

BRITISH COLUMBIA SECURITIES COMMISSION  
*Securities Act*, RSBC 1996, c. 418

Citation: Re Red Eagle, 2015 BCSECCOM 401

Date: 20151103

**Red Eagle Mining Corporation, CB Gold Inc. and Batero Gold Corp.**

<b>Panel</b>	Nigel P. Cave Judith Downes George C. Glover, Jr.	Vice Chair Commissioner Commissioner
<b>Hearing date</b>	September 10, 2015	
<b>Date of Ruling</b>	September 11, 2015	
<b>Date of Reasons</b>	November 3, 2015	
<b>Appearing</b>		
Teresa M. Tomchak Jay Sujir Matthew W. Pierce Arden M. Beddoes	For Red Eagle Mining Corporation	
David R. Brown Angela Crimeni John F. Anderson	For CB Gold Inc.	
Georges Dube Brigeeta Richdale	For Batero Gold Corp.	
Gordon Smith Leslie Rose Victoria Steeves	For the Executive Director	

**Reasons for Decision**

**I. Introduction**

- [1] An application was brought by Red Eagle Mining Corporation to have the Commission exercise its public interest jurisdiction under section 161(1)(b) of the *Securities Act*, RSBC 1996, c.418, as amended, to:

- a) grant a cease-trade order in respect of any securities issued, or to be issued, under or in connection with the shareholder rights plan (Plan) of CB Gold Inc.;
  - b) to remove any prospectus exemptions in respect of the distribution of the securities issued, or to be issued under or in connection with the Plan;
  - c) grant a cease-trade order in respect of any securities issued, or to be issued under or in connection with a private placement of 11,500,000 shares of CB Gold at \$.05 per share (Private Placement) to Batero Gold Corp. and that the boards of CB Gold and Batero take all steps necessary to reverse the issuance of the shares to Batero pursuant to the Private Placement; and
  - d) grant a cease trade order in respect of any securities to be taken up under a take-over bid for the shares of CB Gold announced by Batero on July 24, 2015 (Batero Offer) and formally commenced on August 11, 2015.
- [2] On September 10, 2015, we held a hearing to determine the merits of Red Eagle's applications during which we heard evidence and received submissions from each of Red Eagle, CB Gold, Batero and Commission staff.

- [3] On September 11, 2015, we issued the following decision, with reasons to follow:

After considering the evidence and submissions of the parties, including Red Eagle's undertaking to provide a ten-day extension of its bid in the event that it takes up any securities under its bid, and considering it to be in the public interest, the Commission:

1. orders:

- (i) pursuant to section 161(1)(b) of the Act that trading cease in respect of any securities issued, or to be issued, under or in connection with the Plan, and
- (ii) pursuant to section 161(1)(c) of the Act that any prospectus exemptions in respect of the distribution of the rights pursuant to the Plan and in respect of the exercise of those rights do not apply; and

2. dismisses the applications to make orders that:

- (i) trading cease in respect of any securities issued or to be issued in connection with the Private Placement and that the boards of CB Gold and Batero be ordered to take all steps to reverse the issuance of the securities under the Private Placement, and

(ii) trading cease in respect of any securities to be taken up under the Batero Offer.

[4] These are the reasons for our decision in this matter.

## **II. Facts**

### ***a) The parties***

[5] Red Eagle is a gold exploration and development company headquartered in Vancouver, British Columbia. Its projects are geographically focused in Colombia. Red Eagle is a reporting issuer under applicable securities laws in British Columbia, Alberta and Ontario and its shares are listed on the TSX Venture Exchange.

[6] CB Gold is a mineral exploration company headquartered in Vancouver, British Columbia. Its principal asset, owned through an indirect wholly owned subsidiary, Leyhat Colombia Sucursal, is the Vetas Gold Project in Colombia. CB Gold is a reporting issuer under applicable securities laws in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and its shares are listed on the TSX-V.

[7] Batero is a mining company headquartered in Toronto, Ontario. Batero is a reporting issuer under applicable securities laws in British Columbia, Alberta, Saskatchewan and Ontario and its shares are listed on the TSX-V.

### ***b) Background to the Red Eagle Offer***

[8] Red Eagle and CB Gold engaged in friendly merger discussions in the first half of 2014. Those discussions ended without an agreement between the parties.

[9] On August 27, 2014, CB Gold announced the adoption of the Plan, subject to approval by the CB Gold shareholders.

[10] In October 2014, CB Gold announced a private placement to raise \$3,000,000 but was only able to raise approximately \$750,000 of that amount.

[11] On January 28, 2015, the Plan was approved at a CB Gold shareholders meeting by 98% of the CB Gold shareholders that voted in person or by proxy at the meeting.

