

2006 BCSECCOM 705

Imperial Metals Corporation, CAT-Gold Corporation, and bcMetals Corporation

Sections 114 and 161 of the *Securities Act*, RSBC 1996, c. 418

Reasons for Decision

Panel	Robin E. Ford John K. Graf Kenneth G. Hanna	Commissioner Commissioner Commissioner
--------------	---	--

Date of hearing November 10, 2006

Date of decision November 10, 2006

Date of reasons December 4, 2006

Appearing

Mark D. Andrews
Andrew I. Nathanson
Tracey M. Cohen
Charlotte P. Bell

For Imperial Metals Corporation and CAT-Gold Corporation

Craig A.B. Ferris
John Smith
Kinji C. Bouchier

For bcMetals Corporation

Peter Brady
Gordon Smith
Pamela Egger

For the Executive Director

Introduction

- ¶ 1 On November 3, 2006, Imperial Metals Corporation and its subsidiary CAT-Gold Corporation (together “Imperial”) applied to the Commission under section 161(1) of the *Securities Act*, RSBC 1996, c.418 for an order to cease trade the shareholder rights plan of bcMetals Corporation so that Imperial could freely take up bcMetals shares under its bid without triggering the rights plan.
- ¶ 2 On November 6, 2006, bcMetals applied to the Commission under section 114 of the Act for an order that Imperial comply with the Act and give holders of bcMetals shares taken up by Imperial the right to withdraw them from the bid.

2006 BCSECCOM 705

- ¶ 3 We held a hearing on November 10, 2006. At the end of the hearing, we ruled that Imperial did not have standing to apply for a cease trade order and we refused bcMetals' application, with reasons to follow. These are our reasons. The legislation we refer to in our reasons is set out in the annex.

Summary of the facts

- ¶ 4 Imperial Metals Corporation is incorporated in British Columbia. Its shares trade on the TSX. It is a reporting issuer under securities legislation in BC, Saskatchewan, Ontario, and Quebec.
- ¶ 5 On September 8, 2006, Imperial issued a news release announcing its intention to make a take over bid for all the outstanding shares of bcMetals Corporation at \$0.95 per share. bcMetals is incorporated in Alberta. Its shares trade on the TSX Venture Exchange. It is a reporting issuer under securities legislation in Alberta, BC, and Ontario.
- ¶ 6 On September 27, 2006, Imperial Metals Corporation (by its subsidiary CAT-Gold Corporation) made a formal bid to purchase the common shares and out-of-the-money warrants of bcMetals. The all-cash bid was to expire at 4:00pm on November 2, 2006.
- ¶ 7 The bid was subject to a number of conditions including the deposit of 90% of bcMetals shares and no adoption of a shareholder rights plan.
- ¶ 8 On October 10, 2006, bcMetals announced the Red Chris transaction, involving the sale of a 75% interest in its Red Chris property to a joint venture with a third party who would finance the development of a copper mine on the property. The Red Chris property was substantially all of bcMetals' assets. Therefore, under Alberta legislation, the transaction was subject to the approval of bcMetals shareholders. To seek such approval, bcMetals called a meeting of shareholders for November 30, 2006.
- ¶ 9 On October 12, 2006, the board of bcMetals mailed its directors' circular recommending that shareholders reject the Imperial bid and instead vote at the shareholders meeting in favour of the Red Chris transaction.
- ¶ 10 On October 19, 2006, bcMetals announced the adoption of a shareholder rights plan. Under the plan, Imperial could not acquire more than 20% of bcMetals shares without triggering the plan, unless it was a permitted bidder. Imperial was not a permitted bidder only because its offer was not open for acceptance for 60 days. The plan was adopted subject to the approval of bcMetals shareholders, and this too was scheduled for the shareholders meeting.

