Citation: 2014 BCSECCOM 154

HudBay Minerals Inc.

and

Augusta Resource Corporation

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

Panel	Nigel P. Cave	Vice Chair
	Judith Downes	Commissioner
	George C. Glover, Jr.	Commissioner
	Don Rowlatt	Commissioner
Dates of hearing	**April 29, 2014 and May 2, 2014**	
Date of Decision	**May 2, 2014**	
Date of Reasons	**June 24, 2014**	
Appearing		
Alan H. Mark David Redford Rebecca Burrows Kari MacKay David Coll-Black Jonathan Lampe	For HudBay Minerals Inc.	
Stephen Schachter, Q.C. Geoffrey Gomery, Q.C. Kevin Thomson Peter Hong	For Augusta Resource Corporation	
Gordon Smith Leslie Rose Victoria Steeves	For the Executive Director	

Reasons for Decision

Background

¶ 1 **A.** ***Introduction***

1. An application was brought by HudBay Minerals Inc. (HudBay) to have the Commission exercise its public interest jurisdiction under section 161(1)(b) of the *Securities Act*, R.S.B.C. 1996, c.418, as amended (Act), to grant a cease-trade order in respect of any securities issued, or to be issued, under or in connection with a shareholder rights plan (Plan) of Augusta Resource Corporation (Augusta). HudBay had made a bid (Bid) to acquire all of the common shares of Augusta (Augusta Shares) not already owned by HudBay.

2. While this application required the panel to consider many of the issues typically found in rights plan cases, at its heart, this application has resulted in our consideration of how to exercise the Commission's public interest jurisdiction in the context of the Augusta shareholders (Augusta Shareholders) approving the continuation of the Plan balanced against the interests of individual shareholders of Augusta in having the unimpeded opportunity to tender their shares to the Bid should they so choose. The traditional view of this and other Commissions has been that, at some point, "a pill has to go" and that a shareholder rights plan cannot be used indefinitely to prevent shareholders from exercising their inalienable right to make their own decisions with respect to a bid.

3. On April 29, 2014, we commenced a hearing to determine the merits of HudBay's application during which we heard evidence and received submissions from HudBay and Augusta. After hearing evidence and submissions on April 29, 2014, we adjourned the hearing to May 2, 2014 in order to receive evidence and further submissions with respect to the results of a vote of the Augusta Shareholders on the Plan. On May 2, 2014, we heard further evidence and submissions from HudBay, Augusta and staff of the Commission (Staff).

4. At the conclusion of the hearing on May 2, 2014, we issued the following decision, with reasons to follow:

> "…after considering the evidence and submissions of the parties, and considering it to be in the public interest, pursuant to section 161(1)(b) of the Act the Commission orders that, if
>
> 1. HudBay extends its take-over bid for the shares of Augusta to expire no earlier than July 16, 2014; and
> 2. HudBay provides a ten day extension of its take-over bid if it takes up any shares under the take-over bid,

> the Commission will issue an order cease trading Augusta's shareholder rights plan, and any securities issued in connection therewith, effective 5:00 pm, Vancouver time, on July 15, 2014, unless Augusta issues and files with the Commission a news release by 5:00 pm, Vancouver time, on July 14, 2014, confirming that it has terminated its shareholder rights plan."

The panel had the benefit of receiving excellent written and oral submissions from HudBay, Augusta and Staff.

5. These are the reasons for our decision in this matter.

¶ 2 **B.** ***Facts***

I. *History of the Bid and the Plan*

6. HudBay is a Canadian integrated mining company with producing and development projects in North and South America. Its common shares are listed on the Toronto Stock Exchange (TSX) and the New York Stock Exchange.

7. Augusta is a Canadian mining company whose only material property is the Rosemont copper project (Rosemont Project) located in Arizona. The Augusta Shares are listed on the TSX and the New York Stock Exchange.

8. The Rosemont Project contains a significant ore body but will require significant capital expenditures in order to bring it into production. Augusta has experienced significant delays in obtaining all of the necessary permits in order to develop the project.

9. In 2010, HudBay and Augusta commenced discussions about a potential business combination or other transaction. During the summer of 2010, through a combination of market acquisitions and a private placement transaction, HudBay acquired 11% of the outstanding Augusta Shares. Discussions between HudBay and Augusta in 2010 did not result in any agreement.

10. In 2012 and 2013, HudBay and Augusta had further discussions about the status of the Rosemont Project and other possible transactions. In the spring of 2013, HudBay conducted further market acquisitions of Augusta Shares such that its holdings increased to 15% of the outstanding shares.

11. On April 18, 2013, the board of directors of Augusta adopted the Plan. The Plan contains a triggering threshold of 15%, with the existing Augusta Shares then held by HudBay being grandfathered under the Plan. This meant that any further acquisitions of Augusta Shares by HudBay would trigger the Plan. The Plan contained provisions such that it was to remain in place on a permanent basis,

subject to annual votes of the Augusta Shareholders approving continuation of the Plan.

