2010 BCSECCOM 233

Icahn Partners LP, Icahn Master Fund LP,
Icahn Partners Master Fund II LP,
Icahn Master Fund Partners III LP, High River Limited Partnership,
Icahn Fund S.àR.L. and Daazi Holding BV

and

Lions Gate Entertainment Corp.

***Securities Act,* RSBC 1996, c. 418**

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
	Shelley C. Williams	Commissioner
Date of application	March 24, 2010	
Date of hearing	April 26 and 27, 2010	
Date of decision	April 27, 2010	
Date summary reasons of the majority issued	May 6, 2010	
Appearing		
Mark Gelowitz Allan Coleman Robert Anderson	For Icahn	
Jessica Kimmel Jonathan Lampe Geoff Plant Patricia Taylor	For Lions Gate Entertainment Corp.	
Shawn McColm Gordon Smith Leslie Rose	For the Executive Director	

Summary Reasons of the Majority for Decision

2010 BCSECCOM 233

¶ 1 Icahn Partners LP, Icahn Master Fund LP, Icahn Partners Master Fund II LP, Icahn Master Fund Partners III LP, High River Limited Partnership, Icahn Fund S.àR.L. and Daazi Holding BV applied for an order cease-trading a shareholder rights plan (SRP) adopted by the board of directors of Lions Gate Entertainment Corp. on March 11, 2010. The Lions Gate board adopted its SRP in response to the applicants' (whom we refer to as "Icahn") take-over bid for Lions Gate.

¶ 2 The hearing was on April 26 and 27. At the close of the hearing we ordered, considering it to be in the public interest, that trading cease in any securities issued, or to be issued, under, or in connection with, the Lions Gate SRP, with reasons to follow (see 2010 BCSECCOM 214).

¶ 3 Lions Gate has applied to the British Columbia Court of Appeal for leave to appeal our decision. We understand the Court will hear the leave application tomorrow and, if it grants leave, will then immediately hear the appeal.

¶ 4 To assist the parties and the Court in those proceedings we are issuing these summary majority reasons now. We will issue final reasons in due course. The final reasons will include those of Commissioner Williams, who concurred in making the order but does not agree with all of our reasoning.

I Background

¶ 5 There is a history to the relationship between Icahn and Lions Gate. We have limited this description of the facts to those relevant for the purposes of these reasons.

¶ 6 On March 1, 2010 Icahn made a cash take-over bid of US$6 per share for up to 13 million Lions Gate shares that, with the 19% of Lions Gate Icahn already held, would have given Icahn just under 30% of Lions Gate's outstanding common shares.

¶ 7 The US$6 offering price represented a 14.7% premium over the closing price of the Lions Gate shares on the New York Stock Exchange immediately prior to the public announcement of the offer.

¶ 8 The offer had an expiry date of April 6.

¶ 9 On March 11 the Lions Gate board of directors adopted the Lions Gate SRP and the next day sent notice of a shareholders meeting on May 4 to approve the Lions Gate SRP.

¶ 10 Under the Lions Gate SRP, any take-over bid other than a "permitted bid" (as defined in the SRP) would trigger a rights offering to Lions Gate shareholders designed to render non-viable any offer not in the permitted bid category.

¶ 11 A permitted bid under the Lions Gate SRP must be for more than 50% of the outstanding Lions Gate shares not owned at the time of the bid by the offeror, and this 50%-plus minimum tender condition cannot be waived.

¶ 12 On March 19 and April 15 Icahn varied its bid. As a result of these variations, the price increased to US$7 per share, the bid was for all shares of Lions Gate that Icahn did not already own, and the expiry date was extended to April 30.

¶ 13 The varied bid included a condition that a minimum number of shares be tendered under the bid that, with the 19% Icahn already owned, would total at least 50.1% of the outstanding Lions Gate shares. Icahn reserved the right to waive that condition. The varied offer included the condition that the Lions Gate SRP be cease-traded, or otherwise enjoined, or suspended by Lions Gate.

¶ 14 In the varied offer Icahn undertook to extend the offer if the minimum tender condition was met or if it chose to waive it.

¶ 15 The Icahn bid was not a permitted bid under the Lions Gate SRP.

¶ 16 The Lions Gate board concluded that it was not the time to put the company in play, and took no steps (and does not intend to take any steps) to seek a competing bid or an alternative transaction.

