

2012 BCSECCOM 442

Inmet Mining Corporation

and

Petaquilla Minerals Ltd.

Securities Act, RSBC 1996, c. 418

Panel	Brent W. Aitken	Vice Chair
	Brad Doney	Commissioner
	Don Rowlatt	Commissioner

Date of hearing October 30, 2012

Date of decision October 31, 2012

Date of reasons for decision November 28, 2012

Appearing

Robert Cooper	For Inmet Mining Corporation
Miranda Lam	
Shane D'Souza	

Sean K. Boyle	For Petaquilla Minerals Ltd.
Alexandra Luchenko	
Craig Thorburn	

C. Paige Leggat	For the Executive Director
Gordon Smith	

Reasons for Decision

I Introduction

- ¶ 1 After a hearing on October 30, 2012 we made orders in connection with an offer by Inmet Mining Corporation for Petaquilla Minerals Ltd. (see 2012 BCSECCOM 409). These are our reasons.

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II Background

- ¶ 2 On September 5, 2012, Inmet Mining Corporation announced its intention to make an all-share bid for the outstanding common shares of Petaquilla Minerals Ltd. for cash, common shares of Inmet, or a combination thereof, at the election of each holder of Petaquilla shares.
- ¶ 3 On September 28, 2012, the offer was formally commenced by Inmet's filing a take over bid circular.
- ¶ 4 On October 24, 2012, Inmet increased the consideration under the offer by 25%, resulting in an offering price that was a 71% premium over the closing price on the Toronto Stock Exchange of Petaquilla shares on September 5, 2012, the date that Inmet announced its offer.
- ¶ 5 The offer had an expiry date of November 5, 2012.
- ¶ 6 The offer was not a "permitted offer" under a shareholders rights plan adopted by Petaquilla in October 2010. It was a condition of the offer that the Petaquilla rights plan be rendered not effective.
- ¶ 7 Petaquilla announced in July 2012 its intention to offer under a private placement US\$210 million principal amount of senior secured notes that may have included warrants to purchase Petaquilla common shares. It was a condition of the offer that the notes offering not occur.
- ¶ 8 Inmet applied for orders cease-trading securities issued under or in connection with the Petaquilla rights plan and the Petaquilla notes offering.
- ¶ 9 Petaquilla applied for an order cease-trading any securities issued by Inmet in connection with its offer on the basis that Inmet's offering circular contained misleading information.
- ¶ 10 After the hearing we granted Inmet's applications and dismissed Petaquilla's application.
- ¶ 11 The Inmet offer expired on November 5. Shares tendered under the offer did not reach the offer's minimum tender condition (50.1% of Petaquilla's issued and outstanding shares). Inmet did not take up any Petaquilla shares.

III Analysis

A Inmet's applications

1. Application to cease-trade the rights plan

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Applicable law

- ¶ 12 The law applicable to Inmet's application is straightforward. We considered National Policy 62-202 *Take-Over Bids – Defensive Tactics* and followed the relevant authorities. The law has been recently considered by this Commission in *Icahn Partners 2010 BCSECCOM 214* (decision), 2010 BCSECCOM 233 (reasons), and by the Ontario Securities Commission in *Baffinland Iron Mines Corp.* 2010 LNONOSC 904, so we need not review it again here.
- ¶ 13 The issue before us was whether it was time for the Petaquilla rights plan to go. Inmet's application turned primarily on two of the factors to be considered when determining whether it is time for a rights plan to go: the period the offer has been announced and outstanding; and whether there is a real and substantial possibility of an alternative that would increase shareholder choice and maximize shareholder value.

Time that the offer was announced and outstanding

- ¶ 14 A relevant factor for determining whether it is appropriate to cease-trade a rights plan is the length of time the offer has been announced and outstanding. It is a measure of how long the target has had to seek out better alternatives to the offer.
- ¶ 15 In many cases, the duration of the offer for the purpose of considering this factor begins at the time the offeror's take over bid is filed because that is the first time that the offer, and its details, are made public.
- ¶ 16 Here, the issue is whether the time the offer was outstanding should be measured from the date of Inmet's announcement on September 5 or the date of Inmet's filing of its take over bid circular on September 28. The offer's expiry date of November 5 was 60 days from Inmet's announcement, and 38 days after Inmet filed its take over bid circular.
- ¶ 17 Inmet announced its offer on September 5, a Wednesday. Inmet's announcement was unequivocal and disclosed all the material elements of the offer. In its announcement, Inmet disclosed all of the material terms and conditions of the offer, including the details of the consideration offered, the number of shares it was seeking to buy, the minimum tender condition, and the conditions related to the Petaquilla rights plan and Petaquilla's proposed notes offering.
- ¶ 18 Moreover, Petaquilla's behaviour was consistent with that of a target in play. It did not wait until Inmet filed its take over bid circular before taking steps. On Monday, September 10 the Petaquilla board decided to seek a financial advisor in relation to the offer, and during that week met with candidates for that position. On September 17, Petaquilla chose UBS Securities Canada Inc.

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- ¶ 19 We find that for the purpose of considering the time that the offer has been announced and outstanding, that the offer was fully disclosed to Petaquilla and the public in Inmet's September 5 announcement, and that Petaquilla had about 60 days to respond to the offer before its expiry on November 5.

