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Covert Defences: Reassessing the Regulation of Private Placements in Canadian Takeover Bids

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ABSTRACT

This article examines the use of private placements as defensive tactics in the context of unsolicited takeover bids in Canada. While poison pills have traditionally been the main focus of regulatory scrutiny and academic debate, private placements have received little attention. Through a critical analysis of two key decisions involving private placements, the article argues that securities commissions have improperly deferred to target boards by assessing private placements through the lens of business judgment and fiduciary duties. This approach strays from the core tenet of National Policy 62-202 (NP 62-202), which prioritizes shareholder choice and seeks to prevent tactics that undermine a fair and open bid process.

The article contends that the proper focus of regulatory inquiry should be the effect of a measure on shareholders' ability to respond to a bid, rather than the board's stated intentions. It proposes a narrower and more precise framework: once it is established that the target company does not

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require financing to remain a going concern, securities commissions should assess whether a private placement was adopted during or in anticipation of a bid and whether its dilutive impact impairs shareholder choice. This effect-based standard aligns more closely with NP 62-202 and avoids entangling securities regulators in fiduciary duty inquiries more appropriately left to the courts. Reframing regulatory oversight in this manner would restore focus on the public interest, strengthen shareholder protections, and ensure that private placements do not serve as covert entrenchment tools in Canada's takeover bid regime.

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RÉSUMÉ

Le présent article examine l'utilisation des placements privés comme moyen de défense dans le contexte des offres publiques d'achat non sollicitées au Canada. Alors que les pilules empoisonnées (régimes de droits des actionnaires) ont traditionnellement retenu l'essentiel de l'attention des autorités de réglementation et de la doctrine, les placements privés ont suscité peu d'intérêt. En analysant de façon critique deux décisions clés sur des placements privés, l'article soutient que les commissions des valeurs mobilières s'en sont indûment remises aux conseils d'administration des sociétés visées en analysant les placements privés au regard de l'appréciation commerciale et des obligations fiduciaires. Cette approche s'écarte du principe fondamental de l'*Instruction générale canadienne 62-202* (IG 62-202), qui privilégie le choix des actionnaires et vise à empêcher les tactiques qui compromettent l'équité et la transparence du processus d'offre.

L'article soutient que l'analyse réglementaire devrait se concentrer d'abord sur l'effet d'une mesure sur la capacité des actionnaires de répondre à une offre, et non sur les intentions déclarées du conseil. Il propose un cadre d'analyse plus étroit et précis: une fois établi que la société visée n'a pas besoin de financement pour assurer la continuité de son exploitation, les commissions des valeurs mobilières devraient déterminer si le placement privé a été effectué pendant une offre ou en prévision de celle-ci et si son effet dilutif porte atteinte au choix des actionnaires. Ce critère fondé sur l'effet s'harmonise davantage avec l'IG 62-202 et évite d'entraîner les commissions des valeurs mobilières dans l'examen des

obligations fiduciaires, question qu'il convient mieux de laisser aux tribunaux. Réorienter la surveillance réglementaire de cette manière permettrait de renouer avec l'intérêt public, de renforcer la protection des actionnaires et de faire en sorte que les placements privés ne servent pas d'outils d'enracinement déguisés dans le régime canadien des offres publiques d'achat.

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INTRODUCTION

THIS article seeks to fill a gap in the scholarship on defensive tactics in Canadian takeover bids by directing attention to private placements, an area that has been overlooked in a literature dominated by analysis of poison pills. I revisit two decisions which are particularly noteworthy as they were rendered after the overhaul of the takeover bid regime in 2016 and articulated a framework for assessing private placements. I argue that the deference securities commissions have shown to boards in these cases has allowed private placements to function as covert defensive measures that deprive shareholders of the opportunity to tender to a hostile bid. In both decisions, the reviewing commissions permitted significant share issuances to private parties, resulting in substantial dilution to all shareholders, including the bidders, and the withdrawal of the unsolicited offers before they could be accepted by shareholders. My position is that the commissions failed to scrutinize the placements through the lens of National Policy 62-202 (NP 62-202) and its organizing principle of the paramountcy of shareholder choice. Rather than evaluating the defensive measures by their effects on shareholder choice to respond to bids, the commissions chose to defer to the business judgment of the boards behind the private placement decisions at the expense of shareholder choice.

I argue that regulatory reviews of defensive measures ought to be distinct from the fiduciary duty inquiries conducted by courts, grounded in the public interest, and narrowly focused. In conducting an inquiry to determine whether the board has met its fiduciary duties or whether the private placement has been pursued as a bona fide business strategy, the commissions in these cases deviated from the focused review of a measure's impact on shareholder choice that is the core tenet of NP 62-202. This deviation not only entangles securities commissions in inquiries outside their jurisdiction for which they are ill-suited but also departs from their "protective and preventive" mandate.[1] The central question under NP 62-202, which provides the framework for the commissions' analysis, is not whether a board has fulfilled its fiduciary duties, but whether measures taken by the board improperly impede shareholder choice.

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1 *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42 [*Equal Treatment*].

I propose a reframing of the inquiry in a narrower and more precise manner consistent with the principles of NP 62-202 and supported by longstanding jurisprudence on defensive measures. According to my approach, once it is established that the target company does not require financing to remain a going concern, the pivotal inquiry under NP 62-202 should be whether the effect of the private placement is that of a defensive barrier that would reasonably be expected to prevent shareholders from accepting the bid. Such an approach would recentre the public interest and shareholder choice in questions of defensive measures and is better aligned with the articulated goals of NP 62-202 and the overarching regulatory objectives of Canadian securities commissions.

I. THE EVOLVING LANDSCAPE OF DEFENSIVE TACTICS AND NP 62-202

Faced with an unsolicited (hostile) takeover bid, a target company's board of directors often resorts to defensive measures. Since public companies are subject to securities laws, in Canada, both these defensive measures and the takeover bids they respond to fall under the jurisdiction of securities regulators.[2] This approach of regulating both offeror and offeree contrasts with securities regulation in the United States where the federal Securities and Exchange Commission has largely refrained from regulating target company defensive measures.[3] Instead, in the American context, Delaware courts have served as the primary forum for resolving disputes over defensive tactics, applying the fiduciary duties framework under corporate law.[4] In Canada, securities commissions

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2 See e.g. *Securities Act*, RSO 1990, c S.5, ss 90, 143(28)(vii) [*OSA*]. See also *Securities Act*, RSBC 1996, c 418, s 98 [*BCSA*]. See also *Take-Over Bids and Issuer Bids*, OSC NI 62-104, (2016) 39 OSCB 4225, ss 2.28.1, 2.29.1(a), 2.29.1(c) [NI 62-104].

3 Steven M Davidoff, "The SEC and the Failure of Federal Takeover Regulation" (2007) 34:2 Fla St UL Rev 211 at 213–14.

4 *Ibid* at 240–44; Robert Yalden, "Stuck at the Crossroads?: The Regulation of Defence Strategies in Canadian M&A" (2020) 63:3 Can Bus LJ 288 at 313–14, 328. The following passage illustrates how American law addresses key defensive tactics, such as the poison pill:

> In the United States, a target's board may be able to "just say no" and keep its [poison] pill in place for a longer period of time than has traditionally been allowed in Canada. But even in the United States, a poison pill is not necessarily a "showstopper" because a court may not permit it to

have taken on this role, evaluating the permissibility of defensive measures under their broad public interest jurisdiction.[5]

Guidance for commission interventions is principally derived from NP 62-202, which has been operative since its 1997 inception and through the 2016 takeover bid reforms.[6] Although it lacks the binding legal force of formal regulations and national instruments, the policy is a cornerstone of the legal framework governing Canadian takeover bids. It sets out the principles that direct regulatory intervention in contested transactions, especially in exercising the significant cease-trade powers granted by securities law.[7] As such, NP 62-202 provides an essential lens

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> indefinitely block a fully financed, fair offer, and shareholders may also exert pressure on a company to remove the pill. Like all defensive measures put in place in response to a bid, poison pills are subject to enhanced scrutiny under the U.S. Unocal test (see Torys LLP, *Takeover Bids in Canada and Tender Offers in the United States*, Business Law Guide (Toronto: Torys LLP, 2025) at 26, online (pdf): <torys.com> [perma.cc/LBW5-DQ4E]).

The *Unocal* test is two parts: the first requires the board to show that it had reasonable grounds for concluding that a threat to the corporate enterprise existed and the second requires the board to show that the defensive measures were reasonable in relation to the threat posed (see *Unocal Corp v Mesa Petroleum Co*, 493 A (2d) 946 at 955–56 (Del Sup Ct 1985)). Other relevant cases include *Moran v Household International, Inc*, in which the Delaware Supreme Court upheld the validity of poison pills (see 500 A (2d) 1346 at 1348 (Del Sup Ct 1985)), and *Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, which clarified directors' duties once a company is up for sale (see 506 A (2d) 173 at 182 (Del Sup Ct 1986)). More recently, in *The Williams Companies Stockholder Litigation*, the Delaware Court of Chancery struck down the target's poison pill due to its disproportionately restrictive features (see 2021 WL 754593 at 22 (Del Ct Ch)).

5 Ian C Wildgoose Brown, "Hard to Swallow: The Canadian Poison Pill from an American Perspective" (2012) 36:2 Seton Hall Legis J 297 at 299–300.

6 *CSA Notice of Amendments to Take-Over Bid Regime – Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids and Changes to National Policy 62-203 Take-Over Bids and Issuer Bids and Consequential Amendments*, CSA Notice, (2016) 39 OSCB (Supp-1) 1 [*Amendments*] (the amendments came into force 9 May 2016; the CSA "determined not to amend [NP 62-202] … in connection with these amendments" and reminded market participants "of the continued applicability of NP 62-202").

7 *Securities Act*, RSA 2000, c S-4, s 198(1)(a); *BCSA*, *supra* note 2, s 161(1); *OSA*, *supra* note 2, s 127(2); *Take-Over Bids – Defensive Tactics*, OSC NP 62-202, (1997) 20 OSCB 3525 [NP 62-202] ("[t]he Canadian securities regulatory authorities have determined that it is inappropriate to specify a code of conduct for directors of a target company. ... However, the Canadian securities regulatory authorities wish to advise

through which the arguments of litigating parties are assessed and the reasoning of the commissions is articulated.[8] Crucially, while the 2016 reforms reshaped the bid landscape, they did not displace the policy's core function; it continues to provide the guiding principles for the commissions' public interest interventions.[9]

The central principle of NP 62-202 is that, in the public interest, defensive measures cannot be used to deprive shareholders of the opportunity to consider an unsolicited takeover bid.[10] This does not mean that a company must be sold to a hostile bidder or that defensive measures

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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", s 1.1(3)).

8 See e.g. *Icahn Partners LP (Re)*, 2010 BCSECCOM 233 [*Lionsgate*] ("[NP 62-202] reflects the views of the securities regulators in Canada of the public interest as it relates to what are commonly called shareholders rights plans (or more colloquially, 'poison pills') adopted by target companies as a defensive measure to a hostile take-over bid. We refer to these plans as SRPs" at para 21).

9 See e.g. *Re Hecla Mining*, 2016 BCSECCOM 359 [*Hecla*] ("[o]n July 8, Hecla filed an application with the BCSC under subsection 161(1) of the BC Act, *seeking to cease trade the Private Placement on the basis that it was an abusive defensive tactic under* [*NP 62-202*]" at para 7 [emphasis added]); *Aurora Cannabis Inc (Re)*, 2018 ONSEC 10 [*Aurora*] ("NP 62-202 sets out the views of the Commission, the FCAAS and the other Canadian securities regulatory authorities on the use of defensive tactics in relation to take-over bids" at para 145; "[t]he optimum outcome for target shareholders is described in subsection 1.1(5) of NP 62-202" at para 146; "[p]ursuant to clause 134(1)(b) of *The Securities Act, 1988*, S.S. 1988-89, c.S-42.2 ... and in *accordance with the guidance in* [*NP*] *62-202*, ... all trading shall cease in respect of any securities issued" at 34 [emphasis added]); *Re Bison Acquisition Corp*, 2021 ABASC 188 ("*NP 62-202 sets out the views of Canadian securities regulators concerning defensive tactics* that may be employed by a target company subject to a take-over bid" at para 112 [emphasis added]); *Mithaq Canada Inc (Re)*, 2024 ONCMT 9 [*Mithaq*] ("[NP 62-202] contains guidance relating to defensive tactics in the context of take-over bids. While NP 62-202 is not itself part of Ontario securities law, *this Tribunal has consistently applied many of its provisions*" at para 40 [emphasis added, footnotes omitted]); *Re Greenfire Resources Ltd*, 2025 ABASC 104 ("[m]uch of the structure of the TOB Regime is set out in [NP 62-104]. *Also important are* ... [NP 62-202]" at para 207 [emphasis added]).

10 NP 62-202, *supra* note 7, ss 1.1(2), 1.1(5)–(6). See also *Take-Over Bids – Defensive Tactics*, NPS 38 (5 December 1986), as re-enacted by NP 62-202, *supra* note 7. Before the implementation of NP 62-202, Canadian securities regulators monitored defensive tactics under NPS 38. Like NP 62-202, NPS 38 was founded on the principle of protecting the interests of target shareholders and ensuring that defensive measures did not obstruct their ability to respond to unsolicited bids.

are never permissible; the policy—like the broader takeover bid regime in Canada—remains neutral and favours neither the offeror nor the target's management.[11] Instead, the policy's objective is to ensure that shareholders, rather than potentially conflicted management or board members who may have an interest in preserving their positions, have the final say in deciding whether to accept or reject a takeover bid.[12] If shareholders determine that an offer is unattractive, they may simply decline to tender their shares, causing the bid to fail without the need for defensive measures. Notably, the new minimum tender condition effectively embeds a majority shareholder vote into the bid/tender process in that a hostile bidder cannot take up any securities unless more than 50 per cent of the shares held by shareholders other than the bidder are tendered.[13] As a result, an unsolicited bid will inevitably fail without sufficient shareholder support with or without the defensive actions of management.

Nevertheless, the target's board may still play an important role in swaying shareholder support by persuading shareholders that the offer is inadequate or that it is not the right time to sell their shares.[14] Yet, in this respect, as Ronald J. Gilson and Christopher C. Nicholls argue, it is clear that hostile tender offers are focused on target control rather than target management.[15] The management of the company throughout the bid process remains the responsibility of the board or the officers delegated and supervised by the board.[16] The hostile offer is, in effect, aimed at the shareholders' right to elect or remove the board. Protection of this

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11 NP 62-202, *supra* note 7, s 1.1(2).

12 *Ibid*.

13 NI 62-104, *supra* note 2, s 2.29.1(c).

14 NP 62-202, *supra* note 7, s 1.1(1). For a helpful overview of the competing views on the appropriate role of target directors facing a hostile bid, see Christopher C Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control*, 3rd ed, Essentials of Canadian Law (Toronto: Irwin Law, 2020) at 247 [Nicholls, *Changes of Corporate Control*].

15 Ronald J Gilson, "A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers" (1981) 33:5 Stan L Rev 819 at 830–32. Nicholls, *Changes of Corporate Control, supra* note 14 at 247.

16 See *Canada Business Corporations Act*, RSC 1985, c C-44, s 102(1) [*CBCA*]. See also *Business Corporations Act*, SBC 2002, c 57, s 136(1) [*BCBCA*]; *Business Corporations Act*, RSO 1990, c B.16, s 115(1) [*ONBCA*].

right was at the heart of the Kimber Report which first recommended takeover bid regulation and continues to be the overarching principle of the current Canadian takeover bid regime.[17] In furtherance of this right, NP 62-202 rejects the paternalistic notion that a conflicted board should have the power to deprive shareholders of the right to sell their shares, which remain their property, and restricts the defensive measures that such a board can take.[18]

A. The Old and the New: Poison Pills and Private Placements

The archetypal defensive measure is the shareholder rights plan (poison pill) that, in response to a takeover bid, allows existing shareholders, other than the hostile bidder and its joint actors, to purchase additional shares at a steep discount. If the plan is triggered, the pill results in massive dilution of the hostile bidder's stake, making it prohibitively difficult, if not impossible, to complete the acquisition.[19] Another defensive tactic that employs the same principle of share dilution is private placement. In recent years, its use as a defensive strategy, in which the board issues new

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17 *CBCA*, *supra* note 16, s 106(3); *BCBCA*, *supra* note 16, ss 121–22; *ONBCA*, *supra* note 16, s 119(3); Ontario, Department of the Attorney General, Committee on Securities Legislation, *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Department of the Attorney General, 11 March 1965), s 3.01. See also NP 62-202, *supra* note 7, s 1.1(2); Christopher C Nicholls, *Securities Law*, 2nd ed, Essentials of Canadian Law (Toronto: Irwin Law, 2018) at 360 [Nicholls, *Securities Law*]; Mary G Condon et al, *Securities Law in Canada: Cases and Commentary*, 3rd ed (Toronto: Emond, 2017) at 603–04.

18 *Canadian Jorex Ltd (Re)*, 1992 LNONOSC 9, (1992) 15 OSCB 257 (ON Sec Comm) [*Canadian Jorex*]. See also Nicholls, *Changes of Corporate Control*, *supra* note 14 at 247.

19 The first poison pill was introduced in 1983 by Lenox and was akin to the modern flip-over and the more prevalent flip-in shareholder rights plans. The two variations are similar in that they give target shareholders (excluding the bidder) the right to acquire shares of the bidder (flip-over) or shares of the target (flip-in) at a steep discount upon the occurrence of a triggering event (e.g., a takeover bid, a shareholder acquiring more than 20 per cent of outstanding shares). These rights present a severe dilution risk to the bidder that can only be avoided by waiver of the rights plan by the target board (if they agree to the bid) or by a cease-trade order from a securities commission (see Stephen M Bainbridge & Iman Anabtawi, *Mergers and Acquisitions: A Transactional Perspective*, 2nd ed, University Casebook Series (St Paul, Minn: Foundation Press, 2022) at 590–95). See also Mark R Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019) at 766–68; Gordon Coleman, "Poison Pills in Canada" (1989) 15:1 Can Bus LJ 1 at 1–2. See also Yalden, *supra* note 4 at 298–99.

shares to one or more friendly parties aligned with management, has featured prominently in the Canadian takeover bid landscape. Unlike poison pills, which have been the subject of extensive regulatory scrutiny and scholarly debate, private placements have largely escaped rigorous academic and regulatory analysis. The greater significance of private placements can be understood within the broader context of bid regime reforms that have made hostile acquisitions far more challenging in Canada. One of the most significant elements of these reforms, introduced in 2016, is the requirement that bids remain open for at least 105 days, an extension from the previous 35-day minimum, during which the bidder cannot take up any target securities.[20] This prolonged timeline, coupled with the requirement that the bidder secure financing for the entire duration of the bid, significantly increases the business uncertainty for bidders and has sharply decreased the number of bids overall.[21]

Another notable consequence of these reforms is that they have diminished the relevance of poison pills. The securities regulators' longstanding view has been that rights plans should only serve as temporary measures to provide the target board with sufficient time to negotiate a better offer or to solicit alternatives.[22] However, the mandatory extended bid period now effectively serves the same function, granting boards ample time to pursue these objectives without the need for a poison pill.

For this reason, as Robert Yalden notes, absent exceptional circumstances, securities commissions will be reluctant to permit a rights plan—even one previously approved by shareholders—to remain in place

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20 NI 62-104, *supra* note 2, ss 2.28.1, 2.29.1(a). See also *Amendments*, *supra* note 6 at 2.

21 Yalden, *supra* note 4 at 327. See also Jeremy Fraiberg et al, "Declining Hostile Bids, IPOs and Public Companies" (18 December 2024), online: <osler.com> [perma.cc/ZF4Y-XFEM].

22 See *Royal Host Real Estate Investment Trust (Re)*, 1999 LNONOSC 594 at paras 64, 70, (1999) 22 OSCB 7819 (ON Sec Comm) [*Royal Host* ON], heard jointly with 1999 LNBCSC 88, [1999] 47 BCSCW Summ 43 (BC Sec Comm); 1999 LNABASC 470, 8 ASC Sum 3672 (AB Sec Comm). See also *Canadian Jorex*, *supra* note 18 at para 13; *MDC Corp (Re)*, 1994 LNONOSC 211 at paras 44–50, (1994) 17 OSCB 4971 (ON Sec Comm) [*MDC*]; *Samson Canada, Ltd (Re)*, 1999 LNABASC 253 at paras 17, 27, 32, 8 ASC Sum 1791 (AB Sec Comm) [*Samson Canada*]; *BGC Acquisition Inc and Argentina Gold (Re)*, 1999 LNBCSC 55 at para 33, [1999] 25 BCSCW Summ 44 (BC Sec Comm) [*BGC Acquisition*].

beyond the 105-day formal bid period.[23] The Ontario Securities Commission's 2018 decision in *Aurora* further confirms that the 105-day minimum deposit period, along with the mandatory 10-day extension following the satisfaction of the minimum tender condition, provides sufficient time for alternative bids to emerge thus relieving securities commissions from the need to determine how long a poison pill should remain in effect.[24]

Accordingly, recent amendments to takeover bid rules, which now mandate extended bid periods and minimum tender conditions, have incorporated the primary protections traditionally offered by shareholder rights plans. Consequently, the role of a rights plan has been rendered largely redundant once a formal bid is launched. Its utility has shifted almost exclusively to the pre-bid environment, where it can still serve to prevent creeping takeovers through exemptions for private agreements or normal course purchases.[25] This shift in bid dynamics has, in turn, made the private placement a more prominent defensive strategy for a target company to use while a bid is open. Unlike a rights plan, which is now functionally sidelined during a bid, a private placement can be justified as meeting a company's financing needs, making its review by securities commissions more challenging. Despite this, the dilutive effects of a private placement pose a significant threat to shareholder choice. A rights plan can be waived or redeemed, but a private placement is typically irreversible and can permanently alter bid dynamics, potentially preventing shareholders from considering an unsolicited offer or precluding competing bids.

II. FRAMING THE DEBATE: A CONFLICT OF DUTIES OR A DISTINCTION OF MANDATES?

Much of the recent scholarship on defensive tactics is predicated on a perceived conflict between the board's fiduciary duties under corporate law and the principles of shareholder choice championed by securities regulators. No one has articulated this tension more comprehensively than Yalden.[26] He traces the shareholder-centric approach of securities

23 *Supra* note 4 at 330.

24 *Aurora*, *supra* note 9 at paras 148–49.

25 NI 62-104, *supra* note 2, ss 4.1–4.2.

26 *Supra* note 4.

commissions back to their adoption of National Policy 38 in 1986, arguing that their "regulatory philosophy" has long prioritized the maximization of shareholder value through an "unrestricted auction" process.[27] He contrasts this with the trajectory of Canadian corporate law, which, as crystallized in the Supreme Court's landmark *BCE Inc. v. 1976 Debentureholders* decision,[28] requires a board to act in the best interests of the corporation, explicitly rejecting shareholder primacy and permitting the consideration of a wide range of stakeholder interests.[29] The result, Yalden contends, is that Canadian M&A regulation is "stuck at the crossroads," caught in an "unsatisfactory dialectic" between two fundamentally opposed visions.[30]

This view is shared by others such as Vanderpol and Waitzer who argue that the shareholder-centric approach of NP 62-202 is "increasingly difficult to reconcile with Canadian corporate law" and that securities regulators should "vacate the field" in favour of the courts.[31] This same tension was central to the 2013 proposal by the Autorité des marchés financiers (AMF) to overhaul the takeover bid regime, which was motivated by a concern that NP 62-202 unduly constrained boards from fulfilling their duties under *BCE Inc. v. 1976 Debentureholders*.[32]

This article, however, proceeds from a different premise: that no such conflict exists. Rather, the perceived tension arises from a distinction in institutional roles, where securities commissions stray from their specific public interest mandate into the realm of adjudicating corporate law inquiries. The regulation of defensive tactics exists precisely because securities law requires something more than corporate law to govern a hostile bid. If deference to a board's business judgment were the only standard, the specific policy objectives of NP 62-202, namely protecting an open bid process and maximizing shareholder choice, would be rendered

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27 *Ibid* at 295–96.

28 2008 SCC 69 [*BCE* SCC].

29 Yalden, *supra* note 4 at 289.

30 *Ibid* at 290, 338.

31 Sean Vanderpol & Ed Waitzer, "Mediating Rights and Responsibilities in Control Transactions" (2010) 48:3/4 Osgoode Hall LJ 639 at 654.

32 Autorité des marchés financiers, "Consultation Paper: An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics" (14 March 2013) at 2–3, 10–11, online (pdf): <lautorite.qc.ca> [perma.cc/74FY-XV9D].

meaningless. The two frameworks are, and should be treated as, distinct spheres. Corporate law inquiries—such as whether a board has fulfilled its fiduciary duties or whether its decisions are owed deference under the business judgment rule—are remedial matters best left to the courts. In contrast, the mandate of securities commissions, as clarified by the Supreme Court of Canada, is "preventive in nature and prospective in orientation."[33] While securities legislation allows commissions to issue orders in the public interest, this power is aimed at protecting the integrity of the capital markets, not to provide a "remedy for harm suffered by private parties," a function reserved for the courts.[34] The use of the cease-trade power to halt abusive defensive tactics is a direct application of this forward-looking, market-protective mandate. Consequently, the central question for a commission under NP 62-202 is not a remedial one concerning a board's business judgment or fiduciary duties, but a protective one: whether the board's actions improperly impede shareholder choice.

The debate over these competing views was accelerated by the regulatory intervention in *Re Fibrek*.[35] The case began in late 2011 when Resolute Forest Products announced an unsolicited bid to acquire Fibrek Inc. Prior to launching its formal offer, Resolute had secured irrevocable hard lock-up agreements with three major shareholders, who collectively held 46 per cent of Fibrek's shares.[36] Notably, one of these shareholders, Fairfax Financial, was also a significant investor in the bidder, Resolute. Resolute's formal bid was for $1.00 per share, which Fibrek's board rejected as inadequate.[37] The board's position was supported by a formal valuation that placed the shares' value between $1.25 and $1.45. After searching for an alternative, the board found a friendly acquirer in Mercer International, which made a superior offer of $1.30 per share.[38] To secure this bid, the board agreed to a private placement of special warrants to Mercer. Crucially, however, the placement was structured not as a conventional defensive measure, but as a tool to facilitate a continued auction. As part of the deal, Mercer agreed to a twenty-one-day grace period

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33 *Equal Treatment*, *supra* note 1 at para 45.

34 *Ibid* at paras 43–44.

35 *AbitibiBowater inc (Produits forestiers Résolu) c Fibrek inc*, 2012 QCBDR 17.

36 *Ibid* at paras 9–11.

37 *Ibid* at paras 10–12, 19–21.

38 *Ibid* at paras 33–34, 125.

during which it could not convert the warrants, giving Fibrek an explicit window to solicit an even higher offer and cancel the warrants if successful.[39] It was this carefully structured transaction that Resolute challenged, applying to Quebec's securities regulator (Bureau), which ultimately issued a cease-trade order on the placement.[40]

From a public interest perspective, however, the Bureau's intervention represented a significant misapplication of the principles outlined in NP 62-202. The policy explicitly permits defensive tactics employed in a "genuine attempt to obtain a better bid," stating that the primary objective is the "protection of the bona fide interests of the shareholders."[41] The Fibrek board's use of a private placement directly fulfilled this objective, as it facilitated a competitive auction that otherwise would not have materialized. By blocking the private placement, the Bureau effectively prioritized the contractual interests of the locked-up shareholders, one of whom had an interest in the bidder, over the entire body of shareholders, depriving them of the opportunity to consider a superior offer. Even from the standpoint of the locked-up shareholders, the intervention was questionable. The private placement did not nullify the advantage of their agreements; it merely adjusted the bid threshold, thereby incentivizing Resolute to compete on merit rather than rely solely on its locked-up block. While the Bureau's decision was ultimately upheld on appeal based on a standard of deference to the specialized tribunal, its substantive reasoning remains a cautionary tale of a regulator misapplying its own policy.[42]

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39 *Ibid* at paras 69, 137.

40 *Ibid* at paras 226–28.

41 NP 62-202, *supra* note 7 ss 1.1(2), 1.1(6).

42 The problems with the Bureau's decision were explicitly recognized by the Court of Quebec, which reversed the Bureau's cease-trade order of the private placement. The Quebec Court of Appeal, however, reversed that decision, holding: "This type of decision, made by an independent and specialized organization, warrants the greatest deference. The Court of Québec was therefore obligated to show the highest degree of deference to the Bureau's decision." See *Fibrek inc c AbitibiBowater inc (Produits forestiers Résolu)*, 2012 QCCQ 1814 at paras 155–64; *AbitibiBowater inc (Produits forestiers Résolu) c Fibrek inc*, 2012 QCCA 569 at paras 35–36. At the time, the applicable standard of review for administrative tribunals was reasonableness, which required courts to intervene with securities regulators' decisions only where they were not justified, intelligible, or transparent, or where they fell outside the range of possible, acceptable outcomes: *Pezim v British Columbia (Superintendent of*

The debate catalyzed by cases like *Fibrek* did not, however, lead to the board-deferential model the AMF proposed. Instead, the 2016 takeover bid reforms substantially resolved the central concerns about structural coercion that drove the AMF's original proposal. Key features recommended by the AMF, such as the mandatory 50 per cent minimum tender condition and the 10-day extension, were implemented, providing a robust mechanism for collective shareholder action.[43] These changes, combined with the extended 105-day bid period, grant boards ample time and leverage to respond to unsolicited offers.[44] If anything, the sharp decline in hostile bids since 2016—from a peak of twenty-four in 2006 to just one in 2024—underscores the increased importance of preserving shareholder choice when such rare offers do emerge.[45]

This brings the analysis to the final pillar of the argument: that the scholarly emphasis on a conflict is challenged by a closer reading of the *BCE* decision itself. This case was not about defeating an unsolicited bid with defensive tactics; rather, it involved a board that ran a competitive auction resulting in three LBO offers, all of which would negatively impact the company's debentures.[46] The board's ultimate decision was to accept the superior offer, which provided a 40 per cent premium to shareholders while causing the company's debentures to lose their investment-

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Brokers), 1994 CanLII 103 (SCC); *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12. The Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], significantly altered the standard of review framework for statutory appeals from administrative tribunals. Since the legislature has not specified the applicable standard for statutory appeals of securities regulators' decisions, "the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review." Thus, questions of law, including statutory interpretation and the scope of a decision-maker's authority, attract the correctness standard, in line with *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. By contrast, questions of fact (and mixed questions where the legal principle is not readily extricable) are reviewed on the standard of palpable and overriding error (see *Vavilov*, *supra* note 42 at para 35; *Housen*, *supra* note 42 at paras 35–37).

43 Autorité des marchés financiers, *supra* note 32 at 15–16; NI 62-104, *supra* note 2, s 2.29.1(c).

44 NI 62-104, *supra* note 2, ss 2.28.1, 2.31.1.

45 See Fraiberg et al, *supra* note 21.

46 *BCE inc (Arrangement relatif à)*, 2008 QCCS 905 at paras 74–76; *BCE* SCC, *supra* note 28 at para 26.

grade status and decline in value by approximately 20 per cent[47] The Supreme Court dismissed the subsequent oppression claim, finding the debentureholders' expectation of protection was not reasonable.[48] The Court's reasoning was clear: as sophisticated parties, the debentureholders had failed to negotiate for contractual covenants that would have protected them in an LBO, a foreseeable commercial risk.[49] While the Court affirmed the principle that directors owe their duty to the best interests of the corporation and may consider a wide range of stakeholders, the practical outcome of the case is unmistakable. The shareholders were the clear winners, receiving a significant premium in a deal approved by 97.93 per cent of their votes, while the debentureholders were set to suffer significant losses and were ultimately held to their contractual bargain.[50] This result suggests that the fiduciary duty articulated in *BCE*, far from conflicting with a shareholder-centric outcome, can in fact endorse it.

III. CASE STUDIES: EXAMINING THE USE OF PRIVATE PLACEMENTS IN HOSTILE BIDS

In this article, I closely examine two decisions in which target boards employed private placements in the face of unsolicited takeover bids. Private placements as defensive measures are not new, and later sections engage with the broader jurisprudence. These two decisions are selected because, first, they were rendered after the 2016 reform of the takeover bid regime and therefore provide a timely basis for analysis; and, second, in each instance the contested placement operated in effect to frustrate a hostile bid and deprive shareholders of the opportunity to decide for themselves—an outcome that, as argued below, is difficult to reconcile with the shareholder-choice principles reflected in NP 62-202. In both matters, the hostile offeror sought cease-trade orders under the commissions' public interest jurisdiction, relying on NP 62-202.

The first decision, *Hecla*, is particularly significant as it is not only the first case on defensive measures following the reform of Canada's takeover bid regime but also the first instance where securities regulators

47 *BCE* SCC, *supra* note 28 at para 4.

48 *Ibid* at para 113.

49 *Ibid* at para 108.

50 *Ibid* at paras 4, 19–20.

established an analytical framework for reviewing private placements in the context of unsolicited takeover bids.[51] *Hecla* is further noteworthy because it involves a joint decision by two securities regulators, the Ontario Securities Commission (OSC) and the British Columbia Securities Commission (BCSC).

The second decision is a more recent example where the use of a private placement was again challenged by a hostile offeror, this time before the Ontario Capital Markets Tribunal. *Mithaq* is particularly noteworthy, not only for adopting the approach developed in *Hecla* but also for further refining and expanding *Hecla*'s framework for reviewing private placements.[52]

After providing a summary of the facts and timeline of events in each case, I outline the decisions of the commissions and then proceed to revisit their findings. I challenge these decisions based on the evidence presented in the cases, their departure from the principles of NP 62-202, and inconsistencies with prior securities commission jurisprudence.

A. Re Hecla Mining

Hecla Mining Company (Hecla) is a US silver producer incorporated under Delaware law. It is listed on the New York Stock Exchange and is a reporting issuer in all Canadian provinces.[53] Hecla started investing in Dolly Varden Silver Corporation (Dolly Varden) in 2012, acquiring approximately 19.9 per cent of Dolly Varden's outstanding shares.[54] Concurrent with this investment, Hecla entered into an Ancillary Rights Agreement giving Hecla a seat on Dolly Varden's technical committee, the right to nominate one board member, and the right to participate in future equity offerings to maintain its ownership level.[55]

In 2015, Dolly Varden secured a senior loan from Hecla that was subject to restrictive covenants, including one which required Hecla's

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51 *Supra* note 9.

52 *Mithaq*, *supra* note 9.

53 *Hecla*, *supra* note 9 at para 18.

54 *Ibid* at para 25.

55 *Ibid* at para 26.

consent for future Dolly Varden equity issuances.[56] In response to Dolly Varden's financial difficulties, on May 9, 2016, Hecla offered to extend the senior loan with more favourable terms but refused to remove restrictions on issuing new equity.[57]

On June 27, 2016, Hecla announced an unsolicited takeover bid to acquire all of Dolly Varden's outstanding shares at a price of $0.69 per share, a 55 per cent premium over the closing market price prior to the announcement.[58] Hecla also announced that it had entered into support agreements with other Dolly Varden shareholders to tender their shares to Hecla's takeover bid.[59] The combined holding of Hecla and the shareholders was 34.4 per cent of the Dolly Varden shares on a fully diluted basis.[60]

On July 4, 2016, Dolly Varden repaid Hecla's senior loan in full with the funds secured from a new loan from a third party (New Loan) and, the next day, announced a private placement to raise $6 million through the issuance of up to 7.26 million common shares at $0.62 per share and 2.14 million flow-through shares at $0.70 per share.[61] Hecla's bid was formally launched on July 8, 2016, and was contingent on Dolly Varden abandoning the private placement.[62] Despite Hecla's objections, Dolly Varden's board instructed the CEO, Rosalie Moore, to negotiate terms and proceed with the private placement.[63]

Viewing the private placement as an abusive defensive measure designed to block its takeover bid, Hecla filed applications with the British Columbia and Ontario Securities Commissions (BCSC and OSC) seeking a cease-trade order against the transaction.[64] Dolly Varden countered by filing an application for a cease-trade order against Hecla's bid citing the absence of a formal valuation required for insider bids under Multilateral

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56 *Ibid* at paras 40–42.

57 *Ibid* at para 55.

58 *Ibid* at paras 1–2.

59 *Ibid* at para 65.

60 *Ibid*.

61 *Ibid* at paras 3–4, 70.

62 *Ibid* at para 3.

63 *Ibid* at para 66.

64 *Ibid* at para 7.

Instrument 61-101 - *Protection of Minority Security Holdersin Special Transactions* (MI 61-101).[65]

After simultaneous hearings on July 20 and 21, 2016, the BCSC and OSC denied Hecla's application.[66] Hecla was ordered to amend its bid to include the required valuation and to keep its bid open for at least thirty-five more days to allow shareholders to digest the new information.[67]

1. The BCSC-OSC Joint Decision

The starting premise of the commissions' decision is that, in reviewing a private placement under NP 62-202, the commissions must balance the corporate law principle of deference to the board under the business judgment rule with the securities law principle of maximizing shareholder choice by fostering an open and even-handed bid environment.[68] The decision stressed that since private placements straddle corporate and securities law, regulators should proceed cautiously and refrain from blocking a private placement unless it is clearly abusive toward target shareholders or the capital markets.[69] Given that heavy dilution and the placement of securities in management-friendly hands can defeat a hostile bid, the commission's cautious and management-deferential stance was a dubious starting point. Their guiding policy, NP 62-202, in fact, espouses the very opposite presumption in insisting that regulatory authorities may take actions against tactics such as private placements that "are likely to deny or limit severely the ability of shareholders to respond to a takeover bid."[70] As such, the starting presumption of deference sets the commissions' analysis on a path inconsistent with its own policy and ignores the core principles that form the basis of NP 62-202 and effect-driven shareholder protection.

The commissions then outlined a two-step analysis for assessing the permissibility of private placements, the first step of which is to

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65 *Ibid* at para 9.

66 *Ibid* at paras 13–16.

67 *Ibid* at para 156.

68 *Ibid* at para 82.

69 *Ibid* at para 89. See also *Re Red Eagle*, 2015 BCSECCOM 401 at para 89 [*Red Eagle*]; *ARC Equity Management (Fund 4) Ltd, Re*, 2009 ABASC 390 at para 120 [*ARC*].

70 NP 62-202, *supra* note 7, s 1.1(6).

determine whether NP 62-202 applies. The commissions decided that NP 62-202 would not engage if the evidence clearly shows that the private placement is not a defensive tactic aimed, in whole or in part, at altering the bid process.[71] Key factors in this assessment include:

- Whether the target has a serious and imminent need for the financing that the private placement provides;
- Whether the evidence demonstrates that the private placement is part of a bona fide, non-defensive, business strategy adopted by the target's board; and,
- Whether the private placement was planned or modified in response to, or in anticipation of, a bid.[72]

If it is determined that the transaction may constitute a defensive tactic, thereby engaging the principles of NP 62-202, the commission must balance the principles of NP 62-202 against the principle of deference to the target board's business judgment.[73] The factors that the commission will consider at this stage include:

- The benefits to the target shareholders resulting from the private placement, such as enabling the target to continue operations or facilitating an auction process;
- The extent to which the transaction alters the dynamics of the takeover bid, potentially depriving shareholders of the opportunity to tender to the bid;
- Whether investors participating in the private placement are related parties to the target or if there is evidence suggesting they may act in a manner that enables the target board to reject the bid or competing offers;
- Any available information regarding how target shareholders perceive the private placement; and,

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71 *Hecla*, *supra* note 9 at para 94.

72 *Ibid* at para 97.

73 *Ibid* at para 98.

- Whether the board appropriately assessed the interaction between the private placement and the bid, including its dilutive effect.[74]

In this case, the commissions found that the private placement was initiated for non-defensive purposes. They determined that Dolly Varden had been considering equity financing to fund the next phase of exploration at the Dolly Varden silver property which was estimated to cost between $4 million and $5 million annually.[75] Given the costs of exploration and Dolly Varden's existing liabilities, including the obligation to repay the New Loan, the $6 million private placement was deemed an appropriate and proportionate means of financing these expenses.[76]

The commissions purportedly recounted the events of the case to support this finding and to demonstrate that Dolly Varden was pursuing a bona fide financing strategy developed by its board in the exercise of its business judgment.[77] In the commissions' view, no evidence indicated that the private placement was planned as a defensive tactic in response to or in anticipation of Hecla's bid, nor was there any indication that the private placement was modified to take on a defensive character after the bid emerged.[78]

More broadly, the commissions' decision acknowledged that junior issuers may frequently pursue dilutive equity issuances as part of bona fide business strategies.[79] The decision further recognized that such transactions could become a recurring feature in the takeover bid landscape as their interaction with the minimum tender condition has the potential to shift the outcome of a bid from success to failure.[80] The commissions noted that they would be responsible for assessing whether a particular issuance constitutes an abusive defensive tactic and for crafting appropriate remedies when necessary. However, the commissions

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74 *Ibid* at para 100.

75 *Ibid* at paras 103, 106.

76 *Ibid* at paras 103, 106, 112.

77 *Ibid* at para 113.

78 *Ibid*.

79 *Ibid* at para 120.

80 *Ibid*.

further concluded that such circumstances were not engaged in the present case.[81]

2. Reassessing *Hecla*: Legitimate Financing Need or a Cloaked Defensive Tactic?

My analysis of the commissions' decision applies the same tests and structures used by the commissions, but results in different conclusions based on the facts presented to them. The focus is on how the commissions characterized the private placement and to assess whether this characterization aligns with the facts of the case, relevant precedents, and, most importantly, the language and objectives of NP 62-202.

a. Was the Private Placement a Defensive Tactic?

Under NP 62-202, defensive tactics come under securities regulators' scrutiny if undertaken during a bid or immediately before one if the target's board has reason to believe that a bid is imminent.[82] The policy then goes on to specifically name as a potential defensive tactic "the issuance [of] ... securities representing a significant percentage of the outstanding securities of the target company."[83] This provision and its language are particularly relevant in assessing Dolly Varden's private placement as both the timing and magnitude of the issuance clearly raise suspicion that it was likely to have been designed to impede Hecla's unsolicited takeover bid.

Dolly Varden's private placement was announced eight days after Hecla publicly disclosed its intention to pursue an unsolicited takeover bid and three days before the bid was formally launched.[84] Notably, Dolly Varden's board instructed the CEO to proceed with negotiating the private placement during the same meeting in which it received Hecla's press release announcing the unsolicited bid.[85] The private placement resulted in a 43 per cent dilution of existing shareholders, significantly

81 *Ibid* at paras 120–21.

82 NP 62-202, *supra* note 7, s 1.1(4).

83 *Ibid*, s 1.1(4)(a).

84 *Hecla*, *supra* note 9 at paras 2–3.

85 *Ibid* at para 66.

increasing the difficulty and cost of Hecla's attempted acquisition.[86] This sequence of events shows that Dolly Varden's board was fully aware of Hecla's bid when they chose to proceed with the highly dilutive private placement transaction that undeniably altered Dolly Varden's capital structure to the detriment of Hecla's bid. In its own subsequent Management's Discussion and Analysis, Dolly Varden management explicitly stated that the funds from the private placement were used to "combat" Hecla's takeover bid all but confirming the placement's defensive character.[87] Such a statement further renders the commissions' finding that the board made a bona fide business decision difficult to reconcile with the facts of the case.

The commissions' decision suggests that private placements should be treated differently than shareholder rights plans and emphasizes that regulators must exercise greater caution before striking down a private placement. Central to this approach is whether the target's board can demonstrate that the private placement was pursued as a "*bona fide*, non-defensive, business strategy."[88] However, this appears contrary to NP 62-202, which does not draw a distinction between private placements and shareholder rights plans.[89] Instead, under NP 62-202, defensive measures are identified based on their *effect* in obstructing a hostile takeover bid and depriving shareholders of choice, rather than the target board's intention in adopting the measure.[90] In fact, ascertaining a board's true intentions is an elusive goal as board resolutions and meeting minutes can be adjusted in light of the board's conflict of interests during a hostile bid. Such records can be carefully drafted with future litigation in mind, shaping a narrative that may not fully reflect the board's underlying motives. Critically, and perhaps for this reason, in whole or in part, NP 62-202 does not place any weight on the board's intent when assessing potential defensive measures.[91] Instead, the policy focuses on the impact of the

86 *Ibid* at para 96.

87 Dolly Varden Silver Corporation, "For the Year Ended December 31, 2016: Management's Discussion and Analysis" (31 December 2016) at 2, online (pdf): <dollyvardensilver.com> [perma.cc/FB9U-CC32].

88 *Hecla*, *supra* note 9 at para 97.

89 NP 62-202, *supra* note 7, s 1.1(4).

90 *Ibid*.

91 *Ibid*.

board's actions on shareholder choice in contested takeover bids, thereby reinforcing the theory that the practical effects of defensive measures, rather than the subjective rationale behind them, should guide regulatory scrutiny.[92]

b. Did the Target Have a Serious and Imminent Need for Financing?

A key finding by the commissions was that the size of the private placement was not inappropriate given Dolly Varden's need to repay its indebtedness and raise an estimated $4–5 million for the next phase of exploration at the Dolly Varden silver property.[93] This conclusion was supported by precedent, notably *Re Red Eagle*, where the BCSC declined to cease trade a private placement upon recognizing that the company required financing to remain a going concern.[94] In that case, the private placement diluted incumbent shareholdings by 4 per cent, reducing the shares tendered to the Red Eagle bid from 52 to 48 per cent.[95]

This finding invites scrutiny on several levels. First, there is a disconnect between the test articulated by the commissions—requiring a serious and imminent need for financing—and its application to the facts of the case. In delivering their decision, the commissions cited Dolly Varden's financial records which revealed significant losses, working capital deficiencies, and difficulties in meeting liabilities.[96] However, this evidence reflected the company's financial condition in 2014–2015.[97] By the time of the private placement in July 2016, Dolly Varden's circumstances had materially changed: Dolly Varden had secured a $1.5 million senior loan in September 2015, followed by an additional $500,000 advance in January 2016.[98] Moreover, the rise in silver prices in April 2016 had significantly bolstered the company's financial outlook.[99]

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92 *Ibid*, ss 1.1(2), 1.1(5)–(6).

93 *Hecla*, *supra* note 9 at paras 103, 106.

94 *Red Eagle*, *supra* note 69 at paras 91, 96–97.

95 *Ibid* at para 38.

96 *Hecla*, *supra* note 9 at paras 36–39.

97 *Ibid*.

98 *Ibid* at paras 41, 51.

99 *Ibid* at para 54.

That the company had roughly five months remaining to discharge its new $2.5 million loan already undermined the claim of imminent need; that it sought to raise $6 million—more than double what was required—makes the assertion of financial necessity entirely implausible.[100] It is of further note that Dolly Varden had also declined an offer from Hecla to extend Dolly Varden's loan repayment date to the end of 2017.[101] This fact is given only fleeting notice by the commission but would seem to be further critical evidence that Dolly Varden was not, at the time of the placement, under the financial stress it claimed as the placement's impetus.[102]

The seemingly dubious nature of Dolly Varden's financial desperation also highlights how the facts in *Hecla* differ significantly from those in *Red Eagle* where the framework of NP 62-202 was followed. In *Red Eagle*, the target required financing to remain solvent and, unlike in *Hecla*, the acquirer had refused the target's request for financial assistance.[103] Additionally, the private placement in *Red Eagle* did not prevent target shareholders from tendering their shares as the offeror waived the 50 per cent minimum tender condition.[104] This waiver, permissible under the pre-reform bid regime, demonstrated the offeror's willingness to acquire any percentage of shares tendered to its bid.[105]

The BCSC noted that, if the minimum tender condition had not been waived, the case could have "directly engaged" the core objective of NP 62-202—protecting target shareholders from being deprived of the opportunity to tender their shares to the bid.[106] Following this reasoning, the BCSC cease traded the shareholder rights plan, preventing the target's board from obstructing shareholders' ability to tender their shares to the hostile bid.[107] Given these distinguishing facts, the analogy to *Red Eagle* is misplaced and therefore does not support the findings in *Hecla*.

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100 *Ibid* at para 58.

101 *Ibid* at para 53.

102 *Ibid*.

103 *Supra* note 69 at para 92.

104 *Ibid* at para 34.

105 *Ibid* at para 94.

106 *Ibid* at para 95.

107 *Ibid* at para 67.

Lastly, as the preceding analysis demonstrates, the size of the private placement was disproportionate to Dolly Varden's actual financing needs. The company did not require $6 million to remain a going concern. Moreover, as I will elaborate in the next section, the majority of the proceeds from the private placement were not allocated toward the exploration of mining properties that they were purportedly earmarked for.[108]

c. Was There Evidence of a Bona Fide Business Strategy Adopted by the Target?

Hecla places great emphasis on the argument that private placements differ from other defensive measures because private placements may reflect a bona fide business strategy and are not necessarily an attempt to thwart a hostile bid. However, this characterization appears overly simplistic as it overlooks the inherent conflict of interest faced by a target's board. This conflict raises questions about whether the board's actions genuinely reflect business imperatives or are strategically designed to frustrate an unsolicited bid.

To illustrate this conflict, it is useful to examine how the proceeds from the private placement were utilized and compare this to the way that the board purportedly intended to use them. As noted earlier, Dolly Varden announced its intention to proceed with the private placement on July 5, 2016—just three days before Hecla formally launched its unsolicited bid.[109] The private placement closed on July 26, 2016, generating gross proceeds of $7.2 million through the sale of 9.1 million common shares at $0.62 per share and 2.1 million flow-through shares at $0.70 per share.[110] With this new financing, Dolly Varden repaid the $2.5 million short-term loan that it had arranged in June 2016.[111]

Dolly Varden's financial records give some indications as to how the remainder of the proceeds were spent. For the year ended December 31, 2016, Dolly Varden's financial statements reveal that the company incurred significant expenses in responding to Hecla's takeover bid. Professional fees increased nearly fourfold from $195,783 in 2015 to

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108 *Hecla*, *supra* note 9 at paras 103, 112, 116–17.

109 *Ibid* at para 3.

110 *Ibid* at para 4.

111 Dolly Varden Silver Corporation, *supra* note 87 at 2.

$769,586.[112] Administrative and consulting fees rose by almost 50 per cent, climbing from $88,081 to $131,258.[113] Beyond these, the company made a cash payment of $105,965 to directors which was described as "in part special compensation for the additional time and effort required to evaluate and combat the takeover bid."[114] Salaries and benefits nearly doubled from $224,607 to $428,924, largely driven by Dolly Varden's accrual of management severance packages.[115]

In contrast, Dolly Varden spent only $1,631,724 on exploration—a decrease of nearly 23 per cent from the $2,106,174 spent in the previous year.[116] This reduction in exploration expenditures stands in stark contrast to the initial justification for the $6 million private placement, which was framed as essential for financing the next phase of exploration at the Dolly Varden silver property. This use of the funds contradicts the expressed need behind the private placement, the result of which was that Dolly Varden shareholders were not afforded the opportunity to assess or tender to Hecla bid.

In light of this fairly strong conflicting evidence respecting the board's intentions and the ultimate denial of shareholder choice, this decision underscores the risks of securities commissions deferring to the business judgment of target boards in the context of hostile bids. As elaborated later in this paper, such deference is at odds with the fundamental objective of NP 62-202, which seeks to maximize shareholder choice during unsolicited takeover bids regardless of board intentions.[117]

B. Mithaq Canada Inc (Re)

As of September 2023, Mithaq Capital SPC (Mithaq) was the largest common shareholder of Aimia Inc., a publicly traded company. From February to May 2023, Mithaq gradually increased its shareholding in Aimia, disclosing ownership levels of 18.74 per cent, 19.99 per cent, and

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112 *Ibid* at 5.

113 *Ibid*.

114 *Ibid* [emphasis added].

115 *Ibid*.

116 *Ibid*.

117 NP 62-202, *supra* note 7, s 1.1(2).

30.96 per cent in its early warning reports.[118] As Mithaq's influence over Aimia grew, so did the tension between the two companies. In April 2023, Mithaq opposed Aimia's board re-election at the annual general meeting.[119] Although Mithaq succeeded in voting out the board chair, the remaining directors were narrowly re-elected.[120] Mithaq requested a proxy review of the meeting's voting results which was denied by Aimia, prompting Mithaq to bring a lawsuit before the Ontario Superior Court of Justice seeking relief to facilitate the review.[121] In June 2023, Aimia adopted a shareholder rights plan in response to Mithaq's growing shareholding and shareholder activism.[122]

The situation further escalated in mid-September 2023, when Aimia sought conditional approval from the Toronto Stock Exchange (TSX) for a private placement involving undisclosed investors for which it received preliminary approval on September 28, 2023.[123] Shortly after this, on October 5, 2023, Mithaq commenced a formal all-cash bid to acquire Aimia's outstanding shares at $3.66 per share.[124] Just one week later on October 13, Aimia announced its newly approved private placement, which included issuing 10,475,000 common shares and an equal number of common share purchase warrants, potentially giving the new investors up to a 24.89 per cent stake in Aimia's equity.[125]

In an application to the Ontario Capital Markets Tribunal, Mithaq requested that the private placement be cease traded and that the TSX's approval of it be set aside.[126] Mithaq also requested that the tribunal cease trade Aimia's shareholder rights plan—however, this request became moot as the rights plan expired and was not renewed following the tribunal's intervention.[127] Aimia countered Mithaq's application by filing a

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118 *Mithaq*, *supra* note 9 at para 10.

119 *Ibid* at para 11.

120 *Ibid*.

121 *Ibid*.

122 *Ibid* at para 13.

123 *Ibid* at paras 14–15.

124 *Ibid* at para 15.

125 *Ibid* at para 17–18.

126 *Ibid* at para 2.

127 *Ibid* at para 3.

cross-application seeking to deny Mithaq the benefit of an exemption under securities law that allows a bidder to acquire up to 5 per cent of a target company's shares outside of the bid if certain conditions are met.[128] To this end, Aimia argued that Mithaq's bid could not have been made in good faith as it was too conditional.[129]

1. Tribunal's Decision

In deciding this case, the tribunal applied the analytical framework established in *Hecla* comprising a two-stage assessment.[130] At the first stage, the tribunal considered whether the private placement was "clearly not" a defensive tactic intended to alter the bid dynamics.[131] If the tribunal could not conclude that the placement was "clearly not defensive," the analysis would proceed to the second stage. At this second stage, the tribunal would weigh the legitimate corporate objectives of the private placement against the need to facilitate shareholder choice.[132]

In the first stage of the analysis, the tribunal found that the private placement materially affected the bid environment by increasing the number of shares required to meet the minimum tender condition and by deterring potential competing bids due to the warrant exercise price.[133] While the tribunal acknowledged Aimia's argument that the private placement was largely planned before Mithaq's bid, it determined that the transaction took on a defensive character once the bid was announced and so could not be said to be "clearly not" a defensive tactic.[134]

Despite these findings, the tribunal, upon proceeding to the second stage of the analysis, concluded that the private placement was still permissible, holding that the benefit to Aimia's shareholders outweighed the negative impact on bid dynamics.[135] The tribunal further reasoned that, although the private placement had acquired a defensive character, its

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128 For the conditions governing this exception, see NI 62-104, *supra* note 2, s 2.2(3).

129 *Mithaq*, *supra* note 9 at para 210.

130 *Ibid* at para 57.

131 *Ibid* at para 58.

132 *Ibid* at para 59.

133 *Ibid* at para 76.

134 *Ibid* at para 104.

135 *Ibid* at para 130.

primary purpose was to address Aimia's "serious and immediate" need for financing.[136] In the tribunal's view, Aimia "began planning the private placement well before Mithaq's bid, when Aimia had no reasonable basis to see a bid as imminent" and therefore the placement was not sufficiently defensive to attract the application of NP 62-202.[137]

2. Revisiting *Mithaq*: Balancing Act or Blurred Lines?

A notable aspect of this decision is that, while it follows the framework found in *Hecla*, it reflects an unease with how *Hecla* articulated the public interest standard for intervention. As explained in the previous section, *Hecla* establishes that a private placement may only be blocked where there is "a clear abuse of the target shareholders and/or the capital markets."[138] However, the *Mithaq* decision questions whether "clear abuse" remains the appropriate standard, given that it originated from the Ontario *Securities Act* prior to the 1994 amendments which shifted the act's purpose to focus on protecting investors from "unfair" practices and fostering "fair" capital markets.[139]

Despite suggesting that the clear abuse standard may evolve in future proceedings, the tribunal ultimately chose not to depart from *Hecla* as neither party sought to challenge the existing "clearly abusive" standard.[140] It remains unclear whether a shift to an "unfairness" standard would lead to substantially different outcomes as both concepts are broad and their precise contours will ultimately depend on the commission's interpretation. Moreover, the concept of "abuse" continues to be relevant under NP 62-202, which directs securities commissions to assess "whether [defensive measures] are abusive of shareholder rights."[141] While the tribunal in *Mithaq* uneasily upheld the standard from *Hecla*, the matrix of evidence in *Mithaq* may be useful for assessing whether this standard was rightly applied. In the following paragraphs, I will revisit key findings of the tribunal and its reasoning in *Mithaq*, considering the

136 *Ibid* at para 92.

137 *Ibid* at para 6.

138 *Hecla*, *supra* note 9 at para 89.

139 *Mithaq*, *supra* note 9 at para 44. See also *OSA*, *supra* note 2, ss 1.1(a)–(b).

140 *Mithaq*, *supra* note 9 at para 45.

141 NP 62-202, *supra* note 7, s 1.1(3).

evidence presented in the case, to argue that the *Hecla* standard should be augmented to better protect the public interest.

3. Did the Target's Board Have Reason to Believe That a Bid Might Be Imminent?

As explained above, the principles of NP 62-202 are engaged when the target's board adopts defensive measures "during the course of a bid, or immediately before a bid, if the board of directors has reason to believe that a bid might be imminent."[142] The tribunal in *Mithaq* correctly began its analysis by asking "whether Aimia's board had 'reason to believe that a bid *might* be imminent,'" but then curiously proceeded to heighten the threshold by altering the test to "when a board has reason to believe a bid *is* imminent."[143] The tribunal went on to state that the answer to this question hinges on "how likely it is that any specific bid will be made," cautioning that if the bar is set too low, it could effectively freeze the financing activities of issuers.[144]

Applying this altered test, the tribunal concluded that Aimia's board lacked sufficient reason to believe a bid was imminent until October 3, 2023, when Mithaq formally announced its intent to bid.[145] While the tribunal recognized indications of a potential takeover, it found these signals too weak to establish that Mithaq was actively considering a bid.[146] Consequently, it held that the private placement was not undertaken in response to or in anticipation of the bid and, thus, did not attract the application of NP 62-202.[147]

In addition to applying the wrong test in reviewing the events in this case, the tribunal's findings, even under this altered higher-bar test, are difficult to reconcile with the surrounding circumstances of the private placement.[148] The private placement was announced shortly after Mithaq

142 *Ibid*, s 1.1(4).

143 *Supra* note 9 at paras 94–95 [emphasis added].

144 *Ibid* at para 95.

145 *Ibid* at para 96.

146 *Ibid*.

147 *Ibid* at para 98.

148 Aaron J Atkinson & Brandon Orr, "Taking AIM at the Mithaq Decision: A Critique" (28 May 2024), online: <dwpv.com> [perma.cc/NV22-C9GY].

had increased its shareholdings from 19.99 per cent to 30.96 per cent prior to May 25, 2023, and had disclosed this increase through early warning reports.[149] The Early Warning Regime (EWR) mandates immediate public disclosure when a person acquires beneficial ownership of, or gains direction or control over, 10 per cent or more of a class of an issuer's equity or voting securities.[150] The EWR also requires subsequent public disclosure for any changes in the acquirer's beneficial ownership or control or direction that amount to an increase or decrease of 2 per cent or more of the class.[151] This reporting framework is crucial in preventing creeping takeover bids where a party gradually acquires control of a target company without offering a control premium.[152] Early warning reports alert the target company, its shareholders, and the market of potential takeovers, thereby allowing directors to develop response strategies, including defensive measures, if the takeover materializes.[153]

It is puzzling that the tribunal did not find the early warning reports to be a strong indicator to Aimia's board that a takeover bid might be imminent—particularly given that previously, in June 2023, Aimia had adopted a shareholder rights plan (poison pill) shortly after Mithaq increased its Aimia holding to 30.96 per cent.[154] The early warning reports and the seemingly responsive adoption of the poison pill suggest a consistent pattern of defensive measures by Aimia's board which intensified with the announcement of the private placement on October 13, 2023—just eight days after Mithaq formally launched its takeover bid on October 5.[155] The close timing suggests the transaction may have been structured in response to, or at least, accelerated by, Mithaq's bid.

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149 *Ibid*.

150 NI 62-104, *supra* note 2, s 5.2.

151 *Ibid*, s 5.2(2).

152 David Johnston, Kathleen Doyle Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham: LexisNexis Canada, 2014) at para 11.31. See also Nicholls, *Securities Law*, *supra* note 17 at 404.

153 Johnston, Rockwell & Ford, *supra* note 152 at para 11.31. For more on the purpose of the EWR, see Ontario Securities Commission, "Proposed National Instrument: NI - 62-103 - The Early Warning System and Related Take-Over Bid and Insider Reporting Requirements" (4 September 1998) at Part 2, online: <osc.ca> [perma.cc/SR9H-XGKG].

154 *Mithaq*, *supra* note 9 at paras 10–13.

155 *Ibid* at paras 15, 17.

Additionally, a draft report prepared by Aimia's management on June 5, 2023, explicitly identified one objective of the private placement as creating a "moat to protect ... against opportunistic raiders."[156] Combined with the early warning reports, the adoption of the poison pill, and the timing of the private placement, there is a strong case that Aimia's board anticipated Mithaq's bid well before October 3, 2023. Therefore, their private placement could have been viewed as planned and executed in a context where "a bid might be imminent," thereby attracting the application of NP 62-202 by the commissions.[157]

4. Serious and Imminent Need for Financing

The tribunal found that, in accordance with the *Hecla* decision, Aimia had a serious and immediate need for financing sufficient to prevail when weighed against shareholders' right to choose to tender to a bid. The tribunal found "immediate" to "imply that the need currently exists, as opposed to being speculative."[158]

The tribunal ultimately held that Aimia's financing need spanning the next twelve months met the "immediate" criterion from *Hecla*. However, extending "immediate" to encompass uncertain, speculative future needs is ambiguous and contrary to the tribunal's own preceding definition.[159] As OSC staff suggested, a more logical interpretation of "immediate" would align with financial distress—a view the tribunal rejected without offering a compelling explanation.[160] Had the Tribunal adopted the logical definition espoused by staff, the facts of this case collectively ought to have raised significant questions about whether there was any "immediate" financing need for which a highly dilutive private placement was truly a necessary and proportionate response.

For example, in reaching its conclusion on Aimia's financial need, the tribunal placed significant weight on the nature of Aimia's business model, which is centred on acquiring, rather than directly operating, businesses. This finding invites scrutiny, particularly in light of evidence

156 *Ibid* at para 94(h).

157 NP 62-202, *supra* note 7, s 1.1(4).

158 *Mithaq*, *supra* note 9 at para 87.

159 *Ibid* at paras 79, 87.

160 *Ibid* at para 87.

that cast doubt on whether Aimia's financing needs for this venture were truly "immediate." At the most fundamental level, Aimia was not facing a crisis in solvency or liquidity. The company's operations appeared stable with no indication of impending financial distress. In fact, Aimia's own management repeatedly stated that the company had ample cash to fund both operations and acquisitions.[161]

Notably, Aimia announced share buyback programs in March and September 2023, the latter just a month before the private placement—an action that typically reflects surplus liquidity rather than financial strain.[162] This announcement is particularly telling because directors can be held personally liable if a buyback violates the statutory solvency test.[163] This test requires that the company can pay its liabilities as they become due and that the realizable value of its assets is not less than the aggregate of its liabilities and stated capital.[164] Given these high personal stakes, a board's willingness to publicly pursue a share repurchase serves as a powerful signal of its confidence in the company's financial health. Therefore, even though these buybacks were contingent on securing debt financing that did not materialize, the board's announced intention indicates it perceived no urgent need for capital at the time.[165]

Casting further doubt on Aimia's need for financing is its May 2023 report in which Aimia projected $126 million in cash following the completion of the Bozzetto acquisition and Aimia management expressed confidence in the company's liquidity.[166] Even as late as September 30, 2023—less than a week before Mithaq announced its bid—Aimia retained $8.2 million in readily available cash.[167] Not only did the tribunal not adopt a coherent definition of "immediate" but it also did not adequately

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161 *Ibid* at para 84; Atkinson & Orr, *supra* note 148 ("[i]n particular, by the time Aimia began negotiations in respect of the private placement, it had $64 million of cash on hand, of which $7 million was immediately available at the parent level, more than twice the amount Aimia required for the $3 million in cash outflows over the succeeding 12 months" at 2).

162 *Mithaq*, *supra* note 9 at paras 84(a), 84(c).

163 *CBCA*, *supra* note 16, s 42.

164 *Ibid*.

165 *Mithaq*, *supra* note 9 at para 84.

166 *Ibid* at para 84(b).

167 *Ibid* at para 82(r).

address evidence that contradicted Aimia's purported financial need within the expanded definition of "immediate."

In light of this contradictory evidence, the tribunal's approach was also inconsistent with previous decisions where the commissions refrained from intervening in private placements because the target explicitly needed financing to maintain itself as a going concern. Notably, in *Red Eagle*, the target company "did not have enough money to meet its liabilities through to the end of the Batero Offer."[168] Similarly, in *ARC*, the evidence showed that the target company, Profound, faced financial distress due to increasing debt, declining commodity prices, and an expected reduction in its credit line.[169] In *ARC*, following the private placement, the proceeds from the transaction, approximately $6.9 million, became subject to a security interest in favour of Profound's lender and were used to reduce Profound's outstanding debt.[170] In both cases, the private placement addressed an immediate and urgent financing need, and it was in this context that the commissions, cautious of this need, refused to cease trade the transactions. In contrast, the tribunal in *Mithaq* appears to have expanded the definition of an "immediate" financing need beyond these established precedents, without adequately addressing the evidence that contradicted its conclusion.

5. Benefit to Target Shareholders

In the second stage of its *Hecla* analysis, the tribunal in *Mithaq* weighed the corporate objectives of the private placement against the principle of facilitating shareholder choice.[171] The tribunal found that while the private placement had a negative impact on Mithaq's bid, its benefits to Aimia and Aimia shareholders outweighed the negative impact.[172] This finding derived largely from the previous analysis in which

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168 *Supra* note 69 at para 92.

169 *ARC*, *supra* note 69 at paras 10, 14, 100.

170 *Ibid* at para 30.

171 Atkinson & Orr, *supra* note 148 ("[i]n considering whether the private placement was 'clearly abusive,' the Tribunal applied the tests set out in NP 62-202, including 'whether the private placement would benefit Aimia's shareholders' and concluded, without much analysis, that the private placement would be a benefit to shareholders" at 3).

172 *Mithaq*, *supra* note 9 at paras 108–15.

the commission viewed the private placement as necessary to address Aimia's serious and immediate need for financing.[173] Given this reasoning, the commission was also reluctant to interfere with the TSX approval of the private placement, finding the TSX process to have been thorough with no evidence of error in principle or compelling new evidence that would warrant revisiting the decision.[174]

The tribunal's conclusion that the private placement benefitted the company's existing shareholders is difficult to substantiate. The primary beneficiaries of the private placement were the new investors who acquired shares at a discount and gained governance rights which included board representation.[175] In contrast, the existing shareholders experienced a significant dilution of their holdings, amounting to a decrease of 24.89 per cent. This dilution effectively harmed existing shareholders by transferring value from them to the new investors.[176] Moreover, the placement denied shareholders the opportunity to accept an all-cash offer at a premium of over 20 per cent, directly thwarting the shareholder protections enshrined in NP 62-202.

Similarly, the tribunal's finding showed "significant deference," to the target's board, as required by *Hecla*, despite evidence of flawed governance and conflicts of interest that did not benefit shareholders.[177] Notably, the tribunal acknowledged that Aimia's special committee failed to consider the extent to which the private placement could restrict shareholder choice in tendering to Mithaq's bid.[178] There was also no evidence to suggest that the special committee sought to use the private placement as a means to improve Mithaq's bid for shareholders or to encourage competing bids.[179]

Curiously, the tribunal did not challenge this practice, even though NP 62-202 authorizes defensive measures only when they are taken by

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173 *Ibid* at paras 6, 38.

174 *Ibid* at paras 194–96.

175 *Ibid* at paras 18, 101, 110–12.

176 *Ibid*.

177 *Ibid* at para 127.

178 *Ibid* at para 126.

179 *Ibid*.

the target's board "in a genuine attempt to obtain a better bid."[180] Equally questionable is the tribunal's reliance on the engagement of a financial advisor as a proxy for shareholder benefit, particularly when, as in this case, the financial advisor receives a fee for the completion of the defensive transaction.[181] It is difficult to view the financial advisor as an impartial agent, given that they are engaged by a board opposing the hostile bid. Furthermore, the fee structure creates a rational incentive for the financial advisor to align with the target board's interests which are contrary to the bid as the board members often fear losing their positions upon acquisition by a hostile bidder.[182]

While it is clear that the tribunal's decision attempts to balance the rights of and benefits to shareholders with the right of a board to govern its company unhindered, its use of an incorrect threshold test and departure from precedent in this balancing only serves to blur the actual implications of NP 62-202 for defensive measures. NP 62-202 is quite clear that takeover bid regulation seeks to "leave the shareholders of the target company free to make a fully informed decision" with respect to a bid by taking action against "tactics that are likely to deny or limit severely the ability of the shareholders to respond to a takeover bid."[183] By focusing on the circumstances surrounding the cause of the defensive measure, the tribunal is skirting the effect-focus that NP 62-202 requires.

IV. REGULATING DEFENSIVE MEASURES: A PUBLIC INTEREST INQUIRY BEYOND FIDUCIARY DUTIES

The Supreme Court of Canada has affirmed that securities commissions' public interest jurisdiction is "neither remedial nor punitive; [rather] it is protective and preventive, intended to be exercised to prevent likely future harm to ... capital markets."[184] Therefore, it follows that it is a conceptual error for securities commissions to evaluate defensive

180 NP 62-202, *supra* note 7, s 1.1(6).

181 *Mithaq*, *supra* note 9 at para 123.

182 *Ibid* at paras 124–26.

183 NP 62-202, *supra* note 7, ss 1.1(2), 1.1(6).

184 *Equal Treatment*, *supra* note 1 at para 42, citing *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [1999] OJ No 388 at para 45, (*sub nom Quebec v Committee for the Equal Treatment of Asbestos Minority Shareholders*) 1999 CanLII 7316 (ONCA), Laskin JA.

measures as though adjudicating fiduciary duty claims which are inherently remedial. Unlike courts, securities commissions lack statutory authority under corporate law to oversee fiduciary duties or grant corporate law remedies.[185]

This distinction also underscores why regulatory reviews of defensive measures in hostile takeovers are not at liberty to apply the business judgment rule applied when courts consider fiduciary duties. Courts apply the business judgment rule in assessing whether a board has met its duty of care, deferring to business decisions as long as they fall within a reasonable range of alternatives. However, the Supreme Court's reasoning in *Kerr v. Danier Leather Inc.* illustrates why business judgment deference is inappropriate in the securities regulatory context.[186] There, the Court rejected the argument that the board was entitled to deference under the business judgment rule when determining whether Danier had met its timely disclosure obligation regarding a fourth-quarter slump in sales.[187] The Court emphasized that while "forecasting is a matter of business judgment, disclosure is a matter of legal obligation" and that "disclosure obligations under the [Securities] Act are not to be subordinated to the exercise of business judgment."[188] The same principle applies to regulatory reviews of defensive measures.

The business judgment rule is traditionally justified on the basis that corporate managers should have discretion to take reasonable risks in pursuit of shareholder value without fear of judicial second-guessing. However, this justification has no application to regulatory scrutiny of defensive measures under NP 62-202. The core issue in such reviews is not whether a board's decision falls within a reasonable range of alternatives but whether the measures improperly deprive shareholders of the opportunity to sell their shares to an unsolicited bidder. Defensive tactics, by their nature, often serve to entrench management at the expense of shareholder choice. Thus, the typical rationales for business judgment deference—such as board expertise and the need to encourage risk-

185 *CBCA*, *supra* note 16, ss 240, 241(3). See also *BCBCA*, *supra* note 16, ss 227, 233–34.

186 2007 SCC 44 at paras 54–55.

187 *Ibid*.

188 *Ibid*.

taking—cannot apply in this context without risking perpetuation of this conflict of interest.[189]

This narrow scope for business judgment rule application is further reinforced by securities commission jurisprudence, which has emphasized that the primary concern in reviewing defensive measures is not whether a board has fulfilled its fiduciary duties but whether such measures improperly impede shareholder choice. The landmark decision in *Canadian Jorex* illustrates this point vividly.[190] The panel pointed out that the question before them was not whether the board acted in good faith or in the best interest of the target shareholders, but rather "where the public interest ... lies."[191] Thus, securities regulators are not tasked with judging the conduct of the target board; their role is strictly to protect the public interest. This is clearly articulated in both the *Canadian Jorex* decision and NP 62-202 which state that the public interest is primarily concerned with preventing defensive measures that significantly restrict or deprive shareholders of their right to respond to an unsolicited bid.[192] In essence, by the letter of NP 62-202, even defensive measures adopted by a board with the best of intentions must not infringe upon the fundamental rights of shareholders to dispose of their shares.

The distinction between inquiries into fiduciary duty and those concerning the public interest becomes even more apparent in the context of private placements. A board may fully discharge its duty of care in adopting a private placement, yet this alone does not justify exempting the transaction from regulatory scrutiny—particularly if the placement is not genuinely intended to enhance an offer or as a means of exploring alternative avenues. As demonstrated in the *Lionsgate* decision, a board's fulfillment of its fiduciary duties does not necessarily align with the public interest directives outlined in NP 62-202.[193]

Likewise, framing the inquiry as whether a private placement constitutes a bona fide business strategy is misguided. Not only does this approach stray from the focused review as contemplated by NP 62-202 but

189 *Ibid* at paras 56, 58.

190 See *Canadian Jorex*, *supra* note 18.

191 *Ibid* at para 6.

192 *Ibid* at para 15; NP 62-202, *supra* note 7, s 1.1(6).

193 *Lionsgate*, *supra* note 8 at paras 62, 65.

it also presents opportunities for misuse by the board of directors, as highlighted in my critique of the *Hecla* decision. When facing an unsolicited bid and the potential loss of their positions, boards can readily rationalize highly dilutive private placements as strategic business decisions. However, they may then allocate the proceeds in ways that scarcely benefit the company or its shareholders and may not be in pursuit of the purported business needs. Thus, constraining the commission's approach in this way leaves the commission with no viable means to verify or oversee how private placement proceeds are ultimately utilized, and improperly subordinates the commission's protective oversight to the vested interests of the board in question.

Against this backdrop, *Hecla*'s proposition that private placements should be subject to a more board-deferential threshold for regulatory intervention than poison pills is also flawed.[194] On the contrary, it is arguable that private placements should be offered less deference as they often pose a greater risk to shareholder choice compared to rights plans. Rights plans primarily operate as deterrent mechanisms with the threatened dilution rarely materializing. In fact, they are adopted with the intent of never being implemented.[195] In contrast, as demonstrated in both *Hecla* and *Mithaq*, private placements can be show-stoppers by operating as irreversible dilutive measures sufficient to stop a bid in its tracks. In both cases, private placements were not aimed at enhancing the bid or soliciting alternatives. Instead, once executed, they effectively neutralized the bid thereby permanently depriving target shareholders of the opportunity to tender their shares.

A. Moving Forward in the Public Interest

The assessment of a private placement requires a more nuanced approach than that applied to a conventional poison pill. Unlike a purely defensive rights plan, which has no independent financing rationale, a private placement can pursue the dual objectives of defending against a hostile bid while also addressing a genuine financing need. This duality creates a significant risk of abuse, as the decisions in *Hecla* and *Mithaq*

194 *Hecla*, *supra* note 9 at para 82.

195 Arthur Fleischer, Gail Weinstein & Scott B Luftglass, *Takeover Defense: Mergers and Acquisitions*, 9th ed (New York: Wolters Kluwer, 2021) § 5.02[A], 5-57 to 5-58.

serve as cautionary tales of how target boards can cloak a defensive private placement in the language of financial necessity. I would therefore argue that the assessment of whether a private placement constitutes an improper defensive measure ought to be framed in a narrower and more precise manner, one that avoids encroaching on the fiduciary duty analysis undertaken by courts.

A going-concern threshold is the appropriate benchmark as it directly confronts this risk of misuse. It would best align with NP 62-202 by striking a crucial balance: preventing private placements that improperly override shareholder choice, while still permitting time-critical financing genuinely necessary to preserve a firm's value. Such a standard is not only a robust safeguard against abuse but is also consistent with prior securities commission jurisprudence, such as in *Re Red Eagle* and *ARC*, where non-intervention was justified because the targets truly required financing to remain viable. To operationalize this threshold, the following analysis identifies objective indicators that commissions can apply with consistency. Under this approach, if and once it is established that the target does not require financing to remain a going concern, the operative question under NP 62-202 becomes whether the private placement functions as a defensive barrier preventing shareholders from considering the bid.

Admittedly, the most challenging part of this inquiry for securities commissions will be determining whether the target company truly requires financing to continue as a going concern. As both the *Hecla* and *Mithaq* decisions illustrate, target boards will almost invariably argue that financing was urgently needed. However, such assertions cannot be accepted at face value. Instead, regulators can and should assess the claim's credibility using a range of objective benchmarks. These include: examining whether the target has a healthy ratio of current assets to short-term liabilities relative to its industry peers; assessing whether the company has sufficient cash reserves and is generating positive or negative cash flow from its core operations; determining if the company is in danger of breaching its debt covenants; and, considering whether the company's own auditor has issued a "going concern" qualification or expressed doubt about its viability in a recent report. While this list is not exhaustive, these benchmarks provide an objective starting point, though the ultimate factual determination will always rest with the commissions based on the unique circumstances of each case.

With a clearer picture of the company's financial state, regulators can then turn to the two key benchmarks for evaluating the private placement itself: (1) Timing – Whether the private placement was undertaken during the bid or before the bid when a reasonable inference can be drawn that the board could have anticipated the bid; and, (2) Impact on bid dynamics – Whether the resulting dilution deprives the shareholders of the ability to respond to the takeover bid.

The first benchmark requires regulators to look beyond a bid's formal launch date to determine if the board had reason to believe a bid was imminent when it initiated the private placement. The inquiry should focus on objective indicators of a potential takeover, such as Early Warning Reports signaling a significant and rapid accumulation of shares, shareholder activism that challenges the incumbent board, or internal board and management communications that reveal a defensive intent.

The second benchmark assesses the private placement's effect on the bid's viability. The central question is whether the dilution created by the new share issuance severely limits or denies shareholders the ability to respond to an offer. Under the current regime, a bid must be accepted by over 50 per cent of the independent shareholders to succeed. A private placement crosses the threshold for intervention if its dilutive impact makes it materially more likely that the bid will not succeed. While this was clearly the case in *Hecla*, where Dolly Varden's 43 per cent dilution proved fatal to the offer, the threshold for intervention can be considerably lower. The TSX Company Manual, which requires shareholder approval for private placements that dilute existing shareholders by more than 25 per cent if priced below market, provides a helpful reference point. However, even a smaller placement can be highly effective at frustrating a bid.[196]

To illustrate, consider a bidder that owns 20 per cent of a company with one hundred shares. To succeed, the bidder must win the support of over 50 per cent of the remaining eighty independent shares—meaning it needs forty-one shares, or 51.25 per cent of the independent float. If the board approves a 20 per cent private placement (twenty new shares) to a friendly party, the total number of shares becomes 120. The minimum tender condition now requires the bidder to obtain tenders from over 50

196 Toronto Stock Exchange, *TSX Company Manual* (Toronto: Toronto Stock Exchange, 2026), s 607(g)(i), online (pdf): <decisia.lexum.com> [perma.cc/PS9H-RKBA].

per cent of the one hundred non-bidder-owned shares, meaning it must now secure fifty-one shares. Since the twenty newly issued shares will not be tendered, the bidder must still source all fifty-one shares from the original pool of eighty independent shareholders. This raises the required tender rate from 51.25 per cent to 63.75 per cent of the original independent float, a significantly higher and potentially insurmountable hurdle.

If both conditions are met, the private placement should be struck down unless it serves to maximize shareholder choice by enhancing the bid or facilitating alternative offers. Reframing the inquiry in this manner aligns not only with the principles of NP 62-202 and the commissions' jurisprudence on defensive measures, but also ensures that securities regulators remain focused on their core public interest mandate and do not become entangled in fiduciary duty assessments that are properly within the courts' jurisdiction rather than the realm of securities regulation. This is not to suggest that the framework exhausts all relevant considerations or dictates the outcome mechanically; residual public interest considerations will remain. But it can nonetheless serve as a principled guide for intervention, helping commissions stay within their mandate while leaving fiduciary issues to the courts.

B. What About Defensive Measures with Shareholders' Support?

I acknowledge that the methodology I have advanced here can be challenged on the basis that it is not fully supported by all commission decisions on defensive measures. Notably, one could cite the decisions in *Neo* and *Pulse* to argue that securities commissions have endorsed the view that a target board, in fulfilling its fiduciary duties, can simply say no to an unsolicited bid.[197] However, as *Lionsgate* notes, these decisions cannot be interpreted broadly as signaling a sweeping departure from the longstanding jurisprudence on defensive measures.[198] If simply saying no to a hostile bid means that the target board is effectively depriving shareholders of the opportunity to respond to a bid, such an outcome is

197 *Neo Material Technologies Inc et al*, 2009 ONSEC 32 [*Neo*]; *Pulse Data Inc, Re*, 2007 ABASC 895 [*Pulse*].

198 *Lionsgate*, *supra* note 8 at paras 83–86.

incompatible with the core objective of the Canadian takeover bid regime which, as expressed in NP 62-202, is to protect target shareholders.[199]

Moreover, *Neo* and *Pulse* involved unique factual circumstances that justified the conclusion that the defensive measures in question—specifically, the shareholder rights plans—were not abusive of shareholder rights and did not warrant regulatory intervention. In *Neo*, for instance, the rights plan adopted in response to Pala Investments' hostile bid was overwhelmingly approved by shareholders: 81.24 per cent of shares voted in favour, with 82.74 per cent of Neo's shares represented at the meeting.[200] There was no evidence that shareholders were misled or pressured into approving the plan.[201] Thus, it could only be found that the shareholder rights plan was in the best interests of shareholders because they supported its adoption.

Moreover, Pala's bid was a partial bid, initially seeking approximately 20 per cent of Neo's outstanding shares, later revised downward to 9.5 per cent.[202] Under the current bid regime, which discourages partial bids, such an offer would likely fail as Pala would not have been able to take up the desired shares without meeting the 50 per cent minimum tender condition. Under section 2.29.1 of NI 62-104, a bidder must secure tenders for at least 50 per cent of the outstanding securities held by shareholders other than the bidder and its joint actors before taking up any shares.[203] Given the overwhelming shareholder support for the rights plan, Pala's bid was effectively precluded from meeting this threshold.

A similar conclusion can be drawn from the Alberta Securities Commission's decision in *Pulse*.[204] In *Pulse*, the shareholder rights plan in question was approved by a large majority of shareholders, with 74.86 per cent of votes cast in favour.[205] Excluding the shares controlled by the offeror, support for the plan exceeded 98 per cent. Furthermore, the 50 per cent minimum tender condition embedded in the rights plan aligned

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199 *Ibid* at para 84.

200 *Neo*, *supra* note 197 at para 49(4).

201 *Ibid* at paras 49(5), 71, 73.

202 *Ibid* at paras 2, 8, 26–28.

203 NI 62-104, *supra* note 2, s 2.29.1.

204 *Supra* note 197.

205 *Ibid* at paras 68–69.

with the current bid regime's explicit requirements.[206] Thus, the rights plan did not deprive shareholders of the opportunity to tender to the bid. The bidder could have still succeeded had it met the minimum tender threshold, demonstrating that the defensive measure was not an impediment to a fair takeover process.

Overall, these factors distinguish *Neo* and *Pulse* from decisions on private placements, where defensive measures were not approved by shareholders. I therefore submit that there is no need to frame *Neo* and *Pulse* as endorsing a target board's absolute right to reject an unsolicited bid or to require securities commissions to defer to board business judgment or conduct a *BCE*-style fiduciary analysis. Rather, these decisions illustrate regulators' reluctance to intervene when a hostile bidder cannot succeed simply because the bid has been effectively rejected by the majority of the target shareholders.

CONCLUSION

The core purpose of defensive strategy regulation in Canada is to protect target shareholders and their right to decide what to do with their property. In the context of a bid, the regime seeks to ensure that shareholders and not management ultimately determine such a bid's success or failure. This principle is not only embedded in NP 62-202 but has also been reinforced by longstanding securities commission jurisprudence which places shareholder choice above board discretion.

As I have argued, however, the *Hecla* and *Mithaq* decisions mark a retreat from this core objective. In both cases, rather than focusing on whether private placements improperly restricted shareholder choice, the commissions strayed into the judicial realms of business judgment and fiduciary duties and upheld the placements on these bases. Not only are these areas not properly within the purview of the securities commission, but also, focusing on them relegates shareholder choice and improperly empowers management. Furthermore, this shift could have the effect of diluting the role of securities regulators in maintaining an open and even-handed takeover bid process and risks legitimizing private placements as

206 For this requirement, see NI 62-104, *supra* note 2, s 2.29.1.

covert defensive tactics that, in effect, are contrary to the regulatory regime's goal.

These decisions represent a missed opportunity to articulate a clear and principled regulatory approach to private placements in the unsolicited bid context. I therefore propose that any private placement that does not enhance shareholder options or returns—but instead effectively deprives shareholders of the ability to tender their shares to a bid—should be struck down regardless of the purported rationale behind the placement. The central premise of my framework is that NP 62-202, which governs the oversight of defensive strategies, is concerned with the effects of defensive strategies on shareholder choice, not the intentions of management in adopting them.[207]

This effect-focused approach would align with the commissions' historical treatment of poison pills and prevent the commissions from becoming entangled in corporate law inquiries beyond their public interest mandate. Most importantly, such an approach would recentre shareholder interests in the regulatory analysis of defensive measures and ensure that private placements, like poison pills, are only permitted when they serve to increase shareholder value. Despite the precedential path that *Mithaq* and *Hecla* present, my critique of these decisions and the path forward I have proposed may assist securities commissions in future cases as they consider both precedent and their regulatory mandate.

Going forward, securities regulators who adopt this approach will bring a more management-skeptical and effect-focused lens to the scrutiny of defensive measures, whether poison pills or private placements, to ensure such measures do not undermine the principle of shareholder choice that lies at the heart of Canada's takeover bid regime. In doing so, commissions can restore clarity to the application of NP 62-202 and fulfill their mandate as stewards of an open, efficient, and even-handed bid process.

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207 NP 62-202, *supra* note 7, ss 1.1(2), 1.1(5)–(6).