

ALBERTA SECURITIES COMMISSION

DECISION

Citation: 1478860 Alberta Ltd., Re, 2009 ABASC 448

Date: 20090903

1478860 Alberta Ltd., a wholly-owned subsidiary of TransAlta Corporation

Applicant

- and -

Canadian Hydro Developers, Inc.

Respondent

Panel:

Stephen Murison
Beverley Brennan, FCA
Karen Prentice, QC

Appearing:

Daniel McDonald, QC
William Maslechko
Shannon Wray
for the Applicant

Webster Macdonald, Jr., QC
Scott Clarke
Karen McGlone
for the Respondent

Taryn Montgomery
Tracy Clark
for Commission Staff

Hearing:

24 August 2009

Oral Decision Delivered:

25 August 2009

Written Decision:

3 September 2009

I. INTRODUCTION

[1] An application (the "Application") was made by 1478860 Alberta Ltd. (the "Applicant", a wholly-owned subsidiary of TransAlta Corporation ("TAC")) for certain orders relating to a "shareholder rights plan" (the "Plan") of Canadian Hydro Developers, Inc. ("Hydro"). The Application arose in the context of a take-over bid by TAC, through the Applicant, for the common shares of Hydro (the "Bid"). Given that the Applicant appears to serve merely as TAC's vehicle for the Bid, and hence also for the Application, we refer to the Applicant and TAC together as "TransAlta".

[2] The Bid having been scheduled to expire on 27 August 2009, an expedited hearing into the Application was held on 24 August 2009. We received written submissions from TransAlta, Hydro and staff ("Staff") of the Alberta Securities Commission (the "Commission"), as well as affidavits sworn by senior executives of, and representatives of external financial advisers to, TransAlta and Hydro. At the hearing the parties made supplementary oral submissions and we heard the testimony of a representative of TransAlta's financial adviser. The quality of the submissions was high, despite the short preparation time available; we commend those responsible. There was, generally, little dispute as to the underlying facts; however, there were considerable differences as to the conclusions that ought to be drawn. We accepted as honestly held, and truthfully expressed, the views and statements presented in the affidavits and witness testimony.

[3] The orders sought by TransAlta would prevent the operation of the Plan by barring trading in any securities issued or issuable under the Plan and removing prospectus exemptions for any trades in securities pursuant to or in connection with the Plan. Such orders would thereby remove a significant, if not insurmountable, impediment to the Bid before its scheduled expiry.

[4] In view of the then-imminent scheduled expiry of the Bid, we delivered a brief decision orally on 25 August 2009, explaining at the time that our augmented written decision and reasons would follow in due course. We set out that written decision and reasons below.

II. ESSENCE OF THE DISPUTE

[5] The Plan, in common with other shareholder rights plans (sometimes called "poison pills"), involves the issuance of rights entitling a shareholder, in specified circumstances, to acquire new voting securities of the Plan issuer (in this case, additional Hydro common shares) at a deeply discounted price. This can make a take-over bid more difficult or expensive, perhaps prohibitively so. The rights under the Plan are not, however, exercisable by an "Acquiring Person" – as defined in the Plan, someone who has or acquires 20% or more of the outstanding Hydro common shares other than through certain means, including a "Permitted Bid" or pursuant to a waiver by the issuer's board of directors.

[6] The Bid does not qualify as a Permitted Bid because the Bid's scheduled expiry date was 35 days after its formal launch, whereas a Permitted Bid as defined in the Plan must be outstanding – no shares may be taken up and paid for under such bid – for at least 60 days from launch.

[7] It appeared common ground that, unless made ineffective by the orders sought, the Plan would block the Bid.

[8] In support of its position that we could, and should, so intervene, TransAlta claimed as a principle of Alberta (and Canadian) securities laws that, faced with a take-over bid, at some point a shareholder rights plan such as the Plan must be set aside or must "go". TransAlta contended that, in this case, in respect of this Plan, that time had come.

[9] Hydro vigorously resisted the Application, contending that our intervention would have been premature because the Hydro board of directors (the "Hydro Board") needed further time to continue "actively pursuing strategic alternatives" in the interests of the Hydro shareholders, and there were indications that such efforts could produce favourable results in the near future. Staff's submissions generally supported the position of Hydro.

III. FACTUAL BACKGROUND

A. TAC and Hydro

[10] TAC is a corporation under Canadian federal law with its head office in Calgary. It describes itself as "among Canada's largest non-regulated electricity generation and energy marketing companies".

[11] Hydro is an Alberta corporation with its head office in Calgary. It describes itself as "the largest and most diversified developer, owner and operator of renewable energy generation facilities in Canada". It has operations in three technologies and in four Canadian provinces, and is "developing prospects" in one further technology and in two other provinces. Hydro common shares trade on the Toronto Stock Exchange. Hydro is a reporting issuer in Alberta and all other Canadian provinces.

B. The Plan

[12] On 14 February 2008 the Hydro Board "resolved to implement" the Plan.

[13] The Plan was presented for Hydro shareholder approval at an annual and special shareholders' meeting on 24 April 2008. The information circular for that meeting (the "Hydro Meeting Circular", which was dated 3 March 2008) included a brief description of the purpose and effect of the Plan and included, as an appendix, a Plan summary. We note that, as a reporting issuer, Hydro would have been required to file the Hydro Meeting Circular on the Canadian securities regulatory disclosure database "SEDAR", such that it would be available to all public viewers of the SEDAR website. The Hydro Meeting Circular stated that the text of the Plan itself was posted on Hydro's website and, if shareholder approval were granted, that it would also be available on the SEDAR website. There was, we noted, no criticism of Hydro's public disclosure.

[14] We reproduce here part of the description and summary of the Plan from the Hydro Meeting Circular:

General Impact of the Plan

It is not the intention of the [Hydro Board], in recommending adoption of the Plan, to secure the continuance of existing directors or management in office, nor to avoid a bid

for control of [Hydro] in a transaction that is fair and in the best interests of [Hydro] Shareholders. For example, through the Permitted Bid mechanism, described in more detail in the summary contained in Appendix F, [Hydro] Shareholders may tender to a bid which meets the Permitted Bid criteria without triggering the Plan, regardless of the acceptability of the bid to the [Hydro Board]. Furthermore, even in the context of a bid that does not meet the Permitted Bid criteria, the [Hydro Board] will continue to be bound to consider fully and fairly any bid for the Common Shares in any exercise of its discretion to waive application of the Plan or redeem the Rights [issued under the Plan]. In all such circumstances, the [Hydro Board] must act honestly and in good faith with a view to the best interests of [Hydro] and its Shareholders.

...

In summary, the [Hydro Board] believes that the dominant effect of the Plan will be to enhance Shareholder value and ensure equal treatment of all [Hydro] Shareholders in the context of an acquisition of control.

...

A "**Permitted Bid**" is a Take-over Bid made by way of a Take-over Bid circular and which complies with the following additional provisions:

- ...
- (ii) the Take-over Bid shall contain, and the provisions for the take-up and payment for [Hydro] Common Shares tendered or deposited thereunder shall be subject to, an irrevocable and unqualified condition that no [Hydro] Common Shares shall be taken up or paid for pursuant to the Take-over Bid prior to the close of business on a date which is not less than 60 days following the date of the Take-over Bid; [original emphasis]

...

[15] Of 143 278 723 Hydro common shares then outstanding, 71 012 159 – 49.56% – were voted by proxy (and holders of a further 1 009 862 common shares, or 0.07% of the total, were apparently present in person) at the 24 April 2008 shareholders' meeting. In respect of the Plan, the recorded results of the proxy votes (it was unclear how those present in person voted) were as follows:

• for the Plan	–	50 965 885
• against the Plan	–	19 175 945
• "Non-Vote"	–	870 329

[16] The proxy votes in favour of the Plan thus represented 35.57% of the total common shares outstanding, 71.77% of the shares voted by proxy at the meeting, and 72.66% of the proxy votes actually cast on the Plan. The votes of those present in person at the meeting would not have affected the result materially. There was no dispute that the Plan was approved by the Hydro shareholders on 24 April 2008.