Real and substantial possibility of a superior alternative

- ¶ 20 Decisions of Canadian securities commissions establish that it is appropriate to allow a rights plan to continue for a time in circumstances where the target shows that there is a real and substantial possibility that more time will yield a transaction superior to the existing offer.
- ¶ 21 In our opinion, Petaquilla failed to demonstrate a real and substantial possibility of a superior transaction.
- ¶ 22 The evidence is that UBS Canada contacted 37 prospective bidders, of whom only two could be said to have any real interest (being the only two who had accessed Petaquilla's data room). One of these, referred to in the proceedings as the interested party, delivered a document described as an "indicative term sheet" that Petaquilla described as a basis for a "potential" transaction.
- ¶ 23 According to the testimony of Joao Manuel, Petaquilla's chief executive officer, Petaquilla and the interested party had not yet agreed on price or structure, although they were "close" because they had been "discussing these for quite some time."
- ¶ 24 Manuel went on to testify that:

"I do believe that we could close the transaction in the next coming weeks if we were just simply to accept the discussions at this stage... but offers are interesting and can be improved because the assets also interest the other parties. So it's a, it's an ongoing process that will last still a few more weeks to complete.

...

so, at this stage, we cannot say a lot more than that it can lead to a superior transaction, because there's still this negotiation. And the, and the fundamentals of a successful negotiation are there, because the interested party is seriously interested..."

- ¶ 25 David Bain is the managing director and head of the Canadian mergers and acquisitions group for UBS Canada. He testified that in his opinion there was a "reasonable probability" that a transaction "could lead to an offer that is superior

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to Inmet's 60-cent offer." Counsel for Inmet asked, "That's right. It could lead." Bain responded, "Right."

- ¶ 26 On re-direct, Bain testified that the price in the indicative term sheet from the interested party was a "substantial premium" to Inmet's offer.
- ¶ 27 This evidence fell short of demonstrating a real and substantial possibility that leaving the Petaquilla rights plan in place any longer would result in an alternative transaction for its shareholders to consider that would result in greater shareholder value.
- ¶ 28 Those closest to the negotiations testified only that the negotiations "could" lead to a superior transaction. There was no clear evidence as to why more time was required, and no evidence that gave us confidence of the likelihood of agreement if more time were given. We were left wondering why, if the interested party's opening offer was itself a substantial premium to the Inmet offer, there was not stronger evidence about the likelihood of success.
- ¶ 29 An Inmet executive testified that Inmet would not extend its offer past November 5. Asked if Inmet was reserving the right to do so, he said, "We won't . . . We will let the offer expire."
- ¶ 30 We therefore concluded that it was time for the rights plan to go. Although the evidence showed a possibility of a transaction, it did not establish that the possibility was real and substantial. Allowing the rights plan to continue in these circumstances in the face of unequivocal evidence from Inmet that its offer would not be extended carried the risk that Petaquilla shareholders would be denied the opportunity to consider and tender into the Inmet bid if they so desired.

2. Application to cease-trade the notes offering

- ¶ 31 We heard submissions about whether Petaquilla's proposed notes offering was a bona fide ordinary course financing or an abusive defensive tactic. Based on the evidence of Manuel, it appears that the proposed offering was in the ordinary course of business. Certainly there was no evidence that it was an artificial transaction created as a purely defensive measure.
- ¶ 32 However, regardless of Petaquilla's primary motive for the notes offering, the offering clearly had the potential to deny Petaquilla shareholders the right to tender into the offer. The evidence was that Inmet regarded the notes offering as a threat to Petaquilla's financial stability, and, if the offering included warrants, represented a substantial unquantified dilution risk. Accordingly, Inmet made non-completion of the notes offering a condition of its offer.

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- ¶ 33 The evidence was that Petaquilla had no agreement with any potential investors in the notes offering, the offering had not been priced, and no decision had yet been made about whether the offering would include warrants, and if so, how many. Manuel also testified that Petaquilla was in no particular hurry to complete the offering as it had no immediate need for the financing.
- ¶ 34 Manuel also testified that the Petaquilla board was not prepared to rule out an attempted completion of the notes offering as a defensive tactic.
- ¶ 35 Based on this evidence, we concluded that the notes offering could have the effect of denying Petaquilla shareholders the opportunity to consider and tender into the Inmet offer if they so desired. Furthermore, the evidence was that there would be no adverse impact on Petaquilla during the short period between the hearing and the expiry of the offer if the notes were cease-traded.

B Petaquilla's application

- ¶ 36 There is a dispute between Inmet and Petaquilla in connection with certain properties adjacent to a significant Inmet property in Panama. Petaquilla alleges that the dispute is relevant to Petaquilla shareholders because, in Petaquilla's view, Petaquilla may have the ability to interfere with Inmet's development of its property.
- ¶ 37 Petaquilla alleged that Inmet's take over bid circular failed to disclose the dispute, and that its failure to do so is a material omission.
- ¶ 38 Petaquilla issued news releases about the dispute as part of its defence to the Inmet offer, and also included disclosure about the dispute in its directors' circular.
- ¶ 39 In response to Petaquilla's disclosure, Inmet also made further disclosures about the dispute in its October 24 notice of variation.
- ¶ 40 Petaquilla's application was for a cease-trade order to prevent the offer from being completed as a result of the alleged material omission in Inmet's take over bid circular. What is relevant to the application is not whether Inmet's circular was materially deficient, but whether Petaquilla shareholders were deprived of material information in considering whether to accept the offer.
- ¶ 41 In our opinion, they were not. Whether or not the property dispute and its potential implications were material, the parties' disclosures made during the course of the bid about them were adequate.

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IV Decision

¶ 42 We therefore ordered that if Petaquilla did not waive the rights plan in relation to the offer we would cease-trade the securities issued or to be issued in connection with the Petaquilla rights plan, cease-traded the notes offering, and dismissed Petaquilla's application.

¶ 43 November 28, 2012

For the Commission

Brent W. Aitken
Vice Chair

Brad Doney
Commissioner

Don Rowlatt
Commissioner