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

AND

IN THE MATTER OF
CARA OPERATIONS LIMITED AND THE SECOND CUP LIMITED

Hearing:	**January 8, 2002**		
Panel:	**Paul M. Moore, Q.C.**	**-**	**Vice-Chair**
	H. Lorne Morphy, Q.C.	**-**	**Commissioner**
	R. Stephen Paddon, Q.C.	**-**	**Commissioner**
Counsel:	**Ralph Shay** **Yvonne Chisholm** **Terry Moore**	**-**	**For the Staff of the Ontario Securities Commission**
	Mark A. Gelowitz **Allan D. Coleman**	**-**	**For Cara Operations Limited**
	Benjamin Zarnett **Jessica Kimmel** **Nando Deluca**	**-**	**For The Second Cup Limited**

REASONS FOR DECISION

I. Introduction

[1] On December 5, 2001, Cara Operations Limited (Cara) applied to the Commission for an order under clauses 2 and 3 of section 127(1) of the Securities Act (the Act) that trading cease and exemptions not apply in respect of any securities to be issued under the shareholder rights plan adopted on November 29, 2001 (the Rights Plan) by The Second Cup Ltd. (Second Cup).

[2] On January 8, 2002, the Commission considered at a hearing evidence and submissions from Commission staff and counsel for Cara and Second Cup. Mr. Dominic Paradis of the Capital Markets branch of the Quebec Securities Commission listened to the hearing through telephone hook-up but, otherwise, the Quebec Securities Commission did not participate.

[3] The evidence before us included affidavits by Ian Wilkie, senior vice-president, general counsel and corporate secretary of Cara; William Gula, managing director and head of mergers and acquisitions at Scotia Capital, Cara's financial advisor; Robert Haft, chair of Second Cup's special committee; Ronald Mayers, president of Genoa Capital; and Bradley Cameron, managing director of mergers and acquisitions at RBC Capital Markets. At the hearing, we heard oral testimony from Wilkie, Gula, Haft, Mayers and Cameron, and received submissions from counsel for Cara, counsel for Second Cup and Commission staff.

[4] On January 9, 2002, the Commission ordered that trading cease and exemptions not apply in respect of any securities issued under the Rights Plan, and stated that reasons for its decision would follow in due course. Commissioner Paddon, who recently passed away, participated in that decision, and in preparing these reasons, we have had the benefit of his notes.

II. Facts

[5] Cara is incorporated under the laws of Ontario and is a reporting issuer in Ontario. It is one of Canada's leading food services companies. Cara-owned businesses prepare, serve and distribute food in restaurant, airline and healthcare settings, among others.

[6] Second Cup is incorporated under the laws of Ontario and is a reporting issuer in Ontario. It is the largest specialty coffee retailer in Canada. All of its operations are in Canada. It has a single line of business and a limited range of products, offered through approximately 400 owner-operated cafés and marketing partners.

[7] In May of 1998, Second Cup retained CIBC World Markets Inc. to assist it in identifying and assessing opportunities to deploy its excess capital and maximize shareholder value. Following a review of various alternatives, Second Cup's board of directors implemented certain measures and returned capital to shareholders.

[8] On October 29, 1999, CIBC World Markets was engaged to solicit offers for the purchase of Second Cup. Discussions were held with a number of interested parties over the following year.

[9] On July 10, 2001, Cara, Michael Bregman, his father Louis Bregman, and Second Cup, entered into a standstill agreement. Under the agreement, Cara and the Bregmans agreed not to acquire control except by a formal take-over bid.

[10] On August 13, 2001, Cara announced that it intended to make a pro-rata, all-cash offer to purchase up to 3,000,000 Second Cup common shares at $7.00 per share, a premium of 16.7% over the $6.00 closing price for the shares on the Toronto Stock Exchange on the previous trading day, and that it intended to hold approximately 71% of the shares upon completion of the offer.

[11] Later that day, Second Cup's directors met, a special committee of independent directors was formed to make recommendations on the offer to shareholders, and Dale Lastman was appointed as counsel to the special committee. Gabe Tsampalieros, the president and chief executive officer of Cara and a director of Second Cup, consented to Lastman's acting as counsel to the special committee even though Lastman was a director and longstanding legal advisor to Second Cup.

[12] Haft was appointed chair of the special committee. Haft and Michael Bregman attended graduate school together. Haft had known Bregman for over 20 years. Haft was directly involved in attempts to sell Second Cup in 1998 and 1999, attempts which did not result in a bid being presented to Second Cup shareholders.

[13] On September 7, the special committee announced that it had engaged TD Securities Inc. (TDSI) to prepare a formal valuation of Second Cup and that it had engaged RBC Dominion Securities (RBC DS) to act as financial advisor to the special committee.

[14] On October 22, TDSI advised the special committee that the fair market value of Second Cup's common shares was in the range of $8.25 to $9.75 per common share.

[15] On October 26, Second Cup's board of directors called an annual general meeting of shareholders for December 17.

[16] On November 9, Second Cup sent its shareholders notice of the December 17 meeting along with management's information circular regarding the meeting. Approval of a rights plan was not on the agenda.

[17] On November 16 – 95 days after it had announced its intention to acquire control of Second Cup – Cara sent Second Cup shareholders the circular containing its offer. The expiry date of the offer was December 22. The circular stated that if Cara took up and paid for 3,000,000 shares deposited under the offer, Cara intended to consider whether or not to pursue other means of acquiring any remaining common shares not owned by it.

[18] On November 27, TDSI advised the special committee that from a financial viewpoint, Cara's offer was inadequate to the other Second Cup shareholders.

[19] On November 29 – 108 days after Cara's offer was announced and 13 days after it was officially made – the Second Cup board of directors, on the recommendation of the special committee, voted to recommend that shareholders reject Cara's offer, and adopted the Rights Plan. If the shareholders approved the Rights Plan, it would remain in force until November 29, 2004, and until November 29, 2007 if renewed by the shareholders.

[20] The Rights Plan was not applicable to a bid (a permitted bid) for all common shares and subject to an irrevocable and unqualified condition that no shares would be taken up or paid for unless at least 50% of the shares held by shareholders other than the bidder were deposited and not withdrawn.

[21] The board of directors set January 31, 2002, a date over a month after the scheduled expiry of Cara's offer, as the date for a special meeting of Second Cup shareholders to approve the adoption of the Rights Plan.

[22] On the evening of November 29, Cara announced that it would apply to the Commission for an order cease trading the Rights Plan.

[23] Between November 30 and December 6, the following Second Cup shareholders sent letters to the Commission requesting that the Commission not terminate the Rights Plan before the January 31 special meeting, and that shareholders be given the opportunity to vote on the Rights Plan: I.G. Investment Management Ltd.; Michael Bregman; his mother, Yetta Bregman, who controlled the shares of her now-deceased husband Louis; Genoa Capital Inc.; Robert Grundleger; Hugh Segal, a member of the special committee; Alton McEwen, the chief executive officer of Second Cup and a director; Roy Sugden, a member of the special committee; and Dale Lastman.

[24] On December 5 – 114 days after Cara's offer was announced and 19 days after it was officially made – Cara applied to the Commission to have the Rights Plan cease traded and stated that unless the Rights Plan was cease traded, it did not intend to take up and pay for shares tendered to its offer.

[25] On December 7, a hearing date was set for December 18.

[26] On December 14, Cara announced that it was amending its offer by (i) increasing the offer price from $7.00 to $7.50, a premium of 25% over the closing price on the last trading day before the original offer was announced; (ii) making its bid for all shares not owned by it; and (iii) amending the expiry date to January 10, 2002.

[27] Based on this news, the Commission hearing scheduled for December 18 was postponed to January 8, 2002.

[28] On December 17, the annual general meeting of Second Cup shareholders was held. The incumbent directors, including the members of the special committee, were re-elected.

[29] On December 20, Cara mailed its notice of extension and variation, which contained the terms of the amended offer announced on December 14. One of the new conditions of the amended offer was

the prior issuance of a cease trading order from the applicable regulatory authorities, or an injunction from a court of competent jurisdiction, prohibiting or preventing the exercise of the Rights Plan. In the notice, Cara stated its intent, if it acquired 90% or more of the shares subject to the amended offer, to compulsorily acquire the remaining shares pursuant to the relevant provisions of Ontario corporate law.

[30] When Cara mailed its notice of extension and variation, relevant shareholders of Second Cup, on an undiluted basis, were as follows:

Shareholder	**Relevant Identity**	**% of shares overall**	**% of shares subject to the bid**
Cara	bidder	39.12%	N/A
I.G. Investment Management Ltd.	independent	17.66%	29.02%
Michael Bregman	chair of Second Cup's board	14.43%	23.70%
Yetta Bregman	mother of Michael Bregman	9.51%	15.63%
Genoa Capital Inc.	independent	4.75%	7.80%
Robert Grundleger	independent	1.07%	1.76%
Hugh Segal	director of Second Cup and a member of the special committee	0.29%	0.48%
Alton McEwen	chief executive officer of Second Cup, and a director	0.21%	0.34%
Roy Sugden	a director, and a member of the special committee	0.13%	0.22%
Dale Lastman	a director, a partner of the law firm representing Second Cup, and counsel to the special committee	0.12%	0.19%

[31] Between December 31, 2001 and January 3, 2002, the shareholders indicated above, other than Cara, each wrote a letter to Commission staff regarding Cara's amended offer. The letters repeated the substance of letters written between November 30 and December 6 regarding Cara's original offer.