[12] On May 19, 2015, CB Gold announced that it had entered into an agreement, which provided that CB Gold would sell Leyhat to a company called OML Trading Inc. (OML Transaction). OML is a company controlled by an existing CB Gold shareholder, Michelle Navarro Grau Dyer (Dyer). At the time of the announcement of the OML Transaction, Dyer was the largest CB Gold shareholder, holding approximately 12% of the CB Gold shares. As the OML Transaction amounted to both a “sale of substantially all of the assets” of CB Gold and was a “related party transaction” under Multilateral

Instrument 61-101 *Take-Over Bids and Special Transactions* (MI 61-101), approval of the shareholders of CB Gold was a condition of completion of the transaction.

- [13] Red Eagle says that following the announcement of the OML Transaction it was approached by several large shareholders of CB Gold inquiring about Red Eagle's possible interest in acquiring CB Gold as an alternative, for CB Gold shareholders, to the OML Transaction.

***c) The Red Eagle Offer and the First Private Placement***

- [14] In late May through early June 2015, Red Eagle approached CB Gold with several transaction proposals, which were rebuffed. On June 16, 2015, Red Eagle announced that it would make a share exchange take-over bid for the shares of CB Gold (Red Eagle Offer). The implied value of the transaction was \$0.051 per CB Gold share. Red Eagle announced that its offer was subject to the OML Transaction not proceeding.
- [15] The Red Eagle Offer was for all of the CB Gold shares and contained a minimum 50% tender condition.
- [16] June 19, 2015 was the deadline for proxies for a meeting to be held on June 23, 2015 for the CB Gold shareholders to vote on the OML Transaction. It was not disputed by CB Gold that as of June 19, 2015, it knew that the OML Transaction would not receive the requisite shareholder approvals.
- [17] On June 22, 2015, the day before the planned shareholders meeting, CB Gold announced a private placement with three parties (one of whom was Dyer) to raise \$3.5 million (the First Private Placement). The terms of the First Private Placement would have resulted in CB Gold increasing its total number of issued and outstanding shares by 40%.
- [18] CB Gold says that this was the only source of financing that it had been able to identify, in light of its past attempts to raise money and the upcoming defeat of the shareholder vote on the OML Transaction.
- [19] Red Eagle filed a complaint with the TSX-V with respect to the First Private Placement and filed an application to the Commission to exercise its public interest jurisdiction to cease trade the securities to be issued in connection with the First Private Placement.
- [20] On June 23, 2015, a majority of the CB Gold shareholders who voted at a shareholders meeting, in person or by proxy, voted against the OML Transaction.
- [21] The Red Eagle Offer formally commenced on June 29, 2015 when Red Eagle filed its take-over bid circular.

- [22] On July 2, 2015, CB Gold issued a press release indicating that it would not proceed with the First Private Placement. CB Gold says that this decision arose as a result of Red Eagle's regulatory challenges to that financing.
- [23] Sometime in early July, CB Gold and Red Eagle resumed discussions with a view to reaching an agreement on a friendly transaction. During these discussions, CB Gold indicated to Red Eagle that it would require a financing for approximately US \$550,000 in order to meet its ongoing obligations and remain a going concern prior to the completion of any friendly transaction. These discussions between Red Eagle and CB Gold did not lead to the completion of any agreements.
- [24] On July 14, 2015, CB Gold issued a news release in which it indicated that the board had concluded that the Red Eagle offer failed to provide adequate value for the CB Gold shares.

***d) The Batero Offer and Private Placement***

- [25] On July 24, 2015, Batero and CB Gold announced that they had entered into a support agreement pursuant to which Batero would make an offer to acquire all of the outstanding shares of CB Gold in exchange for a combination of cash and shares in Batero (Batero Offer). The press release announcing the Batero Offer says that the implied value of bid was approximately \$.05 per CB Gold share. The parties further announced that directors, officers and other shareholders of CB Gold, holding an aggregate of 19.5% of the CB Gold shares, had entered into lock-up agreements whereby they would tender their shares to the Batero Offer. The Batero Offer contained a minimum 50% tender condition.
- [26] In the same press release, Batero and CB Gold announced that Batero had agreed to provide \$575,000 to CB Gold pursuant to the Private Placement. There is a dispute among the parties as to when the agreement to provide this financing occurred relative to entering into the support agreement. Red Eagle says that the agreement to provide the financing occurred after the agreement to make the bid. Batero and CB Gold say that the agreement occurred contemporaneously. We will discuss this issue further below.
- [27] The support agreement between Batero and CB Gold provided a non-solicitation provision whereby CB Gold agreed it would not solicit any alternative proposals to the Batero Offer. CB Gold also agreed to waive the Plan in connection with the Batero offer, but that it would not do so until two days prior to the expiry of the Batero Offer.
- [28] These news releases did not disclose that Dyer and her family members controlled approximately 35% of the outstanding shares of Batero.
- [29] Later in the day on July 24, 2015, CB Gold announced that it had closed the Private Placement.

[30] CB Gold said that by July 24, 2015 it had approximately \$70,000 in cash and had numerous liabilities. CB Gold said that the TSX-V made enquiries, as part of its process in issuing conditional approval for the Private Placement, whether the Private Placement was a defensive tactic. CB Gold said that it provided evidence that satisfied the TSX-V that this was not the purpose of the financing and that the funds raised were needed to allow the company to meet its obligations through until the completion of the Batero Offer.

*e) Subsequent Events*

[31] On August 4, 2015, Red Eagle filed a Notice of Extension and Variation with respect to the Red Eagle Offer. Pursuant to that filing, Red Eagle extended the expiry date of its offer to August 31, 2015 and added a subsequent offering period of 10 days if it took up any securities under its offer. These changes to the Red Eagle Offer meant that it met the terms of a “Permitted Bid” under the terms of the Plan (i.e. the Red Eagle Offer was made for all CB Gold shares, would have been open for 60 days by August 31, 2015, had a minimum tender condition of 50% and had a ten-day subsequent offering period).

[32] On August 5, 2015, CB Gold announced that its directors reconfirmed their support for the Batero Offer.

[33] On August 11, 2015, Batero formally commenced the Batero Offer by filing its take-over bid circular. The Batero Offer was initially open until September 16, 2015. Batero confirmed in its circular that the CB Gold shares issued under the Private Placement would be counted for the purposes of determining if Batero met its minimum 50% tender condition.

[34] On August 31, 2015, Red Eagle filed a further Notice of Extension and Variation with respect to the Red Eagle Offer. Pursuant to that filing, Red Eagle extended the expiry date of its offer to September 14, 2015, removed the 50% tender condition and removed the obligation for Red Eagle to include a subsequent ten-day offering (it retained the option to provide a subsequent ten-day offering period or not).

[35] On September 4, 2015, Batero announced that it would increase the consideration of the Batero Offer to \$.06 for each CB Gold share, and that it had entered into an amended support agreement whereby Batero could waive its minimum 50% tender condition without the consent of CB Gold.

[36] Both Batero and Red Eagle made open market purchases of CB Gold shares following the commencement of their take-over bids.

[37] The Private Placement had not received final approval from the TSX-V as of the hearing date for this matter.

[38] As of the date of the hearing, 48% of the CB Gold shares had been tendered to the Red Eagle Offer, which Red Eagle notes would have constituted 52% of the CB Gold shares without the Private Placement. However, the hearing took place shortly after the increase in the Batero Offer and we did not know whether CB Gold shares would be withdrawn from the Red Eagle Offer as a consequence, or not.

### **III. Position of the parties**

#### ***a) Red Eagle***

[39] Red Eagle said that it was time for the Plan to go. It said the Plan had served its purpose by giving the CB Gold board an opportunity to generate an alternative proposal and that the Plan's only purpose, as of the hearing, was to prevent CB Gold shareholders from tendering to the Red Eagle Offer.

[40] Red Eagle submitted that the Private Placement was in contravention of various securities laws and even if it was not, it was an inappropriate defensive tactic. It submitted that the Private Placement contravened section 2.2 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (MI 62-104), in that the Private Placement occurred after Batero committed to make the Batero Offer. It further submitted that there were problems with Batero's and Dyer's (and related entities) early warning reporting in CB Gold prior to the Private Placement. It said that CB Gold's public disclosure did not substantiate its statements to the TSX-V that it was in dire need of financing. Red Eagle said that the Private Placement necessitated it to amend the Red Eagle Offer by waiving the 50% minimum tender condition. It submitted that the history of the CB Gold/Dyer relationship allowed us to infer that the intent of the Private Placement was to defeat the Red Eagle Offer in favour of the Batero Offer. Finally, it said that, although it could not find any examples of securities commissions having exercised this power, this Commission has the authority, under its public interest power, to cause CB Gold and Batero to take steps to unwind the Private Placement.

[41] Lastly, Red Eagle raised a host of issues in support of its application that we issue a cease trade order with respect to the Batero Offer. In particular, it said:

- CB Gold and Batero committed a number of disclosure violations, including: their initial press releases that did not indicate that the Batero Offer was an insider bid; CB Gold's improper disclosures about the OML Transaction; misleading disclosure about the Red Eagle Offer; CB Gold's failure to file certain material contracts; CB Gold's delay in providing its directors' circular responding to the Red Eagle Offer; and failures to provide detailed disclosure about which CB Gold shareholders entered into lock-up agreements in support of the Batero Offer;
- Batero breached section 2.2 of MI 62-104 when it entered into the Private Placement after it had agreed to make the Batero Offer pursuant to the support agreement with CB Gold; and

- Batero's takeover bid circular improperly stated that, while the Batero Offer may be considered an insider bid, an exemption from the valuation requirements of the insider bid regime was applicable to the Batero Offer.