12. The Plan was ratified and approved by the Augusta Shareholders at a special meeting on October 17, 2013. At that meeting, 72% of all the Augusta Shares were voted. Inclusive of the Augusta Shares held by HudBay, 64% of such shares were voted in favour of the Plan and exclusive of the shares held by HudBay, 82% of such shares were voted in favour of the Plan.

13. Further discussions were held between HudBay and Augusta during the fall of 2013 and early part of 2014, without result.

14. On February 9, 2014, HudBay announced its Bid to acquire all of the issued and outstanding Augusta Shares not already owned by HudBay. Augusta Shareholders who tendered to the Bid and had their Augusta Shares taken up would receive 0.315 of a common share of HudBay for each Augusta Share.

15. The Bid included a minimum tender condition that, unless waived by HudBay, would have resulted in HudBay not having to take up any Augusta Shares under the Bid unless those shares, together with the shares already owned by HudBay, would represent not less than 66 2/3% of the outstanding Augusta Shares (on a fully diluted basis). The Bid was conditional, among other things, upon the Plan being cease-traded, waived or otherwise invalidated. The original expiry date of the Bid was March 19, 2014.

16. On February 24, 2014, Augusta announced that its directors unanimously recommended rejection of the Bid and that a group (Augusta Group) consisting of current directors and officers and four other Augusta Shareholders had determined that they would not tender to the Bid. The Augusta Group held 33% of the outstanding Augusta Shares at the time of this announcement. There were subsequent dispositions of Augusta Shares by the Augusta Group such that, at the date of commencement of the hearing, we were told that the Augusta Group held 30% of the Augusta Shares.

17. On March 14, 2013, HudBay announced that it was extending the Bid until April 2, 2014 and that it was waiving its minimum tender condition.

18. On March 31, 2014, HudBay further extended the Bid until May 5, 2014 and indicated that, without the Plan being cease-traded, waived or otherwise invalidated, among other things, this would be the final extension of the Bid.

19. On April 8, 2014, Augusta announced that it was advancing a shareholder meeting (Meeting) called to approve the continuation of the Plan, previously scheduled for May 9, 2014, to May 2, 2014 (i.e. a date prior to the extended expiry date of the Bid).

20. On April 14, 2014, HudBay filed an application to the Commission to have the Plan cease-traded.

21. On May 2, 2014, Augusta held the Meeting to approve the continuation of the Plan. 78% of the Augusta Shares were voted at the Meeting (including the shares held by HudBay). Including the shares held by HudBay, 74.9% of the shares were voted in favour of continuation of the Plan. Excluding the shares held by HudBay, 94% of the shares were voted in favour. Excluding the shares held by HudBay and directors and officers of Augusta, 92.8% of the shares were voted in favour. Finally, excluding all of the Augusta Shares held by HudBay and the Augusta Group, approximately 59% of these remaining shares were voted at the Meeting and 88.4% of these shares were voted in favour of the continuation of the Plan.

22. It was clear from the vote that an absolute majority of all the "public float" (i.e. shareholders other than HudBay and the Augusta Group) attended the Meeting in person or by proxy and voted in favour of continuation of the Plan.

    During the tenancy of the Bid up until May 2, 2014, a considerable volume of Augusta Shares were traded on exchanges. In excess of 75 million Augusta Shares were traded during this period with nearly 10 million of those shares traded after the record date for voting at the Meeting. Most of these shares were exchanged at prices in excess of the effective cash price of the Bid

II. *Evidence of Witnesses*

23. During the hearing, we heard testimony from the chief executive officers of HudBay and Augusta and their financial advisors. In the following paragraphs, we summarize their testimony, first the testimony of HudBay and its advisors and then the testimony of Augusta and its advisors.

24. David Garofalo is President and Chief Executive Officer of HudBay. Here is a summary of his evidence:

    (a) HudBay's interest in making the Bid is to acquire control of the Rosemont Project in order to develop and operate the project, which is generally consistent with HudBay's organizational philosophy of developing and operating mines;

(b) while HudBay believes that all necessary permitting and approvals for the Rosemont Project will ultimately be obtained, it does not share Augusta's view that the material permits and approvals will all be obtained by the end of June, 2014;
(c) Augusta is now nearly four years behind its own original guidance on the timeline for permitting and construction;
(d) Augusta's financial situation is such that it will have to raise additional funds in order to continue development of the project;
(e) without the Plan being cease-traded, waived or invalidated, HudBay would not extend the Bid beyond May 5, 2014; however, were the Plan to be cease-traded, the HudBay board would then consider whether it wished to extend its Bid in these changed circumstances;
(f) HudBay is of the view that the Plan is inconsistent with modern shareholder rights plans in a number of significant ways (as outlined by published reports from proxy voting firms), many of which are designed to aid in entrenching Augusta's management;
(g) HudBay had waived the minimum tender condition in the Bid in order to address the practical reality that the Augusta Group (a number of the members of which were insiders or persons with business or other connections with insiders), holding 33% of the Augusta Shares, had announced their intention to not tender their shares to the Bid, thereby making the minimum tender condition unattainable;
(h) notwithstanding HudBay having received legal advice that the definition of "Beneficial Ownership" in the Plan was unusual and could prevent HudBay from soliciting proxies without triggering the Plan, HudBay had, in fact, spoken to all the large Augusta Shareholders about the Bid and about voting against continuation of the Plan at the Meeting.

