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Stornoway Diamond Corporation
Ashton Mining of Canada Inc.
Ashton Canada Pty Limited
and
QIT-Fer et Titane Inc.

Sections 114(1), 114(2) and 161(1) of the *Securities Act*, RSBC 1996, c. 418

Application

Panel	Brent W. Aitken	Vice Chair
	Neil Alexander	Commissioner
	David J. Smith	Commissioner
Date of Application	September 6, 2006	
Date of Decision	September 6, 2006	
Date Reasons Issued	September 11, 2006	

Appearing

Gerald W. Ghikas, QC Robert Dawkins Fred R. Pletcher	For Ashton Mining of Canada Inc.
William C. Kaplan, QC Geoffrey S. Belsher Patricia Taylor	For Stornoway Diamond Corporation
Mendy Chernos Owen A. Johnson Robert W. Cooper	For Ashton Canada Pty Limited and QIT-Fer et Titane Inc.
Denise Duifhuis Peter Brady	For the Executive Director

Reasons for Decision

Introduction

¶ 1 This was an application by Ashton Mining of Canada Inc. for orders under sections 114(1), 114(2) and 161(1) of the *Securities Act*, RSBC 1996, c. 418. The effect of the orders, if granted, would have been to prevent Stornoway Diamond Corporation from taking up and paying for shares of Ashton tendered by Ashton's majority shareholder under a lock-up agreement between the shareholder and Stornoway in connection with Stornoway's take over bid for Ashton. The orders would also have required Stornoway to extend its offer to a date 35 days after the lockup agreement was amended in the manner requested by Ashton.

¶ 2 In the hearing we gave an oral decision dismissing the application, with reasons to follow. These are the reasons.

The Parties

Stornoway

¶ 3 Stornoway is a Canadian diamond exploration company whose shares are listed on the Toronto Stock Exchange. Its market capitalization is roughly $100 million. Stornoway had a net loss of about $1.8 million in its most recently completed financial year. It is a British Columbia company and its head office is in Vancouver. It is a reporting issuer in several Canadian jurisdictions, including British Columbia.

Ashton

¶ 4 Ashton is a Canadian diamond exploration company whose shares are listed on the Toronto Stock Exchange. It has about 95 million shares outstanding and its market capitalization is roughly $100 million. Ashton had a net loss of about $10.3 million in its most recently completed financial year. It is incorporated under the federal laws of Canada and its head office is in North Vancouver. It is a reporting issuer in several Canadian jurisdictions, including British Columbia.

Rio Tinto

¶ 5 Ashton Canada Pty Limited and QIT-Fer et Titane Inc. are subsidiaries of a group of companies known as the Rio Tinto group. These subsidiaries hold Rio Tinto's beneficial interest in about 52% of the Ashton common shares. We refer to these subsidiaries and their parent as Rio Tinto.

¶ 6 Rio Tinto is a large international mining concern with a market capitalization at the end of 2005 of about US$72 billion. Its profits in 2005 exceeded US$5 billion.

Background

¶ 7 Rio Tinto acquired its 52% interest in Ashton through its acquisition of another company in 2000. The Ashton stake was of no interest to Rio Tinto; it was incidental to the acquisition. Over the past 5 or 6 years since acquiring the Ashton stake Rio Tinto has made substantial efforts to identify opportunities to sell it. However, although it engaged a major Canadian investment bank to locate potential buyers and had tentative discussions with numerous parties, Rio Tinto received no firm offers to buy the stake until the Stornoway offer.

¶ 8 During the same period, no offer was made, or received by Ashton management, for the Ashton shares not owned by Rio Tinto.

¶ 9 Stornoway and Rio Tinto had discussions about the acquisition on and off for about 2 years and in July of this year reached agreement. Stornoway's offer was structured as a take over bid so that it could acquire, in addition to Rio Tinto's interest, all of the outstanding shares of Ashton not owned by Rio Tinto. It is not disputed that Stornoway's acquisition of Rio Tinto's Ashton stake would have come within the private exemption (section 98(1)(c)) from the take over bid requirements. According to Stephen Scott, Rio Tinto's General Manager Commercial, Rio Tinto's sole objective was to sell its interest, but it was amenable to a transaction in which Stornoway acquired its interest in Ashton in conjunction with a take over bid for the whole company.

¶ 10 On July 21 Stornoway and Rio Tinto entered into a lock-up agreement under which Rio Tinto promised to tender its Ashton shares into Stornoway's take over bid for all the shares of Ashton.

¶ 11 A lock-up agreement is a common and legitimate mechanism used by offerors in take over bids to ensure holders of significant blocks of stock will tender their shares into the bid, thus helping to ensure the success of the bid. In the jargon of the industry, lock-up agreements can be "soft" or "hard". In a soft lock-up agreement, the significant shareholder agrees to tender its shares into the bid, but reserves the right to tender its shares into a higher-priced bid should one come along during the time the original bid is in play. In a hard lock-up agreement, the shareholder commits to tender its shares into the bid no matter what. The lock-up agreement between Stornoway and Rio Tinto is a hard lock-up agreement.

¶ 12 When the lock-up agreement was signed, one of its terms was that if Stornoway abandoned its bid for Ashton, it could be required to pay $2 million to Rio Tinto. For convenience we refer to this as the penalty provision. Stornoway and Rio Tinto later amended this provision to provide that if the penalty were to become payable, the $2 million would be paid pro rata to all of the Ashton shareholders.

¶ 13 Because the transaction was structured as a take over bid, Stornoway included in the lock-up agreement and the bid a number of conditions, some of which permitted it to exercise its reasonable judgment in determining whether it would make sense to proceed with the bid. Rio Tinto wanted to protect itself against the risk of any capricious exercise of judgment by Stornoway that would imperil completion of its acquisition of Rio Tinto's Ashton shares. Scott's evidence was that Rio Tinto wanted a mechanism in the deal with Stornoway that would act as a disincentive against Stornoway abandoning its bid. In his words, he wanted to "hold Stornoway's feet to the fire."

¶ 14 To meet this request, Stornoway proposed the $2 million penalty. Scott said that Rio Tinto had no objection to amending the lock-up agreement so that the $2 million penalty, if triggered, would be paid to all of the Ashton shareholders rather than to Rio Tinto alone. He said that regardless of the payee, the obligation to pay would still operate as the disincentive that Rio Tinto was seeking. This stands to reason, given that $2 million is not a material sum to a company the size of Rio Tinto. The $2 million is, however, a material sum to Stornoway.

¶ 15 On August 10 Stornoway made a take over bid to the shareholders of Ashton to purchase all of Ashton's outstanding common shares. The offer's expiry date was September 15 although this was later varied as described below and the offer now expires on September 18.

¶ 16 Each shareholder accepting the offer can elect to receive, for each share of Ashton, either $1.25 per share in cash, or one common share of Stornoway and one cent in cash. The offer is subject to a maximum cash payout of $59.5 million (enough to pay for about half of the outstanding Ashton shares), so if more shareholders elect the cash-only alternative than can be funded by the $59.5 million, the $59.5 million will be pro-rated among all shareholders accepting the offer, the balance of the purchase price to be made up with Stornoway shares. It is likely that the cash will be pro-rated as Rio Tinto has indicated its intention to elect the cash-only alternative.

¶ 17 Stornoway's take over bid does not have the support of Ashton's management.

¶ 18 Faced with the take over bid, Ashton's board of directors formed a committee of its independent directors and on August 22 the Ashton directors issued a directors' circular recommending to Ashton's shareholders that they reject the Stornoway bid and not tender their shares. The directors' circular cites various reasons, including that the consideration in the offer is inadequate (the circular includes an opinion from a financial advisor to that effect), that Ashton shareholders would suffer dilution, that the lock-up agreement is improper, and that the board is pursuing alternative offers.

The Application

¶ 19 On August 22, Ashton made this application (before Stornoway and Rio Tinto amended the lock-up agreement to provide that the $2 million penalty would be paid pro rata to all Ashton shareholders). It sought an order cease-trading the Ashton shares that Rio Tinto had committed to tender to Stornoway under the take over bid, and an order that the offer be extended to a date 35 days after the date that Stornoway and Rio Tinto amended the terms of the lock-up agreement to make it a soft lock-up agreement.

¶ 20 Ashton's application was based on the grounds that the lock-up agreement was in contravention of the identical consideration requirement in section 107(1) of the Act, and the prohibition against what are known colloquially as collateral benefits, in section 107(2).

¶ 21 In its submissions, Ashton added the ground that the bid was in contravention of the identical bid requirement in section 105(a).

Variation of the Offer

¶ 22 On September 1 Stornoway and Rio Tinto amended the lock-up agreement to provide for payment of the $2 million penalty, if triggered, to all Ashton shareholders and informed the other parties of the amendment. On September 5 Stornoway varied its offer to reflect the amended lock-up agreement and to extend the expiry date of the offer to September 18.

The Hearing

¶ 23 The parties filed affidavit evidence and submissions with the Commission prior to the hearing, including supplementary affidavit evidence and submissions arising from the variation of the offer. The panel had the opportunity to read the submissions prior to the hearing and so advised the parties at the outset of the hearing. We then invited Ashton to argue its application, which Ashton did, including a short cross-examination of Scott on his affidavit.

¶ 24 After Ashton completed its oral argument, we took a recess and deliberated the application in light of the evidence and submissions and Ashton's oral argument. We concluded that it would not be in the public interest to make any orders in the matter. We therefore did not need to hear oral argument from the other parties. When the hearing reconvened we informed the parties of our decision and dismissed the application.

Arguments of the parties

Ashton

¶ 25 Ashton says, in essence, that the amended lock-up agreement changes nothing, because:

1. The original lock-up agreement was in contravention of sections 107(1) and (2), and the bid was in contravention of section 105(a), and these contraventions were not cured by the amended lock-up agreement, because
   - Stornoway obtained an advantage through the contraventions
   - the amendment does not restore the balance of competing interests that existed before the original lock-up agreement was made
   - it would be contrary to the public interest to signal to the markets that Stornoway's conduct in contravening the legislation and then attempting to remedy that after the fact was acceptable.

2. The amended lock-up agreement is still in contravention of sections 107(1) and (2) because it is enforceable only by Rio Tinto, not the other shareholders of Ashton.

3. The bid is still in contravention of section 105(a).

4. It would be contrary to the public interest to allow Stornoway to take up the Ashton shares tendered by Rio Tinto under the amended lock-up agreement because it would violate the principle of equal treatment of all target shareholders in a take over bid, and the principle of promoting an open, uninhibited and even-handed auction environment for take over bids.

¶ 26 Ashton wanted us to make orders to prevent Stornoway from taking up and paying for the Ashton shares tendered by Rio Tinto under the bid until Stornoway and Rio Tinto further amend the lock-up agreement to turn it into a soft lock-up, and to require Stornoway to extend the expiry date of its bid to a date 35 days after that amendment is made.

Stornoway and Rio Tinto

¶ 27 Stornoway and Rio Tinto opposed the application because:

1. The original lock-up agreement was not in contravention of the Act, and neither is the amended lock-up agreement.

2. The bid is not in contravention of section 105(a).

3. The amended lock-up agreement is in the public interest because it benefits all of the Ashton shareholders.

¶ 28 They asked us to dismiss the application.

The Executive Director

¶ 29 The Executive Director recommended that we dismiss the application, because:

1. Whatever issue there may have been about whether the original lock-up agreement was in contravention of the Act, the amended lock-up agreement is not in contravention of sections 107(1) or (2).

2. The bid is not in contravention of section 105(a).

3. In these circumstances, the amended lock-up agreement is not contrary to the public interest.

Analysis

¶ 30 The reasons for our decision to dismiss the application is found in our answers to these questions:

1. Was the original lock-up agreement in contravention of section 107(1)? Is the amended lock-up agreement in contravention of that section?
2. Was the original lock-up agreement in contravention of section 107(2)? Is the amended lock-up agreement in contravention of that section?
3. Is the bid in contravention of section 105(a)?
4. Does it matter now whether the original lock-up agreement was in contravention of sections 107(1) or (2), or whether the bid was in contravention of section 105(a)?
5. Is the amended lock-up agreement contrary to the public interest in the circumstances of this case?

1. Was the original lock-up agreement in contravention of section 107(1)? Is the amended lock-up agreement in contravention of that section?

¶ 31 Section 107(1) says:

> 107 (1) Subject to the regulations, if a take over bid or issuer bid is made, all holders of the same class of securities must be offered identical consideration.

¶ 32 Under this section, Stornoway was required to offer, *in the bid*, identical consideration to all Ashton shareholders. This section was not relevant to the original lock-up agreement, because that lock-up agreement was not part of the bid. The section relevant to the original lock-up agreement was section 107(2), discussed below.

¶ 33 We therefore find that the original lock-up agreement was not in contravention of section 107(1).

¶ 34 However, after the bid was varied to reflect the amendment, the penalty provisions of the amended lock-up agreement became, for all practical purposes, a term of the bid. Even at that, in our opinion section 107(1) does not apply. The section refers to "consideration", which in the context of the Act means the consideration the shareholder is to receive upon tendering shares into the bid. Because the penalty under the amended lock-up agreement is payable only if Stornoway fails to take up and pay for the shares, the amount paid under the penalty provision is not "consideration" within the meaning of section 107(1). Therefore, the section does not apply.

¶ 35 Ashton attempted to draw a distinction between the consideration offered and the consideration received for the tender of shares under a bid. In our opinion, there can be no distinction between the two. In *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge and Co. Ltd.,* [1915] AC 847 (HL) at 855, the court defined consideration as "the price for which the promise of the other is bought." Therefore, by definition, whatever consideration is offered must, if the transaction is completed, be the consideration that is received by the other party.

¶ 36 This is supported from a policy perspective by the authorities. In *Re CDC Life Sciences Inc., Caisse de depot et placement du Quebec and Institut Merieux SA* [1998] LNONOSC 300 (QL) at page 3, the Ontario Securities Commission said that the take over bid provisions of the securities legislation are designed:

> . . . to ensure that holders of publicly traded securities are treated equally by persons who *purchase* large numbers of securities, whether from a controlling person, from selected numbers of significant blocks, or from securities generally [emphasis added]

¶ 37 It is clear that the issue is the consideration paid if the offer is completed.

¶ 38 Whatever doubt there may be about that interpretation of section 107(1), as a result of the variation to the bid that reflects the amended lock-up agreement, the bid is now in compliance with the section. As a result of the variation, all Ashton shareholders are now entitled to a pro rata share of the penalty if it is triggered under the amended lock-up agreement. Ashton apparently agrees with this proposition, for its submissions state the following (at paragraph 82 of its August 26 submissions):

> For the Stornoway Offer to provide identical consideration to that given to the Rio Tinto Subsidiaries, each Ashton minority shareholder would have

> to be promised a proportionate [share of the penalty in the lock-up agreement] in the event the Stornoway Offer is terminated, withdrawn, or expires without any Ashton Shares having been taken up or paid for. . . .

¶ 39 This is, of course, exactly what the variation does.

¶ 40 Ashton says the consideration is not the same because only Rio Tinto is a party to the agreement and can trigger the penalty. The other shareholders do not have the same right, it says, because they are not parties to the agreement. Ashton pointed out that the amended lock-up agreement does not require Rio Tinto to collect the penalty, it only provides it the right to collect it.

¶ 41 We do not agree with this argument. The variation of the bid to reflect the payment of the penalty to all Ashton shareholders makes the obligation to pay the penalty, if it is triggered under the amended lock-up agreement, part of the bid. Regardless of what Rio Tinto decides to do in the event that it has the right to trigger the penalty, all shareholders of Ashton will be treated the same. If Rio Tinto decides to trigger the penalty, all shareholders will share it (even those who did not tender their shares!). If Rio Tinto decides not to trigger it, no one gets it. Even if section 107(1) does apply, who triggers the penalty is not relevant to the application of the section. What is relevant is whether, once the penalty is triggered, all shareholders are treated equally. Under the bid as now structured, they are.

¶ 42 We therefore find that the amended lock-up agreement and the bid are not in contravention of section 107(1).

2. Was the original lock-up agreement in contravention of section 107(2)? Is the amended lock-up agreement in contravention of that section?

¶ 43 Section 107(2) says:

> 107 (2) If an offeror makes or intends to make a take over bid or issuer bid, the offeror or any person acting jointly or in concert with the offeror must not enter into any collateral agreement, commitment or understanding with any holder or beneficial owner of securities of the offeree issuer that has the effect of providing to the holder or owner a consideration of greater value than that offered to the other holders of the same class of securities.

¶ 44 Section 107(2) is the companion to section 107(1). Section 107(1) ensures that the terms of the bid offer identical consideration to all shareholders. Section 107(2) makes sure there are no side deals that would defeat the intent of section

107(1). It does this by focusing on what consideration the agreement "provides" to the selling party under the collateral agreement.

¶ 45 An agreement could provide the consideration when the agreement is made, when the selling party's shares are tendered, or at some later time. However, whenever it is provided, the consideration must be connected to the ultimate acquisition of the shares by the offeror.

¶ 46 This is consistent with our discussion about section 107(1). Like section 107(1), section 107(2) refers to "consideration" which, as we noted above, in the context of the Act means the consideration the shareholder is to receive upon tendering shares into the bid. Because the penalty under the original lock-up agreement is payable only if Stornoway fails to take up and pay for the shares, any amount paid under the penalty is not "consideration" or "enhanced consideration" because in those circumstances Rio Tinto's Ashton shares will not be acquired by Stornoway. Therefore, the section does not apply.

¶ 47 We therefore find that the original lock-up agreement was not in contravention of section 107(2).

¶ 48 Even if this is incorrect and section 107(2) did apply, the bid now complies with the section for the same reasons it complies with section 107(1) were that section to apply: all shareholders will share in whatever benefit flows from penalty provisions of the amended lock-up agreement. The reasoning we applied to section 107(1) applies equally here.

¶ 49 We therefore find that the amended lock-up agreement and the bid, are not in contravention of section 107(2).

3. Is the bid in contravention of section 105(a)?

¶ 50 Section 105(a) says:

> 105 Subject to the regulations, the following requirements apply to every take over bid and issuer bid:
>
> (a) *Delivery of bid.* – The bid must be made to all holders of securities of the class that is subject to the bid who are in British Columbia, and delivered by the offeror to all holders in British Columbia of securities of that class and of securities that, before the expiry of the bid, are convertible into securities of that class;

¶ 51 There is no basis to argue that the bid is in contravention of this section. There was, and is, only one bid – the offer dated August 10 as varied on September 5.

The original lock-up agreement was a collateral agreement to that bid. To the extent that the penalty provisions of the amended lock-up agreement are now part of the bid as a result of the variation, there is still only one bid.

¶ 52 We therefore find that the bid is not in contravention of section 105(a) and never has been.

4. Does it matter whether the original lock-up agreement was in contravention of sections 107(1) or (2), or whether the bid was in contravention of section 105(a)?

¶ 53 We have found that the original lock-up agreement was not in contravention of section 107(1) or (2), nor is the amended lock-up agreement in contravention of either of those sections. We have also found that the bid was never in contravention of section 105(a). This question is therefore moot.

¶ 54 However, even if the original lock-up agreement was in contravention of section 107(1) or (2), or the bid in contravention of section 105(a), does it matter?

¶ 55 Ashton stressed the point that it would send the wrong message to market participants to allow Stornoway to contravene the legislation, derive an advantage from that contravention, and then purport to bring itself into compliance by varying its offer.

¶ 56 In considering that argument, it is important to consider what is before us. This was not an enforcement hearing – it was a hearing in which Ashton was asking us to exercise our powers in the public interest to coerce Stornoway and Rio Tinto to further amend the lock-up agreement.

¶ 57 This is an important distinction. Although our task required us to decide whether there had been contraventions, it was not to consider the kinds of factors, cited by Ashton in its submissions, that a panel in an enforcement hearing might consider if it found contraventions. Instead, we had to decide, if there were contraventions, whether Stornoway had derived any unfair advantage as a result. Then we had to reach a decision that was fair (not just to Ashton's minority shareholders, but to Stornoway and Rio Tinto as well), practical, and reasonable in the circumstances.

¶ 58 This is supported by *Royal Trustco Ltd. v. Campeau Corp (No. 2)* (1980), 11 BLR 298, where the Ontario Securities Commission considered the appropriate remedy, given an apparent contravention of the section under the Ontario Securities Act equivalent to section 107, to be an amendment of the collateral agreement so that it was no longer in contravention of the section.

¶ 59 We have found that Stornoway did not contravene the Act, but even if its conduct did amount to a contravention of the Act, in our opinion it derived no advantage from the contravention. Ashton's main argument on this point is that by contravening section 107, it was able to induce Rio Tinto to enter the lock up agreement, thereby giving it the advantage of a hard lock-up.

¶ 60 We do not agree. The evidence is clear that the penalty was not an inducement to Rio Tinto to sell its shares to Stornoway. Although it did not object to selling its interest as part of Stornoway's acquisition of all of the Ashton shares, it would have been quite happy to do so as a private transaction. The penalty was not a demand from Rio Tinto. All it was seeking was a means of "holding Stornoway's feet to the fire". The penalty provision was the mechanism that Stornoway suggested, and Rio Tinto agreed.

¶ 61 Ashton's other arguments in support of their assertion that Stornoway gained an advantage are speculative and not supported by any evidence. We do not find them persuasive.

5. Is the amended lock-up agreement contrary to the public interest in the circumstances of this case?

¶ 62 All of Ashton's public interest arguments are rooted in its argument that the original lock-up agreement was, and the amended lock-up agreement is, in contravention of the Act. Our finding there were no such contraventions therefore in essence disposes of its public interest arguments as well. That said, these are our comments on Ashton's public interest arguments.

¶ 63 It is worth noting that the public interest considerations would be relevant only to our power to make a cease trade order under section 161(1). They would not be relevant to the exercise of our powers under section 114(1), because our jurisdiction under that section is based on contraventions of the Act, and we have found none.

¶ 64 Ashton cited National Policy 62-202 *Take Over Bids – Defensive Tactics* as authority for the proposition that securities laws in Canada embody the principle of equal treatment of securityholders of a target company. This is trite principle, but beyond that the policy has little application in this case because its purpose is to provide guidance to target companies as to appropriate conduct in the defence of a take over bid. It has little light to shed on this case, where the conduct of the offeror is at issue.

¶ 65 More instructive, we think, is *Re Canadian Tire Corp* (1987), 10 OSCB 2184, followed in *Re Canfor Corp.* (1995), 18 OSCB 475.

¶ 66 In *Canadian Tire*, the Ontario Securities Commission said:

> Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the commission took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its view of fairness . . .
>
> . . . To invoke the public interest test of section [161], particularly in the absence of a demonstrated breach of the Act . . . the conduct or transaction must be clearly demonstrated to be abusive of the shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. . . .
>
> . . . absent a breach of the Act . . . the [commission] should not normally exercise its cease trade power in a case of this sort unless [it] first finds that there has been something abusive of investors or the capital markets in the transaction . . . "

¶ 67 As Ashton clearly acknowledged in its submissions, there is nothing illegal, or even improper, about lock-up agreements, including hard lock-up agreements. In our opinion, there is nothing unfair, never mind abusive, about the amended lock-up agreement that would justify our exercising our public interest powers to intervene.

¶ 68 These are the factors that lead us to that conclusion.

1. Stornoway could have purchased Rio Tinto's stake in Ashton privately. However, it chose to purchase the stake in connection with a bid for all of Ashton's shares. This provides Ashton shareholders with the opportunity to decide whether or not to accept that offer. We have to be mindful of the reality that one potential result of issuing the orders Ashton seeks would be to lead Stornoway and Rio Tinto to conclude that the broader offer is no longer attractive in its present form, and it would be preferable for Stornoway to withdraw its offer and complete the acquisition of the Ashton stake separately. This would deny the other Ashton shareholders of the opportunity to make their own decision about whether to tender into the offer.