**b) CB Gold**

[42] CB Gold submitted that the Red Eagle Offer was coercive in that it contained no 50% minimum tender condition. CB Gold relied, in part, on the policy rationale described in proposed amendments to MI 62-104, which, if enacted, would make a 50% minimum tender condition a requirement of all take-over bids. In particular, CB Gold said that the 50% minimum tender condition prevents a bidder from obtaining a blocking position without a majority of a target's shareholders support.

[43] CB Gold also submitted that the Private Placement was not an improper defensive tactic. It said that the Private Placement was carried out for legitimate business purposes as it was necessary for its survival until the completion of the Batero Offer and that the financing amount was minimally dilutive. It said that it obtained conditional approval from the TSX-V which specifically considered the question whether the offering was an improper defensive tactic. Lastly, CB Gold submitted that if the Commission did determine it necessary to interfere in the Private Placement, unwinding the transaction was not a "workable solution" in the circumstances. In particular, it said that it had already spent a significant amount of the proceeds of the Private Placement and therefore did not have the funds to give back to Batero and remain a going concern.

**c) Batero**

[44] Batero submitted that the Private Placement could not be cease traded (or unwound) from a legal or a practical perspective. Further, it said that it was not in the interests of the CB Gold shareholders to cease trade the Batero Offer.

[45] Batero said that the Private Placement complied with securities laws generally and section 2.2 of MI 62-104, in particular. It said that the Private Placement was agreed to prior to Batero's announcement of its intention to make the Batero Offer. It submitted that even if this were not the case, there had been no harm to the CB Gold shareholders or the capital markets that should cause us to exercise the Commission's public interest jurisdiction to cease trade or unwind the Private Placement.

[46] At the time at the offering, Batero assumed that its offer was an insider bid and that it ensured that its offer was in compliance with the insider bid regime. Batero submitted at the hearing that the Batero Offer was not an insider bid in that Dyer and Batero were not acting jointly and in concert with respect to the Batero Offer. While they were presumed to be acting jointly and in concert under section 1.9(b) of MI 61-104, that presumption was rebutted by the facts of this case. Secondly, if the Batero Offer was an insider bid, then an exemption from the valuation requirements contained in the insider bid regime was applicable because neither Batero nor Dyer had any board representation on the CB



Gold board nor were they privy to any undisclosed material information regarding CB Gold.

[47] With respect to Red Eagle's allegations of improper disclosure by Batero and CB Gold, Batero said that there was sufficient information in the public record in order to allow the CB Gold shareholders to make an informed decision about the Batero Offer. In particular, it submitted that the Batero Offer was at that time the superior proposal and that the CB Gold shareholders should not be denied the opportunity to tender to that offer. Batero said that, if there were any securities law violations, then the determination of a remedy for such breaches should be looked through the lens whether there had been any abuse of the capital markets and that was not the case with respect to the Batero Offer.

***d) Commission staff***

[48] Commission staff submitted that we should exercise our public interest jurisdiction to interfere with a private placement in the context of a take-over bid only where there is compelling evidence that a failure to intervene would be abusive of shareholders in particular and the capital markets in general.

[49] Staff said that the evidence in this case did not provide such compelling evidence. They pointed to numerous factors in support of this position, which we will discuss below.

[50] Finally, staff submitted that the Commission does not have the authority under section 161(1) of the Act to order the boards of Batero and CB Gold to unwind the Private Placement. Staff said that a court was the more appropriate forum to seek a remedy that might involve unwinding a private placement and/or cancelling shares.

**IV. Analysis**

***a) Plan***

*i. Summary of law*

[51] National Policy 62-202 *Take-Over Bids – Defensive Tactics* (Policy), adopted in 1997 and unamended since adoption, sets out the guidelines of the Canadian securities regulators regarding the public interest as it relates to defensive take-over bid tactics, including shareholder rights plans. The Policy was adopted at a time when Canadian securities regulators already had considerable experience in considering the public interest associated with rights plans. In addition, there have been numerous decisions of Canadian securities regulators addressing the issue of the public interest in the context of applications by bidders to cease-trade shareholder rights plans, beginning with *Canadian Jorex* (1992) 15 OSCB 257 and on through more recent decisions.

[52] The consideration of the public interest as it relates to defensive take-over bid tactics begins with an understanding of the public interest underlying Canada's take-over bid regime. The Policy in section 1.1(2) outlines that:

The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the *bona fide* interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment.

[53] The decision of this Commission in *Icahn Partners LP*, 2010 LNBCSC 398 (*Icahn*) at para. 24, summarizes the securities regulators' views of the public interest (as reflected in both the Policy and in previous decisions) as it related, at that time, to the adoption of shareholder rights plans as a defensive take-over bid tactic:

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 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 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.

[54] Thus, there remains a process of deciding when, not if, a rights plan must go. Determining when it is time "for a pill to go", requires the consideration of a number of factors. A useful, non-exhaustive list of such factors was set out in *Royal Host Real Estate Investment Trust* 1999 LNBCSC 88 (Q.L.) (*Royal Host*). This was a unanimous decision of our Commission, the Alberta Securities Commission and the Ontario Securities Commission. In *Royal Host* (at p. 16), the Commissions listed the factors as follows:

- a) whether shareholder approval of the rights plan was obtained;
- b) when the plan was adopted;
- c) whether there is broad shareholder support for the continued operation of the plan;

- d) the size and complexity of the target company;
- e) the other defensive tactics, if any, implemented by the target company;
- f) the number of potential, viable offerors;
- g) the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
- h) the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
- i) the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
- j) the length of time since the bid was announced and made;
- k) the likelihood that the bid will not extend if the rights plan is not terminated.

*ii. Applying factors*

- [55] In this case, the Plan was implemented in August 2014 and in January 2015 received approval from the CB Gold shareholders. As was noted by this Commission in *HudBay Minerals Inc. v. Augusta Resource Corporation*, 2014 BCSECCOM 154, there is a difference in weight to be attached to shareholder approval of a rights plan in the face of an existing offer versus shareholder approval obtained prior to the launch of any offers for the target's securities. The CB Gold shareholder approval of the Plan was only one factor to consider, and in this case, was not determinative of the outcome.
- [56] CB Gold had agreed to a non-solicitation provision in its support agreement with Batero and there was no evidence to suggest that any other alternative transactions were possible, let alone likely, to be generated by the board of CB Gold.
- [57] Notwithstanding this, CB Gold submitted that the auction was not over and that the Plan was still creating the possibility of higher offers from either Red Eagle or Batero. While it was entirely possible that the auction for CB Gold might continue, as between Red Eagle and Batero, we did not see how the Plan was aiding in that process. If anything, the Plan was serving to ensure that CB Gold shareholders could not tender to the Red Eagle Offer and was thereby impairing the running of a true open auction for the CB Gold shares.
- [58] The Red Eagle Offer had been open for 72 days as of our hearing. The evidence of the CEO of Red Eagle was that Red Eagle would not be extending its offer past the September 14, 2015 expiry date.
- [59] When pressed by the panel as to what purpose the Plan would serve if left in place, CB Gold submitted that it had two purposes. It would allow the CB Gold shareholders that may have tendered to the Red Eagle Offer to withdraw their shares in order to tender to the Batero Offer, which CB Gold and Batero claimed was at that time the superior offer. In addition, CB Gold submitted that the Plan served to block the coercive Red Eagle

Offer (coercive due to the waiver of the 50% minimum tender condition in the Red Eagle Offer).

- [60] We rejected CB Gold's submission that it was in the public interest to preserve the Plan in order to allow CB Gold shareholders to withdraw their shares from the Red Eagle Offer to tender to the Batero Offer. It is not the role of securities regulators in pill hearings to interfere with timing advantages or disadvantages for bidders within our take-over bid regime. Batero waited until the Friday before a long weekend (four business days ahead of the expiry date of the Red Eagle Offer) to amend its offer. Its reasons for doing so were its own. It was not our role to address the timing issues associated with this decision.
- [61] CB Gold's argument that the Plan legitimately blocked the Red Eagle Offer was founded upon CB Gold's belief that the Red Eagle Offer was coercive. In support of this position, it pointed to the policy rationale set out in proposed amendments to MI 62-104 that would make a 50% tender condition mandatory in all bids.
- [62] These proposed amendments were not yet in effect and we were not bound by them. We were mindful of the policy issues raised by these proposals; however, we elected not to follow the proposed amendments for the reasons that follow.
- [63] It is not coercive in all circumstances to waive (or not include) a 50% minimum tender condition in a take-over bid. Each factual circumstance will dictate whether a bid without a minimum tender condition is, in fact, coercive.
- [64] In these circumstances, we did not find Red Eagle's waiver of the minimum tender condition in its bid to be coercive. In fact, as was the case in *HudBay*, when there is a large, existing minority shareholder blocking position (large enough to require almost all shares not held by the blocker's position to be tendered to an opposing bid for it to succeed), the only way to create a viable auction process is to waive a minimum tender condition. In this case, the circumstances surrounding the minority blocking position to the Red Eagle Offer were exacerbated by the Private Placement and the non-arm's length nature of the relationships among certain large shareholders in CB Gold and Batero.
- [65] However, as this Commission noted in *HudBay*, without a minimum tender condition in a bid, a target's shareholders have considerable uncertainty as to the extent of the shareholdings of the bidder (and other parties) following initial take-up by the bidder. We think that a secondary ten-day offering period is critical in these circumstances to provide target shareholders with a further opportunity to tender their shares to a bid, once they have been provided with notice of the bidder's degree of success in the initial offering period.

