

## Footing the bill: Hollinger International funds Black's defence

Matthew McClearn

Readers of *Canadian Business's* print edition may recall a recent story about how Conrad Black's efforts to defend himself (including hiring roughly three dozen lawyers to fight numerous court actions across North America during the last three years) could conceivably cost hundreds of thousands of dollars — if not millions — every month. In March, however, Black and one of his former companies, Chicago-based Hollinger International, struck an agreement under which the latter will pay most of those costs. They include not only lawyers' fees but also items like transportation to and from various courts, postage and shipping costs, photocopying charges, telephone bills and the like. This apparent victory will take considerable pressure off Black, who denies any wrongdoing during his tenure at the company.

While there are no plans to make the out-of-court settlement available to the public, details appeared in Hollinger International's recently published 2005 Annual Report. Hollinger International will immediately pay its former chairman and CEO US\$4.4 million for legal invoices he'd previously submitted relating to lawsuits in Delaware, including courtroom jousting arising from Black's aborted attempt to effectively sell Hollinger International out from under the management team brought in to replace him — a manoeuvre described as "cunning and calculated" by the judge who prevented Black from pulling it off.

What's more, Hollinger International committed to pay three-quarters of the costs of defending Black against criminal charges in the United States District Court for the Northern District of Illinois. And it will pay half of Black's costs in other matters, including his confrontation with the U.S. Securities and Exchange Commission and other civil litigation. Hollinger International will even pay half of Black's costs in lawsuits he's leveled against the company, such as six defamation suits against current and former directors. In effect, Hollinger International agreed to subsidize lawsuits against itself.

This brings closure to years of legal wrangling over who would foot Black's legal bills. The bickering began not long after Black's resignation as CEO of Hollinger International in November 2003. In March 2004, Black first sued the company seeking advancement of legal expenses. Three months later, the parties struck an agreement under which the company agreed to pay half the costs incurred in lawsuits where Black was a defendant. A year later, though, Black filed another lawsuit arguing that Hollinger International should advance 100% of certain expenses. Reasoning that the Delaware Chancery Court had found that Black had violated his fiduciary and contractual duties to the company, Hollinger International sought a court declaration that it was no longer required to pay any of Black's expenses. All that to-and-fro finally culminated in the compromise reached last month, which would appear to be more in Black's favour than that of Hollinger International.

This is not the end of the matter, however. One unresolved issue is how much of the expenses will be covered under Hollinger International's directors' and officers' liability insurance policy (often called a "D&O" policy). "We plan to submit these legal bills in due course to our insurance [provider]," says company spokesman Jeremy Fielding. "I don't know that we can speculate at this point as to how much will or will not be covered." That policy's terms are not available for public inspection, but the company's insurers have included American Home Assurance Co. and the Chubb Insurance Co. of Canada.

Further complicating matters, Black's former press empire contained a smorgasbord of corporate entities in which he held key positions; for example, he was also chairman and CEO of Hollinger Inc., a Toronto-based holding company. Hollinger International feels that Hollinger Inc. should also cough up part of Black's legal expenses, and is suing the company for "equitable contribution." Says Fielding: "We think it should be 50-50." The Delaware Chancery Court, however, will likely decide the ultimate breakdown.

Hollinger International's own internal investigation lambasted the former CEO for alleged misdeeds. According to a report from a special committee of Hollinger International directors, "Black and [former Hollinger International executive David] Radler made it their business to line their pockets at the expense of Hollinger almost every day, in almost every way they could devise. The Special Committee knows of few parallels to Black and Radler's brand of self-righteous and aggressive looting of Hollinger to the exclusion of all other concerns or interests, and irrespective of whether their actions were remotely fair to shareholders." It might seem a grand lunacy, then, for the company to agree to pay so much of Black's legal fees.

To those initiated in the black arts of modern corporate governance, however, Hollinger International's dramatic concession is *rigueur du jour*. As a precondition of employment, companies routinely indemnify executives and directors against certain legal risks, typically either directly or through a D&O insurance policy. Moreover, Fielding says the laws of Delaware (where Hollinger International is incorporated) require companies to provide indemnification. Accordingly, Hollinger International is also paying legal bills for numerous other former directors and officers, no matter what their purported roles in the corporate scandal. (The lone exception is Radler, who pleaded guilty to fraud charges last year.)

Such obligations are becoming more acute at companies across North America. Scott Saddington, chief underwriting officer with Executive Risk Insurance in Toronto, says that directors in particular are rapidly becoming more knowledgeable about matters involving indemnification and insurance, and often insist on certain provisions in a company's D&O policy before joining its board. "In the last few years, to attract quality directors you need to purchase substantial limits as well as substantial coverage," says Saddington. "Incoming directors often hire legal advice to examine D&O insurance policies before they join a board."

D&O policies commonly stipulate that those guilty of malfeasance aren't covered. Indeed, Black's deal with Hollinger International includes a clause to the effect that, should he later be found not entitled to indemnification, he must repay the company. Of course, the accused has the right to be presumed innocent until proven guilty, and therefore no such judgment is likely to be made until the criminal proceedings in Chicago conclude. At that point, Hollinger International's ability to recover monies from Black might be uncertain. About the only certainty, it seems, is that Hollinger International's shareholders will see much of their corporation's resources going into the pockets of lawyers for many years to come.