

BCSC RELEASES REASONS IN LIONS GATE DECISION

*By Michael T. Waters, Paul A.D. Mingay, Nigel P. Cave and
David R. Surat*

On July 27, 2010, the British Columbia Securities Commission released reasons of the majority of the panel supporting its April 27, 2010, decision to cease-trade the Lions Gate shareholder rights plan. In its reasons the BCSC held that:

- A shareholder rights plan will only be tolerated where the plan provides a target board of directors with additional time to seek an improved or alternative transaction. Otherwise, there is no basis for allowing a shareholder rights plan to continue.
- It is in the public interest that each shareholder of a target company ultimately be given the opportunity to decide whether or not to accept or reject a bid, notwithstanding the conclusions of a target company's board of directors, or the views of a majority of the target company's shareholders. In other words, the BCSC is of the view that a plan may not be used as a "just say no" defence to a take-over bid.

The reasons of the final Commissioner who concurred in the result will be released at a future date. In our May 2010 Mergers & Acquisitions Alert (available [here](#)) we noted the BCSC's reservations regarding the Alberta Securities Commission's 2007 decision in *Pulse Data Inc.* and the Ontario Securities Commission's 2009 decision in *Neo Material Technologies Inc.* With the benefit of the BCSC's majority reasons, it is now clear that a divide has emerged in the interpretative approaches adopted by the BCSC, on the one hand, and the ASC and OSC, on the other, in their treatment of shareholder rights plans and their interpretation of National Policy 62-202 *Take-Over Bids – Defensive Tactics*. This split could have significant consequences for British Columbia issuers faced with a hostile bid.

BCSC RELEASES REASONS IN LIONS GATE DECISION

The split with Alberta and Ontario

In *Pulse* and *Neo*, the ASC and OSC held that, in appropriate circumstances, Canadian securities regulators ought to defer to a target board's decision to leave a shareholder rights plan in place in the face of a hostile bid. Both decisions were driven by unique circumstances.

In both cases, the rights plans were "tactical" rights plans, adopted by the target board after the announcement of the hostile bid. Tactical rights plans have historically faced intense scrutiny from Canadian regulators, however, in both cases the target boards had sought, and secured, shareholder approval of the rights plans before the rights plan hearing. This was the critical factor for both panels. In the end, both panels stated that they were reluctant to interfere with the decision of a target board where the decision reflected the board's reasonable business judgement in its attempt to fulfil its fiduciary duty, and where the decision to maintain the shareholder rights plan had very recently been approved by informed shareholders.

Following the example of the *Pulse* and *Neo* target boards, the Lions Gate board adopted a tactical shareholder rights plan ten days after the Icahn take-over bid, and called a shareholders' meeting for May 4, 2010, to seek shareholder approval. Icahn subsequently varied its bid, increasing the offering price, converting the bid to an all share bid, and extending the expiry date of the bid to April 30, 2010, just four days before the Lions Gate shareholders' meeting.

At the hearing, Lions Gate argued that the *Pulse* and *Neo* decisions supported their position that recent, informed shareholder approval was a relevant consideration, and that the BCSC ought not consider cease trading the Lions Gate shareholder rights plan until shareholders had the opportunity to express their views at the meeting. The BCSC was unmoved and immediately cease traded the Lions Gate rights plan.

Protecting the bona fide interests of shareholders

National Policy 62-202 states that the primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the *bona fide* interests of the shareholders of the target company.

The BCSC adopted the view, articulated in some of the earliest shareholder rights plan decisions, that the public interest lies in upholding the rights of individual shareholders of a target company to exercise one of the fundamental rights of share ownership – the ability to dispose of shares as one wishes. The BCSC found that the continued operation of the Lions Gate shareholder rights plan would deny Lions Gate

BCSC RELEASES REASONS IN LIONS GATE DECISION

shareholders the opportunity to respond to the Icahn bid. In the absence of any attempt by the target board to seek improved or alternative transactions, there was no basis to interfere with each shareholder's right to decide whether to tender to the bid. Accordingly, the plan was cease traded.

Both the ASC and OSC concluded that their public interest jurisdiction required them to consider the interests of target shareholders as a whole, as well as the rights of individual shareholders. In *Pulse*, the ASC found that recent and informed target shareholder approval, given the absence of imminent alternatives to the offer in question, demonstrated that the continuation of the target rights plan was in the *bona fide* interests of the target shareholders. Noting that the Canadian take-over bid regime and National Policy 62-202 are both premised on the concept that an individual's rights of share ownership are subject to reasonable restrictions, the OSC adopted similar reasoning in *Neo*.

The BCSC acknowledged that shareholder approval of a rights plan could be relevant to the Commission's determination of whether it was time for a rights plan to go. For example, a rights plan without shareholder approval will generally be suspect. Further, a negative vote by shareholders may lead a commission to cease to trade the plan even in circumstances where it would otherwise be prepared to give the board additional time. However, in circumstances where the board is not actively seeking alternatives, there is no legitimate purpose for a rights plan and shareholder approval is not relevant.

Reconciling National Policy 62-202 with a target board's fiduciary duty

National Policy 62-202 has been in force since 1997, and continues the policy stated in its predecessor, National Policy 38, adopted in 1986. The policy codifies the view that unrestricted auctions produce the most desirable results in take-over bids, and that defensive tactics may be taken by a target board in a genuine attempt to obtain a better bid.

This policy has been criticized by commentators who suggest that the regulators should allow target boards more leeway to defend against a bid where they consider that it is not in the best interests of the corporation.