- [66] In this case, we were offered a representation from Red Eagle that, if we cease traded the Plan, Red Eagle would offer a secondary ten-day offering period if it took up any shares under its offer.
- [67] Considering this representation, the length of time that the Red Eagle Offer had been open, the evidence that Red Eagle would not extend its bid, there being no reasonable possibility (let alone likelihood ) of other alternative transactions and no legitimate purpose for continuing the Plan, we granted Red Eagle’s application and ordered that the Plan be cease traded immediately from the date of our order.
- [68] At this stage in CB Gold’s auction process, we found the public interest to be best served by giving the CB Gold shareholders an opportunity to tender their shares to either offer or to sell their shares on the open market where shares were trading in the context of both offers.

***b) Private Placement***

- [69] Red Eagle submitted that we should grant its application to cease trade the securities issued pursuant to the Private Placement and order the CB Gold and Batero boards to take steps to unwind the transaction, on the basis that the Private Placement violated certain provisions of securities laws. Red Eagle further submitted that even if the Private Placement did not violate any securities laws we should exercise the Commission’s public interest jurisdiction to make this order in the circumstances.
- [70] Red Eagle’s application was challenging for a number of reasons.
- [71] The review, by a securities regulator, of a private placement made in the context of a hostile bid invokes a number of different legal and regulatory issues that often “scramble” together. For example, a review of a private placement in this context raises the issue of the purpose of the financing. It also, directly or indirectly, raises corporate law questions regarding the issuing board’s fiduciary duties (and associated deference to a board under the business judgment rule) and securities regulators’ views on defensive tactics under the Policy. Tension often arises between corporate law (and board duties in particular) and securities regulatory goals under the Policy. Unlike a rights plan, where a board’s only purpose for introducing the rights plan is to impact the manner in which take-over bids are conducted, private placements may have other business objectives. As a consequence, any review of a private placement by a securities regulator under the Policy risks straying even further into areas of corporate law than in the rights plan context.
- [72] A private placement of securities of a Canadian-listed issuer also invokes the review of that financing by an alternative regulatory body, its home stock exchange. The exchange approval process may involve the exchange’s consideration of the issuance as a defensive tactic. Whether the exchange and a securities commission apply the same considerations

of what is in the public interest is by no means certain. Further, an application to cease trade or reverse a private placement following an exchange approval could proceed as a review of the exchange's decision or a *de novo* hearing. This issue is significant in that differing standards of review may apply to different applications – leading to the possibility of regulatory arbitrage.

[73] Lastly, applications with respect to completed private placements also raise the question of what remedies are available to a securities commission (as opposed to a court) with respect to a completed private placement if the commission has securities regulatory concerns about the financing. This issue is further complicated if the issuer is in financial difficulty and/or has already spent the proceeds of the financing.

[74] All of these issues were present, to a greater or lesser extent, in the applications before us:

- CB Gold submitted that the Private Placement was done for legitimate business purposes (primarily to ensure that CB Gold would be able to continue as a going concern until finalization of the Batero Offer); yet, Red Eagle argued that the Private Placement was pursued as an improper defensive tactic to the Red Eagle Offer. This application forced us to consider whether the decision of the CB Gold board was appropriate from a securities regulatory perspective;
- the Private Placement received conditional approval from the TSX-V; the practical effect of Red Eagle's application with respect to the Private Placement was that we were being asked to re-consider a regulatory decision already made by the TSX-V; however, Red Eagle elected not to proceed with an application to this commission to review of the decision made by the SRO;
- Red Eagle applied for an order that the CB Gold and Batero boards take all steps to unwind the Private Placement. This raised the issue whether we have the authority to make such an order. It also raised the question what the legal impact of such an order would be, given CB Gold's financial circumstances. Such an order could impact creditors and other stakeholders of CB Gold.

*i. Securities law violations*

[75] In this case, Red Eagle raised various potential securities law violations associated with the Private Placement as a basis for our making the requested orders. Those alleged violations included:

- a violation of section 2.2 of MI 62-104, in that Red Eagle alleged that the Private Placement was agreed to after Batero committed to make the Batero Offer;
- a failure by Batero to comply with the early warning requirements of section 5.2 of MI 62-104; and

- that the TSX-V had not granted final approval for the Private Placement as of the date of the hearing.

- [76] The alleged violations of section 2.2 and 5.2 of MI 62-104 both would have required factual determinations by the panel in order to ascertain whether there had been, in fact, violations of those provisions. We did not need to make these determinations.
- [77] Even if we had accepted Red Eagle's arguments that there had been breaches, we would not have found that the appropriate remedies for those breaches were those requested by Red Eagle. There is no material prejudice to the CB Gold shareholders or our capital markets generally arising from the alleged breaches, assuming that they were actually breaches. In particular, the alleged contravention of section 2.2 of MI 62-104 involved a treasury issuance by CB Gold, not acquisitions of shares from members of the public and, even on Red Eagle's version of the facts; the Private Placement was announced within 12 hours after the support agreement was signed. The potential consequences of granting Red Eagle's requested orders for those alleged breaches outweighed any benefits from cease trading or unwinding the Private Placement. Therefore, we dismissed Red Eagle's applications for the requested orders for the alleged violations of securities law.
- [78] We were led no evidence why final approval from the TSX-V had not been granted, although Red Eagle suggested that we could infer that this meant that the TSX-V had concerns with the Private Placement. However, conditional approval had been granted by the TSX-V prior to closing the Private Placement. CB Gold was entitled to close the Private Placement based on this conditional approval. Without any evidence that the TSX-V had actual concerns with the Private Placement, we dismissed Red Eagle's application based on this argument.

*ii. Defensive Tactic*

- [79] It was not disputed by any party that as a result of the decisions in *Canadian Tire Corp. (Re)* (1987), 10 OSCB 857 and *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132, this Commission has the authority to make orders under section 161 without finding a specific contravention of the Act.
- [80] This Commission in *Inmet Mining and Petaquilla Minerals Ltd.*, 2012 BCSECCOM 442, issued a cease trade order prohibiting Petaquilla, the target of a hostile bid from Inmet, from issuing securities in connection with a proposed note offering. The Commission found, factually, that the note offering was part of Petaquilla's ordinary course of business and that there was no evidence to suggest that it was commenced as a defensive tactic. However, Inmet made it a condition of its bid that the note offering not proceed. The evidence suggested that Petaquilla still had a number of significant commercial hurdles to cross before completing the offering but there was evidence that the board of Petaquilla had not ruled out completing the offering as a defensive tactic.

[81] In reaching its decision to cease trade the offering the panel said (para. 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 to 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.

- [82] In *ARC Equity Management (Fund 4) Ltd., Re*, 2009 ABACC 390, the Alberta Securities Commission refused to exercise its public interest jurisdiction to prevent shares issued in connection with a private placement to a bidder from being voted at a shareholders meeting to approve a subsequent going-private transaction.
- [83] In *ARC*, under the terms of a support agreement where Paramount Energy Trust agreed to make a bid to acquire all of the shares of Profound Energy Inc., Paramount provided cash to Profound under a private placement. The securities to be issued under the private placement would constitute 19.9% of the target's shares post offering. The securities to be issued to Paramount were not subject to Paramount's bid being successful.
- [84] Profound's largest shareholder at the time was ARC Equity Management (through several funds) holding 31% of the Profound shares. ARC did not support the Paramount bid or the private placement to Paramount. ARC complained to the TSX with respect to the private placement, but the TSX ultimately approved the transaction. ARC did not appeal the decision of the TSX.
- [85] Ultimately, Paramount was able to acquire approximately 59% of the Profound shares under its bid. When combined with the securities issuable to Paramount under the private placement, its holdings increased to 67% of the Profound shares. Given this shareholding, Paramount proceeded to commence a second-step going private transaction (which would require 66 2/3% approval of the Profound shareholders under corporate law). ARC applied to the ASC to have the shares issued under the private placement to Paramount withheld from voting on the going private resolution.
- [86] In declining to exercise its public interest jurisdiction, the ASC panel concluded that the threshold for exercising that jurisdiction was "abusive conduct". The panel concluded that the purpose of the private placement was a combination of a need for the funds in order to restructure Profound's balance sheet and a tactical move to ensure the likelihood of success of the Paramount offer. While the panel then concluded that the private placement was potentially unfair to ARC, that unfairness fell below the level of "abusive conduct" required for it to exercise its public interest jurisdiction. One of the factors that the panel considered was that ARC had failed to appeal the TSX decision or to take any other steps under corporate law to block the transaction.