¶ 17 There was no issue at the hearing that any party had failed to comply with the relevant securities legislation.

¶ 18 After reviewing the materials filed in connection with Icahn's application, we concluded that there was no evidence to suggest that the Lions Gate board failed to discharge its fiduciary duties. We informed the parties of our conclusion and that we did not need to hear submissions on that issue.

II Issue

¶ 19 The issue before us was whether it was in the public interest to order that trading cease in any securities issued, or to be issued, under, or in connection with, the Lions Gate SRP.

III Analysis

¶ 20 In making the order, we were guided by the Canadian securities regulators' views of the public interest as it relates to the adoption of shareholder rights plans by target companies as a defensive tactic.

A The public interest and take-over bid defensive tactics

¶ 21 National Policy 62-202 *Take-Over Bids – Defensive Tactics* reflects the views of the securities regulators in Canada of the public interest as it relates to what are commonly called shareholders rights plans (or more colloquially, "poison pills") adopted by target companies as a defensive measure to a hostile take-over bid. We refer to these plans as SRPs.

¶ 22 NP 62-202 has been in force since 1997 and its predecessor, National Policy 38, was adopted in 1986.

¶ 23 In addition to NP 62-202, Canada's securities regulators have also expressed their view of the public interest through their decisions on applications by bidders for cease trade orders to neutralize SRPs (see, for example, *Canadian Jorex* (1992) 15 OSCB 257; *Lac Minerals Ltd. and Royal Oak Mines* (1994) 17 OSCB 4963; *MDC* (1994) 17 OSCB 4971; *Royal Host Real Estate Trust* [1999] 47 BSCS Weekly Summary 43; *Falconbridge* (2006) 29 OSCB 6783).

¶ 24 This summarizes the Canadian securities regulators' views of the public interest as it relates to the adoption of SRPs by target companies as a defensive strategy:

1. It is in the public interest that each shareholder of the target company be allowed to decide whether or not to accept or reject the bid.

2. Faced with a bid, the board of directors of the target company have a fiduciary duty to act in the best interests of the corporation. In discharging this duty, target company boards often take various defensive measures. Regulators will be reluctant to interfere with the steps the directors are taking to discharge that duty.

3. SRPs are not contrary to the public interest when used to buy time for the target company to respond appropriately to the bid. For example, they can be an appropriate means by which the directors of the target company take the necessary steps to discharge their fiduciary duties. The corollary is that SRPs are acceptable only as a temporary defence. The issue is not whether the SRP should go, but when.

4. Take-over bids are fact-specific, so the relevance and significance of the factors to be considered will vary with each case.

¶ 25 In the discussion that follows, we refer to previous decisions of Canadian securities commission panels, and sometimes make general statements about them. These statements do not include references to the decisions of the Alberta Securities Commission in *Pulse Data Inc.* 2007 ABASC 895 and the Ontario Securities Commission in *Neo Material Technologies* 2009 LNONOSC 638, for the reasons we explain at the end of these summary reasons.

Opportunity to tender into the bid

¶ 26 NP 62-202 begins by noting the important role that take-over bids play in the economy by "acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses".

¶ 27 The policy identifies the actions that management of a target company may take when faced with a hostile bid: urging shareholders to reject the bid, maximizing value for shareholders (by, for example, seeking higher bids from third parties), and taking other defensive measures.

¶ 28 The policy identifies the primary objective of the take-over bid provisions in Canadian securities legislation as "the protection of the bona fide interests of the shareholders of the target company." It says a secondary objective of these provisions is "to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment."

¶ 29 Later language in the policy makes it clear that the "bona fide interests of the shareholders" to be protected is their right to decide to accept or reject a bid. Paragraph 1.1(2) of the policy says, "The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision." The policy then identifies a concern about defensive measures that "may have the effect of denying shareholders the ability to make such a decision and of frustrating an open take-over bid process."

¶ 30 This idea is reinforced in paragraphs 1.1(5) and (6). Paragraph 1.1(5), after noting that "unrestricted auctions produce the most desirable results in take-over bids", notes that Canadian securities regulators "will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid". Paragraph 1.1(6), says that regulators may take action if a target board adopts defensive tactics "that are likely to deny or limit severely the ability of the shareholders to respond to a take-over bid".

