its discretion under section 603 of the Company Manual to require that Acasta obtain Minority Shareholder approval of the Transaction.

Decision of the TSX

11. On February 20, 2019, Acasta announced that the TSX had accepted notice of the Transaction without requiring approval by the Minority Shareholders.
12. The TSX erred in doing so. Section 603 of the Company Manual gives the TSX discretion to accept or reject a proposed issuance of securities, or to impose conditions on the issuance, in light of certain factors. The TSX Decision fails to properly take these into account as follows:
- (a) “*The involvement of insiders or other related parties of the listed issuer in the transaction*”: the parties to the Transaction are Acasta and WFI. The Wachsbergs are co-CEOs of Acasta and directly or indirectly control 36% of the Shares. The Wachsbergs indirectly control WFI.
 - (b) “*The material effect on control of the listed issuer*”: the Transaction will result in the Wachsbergs directly or indirectly controlling 41.8% of the Shares which, given historically low shareholder turnout, materially affects control.
 - (c) “*The listed issuer's corporate governance practices*”: approval of the Transaction followed reconstitution of the Board so as to eliminate elected, independent directors in light of their strategic disagreement with the Wachsbergs.

(d) *“The listed issuer’s disclosure practices”*: Acasta has made no disclosure with respect to the Transaction other than the February 8, 2019 press release and subsequent Material Change Report. Neither document adequately discloses the basis upon which the Board approved the Transaction.

13. These characteristics demonstrate that the absence of Minority Shareholder approval of the Transaction would be contrary to the public interest.

Conditions attaching to the Transaction

14. On February 21 and 22, 2019, by way of a with prejudice settlement offer, Acasta invited Ewing and another objecting Minority Shareholder to subscribe to a private placement on the same terms as the Transaction. Ewing declined this offer, which did not extend to all Minority Shareholders, as participation would have left its significant concerns regarding the Transaction unaddressed.

15. Nevertheless, an agreement was reached whereby the Transaction closed as scheduled subject to an undertaking by Acasta allowing it to be unwound should the applications by Ewing and another objecting Minority Shareholder succeed.

Other Grounds

16. Sections 8, 21.7 and 127 of the Act.

C. DOCUMENTS AND EVIDENCE

1. Ewing requests the record of the TSX Decision and any associated reasons, and reserves its right to supplement or amend its application upon their receipt.
2. In addition to the record of the TSX Decision, Ewing relies on affidavit evidence to be sworn.

DATED this 4th day of March 2019

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