Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
22nd Floor
20 Queen Street West
Toronto ON M5H 3S8
22e étage
20, rue queen ouest
Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
THIRDCOAST LIMITED AND PARRISH & HEIMBECKER, LIMITED

REASONS FOR DECISION
(Section 127)

Hearing:	July 4, 2012	
Decision:	July 4, 2012	
Reasons:	August 11, 2014	
Panel:	Mary G. Condon	- Vice-Chair and Chair of the Panel
	C. Wesley M. Scott	- Commissioner
	Paulette L. Kennedy	- Commissioner
Appearances:	Christopher Bredt David Di Paolo Kara Beitel	- Parrish & Heimbecker, Limited
	Blair W. M. Bowen Rick Moscone W. Ross MacDougall	- For Thirdcoast Limited
	Kathryn Daniels Shannon O'Hearn Alex Gorka	- For Staff of the Commission

TABLE OF CONTENTS

REASONS FOR DECISION

I. OVERVIEW

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider two applications filed with the Commission by (1) Parrish & Heimbecker, Limited ("**P&H**") on June 8, 2012 and (2) Thirdcoast Limited ("**Thirdcoast**") on June 12, 2012, respectively.

[2] The application filed by P&H (the "**Rights Plan Application**") sought a permanent order that all trading cease in connection with the shareholder rights plan of Thirdcoast Limited dated May 30, 2012 (the "**Rights Plan**"). Specifically, P&H sought the following relief pursuant to the Rights Plan Application:

(a) A permanent order pursuant to section 127 of the Act that all trading cease in respect of any securities issued, or that are proposed to be issued, in connection with the Rights Plan, including, without limitation, in respect of any rights issued or to be issued under the Rights Plan ("**Rights**") and any common shares of Thirdcoast to be issued upon the exercise of such Rights; and

(b) A permanent order removing prospectus exemptions in respect of the distribution of Rights issued under or in connection with the Rights Plan and in respect of the exercise of such Rights.

[3] The application filed by Thirdcoast (the "**Lock-up Agreements Application**") sought a permanent order that all trading in Thirdcoast common shares pursuant to lock-up agreements (the "**Lock-up Agreements**") entered into by P&H pursuant to its take-over bid for common shares of Thirdcoast cease (the "**Bid**" or "**Offer**"). Specifically, Thirdcoast sought the following relief pursuant to the Lock-up Agreements Application:

(a) A permanent order pursuant to section 127 of the Act that all trading in Thirdcoast common shares pursuant to the terms of the Lock-up Agreements cease; and

(b) An order pursuant to section 104(1)(b) of the Act that P&H amend its Offer and its take-over bid circular delivered to shareholders of Thirdcoast in connection with the Offer to provide for the amended information with respect to the Lock-up Agreements, which would include a recommencement of the 35-day minimum period that shareholders of Thirdcoast would be permitted to deposit their common shares of Thirdcoast under the Offer.

[4] On June 14, 2012, the Commission issued a Notice of Hearing for a hearing commencing on July 4, 2012 to consider whether it is in the public interest to make an order, pursuant to the Rights Plan Application, cease trading the securities issued or proposed to be issued pursuant to the Rights Plan and to consider whether it is in the public interest to make an order, pursuant to the Lock-up Agreements Application, cease trading the securities that are subject to the Lock-up Agreements.

[5] On July 4, 2012, a hearing to consider the Rights Plan Application and the Lock-up Agreements Application was held and an order was issued by the Panel granting the relief

requested in the Rights Plan Application and dismissing the Lock-up Agreements Application in its entirety (the "**Decision and Order**"). A copy of the Decision and Order can be found at (2012) 35 O.S.C.B. 6464. In the Decision and Order, the Panel indicated that it would be delivering its reasons for its decision in due course. These are those reasons.

II. BACKGROUND

[6] At the time of the hearing, Thirdcoast was a reporting issuer existing under the laws of Ontario whose common shares traded primarily on the over-the-counter market and were not listed on any stock exchange. P&H was the largest holder of Thirdcoast common shares, holding approximately 27.99% of the issued and outstanding common shares of the company.

[7] P&H first entered into Lock-up Agreements with a number of Thirdcoast shareholders on January 23, 2012.

[8] On February 21, 2012, P&H informed members of Thirdcoast's board of directors of its intention to acquire the remaining common shares of Thirdcoast that P&H did not then own and requested that Thirdcoast obtain an independent valuation in accordance with requirements for insider bids pursuant to Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**").

[9] As of the close of business on March 5, 2012, the prices for Thirdcoast common shares were posted as at January 31, 2012 at a bid price of $75.00 per common share and an ask price of $79.00 per common share.

[10] On March 6, 2012, P&H issued a press release announcing its intention to make an all-cash offer of $115 per share for Thirdcoast common shares and disclosing that it had entered into Lock-up Agreements with certain shareholders of Thirdcoast, pursuant to which those shareholders agreed to tender their common shares to P&H and not to withdraw their common shares from the offer unless the Lock-up Agreements were terminated. The Thirdcoast common shares owned by P&H, combined with those common shares subject to the Lock-up Agreements, constituted 51.62% of the issued and outstanding Thirdcoast common shares.

[11] On March 9, 2012, Thirdcoast issued a press release announcing that William Howson ("**Howson**") had resigned as a member of the Thirdcoast board of directors due to existing business relationships between Howson & Howson Limited (of which he was an officer and director) and P&H. On March 12, 2014, Howson entered into a Lock-up Agreement with P&H.

[12] On March 27, 2012, P&H entered into a Lock-up Agreement with Thompsons Limited, one of Thirdcoast's largest shareholders and a Thirdcoast customer.

[13] On March 30, 2012, P&H issued a press release which stated that P&H's intention was "to continue the operation of Thirdcoast's grain handling facilities under the existing public house model in the event that P&H successfully acquires or controls Thirdcoast as a result of the Bid".

[14] On May 28, 2012, the independent valuation of Thirdcoast, prepared as required by MI 61-101, valued Thirdcoast common shares in the range of $130 to $170 per common share.

[15] On May 29, 2012, after receipt and review of the independent valuation of Thirdcoast made in connection with the Offer, P&H issued a press release announcing an increase in the consideration to be offered for Thirdcoast common shares to $155 per common share.

[16] On May 30, 2012, Thirdcoast issued a press release announcing that the Thirdcoast board of directors adopted the Rights Plan "to allow the Board time to explore and develop strategic alternatives in the context of [P&H's] Insider Bid".

[17] On May 31, 2012, P&H formally commenced its Bid for any and all of the issued and outstanding common shares of Thirdcoast not currently owned by P&H for all-cash consideration of $155 per common share.

[18] On June 28, 2012, Thirdcoast issued a press release announcing, among other things, that the independent committee of the Thirdcoast board of directors (the "**Independent Committee**"), in consultation with its financial advisor, "is working on an alternative asset transaction involving the sale of its grain business which would result in Shareholders receiving a superior return to [P&H's offer]". The June 28, 2012 press release further stated that "[t]here is no guarantee that a Superior Transaction will be entered into, but if it were, it is expected that the net proceeds of such Superior Transaction (after all taxes and transaction costs) combined with Thirdcoast's cash and liquid investment balance would be in excess of $155 per share, and result in cash being paid out to Shareholders in the form of a dividend".

[19] In response to P&H's Rights Plan Application, Thirdcoast requested that the Rights Plan be permitted to remain in place for a further 30 days, "to permit the Independent Committee to fulfill their fiduciary duties to Thirdcoast", and in particular, to pursue "an alternative asset transaction", which, at the time of this hearing, was the subject of concurrent litigation.

III. ISSUES

[20] The applications before the Commission raised the following issues:

A. Was the Offer coercive for lack of a minimum tender condition and as a result of the existence of the Lock-up Agreements?

B. Was a collateral benefit being offered to some shareholders in exchange for entering into the Lock-Up Agreements, in contravention of section 97.1(1) of the Act?

C. Should the Commission exercise its public interest jurisdiction to cease trade the Rights Plan?

[21] We will address the submissions of the parties on these issues in the context of our analysis below.

IV. THE LAW AND ANALYSIS

A. The Offer was not Coercive

[22] Thirdcoast took the position that the Offer was coercive because of the lack of a minimum tender condition combined with the existence of the "hard" Lock-up Agreements.

[23] Part XX of the Act, which governs take-over bids, does not provide any obligation for a bidder to include a minimum tender condition as a term of its bid. In *Re Sears Canada Inc.* (2006), 35 O.S.C.B. 8766 ("***Re Sears***") at paragraphs 269 and 270, this Commission held that although no minimum tender condition is required, a lack thereof is a relevant factor in determining whether a bid is coercive:

> We cannot conclude that the absence of a minimum tender condition is necessarily coercive on its own. There is no obligation to include a minimum tender condition in every offer and nothing, per se, improper with announcing the intention to include such a condition but subsequently deciding not to include it once the bid is formally launched. We also note that even where take-over bids do include such a condition, the condition can typically be waived in the sole discretion of the offeror.
>
> However, liquidity concerns on the part of shareholders who would prefer not to tender to the Offer which lacks the protection of a minimum tender condition can create pressure on shareholders to tender despite their views as to the adequacy of the offer. On its own, this does not warrant Commission intervention but it is a factor to bear in mind in considering the other claims of coercive or abusive conduct relating to the Offer.

[24] Further, lock-up agreements are contemplated in MI 61-101 and Part XX of the Act and the Commission has held that bidders, including insiders, are entitled to enter into lock-up agreements with target shareholders:

> Deposit agreements, support agreements, and lock-up agreements are all contemplated by the Act and Rule 61-501 [predecessor to MI 61-101] and are not, in and of themselves, objectionable or illegal. As counsel for RBC pointed out to us in closing submissions, such agreements are a common and accepted tool for bidders in this jurisdiction. Insider bidders are also entitled to lock-up a majority of the minority votes and to have those votes count in a second stage transaction...
>
> (*Re Sears*, at para. 250)

[25] Lock-up agreements are a business tool commonly used in the context of take-over bids to ensure that significant shareholders will tender to a bid, thereby ensuring the success of a bidder's transaction. This Commission has confirmed that this is not an illegitimate or improper practice (*Re Sterling Centrecorp Inc.* (2007), O.S.C.B. 6683 at paragraph 104). In *Re Stornoway Diamond Corp.*, [2006] LNBCSC 591, the British Columbia Securities Commission specifically considered whether hard lock-up agreements were contrary to the public interest and found that "… there is nothing illegal, or even improper, about lock-up agreements, including hard lock-up agreements" (at para. 67). In this case, Thirdcoast conceded that the Lock-up Agreements were not, in and of themselves, coercive.

[26] Thirdcoast argued that by entering into the Lock-up Agreements, P&H was attempting to circumvent the prohibitions in Part XX of the Act. Specifically, Thirdcoast took the position that because P&H could not utilize the exemptions set out in sections 100 and 100.1(1) of the Act,

P&H used the hard Lock-Up Agreements in *lieu* thereof. Their argument is set out in paragraphs 39 and 42 of their Memorandum of Fact and Law:

> 39. At the time of entering into the Lock-Up Agreements, if P&H wanted to purchase more shares of Thirdcoast than it already owned, it would have had to do so pursuant to an exemption from Part XX of the Act as it already owned more than 20% of the Thirdcoast common shares. Any purchase of additional common shares would have been considered a "take-over bid". The only exemptions available to P&H would have been the Normal Course Purchase Exemption (Section 100) and the Private Agreement Exemption (Section 100.1(1))…
>
> ….
>
> 42. By entering into the hard Lock-up Agreements with no minimum tender requirement to its Bid, P&H is attempting to achieve indirectly what it is prohibited from achieving directly under Part XX of the Act. That is, to acquire shares on a piece-meal basis without any obligation to acquire the remaining shares.

[27] We disagree with Thirdcoast's characterization of the nature of the Bid. P&H made an offer to all of the Thirdcoast shareholders and was required to accept tendered shares *pro rata* in accordance with the take-over bid provisions in the Act. Lock-up agreements do not permit P&H to derogate from these principles.

[28] We also disagree with Thirdcoast's suggestion that entering into a lock-up agreement is tantamount to acquiring shares. It is not by virtue of entering into a lock-up agreement with target shareholders that a bidder triggers the rights attaching to the target shares. The act of entering into the Lock-up Agreements was not an acquisition of Thirdcoast's shares by P&H. Accordingly, this Panel determined that the Offer was neither coercive nor in contravention of Part XX of the Act.

B. There were no Collateral Agreements, Commitments or Understandings

[29] Subsection 97.1(1) of the Act provides as follows:

> If a person or company makes or intends to make a formal bid, the person or company or any person or company acting jointly or in concert with that person or company shall not enter into any collateral agreement, commitment or understanding that has the effect, directly or indirectly, of providing a security holder of the offeree issuer with consideration of greater value than that offered to the other security holders of the same class of securities.

[30] The precise wording of the section refers to "any person or company acting jointly or in concert" with a bidder, which has been held to include parties to a lock-up agreement. However, in order for this Panel to find that P&H acted in breach of the prohibition in subsection 97.1(1) of the Act, there must be clear evidence that a collateral agreement, commitment or understanding was entered into by P&H with some, but not all, of the Thirdcoast shareholders in exchange for the executed Lock-up Agreements. Section 97.1(1) makes clear that if this Panel finds any one of an agreement *or* a commitment *or* an understanding to exist, any such arrangement that has

the effect of offering greater value to some security holders than that offered to others of the same class of securities is prohibited by the Act.

[31] The panel in *Re Sears* reflected that:

> …the Commission has described a "collateral agreement" as: "… an agreement separate and apart from any agreement resulting from acceptance of the offeree's take-over bid itself … The primary dictionary meaning of collateral is "running side by side – parallel."
>
> (*Re Sears* at para. 203, citing *Re Genstar Corp.* (1982), 4 O.S.C.B. 326C at 338C)

We note that Thirdcoast did not suggest the existence of a collateral agreement or commitment but only a collateral understanding. The Oxford English Dictionary defines "understanding" as "an informal or unspoken agreement or arrangement."

[32] Thirdcoast submits that at least one of the Lock-Up Agreements was entered into by reason of a collateral understanding. Specifically, Thirdcoast alleges that Thompsons Limited, one of Thirdcoast's largest shareholders, entered into a collateral understanding with P&H for long term access to Thirdcoast's facilities.

[33] At the heart of Thirdcoast's argument was that the totality of the evidence before the Commission provided this Panel with clear evidence that a collateral "understanding" was entered into in exchange for the Lock-up Agreements resulting in the unequal treatment of Thirdcoast shareholders. This would be a contravention of subsection 97.1(1) of the Act. The evidence relied upon by Thirdcoast was (a) email correspondence between Mr. Bryson, Vice-President of P&H, and Mr. Thompson, Thompsons Limited's principal, (b) a conversation between Mr. Henry, Thirdcoast's President and CEO, and Mr. Thompson, as described in the affidavits of Mr. Bryson and Mr. Henry, and (c) a P&H press release dated March 30, 2012.

[34] The impugned press release provided, in part, as follows:

> …We wish to affirm that our intention is to continue the operation of Thirdcoast's grain handling facilities under the existing public house model in the event that P&H successfully acquires or controls Thirdcoast as a result of the Bid.

[35] Counsel for Thirdcoast relied on *Re Sears* at paragraph 57 for the proposition that a broad approach should be taken to determine what constitutes consideration of greater value than offered to other shareholders. With respect to the press release, counsel for Thirdcoast submitted as follows:

> And that is the understanding. The understanding that we say was a collateral benefit is the understanding that if you enter into a lock-up agreement with us, we will continue to provide you with access to the Goderich terminal for that purpose.
>
> (Hearing Transcript at pages 131-132)

[36] Counsel for Thirdcoast asserted that the statements made in the March 30, 2012 press release constitute a clear breach of section 97.1(1) of the Act:

> There was a public pronouncement put out by P&H in one of its press releases that essentially said, we will maintain this Goderich terminal, if we acquire it, as a public house, so there shouldn't be any undue concern about us acquiring it.
>
> Well, that's fine, but that's -- so there's a proposition that there is -- that you will not be denied access. So there's an assurance given. That's why I say an understanding. There's an assurance given by one party and accepted as an assurance by the other party. There's no agreement. But one party says, we're not going to deny you access. We want your support. We're not going to deny you access. We're going to maintain this as a public house.
>
> But it can only do that to people who use it as a public house. It can only do that to shareholders who are customers of that public house and not all shareholders.
>
> (Hearing Transcript at pages 136-137)

[37] Counsel for Thirdcoast submit that the impetus for the press release was the existence of a collateral understanding between Mr. Thompson and P&H as demonstrated by an email dated March 15, 2012 from Mr. Bryson to Mr. Thompson, which provided as follows:

> I will be happy to give you written guarantee of access to the terminals, with or without a lock-up agreement. While I would like to see us agree to the lock-up agreement our first priority at Thirdcoast is to maintain your business as a key customer.

[38] Counsel also took the Panel to Mr. Thompson's affidavit and asked us to infer that the March 15, 2012 email, combined with the March 30, 2012 press release, together with the affidavit evidence before us, demonstrated the existence of a collateral understanding prohibited by section 97.1(1) of the Act. On further questioning by the Panel about this "understanding", the response from counsel for Thirdcoast was as follows:

> MR. MOSCONE: There's no question that there's some speculation is required here [*sic*]. But I think, you know, if you sort of put -- if you sort of look at it objectively, I find it surprising that Wes Thompson on March 15th, in response to a request for a lock-up agreement, says, can you work in there language about access to the facility. That was his request.
>
> And the response from P & H is: Not a problem, we can give you that whether you sign a lock-up agreement or not. So the question is, why did it then take him 12 days to sign the lock-up agreement, subsequent conversation?
>
> And in between that, a meeting that he attended which he says -- I mean, in it, he says that they attended a conference call in an effort to organize a resistance to the bid. So why did he attend that conference call? And why did he decide five days later to enter into this lock-up agreement?

CHAIR: So you tell us what you think is the answer to that question.

MR. MOSCONE: Well, I don't know. But I think it comes back to the question you asked Mr. Bowen, which is what's the difference between an agreement or an understanding. And obviously, we don't have an agreement here. But do we have an understanding? I think it's fairly clear.

(Hearing Transcript at pages 139-140)

[39] In response to Thirdcoast's submissions, counsel for P&H took us to the affidavit of Mr. Henry, President and CEO of Thirdcoast, which was evidence submitted by Thirdcoast in support of its argument that a collateral understanding existed. In his affidavit, Mr. Henry recalls a conversation with Mr. Thompson where he says Mr. Thompson revealed that he entered into an agreement with P&H for future access to Thirdcoast's facilities in exchange for his support of the Bid. Counsel for P&H characterized Mr. Henry's evidence as follows:

Now, this is the only evidence that Thirdcoast has called on this issue. It's not direct evidence. It's simply hearsay evidence regarding a discussion that he had with Mr. Thompson.

(Hearing Transcript at page 152)

[40] Counsel for P&H further referred to the affidavit of Mr. Thompson in which he disagrees that he told Mr. Henry that Thompsons Limited had come to an agreement with P&H for future access to Thirdcoast's facilities in exchange for Thompsons Limited's support of the Bid:

… I disagree with Mr. Henry's statement; Thompsons and P&H did not enter into an agreement in exchange for Thompsons supporting the take-over bid by P&H for all of the issued and outstanding common shares of Thirdcoast … Moreover, I did not refuse to discuss terms of the agreement with Mr. Henry; rather, there are no terms to discuss because there is no agreement.

I did, on behalf of Thompsons, sign a lock-up agreement on March 27, 2012 … pursuant to which Thompsons agreed to tender its shares of Thirdcoast under the Bid. The consideration under the Bid (at that time) was $115 per common share. No other consideration was provided to Thompsons under the Lock-up Agreement or to entice it to enter into the Lock-up Agreement. …

(Affidavit of Wesley T. Thompson sworn June 20, 2012 at pages 1-2)

[41] In his affidavit, Mr. Thompson states that he had discussions with the Vice-President of P&H Grain Group about continued access to Thirdcoast's grain terminal in Goderich. During these discussions Mr. Thompson was assured that Thompsons Limited would continue to have access to the Goderich terminal, regardless of whether Thompsons Limited entered into a lock-up agreement:

At some point during our discussions, Mr. Bryson confirmed to me that he was not permitted to offer me anything other than what he was offering to all other Thirdcoast customers. He also advised me that Thompsons would continue to

> have the same access it had in the past, regardless of whether it decided to enter into the Lock-up Agreement.
>
> (Affidavit of Wesley T. Thompson sworn June 20, 2012 at page 2)

[42] In *Re CDC Life Sciences Inc.* (1988), 11 O.S.C.B. 2541 ("**CDC**") at 2547 this Commission articulated the fundamental requirement for equal treatment of security holders in the context of a take-over bid scenario. Specifically with respect to collateral agreements or understandings, this Commission determined that they will be considered on their own facts in each case, and noted common elements of collateral agreements, commitments or understandings that have been approved in past cases:

> During the course of the hearing questions were raised as to what sorts of collateral agreements, commitments or understandings might be entered into without creating a breach of subsection 96(2) [now subsection 97.1(1)]. Such collateral agreements are both many and various, and each will be considered on its own facts. Mr. Sorell filed a helpful compendium of decisions in which the Commission has considered such agreements, and a common thread runs through most of them: a clearly established business or financial purpose related either to the terms upon which the offeror is prepared to acquire the target company or to its ongoing operation. Thus, the Commission has approved agreements under which certain shareholders would receive deferred compensation rather than immediate cash; others, requiring the controlling shareholders to take certain assets out of the company as a condition of the offeror's proceeding; yet others, providing for continuity of senior management by way of employment contracts. In each case, Staff has tested the reasonableness of the arrangement in relation to the purpose claimed for it and independent opinions on that issue have sometimes been required.
>
> (*CDC* at 2560)

[43] We recognize that the parties to this hearing did not cross-examine the affidavit evidence submitted in support of the applications and we took this into consideration when weighing the evidence. Notwithstanding that Mr. Thompson was not cross-examined, we did not find that a collateral understanding either (a) was entered into in exchange for the Lock-Up Agreement or (b) resulted in the unequal treatment of security holders. Thirdcoast did not present any evidence that led the Panel to conclude that P&H entered into any collateral understanding that would have the effect of providing any Thirdcoast shareholder with consideration of greater value than any other shareholder as a result of entering into the Lock-up Agreements.

[44] At the time that Thompsons Limited entered into the Lock-up Agreement with P&H, it understood that it would continue to have access to Thirdcoast's facilities following an acquisition by P&H. However, this was not an understanding collateral to P&H making the Bid or to entice Thompsons Limited to enter into a Lock-up Agreement.

[45] Although contemporaneous with the Bid, the understanding that Thompsons Limited would continue to have access to Thirdcoast's facilities was not a form of consideration provided to Thompsons Limited in exchange for entering into a Lock-up Agreement. Neither was it

provided uniquely to Thompsons Limited; Mr. Thompson's evidence was that P&H was not offering Thompsons Limited anything that would not also be available to other Thirdcoast customers.

[46] Upon consideration of the nature of the Lock-up Agreements, the evidence submitted at the hearing and the context of section 97.1 of the Act and the *CDC* case, we were not satisfied that there was any benefit provided to any of the locked-up Thirdcoast shareholders of greater value than that provided in the Offer. There was no evidence before us that P&H engaged in activities prohibited under section 97.1(1) of the Act. Accordingly, we dismissed Thirdcoast's application for an order cease trading the Thirdcoast shares that were subject to the Lock-up Agreements.

C. The Rights Plan should be Cease Traded

[47] The Rights Plan was a defensive tactic implemented by Thirdcoast in response to the P&H Bid. Subsection 1.1(5) of National Policy 62-202 *Defensive Tactics* ("**NP 62-202**") articulates the Commission's view that it "will take appropriate action if [the Commission] become[s] aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid."

[48] This Commission has repeatedly recognized that, notwithstanding the potential benefits of a shareholder rights plan, there comes a time when such plan has served its purpose by encouraging competing bids or otherwise maximizing shareholder value and is no longer any benefit to the bidding process: *Re Canadian Jorex Ltd.* (1992), 15 O.S.C.B. 257 ("***Jorex***"). In *Jorex*, a foundational decision by the Commission, the panel held at page 266 as follows:

> … For us, the public interest lies in allowing shareholders of a target company to exercise one of the fundamental rights of share ownership – the ability to dispose of shares as one wishes – without undue hindrance from, among other things, defensive tactics that may have been adopted by the target board with the best of intentions, but that are either misguided from the outset or, as here, have outlived their usefulness.

[49] With respect to the Rights Plan Application, we considered NP 62-202 as well as the case law which sets out the relevant factors to be considered in making a determination to cease trade a shareholder rights plan. Specifically, we considered the factors enumerated in *Re Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819 ("**Royal Host**") at paragraph 74. In the recitals to the Decision & Order, this Panel enumerated certain Royal Host factors that were relevant and taken into consideration at the time of the hearing, as follows.

Shareholder Approval

[50] NP 62-202 sets out some of the guiding principles for the Commission's review of defensive tactics implemented by a target board in response to a bid. It seeks to strike a balance between giving deference to directors of a target company and preventing abuse of the rights of shareholders of a target. Specifically, section 1.1(3) of NP 62-202 provides as follows:

> (3) The Canadian securities regulatory authorities have determined that it is inappropriate to specify a code of conduct for directors of a target company, in

> addition to the fiduciary standard required by corporate law. Any fixed code of conduct runs the risk of containing provisions that might be insufficient in some cases and excessive in others. However, the Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns.

[51] In *Re Cara Operations Ltd*. (2002), 25 O.S.C.B. 7997 ("***Cara***"), this Commission held at paragraphs 62-66 as follows:

> Certain guideposts or indicia have been outlined in Royal Host and other cases to help determine whether a rights plan in a given case is in the best interest of the shareholders.
>
> Tactical rights plans generally will not be found to be in the best interest of the shareholders.
>
> If a plan is not put in place before a particular bid becomes evident, it very likely will be that the plan is tactical and directed at the particular bid.
>
> If a plan does not have shareholder approval, it generally will be suspect as not being in the best interest of the shareholders; however, shareholder approval of itself will not establish that a plan is in the best interest of the shareholders.
>
> If, in the face of a take-over bid, a director, a special committee member, or an advisor acts in a manner that raises serious questions as to whether such person is acting solely in the best interest of the shareholders, then the onus of establishing that the rights plan is in the best interest of the shareholders may be significantly increased.

[52] Thirdcoast shareholders did not have an opportunity to approve the Rights Plan and no evidence was provided of shareholder support for the Rights Plan. Thirdcoast acknowledged that, based on the existence of the Lock-up Agreements, it was unlikely that any such approval would be forthcoming.

The Rights Plan was Adopted in Response to P&H's Offer

[53] As noted in the excerpt from *Cara* above, if a shareholder rights plan is not put in place before a particular bid becomes evident, it is likely that the plan is tactical and directed at the particular bid. The plan then has the effect of constraining the ability of shareholders to respond to the bid when they have not accorded authority to the board to act in this manner.

[54] On February 21, 2012, Thirdcoast first became aware of P&H's intentions to acquire its remaining common shares. On March 6, 2012, P&H issued a press release announcing its intention to make a formal bid and revealing the existence of the Lock-up Agreements. It was not until three months after P&H advised Thirdcoast of its intention to bid that, on May 30, 2012, Thirdcoast announced its adoption of the Rights Plan. This was clearly a tactical move in a

context in which it was aware that a majority of shareholders would not have approved the Rights Plan. This timing is a relevant consideration for this Commission in determining if it is an abuse of the rights of Thirdcoast's shareholders.

Length of Time Since the Bid was Announced

[55] In *Cara*, this Commission recognized that clear timelines for take-over bids is in the best interests of shareholders because it encourages bidders to come forward while giving shareholders an opportunity to realize upon their investment at optimum values. In this context, the panel in *Cara* found that the longer a rights plan remains in place, the higher the onus on the target to demonstrate that such plans continues to serve the best interests of the shareholders:

> The longest period following the announcement of a bid that a rights plan was permitted to operate in the cases referred to us was the period of 108 days in Ivanhoe. That would have been an inordinate period of time, except for the special circumstances of that case. While absolute numbers of days, on their own, should not be the deciding factor in determining whether a rights plan no longer serves the interest of shareholders, the longer the period the higher the onus is on those alleging that the rights plan still serves the interest of shareholders.
>
> (*Cara* at para. 60)

[56] As of the expiry of the Bid on July 5, 2012, the formal Bid had been outstanding for 35 days, public notice of P&H's intention to make the Bid had been made for 122 days and Thirdcoast had been aware of P&H's intention to acquire the remaining common shares of Thirdcoast which it did not own for 135 days.

[57] Similar to the facts in *Cara*, without any indication of an emerging competitive bid, it was difficult for this Panel to assume that there was a substantial possibility that a better offer was imminent (*Cara* at paragraph 76). No other viable bidder for Thirdcoast's common shares had come forward as at the date of this hearing. Thirdcoast did not meet its onus of demonstrating that the Rights Plan continued to serve the best interests of Thirdcoast's shareholders and we were not satisfied that the Rights Plan continued to provide an opportunity for further bids for Thirdcoast's common shares.

[58] Neither were we persuaded that Thirdcoast's proposed sale of its Goderich facility would provide a viable alternative that would justify leaving the Rights Plan in place for additional time (see our discussion of the issue of the proposed asset sale as an alternative action to the Bid at paragraphs [62] to [64], below).

The Bid was Not Coercive

[59] Thirdcoast took the position that the hard Lock-up Agreements combined with no minimum tender condition made the Bid coercive in nature. As discussed herein, there is nothing illegitimate about P&H pursuing each of these tactics and to do so contemporaneously is not coercive (see *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*, 160 D.L.R. (4th) 131 at paragraph 57). The features of the Bid which were identified at the hearing did not support the allegation by Thirdcoast that this Bid was coercive.

Other Defensive Tactics Implemented by Thirdcoast

[60] P&H submitted that Thirdcoast engaged in other defensive tactics by delaying the formal valuation required pursuant to MI 61-101 and implementing the potential sale of the Goderich grain facility.

[61] The timeline regarding the valuation request was not in dispute. On February 21, 2012, P&H requested that Thirdcoast prepare an independent valuation for the purpose of preparing a proper bid for the remaining common shares of Thirdcoast. On March 29, 2012, the Independent Committee engaged National Bank and the valuation was completed on May 28, 2012. In the absence of evidence, it is difficult for this Panel to assess whether the alleged delays were reasonable. We agree with Staff's submissions, however, that such allegations are irrelevant to the Commission's decision that additional time was not needed to maximize shareholder value because the time that had passed since the bid was announced and tendered was longer than the time required to complete the valuation.

[62] Further, concurrent with these Applications was a Court proceeding regarding the potential sale by Thirdcoast of its Goderich grain facility. P&H maintained that the sale of this asset would be prejudicial to Thirdcoast whose operations are highly dependent on the Goderich Terminal, and to the Thirdcoast shareholders who were not given an opportunity to respond to either the asset sale or the Bid. P&H submitted that Thirdcoast's attempt to sell the Goderich Terminal was a defensive tactic designed to subvert the regulatory framework of take-over bids and was intended to derail the Bid.

[63] Section 1.1(4) of NP 62-202 provides as follows:

> (4) Without limiting the foregoing, defensive tactics that may come under scrutiny if undertaken during the course of a bid, or immediately before a bid, if the board of directors has reason to believe that a bid might be imminent, include
>
> > (a) the issuance, or the granting of an option on, or the purchase of, securities representing a significant percentage of the outstanding securities of the target company,
> >
> > (b) the sale or acquisition, or granting of an option on, or agreeing to sell or acquire, assets of a material amount, and
> >
> > (c) entering into a contract other than in the normal course of business or taking corporate action other than in the normal course of business.

[64] Although Thirdcoast's actions may engage section 1.1(4)(b) and (c) of NP 62-202, we agree with Staff's submissions that ultimately there was insufficient evidence provided by the parties for the Commission to consider this matter. We did not feel that this in any way limited our ability to reach our decision as there was sufficient other evidence, as noted herein, to make our determination regarding the Rights Plan Application.

It was Unlikely that a Better Bid or Transaction would be Found

[65] Given that no competitive bid had emerged from the time that the Rights Plan was adopted, we determined that it would be unlikely that the Rights Plan would continue to be in the best interest of Thirdcoast shareholders (see *Cara* at paragraph 67). As at the hearing date, there was no evidence before us of a realistic and competitive bid. In light of this, combined with the existence of the Lock-up Agreements and P&H's holdings of Thirdcoast's common shares, we were not presented with sufficient evidence that would lead us to conclude that permitting the Rights Plan to remain in place for an additional 30 days, as requested by Thirdcoast, would serve the purpose of enhancing shareholder value.

V. CONCLUSION

[66] Accordingly, upon hearing the merits of the Rights Plan Application and the Lock-up Agreements Application, and for the reasons set out above, this Panel concluded that it was in the public interest to order as follows:

1. Pursuant to clause 2 of subsection 127(1) of the Act, trading in any securities issued or to be issued under or in connection with the Rights Plan shall cease permanently;
2. Pursuant to clause 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply permanently to any securities issued or to be issued under or in connection with the Rights Plan; and
3. The Lock-up Agreements Application is dismissed.

Dated at Toronto this 11th day of August, 2014.

"Mary G. Condon"

Mary G. Condon

"C. Wesley M. Scott"

C. Wesley M. Scott

"Paulette L. Kennedy"

Paulette L. Kennedy