Poison Pills after Pulse Data: the "Unique Circumstances" Defence

by Stephen Erlichman*

Stephen Erlichman, a senior partner of Fasken Martineau DuMoulin LLP, was part of the legal team retained by Seitel, Inc. to assist in its bid for Pulse Data Inc., during which the Alberta Securities Commission was asked to strike down the Pulse Data shareholder rights plan. Mr. Erlichman is intimately familiar with the proceedings that transpired throughout the course of the ASC hearing dealing with this request and has written the following article. RiskMetrics is publishing this article because it raises issues of importance with respect to RiskMetrics' analysis of shareholder rights plans in Canada. RiskMetrics intends to respond to Mr. Erlichman's request, found in the conclusion of this article, in the next issue of the Corporate Governance Review. The views expressed herein are those of the author and should not be construed to reflect those of RiskMetrics Group.

INTRODUCTION

Prior to September 27, 2007 securities lawyers, investment bankers, investors and Canadian public companies believed that the law in relation to poison pills had been relatively well settled in Canada. On that day, however, the Alberta Securities Commission ("ASC") released its oral decision in the **Pulse Data** case (followed by its written decision on November 30, 2007)[1]. The ASC framed the issue it had to decide as "whether, in the acknowledged absence of a real and substantial possibility of an imminent auction to increase Shareholder value, it would be in the public interest to discontinue the operation of [Pulse's shareholder rights plan] with respect to the Offer in order to afford Pulse Shareholders the opportunity to tender their Pulse Shares to and have them taken up in accordance with the Offer". In fact, however, the ASC seemed to focus on a more narrow issue, namely whether in light of the circumstances existing at the time of the ASC hearing, the "majority of minority" tender requirement in the definition of the term "Permitted Bid" in the shareholder rights plan (the "Rights Plan") of Pulse Data Inc. ("Pulse") was appropriate. The ASC held that, in the "unique circumstances of this case", the ASC was not persuaded that it was in the public interest at the time of the hearing for the ASC to make an order discontinuing the Rights Plan. As a result of the ASC's decision, Pulse's Rights Plan (which had been adopted by the Pulse board of directors and then approved by Pulse shareholders after the commencement of the all cash take-over bid for 100% of Pulse's shares (the "Bid") by an indirect subsidiary of Seitel, Inc. ("Seitel")) remained in place during the Bid, the "majority of minority" tender requirement of the Rights Plan could not be satisfied and the Bid ended after several extensions on October 19, 2007 without any shares being taken up.

I respectfully suggest that the ASC's decision is incorrect, both based on many years of poison pill precedent as well as on policy considerations, and that there are broad and important issues which were raised by Seitel's counsel and by ASC Staff which the ASC failed to address in making its decision.

FACTS

The following is a summary of the relevant facts in the **Pulse Data** case.

In July 2005, Seitel made a written proposal to Pulse to acquire all of its outstanding shares pursuant to a take-over Bid or plan of arrangement for $119.9 million (approximately $2.60 per share). Pulse's board of directors rejected that proposal.

In December 2006, Pulse was approached by a private equity fund to consider a going-private transaction. After several months of private discussions, in April 2007 the fund privately

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proposed an all cash take-over bid of $3.10 per share and a few weeks later agreed to increase the bid price to $3.15 per share. Pulse's board of directors received recommendations from its independent committee as well as valuation analyses from its financial advisors, the independent committee advised the fund of Pulse's position on various outstanding issues, the fund indicated it was not prepared to negotiate further on those issues and discussions between the fund and Pulse terminated.

On June 19 2007, an unsolicited take-over bid to purchase all outstanding Pulse shares was announced by Quantum Yield Inc. in exchange for debentures of a shell corporation. Pulse applied to the ASC for an order cease trading the Quantum bid and Quantum withdrew its bid.

On June 20 2007, Pulse received a written proposal from ValueAct Capital Master Fund, L.P. ("ValueAct Capital") on behalf of Seitel to acquire all of the Pulse shares pursuant to a plan of arrangement for $3.10 per share in cash. On June 29, Seitel was informed that Pulse was rejecting the proposal. On August 3, ValueAct Capital and ValueAct Capital Master Fund III, L.P. ("ValueAct Capital III") issued a news release and filed an early warning report indicating that they had acquired approximately 13.5% of the outstanding Pulse shares. On August 10, Seitel announced the commencement of the Bid, which was an all cash take-over bid at $3.10 per share for 100% of the outstanding shares of Pulse expiring on September 18. The Bid contained the typical minimum tender condition that there shall have been validly deposited under the Bid and not withdrawn at the expiry time that number of Pulse shares which, when added to the Pulse shares then owned by Seitel, ValueAct Capital, ValueAct Capital III and their respective affiliates, constitutes at least $66^{2/3}$% of the Pulse shares outstanding on a fully diluted basis.

On August 13, Pulse announced that its board of directors had adopted the Rights Plan. The Rights Plan defined "Permitted Bid" as a take-over Bid that complies with several provisions, including that (i) the bid remain open for 60 days and (ii) no shares are taken up or paid for pursuant to the bid unless more than 50% of the shares held by independent shareholders have been deposited or tendered pursuant to the bid and not withdrawn (the "majority of minority" tender requirement). On August 21, Pulse issued a news release announcing a special meeting of Pulse shareholders to be held on September 21 in order to approve the Rights Plan. On August 23, the Pulse board of directors approved its Directors Circular in response to Seitel's Bid as well as the proxy materials in connection with the special meeting of shareholders. The Directors Circular, which unanimously recommended shareholders reject Seitel's Bid, was mailed to shareholders on August 28. That day Pulse also filed with the Canadian securities regulators various valuation analyses referred to in the Directors Circular.

On September 18, the original expiry date of Seitel's Bid, Seitel issued a news release announcing the Bid's extended expiry date of September 28 and mailed to Pulse shareholders the Notice of Extension to its Bid.

At the special meeting of Pulse shareholders on September 21, 56.48% of the Pulse shares were present, of which 74.86% were voted in favour of and 25.14% were voted in opposition to the Rights Plan. Including Pulse shares voted late, 64.06% of the Pulse shares were present of which 77.83% were voted in favour of and 22.17% were voted in opposition to the Rights Plan. Excluding the votes of ValueAct Capital and ValueAct Capital III, 98.3% of the Pulse shares voted (98.6% of the Pulse shares voted including late votes) were voted in favour of the Rights Plan. Even if one counts shares voted late, however, 35.94% of the Pulse shares still were not present and thus were not voted at the meeting.

A Notice of Change to the Directors Circular dated September 21 was mailed to Pulse shareholders on September 24 disclosing recent developments concerning Seitel's Bid, including the approval of the Rights Plan. In the Notice of Change, the Pulse board continued to unanimously recommend that Pulse shareholders reject Seitel's Bid.

On September 25, Pulse announced it had waived the time period that Seitel's Bid would have to remain open in order to qualify as a Permitted Bid under the Rights Plan such that Seitel would be in a position to acquire the Pulse shares under its Bid if the Bid complied with the other requirements of the Rights Plan. Thus, the only remaining provision of the Rights Plan that could stop Seitel from taking up Pulse shares tendered to the Bid was the "majority of minority" tender requirement. In that September 25 news release, Pulse also announced "preliminary indications of interest from certain parties which have indicated price levels superior to that which is being offered under the Seitel offer".

At the hearing before the ASC on September 26, counsel for Pulse confirmed "There is no auction".

DISCUSSION

According to the RiskMetrics ISS Governance Services ("ISS") 2007 Canadian Proxy Voting Guidelines[2] (which were ISS's voting guidelines in force at the time of the **Pulse Data** hearing before the ASC), a rights plan "will be acceptable if its scope is limited to the following two specific purposes and it conforms to 'new generation' rights plan guidelines:

- to give the board more time to find an alternative value enhancing transaction;
- to ensure the equal treatment of all shareholders."

With respect to ISS's first permitted purpose of a rights plan, namely giving the board more time to find an alternative value enhancing transaction, remember that Pulse's board of directors waived the 60 day time requirement in the definition of Permitted Bid in its Rights Plan on September 25, 2007, which was the day before the ASC hearing to determine whether the Rights Plan would be cease traded. I suggest the board waived the provision because it realized it could not justify to the ASC requiring the time period for Seitel's Bid to extend beyond the time that already had transpired. Note the following submissions of ASC Staff to the ASC's hearing panel on this point:

"16. (f) ... As of the date of the hearing [i.e. September 26, 2007], Pulse will have had 43 days since the date of the Seitel take-over bid to search out alternative offers in order to maximize shareholder value and choice.

Further, due to the previous Quantum take-over bid attempt and the fact that Seitel approached Pulse with a written proposal, Pulse either knew or ought to have known that it should be actively seeking alternative offers as early as June, 2007.

Finally, as noted above Pulse indicates in its submissions that the steps that it has taken to find alternative bids have been unsuccessful." …

"(h) … As noted above, the bid was made on August 10, 2007. However, Seitel originally approached Pulse on June 20, 2007 with a written proposal [to] acquire all of Pulse Data's equity interests. Pulse rejected this offer on June 29, 2007.

Seitel voluntarily extended the bid from the original 35 days to 45 days, which expires at 5:00 pm on Friday, September 28, 2007." …

"23. Pulse has not met the burden of proof with respect to showing that there is a real and substantial probability that given a reasonable period of further time, Pulse will increase shareholder choice and value.

24. While the adoption of the [Rights Plan] may have been intended to maximize Pulse's shareholders' choice and value when it was first adopted on August 13, 2007, ample time has passed for it to have served these purposes.

25. In particular, Pulse has not provided evidence to suggest that continuing the [Rights Plan] for any period of time i likely to result in alternative offers being made available to Pulse shareholders.

26. It is Staff's opinion that Pulse has had sufficient time to seek out alternative offers which do not appear to be forthcoming in the near future. Thus, continuing the [Rights Plan] may deprive Pulse shareholders of the right to choose whether or not to tender to the Seitel bid. This is not in the best interests of the Pulse shareholders."

As a corollary to Pulse dropping the 60 day time requirement, the ASC decision stated that at the ASC hearing the next day September 26, 2007, Pulse's counsel confirmed "There is no auction". This admission was contrary to what Pulse had implied in its September 25, 2007 press release a day earlier, and contrary to what Pulse had intimated in its September 21, 2007 Notice of Change to its Directors' Circular, as in both of these documents Pulse stated that it "has received preliminary indications of interest from certain parties which have indicated price levels superior to that which is being offered under the Seitel Offer".

Accordingly, it was clear by the time of the ASC hearing that the Rights Plan could not fulfill ISS's first permitted purpose.

With respect to ISS's second permitted purpose of a rights plan, namely to ensure equal treatment of all shareholders, remember that Seitel's Bid was an all cash offer for 100% of the outstanding shares of Pulse. Even though Seitel wished to acquire 100% of Pulse's shares and thus had the typical two-thirds tender condition in its Bid, Seitel reserved the right to waive the two-thirds condition and take up any tendered shares, and if that event occurred Seitel had indicated that it would announce what it had taken up and it would extend the Bid so that other shareholders could tender if they so wished with full knowledge of Seitel's ownership position. The ASC was aware of this point, as it indicated by quoting from Seitel's submissions to the ASC:

"70. ... The Offeror fully intends to satisfy the Minimum Tender Condition, and is committed to acquiring all outstanding Shares through the Offer and a Compulsory Acquisition or a Subsequent Acquisition

Transaction. However, if at the Extended Expiry Date the Minimum Tender Condition has not been satisfied and the Offeror waives that condition and takes up and pays for Shares deposited at that time, then the Offeror intends to extend the Offer. This would provide non-tendering Shareholders the ability to reconsider their decision to not deposit Shares under the Offer in light of the waiver of the Minimum Tender Condition."

Thus, all Pulse Data shareholders were being treated equally and therefore the Rights Plan did not fulfill ISS's second permitted purpose.

In addition, in response to Pulse's submission that Seitel's Bid was a coercive creeping bid, ASC Staff said in its submissions to the ASC that take-over bids "have been found to be coercive if the bidder does not provide any assurance that it will bid for the remaining shares or acquire them in a second step transaction". In light of Seitel's cash Bid for 100% of Pulse's shares and Seitel's stated commitment to acquire all Pulse's shares through the Bid or through a subsequent acquisition transaction, ASC Staff stated that the Seitel bid "does not appear to [be] coercive or unfair to Pulse's shareholders". ASC Staff also submitted to the ASC hearing panel that, based on poison pill precedent, policy and the facts of the case, the Rights Plan should be cease traded in order "to allow Pulse shareholders the opportunity to consider whether to accept or reject the Seitel take-over bid".

Given that Pulse's counsel confirmed "There is no auction", Pulse had waived the 60 day requirement for Seitel's Bid, the Pulse board had been unable to find another bidder, all Pulse shareholders were being treated equally in Seitel's bid, and ASC Staff submitted that the Bid was not coercive or unfair and that it recommended cease trading the Rights Plan, one would have thought that, based on the Royal Host[3] analysis and other poison pill decisions that say it is only a question of when, not if, a rights plan will be cease traded, it was now "time for the pill to go" and thus the Rights Plan would be quashed by the ASC. Because of the ASC's focus on the narrow issue of whether the "majority of minority" tender requirement in the definition of the term "Permitted Bid" in the Rights Plan was appropriate in light of the circumstances existing at the time of the hearing, however, the ASC glossed over broad and important policy issues and, "in the unique circumstances of this case", decided not to follow years of poison pill precedent that had been brought to the ASC's attention not only by Seitel's counsel but also by ASC Staff in their recommendation to cease trade the Rights Plan. Thus, the ASC permitted the Rights Plan to remain in place, indefinitely. In this regard, the transcript of the ASC's oral decision on September 27, 2007 contains the following interchange between Seitel's counsel and the ASC:

COUNSEL: **"Part of the order suggests that we can reapply at some future time if so advised, but there is no express ruling at this time as to any definitive time as at which the pill might go. It's there until we can make further application that it should be dissolved"**

THE CHAIR: **"That's correct."**

The ASC's statement that "this decision does not preclude any party from making further applications to the Commission should circumstances change", however, begs the question as to what circumstances needed to change in order for the Rights Plan to be cease traded. Is the passage of further time alone sufficient circumstances – if so, why could the ASC not have made reference to some future "definitive time as at which the pill might go"? Given the ASC's deviation from years of poison pill precedent, some guidance as to what the ASC had in mind when it referred to "should circumstances change" would have been appropriate.

It is interesting that ISS (through its predecessor Fairvest Securities Corporation) had made a clear statement in 1994 about the "majority of minority" tender requirement and ISS has advised me that these views have not changed. ISS's publicly stated view since 1994 is as follows:

"Most of the early poison pill rights plans require a special meeting of shareholders to be called to vote on a takeover bid and provide that the bid will be "permitted" only if a majority of the independent shareholders vote in favour of it. This requirement would force a bidder to engage in a proxy contest, as well as a takeover bid, and is unnecessary even to accomplish its stated purpose.

An alternative shareholder approval mechanism was introduced in 1990 by CAE Industries. CAE's rights plan requires only that more than 50 per cent of the outstanding shares held by independent shareholders be deposited in a takeover bid and not withdrawn on the date on which shares may be taken up by the offeror. Most recent plans follow this model for obtaining shareholder approval. If the condition is satisfied, the bidder is required to make a public announcement of that fact and to keep the bid open for at least ten days following the date of the announcement to enable shareholders who have not tendered to do so.

***Even this type of shareholder approval mechanism is unnecessary.* As the OSC's Lac Minerals_and Regal Greetings decisions suggest, *the period of delay required by a rights plan is alone sufficient to accomplish the plan's legitimate purposes,* that is, to ensure equal treatment of shareholders and to provide the corporation's board of directors with an opportunity to seek an alternative that enhances shareholder values. One recent rights plan adopted a variation of this approach by requiring only that a takeover bid remain open for the minimum period and that the bid be extended for ten days if more than 50 per cent of the shares are tendered."[4] (emphasis added)**

Thus, ISS has made it clear that having a requirement in a rights plan that the "majority of minority" tender into a take-over bid is "unnecessary", because the time period required by a rights plan "is alone sufficient to accomplish the plan's legitimate purposes, that is, to ensure equal treatment of shareholders and to provide the corporation's board of directors with an opportunity to seek an alternative that enhances shareholder values".

Yet, as Pulse correctly submitted to the ASC, "ISS reviewed and specifically endorsed the Rights Plan" in ISS's September 7, 2007 recommendation. The fact that ISS had endorsed the Rights Plan was quoted by the ASC as one of the "unique circumstances" for its decision:

"Indeed, we noted that ISS, an independent advisory service, recommended to its institutional shareholder clients that they vote in favour of the Rights Plan at the special meeting of Pulse Shareholders on 21 September 2007."

The ISS endorsement of the Rights Plan (notwithstanding that it was contrary to ISS's rationale for poison pills clearly stated in 1994 and carried forward to date) was but one of the factors enunciated by the ASC in finding that "in the unique circumstances of this case, we were not persuaded that, … as at 27 September 2007 [the date of the ASC hearing] it was in the public interest to make an order … that would have the effect of discontinuing the Rights Plan". The ASC stated that "our primary consideration in exercising our public interest authority … was the protection of the *bona fide* interests of Pulse Shareholders. With that in mind, the following unique circumstances persuaded us that the Rights Plan ought to stand for the time being". The ASC then set out the following "unique circumstances" in addition to the ISS endorsement:

- "it was the Pulse Shareholders' very recent and informed choice to have the Rights Plan remain in effect"

- "At a special meeting of Pulse Shareholders held less than one week before the Hearing … 74.86% of 56.48% of the Pulse Shares present … were voted in favour of the Rights Plan. Including Pulse Shares voted late, 77.83% of 64.06% of the Pulse Shares present ... were voted in favour of the Rights Plan. Very few of the Pulse Shares voted, apart from the Shares owned by ValueAct, were voted in opposition to the Rights Plan. Further, three institutional Pulse Shareholders … filed letters supportive of the Rights Plan in the face of the Offer."

- The Pulse Shareholders had been given "extensive disclosure" about the Rights Plan prior to the shareholders' meeting. According to the ASC, this extensive disclosure meant that Pulse Shareholders: (i) "knew, or ought to have known, that there was no real and substantial possibility of an imminent auction – Pulse had been "in play" for a lengthy period, beginning in July 2005 when it was approached by Seitel and again in December 2006 when it was approached by [a private equity fund]; there was an earlier unsolicited take-over bid made on June 19, 2007 and withdrawn on June 29, 2007; and despite Pulse's soliciting indications of interests from parties it believed might be interested in discussing a potential transaction, no alternative bid or transaction had emerged since the Offer was made some 40 days before"; (ii) knew that Seitel "is a competitor of Pulse and were advised that the Offer price … was significantly below the value of the Pulse Shares"; (iii) were advised that "the Pulse Board was very confident about Pulse's future"; (iv) knew of "the Offeror's ability to waive the Minimum Tender Condition under the Offer"; and (v) were advised that "the Rights Plan would restrict the ability of the Offeror to acquire effective control of Pulse through a creeping take-over, which effective control could result in any subsequent superior acquisition transaction not proceeding."

- "There was no suggestion of managerial coercion or inappropriate managerial pressure being brought to bear on Pulse Shareholders to approve the Rights Plan".

- "We were reluctant to interfere with a decision of the Pulse Board that has a fiduciary duty to act in the best interests of Pulse Shareholders, particularly when that decision had very recently been approved by informed Shareholders".

- "the Rights Plan did not stand in the way of the Offer so long as more than 50% of the Pulse Shares other than ValueAct's Pulse Shares … were tendered to the Offer".

The ASC then summarized its decision as follows:

"In our view, this very recent and informed Pulse Shareholder approval, given in the absence of any imminent alternatives to the Offer, demonstrated that the continuation of the Rights Plan as at 27 September 2007 was in the bona fide interests of Pulse Shareholders."

Let me explain why I find the ASC's decision troubling and, with respect, incorrect.

First, the ASC's decision in effect amends existing securities legislation. Unless the ASC's decision can be distinguished or overruled in the future, the decision means that if a target has a rights plan similar to Pulse's Rights Plan (which may have been adopted by the target's board tactically after the commencement of a take-over bid and then approved at a meeting of shareholders), then a bidder making a cash take-over bid for 100% of the target's shares can not waive a two-thirds tender condition, take up and pay for shares tendered, announce its ownership position and extend the offer for other shareholders to tender, unless first the "majority of minority" of the target's shares are tendered. Remember the clear statement in Fairvest's 1994 article (which still reflects ISS's views today): "this type of shareholder approval mechanism is unnecessary". The ASC Staff's submission, which was not followed by the ASC hearing panel, also pointed out the issue:

"27. From a policy perspective, Staff submits that to accept Pulse's submissions would *in effect be adding new requirements to Canadian take-over bid legislation.*

28. Allowing the [Rights Plan] to stand would then require any bidder for Pulse shares to obtain greater than 50% of Pulse shares for any bid to be successful. *This effectively could be seen as adding a new requirement to securities legislation. New requirements for hostile take-over bids are policy decisions that should be made by securities regulators, who are bound by rigorous policy-making processes."* (emphasis added)

I would add to Staff's submission my view that new requirements for take-over bids which could apply across Canada are policy decisions that should be made not by a two person hearing panel at one securities commission but rather by securities regulators across the country together with elected legislators (unless specific rulemaking power has been delegated to the securities regulators alone). The fact that a two person panel in one province can make a decision which in effect amends securities legislation and thus can affect future take-over bids across Canada is, I suggest, another argument in favour of why Canada should have a national securities regulator.

Second, the ASC's decision in effect introduces into our securities laws a procedure to "cram down" those shareholders who did not vote at the shareholders meeting held to consider the Rights Plan or who voted against the Rights Plan at that meeting. As the ASC Staff noted in its submissions:

"18. In this case at least 36% of Pulse shareholders did not vote on the [Rights Plan] at all. While there was broad support of the [Rights Plan] from disinterested shareholders…, there is a significant number of shareholders who did not express an opinion as to whether the [Rights Plan] should be adopted. The interests of these shareholders must also be considered

19. It must be remembered that the result of cease trading the [Rights Plan] with respect to the Seitel take-over bid does not ensure the success of the bid. It merely gives all Pulse shareholders the right and ability to decide whether they wish to tender their shares. In so doing, they are fully within their rights to reject the bid."

Notwithstanding ASC Staff's submissions, the ASC decision in effect permitted a cram down by shareholders who voted in favour of the Rights Plan against those shareholders who did not vote or who voted against. The problem with this result is that, unlike the asset backed commercial paper cram down presently working its way through our court system which occurs under a re-organization statute (i.e., the *Companies' Creditors Arrangement Act*) that specifically permits a cram down, or unlike a re-organization under a trust indenture which has been drafted so that it specifically permits the holders of a majority of the outstanding securities under the indenture to make decisions which can affect the fundamental rights of 100% of the securityholders, neither the *Canada Business Corporations Act* under which Pulse is governed nor provincial securities laws governing a take-over bid gives to a board of directors (even with the approval of the holders of a majority of a corporation's outstanding shares) the right to utilize a cram down procedure in a document such as the Rights Plan in order to restrict a fundamental right (i.e., the right to freely alienate the shares of a publicly traded corporation) of 100% of the shareholders.

Third, the ASC decision in effect permits a corporation's board of directors with the approval of a majority of the shareholders to take away property rights inherent in the ownership of shares of a public company. Pulse is not a constrained share corporation which under the *Canada Business Corporations Act* would permit share sales or share ownership to be restricted in certain circumstances. Every shareholder who purchases shares of a public company like Pulse on a stock exchange acquires those shares with the expectation of being able to resell those shares to whomever and whenever the shareholder wishes. The ASC's decision to permit the Rights Plan (and thus the "majority of minority" tender requirement) to remain in place restricted those shareholders who tendered to the Bid from selling their shares at the all cash offer price and forced those shareholders to either hold on to their shares or to sell them in the market. The result of the ASC's decision was exactly the unfairness feared by ASC Staff when they said that "allowing the [Rights Plan] to stand … would prevent Pulse's shareholders from having the choice as to whether to tender their shares to the Seitel bid." I query whether in the circumstances of this case, where the Rights Plan was adopted after the announcement of Seitel's all cash Bid for 100% of Pulse's shares and where Pulse's stock continues to trade at a price below Seitel's final all cash offer price of $3.30 per share, shareholders who wished to tender or in fact did tender into the Bid would have an oppression claim against Pulse and its board of directors.

CONCLUSION

In conclusion, I believe that the ASC decision in **Pulse Data** was incorrect in policy and based on many years of poison pill precedent. The **Pulse Data** decision permitted what is called a shareholder rights plan to *remove* rights from those shareholders who tendered or wished to tender into Seitel's all cash Bid for 100% of the outstanding Pulse shares. I hope that the **Pulse Data** decision is not followed by Canadian securities regulators or courts, but rather than distinguishing **Pulse Data** on its "unique circumstances" I hope a securities commission or a court will state unequivocally that the decision is incorrect. I also hope that in future rights plans hearings, securities regulators fully address both past precedent as well as future policy ramifications which can flow from their decisions. Finally, in light of the **Pulse Data** decision, I hope that ISS reaffirms publicly its views stated in 1994 that a "majority of minority" tender requirement in a shareholder rights plan "is unnecessary" because "the period of delay required by a rights plan is alone sufficient to accomplish the plan's legitimate purposes", and that ISS also reconsiders whether in the future it will endorse a rights plan which has a "majority of minority" tender requirement.

Endnotes

1 Re Pulse Data Inc., 2007 ABASC 895

2 ISS 2007 Canadian Proxy Voting Guidelines

3 Re Royal Host Real Estate Investment Trust (1999), 22 O.S.C.B. 7819, 8 A.S.C.S. 3672

4 "Poison Pill Rights Plans: A Checklist of Current Issues", Corporate Governance Review, Vol. 6 No. 5 at 15 (1994)