2006 BCSECCOM 705

- ¶ 11 By news release dated October 31, 2006, Imperial announced that it would proceed with its bid. By November 1, holders of about 35% of bcMetals shares had tendered to the bid.
- ¶ 12 On the morning of November 2, 2006, Taseko Mines Limited announced its intention to make a \$1.05 per share take over bid for bcMetals. It said the bid would be subject to a number of conditions including 90% of the shares tendered to its bid, and shareholders' rejection of the rights plan and the Red Chris transaction. After the announcement, shareholders withdrew shares deposited under Imperial's bid, leaving about 10% of bcMetals shares on deposit.
- ¶ 13 Imperial then waived the conditions to the bid. At 3:53pm on November 2, 2006, Imperial notified the depositary that it had waived the conditions and directed the depositary to take up the shares on deposit. After the take up, Imperial extended its bid to November 14, 2006.
- ¶ 14 Imperial filed its notice of variation and extension dated November 2, 2006 on SEDAR and mailed it to bcMetals shareholders whose shares had not been taken up.
- ¶ 15 By news release dated November 3, 2006, Imperial announced that:
- all the conditions of the bid to acquire the shares of bcMetals had been met or waived,
 - Imperial had taken up all the shares tendered under the bid and not withdrawn (and, with shares already acquired on the open market, now held 18.09% of bcMetals shares), and
 - Imperial had extended the bid to November 14, 2006.
- ¶ 16 Imperial announced the termination of its bid by news release dated November 8, 2006 stating:
- Imperial's decision to terminate is attributable to certain risks and uncertainties arising from the enactment by bcMetals of a poison pill shareholder rights plan.
- ¶ 17 On the morning of November 10, 2006, by news release, Taseko announced that:
- ... BCSC will hear Imperial's application on Friday, November 10, 2006, together with the application filed by bcMetals in connection with the take-up of bcMetals shares by Imperial. In the light of uncertainties resulting from this situation as it relates to the conditions cited in Taseko's Nov. 2 press release, Taseko is re-evaluating its options.

2006 BCSECCOM 705

Analysis

Imperial's application

- ¶ 18 Imperial applied for a cease trade order under section 161(1) of the Act. It then terminated its bid for bcMetals. Before hearing submissions on the merits of the application, we asked to hear submissions on whether, in light of the termination, we should hear the application. Both the Executive Director and bcMetals argued that the application had become moot.
- ¶ 19 Imperial argued first that, notwithstanding the termination of its bid, bcMetals remained in play and therefore we should consider whether the rights plan was interfering with the bidding process and should be cease-traded. Second, bcMetals management's preferred transaction, the Red Chris transaction, was scheduled to go to a shareholder vote on November 30, 2006. That transaction, said Imperial, was equivalent to a bid because it was the sale of substantially all of the assets of the company. November 30 was therefore the end date for other bids or options for shareholders to consider.
- ¶ 20 Imperial said that there were three consequences of those two facts (a company in play and a deadline for other options). One was timing sensitivity due to the deadline of November 30. Two, the rights plan was having the effect of discouraging bids. That effect, said Imperial, had already been seen in the termination of Imperial's bid and Taseko's decision to re-evaluate its options. Three, the continued existence of the rights plan was of practical importance to bcMetals shareholders, including Imperial, who were entitled to have other options on or before November 30.
- ¶ 21 The rights plan, said Imperial, would apply to any non-permitted bid to discourage the bid, but it would not apply to management's favoured transaction, Red Chris. So even though both transactions were in substance the sale of the company, one by the sale of shares, the other by the sale of assets, they were being treated unequally because of the continued application of the rights plan.
- ¶ 22 For all these reasons, said Imperial, it was necessary for the Commission to deal with its application to remove uncertainty, to stimulate bids, and to level the playing field between potential bids and the asset sale. Imperial argued that a Commission decision would have real consequences in stimulating an auction to maximize shareholder value before the vote on November 30.

Our conclusions

- ¶ 23 We ruled that, having terminated its bid, Imperial did not have standing to apply for an order under section 161(1) of the Act to cease trade the bcMetals rights plan. A rights plan is activated when a person makes a take over bid that is not

2006 BCSECCOM 705

permitted under the plan. On an application, the question for the Commission is whether the plan has served its purpose (to give the target's directors time to fulfil their duty to maximize shareholder value) and it is therefore time for the plan to go. However, Imperial had terminated its bid and could not say that its interests as a bidder continued to be affected by the rights plan.

- ¶ 24 Nor did Imperial persuade us that its interests as a shareholder were sufficiently affected that we should give it standing.
- ¶ 25 Section 161 provides us with a very wide discretion to act “in the public interest”. We may intervene to “provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment” under National Policy 62-202 *Take-Over Bids – Defensive Tactics*. It will rarely, however, be in the public interest to allow a person who is not making a take over bid to ask the Commission to cease trade a rights plan under section 161(1) of the Act.

bcMetals' application

- ¶ 26 bcMetals applied to the Commission for orders under section 114(1) of the Act:
- restraining Imperial from contravening Part 13 of the Act (Take over bids and issuer bids) by taking up and paying for bcMetals securities that were deposited and not withdrawn before Imperial extended the offer;
 - directing Imperial to deliver to the security holders of bcMetals, who had deposited (and not withdrawn) their securities, notices of change and variation providing the information required under the Act; and
 - directing Imperial to grant rights of withdrawal to bcMetals security holders whose securities had been taken up under Part 13 of the Act.