¶ 31 Canadian securities commission panels have applied this principle consistently in their decisions. For example, in *Jorex* the Ontario Securities Commission, after citing the provisions mentioned above, said this:

> "For us, the public interest lies in allowing shareholders of a target company to exercise one of the fundamental rights of share ownership – the ability to dispose of shares as one wishes – without undue hindrance from . . . defensive tactics . . . adopted by the target board . . . ."

¶ 32 The panel in *Jorex* also specifically rejected any notion that the decision about whether a bid was acceptable should be left in the hands of the target board:

> "In so stating our view of the public interest, we must be taken as disagreeing with the views of another of Jorex's witnesses, Mr. David Ward . . . who stated most emphatically that, in his opinion, 'shareholders can't individually handle a lot of this'. In Mr. Ward's view, therefore, the ultimate decision as to the value and appropriateness of a given bid, and thus as to whether or not it should be considered acceptable, should be left in the hands of the target board or its independent committee, and their professional advisers. Clearly, this is not the view that we take (nor does National Policy 38, for that matter), since we have every confidence that the shareholders of a target company will ultimately be quite able to decide for themselves, with the benefit of the advice they receive from the target board and others, including their own advisers, whether or not to dispose of their shares and, if so, at what price and on what terms. And to us the public interest lies in allowing them to do just that."

Exercise of fiduciary duty by directors of the target company

¶ 33 Canadian securities regulators acknowledge that a target company board, faced with a hostile bid, has a fiduciary duty to act in the best interests of the corporation, and regulators are reluctant to interfere with a target board's attempts to do so. NP 62-202 acknowledges that SRPs are one form of defensive tactic that a target board may adopt.

¶ 34 For example, in *Lac Minerals* the OSC said (at page 4968):

> "The Commission will only make an order . . . to cease trade securities when in its opinion it is in the public interest to do so. In considering whether to make an order in this case, the real issue the Commission had to determine was whether, the extent

> to which, and when the Commission should interfere with the conduct of the Lac Board, professed to be directed at maximizing shareholder value . . . .
>
> This issue involved interesting questions about the relationship between securities law and corporate law. It raised the tension between (i) the board's duty to manage the corporation honestly and in good faith with a view to the best interests of the corporation; and (ii) the shareholders' 'right' to decide whether to sell their shares in response to a take-over bid."

¶ 35 The panel then resolved this tension in a manner consistent with the public interest as articulated in NP 62-202 and *Jorex* that allowed shareholders to make their decision whether or not to sell (at page 4969 and 4970):

> "In a case such as this, the Commission's main concern is the interests of the shareholders of the target company. Would the interest of the Lac shareholders be prejudiced by the continued operation of the Lac Rights Plan in the face of the outstanding bids by Royal Oak and American Barrick?
> . . .
> In our view . . . the existence of the Lac Rights Plan could well have impeded [Lac shareholders'] decision to tender to the bid. Accordingly we decided that it was in the public interest to indicate that in those circumstances, should the Lac Board not do so, we would make an order cease trading any securities issued or to be issued in connection with the Lac Rights Plan . . . ."

¶ 36 The significant point here is that although regulators will be reluctant to interfere with a target board's discharge of its fiduciary duty in the face of a hostile bid, that reluctance:

(a) is founded on the practice of boards, in taking steps to act in the best interests of the corporation, of making efforts to maximize shareholder value (whether through enhancements to the bid, through competing bids, or through alternative transactions), and

(b) is tempered by the need to ensure that the shareholder ultimately has the opportunity to decide whether or not to tender into the bid.

SRPs only a temporary defence

¶ 37 NP 62-202 does not say in so many words that SRPs can remain in force only as a temporary measure, but that is necessarily implied from the excerpts from the

policy cited above, especially those from paragraphs 1.1(5) and (6). An SRP, if left in place permanently, would "result in shareholders being deprived of the ability to respond to a take-over bid".

¶ 38 The cases are explicit on this point and are uniform in expressing the view that, when considering an application to cease trade an SRP, the issue is not whether the SRP will go, but when. As the *Jorex* panel said, "there comes a time when the pill has got to go".

¶ 39 The outcomes of the cases vary. Depending on the circumstances before them, securities commission panels have cease traded SRPs or let them continue for a while longer. However, in all of the cases, the central issue was whether the continued operation of the SRP was necessary for it to achieve the purpose of protecting the interests of the target company shareholders.

