

## OSC releases Reasons in Neo denying application to cease trade shareholder rights plan

JONAH MANN (jmann@stikeman.com) AND DAVID WEINBERGER (dweinberger@stikeman.com)

On September 1, 2009, the Ontario Securities Commission (OSC) released the full Reasons for its decision to deny an application to cease trade a second shareholder rights plan (or tactical plan) implemented by Neo Materials Technologies Inc. (Neo) in the face of a hostile partial bid by Pala Investments Holdings Limited (Pala). Prior to the expiry of the Pala bid, the tactical plan was approved by 81.24% of shares voted (excluding shares held by Pala) at an annual and special meeting of Neo's shareholders.

In its Reasons, the OSC reiterated that it has broad discretion to determine whether to exercise its public interest jurisdiction in a given matter and the scope of this jurisdiction must be interpreted in the context of the purposes of the *Securities Act* as a whole. While it will not hesitate to exercise its public interest jurisdiction in appropriate circumstances, it is also mindful that a degree of deference is owed to the decision of the board of directors. In determining whether to exercise its public interest jurisdiction, the OSC will examine all of the circumstances surrounding the establishment of a shareholder rights plan, including whether informed shareholder approval was given, and the context of that approval. While the Reasons put considerable emphasis on shareholder approval as a relevant consideration, the OSC was also careful to note that shareholder approval does not necessarily mean that a shareholder rights plan is protected from the OSC's public interest jurisdiction.

That being said, the OSC endorsed the Alberta Securities Commission's (ASC) position in *Pulse Data*, stating that, "as a general matter, recent and informed shareholder ratification of a rights plan, erected in the face of the hostile take-over bid is suggestive of a finding that the continuation of the shareholder rights plan is in the *bona fide* interest of a target's shareholders." The OSC further noted that a fully informed shareholder approval of a tactical plan is not determinative where:

1. there is evidence the board process in evaluation and responding to the bid, including the decision to implement a shareholder rights plan, was not carried out in the best interest of the corporation and the target's shareholders, as a whole; or
2. there is evidence to suggest that management or the board of directors coerced or unduly pressured the target's shareholders to approve the shareholder rights plan.



**This article appears on  
CANADIAN SECURITIES LAW ONLINE**

This securities and M&A blog was recently recognized at the Legal Marketing Association's 2009 Your Honor Awards. The judges were "impressed with the high-level work" and awarded the site top honours in the Online Firm Marketing Tool category. Canadian Securities Law Online is the first major blog to be launched by any of the leading business law firms in Canada and has received over 50,000 visits since its launch.

Subscriptions to the site are available by email and through the site's RSS feed.

Find out more at  
[www.canadiansecuritieslaw.com](http://www.canadiansecuritieslaw.com)

This newsletter was prepared by members of the Securities Group at Stikeman Elliott.

In short, shareholder approval will be an influential factor if it is “informed, provided freely and fairly, and in the absence of coercion or undue pressure”.

In the immediate case, the OSC found that Neo’s shareholders were sufficiently informed, that the decision by Neo’s board to implement the tactical plan reflected its business judgment and that there was no evidence of coercion or undue managerial pressure imposed on Neo’s shareholders to ratify the tactical plan. The OSC also found that despite the fact that the Neo board did not initiate an auction for the company in response to the Pala bid, the tactical plan (at the time of the hearing) continued to serve a purpose by providing the Neo board the ability to protect the long-term interests of Neo and the shareholders as a whole.

On the issue of what is in the best interest of the corporation, the OSC confirmed that it must give effect to the business judgment rule in ascertaining whether the board has discharged its fiduciary obligations. The business judgment rule, the OSC states, properly permits directors to make appropriate decisions sufficient to fulfill their fiduciary obligations, the scope and content of which have been amplified by the Supreme Court of Canada in the recent decision of *Re BCE Inc.* The OSC then proceeded to emphasize the Supreme Court’s statement that the fiduciary duty is a broad and contextual concept that is not confined to short-term profit of share value and which looks to the long-term interests of the corporation where the corporation is a going concern. Indeed, the OSC clearly states in its Reasons 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. The corollary of this is that using a shareholder rights plan to provide sufficient time to run an auction or seek alternative bidders (which is generally acknowledged to be the primary purpose for a shareholder rights plan) is not the only legitimate purpose for a shareholder rights plan.

For further information, please contact your Stikeman Elliott representative or any member of our Corporate Finance and Securities Group listed at [www.stikeman.com](http://www.stikeman.com)