25. John Armstrong is Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., financial advisors to HudBay. Here is a summary of his evidence:

(a) the Bid represented a significant premium of over 60% based upon the volume-weighted prices of the Augusta and HudBay shares for the 20 trading days prior to commencing the Bid;
(b) as of the date of commencement of the hearing, 79 days had passed since the commencement of the Bid, significantly longer than the time period required by securities legislation (35 days) and for an offer to be a "Permitted Bid" (60 days) under the Plan;
(c) the size and scope of the Rosemont Project is such that only a limited number of mining companies globally had the capacity to consider an acquisition of Augusta and subsequent development obligations associated with the Rosemont Project;

(d) Augusta has had ample opportunity to run a process to identify and obtain an alternative to the Bid, if one were possible;
(e) HudBay's waiver of the minimum tender condition is not coercive and there are other recent examples of take-over bids in the mining industry where a waiver of the minimum tender condition has occurred;
(f) while the Augusta Shares have traded at a significant premium to the effective cash price of the Bid during the tenancy of the Bid, that premium has slowly deteriorated over time such that as of May 2, 2014 the Augusta Shares were actually trading at a discount to the effective cash price of the Bid;
(g) notwithstanding the uncertainty associated with the status of permitting on the Rosemont Project it is possible to determine a fair value for the Augusta Shares at any given point in time.

26. Gilmour Clausen is the Chief Executive Officer and a director of Augusta. Here is a summary of his evidence:

(a) there is one key approval and one key permit that remain outstanding to secure all necessary material permits and approvals for the Rosemont Project and that, while there is never any certainty about timing for permits and approvals, Augusta believes that these will be obtained by the end of June 2014;
(b) at a February 20, 2014 meeting of the board of directors of Augusta, the directors determined that it was in the best interests of Augusta that the entire board review and consider the Bid and that it not form a special committee for such purpose (and that it would form such a special committee if a conflict of interest arose and no such conflict has arisen);
(c) the board of directors unanimously determined that the Bid should be rejected for the following reasons (among others):
    (i) the Bid was financially inadequate
    (ii) the timing of the Bid was highly opportunistic
    (iii) the board of directors was aggressively pursuing value-maximizing alternatives
    (iv) the Bid was inherently coercive and was not a "Permitted Bid" under the Plan;
(d) Augusta Shareholders holding 33% of the Augusta Shares had indicated that they will not tender to the Bid and that these shareholders have not been acting jointly and in concert or otherwise as a part of a group;
(e) the board of directors implemented the Plan in order to prevent creeping take-over bids and to provide the board with additional time to search for value-maximizing alternatives;

(f) he believes that if the Plan is allowed to remain in place there is a real and substantial possibility that this will allow Augusta to identify a transaction superior to the Bid.

27. John Tuer is Managing Director and Head of Mergers & Acquisitions at Scotia Capital Inc., financial advisors to Augusta. Here is a summary of his evidence:

(a) there were five prospective bidders that were actively working on due diligence on Augusta and the Rosemont Project;
(b) one prospective bidder had provided a written expression of interest indicating that it would be prepared to pay a price that would be in excess of the effective cash price of the Bid – this expression of interest was not definitive and was subject to a number of conditions;
(c) a number of the five prospective bidders had indicated that they would not be prepared to make a definitive offer prior to resolution of the issues around permitting;
(d) a number of the five prospective bidders had indicated that they had concerns about continuing to remain in the process if HudBay's share position increased to form a larger "blocking position";
(e) Augusta had not yet set a deadline by which it wished to receive definitive proposals from prospective bidders, had not yet provided any prospective bidder with a form of definitive support (or other similar) agreement for a transaction and had not yet commenced negotiations with any prospective bidder on the terms of such an agreement;
(f) completion of permitting at the Rosemont Project would have a material impact on Augusta's share price as the project became de-risked.

C. ***Positions of the Parties***

28. HudBay's position was that it was time for the Plan "to go", as:

(a) Augusta had not provided its shareholders with any alternative transaction to the Bid and was, in effect, "just saying no" to the Bid;
(b) Augusta's board and management would have had 85 days, as of the expiry of the Bid on May 5, 2014, to identify alternative transactions;
(c) the Plan was no longer serving the purposes that the Commission has accepted that a shareholder rights plan may serve;
(d) the Plan was impairing the bona fide interests of the Augusta Shareholders.

29. HudBay further asserted, in response to Augusta's reasons for suggesting that the Plan should continue:

(a) the Bid was not coercive, but even if the Commission found that its terms were coercive, a determination that an offer is coercive is not grounds, in and

of itself, to let a shareholder rights plan continue to prevent shareholders from exercising their right to choose;

(b) shareholder approval is not determinative but is rather just one of the factors to weigh in determining whether it is time for a rights plan "to go"; and, in this case, the Commission should consider the Augusta Shareholder vote in favour of continuation of the Plan cautiously due to concerns about the disclosure provided to shareholders and failings in the Augusta board governance process.

30. HudBay argued that the Commission should issue a cease-trade order with immediate effect in respect of the Plan. In the alternative, HudBay argued that, if the Commission was not prepared to issue a cease-trade order with immediate effect, it should issue a cease-trade order with effect at a future "date certain" so as to prevent the Augusta board from "just saying no" to the Bid. HudBay initially argued that the future "date certain" should be a short period of time following the hearing to allow Augusta to complete its auction process, although HudBay subsequently conceded that the most logical "date certain" was one which was tied to Augusta's claim that all material permitting on the Rosemont Project would be complete by June 30, 2014.

31. Augusta's position was that the Commission should first take the opportunity to consider the results of the Augusta Shareholder vote on continuation of the Plan at the Meeting, as shareholder approval is clearly a factor to be considered in these cases and there was no prejudice to HudBay or the Augusta Shareholders in waiting for the results of the Meeting (as the Bid would not expire until May 5, 2014).

32. Augusta argued that the Plan should remain in place, as:

(a) it was in the best interests of the Augusta Shareholders to allow time for Augusta to complete the permitting process, which would be a value enhancing event;
(b) there was a real and substantial possibility that the Augusta board's strategic review process would lead to a superior transaction for Augusta Shareholders;
(c) given the trading price of the Augusta Shares (at a premium to the cash equivalent price of the Bid) there would be no real prejudice to the Augusta Shareholders in having the Bid expire;
(d) the Bid was coercive in failing to preserve the minimum tender condition, thereby allowing for the possibility of a creeping take-over bid;
(e) the existence of significant shareholder support for the continuation of the Plan based on full information should indicate that it is in the public interest to allow the Plan to remain in place;
(f) in these circumstances, the board is not "just saying no" to the Bid.

33. Lastly, Augusta argued against HudBay's alternative position (about cease-trading the Plan at a future "date certain") on the grounds that HudBay or any other bidder would be free to come to the Commission at a future date, in light of the circumstances then present, to seek an order to cease-trade the Plan.

Issue

34. The issue before us was whether it was in the public interest to issue a cease-trade order in respect of any securities issued, or to be issued, under or in connection with the Plan and, if so, when such cease-trade order should take effect.

Analysis

35. 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.

36. We note that the Canadian Securities Administrators (CSA) have published for comment a proposed new rule, National Instrument 62-105 – *Security Holder Rights Plan* (NI 62-105) and, separately, Quebec's Authorité des marchés financiers has issued its own consultation paper (*An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics*) (AMF Proposal). Both of these proposals address the issue of regulatory approaches to rights plans. NI 62-105 and the AMF Proposal remain proposals. Notwithstanding, we were mindful of these proposals and the issues raised by them. A number of arguments raised by Augusta were founded upon or reflected parts of NI 62-105. As will be evident below, we have elected not to follow the changes in policy reflected in either of these proposals. Our views with respect to the underlying premise of NI 62-105, that shareholder approval of a rights plan should be determinative, are set out below under the heading "shareholder approval".

37. 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."

38. 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 have a fiduciary duty to act in the best interests of the corporation. In discharging this duty, target company boards often take various defensive measures. Regulators will be reluctant to interfere with the steps the directors are taking to discharge that duty.
> 3. SRPs are not contrary to the public interest when used to buy time for the target company to respond appropriately to the bid. For example, they can be an appropriate means by which the directors of the target company take the necessary steps to discharge their fiduciary duties. The corollary is that SRPs are acceptable only as a temporary defence. The issue is not whether the SRP should go, but when.
> 4. Take-over bids are fact-specific, so the relevance and significance of the factors to be considered will vary with each case."

39. For a time, some were wondering whether the decisions of the Alberta Securities Commission in *Pulse Data Inc.*, [2007] ABASC 895 (*Pulse Data*) and the Ontario Securities Commission in *Neo Material Technologies Inc.* 2009 LNOSC 638 (*Neo*), had undermined the third proposition in *Icahn* set out above, by defining a set of circumstances in which a target board could "just say no". We agree with the reasoning of this Commission in *Icahn* and of the Ontario Securities Commission in *Baffinland Iron Mines Corporation*, (2010) 33 OSCB 11385 (*Baffinland*) in their interpretation of the scope of the *Neo* and *Pulse* decisions. In *Icahn* (at para. 82-84), our Commission stated:

> "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 [the target company in the *Icahn* matter].
>
> 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 to do so only for a temporary period, at the end of which the shareholders must be given the opportunity to decide whether to tender to 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…. 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 should no longer be allowed to continue."

In *Baffinland* (para. 51), the Ontario Securities Commission stated:

> "Accordingly, in our view, *Neo* does not stand for the proposition that the Commission will defer to the business judgment of a board of directors in considering whether to cease-trade a rights plan, or that a board of directors in the exercise of its fiduciary duties may "just say no" to a take-over bid". Such a conclusion would have been inconsistent with the provisions of NP 62-202 and the relatively long line of regulatory decisions that began with *Canadian Jorex*."

40. 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."

41. What is clear from the decisions relating to rights plans is that the relevance and relative significance of factors will vary from case to case, since hostile take-over bid battles usually come with complex and unique circumstances. As the decision in *Royal Host* (at p. 16) notes:

> "… it is fruitless to search for the "holy grail" of a specific test, or series of tests, that can be applied in all circumstances. Take-over bids are fact specific; the relevant factors, and the relative importance to be attached to each, will vary from case to case. As a result, a test that focuses on certain factors to the exclusion of others will almost certainly be inappropriate in some cases to which we attempt to apply it."

42. In the circumstances of this matter, the panel determined to delay rendering its decision on HudBay's application to cease-trade the Plan until results of the Meeting were known and provided as evidence. While not determinative (as discussed below), evidence of shareholder approval of a rights plan is clearly relevant as one of the factors to be considered in cases of this type. In addition, in exercising its public interest discretion, this Commission generally seeks to hear all relevant evidence. We were not advised of any prejudice to either HudBay or Augusta or to any other public interest in waiting to receive this evidence and we did so.

43. In this case, almost all of the factors outlined in *Royal Host* were raised by HudBay or Augusta. Having considered all of the *Royal Host* factors, the panel determined that the most relevant factors that we were required to weigh were as follows (set out in no particular order):

(a) the length of time that the Augusta board had already had to run a process aimed at identifying a superior transaction to the Bid – (85 days by the expiry of the Bid on May 5, 2014);
(b) the likelihood of the Augusta board being able to find a superior transaction, and the panel having significant concerns about how seriously Augusta was pursuing an auction prior to completing its permitting and approval process on the Rosemont Project;
(c) HudBay's waiver of the minimum tender condition in its Bid and whether the Bid was therefore coercive to the Augusta Shareholders;
(d) the vote to approve continuation of the Plan by the Augusta Shareholders during the tenancy of and prior to the expiry of the Bid; and

(e) the likelihood that if the Plan was cease traded at the hearing or at a future date certain, HudBay would extend the Bid.

We will deal with each of these factors below.

a) Length of Bid

44. The Augusta board had already had significant time to pursue alternative value maximizing transactions. The 85 days (by the expiry of the Bid) was already significantly in excess of the minimum 35 days required under the *Securities Act* for take-over bids and the 60 days set out in the Plan's definition of a "Permitted Bid" (i.e. the time period that the Augusta board itself had set as the time necessary to consider and pursue alternative transactions). The length of the Bid was also at the outer limit of historical decisions of Canadian securities regulators for leaving rights plans in place in order to allow boards to pursue alternative transactions.

45. The length of the Bid was not sufficient to allow the board to achieve completion of its permitting and approvals on the Rosemont Project, which was clearly its first choice (as discussed below). However, due to the uncertainty associated with when this permitting and approval process would be completed and the fact that, whatever the timetable for completion of permitting, it was still a couple of months away in Augusta's own submissions, we would not have considered this a reasonable basis for denying HudBay's application, in and of itself.

46. In sum, the length that the Bid had been outstanding was a clear factor suggesting that it was time for the Plan "to go".

b) Likelihood that, if given more time, the Augusta board could find a superior transaction

47. The evidence of Mr. Tuer made it clear that: (i) no deadline had been established by Augusta by which time alternative prospective bidders were to make definitive proposals; (ii) no form of support or other similar agreement had been provided to prospective bidders as a basis for comment or negotiations; and (iii) Augusta was not engaged in any negotiations towards a definitive support agreement or other similar form of agreement.

48. The evidence suggested that there were five prospective bidders performing due diligence on Augusta and on the Rosemont Project. We also heard that a number of the prospective bidders indicated an unwillingness to make a definitive proposal until the permitting issues were resolved and that a number of the prospective bidders were concerned about HudBay obtaining an enhanced "blocking position" in Augusta.

49. We heard evidence from Mr. Clausen that he believed there was a real and substantial possibility of another transaction, superior to the Bid, coming to fruition. However, the description of the auction process by Mr. Tuer and Mr. Clausen as of approximately eighty days after the commencement of the Bid, suggested, at the very least, that any alternative transactions were still a long ways from fruition and also raised questions about the likelihood of any alternative transactions coming forward.

50. HudBay urged us to draw a negative inference regarding the integrity of the value maximization process and the quality and independence of the information that Augusta provided to its shareholders from Augusta's failure to follow traditional public company mergers and acquisitions practice by not establishing a special committee (independent of management) to manage the response to the Bid and to run the search for alternative transactions. We agree that this was an unusual decision in the circumstances. In and of itself nothing turned on this issue; however, this and the testimony of Augusta's financial advisor describing the state of the search for other prospective bidders made us question just how seriously Augusta was pursuing the search for alternative transactions and whether, in reality, the board's clear first choice was to attempt to complete the permitting and approvals for the Rosemont Project.