¶ 40 And what have been the purposes of those SRPs? In past cases, the securities commission panels were dealing with situations where target boards were either actively negotiating or soliciting competing bids or alternative transactions.

¶ 41 In the cases where the commission panels decided that it was time for the SRP to go, it was because it had achieved its purpose (by generating an enhancement to the original bid, a competing bid, or an alternative transaction) and was unlikely to achieve more, or because there was no evidence that its continuation would result in any of those things.

¶ 42 In the cases where the commission panels decided it was not time for the SRP to go, it was because the SRP had not yet yielded the results outlined in the previous paragraph, and it was too soon to conclude that its continuation would not be successful in achieving those results.

¶ 43 The significance of this long line of decisions by securities commission panels is that they all assessed the continued existence of the SRP in terms of what it had accomplished, or was likely to accomplish, in terms of providing alternatives to the bid for shareholders to consider before deciding whether to tender. Whether or not the SRP had accomplished anything, once a panel concluded its continuation was unlikely to do more to provide those alternatives, it invariably decided it was time for the SRP to go.

Other factors

¶ 44 *Royal Host* was a joint decision of panels of the securities commissions of Alberta, British Columbia and Ontario. It is useful authority in that it summarizes the authorities that came before it, stands for the proposition that each case must

be decided on the basis of the factors most relevant to the circumstances, and identifies a non-exclusive list of factors for panels to consider. These include:

- whether shareholder approval of the rights plan was obtained
- when the plan was adopted
- whether there is broad shareholder support for the continued operation of the plan
- the size and complexity of the target company
- other defensive tactics, if any, implemented by the target company
- the number of potential, viable offerors
- the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders
- the likelihood that, if given further time, the target company will be able to find a better bid or transaction
- the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company
- the length of time since the bid was announced and made
- the likelihood that the bid will not be extended if the rights plan is not terminated

B The public interest in the facts of this case

Ability of Lions Gate shareholders to respond to the Icahn bid

¶ 45 The Icahn bid is not a permitted bid under the Lions Gate SRP, and would therefore trigger its operation. It is also a condition of the Icahn bid that the Lions Gate SRP be cease-traded, or otherwise enjoined, or suspended by Lions Gate. The Lions Gate SRP would, in our opinion, result in the Lions Gate shareholders being deprived of the ability to respond to the Icahn bid.

Purpose of the Lions Gate SRP

¶ 46 As a result of Lions Gate's adoption of its SRP, Icahn made several improvements to its initial offer. It raised the share price, extended the scope of the offer to include all shares of Lions Gate it does not already own, and provided additional take up (and withdrawal) periods if the minimum tender condition is met or if it chooses to waive it.

¶ 47 SRPs are inherently contradictory to the fundamental principle expressed in NP 62-202 and *Jorex* that the shareholder must ultimately decide whether or not to accept or reject a bid. Securities regulators tolerate the adoption of SRPs by target company boards and shareholders so that target company boards can discharge their fiduciary duties. An SRP allows a board to do that by giving it time to, among other things, seek to improve the bid, or generate competitive bids or alternative transactions. Once that has happened, or it becomes clear that no

enhancements, competing bids or alternative transactions are likely to surface, the SRP has outlived its usefulness and must go.

¶ 48 Here, the issue is moot. Lions Gate did not seek, and has no intention of seeking, any competing bids or alternative transactions for the Lions Gate shareholders to consider in the context of their decision whether to accept or reject the Icahn bid. Nor is there any evidence of any other steps Lions Gate intends to take that its shareholders could consider before responding to the Icahn bid.

¶ 49 The Lions Gate SRP (if approved by shareholders) would simply remain in place as a bar to any bid not meeting the definition of a permitted bid under the Lions Gate SRP. In our opinion, that is not in the public interest because it would hamper the benefits that take-over bids bring to the market, and would deny shareholders to make their own decision about whether to accept or reject those bids.

Likelihood of extension

¶ 50 The Icahn witness, Mr. Schaitkin, said that the continued existence of the Lions Gate SRP at the time of the expiry of the offer "is something that would be very seriously considered" by Icahn. He said, "I would think that we wouldn't extend in those circumstances" and suggested that Icahn might seek to "influence the company and protect our investment" through "a different way" come the company's annual general meeting in September.

¶ 51 Lions Gate invited us to conclude that Icahn is more likely than not to extend its offer. In our opinion we could not reach that conclusion without persuasive evidence that Icahn would extend its bid. On the facts before us we could not reach that conclusion with enough confidence to risk having denied the Lions Gate shareholders the right to accept or reject that bid, had we reached the conclusion in error.

Shareholder approval or support

¶ 52 Paragraph 1.1(3) of NP 62-202 says that securities regulators "are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns."

¶ 53 However, although shareholder approval is a relevant factor (see *Royal Host)*, it is not determinative. In *Cara Operations Ltd.* (2002) 25 OSCB 7997, the OSC said (at paragraph 65), "If a plan does not have shareholder approval, it generally will be suspect as not being in the best interest of the shareholders; however, shareholder approval of itself will not establish that a plan is in the best interest of the shareholders."

¶ 54 The issue is moot in this case because the Lions Gate shareholders have not approved its SRP. At the time of the hearing before us the shareholders meeting to approve the SRP was scheduled for May 4, two business days after the expiry of the Icahn bid, then set for April 30. Lions Gate argued that we ought not to cease trade the SRP until after the shareholders meeting.

¶ 55 We were not persuaded by this argument, for two principal reasons. First, as noted above, based on the evidence before us, we could not be confident that Icahn would extend its offer beyond April 30. Failing to cease-trade the Lions Gate SRP could therefore have decided the issue – if Icahn did not extend its offer, the Lions Gate shareholders would have been deprived of their opportunity to respond to it.

¶ 56 The second, and more important, reason is that to the extent the panels in other cases have considered shareholder approval of an SRP, or other evidence that shareholders support the continuation of an SRP, it has been in the context of what the SRPs were for. In other words, if shareholders support the continuation of an SRP in order to give the target board more time to seek an improvement in the offer, a competing bid, or an alternative transaction, that is a factor in favour of leaving the SRP in place, although still on only a temporary basis: see, for example, *MDC*.

¶ 57 However, that is not what the Lions Gate SRP is all about. It did achieve an improvement in the Icahn bid, but it did not result in a competing bid or an alternative transaction. There was no evidence that it would have done so in the three business days between the close of the hearing and the expiry of the Icahn bid, nor was there any evidence that Icahn would make any further improvements to its offer. Nor is there any evidence of any other steps Lions Gate intends to take that its shareholders could consider before responding to the Icahn bid.

¶ 58 The only effect of continuing the Lions Gate SRP would be to deny the Lions Gate shareholders the opportunity to accept or reject the Icahn offer.

Coercion and unfairness

¶ 59 Lions Gate says that the Icahn bid is coercive because a shareholder, not knowing how much of the company will end up in Icahn's hands, will not have the information necessary to make an informed decision. Even if shareholders believe the offer price to be inadequate, says Lions Gate, they may feel forced to accept it because they would consider that a better outcome than being a shareholder in a company effectively controlled by Icahn with less than 50% of the shares, and who may have no interest in acquiring any more.

¶ 60 In our opinion, the Icahn bid is not coercive

¶ 61 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 who rejected the offer can have the opportunity to tender their shares if they so wish, in light of the new information.

¶ 62 If Icahn chooses to waive the minimum tender condition, that will be a variation of the Icahn bid and it will be extended. The effect will be that shareholders who have not tendered will then know that the condition has been waived and can reconsider their decision in those circumstances. Similarly, those who have tendered will have the right to withdraw their shares in light of the new information. That extension will be followed by the same extension described in the previous paragraph.

¶ 63 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.

C The *Pulse Data* and *Neo Materials Technologies* decisions

¶ 64 Lions Gate relied on the decisions of the Alberta Securities Commission in *Pulse Data Inc.* and the OSC in *Neo Materials Technologies*.

¶ 65 Those cases may be distinguishable on the facts, but we also have reservations about them. Our reservations center around their apparent departure from the Canadian securities regulators' view of the public interest as it relates to SRPs prior to those decisions.

¶ 66 We will elaborate further on our reservations about those decisions in our final reasons.

IV Decision

¶ 67 We therefore cease-traded the securities issued or to be issued in connection with the Lions Gate SRP.

¶ 68 May 6, 2010

For the Commission

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner