2010 BCSECCOM 432

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
(collectively, "Icahn")

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 of summary reasons of the majority	May 6, 2010	
Date of majority reasons for decision	July 26, 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	

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Majority Reasons for Decision

I Introduction

¶ 1 Icahn applied for an order cease-trading a shareholder rights plan (Lions Gate SRP) adopted by the board of directors of Lions Gate Entertainment Corp. on March 11, 2010 in response to Icahn's take-over bid for Lions Gate.

¶ 2 After a hearing held on April 26 and 27 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 appealed our decision to the British Columbia Court of Appeal. To assist the parties and the Court in those proceedings we issued summary majority reasons on May 6, 2010 (see 2010 BCSECCOM 233). (The Court dismissed the appeal – see 2010 BCCA 231).

¶ 4 These reasons replace our summary reasons.

¶ 5 In our summary reasons, we noted that Commissioner Williams, who concurred in making the order, did not agree with all of our reasoning. Commissioner Williams' reasons will follow.

II Preliminary applications

¶ 6 Lions Gate sought to enter evidence of two legal experts, one on US law, the other on Canadian law.

¶ 7 The evidence of the expert on US law was about how US courts would deal with the application before us. We excluded it because it was not relevant.

¶ 8 We excluded the evidence of the expert on Canadian law because the evidence was not relevant, consisted of findings of fact it was up to the panel to make, or expressed conclusory opinions on the issues it was up to the panel to decide.

III Background

¶ 9 Icahn began acquiring shares of Lions Gate in January 2006. It started discussions with Lions Gate's management about its business and affairs.

¶ 10 In February 2009 Icahn proposed to Lions Gate management that it be represented on the Lions Gate board of directors. Discussions ensued that did not result in any agreement.

¶ 11 In March 2009 Icahn made an offer to acquire two series of Lions Gate convertible notes. In April Lions Gate announced agreements with entities holding both series of notes. The noteholders exchanged their notes of one series for new notes with more favourable terms, and agreed not to tender any notes from the other series into the Icahn offer.

¶ 12 In May 2009 the Icahn offer expired without Icahn having acquired any of the notes.

¶ 13 On February 11, 2010 Icahn told Lions Gate that it was considering a take-over bid to increase its holding to 29.9%. Lions Gate management attempted to dissuade Icahn from doing so, as the acquisition of 20% or more of Lions Gate would be an event of default under some of its credit facilities. That default would in turn trigger cross-defaults in its long term debt instruments.

¶ 14 Icahn responded that the default could be avoided by obtaining a waiver from the lender, or by repaying the credit facility at risk (the amount

outstanding was US$36 million). In any event, Icahn said, its bid would not be conditional on that default not occurring.

¶ 15 Discussions continued for another week or so but nothing came of them and on February 16 Icahn announced its intention to make the bid.

¶ 16 On March 1 Icahn made a cash take-over bid of US$6 per share for up to 13 million Lions Gate shares. That many shares, with the 18.8% of Lions Gate shares Icahn already held, would have given Icahn 29.9% of Lions Gate's outstanding common shares. The bid had an expiry date of April 6.

¶ 17 The US$6 offering price was a 14.7% premium over the closing price of the Lions Gate shares on the New York Stock Exchange immediately prior to Icahn's public announcement of the bid.

¶ 18 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.

¶ 19 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 on terms designed to render the bid not viable.

¶ 20 A permitted bid under the Lions Gate SRP had to be an all-share bid and had to include a non-waivable minimum tender condition that more than 50% of the outstanding Lions Gate shares not owned at the time of the bid by the offeror be tendered into the bid.

¶ 21 On March 19 and April 15 Icahn varied its bid. The price was increased to US$7 per share, the bid became an all-share bid, and the expiry date was extended to April 30.

¶ 22 The varied bid included a condition that a minimum number of shares be tendered under the bid that, with the 18.8% Icahn already owned, would total at least 50.1% of the outstanding Lions Gate shares. To be a permitted bid under the Lions Gate SRP, the minimum tender condition could not be lower than 59.4%. Icahn reserved the right to waive that condition. Under a permitted bid, the minimum tender condition could not be waived. The varied bid included the condition that the Lions Gate SRP be cease-traded, or otherwise enjoined, or suspended by Lions Gate.

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

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

¶ 25 The major Lions Gate shareholders were Dr. Mark Rachesky, a Lions Gate director, who held 19.7%, Icahn, who held 18.8%, and an institutional investor who held 10.4%. Another 17 institutional investors held in the aggregate 36.5%. The largest holding among this group was 6.7% and the smallest was 0.8%. The median holding for all institutional investors was 1.8%. Lions Gate's management and directors (excluding Rachesky) held 2.3%.

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

¶ 27 After reviewing the materials filed in connection with Icahn's application, we concluded that there was no evidence that the Lions Gate board failed to discharge its fiduciary duties and so we did not hear submissions on that issue.

IV Issue

¶ 28 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.

V Analysis

¶ 29 In cease-trading the Lions Gate SRP, we followed the Canadian securities regulators' public interest policy principles governing shareholders rights plans (SRPs) by target companies as a defensive tactic.

A The public interest policy principles governing SRPs in Canada

¶ 30 National Policy 62-202 *Take-Over Bids – Defensive Tactics* states the public interest policy principles of the Canadian Securities Administrators (which comprises all of the securities regulators in Canada) governing SRPs adopted by target companies as a defensive tactic to thwart a hostile take-over bid.

¶ 31 NP62-202 has been in force since 1997. It continues the policy stated in its predecessor, National Policy 38, which the CSA adopted in 1986.

¶ 32 Canada's securities regulators have also expressed public interest policy principles governing SRPs through their decisions on applications by offerors for cease-trade orders to terminate SRPs.

¶ 33 This is a summary of those principles:

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

2. Faced with a bid, the target company board has 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 board to respond appropriately to the bid. For example, an SRP can be an appropriate means for a target company board to discharge its fiduciary duty. It follows that SRPs are acceptable only as a temporary defence. The issue is not whether an SRP should go, but when.

4. A non-exhaustive list of factors relevant to the period of time a target will be allowed to leave an SRP in place include:
   - the number of potential, viable offerors, what the target company board has done to find alternatives to the bid, and whether the board is likely to succeed in finding an alternative
   - when the plan was adopted and whether the shareholders approved the SRP or there is otherwise broad shareholder support for it
   - whether the bid is coercive or unfair

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

¶ 34 The remaining sections (B through F) of this Part of our reasons review these principles and their application to the Lions Gate SRP.

B Shareholders' opportunity to decide whether to tender into the bid

Principles

¶ 35 NP62-202 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".

¶ 36 NP62-202 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.

¶ 37 NP62-202 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."

¶ 38 Later language in NP62-202 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 NP62-202 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."

¶ 39 NP62-202 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."

¶ 40 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".

¶ 41 Paragraph 1.1(6) says that Canadian securities 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".

¶ 42 Canadian securities commission panels have applied these principles consistently in their decisions.

¶ 43 In *Canadian Jorex* (1992) 15 OSCB 257 a panel of 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 . . . ."

¶ 44 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 company 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."

¶ 45 In *Cara Operations Ltd.* (2002) 25 OSCB 7997 a panel of the OSC, under the heading "Guiding Considerations" said,

> "53 While it is important for shareholders to receive advice and recommendations from the directors of the target company as to the wisdom of accepting or rejecting a bid, and for directors to be satisfied that a particular bid is the best likely bid under the circumstances, in the last analysis the decision to accept or reject a bid should be made by the shareholders, and not by the directors or others."

Application of the principles to the Lions Gate SRP

¶ 46 The Icahn bid is not a permitted bid under the Lions Gate SRP, and would therefore trigger its operation.

¶ 47 We find that the Lions Gate SRP, if allowed to continue, would deprive the Lions Gate shareholders of the opportunity to respond to the Icahn bid.

¶ 48 As an aside, we note that it would be very difficult for any offeror in Icahn's position to succeed, even with a permitted bid under the Lions Gate SRP. Icahn held 18.8% of the Lions Gate shares at the time of the bid. Under the Lions Gate SRP, the mandated minimum tender condition would have required Icahn obtain 40.6 % of the shares it did not already own. Lions Gate management and directors (including Rachesky) held 22%, which, according to the Lions Gate directors' circular, would not be tendered into the Icahn bid. That, plus the shares Icahn already owned, would leave only 59.2% of the Lions Gate outstanding shares from which Icahn could meet its minimum tender condition of 40.6%.

¶ 49 In other words, the only way that Icahn could succeed with a permitted bid under the Lions Gate SRP would be its acquisition through the bid of almost 70% of the shares not owned by it or Lions Gate management.

C Exercise of fiduciary duty by the target company board

Principles

¶ 50 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 the regulators are reluctant to interfere with actions taken by a target company board to discharge that duty.

¶ 51 For example, in *Lac Minerals and Royal Oak Mines* (1994) 17 OSCB 4963 a panel of 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."

¶ 52 The panel then resolved this tension in a manner 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 . . . ."

¶ 53 The significant point here is that although Canadian securities regulators are reluctant to interfere with a target company board's discharge of its fiduciary duty in the face of a hostile bid, that reluctance:

(a) is founded on the practice of target company boards of making efforts to maximize shareholder value (whether through enhancements to the bid, competing bids, or alternative transactions) in discharging their fiduciary duty, and

(b) recognizes that the shareholders ultimately have the opportunity to decide whether or not to tender into the bid.

¶ 54 Lions Gate urged us to follow the decisions of the Alberta Securities Commission in *Pulse Data Inc.* 2007 ABASC 895 and the OSC in *Neo Material Technologies Inc.* 2009 LNONOSC 638.

¶ 55 Like this case, *Pulse* involved an all-share bid and the target company board had no intention of seeking alternative transactions to the bid. Unlike this case, the target company board adopted an SRP and its shareholders approved it before the expiry date of the bid. The ASC panel characterized the issue before it as follows:

> "The Offeror's application, then, raised the following issue: whether, in the acknowledged absence of a real and substantial possibility of an imminent auction to increase Shareholder value, it would be in the public interest to discontinue the operation of the Rights Plan with respect to the Offer in order to afford Pulse Shareholders the opportunity to tender their Pulse Shares to and have them taken up in accordance with the Offer."

¶ 56 The panel in *Pulse* cited and purported to follow the Canadian securities regulators' public interest policy principles we have described. Based on these principles, the answer to the issue would normally have been clear. The basis for allowing an SRP to continue is the expectation that the target company board needs a reasonable period of time to seek an improved or alternative transaction. When there is no possibility of that occurring, it follows there is no basis for allowing the SRP to continue.

¶ 57 The ASC panel in *Pulse* concluded, however, that it was not in the public interest to cease-trade the SRP. It is clear that the panel, in reaching its decision, was strongly influenced by the target company shareholders' approval of the SRP. Indeed, that appears to be the primary reason for its decision not to cease-trade the SRP. We discuss this aspect of the *Pulse* decision in section E below.

¶ 58 *Neo* involved a partial bid for 20% of the target's shares the offeror did not already own. If successful, the bid would have increased the offeror's shareholding to 40%. The minimum tender condition was for a number of shares representing about 10% of the target's outstanding shares.

¶ 59 As in *Pulse*, the target company board in *Neo* had no intention of seeking any alternative offers, adopted a tactical SRP, and called a shareholders meeting, which was held before the expiry of the bid.

¶ 60 The OSC panel in *Neo*, like the ASC panel in *Pulse*, cited and purported to follow the public interest policy principles we have described. The panel nevertheless concluded that it was not in the public interest to cease-trade the SRP. It cited several factors.

¶ 61 The panel considered the issue of whether the target company board, in proposing the SRP, did so in the best interest of the corporation and its shareholders – another way of asking whether the target company board discharged its fiduciary duty.

¶ 62 Unless a board fails to do so, this is a neutral factor. If a target company board fails to discharge its fiduciary duty, that is an aggravating factor that would likely lead a regulator to put a stop to the related SRP. But if the board does not fail to do so, that means only that the board is doing no more than what we expect of a board of a public company. Proper behaviour is expected; behaving properly is therefore not a factor in favour of allowing an SRP to continue.

¶ 63 In *Neo*, the panel analyzed the target company board's reasons for deciding not to conduct an auction, found its process reasonable, and appears to have relied on that in making its decision.

¶ 64 It is clear from the Canadian securities regulators' principles that the reluctance to interfere in the target company board's exercise of its fiduciary duty arises from the importance of ensuring that the board has a reasonable time to seek an improved or alternative transaction. We discuss this aspect of the *Neo* decision in section D below.

¶ 65 The panel also noted that the target company shareholders had approved the SRP by a significant majority. We discuss this aspect of the *Neo* decision in section E below.

¶ 66 A target company board's choice not to seek an improved or alternative transaction is not, in and of itself, proof that it has failed to meet its fiduciary duty. However, having made that choice, the board should not expect Canadian securities regulators to allow an SRP to interfere with the shareholders' right to decide whether to tender into the bid.

Application of the principles to the Lions Gate SRP

¶ 67 In this case, the Lions Gate board did not seek, and said it had 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.

¶ 68 Based on the public interest policy principles expressed by Canadian securities regulators through NP62-202 and their decisions, that essentially disposes of the decision whether the Lions Gate SRP ought to be allowed to continue. As discussed above, in the absence of any attempts by the target company board to take any steps to increase shareholder value through an improvement of the bid or the presentation of alternative transactions, there is no basis for allowing an SRP to continue.

¶ 69 Those were the facts here. For that reason alone, there was no basis to allow the Lions Gate SRP to continue.

¶ 70 Parenthetically, as a result of Lions Gate's adoption of its SRP, Icahn made several improvements to its initial bid. It raised the share price, changed the bid to an all-share bid, and provided additional take up (and withdrawal) periods if the minimum tender condition was met or if it chose to waive it. At the time of the hearing, it appeared to us that the Lions Gate SRP had accomplished all that it was likely capable of accomplishing.

D An SRP is only a temporary defence

Principles

¶ 71 NP62-202 acknowledges that the adoption of an SRP is one form of defensive tactic available to a target board.

¶ 72 If a board chooses to do so, Canadian securities regulators will allow the SRP to continue in limited circumstances – although, in the words of the OSC panel in *Cara*, SRPs are "rightly scrutinized with suspicion".

¶ 73 NP62-202 does not say in so many words that SRPs can remain in force only as a temporary measure, but that is necessarily implied from its language, especially 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".

¶ 74 Whatever doubt there may be about that interpretation of NP62-202 is put to rest by the decisions of Canadian securities commission panels, which make clear two things. One, that the only reason a Canadian securities regulator will tolerate an SRP is to give the target company board time to discharge its fiduciary duty. Two, the focus of that duty is to improve the existing bid or to find a better one.

¶ 75 The reluctance expressed by Canadian securities regulators to interfere with a target company board's discharge of its fiduciary duty is based on the sound reasoning that the board is in the best position to respond to a bid in the best interests of the target's shareholders, and should be given a reasonable period of time to do so.

¶ 76 That said, Canadian securities regulators expect boards to act promptly and to produce results. In *MDC Corp.* (1994) 17 OSCB 4971, a panel of the OSC said:

> "It is true that Jorex teaches that 'there comes a time when the pill has to go'. However, this is not to say that, once a takeover bid has been made, a shareholder rights plan . . . must be automatically struck down . . . . If there appears to be a real and substantial possibility that, given a reasonable period of further time, the board of the target corporation can increase shareholder choice and maximize shareholder value, then . . . the Commission should allow the plan to function for such further period, so as to allow management and the board to continue to fulfil their fiduciary duties."

¶ 77 That the central issue about whether an SRP can continue is whether there is a real and substantial possibility of the board's producing a better transaction for the shareholders to assess is clear from the decisions of commission panels. All of them (except *Pulse* and *Neo*) dealt with situations where target company boards were actively negotiating or soliciting competing bids or alternative transactions.

¶ 78 The outcomes of the decisions vary. In the decisions where the commission panel decided that it was time for the SRP to go, it was because the SRP 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 the SRP's continuation would result in any of those things.

¶ 79 In the decisions where the commission panel 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.

¶ 80 The significance of these Canadian securities commission decisions is that the panels 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.

¶ 81 The ASC panel in *Pulse* closed its decision by observing that its decision "does not preclude any party from making further application to the Commission should circumstances change". Similarly, the *Neo* panel closed by saying "the time for the pill to go is not yet upon us".

¶ 82 Some may interpret *Pulse* and *Neo* as authority for the proposition that target company boards can enshrine an SRP and "just say no" to offers not permitted under the SRP, if the target's shareholders have approved the SRP in the face of a bid. This was essentially the interpretation urged on us by Lions Gate.

¶ 83 We do not interpret those decisions that broadly. That interpretation would mean that the *Pulse* and *Neo* panels intended to reverse the long-standing policy of Canadian securities regulators that SRPs, if they are to continue, can be allowed do so only for a temporary period, at the end of which the shareholders must be given the opportunity to decide whether to tender into the bid.

¶ 84 The principle that the shareholders must always have the opportunity to decide cannot co-exist with one that would allow target company boards to "just say no" to bids. The *Pulse* and *Neo* panels would also have understood the significance of rendering a decision that represented a movement in Canadian securities public policy principles governing SRPs towards a "just say no" regime. In any event, the language the panels used does not suggest a movement to "just say no". The closing words of their decisions show that they anticipated changes in circumstances that could lead them to conclude that the SRPs before should no longer be allowed to continue.

¶ 85 Both panels affirmed the Canadian securities regulators' principles governing SRPs. In addition, an ASC panel in *1478860 Alberta Ltd.* 2009 ABASC 448, in a decision made two years after *Pulse*, referred again to those principles and to *Pulse* in deciding not to cease-trade a bid, having concluded that "there were signs of real activity" by the target company board that could result in an alternative proposal.

¶ 86 We therefore do not interpret the *Pulse* and *Neo* decisions as representing any significant change to the Canadian securities regulators' public interest policy principles governing SRPs.

¶ 87 That said, we find it unfortunate that neither panel, having indicated that a change in circumstances could lead to the SRPs being cease-traded, gave no more guidance about what sort of changes in the circumstances could bring that about. Absent that guidance, it is not certain how to apply the reasoning of those decisions to other fact situations. This, in our opinion, limits their usefulness as authorities.

Application of the principles to the Lions Gate SRP

¶ 88 Had we not cease-traded the Lions Gate SRP (now approved by shareholders) it could have remained in place indefinitely. That, in the face of its board having no intention of seeking alternatives to the bid, would not be consistent with the Canadian securities regulators' public interest policy principles governing SRPs. It would, essentially, have allowed the Lions Gate board to "just say no" to the Icahn bid or any other bid not meeting the terms of the Lions Gate SRP (or any other SRP it may care to adopt).

¶ 89 Under the Canadian securities regulators' public interest policy principles governing SRPs, shareholders must ultimately get the opportunity to decide whether to tender into a bid. Permitting the continuation of an SRP, with no expectation that the target company board will seek alternatives, would limit that opportunity only to bids that the target company board deems acceptable. That would be a dramatic, and in our view unwelcome, change to the public interest policy principles governing the use of SRPs in take-over bids in Canada.

E Shareholder approval or support of an SRP

Principles

¶ 90 Paragraph 1.1(3) of NP 62-202 says that Canadian 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."

¶ 91 Although shareholder approval is a relevant factor (see *Royal Host* 1999 LNBCSC 88 and *Chapters*), it is not determinative. In *Cara*, an OSC panel 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."

¶ 92 In *MDC*, the OSC panel declined to cease-trade the SRP, having concluded that if the SRP were allowed to continue, "there was a reasonable possibility that a better offer would come along during the period." It then turned to the question of the wishes of the target's shareholders:

> "It is all very well for us to conclude that there is a real possibility that shareholder value will be increased as a result of our deciding that 'the time has not yet come', but

> we would not have been prepared to do so if it was clear that the shareholders . . . felt otherwise."

¶ 93 In *Chapters Inc.* 2001 LNONOSC 184, the OSC said,

> "When shareholders approve a pill, it does not mean that they want the pill to continue indefinitely. A company's board of directors is not permitted to maintain a shareholder rights plan indefinitely to prevent a bid's proceeding, but may do so as long as the board is actively seeking alternatives and there is a real and substantial possibility that the board can increase shareholder choice and maximize shareholder value."

¶ 94 *Chapters* is one statement of the principle that shareholder approval is not relevant where there are no alternatives to the bid and the target board has no intention of seeking any. In those circumstances, there is no basis to allow the SRP to continue. Otherwise, those not voting in favour would be deprived of their opportunity to decide whether to tender under the bid as a result of the votes of other shareholders.

¶ 95 The panels in *Pulse* and *Neo* placed strong reliance on shareholder approval.

¶ 96 In *Pulse*, the target's shareholders approved the SRP in the face of the outstanding bid and with full awareness of the circumstances leading up to the bid.

¶ 97 Shareholders representing 56% of the shares voted. Excluding the 3% of shares held by the target's directors and officers, 73% were voted in favour of the SRP.

¶ 98 The ASC panel in *Pulse* did not identify any other reasons as significant factors in its decision not to cease-trade the SRP. It appears to have treated the target's shareholder approval as determinative, not merely as one factor to be considered, but did not reconcile its approach with the *Cara* panel's statement that "shareholder approval of itself will not establish that a plan is in the best interests of the shareholders".

¶ 99 It turned out in *Pulse* that a minority of the target's shareholders determined the outcome. Only 56% of the shares were voted, so even a 73% vote of those shares in favour meant that only 44% of the *Pulse* shares were voted in favour of the SRP (assuming the 3% held by management were voted in favour). In our opinion that outcome is inconsistent with the principle that

the shareholders ultimately have the opportunity to decide whether or not to tender into the bid.

¶ 100 In *Neo*, shareholders representing 83% of the shares voted, 81% of those in favour of the SRP (excluding the shares held by the offeror), which works out to 67% of all of the target company shares outstanding having been voted in favour of the SRP. Although that is a significant majority, in the result the SRP deprived one-third of the target's shareholders of the opportunity to decide whether or not to tender into the bid.

¶ 101 Both the *Pulse* and *Neo* panels found the shareholders had all of the information relevant to their decision to vote. In *Pulse* the ASC panel also mentioned the absence of any "managerial coercion or inappropriate managerial pressure" in persuading shareholders to approve the SRP.

¶ 102 To echo our earlier comments that a target company board discharging its fiduciary duty is a neutral factor, the same goes for ensuring shareholders are fully informed about the subject matter of the vote and are not subject to improper pressure. Failure to do so would be an aggravating factor, but expected behaviour by the target company is not a factor in favour of continuing an SRP.

Application of the principles to the Lions Gate SRP

¶ 103 The Lions Gate SRP is tactical. It was adopted in the face of the Icahn bid without shareholder approval.

¶ 104 At the time of the hearing the shareholders meeting to approve the Lions Gate 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 consider cease-trading the SRP until after the shareholders meeting.

¶ 105 We were not persuaded by this argument.

¶ 106 As we have made clear in these reasons, there is no basis for allowing an SRP to continue if the target company board is not actively seeking alternatives to the bid. In those circumstances, shareholder approval is not relevant.

¶ 107 That is what happened here. The Lions Gate board did not intend to make use of the Lions Gate SRP to buy time to seek an improved or alternative transaction, so there was no basis to allow its SRP to continue. Shareholder approval of the Lions Gate SRP was therefore not relevant.

¶ 108 In our summary reasons, we found that the evidence did not establish that Icahn was likely to extend its bid if we did not cease-trade the Lions Gate SRP, and cited it as a factor in our decision. In fact, that is not a relevant consideration, given the irrelevance of the shareholder vote in these circumstances.

¶ 109 The parties made earnest submissions about the expiry of the Icahn bid on Friday, April 30, only two business days before the Lions Gate shareholders meeting to be held on Tuesday, May 4. Lions Gate said that Icahn deliberately chose the expiry date for the varied bid to precede the Lions Gate shareholders meeting. Icahn replied that Lions Gate could have organized its affairs in order to hold the meeting sooner.

¶ 110 The parties appeared to attach particular significance to these submissions, so we make the following observations, even though they did not influence our decision.

¶ 111 To some extent the timing issue was of Lions Gate's own making. The history of the relationship between Lions Gate and Icahn, once Icahn became a significant Lions Gate investor, shows that Icahn was clearly interested in exercising greater control over Lions Gates' affairs. Icahn's attempted acquisition of the Lions Gate convertible notes was, we would have thought, a clear signal to Lions Gate that a take-over bid for Lions Gate shares was a clear possibility.

¶ 112 We doubt any of this was lost on the Lions Gate board, yet for its own reasons it chose not to adopt an SRP and put it before the shareholders before Icahn made its bid. In these circumstances, Lions Gate can hardly complain that Icahn failed to choose an expiry date that suited the convenience of Lions Gate management.

F Coerciveness or unfairness

Principles

¶ 113 In *CW Shareholdings Inc*. 1998 LNONOSC 222, a decision of the British Columbia, Alberta and Ontario securities commissions, the panel considered an allegation that the bid was coercive. It found the bid was not coercive and noted in its reasons for cease-trading the SRP (at page 15):

> "The Rights Plan was put into place in the face of the bid and without a vote of shareholders. In such circumstances, it is, at the very least, necessary for the target company to demonstrate that it was necessary to do so because of the

> coercive nature of the Bid, or some other very substantial unfairness or impropriety."

¶ 114 In *Ivanhoe III Inc.* 1999 LNONOSC 84, a joint hearing of the Ontario and Quebec securities commissions, the panel considered a partial bid for a target whose shares were held largely by institutional investors. The evidence was that the market for the target's shares was relatively illiquid and, if the bid was successful, would become even less so. The offeror held 43% of the shares at the time of the bid and was seeking another 25%.

¶ 115 The panel found that in these circumstances, the bid was coercive because it put pressure on minority shareholders to dispose of whatever shares they could before being locked into a minority position. It found "there was no assurance whatsoever that Ivanhoe would ever bid for the remaining minority shares."

¶ 116 The panel noted that had it not found the bid coercive "we would have immediately cease traded the Plan" but, having found the bid coercive, decided to allow the SRP to continue. The panel concluded that there was a reasonable possibility that a better offer would arise during that period, and that there was "every reason" to believe that the offeror would extend the bid.

¶ 117 In *Ivanhoe*, the target company directors' circular contained a paragraph describing partial bids as "inherently coercive" and giving the reasons why. In its decision, the panel quoted the paragraph and said, "In general, we agree with this statement."

¶ 118 In *Chapters Inc*. 2001 LNONOSC 112, another decision involving a partial bid, an OSC panel commented on *Ivanhoe*, saying that the *Ivanhoe* panel did not decide that all partial bids were inherently coercive.

¶ 119 The *Chapters* panel, like that in *Ivanhoe*, focused on lack of liquidity as the key element in finding coerciveness, and went on to find that the partial bid before it was not coercive.

¶ 120 In *MDC*, the OSC panel referred to the "fear factor" raised at the hearing by the target. Although the bid was an all-share bid, the issue arose from the offeror's statement that it would "consider other means of acquiring" any shares it did not acquire under the bid, and that the consideration could differ in value from the bid. The target argued that this equivocal language (compared, for example, to a stated intention to acquire shares not tendered under the bid for consideration equal in value to the bid price) could lead a

shareholder to tender into the bid "out of fear of being left as minority shareholders in a company controlled by [the offeror], having little liquidity for their shares."

¶ 121 The panel did not find the bid coercive. It went only so far as deciding not to treat shareholders' tendering of shares into the bid as an indication that they did not support continuation of the SRP.

¶ 122 In *Samson Canada Ltd.* (1999) 8 ASCS 1791 an ASC panel considered whether an opportunistic offer for all of the shares of the target was inherently coercive. In that case, the evidence was that the target was undervalued and so the bid was opportunistic. The panel said, "We agree that the Samson Offer was opportunistic. In our view, there is nothing improper about that. It is normal for hostile take-over bids to be opportunistic but that, in itself, does not make them coercive . . . ."