Section 108(2)

- ¶ 27 bcMetals argued that changes had occurred in the information contained in Imperial's take over bid circular that would reasonably be expected to affect the decision of the holders of bcMetals securities to accept or reject the bid. Accordingly, under section 108(2) of the Act, Imperial should have delivered a notice of change to every person to whom the circular was required to be delivered and whose securities were not taken up at the date of the change. Imperial and the Executive Director disagreed.
- ¶ 28 bcMetals argued that Imperial should have informed shareholders what it intended to do with any shares issued under the rights plan or with respect to any other matter that might flow from triggering the plan. In addition, to waive all the conditions, including the condition that a rights plan would not be adopted, was to fundamentally change the nature of the bid to one limited to the acquisition of

2006 BCSECCOM 705

12% of the shares, due to the rights plan. When it acted in the face of an operative rights plans without taking steps to neutralize it, Imperial's intentions with respect to the rights plan were within its control and this was information 'that would reasonably be expected to affect the decision of the holders of bcMetals securities to accept or reject the bid'.

- ¶ 29 We disagreed. Many public companies in Canada have adopted shareholder rights plans. Many take over bids have been made in the face of these plans. If necessary, the bidder has come to the Commission and asked for an order to cease trade the plan when there are grounds to argue that it is time for the plan to go.
- ¶ 30 With this history in mind, we could not conclude that Imperial's intention was information 'that would reasonably be expected to affect the decision of the holders of bcMetals securities to accept or reject the bid'. We found that Imperial had no obligation under the Act to deliver a notice of change because of the rights plan.

Section 108(4)

- ¶ 31 bcMetals also argued that because, under section 108(4) of the Act, Imperial was required to deliver a notice of variation, the depositing shareholders were entitled to a ten-day withdrawal period under section 105(d)(ii). All the parties had somewhat different submissions on this issue. We do not address each of their submissions here directly, but simply set out the relevant facts and our interpretation of the legislation as it applied to those facts.
- ¶ 32 On November 2, 2006, just before 4pm (the expiry of the bid), Imperial waived all the conditions that had not been met. On the waiver of the conditions, Imperial was required to deliver a notice of variation under section 108(4) to every person to whom the take over bid circular was required to be delivered and whose shares had not been taken up at the date of the variation.
- ¶ 33 The Imperial offer was an all-cash bid. Accordingly, due to section 108(6), the requirement to deliver a notice of variation under section 108(4) did not trigger the requirement in section 108(5) to extend the period for deposit of securities. Under section 108(6), section 108(5) does not apply to a variation consisting solely of the waiver of a condition where the consideration offered for the securities under the bid is all cash.
- ¶ 34 Under section 105(c) of the Act, Imperial could take up the securities deposited under the bid on the expiry of the prescribed period of 35 days. The period expired at midnight on November 1, 2006. That meant that, after the waiver of conditions, Imperial had the right to take up the shares not withdrawn. There was no right of withdrawal under section 105(d)(ii) because there was no prescribed

2006 BCSECCOM 705

period of extension from the date of the notice of variation, as described above. Imperial took up the shares.

¶ 35 Imperial then decided to extend its bid. Under section 105(1), before it extended its bid, Imperial was first required to take up the shares. This it had done. Imperial delivered a notice of variation and extension.

¶ 36 We found that, at each of these three stages, Imperial complied with the legislation. We refused bcMetals' application.

Executive Director's submissions on the public interest

¶ 37 The Executive Director argued that the right result, in the public interest, for the protection of shareholders, was to stop Imperial from taking up and paying for the shares until it extended withdrawal rights to the shareholders for ten days. In the Executive Director's view, the principle behind sections 108 and 105 of the Act is that when two notices of change, for waiver of condition and extension of the bid, are delivered at the same time or in close succession, the bid should be extended without the offeror first taking up the shares.

¶ 38 We disagreed with the Executive Director's arguments. The legislation is complex but, with respect to Imperial's actions, unambiguous. We saw no grounds for an order under section 161 of the Act.

