

THE LIONS GATE POISON PILL CASE BRITISH COLUMBIA BREAKS RANKS WITH ALBERTA AND ONTARIO



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The British Columbia Securities Commission has declined to adopt the somewhat more target-friendly approach to the regulation of shareholder rights plans (poison pills) indicated in decisions of the Alberta and Ontario securities regulators in the past three years. In the recent case of *Re Icahn Partners LP and Lions Gate Entertainment Corp.*, the BC Commission rejected any departure from the stance taken by the regulators in Canadian poison pill decisions from the first case in 1991 until 2007 when the Alberta Securities Commission allowed a poison pill to block a hostile bid indefinitely. The Ontario Securities Commission made a similar decision to that of Alberta in 2009. Prior to 2007, poison pills were only permitted, at most, to delay completion of a hostile bid on a temporary basis.

BACKGROUND – NATIONAL POLICY 62-202 AND SHAREHOLDER APPROVAL OF POISON PILLS

The regulation of poison pills by the Canadian securities regulators is based on their National Policy 62-202 – *Take-over Bids – Defensive Tactics* (NP 62-202), which warns that the regulators will intervene if the management of a take-over target takes defensive measures that will likely result in shareholders being deprived of the opportunity to respond to a take-over bid. Of particular note in the context of the recent decisions is the following passage from NP 62-202:

...the Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns.

NP 62-202 came into effect before the first poison pill was adopted in Canada, and it was initially unclear as to how the reference to prior shareholder approval in NP 62-202 would be applied to poison pills. A possible reading of the passage quoted above was that it was an acknowledgment that it would be difficult to take the position that a target company tactic was “abusive of shareholder rights” if the very persons affected by the tactic, the shareholders, voted in favour of it (assuming that the shareholders who voted did not have a conflict of interest). However, this interpretation was not reflected in the decisions of the regulators prior to 2007.

The regulators established from the outset that they would not object to the adoption of a poison pill per se, whether with or without prior shareholder approval, although the Toronto Stock Exchange required shareholder ratification within six months after adoption. The attempted use of a poison pill to stop an actual bid, however, routinely became the subject of a securities regulatory hearing based on the regulators’ public interest jurisdiction and NP 62-202, regardless of whether shareholders had approved the pill.

The regulators in the pre-2007 hearings took the position that shareholder approval of a poison pill did not justify the use of the pill to defeat a take-over bid. Shareholder approval was only one of a number of factors to be considered, and its relevance was only in determining whether the pill should be cease traded immediately following the hearing or a short time later after the target company had a limited additional period of time to obtain a better transaction for shareholders. This was the case whether the poison pill had been approved by shareholders prior to the hostile bid in question or during the bid (as in *Re Samson Canada, Ltd. and Highridge Exploration Ltd.*, a 1999 decision of the Alberta Securities Commission in which the Commission acknowledged that the poison pill was “effectively ratified” by the target’s shareholders during the hostile bid).

ALBERTA BREAKS NEW REGULATORY GROUND, FOLLOWED BY ONTARIO

In 2007, in *Re Pulse Data Inc.*, the Alberta Securities Commission (ASC) made the unprecedented decision of allowing a poison pill to remain in place indefinitely to defeat a hostile take-over bid despite the fact that the target was not seeking a superior transaction for shareholders. The target’s shareholders had approved the pill during the take-over bid on what the ASC considered to be a fully informed basis, and the ASC decided essentially to give effect to that vote. The Ontario Securities Commission (OSC) made a similar decision in 2009 in *Re Neo Material Technologies and Pala Investments Holdings Limited*. In its reasons for that decision, the OSC referred to the Supreme Court of Canada’s discussion of directors’ fiduciary duties in the 2008 case of *BCE Inc. v. 1976 Debentureholders*, including the court’s comment that those duties were not confined to short-term profit or share value but looked to the long-term interests of the corporation. The principles set out by the court in *BCE* could be construed as running counter to NP 62-202 and the previous OSC decisions that were based on it, but the OSC was explicit in not taking that view in the *Neo Material Technologies* reasons. In regard to the possible purposes of a poison pill, the OSC said:

As discussed above, in this case, Pala submits that the *only* proper use of a shareholder rights plan in the face of a take-over bid is to allow a board of directors sufficient time to seek out alternative bidders. Consistent with the Supreme Court’s statements in *BCE* and the established body of corporate case law it is our view that, shareholder rights plans *may* be adopted for the broader purpose of protecting the long-term interests of the shareholders, where, in the directors’ reasonable business judgment, the implementation of a rights plan would be in the best interests of the corporation. [Emphasis in original.]

A subsequent 2009 ASC poison pill decision, *Re 1478860 Alberta Ltd. and Canadian Hydro Developers, Inc.*, signalled a possible continuation of the movement toward greater regulatory weight being given to shareholder approval of a poison pill. In that case, the target’s shareholders had approved the poison pill more than a year prior to the hostile bid that was the subject of the hearing. The ASC was persuaded that the poison pill should be allowed to remain in effect following the hearing on the basis that the evidence indicated that there was a real and substantially possibility that an alternative proposal would materialize. While this did not mean that the pill would be permitted to stay in place indefinitely to defeat the bid, it was noteworthy that the ASC devoted several paragraphs of its reasons to make the point that shareholders, when previously making an informed decision to approve the poison pill, had condoned the future use of the poison pill to impede a take-over bid that was not a “permitted bid” as defined in the pill.

THE LIONS GATE DECISION

In March of 2010, Lions Gate Entertainment Corp. was the subject of a hostile take-over bid launched by entities controlled by Carl C. Icahn. After the commencement of the bid, Lions Gate’s board of directors adopted a poison pill and scheduled a meeting of Lions Gate shareholders to vote on confirmation of the pill. The pill was to be in effect pending the meeting of shareholders.

The bidders applied to the British Columbia Securities Commission (BCSC) for a cease trade order against the poison pill. At the time of the hearing, the takeover bid was scheduled to expire two business days before the meeting of shareholders to confirm the pill. Lions Gate did not take the position at the hearing that the

poison pill was necessary in order to enable the board to obtain an alternative transaction for shareholders, and in fact the Lions Gate board of directors had decided that it was not the time to put the company in play.

Following the hearing, on April 27, 2010, the BCSC decided to grant the requested cease trade order. Lions Gate appealed the decision to the British Columbia Court of Appeal, which dismissed the appeal on May 7.

On May 6, the BCSC issued summary reasons for the decision of a majority of the panel members. (One of the three panel members agreed with the result but not with all of the reasoning of the other two members.) At the time of the writing of this article, the BCSC has not issued its final reasons.

As indicated in its summary reasons, the BCSC based its decision on the principles consistently applied by the securities regulators prior to the ASC's *Pulse Data* decision. The BCSC regarded a poison pill as acceptable only as a temporary defensive measure to assist the board in attempting to maximize shareholder value through an alternative transaction. If the continuation of the poison pill was unlikely to serve that purpose, it could no longer remain in place to impede a take-over bid.

In its analysis of the application of previous poison pill decisions of the securities regulators to the facts of *Lions Gate*, the BCSC explicitly excluded *Pulse Data* and *Neo Material Technologies*. The reasons concluded with an explanation that the BCSC had reservations about those two decisions and specifically with their departure from the regulators' previous view of the public interest as it related to poison pills.

CONCLUSION

After *Pulse Data* and *Neo Material Technologies*, take-over targets and their advisers could not have been faulted for concluding that there had been somewhat of a shift in the attitude of securities regulators and their approach to NP 62-202. Specifically, regulators appeared to be attaching more weight to the reference to shareholder approval in the policy statement. Obtaining approval of a poison pill by fully informed shareholders, possessed with the knowledge that the pill could permanently defeat a specified bid that was current at the time of the shareholder vote, was seen as a possible "just say no" type of defence that would satisfactorily address any regulatory issues.

The *Lions Gate* decision has put an end to any assumptions that may previously have existed regarding the position of the securities regulators on poison pills and shareholder approval. Whether shareholder approval of a poison pill during a take-over bid will allow the pill to be used as a "just say no" defence may now depend on the jurisdiction in which the regulatory hearing is held. It would be desirable for the regulators to work toward harmonization in this area and to provide needed guidance to market participants. Enhanced regulatory clarity would not only be beneficial to bidders, targets and the investing public, but it would also assist shareholders in understanding what they are really voting on when they are asked to ratify a poison pill.



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