In contrast to the more traditional approach adopted by the BCSC, both the ASC and OSC were prepared to defer to the target board where the decision to implement a shareholder rights plan in the face of a hostile bid reflected the reasonable business judgement of a target board in its attempt to fulfil its fiduciary duty.

In reaching its conclusion in *Neo* the OSC relied on the Supreme Court of Canada's clarification of a board's fiduciary duty in the *BCE* decision. While acknowledging that, in many instances, a primary

BCSC RELEASES REASONS IN LIONS GATE DECISION

purpose for adopting a shareholder rights plan is to allow the target board to pursue alternative value-enhancing transactions, the OSC held that this is *not* the only legitimate purpose for a shareholder rights plan. Instead, citing the Supreme Court's statements in *BCE*, and the established body of corporate case law on the subject, the OSC held that a shareholder rights plan may be adopted for the broader purpose of protecting the long-term interests of shareholders, where, in the directors' reasonable business judgement, the implementation of a rights plan would be in the best interests of the corporation and shareholders as a whole.

The BCSC held that, whatever doubt there may be in the interpretation of National Policy 62-202, the body of decisions by Canadian securities commissions makes clear that the *only* reason a Canadian securities regulator will tolerate a shareholder rights plan is to give the target company board time to discharge its fiduciary duty; and the focus of that duty is to improve the existing bid, or to find a better one. Whether a target board complies with its broader duty to act in the best interests of the corporation is at best a "neutral factor". "Proper behaviour is expected; behaving properly is therefore not a factor of allowing a [shareholder rights plan] to continue." In effect, the BCSC is saying that directors are expected to fulfill their fiduciary duty, but a shareholders rights plan is not a tool that is available to them, as a matter of securities law, unless they are actively seeking improved or alternative bids.

Consequences for future decisions

In each of the *Pulse*, *Neo* and *Lions Gate* decisions, the target board of directors expressed concern that the bid in question could be used to facilitate a "creeping take-over" of the target company. Faced with the very real possibility of creeping take-over bids, both the ASC and OSC held it was appropriate to defer to a target board's decision to leave a shareholder rights plan in place in the face of a hostile bid where this decision was supported by recent, informed shareholder ratification. In appropriate circumstances, this approach allows target boards in these jurisdictions to mount a successful defence against a creeping take-over bid.

The BCSC's decision in *Lions Gate* suggests that this mechanism is not available to British Columbia issuers or their shareholders.

These two approaches appear to be at odds. In view of the uncertainty, it appears likely that target boards will continue to put tactical shareholder rights plans to a shareholder vote if the opportunity arises. It will be interesting to see whether Commission staff and adjudicative panels in the future are persuaded to continue to develop the more deferential approach suggested by the *Pulse* and *Neo* decisions or accept the more traditional view articulated by the BCSC in *Lions Gate*. We have yet to see the minority reasons in *Lions Gate*, but it seems likely that they will provide an additional dimension to this debate.

THE BCSC'S LIONS GATE DECISION

The Canadian securities regulators have expressed reservations about setting policy through adjudicative decisions. If the law in this area continues to diverge, it may lead to public consultations or a revisiting of National Policy 62-202.

The BCSC's majority reasons are available on its website.

If you would like more information about this decision, please contact the authors, or your usual lawyer in **BLG's Mergers & Acquisitions Group**.

BLG's Mergers & Acquisitions Group Leaders are:

National Leaders

Paul A.D. Mingay

Toronto – 416 367-6006

pmingay@blgcanada.com

Robert R. Shouldice

Vancouver – 604 640-4145

rshouldice@blgcanada.com

We publish Alerts from time to time on matters of interest to our clients. If you did not receive this Alert directly, please contact us by calling 1-877-BLG-LAW1 or emailing subscriptions@blgcanada.com and we will add you to our mailing list for future Alerts.

If you received this Alert in error, or if you do not wish to receive further Alerts, you may also ask to have your contact information removed from our mailing lists. This Alert has been sent to you courtesy of Borden Ladner Gervais LLP. We respect your privacy and wish to point out that our privacy policy relative to our publications may be found at <http://www.blgcanada.com/home/website-electronic-privacy>.

© 2010 Borden Ladner Gervais LLP

BORDEN LADNER GERVAIS LLP

Borden Ladner Gervais LLP
Lawyers • Patent &
Trade-mark Agents

Calgary

1000 Canterra Tower
400 Third Avenue S.W.
Calgary, Alberta, Canada
T2P 4H2
tel: 403 232-9500
fax: 403 266-1395

Montréal

1000 de La Gauchetière
Street West
Suite 900, Montréal,
Québec, Canada H3B 5H4
tel: 514 879-1212
fax: 514 954-1905

Ottawa

World Exchange Plaza
100 Queen St., Suite 1100
Ottawa, Ontario, Canada
K1P 1J9
tel: 613 237-5160
1-800-661-4237
legal fax: 613 230-8842
IP fax: 613 787-3558

Toronto

Scotia Plaza,
40 King Street West
Toronto, Ontario, Canada
M5H 3Y4
tel: 416 367-6000
fax: 416 367-6749

Vancouver

1200 Waterfront Centre
200 Burrard Street,
P.O. Box 48600
Vancouver, British Columbia,
Canada V7X 1T2
tel: 604 687-5744
fax: 604 687-1415

Waterloo Region

Waterloo City Centre
100 Regina Street South,
Suite 220
Waterloo Ontario N2J 4P9
tel: 519 579-5600
fax: 519 579-2725
IP fax: 519 741-9149

www.blgcanada.com

Borden Ladner Gervais LLP
is an Ontario Limited
Liability Partnership