¶ 39 December 4, 2006

Robin E. Ford
Commissioner

John K. Graf
Commissioner

2006 BCSECCOM 705

Kenneth G. Hanna
Commissioner

Annex

Securities Act, RSBC 1996, c. 418 - key legislative provisions

Enforcement orders

161 (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:

(a) that a person comply with or cease contravening, and that the directors and senior officers of the person cause the person to comply with or cease contravening,

(i) a provision of this Act or the regulations,

(ii) a decision, whether or not the decision has been filed under section 163, or

(iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body, exchange or quotation and trade reporting system, as the case may be, that has been recognized by the commission under section 24;

(b) that

(i) all persons,

(ii) the person or persons named in the order, or

(iii) one or more classes of persons

cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;

(c) that any or all of the exemptions described in any of sections 44 to 47, 74, 75, 98 or 99 do not apply to a person;

...

2006 BCSECCOM 705

Applications to the commission

114 (1) If the commission considers that a person has not complied or is not complying with this Part or the regulations related to this Part, the commission may make an order,

...

(c) directing any person to comply with this Part or the regulations related to this Part or restraining any person from contravening this Part or the regulations related to this Part and directing the directors and senior officers of the person to cause the person to comply with or to cease contravening this Part or the regulations related to this Part.

(2) If the commission considers that to do so would not be prejudicial to the public interest, the commission may

(a) decide for the purposes of section 107(2)

(i) that an agreement, commitment or understanding with a selling security holder is made for reasons other than to increase the value of the consideration paid to the selling security holder for the securities of the selling security holder, and

(ii) that the agreement, commitment or understanding may be entered into despite that subsection,

(b) vary any time period set out in this Part and the regulations related to this Part, and

(c) order that a person or class of persons is exempt from one or more of the requirements of this Part or the regulations related to this Part.

(3) An order under subsection (1) or (2) may be made on application by an interested person or on the commission's own motion.

Offeror's circular

108 (1) An offeror must deliver, with or as part of a take over bid or issuer bid, a take over bid circular or issuer bid circular, as the case may be.

(2) If, before the expiry of a take over bid or issuer bid or after the expiry of the bid but before the expiry of all rights to withdraw the relevant securities, a change has occurred in the information contained in a take over bid circular or issuer bid

2006 BCSECCOM 705

circular or in any notice of change or notice of variation that would reasonably be expected to affect the decision of the holders of the securities of the offeree issuer to accept or reject the bid, a notice of the change must be delivered to every person to whom the circular was required to be delivered and whose securities were not taken up at the date of the occurrence of the change.

(3) Subsection (2) does not apply to a change that is not within the control of the offeror or of an affiliate of the offeror unless it is a change in a material fact relating to the securities being offered in exchange for securities of the offeree issuer.

(4) If there is a variation in the terms of a take over bid or issuer bid, including any extension of the period during which securities may be deposited under the bid, and whether or not the variation results from the exercise of any right contained in the bid, a notice of the variation must be delivered to every person to whom the take over bid circular or issuer bid circular was required to be delivered and whose securities were not taken up at the date of the variation.

(5) Subject to subsection (6), if there is a variation in the terms of a take over bid or issuer bid, the period during which securities may be deposited pursuant to the bid must not expire before the prescribed period after the notice of variation has been delivered.

(6) Subsection (5) does not apply to a variation in the terms of a bid consisting solely of the waiver of a condition in the bid where the consideration offered for the securities that are subject to the bid consists solely of cash.

...

General provisions

105 Subject to the regulations, the following requirements apply to every take over bid and issuer bid:

...

(c) When taking up prohibited. — Securities deposited pursuant to the bid must not be taken up by the offeror until the expiration of the prescribed period;

(d) Withdrawal. — Securities deposited pursuant to the bid may be withdrawn by or on behalf of a depositing security holder

2006 BCSECCOM 705

(i) at any time before the securities have been taken up by the offeror,

(ii) at any time before the expiration of the prescribed period from the date of a notice of change or variation under section 108, and

(iii) if the securities have not been paid for by the offeror within the prescribed period after having been taken up;

(e) Exception. — The right of withdrawal conferred by paragraph (d) (ii) does not apply

(i) if the securities have been taken up by the offeror at the date of the notice,

(ii) if a variation in the terms of a bid consists solely of an increase in the consideration offered for the securities subject to the bid and the time for deposit is not extended for a period greater than that required by section 108 (5), or

(iii) in the circumstances described in section 108 (6);

...

(l) Extension restricted. — A bid may not be extended by the offeror, if all the terms and conditions of the bid have been complied with except those waived by the offeror, unless the offeror first takes up all securities deposited under the bid and not withdrawn;

(l.1) Further regarding bid extensions. — Despite paragraph (l), if the offeror waives any terms or conditions of a bid and extends the bid in circumstances where the rights of withdrawal conferred by paragraph (d)

(ii) are applicable, the bid must be extended without the offeror first taking up the securities which are subject to those rights of withdrawal;

...