- [87] A few principles emerge from a review of these decisions. It is clear that this Commission has the jurisdiction to make an order in the public interest even without a contravention of securities laws. We may exercise this public interest jurisdiction under the Policy to override the business judgment rule and cease trade a private placement that inappropriately alters the basic dynamics of an M&A transaction. However, the public interest jurisdiction must be exercised conservatively and consideration should be given if there is an abuse of the capital markets. The interference in private placements should be exercised even more cautiously than in the rights plan context.
- [88] The decision in *ARC* also asks the question whether court action in the form of an oppression remedy is the more appropriate proceeding for these matters.
- [89] We agree with the policy perspective in *ARC*, that securities regulators should tread warily in this area and that a private placement should only be blocked by securities regulators where there is clear abuse of the target shareholders and/or the capital markets.
- [90] In this case, Red Eagle argued that the Private Placement was clearly a defensive tactic and that it could and did have the effect of preventing Red Eagle from taking up shares deposited to its bid. It submitted that the operative question was whether the transaction was likely to deny or severely limit the ability of shareholders to consider the take-over bid.
- [91] We did not find that the Private Placement was clearly a defensive tactic, nor that it had the effect of limiting the CB Gold shareholders from tendering to the Red Eagle Offer.
- [92] Although Red Eagle raised questions about the accuracy of the disclosure of CB Gold's financial situation, it is clear, at the time of the Private Placement, that CB Gold required some form of financing to maintain itself as a going concern. CB Gold asked Red Eagle to provide financing (in roughly the same amount as the Private Placement) as part of their friendly discussions after the Red Eagle Offer was launched. There was no contrary evidence that at the time of the Private Placement, CB Gold did not have enough money to meet its liabilities through to the end of the Batero Offer. Given this, it was not clear that the Private Placement was primarily a defensive tactic.
- [93] Red Eagle said that the history of non-arm's length transactions between CB Gold and Dyer (including the OML Transaction and the First Private Placement) created the backdrop to allow us to infer that the Private Placement was a defensive tactic. While this history raised the possibility of an ulterior motive for the CB Gold board, we did not make this inference to override the evidence supporting CB Gold's need for financing.
- [94] Red Eagle argued that the effect of the Private Placement was to prevent the CB Gold shareholders from considering the Red Eagle Offer. Factually, this was not accurate.

Prior to the hearing, Red Eagle had already waived its 50% minimum tender condition. This meant that Red Eagle was prepared to acquire whatever percentage of CB Gold shares was tendered to its bid. By waiving the minimum tender condition, Red Eagle had negated the possibility that the Private Placement could act as a bar to the CB Gold shareholders having their shares acquired under the Red Eagle Offer.

[95] Without the waiver of the 50% minimum tender condition by Red Eagle, it was likely that this application would have become considerably more difficult to decide. If the shares issued under the Private Placement were acting as a bar to Red Eagle meeting a mandatory 50% minimum tender condition, then the objectives in the Policy of ensuring target shareholders have an opportunity to tender to bids would have become more directly engaged.

[96] In this case, we did not consider the Private Placement to be abusive to the capital markets. In fact, the evidence suggested the very real possibility that without the Private Placement, the auction would not have taken place.

[97] We dismissed Red Eagle's applications for orders based on allegations of improper defensive tactics.

*c) Batero Offer*

[98] Red Eagle applied to have the Batero Offer cease traded.

[99] Red Eagle alleged that:

1. Batero breached section 2.2 of MI 62-104 (as described above);
2. the disclosure by CB Gold and Batero contained a number of violations of securities laws including that:
  - the CB Gold directors' circular with respect to the Red Eagle Offer was late;
  - CB Gold made misleading disclosure about the ownership interest that the CB Gold shareholders would have in Red Eagle if the Red Eagle Offer was completed;
  - CB Gold's disclosure about the OML Transaction was faulty;
  - CB Gold failed to file certain material contracts;
  - CB Gold's failed to file a copy of the Plan until July 10, 2015;
  - CB Gold failed to file a copy of the subscription agreement for the Private Placement on SEDAR and similarly failed to file an Exempt Distribution Report for the Private Placement;
  - the disclosures by Batero and CB Gold regarding the relationships among CB Gold, Dyer (and related parties) and Batero were not accurate; and
  - Batero and Dyer failed to follow the early warning reporting requirements.

3. Batero breached MI 61-101 by failing to obtain a valuation for CB Gold as required by the insider bid regime.

[100] Again, a number of these allegations would have required us to make factual determinations in order to decide if the allegations were true. We did not need to make these determinations, as even if we accepted Red Eagle's arguments that there had been breaches or violations of securities laws, we would not have found that the appropriate remedy for those breaches or violations was that requested by Red Eagle. There was no material prejudice to the CB Gold shareholders or our capital markets arising from the alleged breaches or violations, assuming that they were proven by the evidence.

[101] In particular, there was a public auction process ongoing with respect to the shares of CB Gold. There was no benefit that a valuation would provide over and above the ongoing auction process. Further, all material information relating to the relationships among CB Gold, Batero and Dyer were, by the time of the hearing, part of the public record. In any event, any failure to provide this information could not materially prejudice the CB Gold shareholders. It would have been a far greater prejudice to deprive them of an opportunity to tender to the Batero Offer with a permanent cease trade of that bid or to substantially alter the dynamics of the ongoing auction if we cease traded the Batero Offer until further disclosures were provided.

November 3, 2015

**For the Commission**

Nigel P. Cave  
Vice Chair

Judith Downes  
Commissioner

George C. Glover, Jr.  
Commissioner