C. Contact Between TAC and Hydro

[17] TAC's chief financial officer ("CFO") stated that, "In the fall of 2008, [TAC] commenced a process to review and consider a possible combination of [TAC] and [Hydro]. [TAC] began conducting financial, legal and business due diligence based on publicly available information".

[18] He also deposed that, in December 2008, TAC's chief executive officer ("CEO") Steve Snyder ("Snyder") telephoned his counterpart at Hydro, John Keating ("Keating"), with the suggestion that (as expressed by TAC's CFO) they "meet to discuss trends and potential opportunities for the companies to work together". Keating agreed to meet but stated, according to TAC's CFO, that Hydro was not interested in a merger or sale of the company.

[19] The two CEOs met on 18 December 2008 and again on 23 February 2009. At the second meeting, according to TAC's CFO, Snyder outlined in general terms TAC's views of the potential benefits of combining TAC and Hydro and discussed an indicative range of values for Hydro, as assessed by TAC based on available public information. Again according to TAC's CFO, Keating undertook to review with the Hydro Board and senior management the concept of a sale of Hydro to TAC.

[20] On 17 March 2009 Snyder wrote to Keating, urging "a combination of the two companies". According to TAC's CFO, Keating responded that he would review the matter with the Hydro Board at its next meeting.

[21] On 23 March 2009 Hydro's Board appointed a special committee (the "Hydro Special Committee") of independent members, with authority to obtain advice from independent financial advisers and legal counsel. The Hydro Special Committee's mandate included:

- examining and reviewing the merits of the proposal described in the 17 March 2009 letter, and advising the Hydro Board whether the concept expressed in that letter was in the best interests of Hydro and its shareholders;
- "potentially" identifying other interested parties and other strategic alternatives;
- making recommendations to the Hydro Board; and
- as appropriate, negotiating (or supervising the negotiation of) any agreement or offer that may have arisen from the 17 March 2009 letter.

[22] On 27 March 2009 the Hydro Special Committee formally retained financial advisers.

[23] On 2 April 2009 the Hydro Board received the advice of the financial advisers and legal counsel.

[24] On 7 April 2009, according to TAC's CFO, Keating advised Snyder that the Hydro Board "had decided not to move forward with" TAC's proposal in the 17 March 2009 letter. Hydro's understanding seems to have been rather different. According to an affidavit of Keating's successor as Hydro CEO, Kent Brown ("Brown"), and according also to the Hydro Board directors' circular mentioned below, Keating's communication to Snyder on 7 April included a

request for further information concerning TAC's proposal as well as an invitation to discuss a possible joint venture relating to a particular project.

[25] On 6 July 2009 Snyder met with Brown, enquiring again about the possibility of a TAC acquisition of Hydro. According to TAC's CFO, Snyder requested Hydro's cooperation with a view to finalizing a proposal for presentation to Hydro shareholders before the end of that month.

[26] On 7 July 2009 Snyder presented to Brown – for consideration by the Hydro Board – a nonbinding written proposal to buy Hydro at a price of \$4.55 cash per common share (the "July Proposal").

[27] On 8 July 2009 the Hydro Board reviewed the July Proposal and "reconstituted" the Hydro Special Committee.

[28] On 13 July 2009 Brown responded by letter to Snyder advising that the Hydro Board had determined that it was not in the best interests of Hydro and its shareholders to engage in discussions respecting the July Proposal.

[29] On 14 July 2009 Snyder asked Brown for a reconsideration of Hydro's position, and for a final response by 17 July 2009. According to TAC's CFO, Snyder told Brown that TAC was committed to taking the steps necessary to consummate the proposed transaction.

[30] On 17 July 2009 Brown told Snyder that Hydro would not reconsider the July Proposal and that Brown's 13 July 2009 letter still stood as Hydro's response.

[31] In a 20 July 2009 news release TAC announced its intention to make the Bid on terms (notably, the all-cash consideration and bid price) seemingly consistent with the July Proposal. The Bid was formally launched on 22 July 2009 with the publication of TransAlta's Notice of Offer to Purchase and the issuance of its bid circular. The Bid, by the Applicant as offeror, offered \$4.55 for each of the outstanding Hydro common shares (and associated rights under the Plan), with a minimum deposit threshold of 66⅔% and a condition that the Plan be waived, invalidated or cease-traded. Bid expiry was set for 27 August 2009.

[32] On 23 July 2009 the Hydro Board announced its unanimous recommendation that Hydro shareholders reject the Bid. This rejection recommendation was repeated in the Hydro Board directors' circular of 4 August 2009. In rejecting the Bid, the Hydro Board characterized the Bid's timing as "opportunistic" and its terms as "inadequate" and not reflective of the value of Hydro's "extensive growth prospects".

[33] The Application was made by letter from counsel for the Applicant dated 17 August 2009 and the expedited hearing was scheduled for 24 August 2009.

[34] On 20 August 2009 a delegation from what Brown described as a "a leading international financial institution based in New York" met with Hydro in Calgary; it also met separately that day with Hydro's "primary commercial lender". According to Brown, this institution and Hydro were "well known to each other", having had "high level discussions about a potential strategic

combination" over the last year. Further, Brown deposed that a proposal "to acquire all of the [Hydro] Common Shares at a price per share greater than that proposed by TransAlta" was "anticipated" by "the end of the week of August 24, 2009" – that is, we inferred, on or before Friday 28 August 2009 but not necessarily before the scheduled expiry of the Bid. For simplicity we refer to this development as the "New York Prospect".

IV. SUMMARY OF THE LAW

[35] Alberta (and Canadian) securities laws recognize the legitimate role of both take-over bids and shareholder rights plans. Consonant with their broader purpose of protecting investors and the integrity of the capital market, these laws establish a regulatory framework intended to protect target shareholders (here, Hydro common shareholders) but also to ensure that take-over bids are conducted – and defended against – in a manner consistent with the public interest. As set out in National Policy 62-202 *Take-over Bids – Defensive Tactics* (at section 1.1(2)):

The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision.

[36] Shareholder rights plans are often viewed as a defensive tactic implemented by a company that is, or anticipates becoming, the target of a take-over bid. This is sometimes referred to as a "tactical plan" or "tactical pill". Defensive tactics are not prohibited, but Canadian securities regulators will intervene where they consider it to be in the public interest, notably where they consider that a defensive tactic – or its prolongation – is acting to the detriment of target shareholders. Of particular concern will be indications either that target shareholders are being somehow coerced, or conversely that they are being unduly or unfairly deprived of the ability to respond to opportunities relating to their investment (for example, because of steps taken by target company management to ward off a potential acquirer in an attempt to entrench management's own position).

[37] The conduct of take-over bids, and the operation of shareholder rights plans, have been the subject of evolving policy development as well as numerous decisions of securities regulators and courts. The minimum required duration of a take-over bid has been reduced over time, to the 35 days now prescribed in section 2.28 of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids*, which also sets out other basic terms for a take-over bid.

[38] As to shareholder rights plans, it is recognized that they can and do play a valid role, in appropriate circumstances, among other things by giving target companies (and their management and directors) more time than the minimum prescribed by law to respond to a take-over bid and explore potential alternative avenues that might better serve the target shareholders' interests. However, as TransAlta rightly claimed, there will likely come a time at which even the most useful and appropriate shareholder rights plan "must go" (for example, see: *Re Canadian Jorex Ltd.* (1992), 15 O.S.C.B. 257; *Re 1153298 Alberta Ltd.*, 2005 ABASC 725; and *Re Pulse Data Inc.*, 2007 ABASC 895). The regulatory concern with such plans arises when it is considered that their effect of blocking a take-over bid – such as by making the successful

conclusion of a bid impractically expensive through a massive expansion in the number of target securities outstanding – interferes unduly with target shareholders' ability to give effect to their own desires to respond to a bid.

[39] The end of a plan may occur in a variety of ways, including waiver by the issuer's board of directors, or Commission orders of the nature sought here.

[40] This Commission, and our counterparts elsewhere in Canada, have said that we will intervene to constrain or block some defensive tactics – including shareholder rights plans – in certain circumstances. We do so when persuaded that the effect of such tactics would improperly deprive shareholders of their entitlement or expectation of being able to make their own decisions about their investments. In some circumstances this has meant that a shareholder rights plan will be terminated and an outstanding bid allowed to go forward without that impediment, with the target shareholders free to decide whether to tender to that bid. It must be stressed, though, that this is not an invariable outcome: each such case is heavily dependent on its facts. This said, a decision-maker will often look to the non-exhaustive list of factors enumerated by the Commission (in conjunction with the Ontario Securities Commission and the British Columbia Securities Commission) in *Re Royal Host Real Estate Investment Trust* (1999), 8 ASCS 3672 #08/48:

- whether shareholder approval of the rights plan was obtained;
- when the plan was adopted;
- whether there is broad shareholder support for the continued operation of the plan;
- the size and complexity of the target company;
- the other defensive tactics, if any, implemented by the target company;
- the number of potential, viable offerors;
- the steps taken by the target company to find an alternative bid or transaction that would be better for shareholders;
- the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
- the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
- the length of time since the bid was announced and made;
- the likelihood that the bid will not be extended if the rights plan is not terminated.

[41] Largely in recognition of their fiduciary duties to their company and its shareholders, Canadian public company boards of directors give take-over bids serious consideration. This often (if not invariably) involves striking a special committee of directors independent both of company management and of the bidder, as was done here. That special committee then (taking advice from legal and financial advisers) analyses the bid, the company's circumstances and prospects and various possible courses of action, to arrive at a position that the special committee will recommend to the full board and, in turn, to the shareholders. As suggested by the seventh and eighth factors cited above, the process followed by the target company board of directors or special committee, and the outcomes anticipated from such process, will often come under scrutiny when a shareholder rights plan is challenged.

V. THE PARTIES' POSITIONS

A. Position of TransAlta

[42] TransAlta contended that the time for the Plan to "go" had arrived, and that it should be brought to an end before the scheduled 27 August 2009 expiry of the Bid.

[43] TransAlta submitted that the burden of justifying the Plan, and its continuation, fell on Hydro. TransAlta argued that Hydro and the Hydro Board have had ample time to respond to the Bid and explore alternatives; that they have found no plausible alternatives; that further time is unlikely to produce any; and that Hydro shareholders should be able to tender to the Bid unimpeded by the Plan. In TransAlta's submission, Hydro and the Hydro Board already had enough information, sufficiently prior to TransAlta's formal launch of the Bid, to have been in a position to anticipate and respond to the Bid once it was formally launched. In other words, TransAlta suggested that we should not measure the time available to the Hydro Board and Hydro Special Committee only by the period after formal launch of the Bid, given the contacts between TransAlta and Hydro in the months preceding July 2009. Moreover, TransAlta suggested that Hydro itself is not a particularly complicated enterprise to understand or value, and that information in the public domain and Hydro's data room would facilitate the task of any prospective acquirer in understanding and valuing Hydro.

[44] TransAlta seemed to suggest, on the one hand, that the Hydro Board responded hastily in rejecting the Bid (citing the one-day span between Bid launch and announced rejection) but, on the other hand, that the Hydro Special Committee process was somewhat dilatory and not "robust". A senior representative of TransAlta's financial adviser testified that, in his experience, more would be expected to have been done, sooner, than was done by the Hydro Special Committee. He also suggested that the advent of the New York Prospect indicated a shift in attention of the Hydro Special Committee process away from other possible alternatives to focus now on encouraging an alternative proposal from the New York Prospect, converting the process into a "two-horse race" (between TransAlta's Bid and whatever proposal might materialize from the New York entrant). He conveyed doubt that more time would produce a better result for Hydro shareholders than the Bid. TransAlta's position, therefore, was that the Plan should be brought to an end now.

[45] The representative of TransAlta's financial adviser cited examples of other take-over bids that had been allowed to expire, rather than be extended, in the face of a shareholder rights plan.

TransAlta asserted that it had made no decision about extending this Bid, and suggested that we should not assume it would be extended were we to deny the Application.

B. Position of Hydro

[46] Hydro contended that the Plan, and its continuation, were in the interests of its shareholders, as there was a real and substantial possibility of other bids "which would provide greater value to [Hydro] shareholders". Hydro argued that the Hydro Special Committee should not have been expected to have responded pre-emptively to the Bid, suggesting (this was an area in which the parties took different positions on the facts) that TAC had left Hydro with the impression it accepted the rebuff of its earlier approaches and that, therefore, the 20 July 2009 announcement of the intended Bid was a new development. Hydro submitted that the Hydro Special Committee responded appropriately and with alacrity to the Bid, once it was launched, with a process that was, in fact, "robust".

[47] Hydro also argued that it was a more complex entity than suggested by TransAlta; that some potentially interested parties were based in Europe, where the traditional summer holiday break was a particular impediment to rapid progress; and that despite this the Hydro Special Committee process was showing results with several parties having shown interest – six having gone so far as to sign confidentiality agreements to gain access to the Hydro data room established for this purpose and two meetings with "further players" being scheduled for the week of the hearing. Hydro contended that the New York Prospect constituted a very substantial development with (as mentioned) a proposal anticipated by the end of the week of the hearing. Hydro suggested that the New York Prospect "only enhances" Hydro's position that its current process was viable but required more time to produce results – time afforded by allowing the Plan to continue.

C. Position of Staff

[48] Staff largely supported Hydro's position. Staff did, however, take issue with Hydro's suggestion that the summer timing of the Bid was a significant factor, noting (with reference to an earlier decision of this Commission) that businesspeople can and do act quickly when necessary, holiday or no. Staff contended that it was not appropriate for us now to end the Plan, but that it should be allowed to continue for an appropriate further period – noting that, had the Bid conformed to the terms of a Permitted Bid under the Plan, it would not expire before 21 September 2009.

VI. ANALYSIS

A. Overview and Approach

[49] In our view, shareholders of a public company should not be denied, indefinitely, the opportunity to make decisions about their investment once their company has become the target of an acquisition proposal. That said, a determination of when that point has arrived will depend on all the circumstances of the particular case.

[50] Reference was made in the parties' submissions to several earlier decisions dealing with other shareholder rights plans. We took guidance from the principles developed in those cases. However, the present circumstances are sufficiently distinguishable from prior decisions that none was determinative of our decision here.

[51] We agreed with TransAlta that, in the circumstances, Hydro bore the burden of demonstrating in the first instance that there was "a real and substantial probability" – not, we note, a certainty – that continuation of the Plan for a reasonable time could enhance the outcome for the Hydro common shareholders, in terms of choice or "shareholder value". Were Hydro to fulfil that burden, it would then fall on TransAlta to either: (i) show that (despite Hydro having, in this scenario, satisfied the initial burden) there was no real and substantial probability, within a reasonable time, of some other, enhanced outcome for Hydro common shareholders; or (ii) demonstrate some other compelling reason for the Plan nonetheless to be brought to an end now (see *Re Nations Energy Company Ltd.*, 2005 ABASC 725 at para. 52, citing *Re Samson Canada, Ltd.* (1999), 8 ASCS 1791 #08/25).

B. Hydro Discharged Initial Burden

[52] The financial advisers for TransAlta and Hydro conveyed very different views as to how well the Hydro Special Committee had conducted itself and as to the quality and prospects of the Hydro Special Committee process. Their comments related, in particular, to the chances of the Hydro Special Committee process generating something more acceptable to Hydro and more favourable for the Hydro shareholders than the Bid – both before and after taking into account the news of the New York Prospect. Another area of difference, pertaining to the timeliness of the Hydro Board's preparation for and response to the Bid, centred on whether Hydro and the Hydro Board had reason, before the Bid was launched, to believe (as was claimed) that TAC was unlikely to proceed other than by agreement with Hydro. As stated, we considered the views and statements presented to us in affidavit evidence and witness testimony to have been honestly held and truthfully expressed. Where there were differences, they appeared to us to reflect perception, belief or emphasis more than real disputes as to underlying facts (this could be said even of the different characterizations of a 7 April 2009 communication mentioned above).

[53] Nothing in the evidence persuaded us that Hydro or the Hydro Board failed to respond to the Bid with reasonable diligence and a fair appreciation of their duties to their shareholders. Hydro, the Hydro Board and the Hydro Special Committee undertook and continued to pursue a process that involved consideration of the Bid and other possible alternatives with a view to the interests of the company and its shareholders. At the time of the hearing, the Hydro Board had not changed its mind that the Bid was not in the interests of those shareholders.

[54] Differing views notwithstanding, the fact remained that neither TransAlta nor Hydro (nor Staff, nor this panel) could know with certainty what would transpire as a result of the Hydro Special Committee process generally or in respect of the New York Prospect specifically – nor when anything might transpire. It was not clear to us that the New York Prospect would crystallize into anything, one way or the other, by 27 August 2009 (the scheduled Bid expiry date). Nor did we know with certainty that the New York Prospect represented the only potential alternative to the Bid.

[55] We were persuaded that Hydro and the Hydro Board were actively pursuing options that might, in their view, serve Hydro common shareholders better than would the Bid. Moreover, we accepted the evidence that there were signs of real activity in the Hydro Special Committee

process, and some likelihood that an alternative proposal could materialize. There was enough, in our view, to conclude that there was a "real and substantial probability".

[56] We therefore concluded that Hydro had discharged the initial burden upon it in this proceeding.

C. No Real and Substantial Probability of Enhanced Outcome?

[57] As mentioned, with Hydro having discharged this initial burden, it then fell to TransAlta to demonstrate that we should, nonetheless, bring the Pill to an end. One method of doing so (following *Samson*) would be to persuade us that, Hydro's success in discharging its initial burden notwithstanding, there truly was no real and substantial probability that prolonging the Plan – and the Hydro Special Committee process – beyond the scheduled expiry of the Bid could generate a better outcome for Hydro common shareholders.

[58] In assessing whether TransAlta had accomplished this, we considered the same submissions and evidence as when we first assessed Hydro's discharge of its initial burden. Our conclusion was essentially the same: while TransAlta rightly pointed out the undeniable uncertainty as to what, if anything, the current Hydro Special Committee process might generate, we concluded that there was evidence sufficient to indicate, at that point, a real and substantial probability of an enhanced outcome were more time allowed under the Plan.

D. Compelling Reason to Intervene?

[59] We then considered whether TransAlta had, nonetheless, made a compelling case that there was reason to intervene and bring the Plan to an end. In so doing, we looked to the circumstances surrounding the Plan itself.

[60] The Plan was adopted by the Hydro Board and approved by Hydro shareholders in advance of the Bid – indeed, in advance even of TAC's initial approach to Hydro. We attached considerable importance to this.

[61] We considered that at the time the Plan was put to a shareholder vote – in April 2008 – Hydro shareholders had, and exercised (to the extent they wished to), the opportunity to make a decision, in advance, relating to take-over bids. We noted the solid (over 70%, as mentioned) support given the Plan by the Hydro common shareholders who voted on it. Clearly the votes were cast in light of the information about the Plan set out in the Hydro Meeting Circular. We concluded that the Hydro shareholders gave their approval with knowledge of the disclosed key terms of the Plan, such as the 60-day minimum duration of a "Permitted Bid".

[62] In our view, therefore, it followed that Hydro shareholders can fairly be presumed to have made an informed decision that would have the effect of impeding a take-over bid that (like the Bid) was not a "Permitted Bid", one key characteristic of which would be a minimum duration of 60 days. This presumption implied also that Hydro shareholders knew and accepted the risk that a potential non-Permitted Bid – even a highly attractive one – might be blocked by the Plan.

[63] Thus, after April 2008 Hydro shareholders and prospective acquirers of Hydro alike would have known that a take-over bid that was not outstanding for at least 60 days would face a

major hurdle in the form of the Plan, unless Hydro's directors were to waive the Plan in favour of a non-Permitted Bid.

[64] TAC first approached Hydro over seven months after the Hydro shareholders approved the Plan. After some intermittent further contacts and rebuffs, TransAlta announced on 20 July 2009 that it would make the Bid, formally launching it two days later.

[65] TAC acknowledged that it knew of the Plan, as stated by its CFO in an affidavit. Moreover, the Bid circular (as mentioned) expressly referred to the rights associated with the Plan.

[66] In setting a 35-day duration for its Bid, TransAlta chose the shortest duration allowable at law, for reasons of its own. TransAlta was aware that its Bid would not qualify as a Permitted Bid under the Plan. TransAlta knew that intervention from some quarter – such as a change of heart by the Hydro Board or an order by the Commission – would be needed to remove the obstacle to its Bid. TransAlta should have known the risk it was running when it set the terms of the Bid. TransAlta walked into this situation with its eyes open, but turns now to us to remove this impediment of the Plan.

[67] In our view, the Plan was, at the time of the hearing, operating within the law, essentially as designed and as approved by Hydro shareholders. We were not persuaded that the Plan was being misused by Hydro or the Hydro Board. As discussed, we concluded that there were signs of real activity in the Hydro Special Committee process, and some likelihood that an alternative proposal could materialize. This situation was what the Hydro shareholders agreed to accept when they approved the Plan.

[68] We appreciated – as should Hydro shareholders and directors – that TransAlta was not obliged and had not committed to extend the Bid. TransAlta could allow the Bid to expire as scheduled on 27 August 2009 without taking up any Hydro shares. That, in our view, was a risk that Hydro and the Hydro Board must be presumed to have understood. It was, moreover, a risk in April 2008 (albeit at that time a hypothetical one) that we believe Hydro shareholders must be assumed to have understood when they were presented with the Plan and approved it.

[69] For these reasons, we considered that TransAlta had not demonstrated a compelling reason for us to intervene and interfere with the Plan. We concluded that this was not a case warranting our intervention at the time of the hearing, as that would undermine the Hydro shareholders' earlier decision of what would serve their interests.

E. Different Circumstances Could Lead to Different Outcome

[70] Notwithstanding our conclusion on the facts before us at the hearing, we foresaw that a time could arrive – and quite soon – when the Plan ought to go, by Commission order or simple waiver by the Hydro Board. Although we were not in a position to specify when precisely that time would be, we envisaged potential scenarios that could narrow the time horizon.

[71] Recalling that the Plan the Hydro shareholders approved was designed to give the Hydro directors 60 days in which to respond to a bid, we were of the view that an extension of the

TransAlta Bid to a period amounting to 60 days from its inception would substantially serve that purpose. We would expect that the Plan should come to an end before the expiry of such a hypothetical extension of the Bid.

[72] Moreover, we considered that there could be circumstances warranting an even earlier end to the Plan. One such circumstance might be a crystallization, into an actual proposal, of the New York Prospect. Another such circumstance might be a concrete indication that no alternative to the Bid should be expected in the coming few weeks.

VII. CONCLUSION

[73] To summarize, we concluded that this case did not warrant our intervention at the time of the hearing – but that a change in circumstances could lead to a different outcome.

[74] We therefore made no orders, and dismissed the Application.

3 September 2009

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Beverley Brennan, FCA

"original signed by"
Karen Prentice, QC