

THE BCSC'S LIONS GATE DECISION

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On May 6, 2010 the British Columbia Securities Commission issued summary reasons for its decision on April 27, 2010 to cease trade the Lions Gate shareholder rights plan.

Although the panel's full reasons will be released at a later date, it is clear that the BCSC has firmly endorsed the position that a shareholder rights plan, or poison pill, is a temporary measure that will be tolerated only for as long as it assists a board of directors to discharge its fiduciary duties "by giving it time to, among other things, seek to improve the bid, or generate competitive bids or alternative transactions."

The BCSC principally justified the exercise of its public interest jurisdiction to cease trade the rights plan and allow individual shareholders to decide whether to tender their shares to the take-over bid launched by the Icahn Group on the basis that Lions Gate was not pursuing alternative transactions and that the only effect of continuing the Lions Gate shareholder rights plan would be to deny shareholders the opportunity to accept or reject the Icahn offer.

Although this decision is consistent with the traditional understanding of the purpose of a shareholder rights plan, the Ontario Securities Commission's decision last year in *Neo Material Technologies Inc.* (discussed in greater detail [here](#)) and the Alberta Securities Commission's 2007 decision in *Pulse Data Inc.* appeared to take a more flexible approach to the regulators' public interest jurisdiction. In those decisions, the regulators refused to cease trade shareholder rights plans in spite of the fact that incumbent management was not seeking to create new alternatives for shareholders. In both cases, the decision was influenced by a shareholder vote strongly ratifying the adoption of the shareholder rights plan.

In acting to remove the Lion's Gate shareholder rights plan just seven days before a shareholder vote on its continued existence, the BCSC appears to be taking a

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different view of the significance of a shareholder vote to the question of whether a shareholder rights plan should be allowed to continue, noting that:

“Those cases [*Neo* and *Pulse*] may be distinguishable on the facts, but we also have reservations about them. Our reservations centre around their apparent departure from the Canadian securities regulators’ view of public interest as it relates to [shareholder rights plans] prior to those decisions.”

While all of these decisions were predicated on the principle that the shareholders should decide on a bid, the key difference appears to be whether it should be the decision of the majority of the shareholders, collectively, or of the individual shareholder that should be protected.

The BCSC also considered whether the Icahn bid (initially structured as a partial bid, but later varied to bid for all shares with a minimum tender threshold of 50.1% - taking into account the 19% Icahn already owned) was coercive, on the basis that shareholders might feel forced to accept the bid rather than be left as part of a shareholder minority. In dismissing this concern, the BCSC noted that under the terms of the Icahn bid, if the minimum tender condition is satisfied, there will be an extension of the offer for a further 10 business days so that those shareholders who rejected the offer can have the opportunity to tender their shares if they so wish, in light of the new information. Similarly, if Icahn chooses to waive the minimum tender condition, the BCSC noted that this would constitute a variation of the bid, which would trigger both an extension of the bid and withdrawal rights, which would allow both tendering and non-tendering shareholders to reconsider their decision in light of the waiver. The BCSC also stated that:

“Whether a bid is coercive depends on several factors. It is true that eventually, despite the additional extension, a shareholder may have to decide whether to accept the Icahn bid or take the risk of remaining a shareholder. This element is present in many take-over bids, and in our opinion does not, in and of itself, make the Icahn bid coercive.”

The British Columbia Court of Appeal granted leave for Lions Gate to appeal the BCSC decision, but dismissed the appeal on May 7, 2010.

The BCSC’s summary reasons are available [here](#). The full reasons of the BCSC will be released in due course. These full reasons will be carefully scrutinized by market participants to determine whether a divergence has emerged in the treatment of shareholder rights plans between securities commissions in British Columbia, on the one hand, and in Ontario and Alberta, on the other.

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