



Shareholder Rights Plans

[Rob Wortzman](#)
[Derek Sigel](#)
[Mark Wilson](#)

On April 27, 2010, the British Columbia Securities Commission ("BCSC") rendered its decision regarding the shareholder rights plan of Lions Gate Entertainment Corp. The BCSC's decision does not appear to follow the Ontario Securities Commission's decision in *Re Neo Material Technologies* (2009) or the Alberta Securities Commission's decision in *Re Pulse Data* (2007). As such, there is now significant inconsistency in the way shareholder rights plans ("poison pills") are viewed by the securities commissions in Ontario and Alberta, on the one hand, and the securities commission in British Columbia, on the other resulting in some uncertainty as to how the next challenge to a shareholder rights plan might be handled by a Canadian securities commission.

Carl Icahn's Bid for Lions Gate

Lions Gate is a reporting issuer in Canada. Its common shares are listed on the New York Stock Exchange.

In February 2009, funds managed by Carl Icahn ("Icahn") approached Lions Gate requesting representation on its board of directors. Negotiations between the two sides failed to produce an agreement.

In March 2009, Icahn commenced an offer to purchase certain convertible senior subordinated notes of a subsidiary of Lions Gate. Although Lions Gate's board said that it was neutral to the offer, Lions Gate made arrangements with certain note holders to refinance the debt in exchange for their agreement not to tender their notes to Icahn's offer. Icahn's offer for the notes expired on May 1, 2009.

On March 1, 2010, Icahn made a cash bid of US\$6.00 per share for up to 13 million Lions Gate common shares. Together with the 19% of Lions Gate shares Icahn then held, the offer would have given Icahn a 30% shareholding of Lion's Gates common shares. The offer was to expire on April 6, 2010.

Lions Gate's board adopted a shareholders rights plan ("Rights Plan") on March 11, and the next day sent notice to Lions Gate's shareholders of a special meeting to be held on May 4 to seek approval from shareholders for the Rights Plan.

Icahn varied his offer on both March 19 and April 15, increasing the offer price to US\$7.00 per share, extending the offer to all of Lions Gate's common shares and extending the expiry of the offer to April 30. As amended, the Icahn offer was not a "permitted bid" under the Rights Plan and, as a result, unless the Rights Plan was voluntarily suspended by Lions Gate or cease-traded by the BCSC, the Rights Plan would thwart the offer.

In its proxy material for the shareholders meeting scheduled for May 4, Lions Gate's board expressed the opinion that it was not the time to put the company up for sale. As such, it stated that it had no intention of seeking a competing bid to the Icahn offer.

Icahn applied to the BCSC for an order cease-trading the Rights Plan. After hearing the application on April 26 and 27, the BCSC granted the order cease-trading the Rights Plan.

On April 30, Icahn extended his offer to May 10, 2010. On May 10, the offer was further extended to May 21, 2010.

In the wake of the BCSC's decision, Lions Gate rescheduled the Lion's Gate shareholders meeting to approve the Rights Plan to May 12. Lions Gate also applied to the British Columbia Court of Appeal for leave to appeal the BCSC's decision. Leave was not granted.

At the special meeting of shareholders of Lion's Gate held on May 12, approximately 70% of the shares represented in person or by proxy at the meeting (excluding those held by Icahn and his affiliates) voted in favour of the Rights Plan.

The BCSC's Decision

On May 6, in order to assist the motion for leave to appeal to the British Columbia Court of Appeal, the BCSC issued a summary of its reasons for granting the cease-trade order against the Rights Plan. One of the commissioners hearing the matter, who concurred in making the cease-trade order, did not

agree with all of the reasoning of the other two commissioners on the panel.

In examining the facts at issue regarding the Rights Plan, the BCSC summarized what it believes is the view of Canadian securities administrators with respect to the public interest as it relates to the adoption of shareholder rights plans by target companies as a defensive strategy:

- 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.
- Faced with a bid, the board of directors of the target company has a fiduciary duty to act in the best interests of the corporation. In discharging this duty, target company boards often take various defensive measures. Regulators will be reluctant to interfere with the steps the directors are taking to discharge that duty.
- Shareholder rights plans are not contrary to the public interest when used to buy time for the target company to respond appropriately to the bid. Shareholder rights plans 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 shareholder rights plans are acceptable only as a temporary defence. The issue is not whether a rights plan should go, but when.
- Take-over bids are fact specific, so the relevance and significance of the factors to be considered will vary with each case.

In reviewing decisions of various Canadian securities commissions regarding shareholder rights plans, the BCSC concluded that “the significant point here is that although regulators will be reluctant to interfere with a target board’s discharge of its fiduciary duty in the face of a hostile bid, that reluctance:

- a) is founded on the practice of boards, in taking steps to act in the best interests of the corporation, of making efforts to maximize shareholder value (whether through enhancements to the bid, through competing bids, or through alternative transactions); and
- b) is tempered by the need to ensure that the shareholder ultimately has the opportunity to decide whether or not to tender into the bid.”

In applying its interpretation of the law to the facts at issue, the BCSC focused on a few key facts. The first was that the Rights Plan had fulfilled its purpose in

that Icahn had improved his original offer. The second was that the Lions Gate board was taking no steps to find an alternative to the Icahn offer. The third was that there was no assurance that Icahn would extend his offer beyond April 30. The BCSC concluded that “the only effect of continuing the Lions Gate SRP [shareholder rights plan] would be to deny the Lions Gate shareholders the opportunity to accept or reject the Icahn offer”.

Comparing Lions Gate, Pulse Data and Neo

In *Pulse Data*, the Alberta Securities Commission (“ASC”) declined to cease-trade a shareholder rights plan specifically put in place to deal with a hostile bid, relying on the fact that the rights plan had been approved by the shareholders of the target. There was no auction for the company taking place at the time. In *Neo*, the Ontario Securities Commission (“OSC”) declined to cease-trade a shareholder rights plan in similar circumstances as in *Pulse Data*. Commentators on these two decisions have drawn the conclusion that the principal that “the issue is not whether the shareholder rights plan should go, but when” is now qualified in Alberta and Ontario if the target’s shareholders have approved the rights plan in the face of the hostile bid, regardless of whether the target is seeking alternatives to the bid. In the United States, boards have available to them the “just say no” defence, such that boards, in properly exercising their responsibilities, can simply act to thwart a hostile offer for as long as they wish, without the pressure of a deadline imposed by courts or securities regulators. After *Pulse Data* and *Neo*, it appears that the ASC and OSC accept a “just say no” defence as long as it is approved by shareholders.

In its summary reasons in the Lions Gate matter, the BCSC stated that “those cases (*Pulse Data* and *Neo*) may be distinguishable on the facts, but we also have reservations about them. Our reservations centre around their apparent departure from the Canadian securities regulators’ view of the public interest as it relates to SRPs [shareholder rights plan] prior to those decisions”.

The BCSC will be issuing more detailed reasons for its cease-trade order in due course. Those reasons will now stand in the context of a 70% approval of the Rights Plan by Lions Gate’s shareholders, other than Icahn.

The BCSC believes that once a shareholder rights plan has served its purpose (improved an offer or provided a target with sufficient time to find an alternative), it must be removed. If not, a shareholder is denied the fundamental right to accept an offer. The ASC and OSC appear to believe that the

shareholders of the target can themselves qualify that right: a majority can vote to keep a shareholder rights plan in place, thereby affecting the ability of all shareholders to accept an offer. It is unclear how a securities commission dealing with a contested shareholder rights plan in the future will attempt, or be able to, reconcile these opposing views.

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation.

If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact us.

Wildeboer Dellelce LLP

Wildeboer Dellelce Place
365 Bay Street, Suite 800
Toronto, ON M5H 2V1
Phone: (416) 361-3121
Fax: (416) 361-1790

187 King Street South, Suite 205
Waterloo, Ontario N2J 1R1
Phone: (519) 741-8708
Fax: (519) 741-9576



wildlaw.ca