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Canadian Securities Regulators' Decisions on Poison Pills Diverge

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The British Columbia Securities Commission, in the majority's full reasons for decision in *Icahn Partners LP v. Lions Gate Entertainment Corp.*, has reaffirmed the orthodox Canadian securities regulatory approach to poison pills, explicitly rejecting any departure from orthodoxy suggested by the Ontario Securities Commission's September 2009 decision in *Neo Materials Technologies Inc.* and the Alberta Securities Commission's November 2007 decision in *Pulse Data Inc.*

According to the BCSC in *Lions Gate*, the question in all poison pill cases continues to be *when*, not *whether*, the pill will go. This is so even if a majority of target shareholders favour the continued deployment of the pill, a circumstance in which the OSC in *Neo* indicated it might be prepared to permit a pill to remain in place for an indeterminate time.

The facts in *Neo* and *Lions Gate* are broadly similar. In both cases,

- the target was the subject of a hostile bid from a substantial current shareholder;
- the bid was a partial bid (although in *Lions Gate*, the initial partial bid was amended to a bid for all, with a minimum tender condition waivable by the bidder);
- the target board viewed the bid as undervalued and coercive, and implemented a tactical poison pill to block the bid;
- the tactical pill was submitted by the target board to shareholders for ratification;
- target shareholders ratified by a substantial majority (although in *Lions Gate*, ratification came at a shareholders' meeting that followed the BCSC decision to cease trade the pill, effectively rendering the shareholder vote moot);
- by the time of the cease-trade hearing, the target board was not seeking to use the pill to assist in attaining a better bid; rather, the target board was effectively "just saying no."

Although the facts in the two cases are broadly similar, the decisions of the securities regulators in the two cases are very different. In *Neo*, the OSC dismissed the bidder's application to cease trade the pill, allowing it to remain in place for an indeterminate time. In *Lions Gate*, the BCSC granted the bidder's application and cease traded the pill before the scheduled shareholder vote on ratification, treating the prospect of shareholder ratification as irrelevant in the circumstances. The BCSC said that it did not interpret *Neo* as endorsing a "just say no" defence to a hostile bid, although that

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was the effect of the *Neo* decision because the OSC provided no guidance on the circumstances in which it would be appropriate for the pill to be cease traded.

The explanation for the different result in the two cases, despite broadly similar facts, is that on two points of fundamental principle, the BCSC and the OSC diverged: the BCSC adhered to the previously accepted approach of Canadian securities regulators to poison pills, and the OSC took a different approach. The two key points of divergence are (i) the legitimate purpose of poison pills; and (ii) a shareholder's right of access to an offer for the shareholder's shares.

The legitimate purpose of poison pills. In *Neo*, the OSC described the purpose of poison pills as being to assist the target board in fulfilling its fiduciary duty, as prescribed by the Supreme Court of Canada in *BCE Inc.*: to protect the long-term best interests of the target corporation (as opposed to maximizing short-term shareholder value). According to the OSC, a pill may continue to be deployed as long as it continues to serve this purpose. In *Lions Gate*, in contrast, the BCSC, following prior poison pill jurisprudence, ruled that the only legitimate purpose for a poison pill is to facilitate negotiations with the bidder for an enhanced bid or to solicit competing bids or alternative value-enhancing transactions. Once there is no reasonable prospect of further enhancement of the bid and no alternatives are being solicited, then, according to the BCSC, the pill should go. For this reason, the BCSC regarded the prospect of shareholder ratification of the pill in question as irrelevant: even if ratified, the pill no longer served the only purpose for which it could be justified and it was therefore contrary to the public interest.

A shareholder's right of access to an offer. In *Neo*, the OSC noted the well-established securities regulatory principles according to which the role of takeover bid regulation is to protect the interests of target company shareholders; defensive tactics like poison pills may not be used to deny target shareholders the right to make the takeover bid decision. The OSC viewed the opportunity for shareholders to vote on ratification of the pill in *Neo* as sufficient for this purpose and rejected the notion that each shareholder had a right of access to the offer if they wanted to tender. In *Lions Gate*, in contrast, the BCSC took the position that each shareholder must ultimately be given access to an offer and the opportunity to tender; this right could not be permanently blocked by the board, whether or not ratified by a majority of shareholders.

The ball is now in the OSC's court to clarify the position with respect to poison pills under Ontario securities law. Was *Neo* a one-off decision, distinguishable on its facts and not intended as a departure from settled Canadian poison pill jurisprudence? Or is there now a divergence between Ontario and B.C. securities regulators on the public interest as it relates to poison pills, with the applicable legal position dependent on which securities regulator is the primary regulator of the target? This question is particularly interesting arising at a time when the debate on the need for a national securities regulator is heating up. T