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

Citation: Re Chilean Metals Inc., 2019 BCSECCOM 24 Date: 20190122

Chilean Metals Inc. and TSX Venture Exchange

Panel	Nigel P. Cave	Vice Chair
	George C. Glover, Jr.	Commissioner
	Audrey T. Ho	Commissioner
Hearing date	November 13, 2018	
Submissions completed	November 13, 2018	
Date of decision	November 19, 2018	
Date of reasons	January 22, 2019	

Appearing

John Shewfelt Chantelle Rajotte	For Chilean Metals Inc.
Linda Plumpton James Gotowiec Stacey Danis	For TSX Venture Exchange
Jennifer Whately	For British Columbia Securities Commission

Reasons for Decision

I. Introduction

[1] This was a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 of:

a) decisions of the TSX Venture Exchange dated July 27 and August 10, 2018 refusing to approve two tranches of a private placement by Chilean Metals Inc. (the Private Placement Decisions); and

b) a decision of the Exchange dated August 27, 2018 to halt trading of the securities of Chilean (the Halt Trade Decision).

[2] There was a preliminary application by Christopher Berlet and Cogonov Inc. (the Intervenors) for intervenor status that we granted on October 24, 2018, with reasons to follow.

[3] On November 13, 2018, we dismissed Chilean's application for an interim stay of the Halt Trade Decision, with reasons to follow.

[4] On November 19, 2018, we dismissed all of Chilean's applications for orders in connection with our hearing and review of each of the Private Placement Decisions and the Halt Trade Decision (collectively, the Decisions), with reasons to follow.

[5] These are our reasons with respect to our decisions to grant intervenor status to Berlet and Cogonov, dismiss Chilean's application for an interim stay of the Halt Trade Decision and dismiss all of Chilean's applications for orders in connection with our hearing and review of the Decisions.

II. Background Facts

a) Procedural history

[6] On August 24, 2018, Chilean applied to the Commission for a hearing and review of the Private Placement Decisions.

[7] On September 2, 2018, Chilean applied to the Commission for a hearing and review and interim stay of the Halt Trade Decision.

[8] In particular, Chilean sought:

a) an interim stay of the Halt Trade Decision pending disposition of the hearing and review of the Decisions;

b) a declaration that the private placement that was the subject of the first Private Placement Decision was not a defensive tactic;

c) an order that the Decisions be set aside; and

d) an order approving Chilean's two tranches of a private placement that were the subject of the Private Placement Decisions or, in the alternative, an order remitting the matters back to the Exchange for reconsideration with directions.

[9] At a hearing management meeting held on September 5, 2018, the parties agreed, by consent that Chilean's two applications (with respect to all three of the Decisions) should be heard together and that they would be heard on November 13, 2018.

[10] On October 9, 2018, the Intervenors applied for an order granting them standing as parties in the hearing and review (the Intervenors' Application). The panel directed that it would consider the Intervenors' Application by way of submissions in writing.

[11] Each of Chilean and the Intervenors provided written submissions on the Intervenors' Application. The Exchange consented to the Intervenors' Application. The executive director took no position on the Intervenors' Application and did not provide submissions on that application.

[12] On October 24, 2018, the panel granted the Intervenors' Application, with reasons to follow (2018 BCSECCOM 334).

[13] On November 13, 2018, we held a hearing and review with respect to Chilean's applications on the Decisions. Chilean and the Exchange each made written and oral submissions on Chilean's applications with respect to the Decisions. The Intervenors made written submissions on the applications, but did not attend, nor were they represented at the hearing and review. The executive director attended the hearing but did not make any written or oral submissions on the applications.

[14] On November 13, 2018, we dismissed Chilean's application for an interim stay of the Halt Trade Decision, with reasons to follow.

[15] On November 19, 2018, we dismissed Chilean's section 28 applications with respect to all of the Decisions, with reasons to follow (2018 BCSECCOM 371).

b) General background facts

[16] Chilean is incorporated under the laws of British Columbia and its common shares are listed on the Exchange. Chilean is a junior mineral exploration company with properties in Canada and Chile.

[17] In early 2018, Chilean required additional funding to complete planned exploration work and to fund its ongoing working capital requirements.

[18] On April 23, 2018, counsel for the Intervenors wrote to the Exchange to notify it of certain concerns that the Intervenors had with respect to Chilean and its affairs. The Intervenors advised the Exchange that they were significant shareholders of Chilean, the company had not held a shareholders' meeting since November 2016 and that, on April 12, 2018, the Intervenors had issued a press release announcing that they were requisitioning a meeting of the shareholders of Chilean. They further advised that on April 13, 2018, Chilean had announced a private placement of $1,000,000 (with terms to be determined) and a share consolidation. The Intervenors advised the Exchange that they had concerns that the announced private placement was an inappropriate defensive tactic.

[19] On April 23, 2018, the Exchange acknowledged receipt of this communication from counsel for the Intervenors.

[20] In early May 2018, Chilean sought approval from the Exchange for the issuance of shares to former executives as part of severance packages. In reviewing this application, the Exchange asked questions of Chilean and the Intervenors relating to the Intervenors' complaint. The Exchange ultimately approved the share issuance, with a portion of the issuance being made subject to shareholders' approval, in part, because some of the shares were being issued to persons related or connected to the Intervenors.

[21] Also, in early May 2018, the Exchange advised Chilean that it would not approve further share issuances until the company had set a date for a shareholders' meeting and had set a record date for that meeting.

[22] Chilean's CEO responded by letter to the Exchange's communication regarding the need for an early shareholders' meeting, in which he indicated that this would be a "very bad outcome" for the company. His stated rationale for this was that the company needed to first focus on raising funds. His letter also acknowledged his awareness that the Intervenors had written letters of complaint to the Exchange.

[23] The Exchange responded to this letter by confirming that Chilean was in default of the Exchange's policies as a consequence of its failure to hold a shareholders' meeting within 15 months of its last shareholders' meeting. The Exchange further set out its expectation that the company would announce and file its notice of meeting and record date within 30 days.

[24] Counsel for Chilean responded that it would comply with the Exchange's requirements.

[25] On May 18, 2018, Chilean issued a press release announcing a private placement. The private placement contemplated an offering of 12.5 million units, at $0.12 per unit, for gross proceeds of $1.5 million - with each unit comprised of one common share and one warrant to purchase an additional common share, exercisable for five years with an exercise price of $0.18. The private placement also contemplated an offering of four million flow-through units (where the terms of the units were identical), at $0.16 per unit, for gross proceeds of $640,000. The press release indicated that the company would use the existing shareholder exemption from the prospectus requirements of the Act and that shareholders interested in participating in the private placement should contact the company. Finally, the press release indicated that the private placement was subject to approval of the Exchange.

[26] On May 25, 2018, counsel for the Intervenors sent a second letter to the Exchange reiterating their previously raised concerns that the announced private placement was a defensive tactic but also raising other issues relating to Chilean's disclosure record.

[27] The Exchange considered this second correspondence and determined to ask questions of Chilean related to certain of the disclosure issues raised, which it did by email to the company on June 14, 2018.

[28] On June 8, 2018, Chilean issued a press release indicating that it had closed a private placement in which it had raised an aggregate of $1.65 million. Of this amount, $1.185 million was raised through the sale of units as described in the company's May 18, 2018 press release and the remainder through the sale of the flow-through units.

[29] On June 19, 2018, the Exchange learned that Chilean had closed the private placement (and issued a press release respecting it) while reviewing Chilean's disclosure documents

in connection with the Exchange's investigations related to the Intervenors' second complaint letter.

[30] Chilean had not filed a Form 4B for the private placement with the Exchange and had, therefore, not obtained conditional approval from the Exchange for the offering prior to its closing.

[31] On June 19, 2018, the Exchange contacted Chilean to ask about the status of the private placement and whether any securities had been issued with respect to it.

[32] On June 20, 2018, counsel for Chilean indicated that there had been a miscommunication between Chilean's counsel and the company with respect to who had responsibility for filing the Form 4B for the offering and each believed that the other had filed the Form 4B. That was submitted as the reason that the offering had been closed without the company obtaining prior Exchange approval. Counsel for Chilean filed a completed Form 4B with the Exchange on the same day.

[33] Internal e-mails among staff at the Exchange confirmed that the closure of the private placement without Exchange approval set off "alarm bells" and that this would significantly complicate the Exchange's ongoing review of the complaints filed by the Intervenors.

[34] Staff at the Exchange determined that they would not recommend halt trading Chilean's shares at the time. Instead, they suggested that the company should be advised to issue a press release providing further information about the offering and the component of the private placement offering taken-up by related parties. Finally, the Exchange determined to ask Chilean further questions relating to the private placement.

[35] On June 22, 2018, the Exchange received a third letter from counsel to the Intervenors. In that letter, the Intervenors expressed concern that the private placement that had already been closed resulted in a substantial dilution to the existing shareholders of Chilean and, again, reiterated their concern that the private placement was a defensive tactic.

[36] On June 25, 2018, the Exchange advised Chilean that it had breached Exchange policies by closing the private placement without obtaining prior approval from the Exchange. The Exchange asked for confirmation from Chilean that it would be seeking approval for any further issuances of securities under the previously announced private placement, for information relating to the placees in the private placement and for information as to why the Exchange should not view the issuance of the private placement securities as a defensive tactic. Finally, the Exchange advised Chilean that if it did not provide the requested information then the Exchange would proceed to halt trading of the company's shares.

[37] On June 26, 2018, counsel for Chilean advised the Exchange that the Intervenors had not validly requisitioned a shareholders' meeting (in April) and that, as a consequence, the private placement could not be viewed as a defensive tactic.

[38] In response to this communication, the Exchange reiterated its information requests.

[39] Chilean complied with the Exchange's information requests. From that, the Exchange was able to determine that a significant portion of the completed private placement had been completed with insiders of the company.

[40] Internal correspondence at the Exchange indicates that, following the provision of this information, the Exchange concluded that:

- Chilean had not complied with Exchange policies related to private placements;

- the Exchange was concerned that the first tranche of the private placement was a defensive tactic;

- if the private placement had been filed with the Exchange for prior approval, the Exchange would have attached conditions to its approval or required modifications to the terms of the offering, given the context of the Intervenors' requisition of a shareholders' meeting (e.g. the Exchange might have restricted the participation of insiders in the placement or required disinterested shareholder approval of the transaction, etc.); and

- if the Exchange were ultimately to approve (retroactively) the completed private placement, the Exchange should do so only on the basis that the shares issued in the private placement could not vote at Chilean's upcoming shareholders' meeting.

[41] On July 13, 2018, the Exchange informed Chilean that it did not accept its filing for approval of the private placement. In so doing, the Exchange indicated that the shares issued under the private placement could not be voted at the company's upcoming shareholders' meeting. Finally, the Exchange asked for further information relating to insiders of the company and their participation in the first tranche of the private placement.

[42] On July 19, 2018, Chilean filed an application for Exchange approval of a second tranche of the private placement. Internal communications at the Exchange indicate that the Exchange determined to not take any action with respect to this second application for approval until it had resolved its ongoing concerns with the first tranche of the private placement.

[43] On July 23, 2018, counsel for Chilean responded to the Exchange's communication of July 13, 2018. Chilean indicated that the private placement was not a defensive tactic as

Chilean had a serious need of financing. It also provided information in connection with the requests made by the Exchange.

[44] On July 27, 2018, the Exchange replied to counsel for Chilean. This communication constitutes the first of the Private Placement Decisions. The Exchange indicated that Chilean had failed to comply with the Exchange's policies by issuing securities without obtaining prior approval of the Exchange. The Exchange also highlighted that Chilean was in breach of its listing agreement with the Exchange which requires a listed company to comply with the rules and policies of the Exchange. Finally, the Exchange indicated that, in order for it to consider approving the private placement and thereby rectifying the company's non-compliance, the Exchange would require:

- evidence of disinterested shareholders' approval for the private placement, to be obtained as the first matter put to the Chilean shareholders for approval; or

- that Chilean ensure that the shares issued in the private placement (or upon the exercise of any share purchase warrants issued in the private placement) not be voted at the next shareholders' meeting of the company (these two options are hereafter referred to as the "Conditions").

[45] On July 30, 2018, the CEO of Chilean wrote to the Exchange and asked it to reconsider its first Private Placement Decision. He said that the company had provided the Exchange with evidence to show that the private placement was not a defensive tactic. He also advised the Exchange that, in his view, the Intervenors had not, as yet, commenced a proxy contest. He also said that the Conditions were unfair as they disenfranchised the purchasers of shares in the private placement by taking away their voting rights. Finally, he suggested that the Exchange consider an alternative to the Conditions which was to not allow the shares acquired in the first tranche of the private placement by the CEO and the other directors and officers of the company, to be voted at the company's upcoming shareholders' meeting.

[46] On July 31, 2018, the Exchange replied that it had considered these additional submissions but had not changed its decision.

[47] On August 7, 2018, counsel for Chilean again asked the Exchange to reconsider its first Private Placement Decision on the basis that the Exchange had no reasonable basis to conclude that the private placement was a defensive tactic and that the company's contraventions of the Exchange's rules and policies were inadvertent. Counsel for Chilean reiterated that the company did not view the Conditions as being acceptable. Finally, counsel for Chilean indicated that the Exchange had no basis upon which to withhold conditional acceptance of the second tranche of the private placement and that the company intended to close that offering.

[48] On August 9, 2018, the Exchange replied that it had considered these additional submissions but had not changed its decision and that the Exchange would only provide

post facto approval for the first tranche of the private placement if the company complied with one or other of the two Conditions.

[49] On the same day, counsel for Chilean responded that the company wanted conditional approval for the second tranche of the private placement by August 10, 2018 and, if the Exchange failed to provide that approval, Chilean might elect to close that offering without such approval.

[50] On August 15, 2018, the Exchange wrote to Chilean setting out that it had not received a response from Chilean with respect to its communication of July 27, August 7 and August 9, 2018 and that the Exchange had further concerns that the company appeared to be in a position where it would be postponing its upcoming shareholders' meeting. That letter indicated that if Chilean remained in contravention of the Exchange's policies and its listing agreement the Exchange might impose further measures against the company.

[51] On August 17, 2018, Chilean issued a press release stating that the company was postponing its upcoming shareholders' meeting.

[52] On August 17, 2108, the Exchange wrote to counsel for Chilean indicating that the Exchange required the company to advise the Exchange how it would address its ongoing non-compliance with Exchange policies and to publicly announce a new date for a shareholders' meeting to be held not later than October 31, 2018. The letter indicated that the Exchange required a response by August 21, 2018 or it would halt trading in the company's shares.

[53] On August 22, 2018, the CEO of Chilean met with representatives of the Exchange. This did not lead to a resolution of the outstanding issues.

[54] On August 24, 2018, Chilean filed its application for a hearing and review of the two Private Placements Decisions.

[55] On August 27, 2018, the Exchange halt traded Chilean's shares.

c) Chilean's additional evidence and expert opinion

[56] As part of its submissions in connection with the hearing and review, Chilean filed affidavits from its CEO and CFO. It also filed an expert opinion letter from a former employee of the Exchange (and its predecessor organizations).

[57] Although it did not formally apply to the Commission to do so, Chilean was, in effect, applying to have the Commission consider this evidence in the hearing and review even though it was not part of the record filed by the Exchange.

[58] The additional evidence in the affidavits can be summarized as follows:

- a notice of Chilean's board of directors meeting to consider a consolidation of the company's shares and a private placement for up to $1 million was circulated on April 10, 2018;

- letters from the Intervenors to the company requisitioning a meeting were delivered on April 11 and 12, 2018;

- this correspondence from the Intervenors was the first time that the board of the company was aware of the Intervenors' intentions in this regard;

- at a board meeting on April 12, 2018, the board, including directors connected to the Intervenors, approved the consolidation and private placement;

- the company had been planning a financing transaction for months prior to this April 12, 2018 board decision;

- the private placement was not planned or modified in response to the potential proxy contest;

- the Exchange's decision to halt trade the company's shares was causing Chilean substantial harm;

- the company had rescheduled a shareholders' meeting for November 23, 2018;

- Chilean was not provided with copies of the Intervenors' correspondence and complaints to the Exchange;

- suggestions that there existed an inappropriate relationship between counsel for the Intervenors and employees of the Exchange, through that counsel's participation on one of the Exchange's advisory committees; and

- the failure to file a Form 4B in connection with the company's first private placement arose as a result of a failure by counsel to the company to file the form.

[59] The material component of the expert opinion was as follows:

> If there had been no issue whatsoever before the Exchange about whether or not the private placement was a defensive tactic, the typical and most likely disposition of Chilean Metals' request for *post-facto* approval of its private placement after it discovered its lawyer's inadvertent failure to seek pre-approval of the private placement, would be the processing of the submission for review and an acceptance of same by the Exchange.

III. Intervenors' Application

[60] On October 9, 2018, the Intervenors applied for intervenor status in the hearing and review.

[61] The Exchange consented to the Intervenors' Application and the executive director took no position on the application. Chilean objected to the application. The Intervenors' Application was heard in writing.

[62] Both the Intervenors and Chilean submitted that the legal test for determining the Intervenors' Application was whether the Intervenors were "directly affected" by the Decisions. Chilean submitted that they were not; the Intervenors submitted that they were.

[63] The "directly affected" test comes from section 28 of the Act which sets out that a person directly affected by a decision of the Exchange may apply to the Commission for a hearing and review of that decision.

[64] The "directly affected" test delineates that only those with a sufficient interest in a decision of the Exchange will have standing *to apply for a review* of that decision. That is the threshold that Chilean must meet in order for it to apply for a review of the Decisions. Of course, there was no debate that Chilean had the requisite standing to make its applications. However, the "directly affected" test is not the applicable one in relation to an application for intervenor status. The Intervenors were not applying for a hearing and review of any of the Decisions. These are not one and the same.

[65] We are cognizant that there is a legitimate public interest reason for limiting grants of intervenor status in hearings and reviews. Commission proceedings must be efficient. However, this interest must be balanced against ensuring that the Commission, as a public interest regulator, affords the opportunity to persons with relevant evidence to make submissions and have the opportunity to be heard. Relevant evidence, in the context of a hearing and review, must be assessed with a view to whether the evidence may be material to a question that may be in issue in the hearing and review.

[66] As such, we did not approach this application through the lens of the "directly affected" test.

[67] We granted the Intervenors' Application because Chilean's application suggested that it would be leading additional evidence and making submissions related to whether its private placement was a defensive tactic – the Intervenors were the parties who had complained that the issuance was a defensive tactic and therefore might reasonably have relevant evidence on the central issue raised by Chilean.

[68] As a consequence, on October 24, 2018, we granted the Intervenors' Application.

IV. Application to introduce new evidence

[69] Section 5.9(a) of BC Policy 15-601 permits a party to a hearing and review to apply to introduce new evidence that was not part of the record in the proceeding under review as part of the Commission's hearing and review. That section makes clear that the test for admission of that new evidence is whether it is "new and compelling". That test has been

affirmed in many decisions of this Commissions (see, for example, *Re TerraNova Partners LP*, 2017 BCSECCOM 76 at paragraph 40) and in the decisions of other securities regulatory proceedings across the country (see *Eco Oro Minerals Corp.,* 2017 ONSEC 23).

[70] The "new and compelling" test was considered in the recent decision of *Re Imex Systems Inc.*, 2019 BCSECCOM 23. In that decision, the panel (at paragraph 88) set out the following steps for that test:

> 88. In summary, in a hearing and review, the "new and compelling" test requires the following assessments:
>
> - does an assessment of the evidence raise a significant likelihood
> - that the decision maker would have reached a different decision had it considered the evidence, or
> - that the panel should not show deference to the decision in question?
>
> - was the evidence considered by the decision maker?
>
> - is there a reason in the public interest not to admit the new evidence?

[71] Chilean submitted that we should admit and consider the new evidence on the basis that:

- the evidence of harm was relevant to its application for an interim stay of the Exchange's halt trade order; and

- the general administrative law principles of fairness and natural justice support Chilean's right to respond to the substance of the Intervenors' correspondence to the Exchange and to correct deficiencies in the information upon which the Decisions were made.

[72] The Exchange submitted that the information did not meet the "new and compelling" test set out in Policy 15-601 (and the related decisions from this Commission) and the opinion evidence of SW did not meet the test for the admissibility of opinion evidence set out by the Supreme Court of Canada (citing *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23).

[73] A review of the information contained in the affidavits from the CEO and CFO of Chilean reveals that, other than the evidence relating to the harm caused by the halt trade order (which will be discussed in further detail below), none of the information that could be considered relevant to the issues in this hearing and review was "new" (in the sense that it was already part of the record) and that the only information that was contained therein that was not part of the record was completely irrelevant.

[74] The information in the affidavits that the failure to file the Form 4B was inadvertent, the company was contemplating a financing transaction prior to the Intervenors'

requisitioning of a shareholders' meeting and that the two private placement transactions were not defensive tactics were all part of the record. They were submissions that Chilean made repeatedly to the Exchange during the July and August 2018 period. That Chilean had not been provided with copies of correspondence from counsel to the Intervenors was also clear from the record. It is also clear from the record that Chilean was aware of the general nature of that correspondence. All of that information was in the record.

[75] The only new information in the affidavits was the CEO of Chilean's assertion that counsel for the Intervenors participated on an advisory panel for the Exchange. The CEO alleged that this new evidence suggested that there was an improper relationship between counsel for the Intervenors and employees of the Exchange. There was no evidence to support such suggestion. Participation on advisory panels for regulatory agencies is a regular and common practice. We do not draw any adverse inference of bias arising from this circumstance. We found this evidence to be irrelevant.

[76] As a consequence, we did not consider the affidavits tendered by Chilean's CEO and CFO in our consideration of the application for a hearing and review; however, as will be discussed below, we did consider the evidence of harm to Chilean resulting from the Halt Trade Decision when considering the company's application for an interim stay of that decision.

[77] The opinion of SW sets out the author's view of the Exchange's "typical" practice in circumstances where a *post facto* application for an approval of a private placement occurs.

[78] We did not find that opinion to be relevant. As will be discussed below, the issue in this hearing and review is whether each of the Decisions, made in the very specific circumstances of this case, was reasonable. The opinion of a third person about what the Exchange might "typically" do in similar circumstances is not relevant to that analysis. Further, the Exchange makes decisions of the kind in issue in this hearing and review as part of its mandate as an exchange recognized by the Commission. It is for the Commission, as part of both its oversight of the exchange and its responsibilities under the Act, as the expert body in these matters, to be making assessments of the reasonableness of the Exchange's decisions in the public interest. This is not something for which we require a third person's opinion.

[79] As a consequence, we did not consider the opinion of SW tendered by Chilean.

V. Application for an interim stay of the Halt Trade Decision

[80] Chilean filed an application under section 165(5) of the Act for an interim stay of the Halt Trade Decision until we had made a determination with respect to its applications for a hearing and review of the Decisions.

[81] In support of its application, Chilean relied upon the three part test for considering a stay, pending a decision on a hearing and review, set out in the Commission's decision in *Richard J. Watson, Re*, 2002 BCSECCOM 782:

> The first test, the "serious question" test, is a preliminary and tentative assessment of the merits of the case. The applicant seeking the stay must make out a prima facie case or show that there is a serious question to be tried as opposed to a frivolous or vexatious claim. The second test requires the applicant to establish that irreparable harm will be suffered if the stay is not granted. The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of the stay pending a decision on the merits. When weighing the balance of convenience the Commission must take into account the public interest.

[82] This is a common test for considering stay applications in a variety of contexts.

[83] It is generally acknowledged that the first test is a low threshold to meet and an applicant need only establish that the question to be tried is neither frivolous nor vexatious. There was no serious argument that this aspect of the test had not been satisfied.

[84] Chilean referred to the Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 for the proposition that the concept of "irreparable harm" in the second test refers to the nature of the harm and not the magnitude of the harm. In the affidavit from the CEO of Chilean, he referenced a number of harms resulting from the Halt Trade Decision: lost opportunities to finance the company, delayed exploration activity and reputational harm. We accepted Chilean's submissions that the halt trade order was causing harms that would likely not be curable or quantifiable in monetary damages.

[85] The Exchange submitted that the application for an interim stay failed the "balance of convenience" test. We agreed with those submissions.

[86] The *RJR* decision speaks to the appropriateness of considering the public interest when assessing harm in the context of applications to stay decisions of public authorities:

> 71 …In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant… The test will nearly always be satisfied upon proof that the authority is charged with the duty of promoting and protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[87] This concept is echoed by the Commission's decision in *Watson*, as set out above, that the Commission must consider the public interest in weighing the balance of convenience.

[88] Four factors weighed heavily in favour of rejecting the application for a stay of the Halt Trade Decision under the balance of convenience test:

- the Halt Trade Decision was made by the Exchange pursuant to its delegated authority from the Commission to act as a critical gatekeeper in our public markets;

- Chilean's threat to close the second tranche of the private placement, notwithstanding its lack of conditional approval from the Exchange to do so;

- as at the date of the application, Chilean's shares had already been subject to the Halt Trade Decision for over two months; and

- if the halt trade were not in effect, the shares that had been issued in the first tranche of the private placement would be free trading and could be traded on the Exchange.

[89] First, there was no evidence that the Halt Trade Decision was issued by the Exchange for an improper purpose or for reasons other than what the Exchange considered to be in the public interest in the circumstances. Chilean has asked for a hearing and review of that decision and whether it was reasonably made. However, following *RJR*, we can assume there will be irreparable harm to the public interest in interfering with that decision, prior to any determination that the decision was unreasonable.

[90] Secondly, by threatening to close the second tranche of the private placement, notwithstanding that it did not have conditional approval from the Exchange to do so, it is clear from the evidence that Chilean at least considered this course of conduct. The tools available (and the related public interest considerations) to securities regulatory authorities to "unscramble" a transaction which has not been carried out in a manner that is consistent with securities regulatory rules and which has already closed are more limited and more complex in their application. We had significant concerns that a stay of the Halt Trade Decision would allow Chilean to make good on its threat and close the second tranche of the private placement (without Exchange approval), exacerbating an already challenging situation.

[91] Thirdly, we had evidence of the harm to Chilean being caused by the halt trade. We accepted that harm as being real and significant; however, that evidence did not demonstrate, other than in a very general sense, that that harm was made substantially worse by the continuation of the halt trade for some period of time to allow consideration of the hearing and review applications, given that the halt trade had already been in effect for over two months.

[92] Finally, the shares issued under the first tranche of the private placement were subject to a four month hold period following their issuance. That hold period had elapsed during the tenancy of the halt trade order. We had significant concerns that shares issued under the first tranche of the private placement (an issuance not approved by the Exchange) could be traded on the Exchange if the Halt Trade Decision was lifted, thereby making it difficult, if not impossible to reverse the transactions, if needed, at a later date.

[93] As a consequence of the above, the balance of convenience clearly favoured dismissing the interim stay application and leaving the halt trade order in effect until we made our decisions on the hearing and review applications.

VI. The hearing and review applications

a) Standard of Review

[94] Policy 15-601 clearly articulates that the Commission's standard of review of a decision made by the Exchange is generally one of reasonableness not correctness.

[95] Policy 15-601 also goes on to state that the Commission will generally not interfere with an Exchange decision unless the applicant is able to establish that, in reaching the decision in question, there was an error in law, an overlooking of material evidence, new and compelling evidence has come to light or that the Commission's view of the public interest is different than that of the Exchange.

[96] The onus for establishing one of these grounds is upon Chilean.

[97] This framework has been applied in numerous decisions of this Commission, including *TerraNova* and *Re Jaguar Financial Corporation*, 2014 BCSECCOM 440. None of the above was questioned by any of the parties in the proceedings before us.

[98] As the Exchange submitted, substituting our views on the Decisions for those of the Exchange is not something that we should do lightly. There are substantial public interest reasons for showing deference to Exchange decisions.

[99] However, that deference should not and cannot be absolute. Policy 15-601 sets out circumstances in which a Commission may intervene. Those circumstances were articulated in the OSC decision of *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3565. In this matter, we find that the appropriate standard of review is one of reasonableness.

b) Relevant Exchange Policies and regulatory framework

[100] The Exchange is a stock exchange recognized by the Commission under s. 24 of the Act and pursuant to a Recognition Order, *TSX Venture Exchange Inc.*, 2012 BCSECCOM 273 (Recognition Order).

[101] The Recognition Order sets out terms and conditions incumbent on the Exchange to fulfill in order for it to continue to perform its roles in the capital markets. One of the requirements is that the Exchange establish, maintain and enforce rules that govern its operations. These rules, approved by the Commission, are intended, among other things,

to ensure compliance with securities legislation and the policies of the Exchange. The rules of the Exchange applicable to its listed issuers are set out in the TSXV Manual.

[102] To be listed on the Exchange, all issuers must enter into a listing agreement. By signing the listing agreement, issuers agree to comply with all Exchange Requirements and all applicable legal requirements. The term "Exchange Requirements" is defined in Policy 1.1 of the TSXV Manual as follows:

> Exchange Requirements means and includes the Articles, by-laws, policies, circulars, rules (including UMIR) guidelines, orders, notices, rulings, forms, decisions and regulations of the Exchange as from time to time enacted, any instructions, decisions and directions of a Regulation Services Provider or the Exchange (including those of any committee of the Exchange as appointed from time to time), the Securities Act (Alberta) and rules and regulations thereunder as amended, the Securities Act (British Columbia) and rules and regulations thereunder as amended and any policies, rules, orders, rulings, forms or regulations from time to time enacted by the ASC or BCSC and all applicable provisions of the Securities Laws of any other jurisdiction.

[103] The Policy 2.9 of the TSXV Manual addresses when public trading in an issuer's listed shares should be temporarily halted or suspended, or when the issuer's listed shares will be delisted:

> The Exchange can impose a trading halt for any one of the following reasons: (a) the issuer is not in compliance with the terms of its Listing Agreement or Exchange Requirements; or (b) circumstances exist which, in the opinion of the Exchange, could materially affect the public interest.

[104] Pursuant to Policy 1.1, section 4.1 of the TSXV Manual, the Exchange reserves the right to exercise discretion in the application of its policies. The TSXV Manual specifically states the Exchange "may waive or modify an existing requirement or impose additional requirements in applying its discretion. It may also take into consideration the public interest and any facts or situations unique to a particular party."

c) Analysis

[105] Chilean submitted that, pursuant to the Commission's decision in *Re Hecla Mining*, 2016 BCSECCOM 359, the evidence clearly established that the first tranche of the private placement was not a defensive tactic. Without a reasonable basis for finding that it was a defensive tactic, the first Private Placement Decision (i.e. the Exchange's refusal to accept the private placement on a *post facto* basis (without compliance with one of the Conditions)) was unreasonable.

[106] Chilean further submitted that it had complied with all of the Exchange's policies in connection with its application for approval of the second tranche of the private placement and therefore the second Private Placement Decision was unreasonable.

[107] Finally, Chilean submitted that as the first Private Placement Decision was unreasonable, and because the Halt Trade Decision flowed from that decision, it too was also unreasonable.

[108] The Exchange submitted that, as set out in the record, while the Exchange had concerns that the first tranche of the private placement was a defensive tactic, it could not make this determination conclusively on the information it then had and that its decision to not approve the first tranche of the private placement (without one of the Conditions being fulfilled) was based solely upon Chilean's ongoing breaches of the Exchange's policies and the listing agreement between Chilean and the Exchange.

[109] The Exchange further submitted that Chilean had failed to meet its burden of establishing one of the grounds, under Policy 15-601, for the Commission to intervene in the circumstances. In particular, the Exchange emphasized that it had made neither an error in law nor had it made any decision that was contrary to the public interest.

[110] The Intervenors' submissions essentially mirrored those of the Exchange.

[111] As can be seen from the above summary, there was very little intersection between the submissions from the parties. Summarized in their simplest form, Chilean's position was that the Exchange had made an error in determining that the first tranche of the private placement was a defensive tactic and that, therefore, the first Private Placement Decision was unreasonable and the two subsequent Decisions (tied to the first Decision) were unreasonable as a consequence. The Exchange's submission was that its first Decision was not based upon a finding that it was a defensive tactic, but rather Chilean's non-compliance with Exchange policies and that the Exchange's decision to refuse to approve that transaction and the two subsequent Decisions were all reasonable in the circumstances.

[112] A review of the record supports the Exchange's construction of the Decisions.

[113] The record contains a memorandum (prepared after the Decisions) setting out the history of the Decisions and the Exchange's reasons therefore. That document sets out:

> …while it did appear that the PP could be considered a defensive tactic, the decision regarding the PP and the Alternatives [obtain disinterested shareholder approval of the PP or ensure that the shares issued under the PP would not be voted at the shareholder meeting] was based on the Issuer's non-compliance with Exchange policies.

[114] The reasons go on to state that the Decisions were based upon an exercise of the Exchange's discretion and that the Exchange's policies give it this discretion (in section 4.1 of Exchange Policy 1.1) and that Chilean had explicit prior notice of this discretion.

[115] Those reasons are consistent with and supported by the Exchange's contemporaneous internal communications relating to its decision with respect to the first tranche of the private placement. It is clear that the Intervenors' complaints, when combined with the company's closing of a private placement without Exchange approval and the company's ongoing failure to hold a shareholders' meeting, did raise concerns within the Exchange about whether the private placement was a defensive tactic. The Exchange set about pursuing these concerns. That investigation was carried out in a diligent manner. However, there is nothing in the record to suggest that the Exchange reached a definitive conclusion that the private placement was a defensive tactic.

[116] The record is clear that the Exchange determined that Chilean was in contravention of two of the Exchange's policies (its policy on the timing for holding an annual shareholders' meeting and the requirement to obtain Exchange approval prior to issuing listed securities).

[117] Therefore, the central question in this review is whether, when faced with Chilean's breach of Exchange policies and its listing agreement, was it reasonable for the Exchange to make the three Decisions?

[118] We find that each of the Decisions was reasonable in the circumstances.

[119] The Exchange plays a significant role as a gatekeeper in our capital markets. Part of that role, as a gatekeeper (as set out in the Exchange's recognition order from the Commission), is the enforcement of its rules and policies in the public interest. With the authority to enforce its rules and policies, must come some latitude for the Exchange to reasonably use its discretion to apply, waive or modify (through the imposition of conditions) those rules and policies in a nuanced manner, applicable to the specific circumstances of each situation. This concept is clearly reflected in Policy 1.1, section 4.1 of the TSXV Manual, as outlined above.

[120] The specific factual context in which these Decisions were made included:

- Chilean being in breach of the Exchange's policy on the timing of holding an annual shareholders' meeting;

- the Intervenors raising concerns about defensive tactics and disclosure issues; and

- the Exchange's ongoing investigation of the Intervenors' concerns.

Upon learning of Chilean's closing of an unapproved private placement, the Exchange had limited options available to it. Chilean's view is that the Exchange should simply have approved the placement on a *post facto* basis. However, in the context in which this occurred, it was reasonable that the Exchange did not make that decision. Rather than move immediately to the most serious option available to the Exchange to enforce compliance with its Policies (halt trading), it offered Chilean a basis upon which it could rectify its non-compliance (by accepting one of the Conditions). It offered Chilean the

opportunity to get approval on a *post facto* basis. Chilean simply did not like the basis upon which it could obtain that approval. Neither of the Conditions was unreasonable in the circumstances. The basis upon which Chilean objected – that the Conditions would result in disenfranchising shareholders in some manner – was not a basis to object to the Conditions. There are many circumstances in securities law (including under the Exchange policies) in which disinterested shareholder approval is required or the votes of certain shareholders cannot be included on a matter at a shareholders' meeting (for one reason or another). The Exchange's Halt Trading Decision was also reasonable. Halt trading orders are one of the Exchange's tools and security holders are subject to the risk that the Exchange will impose such orders when it considers necessary in the public interest.

[121] With Chilean's refusal to accept the Exchange's first Private Placement Decision, the Exchange's subsequent decision to not approve the second tranche of the private placement and its ultimate Halt Trade Decision were reasonable.

[122] Chilean was provided with both ample notice and opportunity to be heard on all of the Decisions and the record does not disclose any aspect of procedural unfairness. Frankly, the record discloses the opposite.

[123] As a consequence, we dismissed Chilean's applications with respect to each of the Decisions.

January 22, 2019

For the Commission

Nigel P. Cave
Vice Chair

George C. Glover, Jr.
Commissioner

Audrey T. Ho
Commissioner