2.2

Décisions

2.2 DÉCISIONS

Bureau de décision et de révision
en valeurs mobilières

PROVINCE DE QUÉBEC
MONTRÉAL

DOSSIER N^{O} : 2006-022

N° DE DÉCISION : 2006-022-005

DATE : Le 3 juillet 2007

EN PRÉSENCE DE : M^{e} GÉRALD LA HAYE

AUTORITÉ DES MARCHÉS FINANCIERS

DEMANDERESSE

c.

JACQUES GAGNE

et

MARTINE GRAVEL

et

9112-2192 QUEBEC INC.

et

9151-2632 QUEBEC INC.

et

DANIEL BELANGER

INTIMES

et

BANQUE NATIONALE DU CANADA

et

BANQUE CIBC

MISES EN CAUSE

PROLONGATION D'UNE ORDONNANCE DE BLOCAGE
[art. 250 (2^{e} AL.), *Loi sur les valeurs mobilières* (L.R.Q., chap. V-1.1) & art. 93 (3°), *Loi sur l'Autorité des marchés financiers* (L.R.Q., chap A-33.2)]

M^{e} Jacques Breton
Procureur de l'Autorité des marchés financiers

Date d'audience : 28 juin 2007

DÉCISION

LES FAITS

Le 19 octobre 2006, à la demande de l'Autorité des marchés financiers (ci-après, « l'Autorité »), le Bureau de décision et de révision en valeurs mobilières (ci-après, le « Bureau ») a prononcé, notamment,

une ordonnance de blocage visant les comptes des sociétés intimées1, en vertu des articles 249 et 323.7 de la Loi sur les valeurs mobilières2 et de l'article 93 (3°) de la Loi sur l'Autorité des marchés financiers3.

Le 3 janvier 2007, l'Autorité saisissait le Bureau d'une demande à l'effet de prolonger ladite ordonnance de blocage pendant 90 jours. Cette demande a été entendue le 8 janvier 2007 et, suite à cette audience, et à la même date, le Bureau prononçait la décision n° 2006-022-03 à l'effet de prolonger le blocage initial jusqu'au 16 avril 20074.

Le 15 mars 2007, l'Autorité a adressé au bureau une demande à l'effet de prolonger le susdit blocage pour une nouvelle période de 90 jours. Suite à cette demande, le Bureau a adressé un avis aux intimés et aux mises en cause daté également du 15 mars 2007 pour les convoquer à une audience devant se tenir le 12 avril 2007. Suite à cette audience, le Bureau a prononcé une décision, datée du 13 avril 2007, par laquelle il accueillait la demande de prolongation de blocage du Bureau jusqu'au 14 juillet 20075.

Le 8 juin 2007, l'Autorité adressait à nouveau une demande de prolongation de blocage au Bureau qui convoquait alors les parties pour une audience devant se tenir le 28 juin 2007, à son siège. Quelques jours avant l'audience, le procureur de Jacques Gagné et de Martine Gravel adressait une lettre au secrétariat du tribunal afin d'informer le Bureau qu'il ne contesterait pas la demande de prolongation de blocage de l'Autorité.

L'AUDIENCE

L'audience s'est tenue au siège du Bureau le 28 juin 2007, tel que prévu. Le tout s'est déroulé en l'absence du procureur des intimés Jacques Gagné et de Martine Gravel mais aussi sans que les autres intimés ou mises en cause soient présents, encore que toutes les parties aient reçu signification de l'avis d'audience du Bureau et de la demande de l'Autorité.

Le procureur de l'Autorité a fait entendre le témoignage d'un enquêteur de la direction des enquêtes de l'Autorité ; ce dernier a indiqué au tribunal que, dans ce dossier, l'enquête de la demanderesse n'est pas encore terminée et que les motifs du blocage initial existent toujours. Il fut aussi traité du contenu des comptes, de l'identité des personnes au nom desquelles ils sont ouverts et des possibilités de recours judiciaires pouvant être exercés à l'égard de leur contenu.

LA DÉCISION

Le Bureau tient à rappeler qu'il considère que le but d'un blocage de fonds est de protéger les intérêts des épargnants. Le 2e alinéa de l'article 250 de la Loi sur les valeurs mobilières6 prévoit que le Bureau peut prolonger une ordonnance de blocage si les personnes intéressées ne manifestent pas leur intention de se faire entendre et si elles n'arrivent pas à établir que les motifs de l'ordonnance de blocage initiale ont cessé d'exister. Or, les intimés dans le présent dossier ne se sont pas prévalus de la possibilité de s'objecter au renouvellement de l'ordonnance de blocage qui lui est offerte par la loi.

De plus, l'Autorité a fait entendre le témoignage d'un de ses enquêteurs, faisant ainsi la preuve des motifs positifs justifiant la prolongation du blocage. Par conséquent, le Bureau de décision et de révision en valeurs mobilières estime que les exigences prévues à la loi sont respectées et que, conformément aux dispositions de l'article 323.5 de la Loi sur les valeurs mobilières7, l'intérêt public justifie de donner suite à la demande de prolongation de blocage qui lui a été présentée par l'Autorité des marchés financiers.

De ce fait, après avoir pris connaissance de la demande de l'Autorité, tenant compte de l'absence de contestation de cette demande de la part des intimés Jacques Gagné et Martine Gravel, de l'absence des autres intimés et mises en cause, malgré que l'avis de convocation du Bureau leur ait été dûment signifié, et de la preuve soumise lors de l'audience du 28 juin 2007, le Bureau, en vertu du deuxième alinéa de

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1. *Autorité des marchés financiers* c. *Jacques Gagné, Martine Gravel, 9112-2192 Québec Inc., 9151-2632 Québec Inc*. et *als.,* 10 novembre 2006, Vol. 3, n° 45, BAMF, 17.
2. L.R.Q., c. V-1.1.
3. L.R.Q., c. A-33.2.
4. *Autorité des marchés financiers* c. *Jacques Gagné, Martine Gravel, 9112-2192 Québec Inc., 9151-2632 Québec Inc*. et *als.,* 2 février 2007, Vol. 4, n° 4, BAMF 18.
5. *Autorité des marchés financiers* c. *Jacques Gagné, Martine Gravel, 9112-2192 Québec Inc., 9151-2632 Québec Inc*. et *als.*, 27 avril 2007, Vol. 4, n° 17, BAMF, 20.
6. Précitée, note 2.
7. *Ibid.*

l'article 250 de la Loi sur les valeurs mobilières8 et de l'article 93 (3°) de la Loi sur l'Autorité des marchés financiers9, accueille la demande de prolongation de blocage :

- il ordonne à la Banque nationale du Canada, sise au 6250, rue Cousineau, St-Hubert, Québec, J3Y 8X9, de ne pas se départir des fonds en dépôt dans le compte portant le numéro no 2567197 ainsi que dans tous les autres comptes au nom de 9151-2632 Québec inc. ; et
- il ordonne à la Banque CIBC, sise au 5950, rue Cousineau, St-Hubert, J3Y 7R9, de ne pas se départir des fonds en dépôt dans le compte portant le numéro no 7702914 ainsi que dans tous les autres comptes au nom de 9112-2192 Québec inc.

Cette décision entrera en vigueur à compter de la date à laquelle elle est prononcée et le demeurera jusqu'au 26 septembre 2007 inclusivement, à moins qu'elle ne soit ultérieurement modifiée ou abrogée par le Bureau.

Fait à Montréal, le 3 juillet 2007

(S) Gerald La Haye
M^{e} Gérald La Haye, membre

COPIE CONFORME

(S) Claude St Pierre
Claude St Pierre, secrétaire général
Bureau de décision et de révision en valeurs mobilières

8. *Ibid.*
9. Précitée, note 3.

2.2 DÉCISIONS (SUITE)

Bureau de décision et de révision
en valeurs mobilières

PROVINCE DE QUÉBEC

MONTRÉAL
DOSSIER N^{o} : 2007-012

DÉCISION N°: 2007-012-001

DATE : le 18 juin 2007

EN PRÉSENCE DE : M^{e} JEAN-PIERRE MAJOR
M^{e} ALAIN GÉLINAS

AUTORITÉ DES MARCHÉS FINANCIERS
800, Square Victoria, 22^{e} étage, Montréal (Québec) H4Z 1G3

DEMANDERESSE

c.

NORMAND BOUCHARD
3840, rue Saint-Denis, Montréal (Québec), H2W 2M2

INTIMÉ

ORDONNANCE D'INTERDICTION D'OPÉRATION SUR VALEURS
[arts. 265 & 323.7, *Loi sur les valeurs mobilières* (L.R.Q., chap. V-1.1) & art. 93 (6°), *Loi sur l'Autorité des marchés financiers* (L.R.Q., chap. A-33.2)]

M^{e} Richard Proulx
Procureur de l'Autorité des marchés financiers

Date d'audience : 15 juin 2007

DÉCISION

Le 15 juin 2007, l'Autorité des marchés financiers (ci-après l' « *Autorité* ») a saisi le Bureau de décision et de révision en valeurs mobilières (ci-après le « *Bureau* ») d'une demande *ex parte* afin qu'il prononce une ordonnance à l'effet d'interdire à Normand Bouchard, intimé en la présente instance, d'effectuer toute opération sur valeurs. Cette décision a été demandée en vertu de l'article 265 de la *Loi sur les valeurs mobilières* du Québec[1] ainsi que du paragraphe 6° de l'article 93 de la *Loi sur l'Autorité des marchés financiers*[2].

Elle a été présentée au Bureau en vertu de l'article 323.7 de la *Loi sur les valeurs mobilières*[3] selon lequel il est loisible au Bureau de prononcer une décision affectant défavorablement les droits d'une personne sans audition préalable, lorsqu'un motif impérieux le requiert.

À cet égard, l'Autorité a déposé avec sa demande l'affidavit requis par l'article 19 du *Règlement sur les règles de procédure du Bureau de décision et de révision en valeurs mobilières*[4], en vertu duquel une demande fondée sur des motifs impérieux doit être accompagnée d'une déclaration sous-serment écrite à l'appui des faits de la demande et des motifs impérieux. Des copies conformes de la demande de l'Autorité et de la déclaration sous-serment sont annexées à la présente décision.

1. L.R.Q., c. V-1.1.
2. L.R.Q., c. A-33.2.
3. Précitée, note 1.
4. (2004) 136 G.O. II, 4695.

LES FAITS

À l'appui de se demande, l'Autorité a soumis au Bureau les faits suivants :

1. Normand Bouchard est domicilié au 3840, rue Saint-Denis, Montréal (Québec), H2W 2M2.
2. Millenia Hope inc. est une société dont les actions sont inscrites aux États-Unis sur le marché «Pink Sheets».
3. Le siège social de Millenia Hope inc. est situé au 1250, boulevard René-Lévesque Ouest, Montréal (Québec) H3B 4W8.
4. L'enquête a démontré les faits suivants.
5. Une annonce similaire à celle-ci est publiée dans un journal local, comme celle-ci dans le journal « *L'expression* » en septembre 2006:

   « $$$$$ Aide financière $$$$$ Si vous possédez un CRI (fonds de pension ex-employeur) FRV (fonds de revenu viager) Aucun refus, transaction rapide et sérieuse (514) 983-2608 »

6. Le *modus operandi* est le suivant.
7. L'investisseur téléphone à ce numéro et entre en contact avec Normand Bouchard.
8. L'investisseur ouvre un compte auprès d'un courtier en valeurs mobilières, notamment « Courtage à escompte Banque Nationale », aujourd'hui « Courtage Direct Banque Nationale Inc. » ou « Desjardins courtage en ligne Disnat ».
9. L'investisseur transfère dans son compte de courtage les sommes d'argent détenues dans son CRI.
10. L'investisseur confie son code d'usager et son NIP de son compte de courtage à Normand Bouchard.
11. Normand Bouchard achète des actions de la société Millenia Hope inc.
12. Ainsi, en septembre 2006, un investisseur a transféré la somme de 37 000 $ alors que Normand Bouchard lui aurait promis en échange de sa participation à ce stratagème 5 000 $ comptant mais finalement l'investisseur a reçu seulement 2 707,83 $.
13. Le numéro de téléphone (514) 983-2608 est détenu par Normand Bouchard et la facturation est adressé au 3840, rue Saint-Denis, Montréal (Québec), H2W 2M2.
14. L'enquête démontre que des annonces similaires ont été publiées dans les derniers mois dans différents journaux locaux et sur Internet en faisant référence au même numéro de téléphone.
15. Entre le 1er janvier 2007 et le début de mai 2007, Courtage Direct Banque Nationale Inc. a retracé des actions de Millenia Hope inc. dans le compte de quatorze clients et l'enquête démontre que neuf clients ont acquis leurs actions par l'intermédiaire de Normand Bouchard.

À l'appui de sa demande, l'Autorité a soumis les arguments suivants :

a. Normand Bouchard exerce l'activité de courtier en valeurs sans être inscrit auprès de la demanderesse, en contravention de l'article 148 de la *Loi sur les valeurs mobilières*[5] ;

b. Il est impérieux pour la protection des investisseurs que le Bureau de décision et de révision en valeurs mobilières prononce sa décision sans audition préalable conformément à l'article 323.7 de la *Loi sur les valeurs mobilières*[6].

L'AUDIENCE

L'audience *ex parte* s'est tenue au siège du Bureau le 15 juin 2007. Le procureur de l'Autorité a fait entendre le témoignage d'un enquêteur de cet organisme; cette personne a fait état des faits qui sont invoqués à l'appui de sa demande et a répondu aux questions des membres sur le tout.

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5. Précitée, note 1.
6. *Ibid.*

L'ANALYSE

Un des objectifs des ordonnances émises en fonction de l'intérêt public est la protection des investisseurs. Le Bureau tient à rappeler que le marché des valeurs mobilières est basé sur la confiance des investisseurs vis-à-vis de la législation en valeurs mobilières, des bourses, des firmes et des organismes de réglementation ou d'autoréglementation. La première ligne de défense des marchés financiers repose sur un document d'information adéquat et sur l'intégrité, la solvabilité et la compétence des professionnels agissant auprès des investisseurs.

L'honorable juge Iacobucci de la Cour suprême rappelait ainsi, dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*[7], l'importance de l'encadrement des personnes inscrites au sein de la structure réglementaire de l'industrie des valeurs mobilières au Canada ainsi que sur le but de la législation :

> « Comme je l'ai déjà mentionné, les lois sur les valeurs mobilières visent avant tout à protéger le public investisseur. Dans l'arrêt (*Brosseau*), notre Cour a reconnu l'importance de cet objectif lorsqu'il faut procéder à l'examen de décisions prises par des commissions des valeurs mobilières; le juge L'Heureux-Dubé, s'exprimant au nom de notre Cour, dit, à la p. 314:
>
> > D'une manière générale, on peut dire que les lois sur les valeurs mobilières visent à réglementer le marché et à protéger le public. Cette Cour a reconnu ce rôle dans l'arrêt *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584, dans lequel le juge Fauteux a fait remarquer à la p. 588:
> >
> > [TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont honnêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.
> >
> > Ce rôle protecteur, qui est commun à toutes les commissions des valeurs mobilières, donne à ces organismes un caractère particulier qui doit être reconnu lorsqu'on examine la manière dont leurs fonctions sont exercées aux termes des lois qui leur sont applicables.»[8]

Face à l'objectif de la loi de protéger les investisseurs, le Bureau est particulièrement inquiet des faits suivants qui ont été soulevés par l'enquêteur et par l'analyse de la demande :

- la publicité effectuée auprès du public en général au cours des derniers mois dans différents journaux locaux;
- le fait que l'investisseur confie son code d'usager et son NIP à l'intimé;
- la difficulté pour un investisseur d'obtenir le montant promis;
- le manque de diversification des investissements effectués; et
- l'allégation à l'effet que Normand Bouchard exerce l'activité de courtier en valeurs sans être inscrit à ce titre auprès de l'Autorité des marchés financiers.

LA DÉCISION

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7. *Pezim c. Colombie-Britannique (Superintendent of Brokers)* [1994] 2 R.C.S. 557.
8. *Ibid.*

La preuve présentée par l'Autorité a convaincu le Bureau de l'existence de motifs sérieux pour l'émission immédiate d'une ordonnance d'interdiction d'opération sur valeurs, compte tenu de l'intérêt public. Ainsi, après avoir pris connaissance de la demande de l'Autorité des marchés financiers, de la preuve présentée et des arguments de cette dernière entendus pendant l'audience du 15 juin 2007, le Bureau arrive à la conclusion que la demande d'interdiction d'opération sur valeurs introduite par l'Autorité est bien fondée.

En conséquence, le Bureau de décision et de révision en valeurs mobilières, en vertu de l'article 93 paragraphe 6° de la *Loi sur l'Autorité des marchés financiers*[9] et de l'article 265 et 323.7 de la *Loi sur les valeurs mobilières*[10], prononce l'interdiction d'opération sur valeurs suivante :

> Il interdit à Normand Bouchard toute activité, directement, indirectement ou via Internet, en vue d'effectuer toute opération sur valeurs, notamment le placement des actions de la société Millenia Hope inc.

En application du second alinéa de l'article 323.7 de la *Loi sur les valeurs mobilières*[11], le Bureau informe l'intimé qu'il pourra tenir une audience dans les quinze jours de la présente décision, dans la salle d'audience *Paul Fortugno* qui est située au 500 boulevard René-Lévesque ouest, bureau 16.40, à Montréal (Québec). Il lui appartient alors de communiquer avec le secrétaire général du Bureau au 1-877-873-2211, pour l'informer qu'il entend exercer son droit d'être entendu.

L'intimé est aussi invité à prendre note qu'une partie a le droit de se faire représenter par un avocat[12].

L'ordonnance d'interdiction d'opération sur valeurs demeurera en vigueur jusqu'à ce qu'elle soit modifiée ou abrogée.

Fait à Montréal, le 18 juin 2007

(S) Jean-Pierre Major
M^{e} Jean-Pierre Major, vice-président

(S) Alain Gélinas
M^{e} Alain Gélinas, vice-président

COPIE CONFORME

(S) Claude St Pierre
Claude St Pierre, secrétaire général
Bureau de décision et de révision en valeurs mobilières

DEMANDE

BUREAU DE DÉCISION ET DE RÉVISION
EN VALEURS MOBILIÈES

PROVINCE DE QUÉBEC
MONTRÉAL

DOSSIER N°:

AUTORITÉ DES MARCHÉS FINANCIERS
800, square Victoria, 22^{e} étage
Montréal (Québec) H4Z 1G3
DEMANDERESSE

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9. Précitée, note 2.
10. Précitée, note 1
11. *Ibid.*.
12. *Règlement sur les règles de procédure du Bureau de décision et de révision en valeurs mobilières*, précité, note 4, art. 31.

c.

NORMAND BOUCHARD
3840, rue Saint-Denis
Montréal (Québec) H2W 2M2
INTIMÉ

Demande de l'Autorité des marchés financiers en vertu du paragraphe 6° de l'article 93 de la *Loi sur l'Autorité des marchés financiers*, L.R.Q., c. A-7.03 et des articles 265 et 323.7 de la *Loi sur les valeurs mobilières*, L.R.Q., c. V-1.1.

1. Normand Bouchard est domicilié au 3840, rue Saint-Denis, Montréal (Québec), H2W 2M2.
2. Millenia Hope inc. est une société dont les actions sont inscrites aux États-Unis sur le marché «Pink Sheets».
3. Le siège social de Millenia Hope inc. est situé au 1250, boulevard René-Lévesque Ouest, Montréal (Québec) H3B 4W8.
4. L'enquête a démontré les faits suivants.
5. Une annonce similaire à celle-ci est publiée dans un journal local, comme celle-ci dans le journal « L'expression » en septembre 2006:

   « $$$$$ Aide financière $$$$$ Si vous possédez un CRI (fonds de pension ex-employeur) FRV (fonds de revenu viager) Aucun refus, transaction rapide et sérieuse (514) 983-2608 »
6. Le *modus operendi* est le suivant.
7. L'investisseur téléphone à ce numéro et entre en contact avec Normand Bouchard.
8. L'investisseur ouvre un compte auprès d'un courtier en valeurs mobilières, notamment « Courtage à escompte Banque Nationale », aujourd'hui « Courtage Direct Banque Nationale Inc. » ou « Desjardins courtage en ligne Disnat ».
9. L'investisseur transfère dans son compte de courtage les sommes d'argent détenues dans son CRI.
10. L'investisseur confie son code d'usager et son NIP de son compte de courtage à Normand Bouchard.
11. Normand Bouchard achète des actions de la société Millenia Hope inc.
12. Ainsi, en septembre 2006, un investisseur a transféré la somme de 37 000 $ alors que Normand Bouchard lui aurait promis en échange de sa participation à ce stratagème 5 000 $ comptant mais finalement l'investisseur a reçu seulement 2 707,83 $.
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14. L'enquête démontre que des annonces similaires ont été publiées dans les derniers mois dans différents journaux locaux et sur Internet en faisant référence au même numéro de téléphone.
15. Entre le 1er janvier 2007 et le début de mai 2007, Courtage Direct Banque Nationale Inc. a retracé des actions de Millenia Hope inc. dans le compte de quatorze clients et l'enquête démontre que neuf clients ont acquis leurs actions par l'intermédiaire de Normand Bouchard.
16. Normand Bouchard exerce l'activité de courtier en valeurs sans être inscrit auprès de la demanderesse, en contravention de l'article 148 de la *Loi sur les valeurs mobilières*, L.R.Q., c. V-1.1 (ci-après : « LVM »).
17. Il est impérieux pour la protection des investisseurs que le Bureau de décision et de révision en valeurs mobilières prononce sa décision sans audition préalable conformément à l'article 323.7 de la LVM.

EN CONSÉQUENCE, la demanderesse demande au Bureau de décision et de révision en valeurs mobilières en vertu du paragraphe 6° de l'article 93 de la *Loi sur l'Autorité des marchés financiers* et des articles 265 et 323.7 de la *Loi sur les valeurs mobilières :*

D'INTERDIRE à Normand Bouchard toute activité, directement, indirectement ou via Internet, en vue d'effectuer toute opération sur valeurs, notamment le placement des actions de Millenia Hope inc.

DE DÉCLARER en vertu de l'article 323.7 de la *Loi sur les valeurs mobilières* que la décision du Bureau de décision et de révision en valeurs mobilières entre en vigueur sans audition préalable et de donner à Normand Bouchard l'occasion d'être entendu dans un délai de 15 jours.

Fait à Montréal, le 15 juin 2007

(S) Girard et al.
GIRARD ET AL.
Procureurs de l'Autorité des marchés financiers

COPIE CONFORME

(S) Claude St Pierre
Claude St Pierre, secrétaire général
Bureau de décision et de révision en valeurs mobilières

AFFIDAVIT

Je, soussigné, Frédéric Marchand, exerçant au 800, square Victoria, 22ième étage, dans la ville et le district de Montréal, affirme solennellement ce qui suit :

1. Je suis enquêteur à l'Autorité des marchés financiers.
2. Je suis enquêteur dans le dossier de Normand Bouchard et als.
3. Tous les faits allégués à la présente demande concernant normand Bouchard sont vrais.

EN FOI DE QUOI, J'AI SIGNÉ À MONTRÉAL,
Ce 15 juin 2007

(S) Frédéric Marchand
Frédéric Marchand

Affirmé solennellement devant moi à
Montréal, ce 15 juin 2007.
(S) Marie-Josée Locas
Commissaire à l'assermentation.

COPIE CONFORME

(S) Claude St Pierre
Claude St Pierre, secrétaire général
Bureau de décision et de révision en valeurs mobilières

2.2 DÉCISIONS (SUITE)

[CETTE DÉCISION EST LA TRADUCTION NON OFFICIELLE DE LA DÉCISION PUBLIÉE AU BULLETIN NO 15 DU 13 AVRIL 2007]

Bureau de décision et de révision en valeurs mobilières

PROVINCE DE QUÉBEC
MONTRÉAL

FILE No.: 2006-021

DECISION No.: 2006-021-02

DATE: April 4, 2007

BEFORE: Mtre GUY LEMOINE
Mtre MARK ROSENSTEIN
Mtre MICHELLE THÉRIAULT

NORTHERN FINANCIAL CORPORATION (APPLICANT)
v.

JAGUAR NICKEL INC. (RESPONDENT)
and

ONTARIO SECURITIES COMMISSION

and

AUTORITÉ DES MARCHÉS FINANCIERS

and

TORONTO STOCK EXCHANGE (TSX)

MIS EN CAUSE

DECISION ON THE APPLICATION FOR CEASE TRADING ORDERS
(s. 265, *Securities Act*, R.S.Q., c. V-1.1 and s. 93(6),
An Act respecting the Autorité des marchés financiers, R.S.Q., c. A-33.2)

Mtre Pierre Y. Lefebvre
Mtre Gilles Leclerc
Mtre Marie-Josée Neveu
Mtre Eleni Yanakis
Mtre David Hausman
Ms. Valérie Marchand, articling student
Fasken Martineau DuMoulin LLP
Counsel for the applicant

Mtre Louis-Martin O'Neill
Mtre William Brock
Mtre Cara Cameron
Mtre Neil Kravitz
Davies Ward Phillips & Vineberg LLP
Counsel for the respondent

Mtre Richard Proulx
Mtre Sylvain Gagnon
Counsel for the Autorité des marchés financiers, mis en cause

Dates of hearing: October 4, 12, 16 & 17, 2006

REASONS FOR DECISION

The reasons for the decision were written by Mtre Guy Lemoine.

Northern Financial Corporation ("Northern") has applied to the Bureau de décision et de révision en valeurs mobilières (the "Bureau") for cease trading orders pursuant to section 265 of the *Securities Act*[1] and section 93(6) of the *Act respecting the Autorité des marchés financiers*[2] in respect of the issuing of shares of Jaguar Nickel Inc. ("Jaguar") as well as the issuing of rights or the exercise of rights issued pursuant to the Jaguar Shareholder Rights Plan Agreement ("Rights Plan" or "Plan").

The need for a speedy decision led the Bureau to render its decision on October 30, 2006[3] and to file its reasons for decision at a later date.

THE PARTIES

JAGUAR NICKEL INC.

Jaguar is a Québec company continued under Part 1A of the Québec *Companies Act*.[4] It is a reporting issuer in Québec and in various provinces. The shares of Jaguar are listed on the Toronto Stock Exchange (TSX:JNI).

The company's 108,096,432 shares are distributed among a large number of shareholders. With the exception of Northern, which is the holder of record or owner of approximately 16,023,500 shares of Jaguar, or about 14.8% of the issued shares, no single person owns more than 5% of Jaguar shares.

Jaguar is a mining exploration and development company.

On January 31, 2006, it sold its primary mining assets to BHP Billiton Limited. Its primary assets are now composed of cash or short-term securities totaling approximately $30 million.

On May 1, 2006, Jaguar issued a press release announcing an agreement with First Nickel Inc. ("First Nickel") regarding a possible merger between the two companies.

On June 12, 2006, Jaguar announced that the parties to this planned transaction had agreed not to proceed with the contemplated merger.

Jaguar has considered other possibilities since then, but they have not yet materialized.

NORTHERN FINANCIAL CORPORATION

Northern is a financial enterprise operating out of Toronto. Its shares are listed on the Toronto Stock Exchange (TSX:NFC).

It began acquiring Jaguar shares in May 2006, with the collaboration of Romspen Investment Corporation ("Romspen"). On July 25, 2006, it issued a press release declaring that it owned 11,575,000 shares of Jaguar, representing approximately 10.7% of Jaguar's total shares, for investment purposes.

Northern subsequently continued to acquire additional shares of Jaguar.

DISCUSSIONS BETWEEN NORTHERN AND JAGUAR

On July 25, 2006, Mr. Alboini, the president of Northern, met with Mr. Eby, one of the directors of Jaguar, and informed him that Northern wished to consider the possibility of a transaction between one of the companies related to Northern, namely, Lakeside Steel Corporation ("Lakeside"), and Jaguar. Northern then indicated that Jaguar might receive further proposals for transactions with other companies related to Northern.

[1] R.S.Q., c. V-1.1.
[2] R.S.Q., c. A-33.2.
[3] *Northern Financial Corporation v. Jaguar Nickel Inc.et al* (December 1,2006), 2006-021-01, Vol. 3, no. 48, BAMF 20.
[4] R.S.Q. c. C-38.

At the time, Jaguar's board of directors was focusing its efforts on a possible transaction with Monterey Exploration Ltd. ("Monterey"), a private company in Alberta operating in the oil and gas exploration and development sector.

After considering various possibilities, including a transaction with Lakeside, Jaguar's board of directors concluded that the transaction with Monterey was its best option.

On August 15, 2006, Jaguar informed Northern that, while it might consider other possibilities, it planned to pursue its efforts to put together a transaction (to make a deal) with another party.

On September 15, 2006, Mr. Alboini informed Jaguar that Northern wished its nominees to be elected to Jaguar's board, such nominees to constitute a majority thereof, and that if this change were not implemented voluntarily, Northern would requisition a special meeting of shareholders and solicit proxies with a view to changing the composition of the board of directors. Northern was of the opinion that the solicitation would be well-received by Jaguar shareholders, particularly since the price of the company's shares had fallen in the preceding months from approximately $2.00 in January, 2004 to $0.30 at the time of the hearing.

On September 19, 2006, around 2:30 p.m., Northern filed a written requisition for a special meeting of Jaguar shareholders in order to remove the directors of Jaguar and to replace them with candidates proposed by Northern and related to either itself or Romspen. In its requisition, Northern informed Jaguar that its participation in the share capital of Jaguar was now 15,733,500 shares, representing approximately 14.6% of Jaguar's issued shares. That same day, Northern issued a press release relating the events of the day.

On September 26, 2006, Northern owned 16,023,500 shares of Jaguar.

Northern stated that it did not intend to launch a take-over bid for shares of Jaguar at the moment. It added that its intention was to solicit proxies in order to remove the current directors of Jaguar.

Jaguar, however, feared that Northern would gain control of its board of directors and would thereby have access to Jaguar's cash without having launched a bid to take over Jaguar's shares. Jaguar claimed that Northern's press releases disrupted its ongoing discussions with Monterey, and that Monterey was uncertain about whether it wanted to carry on negotiations with Jaguar, given that Northern held a significant block of shares of the company. According to Jaguar, the possibility that Northern might increase its holdings in Jaguar could discourage other strategic partners from considering partnership deals with Jaguar, to the detriment of all of Jaguar's shareholders.

THE RIGHTS PLAN

On September 19, 2006, around 5:43 p.m., Jaguar announced publicly that it had adopted a shareholder rights plan (a "poison pill"). In particular, it stated the following:

The Board has been actively reviewing various strategic alternatives for the Company and is concerned that the accumulation of a significant block of shares by one or more individual parties without an offer being made to all shareholders could have a prejudicial effect on the ongoing strategic alternative review and could deter interested parties from proceeding with potential beneficial transactions involving the Company.[5]

Jaguar's board of directors was particularly worried that Northern might increase its block of shares beyond 15% of Jaguar's issued shares and thereby hold a sufficient number to block the approval, by the majority of shareholders, of a business combination that would otherwise be in the best interest of the shareholders. In addition, if the transaction Jaguar was planning took the form of a merger, Northern would have an even greater ability to block the approval of the merger by-law, since a merger would require approval by two-thirds of the votes cast at a special shareholders' meeting.[6] What is more, according to Jaguar's board of directors, a holding of a block totalling more than 15% of Jaguar shares could deter potential partners from negotiating a partnership with Jaguar.

These fears were based on the fact that the stock ownership of Jaguar was very dispersed, primarily among many small investors. In addition, shareholder participation in Jaguar's meetings, either in person or by proxy, had been low in the past. At the last special shareholders' meeting, only 25% of the shares

[5] Jaguar press release, September 19, 2006. Exhibit D-1(g).
[6] *Companies Act*, *supra* note 4, s. 123.126.

were represented. According to Jaguar, ownership of over 15% of the shares would confer on Northern a disproportionate power at a shareholders' meeting held in order to approve a transaction that Jaguar's board of directors believed would be in the shareholders' best interest. In other words, according to Jaguar, given the history of low shareholder participation at Jaguar's meetings, Northern, with 15% of the shares, could block or veto a proposal brought before an upcoming meeting of Jaguar shareholders.

It was in this context that the triggering threshold in the Rights Plan was set at 15%. Essentially, as soon as one shareholder owned more than 15% of Jaguar's shares, the Plan allowed any other Jaguar shareholder to buy additional shares at a reduced price. The effect of the Plan would have been to dilute the value of the shares and the voting power of anyone who held more than 15% of Jaguar shares. These consequences were intended to restrict or eliminate any interest anyone might have in acquiring securities beyond the Plan's triggering threshold.

SUBSEQUENT EVENTS

On September 28, 2006, Jaguar announced that it had been working toward a business combination with Monterey. The press release suggested that its discussions with Monterey had been disrupted by Northern's requisition for a special meeting of Jaguar shareholders.

On or around October 4, 2006, Jaguar announced that it would hold a special meeting of its shareholders on December 6, 2006, and that the persons recorded on the shareholders ledger on October 11 would be entitled to vote.

On October 6, 2006, Jaguar made some amendments to its Plan.

THE POSITION OF NORTHERN

As noted above, Northern has asked the Bureau to make an order to cease trade activity pursuant to section 265 of the *Securities Act*[7] and section 93(6) of the *Act respecting the Autorité des marchés financiers*[8] in respect of the issuing of shares of Jaguar and the issuing of rights or the exercise of rights issued under the Rights Plan.

Northern is of the view that the *Securities Act*[9] enables any person to acquire up to 19.99% of any class of voting securities without proceeding by way of a take-over bid, provided that it complies with its disclosure requirements. It contests Jaguar's claim that its acquisition of more than 15% of Jaguar shares would have a negative effect on Jaguar's discussions with third parties regarding a business combination or restructuring.

Northern claims that setting the Plan's triggering threshold at 15% is contrary to the public interest because it is inconsistent with the spirit of the legislation (in Québec and in the rest of Canada), which provides that a take-over bid is required only once the threshold of 20% of a class of voting securities is reached. So far, defensive measures have only been permitted in the context of challenged take-over bids. Here, Jaguar's Rights Plan targets current market transactions that are in no way related to a process of competing take-over bids.

It argues that the *Institutional Shareholders Services* stipulates that rights plans should be set to trigger only once the 20% threshold is reached.

It claims that the directors of Jaguar are not entitled to exercise their power to issue new securities to prevent a shareholder from legally acquiring shares of Jaguar.

Even in the case of a take-over bid, *Notice 62-202 relating to Take-Over Bids — Defensive Tactics*[10] permits defensive tactics only when they are used in good faith to increase shareholders' options through a competitive auction process if the shareholders would be deprived of the ability to respond to a higher bid without such a measure. That is not the case here.

In this case, the Rights Plan actually deprives Northern of its ability to acquire additional shares of Jaguar legally and under normal conditions.

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[7] *Supra* note 1.
[8] *Supra* note 2.
[9] *Supra* note 1.
[10] 2003-07-18, vol. XXXIV, no. 28 BCVMQ – Supplement, 2 pages.

THE POSITION OF JAGUAR

Jaguar emphasizes that its board of directors is essentially composed of independent directors. It argues that its board has always acted reasonably and with the intention of defending the best interests of all of its shareholders. Its board of directors does not intend to entrench itself as demonstrated by the transaction it contemplated with First Nickel. Jaguar's board has been actively analyzing various transactions with other companies since the sale of its assets in January 2006.

According to Jaguar, Northern is trying to acquire enough shares of Jaguar to be in a position to block transactions.

In its arguments, it made the following allegations to support its position:

- Northern became a shareholder in Jaguar when its only assets were essentially cash;
- Northern's intention was to gain control of Jaguar and its cash. It also intended to acquire enough shares of Jaguar to block any business combination other than one that it supported;
- Northern acquired securities in order to promote a business combination between Jaguar and Lakeside, a company that it controlled;
- Northern wishes to have five persons to whom it is related elected to Jaguar's board of directors; as a result, Jaguar would no longer have any independent directors;
- Northern's plan for a business combination between a corporation that it controls and Jaguar was not fully disclosed to Jaguar shareholders;
- Jaguar's board has always fulfilled its obligations. It considered the proposed transaction with Lakeside, as well as several other transactions. It feels that the other transactions, including the business combination with Monterey, would be more advantageous than a transaction with Lakeside;
- Jaguar is in the process of negotiating a business combination with Monterey;
- Jaguar claims that Northern intends to block any transaction other than one that it proposes itself;
- Jaguar says that it enacted its Shareholder Rights Plan in response to its concerns regarding:
    - Northern's creeping accumulation of Jaguar shares, and
    - the indication by Northern that it would not consider the transaction proposals put forward by Jaguar's current board of directors.
- Stock ownership in Jaguar is very dispersed; besides Northern, no single shareholder owns more than 5% of its shares;
- Participation at shareholders' meetings is very low. At the last special meeting, only 25% of the shares were represented, either in person or by proxy;
- Northern knows that a 15% block of shares would probably be sufficient to block a proposal for a merger between Jaguar and another company;
- Northern's creeping accumulation of securities to gain the power to veto a business combination proposal and its attempt to take control of Jaguar without proceeding by way of a take-over bid are unfair, improper, and coercive with regard to the other shareholders;
- As there has been no take-over bid for Jaguar shares, the shareholders of this corporation have not been prevented from responding to such an offer;
- The other Jaguar shareholders have not been deprived of their ability to sell their shares on the public market;
- Jaguar shareholders have not been prevented from voting in favour of replacing the members of Jaguar's current board of directors.

Jaguar raises some additional arguments. In particular, it submits that a rights plan may be adopted whether or not there is a real or apprehended take-over bid. It also points out that the Bureau must use its

powers in the public interest and not to ensure compliance with or to protect a shareholder's private interest. Finally, it is of the view that it was justified in setting the Plan's triggering threshold at 15%.

For these reasons, it asks us to dismiss Northern's application.

THE DECISION OF OCTOBER 30, 2006

Because it was necessary to render a timely decision, the Bureau determined that it was appropriate in the circumstances to do as other Canadian securities commissions have done in the past[11] and proceed in two steps: first, to render a speedy decision and second, to publish the detailed reasons for this decision at a later date.

After having considered the evidence and the submissions of Northern, Jaguar, and the Autorité des marchés financiers that were presented at the hearings held on October 4, 12, 16, and 17, 2006, the Bureau determined that it was in the public interest to issue an order. On October 30, 2006, it made the following order:

[TRANSLATION]

Consequently, the Bureau de décision et de révision en valeurs mobilières, pursuant to section 265 of the *Securities Act*[12] and section 93(6) of the *Act respecting the Autorité des marchés financiers*,[13]

Allows the application of Northern Financial Corporation, and

Orders Jaguar Nickel Inc. to cease any securities transaction in respect of:

a) the issuing of shares of Jaguar under Jaguar's Shareholder Rights Plan, and

b) the issuing of rights or the exercise of rights issued under Jaguar's Shareholder Rights Plan.

On October 20, 2006, while the Bureau was still in deliberations, counsel for Jaguar submitted a written request for the Bureau to suspend the execution of the decision to be rendered for a period of five juridical days so that the parties might consider the possibility of an appeal.

On October 23, 2006, counsel for Jaguar[14] responded in writing to this letter, emphasizing it was important for the Bureau to proceed expeditiously and for it to render a speedy decision in this case, insisting that the Shareholder Rights Plan had been adopted following a requisition to convene a Jaguar shareholders' meeting aimed at replacing the company's board of directors. The meeting would take place on December 6.

The Bureau wishes to point out that the general principle governing the enforceability of its decisions is set out in section 267, first paragraph, and section 329 of the *Securities Act*. These provisions read as follows:

> 267. An order made under section 265 or 266 has effect from the time the person concerned is notified or becomes aware of it.
>
> 329. An appeal does not suspend the execution of the decision appealed from, unless the Bureau de décision et de révision en valeurs mobilières or a judge of the Court of Québec decides otherwise.

The Bureau also takes into account the time already elapsed since the coming into force of the Plan on September 19, 2006 and the fact that Jaguar's application[15] would be moot if the Plan remained in force during the appeal, and finds that it is in the public interest to prohibit its application immediately.[16]

REASONS FOR THE DECISION OF OCTOBER 30, 2006

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[11] See in particular the decisions of the Ontario Securities Commission of June 30, 2006 and August 17, 2005, reported in *In the matter of Falconbridge Limited*, Ontario Securities Commission, June 30, 2006, W. S. Wigle, S. Thakrar and D. L. Knight, 2 pages, and OSCB, Issue 29/34, August 25, 2006, 18 pages.

[12] *Supra* note 1.

[13] *Supra* note 2.

[14] The text should have referred to Northern.

[15] The text should have referred to Northern.

[16] *Supra* note 3.

THE PURPOSE AND EFFECT OF THE PLAN

It should be recalled that the Rights Plan at issue was adopted by Jaguar less than three hours and thirty minutes after Northern's requisition for a shareholders' meeting. The Plan outlines a strategic response to a threat that Jaguar's board apprehended regarding the vote of the company's shareholders, due to the significant block of Jaguar shares held by Northern. The effects of Jaguar's Rights Plan differ from those of conventional rights plans, which have been considered on numerous occasions by Canadian securities commissions. Indeed, unlike a conventional rights plan adopted as a defensive tactic in the event of a take-over bid (a "poison pill"), the background to the Plan at issue here has nothing to do with a take-over bid, either real or apprehended. Rather, the current Plan aims to limit or eliminate any interest a shareholder might have in acquiring more than 15% of Jaguar shares. This limit was set by Jaguar's board of directors, who were made uneasy by the presence of Northern, a new, significant, and involved shareholder, and who wished to counter the apathy or inertia that characterized the participation of its other shareholders.

The adoption of the Rights Plan is clearly a tactical, strategic and defensive measure in the present case. It was adopted to prevent Northern from blocking the transaction that Jaguar's board was planning and from playing a determinative role in the election of the board of directors. In both cases, it aims to reduce the relative importance of Northern's vote in a shareholders' meeting, whether the purpose is to approve a restructuring or to elect a new board of directors.

It was in this context that the triggering threshold in the Rights Plan was set at 15%. Essentially, as soon as a shareholder owns more than 15% of the shares of Jaguar, the Plan permits any Jaguar shareholder, other than the one who owns over 15% of its shares, to purchase additional shares at a reduced price. The effect of the Plan would be to dilute the value of the shares and the voting power of the holder of more than 15% of the shares of Jaguar. These consequences restrict or eliminate any interest this person might have in acquiring securities beyond the Plan's triggering threshold.

In short, Jaguar's board of directors, aware of the relative significance of the proportion of Jaguar shares owned by Northern and the low participation of its shareholders in the past, was concerned about the result of the vote at its next shareholder meeting. Specifically, it feared that Northern, who had earlier proposed a transaction that Jaguar's current board of directors had refused, would manage to have elected a board of directors comprised exclusively of persons that it nominated. The Rights Plan was therefore adopted to limit Northern's influence on the outcome of the vote at the next shareholders' meeting. Although Jaguar's board had been satisfied with the conduct of its shareholders so far, its uneasiness at the arrival of an important and active shareholder led it to adopt a rights plan to reduce this shareholder's influence.

The Rights Plan did not receive shareholder approval. Although this may be explained by the urgency that was perceived by the board, it is nevertheless an element to be considered in our overall assessment of the case.

The Bureau also notes the unusual and inordinately low triggering threshold in Jaguar's Rights Plan. The Plan's triggering threshold was set at 15%, while in current practice, rights plans usually refer to a 20% threshold,[17] the same as the triggering threshold set for take-over bids in Canadian securities legislation. Only three[18] of the one hundred and eighty-five plans referred to by the parties had a 15% triggering threshold, and there is nothing to indicate that the courts have been asked to rule on the validity of such a low threshold. In the other plans surveyed, the threshold was 20%. What is more, the minimum threshold recommended for rights plans in the *Institutional Shareholders Services* guidelines is 20%.[19] Indeed, this organization advises institutional investors to oppose plans that have a triggering threshold below 20% of the issued shares.

THE VOTING POWER OF JAGUAR SHAREHOLDERS

The purpose and effect of triggering the Rights Plan and issuing new shares reserved solely for Jaguar shareholders other than Northern is to diminish Northern's relative voting power. In corporate law, [TRANSLATION] "… the courts have, for example, held that directors may not exercise their power to issue

[17] Exhibit D-11.

[18] Exhibit I-28, I-29 and I-30. The first of the three exceptions refers to an old plan from 1991, the second to a plan from 1997, and the last to a plan adopted less than one month before Jaguar's Plan.

[19] Exhibit D-10.

shares with the sole aim of obtaining control of the votes[20] or to deprive a shareholder of control of the votes[21]".[22] In addition, some authorities maintain that directors should not exercise their power to issue shares in order to [TRANSLATION] "… confer control on someone,[23] defeat a take-over,[24] or foster one[25] …".[26]

The dilution of Northern's relative voting power would be all the more significant in the present case, since the shares of Jaguar issued to the other shareholders under the Plan would be offered at a price lower than the fair market value of the securities.

Although Northern does not have a pre-emptive right with regard to the issue of new shares, it could presume that Jaguar's board of directors would not exercise its share subscription and distribution policy in a discriminatory manner with the sole aim of limiting the influence of one of its shareholders.

Certain provisions in Jaguar's internal by-law on shareholders' meetings are worth citing here:[27]

BY-LAW No. 1

GENERAL BY-LAWS

ARTICLE II

MEETING OF SHAREHOLDERS

Section 8. Quorum

Unless otherwise provided by the Act, the deed of incorporation or any other by-law of the company, two (2) shareholders personally present at the opening of a meeting and representing personally or by proxy five percent (5%) of the issued and outstanding voting shares of the company shall constitute a quorum for the transaction of business at any shareholders' meeting, notwithstanding the fact that there may not be a quorum throughout the meeting.

Section 10. Right to vote

Unless otherwise provided by the Act, the deed of incorporation or any other by-law of the company, at each meeting of shareholders, every shareholder shall be entitled to one vote for each share held. The registered shareholder entitled to vote at all shareholders', meetings and the number of shares they hold shall be determined in accordance with the shareholders' ledger of the company as at the close of business on the day specified by the directors to this effect.

Section 14 Votes to govern

Unless otherwise provided by the Act, the deed of incorporation or any other by-law of the company, all questions submitted to a shareholders' meeting shall be decided by a majority of the votes duly cast on the question. In the case of any equality of votes, the chairman presiding a meeting shall be entitled to a second or casting vote.

In addition, to understand the general context of this case properly, we note that any change to the rights, privileges, and restrictions flowing from the shares of the capital stock of a company governed by Part 1A of the *Companies Act*[28] requires an amendment to its by-laws, which must be carried out as stipulated in the first paragraph of section 123.103 of the Act. This provision sets out the following:

[20] *Smith v. Hanson Tire & Supply* Co., (1927) 3 D.L.R. 786.

[21] *Bonnisteel v. Collis Leather Co. Ltd.*, (1919) 45 O.L.R. 195 at 199. See also *infra* at 23-60 and *Harris v. Sumner*, (1909) 39 N.B.R. 204; *Martin v. Gibson*, (1908) 15 O.L.R. 623; *Hogg v. Cramphorn*, [1967] Ch. 254; *Bamford v. Bamford*, (1969) 1 All. E.R. 969; DRINKER, "The Pre-emptive right to subscribe to new shares" (1930) 43 Harv. L. Rev. 586.

[22] Maurice Martel & Paul Martel, *La compagnie au Québec*, Vol. I, *Les aspects juridiques* (Montréal: Wilson & Lafleur, 2006) 19-78.3.

[23] *Punt v. Symons & Co. Ltd.*, (1903) 2 Ch. 506; *Bernard v. Valentini*, (1978) 18 O.R. (2d) 656.

[24] *Hogg v. Cramphorn Ltd.*, (1967) Ch. 254.

[25] *Howard Smith Ltd. v. Ampol Petroleum Ltd.*, (1974) A.C. 821 (P.C.).

[26] *Supra* note 22 at 23-57.

[27] Exhibit I-26.

[28] *Supra* note 4.

Except in the cases provided for in sections 123.102 and 123.107, the by-law amending the articles of a company must be confirmed by two-thirds of the votes cast by the shareholders at a special general meeting called for that purpose.

Moreover, if the changes affect the shareholders' vested rights, it may be necessary to proceed by way of a compromise under the *Companies Act*[29] and to obtain the consent of three-fourths of each class of shares and have the compromise sanctioned by a judge.

Section 49 of the Act reads as follows:

(1) Where a compromise or arrangement is proposed between a company and its shareholders or any class of them, affecting the rights of shareholders or any class of them, under the company's constituting act or by-laws, a judge of the Superior Court of the district in which the company has its head office may, on application in a summary way of the company or of any shareholder, order a meeting of the shareholders of the company or of any class of shareholders, as the case may be, to be summoned in such manner as the said judge directs.

Sanction.

(2) If the shareholders, or class of shareholders, as the case may be, present in person or by proxy at the meeting, agree, by three-fourths of the shares of each class represented, to the compromise or arrangement either as proposed or as altered or modified at such meeting, such compromise or arrangement may be sanctioned by a judge as aforesaid.

Supp. letters patent.

If so sanctioned, such compromise or arrangement shall thereupon be confirmed by supplementary letters patent deposited in the register by the enterprise registrar. Subject to such deposit, but from the date of the supplementary letters patent, the compromise or arrangement shall be binding on the company and the shareholders or class of shareholders, as the case may be.

In addition to the method Jaguar used to dilute the relative weight of Northern's vote, the Bureau must also consider the economic realities, Jaguar's objective, and the effect of the Rights Plan it adopted.

Although in a different context, the Honourable Justice de Grandpré, writing for the majority of the Supreme Court of Canada in *Pacific Coast Coin Exchange v. O.S.C.*,[30] affirmed that securities legislation should be construed broadly, taking into account the economic realities contemplated therein. The Court added that substance, not form, is the governing factor, and that the focus must be upon the economic realities of the transaction.

Because of the discriminatory nature of the Rights Plan, the purpose and effect of its being triggered would be to diminish in practice the voting power of only those Jaguar shares held by Northern. In addition, the adoption of the Plan is not subject to requirements as rigorous as those applicable to an amendment to Jaguar's by-laws.

Triggering the Plan aims to prevent Northern from carrying out a project it has already initiated and on which it has spent considerable money and energy, in particular by having already acquired nearly 15% of Jaguar's shares. The triggering of the Rights Plan would considerably diminish the relative voting power of one shareholder as soon as it owned more than 15% of the shares. This would occur without any amendment of Jaguar's internal by-laws, without complying with the requirements provided for in the *Companies Act*,[31] regarding modifications to the rights and privileges attached to the shares of the company and without compensation for the person affected.

Condoning such behaviour could curb the initiative of other actors in the securities market, weaken the protection of these investors, and compromise market efficiency.

Northern was justified in pursuing its acquisition of shares and presuming that both the spirit and the letter of the principles set out in securities legislation governing market efficiency, the protection of investors, and the equal treatment of shareholders would be respected.

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[29] *Ibid.*

[30] *Pacific Coast Coin Exchange v. O.S.C.*, [1978] 2 S.C.R. 112.

[31] *Ibid.*

Although *Canadian Tire*[32] was a very different case in that it centred on an application for a cease trading order in respect of a take-over bid, we believe that it clarifies the parameters of the present case. We shall cite only the following short excerpt:

[TRANSLATION]

It is also clear, in our opinion, that the Commission should intervene to prohibit a transaction that constitutes a clear abuse of the investors and the financial markets, regardless of whether or not the transaction is in contravention of the Act, the By-law, or the General Instructions.[33]

SHAREHOLDER APATHY

Given the history of low shareholder participation at previous meetings, either in person or by proxy, Jaguar's board of directors feared that Northern, with over 15% of the votes, would use its voting power to play a determinative role in the election of the members of the board of directors.

These fears are based on the fact that the ownership of Jaguar stock is very dispersed, primarily among many small investors. In addition, shareholder participation in Jaguar's meetings, either in person or by proxy, has been low in the past. At the last special shareholders' meeting, only 25% of shares were represented. According to Jaguar, Northern's ownership of over 15% of the shares would grant that company disproportionate power at a shareholders' meeting aiming to approve a transaction that Jaguar's board believes to be in the shareholders' best interest. Jaguar also claims that, given the history of low shareholder participation in Jaguar's own meetings, if Northern held 15% of the shares, it could block or veto a proposal brought before an upcoming meeting of Jaguar shareholders. In addition, Jaguar's board of directors feared that, due to the relative weight of its vote, Northern could determine the outcome of an election of the members of Jaguar's next board of directors.

The Bureau, however, believes it presumptuous to conclude that Northern would be in a position to block the transaction sought by Jaguar or to dictate the composition of Jaguar's future board of directors at the next meeting. Although their fear is plausible, such a situation is hypothetical at this point, as it depends on the degree of participation of Jaguar shareholders at the next meeting. Nothing indicates that low participation in the past is a sign that the next meeting will not generate more interest. Jaguar's board of directors has all the resources and time it needs adequately to inform its shareholders about the stakes at issue at its next meeting. The importance of the issues to be discussed at the upcoming meeting, the conflicting positions of the parties soliciting proxies, and the current proxy battle are likely to increase shareholder participation at the next meeting substantially.

In addition, as noted above, paragraph 8 of Jaguar's internal by-law provides for quorum in that:

two (2) shareholders personally present at the opening of a meeting and representing personally or by proxy five percent (5%) of the issued and outstanding voting shares of the company shall constitute a quorum for the transaction of business at any shareholders' meeting, notwithstanding the fact that there may not be a quorum throughout the meeting

It is general practice for the vote of a shareholder who owns more shares of a company to carry more weight than the vote of a shareholder who owns fewer shares of that company.

Finally, it should be pointed out that even if Northern exercised its voting power in order to have only those candidates it nominated elected to Jaguar's board of directors, once elected these new directors, as the current members of Jaguar's board, would be required to fulfil the duties and obligations incumbent on the directors of a public corporation. Nothing leads to believe that they would not comply with their obligations.

Jaguar's current board of directors was elected due to the company's low shareholder participation. Now that there is a major shareholder, this same board objects to having the rules that applied to its own election govern the election of future directors.

[32] *C.T.C. Dealer Holdings Limited*, Vol. 18, no. 14 (2000) BCVMQ at A1.
[33] *Ibid.* at A23.

THE PRINCIPLES GOVERNING THE ISSUE OF SECURITIES

Generally speaking, resorting to the primary securities market and to issuing securities is a means of raising capital to finance the issuer's projected activities. In this case, Jaguar had no clear need for capital, as its exploration and operation activities had been sold several months before and the company had no projects requiring the injection of new capital. Most of its assets had already been converted into cash or liquid assets. The role of the securities market is to promote a healthy allocation of resources. The power to issue shares is conferred on the directors of a corporation primarily to enable them to raise capital for the business and not to prevent the shareholders from legitimately exercising their influence.[34]

The Rights Plan adopted in this case did not have the clear objective of raising capital for the issuer. Rather, it was intended to provide Jaguar's board of directors with a strategic tool to counter the influence of Northern.

THE DILUTING EFFECT OF THE PLAN AND EQUAL TREATMENT

If Jaguar's Rights Plan were triggered, its diluting effect on Northern would be twofold. First, it would dilute the voting power of one shareholder, namely, Northern. Second, it would dilute the cash value and market value of Jaguar's shares held by Northern because the other shareholders would be issued securities at a price below their fair market value. This dilution of value would be advantageous to the beneficiaries of the Plan, however, since they would acquire shares of Jaguar at a discount. Furthermore, Northern's portion of possible dividends would also be diluted, as would the portion of the assets it could receive if the company were liquidated. In a way, if the Plan were triggered, not only would Northern lose a part of its relative influence over the shareholder vote, but a portion of the cash value and market value of its shares would also be transferred to the shareholders who would subscribe for new shares at a price below their fair market value.

Such a result would not only contravene the principle of equal treatment of shareholders, it would also lead to a form of expropriation without compensation of a portion of Northern's relative interest in Jaguar. In practice, this change would be tantamount to modifying the rights or privileges attached to the shares of a shareholder owning more than 15% of Jaguar's shares. Moreover, this relative dilution would be carried out without regard to the formalities and procedures for change set out in the *Companies Act*[35] (sections 49 and 123.103) and without compensation. In addition, market regulators have on numerous occasions referred to the principle of equal treatment of holders of securities of the same class or series as one of the conditions essential to an efficient securities market. The triggering of the Plan or, perhaps, given the threat it represents, its mere adoption violates this principle.

In the present circumstances, the Bureau is of the view that the Plan unduly interferes with Jaguar's corporate democracy and that its effects are too draconian. Applying the Plan would result in the unequal treatment of the shareholders without compensation, by:

- increasing the vote and influence of a group of shareholders to the detriment of another shareholder holding identical shares,
- diluting the cash value of the shares it holds,
- reducing its portion of dividends or rights in the event of liquidation.

This would be done in the hope of countering the apprehended influence that a specific shareholder, Northern, could have at the shareholders' meeting it has requisitioned.

THE EFFECT OF THE PLAN ON JAGUAR SECURITY HOLDERS

In theory, the presence of a buyer in a public market contributes to the liquidity of that market and provides all shareholders with an equal opportunity to sell their shares. The pressure he causes tends to increase the price of the shares to the benefit of the security holders.

Jaguar's Rights Plan has a major deterrent effect on any securities buyer who wishes to own more than 15% of Jaguar's shares. It penalizes anyone who steps beyond this threshold with a double dilution effect. Under the pretext of compensating for the apathy of its largely dispersed shareholders, the Plan interferes with the workings of the natural mechanisms of the securities market and with corporate

[34] *Punt v. Symons & Co. Ltd*., *supra* note 23.
[35] *Supra* note 4.

democracy. Jaguar's Rights Plan has repercussions on both the purchaser and the existing shareholders since, for all practical purposes, it deprives the latter of the possibility of selling their shares to a purchaser who, over the last few months, purchased approximately 16,023,500 shares of Jaguar and may be interested in acquiring more.

The adoption of a rights plan like Jaguar's and the threat of its implementation are generally sufficient to deter actors who are likely to suffer from its triggering. Indeed, the potential negative repercussions of the triggering of a plan are usually so significant that they prevent the actors from doing anything to bring such prejudicial consequences upon themselves.

Therefore, the adoption of a rights plan and the threat of its being triggered may justify an immediate intervention to restore the ability to act of persons affected by such a rights plan.

THE TIME PERIOD UNTIL THE SHAREHOLDER MEETING

The Bureau also takes into consideration Jaguar's current situation, namely, a company with mostly cash and liquid assets that is seeking a business opportunity to relaunch its activities. This situation, however, has been the same since January, 2006 and was no doubt foreseeable as soon as Jaguar began contemplating the sale of its assets. The final detail to be considered in this case is that Jaguar wishes to implement a plan whose effects would be felt for a long period of time, even though the company's situation is relatively simple. The Bureau also believes that Jaguar's board of directors will have had enough time to move its projects forward between October 17, 2006, the last day of the hearing, and December 6, 2006, the date of the next shareholders' meeting. By that date, Jaguar's current board of directors will have had almost a year to bring its projects to fruition. The triggering of the Plan would have unduly prolonged a situation that has already existed for a long time.

THE PRINCIPLES GOVERNING THE ISSUE OF AN ORDER TO CEASE ACTIVITY

The Bureau is not a civil court asked to rule on the legality of Jaguar's Rights Plan under corporate law. However, under the jurisdiction conferred on it by section 93(6) of the *Act respecting the Autorité des marchés financiers*[36] and section 265 of the *Securities Act*,[37] it must consider whether it is appropriate to grant the applicants' request for an order to cease activity in respect of the securities that could be issued under the Rights Plan. Such a measure must be based on the Bureau's assessment of the public interest, as provided for in section 323.5 of the *Securities Act*:[38]

> Subject to the third paragraph of section 93 of the Act respecting the Autorité des marchés financiers (chapter A-33.2), the board shall exercise the discretion conferred on it in accordance with the public interest.

In its assessment of the public interest, the Bureau takes into account the prescriptions of the *Securities Act*[39] and its regulations. In particular, it bears in mind the principles in the second paragraph of section 276 of the Act. This provision sets out the mission of the Autorité des marchés financiers, which accurately reflects the objectives of the securities legislation:

> [T]he Authority's mission is
>
> 1) to promote efficiency in the securities market;
>
> 2) to protect investors against unfair, improper or fraudulent practices;
>
> 3) to regulate the information that must be disclosed to security holders and to the public in respect of persons engaging in the distribution of securities and in respect of the securities issued by these persons;
>
> 4) to define a framework for the activities of the professionals of the securities market and organizations responsible for the operation of a stock market.

Orders to cease trading activity like the one sought by Northern are not limited to cases where there has been a violation of the Act. Rather, the appropriateness of such an order must be assessed in terms of the public interest.

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[36] *Supra* note 2.
[37] *Supra* note 1.
[38] *Ibid.*
[39] *Ibid.*

In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*,[40] the Supreme Court of Canada was asked to consider the nature of a power to intervene similar to the one we are now asked to exercise. An excerpt follows:

IV. Analysis

1. *What Is the Nature and Scope of Section 127 Jurisdiction to Intervene in the Public Interest?*

39 Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case:

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders . . . . [Emphasis added.]

40 The breadth of the OSC's discretion to act in the public interest is also evident in the range and potential seriousness of the sanctions it can impose under s. 127(1). Furthermore, pursuant to s. 127(2), the OSC has an unrestricted discretion to attach terms and conditions to any order made under s. 127(1):

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

41 However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

42 Second, it is important to recognize that s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as *Canadian Tire*, *supra*, aff'd, (1987), 59 O.R. (2d) 79 (Div. Ct.); leave to appeal to C.A. denied (1987), 35 B.L.R. xx, in which it was held that no breach of the Act is required to trigger s. 127. It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219.

43 Furthermore, the above interpretation is consistent with the scheme of enforcement in the Act. The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in s. 127 as "Orders in the public interest". Such orders are not punitive: *Re Albino* (1991), 14 O.S.C.B. 365. Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets: *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600. In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively: see D. Johnston and K. Doyle Rockwell, *Canadian Securities Regulation* (2nd ed. 1998), at pp. 209-11.

44 More specifically, s. 122 makes it an offence to contravene the Act and, though the OSC's consent is required before a proceeding under s. 122 can commence, the provision authorizes the courts to impose fines and terms of imprisonment. Under s. 128, the OSC may apply to the Ontario Court (General Division) for a declaratory order. In making such an order, the courts may resort to a wide range of remedial powers detailed in that section, including an order for compensation or restitution which would be aimed at providing a remedy for harm suffered by private parties or individuals. In addition, further

[40] [2001] 2 S.C.R. 132.

remedial powers are available under Part XXIII of the Act which deals with civil liability for misrepresentation and tipping and creates rights of action for rescission and damages.

45 In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

CONCLUSION

The factors analyzed above do not necessarily constitute an exhaustive list of the factors to be considered when considering the validity of a rights plan in order to determine whether to make an order to cease activity in respect of securities resulting from the triggering of the plan. The presence of one of these factors does not necessarily lead to an order to cease activity, just as the absence of one or more does not preclude such an order. Each case must be considered on its own merits.

In light of the facts as a whole in the present case, the Bureau finds that the implementation of the Plan would not only affect the fair treatment of a shareholder owning more than 15% of Jaguar shares and specifically the interests of Northern, it would also affect the interests of all Jaguar shareholders. In this case, the triggering of the Rights Plan would have the effect of interfering with the expression of a healthy corporate democracy. Such a practice is in our view improper with regard to investors.

The Bureau also finds that it would be contrary to the public interest to accept such behaviour on the part of a public issuer. This finding is based on the fact that the implementation of the Plan would have an impact on the functioning of the securities market by failing to treat the shareholders equally, by reducing the demand for Jaguar's shares, and by disrupting the effectiveness and efficiency of the market for these securities. Moreover, the protection of the shareholders would be jeopardized if, in the present circumstances, an investor who had devoted significant resources to acquiring a block of shares were treated this way. To condone such behaviour would curb for the future any legitimate initiatives of other actors willing to participate in the market and take initiatives likely to ensure a healthy allocation of resources thus contributing to the overall efficiency of the securities market.

The Bureau therefore concludes that, in the present circumstances, the protection of investors against improper practices and the efficiency of the securities market would be compromised if the Plan were triggered.

No exceptional circumstance was established to demonstrate that the public interest, the efficiency of the market, or the protection of investors would be better served in this case by temporarily or partially limiting the normal application of the principles discussed above.

Therefore, to prevent conduct that risks violating or causing potential prejudice to the public interest in maintaining a just and efficient financial market, and to protect investors against improper practices, the Bureau issued the orders prescribing the cessation of activity, as noted above.

Montréal, April 4, 2007

(S) Guy Lemoine
Mtre Guy Lemoine, president

(S) Mark Rosenstein
Mtre Mark Rosenstein, member

(S) Michelle Thériault
Mtre Michelle Thériault, member

Securities Act – sections 73, 81, 110, 145, 265, 267, 276, 323.5 & 329
Act respecting the Autorité des marches financiers – sections 93(6) & 93(3)
Notice 62-202