¶ 123 The panel went on to say that whether a bid is coercive is only one factor to consider in assessing an SRP, citing *CW Shareholding Inc.* and *Ivanhoe.* In commenting on the decision of the panel in *Ivanhoe*, the panel said,

> "We interpret [*CW Shareholding Inc.*] to mean that the coercive nature of the Bid was a significant factor in the consideration of whether the target had met its burden under the [*MDC*] test [that is, whether there appears to be a real and substantial possibility that, given a reasonable period of further time, the board of the target corporation can increase shareholder choice and maximize shareholder value]. It seems apparent that the coercive nature of a bid may naturally suggest a special need for increasing shareholder choice, and may also influence the determination of what is a reasonable period of further time.
>
> We do not interpret the [*CW Shareholding Inc*] as creating a new test for determining when a tactical pill must go, nor does it elevate coerciveness to the level of a decisive factor. We feel that the [*MDC*] test is the fundamental test for all rights plans. So, it is hypothetically possible for a target to meet its burden under [that test] notwithstanding that there was a tactical pill and a non-coercive bid. Conversely, a target may fail to discharge its burden under the [*MDC*] test, notwithstanding prior shareholder approval of the rights plan and the coercive nature of the bid, if it cannot

> show a real and substantial possibility of producing another bid within a reasonable time."

¶ 124 *Falconbridge Ltd.* (2006) 29 OSCB 6783, a decision of an OSC panel, is the only decision among those cited to us in which coercion was found in connection with an all-share bid. The circumstances were unique and are not relevant to the case before us. The significance of the decision is that the panel, having found coercion, allowed the SRP to continue, but only temporarily.

¶ 125 These decisions demonstrate that where coercion is found, it is at most a factor in determining whether to allow the SRP to continue while the target company board seeks alternatives. It does not change the basis for extending the SRP – that the board use the time to seek alternatives – nor does it change the criteria for determining when an SRP, as it must, come to an end.

Application of the principles to the Lions Gate SRP

¶ 126 Applying the test from *CW Shareholdings Inc.*, did Lions Gate demonstrate that its SRP was necessary because of the coercive nature of the bid, or some other very substantial unfairness or impropriety?

¶ 127 Lions Gate said that the Icahn bid was coercive because a shareholder, not knowing how much of the company would end up in Icahn's hands, would not have had the information necessary to make an informed decision. Even if shareholders believed the bid price to be inadequate, said Lions Gate, they may have felt 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.

¶ 128 Lions Gate also said that because Icahn could waive its minimum tender condition, its bid was in substance a partial bid and was therefore coercive.

¶ 129 We do not agree. As stated in *Chapters* and *Samson*, partial bids are not inherently coercive, but in any event the Icahn bid was an all-share bid. Its reservation of the right to waive the minimum tender condition is a feature common to all types of bids – a feature that has never been found to be, in and of itself, coercive.

¶ 130 Under the terms of the Icahn bid, if the minimum tender condition were satisfied, there was to be an extension of the bid for a further 10 business

days so that those who rejected the bid could have the opportunity to tender their shares if they so wished, in light of the new information.

¶ 131 If Icahn chose to waive the minimum tender condition, that would have been a variation of the Icahn bid and it would have been extended. The effect would have been that shareholders who had not tendered would then have known that the condition had been waived and could have reconsidered their decision in those circumstances. Similarly, those who had tendered would have had the right to withdraw their shares in light of the new information. That extension would have been followed by the same extension described in the previous paragraph.

¶ 132 It is true that eventually, despite the additional extension, a Lions Gate shareholder may have had to decide whether to accept the Icahn bid or take the risk of remaining a shareholder. This element is present in virtually every take-over bid, and in our opinion does not, in and of itself, make the Icahn bid coercive.

¶ 133 That said, the fact remains that coercion is not a relevant factor in this case. Even when commission panels have found coercion, they have merely allowed the SRP to continue for a while longer. That makes sense when there is an auction in play or the target company board is seeking alternatives, but as we have already said, there is no basis for allowing an SRP to continue when neither of these factors is present.

VI Decision

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

¶ 135 July 26, 2010

¶ 136 **For the Commission**

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner