

HECLA DECISION—THE BRITISH COLUMBIA SECURITIES COMMISSION CONTINUES TO NARROW THE USE OF THE PUBLIC INTEREST POWER

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On October 24, 2016, the Ontario Securities Commission (**OSC**) and British Columbia Securities Commission (**BCSC**, together with the OSC, the "**Commissions**") released their joint reasons relating to the proposed private placement undertaken by Dolly Varden Silver Corporation ("**Dolly Varden**") in the context of an unsolicited take-over bid by Hecla Mining Company ("**Hecla**").^[1] The proceedings were closely watched as this was the first hostile bid since Canada's amended take-over bid rules took effect in May 2016.^[2]

Background

In June 2016, Hecla announced its intention to acquire Dolly Varden by way of an insider bid (the "**Offer**") subject to Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**). Shortly thereafter, Dolly Varden announced its intention to undertake a private placement financing (the "**Private Placement**").

Hecla subsequently filed applications with the BCSC and OSC seeking to cease trade the Private Placement on the basis that it was an abusive defensive tactic under National Policy 62-202 – *Take-Over Bids – Defensive Tactics*.

Dolly Varden then applied to the OSC to cease trade the Offer on the basis that Hecla's circular did not include a formal valuation as required by MI 61-101. Although the BCSC has not adopted MI 61-101, Dolly Varden also applied for the same relief from the BCSC under its public interest authority.

In the joint decision, the Commissions upheld the Private Placement. However, the Commissions reached disparate conclusions with respect to the Dolly Varden application. Whereas the OSC ordered Hecla to provide a formal valuation and otherwise to comply with the requirements of MI 61-101, the BCSC declined to make a similar order under its public interest power.

As previously noted, MI 61-101 has not been adopted by the BCSC. Therefore, the BCSC's analysis of this issue involved a determination of whether Hecla's failure to include a formal valuation in the circular was contrary to

the public interest, thereby permitting the BCSC to invoke its public interest jurisdiction to cease trade the Offer.

BCSC Public Interest Analysis

In deciding whether to exercise its public interest jurisdiction, the Panel revisited its recent decision in *Re Carnes*.^[3] In that case, the BCSC concluded that, in the enforcement context (i.e., decisions not directly related to M&A or other capital market transactions), where the *Securities Act* (British Columbia) (the "**Act**") prohibits specific conduct, the public interest power should only be used in "very rare circumstances"—that is, where the conduct is abusive of the capital markets^[4]—to sanction that type of conduct absent a breach of securities laws. However, where the Act does not prohibit the type of conduct in question, the abuse standard "may or may not be the applicable test."^[5]

In *Hecla*, the BCSC noted that, notwithstanding that this was not an enforcement decision, the public interest power should be narrowly applied given its potentially significant impact on the transaction and on the shareholders of Dolly Varden. Accordingly, the Panel would have to find abuse of the capital markets or investors in order to exercise its public interest power. The Panel then concluded that, since (i) the Private Placement would result in a 40% dilution and was negotiated at arm's length at an issue price lower than that offered by Hecla, and (ii) Hecla did not appear to have material undisclosed information that would make the Offer, without a valuation, abusive, the BCSC should not require a formal valuation as a matter of public interest.

There has been debate as to whether the public interest power should be exercised absent a breach of securities laws only in circumstances where the conduct or transaction is clearly "abusive", or whether it may also be exercised "where the market conduct engages the animating principles of [securities legislation]."^[6] We believe that neither position provides a cogent or transparent basis for the exercise of the public interest power.^[7] The decision in *Hecla* further supports the proposition that use of the animating principles standard may be waning. However, the application of the abuse standard has, once again, served merely as shorthand for a conclusion reached by the Panel. Although the Panel outlined its rationale for not exercising its public interest authority, it entirely sidestepped an explanation of what exactly constitutes "abuse" under this standard. We continue to believe that securities regulators should be able to develop a standard that is cogent and transparent, where the results of its application are predictable and easily understood by securities law practitioners and market participants alike.^[8]

by Paul Davis and Allison Vale

[1] *Re Hecla Mining*, 2016 BCSECCOM 359 (October 24, 2016); *Re Hecla Mining Company* (2016), 39 OSCB 8927 [*Hecla*].

[2] For an overview of the adopted amendments, see Paul Collins, Paul Davis and Adam Kline, "[For The Times They Are A-Changin: Canadian Regulators Adopt Fundamental Changes to the Take-over Bid Regime](#)" (March 2016).

[3] 2015 BCSECCOM 187 (May 14, 2015).

[4] *Ibid* at para 131.

[5] *Ibid* at para 132. In response to this conclusion, we suggested that, with respect to the exercise of the public interest power, the distinction between enforcement and other decisions was a tenuous one (see Paul Davis & Samantha Gordon, "[British Columbia Securities Commission Seeks to Limit Exercise of Public Interest Power in the Enforcement Context](#)" (May 2015).

[6] *Re Biovail Corp* (2010), 33 OSCB 8914 at para 382.

[7] Paul Davis, et al "[Justifiable Expectations Standard: The Basis for the Exercise of the Public Interest Power of the Ontario Securities Commission](#)" (August 2014).

[8] *Ibid*.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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