2. Ashton argued that the consideration offered was too low, and so the amended lock-up agreement should be turned into a soft lock-up and the offer extended another 35 days to allow better offers to emerge. On the face of it, this is a seductive suggestion. Why not ease Stornoway's grip on Rio Tinto's Ashton shares and give Ashton more time to come up with a competing offer? After

all, if the offer is better, Rio Tinto will benefit, along with the other Ashton shareholders.

The problem is that there is no evidence that anyone would be interested in bidding for Ashton, even if the lock-up were softened. In fact, the evidence appears to support the opposite conclusion. It took Rio Tinto almost 6 years to find a buyer for its stake (at a price, if you believe Ashton, that is grossly inadequate).

In addition, in Ashton's directors' circular dated August 22, the Ashton board says that "alternative transactions are being aggressively pursued to generate greater value for Ashton shareholders". The circular goes on to say that disclosure of any of these alternatives "would jeopardize the continuation or institution of any discussions or negotiations that Ashton *may* conduct" [emphasis added]. The board has, it says, instructed Ashton management not to disclose any details of these alternatives until "required by law".

In these circumstances, there is nothing for us to rely on to take the relatively intrusive step of forcing Stornoway to extend its bid, especially since the extension could put the current offer at risk. Adding time to transactions generally adds risk. In a longer time frame there is more opportunity for negative factors to arise. All kinds of things can happen. For example, perhaps something could happen that would negatively impact Stornoway's ability to take up and pay for the shares. That is but one example of any number of events that could occur during an extension of the offer that could jeopardize the offer to all Ashton shareholders.

An order preventing Stornoway from taking up and paying for the Rio Tinto stake until they further amended the lock-up agreement to turn it into a soft lock-up would be a significant intrusion into those parties' freedom to structure their business affairs as they see fit. An intrusion, in our opinion, that would be completely unwarranted in circumstances where there is no reason to believe a competing bid will surface. As the Ontario Securities Commission said in *Re Tarxien Corp.* (1996) 19 OSCB 6913 at para. 30:

> . . . we are reluctant to interfere with private contracts . . . . The provisions of the Act prevent shareholders who enter into lock-up and similar agreements from receiving greater consideration per share than to other shareholders. Otherwise, significant shareholders are as entitled as any other shareholder to look into their own interest in deciding which, if any, offer to accept.

3. Under the terms of the amended lock-up agreement, Rio Tinto must tender its Ashton shares into the bid, but there is nothing compelling the other Ashton shareholders to tender theirs. Indeed, the Ashton board has urged them to reject the offer and not tender their shares.

   The Ashton Directors Circular poses the question "What will happen if Stornoway buys more than 50% of the Ashton shares and I don't sell?" and provides this response:

   > **NOTHING.** Ashton currently has a "majority" shareholder – Rio Tinto. Prior to November 2000, Ashton had another "majority" shareholder – Ashton Mining Limited. An acquisition by Stornoway or any other party of greater than 50% of the outstanding voting shares of Ashton will not change the fundamental rights of Ashton Minority Shareholders *or the value of their Ashton shares*. . . . [emphasis added]

4. The original lock-up agreement benefited all Ashton shareholders by "holding Stornoway's feet to the fire" as Rio Tinto intended. They still enjoy this benefit, plus the benefit of sharing in the penalty if it is triggered.

¶ 69 In support of its submissions, Ashton referred us to the decision of the Ontario Securities Commission, *In the Matter of Sears Canada Inc., Sears Holding Corporation, and SHLD Acquisition Corp. et al* (8 August 2006). In our opinion, this case is distinguishable from *Sears*, for two reasons. First, the Ontario Commission found in *Sears* that the collateral agreements contravened the legislation. In this case, we have not made that finding. Second, the elements of the collateral agreements that led the Ontario Commission to conclude that the *Sears* agreements contravened the legislation were not relevant unless the offeror took up and paid for the shares under the offer. In this case, the penalty is payable only if the offer is *not* completed.

¶ 70 We are therefore of the opinion that the lockup agreement is not, and never has been, contrary to the public interest in the circumstances of this case.

Decision

¶ 71 For these reasons, we dismissed the application.

¶ 72 September 11, 2006

¶ 73 **For the Commission**

Brent W. Aitken
Vice Chair

Neil Alexander
Commissioner

David J. Smith
Commissioner