51. Based on the evidence, there did not appear to be a real and substantial possibility of the Augusta board identifying a superior transaction. This was also a clear factor suggesting that it was time for the Plan "to go".

c) Whether the Bid was coercive to the Augusta shareholders

52. Augusta made the case to its shareholders (as support for the continuation of the Plan in the circular for the Meeting and as grounds for rejecting the Bid in the directors' circular responding to the Bid) that the Bid was coercive to Augusta Shareholders and argued that we should agree with this position and use it as the basis, or part of the basis, for rejecting HudBay's application. Augusta's position was as follows:

    (a) the Bid was opportunistic in its timing;
    (b) the waiver of the minimum tender condition meant that HudBay could pursue a creeping take-over bid and form a larger blocking position that would make any subsequent change of control transaction difficult or impossible to pursue for Augusta; and
    (c) that Augusta Shareholders have no idea how many Augusta Shares might be tendered to the Bid and may feel pressure to tender to the Bid in order to avoid being "left behind".

53. Hostile take-over bids, almost by definition, are opportunistic in nature. Whether a bid is opportunistic or not was irrelevant to our analysis and is really not a matter for argument in a regulatory hearing of this type; opportunism does not equate to coercion. This is a matter for a target company's shareholders to decide.

54. We do not find that the waiver of the minimum tender condition made the Bid coercive to the Augusta Shareholders. We reached this conclusion based on a number of considerations:

(a) a number of previous rights plan decisions (including *Icahn*) have determined that a bid is not coercive simply because it contains a right on the part of the bidder to waive a minimum tender condition – this is a feature of many take-over bids;

(b) there are no prohibitions in Canadian securities laws on the making of partial bids, shareholders making creeping take-over bids (whether with partial bids or exempt take-over bids through market acquisitions or private acquisitions) or other similar market behaviour;

(c) the Bid commenced with a minimum tender condition, but was amended to delete this condition in response to the Augusta Group's stated intentions of not tendering to the Bid. One could conclude that, in fact, the Augusta Group was "blocking" (given how difficult it would be for HudBay to reach the minimum tender condition) the remaining shareholders from tendering to the Bid and that the waiver of the minimum tender condition would allow them to tender to the Bid. The concept that a bid without a minimum tender condition is coercive, where a significant minority shareholder "blocking position" exists, is inconsistent with the principles outlined in section 1.1(5) of the Policy:

"The Canadian securities regulators consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to intervene in contested bids."

A requirement for a minimum tender condition in a bid notwithstanding a significant minority shareholder "blocking position" could produce a "restricted auction" and could result in bids not being made at all or in shareholders being deprived of the ability to respond to a bid;

(d) we acknowledge Augusta's argument that the waiver of the minimum tender condition in this Bid would allow for the possible creation of a larger blocking position to be garnered by HudBay, thereby making a subsequent change of control transaction more difficult. However, the reality of the Augusta Shareholder composition is that several large share ownership positions already exist (HudBay already holds 15% of the Augusta Shares, Augusta directors and officers hold just under 10% and one other of the

members of the Augusta Group holds 10%). A successful change of control transaction would already require significant shareholder synergy and we do not see this situation being made appreciably more difficult with the possibility of an increased HudBay share ownership position.

55. We were concerned whether Augusta Shareholders may feel some coercion, in these specific circumstances, due to the uncertainty and breadth of outcomes that are possible with the Bid (without the minimum tender condition). Would shareholders worry about being "left behind" at the end of the Bid?

56. We asked the parties for specific submissions on whether it would be appropriate to require a ten day extension of the Bid if HudBay took up any Augusta Shares under the Bid as a condition of a cease-trade order, either at the time of the hearing or at a future date certain.

57. HudBay volunteered to provide such an extension, without any argument on its merits. Augusta argued that this condition would not address its primary concern about coercion which stemmed from the removal of the minimum tender condition. Staff argued that if we determined that the Bid was not coercive, we should be circumspect in interfering in take-over bids by prescribing specific terms as conditions of a cease-trade order.

58. We agree with the last proposition from Staff, that securities regulators should be cautious to avoid becoming participants in the midst of a bid. In this case, HudBay volunteered to make the suggested extension a term of the Bid, thereby eliminating our need to specifically determine this point; however, in the specific circumstances of this case, where a bidder has removed a minimum tender condition and there are questions about the resultant shareholder dynamics arising from multiple "blocking positions", we were of the view that the ten day extension would be an appropriate condition to impose on the process.

59. We do not view the Bid as being coercive to Augusta Shareholders and therefore this was not a factor in considering dismissing HudBay's application.

d) Shareholder Approval

60. As described earlier, the public interest in rights plan cases is primarily focused on what is in the best interests of the target company's shareholders and secondarily on ensuring the integrity of our capital markets is protected by creating a level playing field for bidders and targets.

61. There have only been two previous circumstances where Canadian securities regulators have addressed applications to exercise their public interest jurisdiction

to cease trade a rights plan in the face of shareholder votes approving the continuation of the plan held during the tenancy of a bid, *Neo* and *Pulse Data*.

62. These situations make the determination of what is in the public interest most difficult as they raise the challenge of balancing the interests of shareholders holding a "majority" of the target company shares as expressed by their vote on the rights plan, with the interests of individual shareholders in having the opportunity to tender their shares to a bid. The public interest is largely (but not wholly) what is in the best interests of the target shareholders. But which shareholders?

63. First, it is clear from *Royal Host* that the issue of shareholder approval of a rights plan is but one of the factors to be considered in these cases. Shareholder approval, in and of itself, is not determinative.

64. One of the reasons that it should not be determinative is that there are problems with the shareholder voting system in Canada generally and these are exacerbated by the volume of trading activity that often occurs in the context of hostile take-over bids. In addition to the common concerns in connection with public company shareholder meetings about the integrity of the votes cast, resulting from the difficulty some beneficial owners of shares have in voting and in "empty voting", here, millions of Augusta Shares traded between the record date for voting at the Meeting and the Meeting date. We have no way of determining precisely how many votes were cast at the date of the Meeting by persons who were no longer Augusta Shareholders at the date of the Meeting, but it is possible that millions of votes were cast in this manner. Conversely, many Augusta Shareholders who acquired their shares after the record date for voting at the Meeting had no opportunity to exercise the voting rights normally attached to those shares. Caution must be exercised in being unduly influenced by the outcome of shareholder voting in the circumstances.

65. Secondly, the weight to be accorded to shareholder approval will certainly vary in differing circumstances. We do not think it a useful exercise to try and divine a single bright line threshold above or below which shareholder approval is to carry more or less weight. We do think that there are a number of factors to consider in determining how much weight to attribute to shareholder approval:

    (i) is the approval obtained in the face of a specific bid versus prior approval unrelated to a specific bid?
    (ii) is the approval an informed one (i.e. was all relevant information available to shareholders)?
    (iii) the context of the vote in relation to the bid;
    (iv) what level of shareholder turnout is reflected in the approval;

(v) what level of approval has been obtained (taking into consideration and excluding "interested" voters (i.e. insiders, bidders, related parties, etc.));

We will discuss these factors below and their application to the Bid.

i. Approval in the face of a specific bid

66. There is a significant difference between shareholder approval for the continuation of a rights plan in the face of a specific bid and shareholder approval obtained at a time prior to a bid. The former is a vote made in the face of an actual economic choice for a shareholder, the other is largely theoretical. A shareholder vote in the face of a specific bid should generally be accorded more weight than a prior vote.

67. In this case, Augusta had both shareholder approval of the Plan prior to the Bid and approval for the continuation of the Plan in the face of the Bid. While the vote at the Meeting was entitled to more weight than the prior vote, the level of shareholder approval on the first vote was generally consistent with the results obtained at the Meeting. This consistency lent further weight to the results of the vote at the Meeting.

ii. Informed vote

68. Like any shareholder vote, in order for it to be meaningful it must be an informed one. One has to be careful about how narrowly or specifically one considers the question of an informed decision. It would not be useful to parse every word of every piece of disclosure to determine whether there are any subtleties or nuances that have not been properly described to shareholders. Rather, the common law test for informed shareholder votes seems appropriate: does a shareholder have sufficient information to make an informed decision on the matter at hand?

69. In this case, there was dispute between HudBay and Augusta about the sufficiency and accuracy of disclosure provided to the Augusta Shareholders in advance of the Meeting. However, the concerns raised by HudBay about the disclosure (including a failure to properly describe all of the elements of the Plan; a failure to properly characterize some of the proxy advisory firms' recommendations to the Augusta Shareholders on the Plan; a failure to adequately disclose the status, timing and risks associated with permitting on the Rosemont Project; and a failure to describe the potential financial consequences to Augusta of further delays in obtaining material permits for the Rosemont Project) do not really undermine the most relevant information provided to shareholders that made it clear that what they were voting on was approval of continuation of the Plan and that a vote in favour of continuation of the Plan could have the effect of blocking the Bid. There was also considerable disclosure to the Augusta Shareholders in the Bid disclosure

documents. In the circular that Augusta provided to its shareholders in advance of the Meeting, these are the four reasons given by the board for recommending that Augusta Shareholders vote in favour of continuation of the Plan:

(a) the Bid remained inadequate and opportunistic[1];
(b) HudBay's waiver of the minimum tender condition was coercive;
(c) non-coercive bids are not precluded by the Plan; and
(d) shareholders who desired to accept the Bid were not prejudiced as they could sell their Augusta Shares in the open market at prices higher than the effective cash price of the Bid.

We cannot conclude that this vote was anything but an informed vote on the key concept, that voting for continuation of the Plan potentially meant blocking the Bid.

iii) Context of the Vote

70. The significance of the vote to continue the Plan was heightened by the context in which it took place. HudBay had been unequivocal in its public disclosure, since its last extension of the Bid, that, without the Plan being cease-traded, waived or otherwise invalidated, it was not going to extend the Bid beyond May 5, 2014. Further, at the date of the Meeting, the Bid had been outstanding for a considerable period of time. Regardless of the view one takes of the legitimacy of the efforts of the Augusta board to run an auction, the time had come, by the time of the vote, where an Augusta Shareholder had to have significant concerns about the likelihood of an alternative superior offer being identified prior to the expiry of the Bid or at any time in the near future.

71. HudBay urged us not to try to interpret the meaning of the vote, as the individual wishes and interests of the Augusta Shareholders could vary considerably. In theory, we agree with this perspective; discerning, on a broad basis, the intent of shareholders from the mere results of a shareholder vote will, in many situations, be very challenging. However, in light of the circumstances of this vote, it is hard to see it as anything other than an unambiguous statement of a majority of the public float in favour of allowing the Plan to continue to act as an impediment to the Bid.

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[1] The Augusta circular described that the reason it was opportunistic was because:
(i) all permits would be obtained by the end of Q2 2014,
(ii) the Rosemont Project would be fully financed and construction commenced in mid-2014; and
(iii) the Bid was timed to deprive shareholders of the full and fair value of the Rosemont Project.

iv) Voter Turnout

72. The weight to be accorded a shareholder vote should vary depending on the proportion of the total votes of shareholders that are represented by the vote. This is of significant importance. Here, nearly 80% of the Augusta Shares were voted at the Meeting and a majority of the public float. For Canadian public company meetings, this is a very high number, even for contested matters.

v) Approval Level

73. While the panel in this case was cautious about not wanting to "parse" shareholder voting totals too closely (in our view, there is no significant distinction between 70% versus 75% support (as an example)), there are still clear differences in levels of shareholder support reflected in voting.

74. Here, there were a number of ways in which the shareholder vote was tabulated and presented at the hearing (without the Augusta Shares held by HudBay; without those shares and the Augusta Shares held by directors and officers; and without all of those shares and the Augusta Shares held by the remainder of the Augusta Group). In each computation other than the last, the approval level in favour of continuation of the Plan was significantly in excess of 90% and in the latter case, the approval level was 88%. These are very high percentages for a contested shareholder vote. These numbers were so high that the votes in favour represented an absolute majority of the Augusta Shares, even if you assumed that every Augusta Share that was not voted at the Meeting would have been voted against continuation of the Plan. This last point was significant to the panel.

75. We also wish to deal with two other arguments that HudBay made with respect to the shareholder vote. First, it argued that due to its concerns about the definition of "Beneficial Ownership" in the Plan potentially triggering the Plan if HudBay solicited proxies, HudBay had been prevented from soliciting proxies and building support for a no vote on continuation of the Plan. However, in cross-examination Mr. Garofalo indicated that HudBay had spoken with all large Augusta Shareholders about the Bid and the vote on the Plan. It is hard to understand how HudBay could make this submission to the panel when it had clearly acted contrary to this argument. Therefore, we did not find there to be any significant prejudice to HudBay arising from the scope of the term "Beneficial Ownership".

76. In sum, all of the factors described above suggested that the Augusta Shareholder vote should be given a very significant weight in assessing the *Royal Host* factors and that this supported the notion that the Plan should not be cease-traded with immediate effect.

e) Likelihood of extension of the Bid

77. As noted above, HudBay was unequivocal in its earlier public pronouncements and at the hearing that it would not extend the Bid if the Plan was not cease-traded, waived or otherwise invalidated. However, it was non-committal about whether it would extend the Bid in circumstances where the Plan was cease-traded, either at the hearing or at a future date certain. In fact, Mr. Garofalo, in his evidence, indicated that, in the situation of a cease-trade order to take effect at a future date certain, the HudBay board would have to consider an extension in light of those changed circumstances (he was also very clear in saying that there was no guarantee of an extension). In addition, HudBay presented the panel with an alternative to its primary position (that the Plan should be cease-traded with immediate effect), and that was that the panel should cease-trade the Plan at a future date certain.

78. We inferred from the evidence of Mr. Garofalo and HudBay's alternative position that there was a reasonable possibility of the Bid being extended if we decided that we would issue an order cease-trading the Plan effective at a future date certain. This was a significant factor in determining that the Plan should not be cease-traded with immediate effect.

Conclusion

79. In the end, after considering all of these factors, we were of the view that it would not be in the public interest to make an order cease-trading the Plan as of May 2, 2014. However, we were also of the view that it would be in the public interest to cease-trade the Plan as of July 15, 2014; provided that, HudBay kept the Bid open until July 16, 2014 and that it agreed to provide a ten day extension of the Bid if it took up any Augusta Shares.

80. Not unusually, for cases of this type, there were *Royal Host* factors which supported the granting of the application to cease-trade the Plan and there were factors in support of continuation of the Plan. The panel ultimately felt that the shareholder vote at the Meeting *in combination* with our view that it was reasonably likely that HudBay would extend the Bid if we fixed a future date certain for termination of the Plan, outweighed the factors that suggested it was time for the Plan "to go" with immediate effect. With our decision, we were able to pay deference to the vote from Augusta Shareholders holding a majority of the public float of the Augusta Shares (by extending the Plan for a period of time that was consistent with management's suggest timeframe to complete permitting) and to respect the rights of individual Augusta's Shareholders to make their choice on

the Bid (with our considered belief that the Bid would be extended if we granted the order we did).

¶ 3 June 24, 2014

¶ 4 **For the Commission**

Nigel P. Cave Vice Chair	Judith Downes Commissioner
George C. Glover, Jr. Commissioner	Don Rowlatt Commissioner