[32] On January 2, 2002, RBC Capital Markets (formerly RBC DS) advised the special committee that: (i) it was not aware of any material adverse change in the business of Second Cup after October 22, 2001, the date of TDSI's valuation; (ii) it was not aware of a circumstance where independent directors of a public Canadian company recommended that shareholders accept an insider bid at a price "materially below" the range established by an independent valuer; (iii) it had been informed by holders of approximately 82% of the shares subject to the amended offer that they intended not to tender their shares to the amended offer; and (iv) it expressed no opinion as to the fairness or adequacy of the amended offer.

[33] On January 2, 2002, the board of Second Cup met to consider its response to the amended offer, and to consider a draft proxy circular and notice to be sent to shareholders regarding the January

31 shareholder meeting. During the meeting, Bregman confirmed to the board that he continued to be interested in, and was himself working on, a rival bid. The board approved reimbursing Bregman for up to $100,000 of expenses incurred in his efforts to develop a superior offer, as recommended by the special committee. The board also recommended that shareholders reject the amended offer.

[34] Haft acknowledged that the potential bid by Bregman was a bid that would not be a permitted bid under the terms of the Rights Plan, as it would be a partial bid and not one for all the outstanding shares. However, the special committee recommended and the board approved that Bregman be reimbursed for it.

[35] The hearing into the continued existence of the Rights Plan was held on January 8 – 148 days after Cara announced its original offer, 53 days after Cara mailed its original offer, 25 days after Cara announced its amended offer, and 19 days after Cara mailed its amended offer.

[36] Very early in the process, Michael Bregman expressed his interest in trying to work with the board to come up with something. In early to mid-October, RBC DS first heard from Bregman's financial advisors, and throughout the process, according to Cameron, Bregman was "our most consistent and steady competing bidder for the company." "He came out of the guns very quickly and said that he thought this bid was inadequate and he was going to do whatever he could to try and help us bring forward a fair bid or launch his own fair bid to all the shareholders . . . . [H]e has been our most consistent potential white knight . . . . Michael was in my face from day one and he wanted to work with us."

[37] Over approximately two weeks in late October, with the assistance of some of the work CIBC World Markets had done in 1999, RBC DS contacted approximately 80 parties. Four of them signed confidentiality agreements. None of the four were among the ten parties who had signed confidentiality agreements in 1999 when CIBC World Markets was involved. The four parties all conducted due diligence but "decided to stand aside and watch how this played out." In contrast, "Michael stayed the course and worked with us." It was decided that Bregman would not have to sign a confidentiality agreement because he did not need access to confidential information.

[38] In an affidavit dated December 13, the day before Cara announced its improved offer and four days before the originally-scheduled date for the Commission's hearing into the Rights Plan, Cameron stated:

> "RBC continues to consider all available alternatives to maximize Second Cup shareholder value and has been soliciting offers from other parties to see if competing offers or alternative proposals are available. A bidder has confidentially indicated an intention and willingness to negotiate an alternative transaction. RBC is now working on that alternative transaction which would involve a bid and recapitalization of the company which, if completed, would result in more value to shareholders than the Cara Offer. I have communicated with this prospective bidder and the bidder's financial and legal advisors more than once a day over the past week and I have met with the bidder's bankers, and our discussions and negotiations are continuing. Confidentiality restrictions prevent me from disclosing the name of the bidder. I

> believe there is a real possibility that there will be an alternative transaction for shareholders to consider and, if there is, I expect it will be announced before January 31, 2002, and possibly before the end of this year."

[39] At the hearing, Cameron admitted that after Cara announced the improvements to its offer on December 14, he could have contacted people who might be interested in that information, including the four parties who had chosen to sit on the sidelines. Cameron stated that he did not do so because of "the logistics . . . . [T]he holiday season was the huge issue because the – somebody said it before – the commercial banks all shut down on the 15th of December and every entrepreneur in North America flies to Florida."

[40] Cameron stated that when Cara announced the improvements, Bregman was "our most real bidder," and because Cara's offer was now for all of the outstanding shares, "Michael had to basically restart the whole process starting in the middle of December."

[41] In late December, Bregman went away for two weeks on a cruise holiday that he had booked some time ago. Upon learning of Cara's improved offer, Bregman said to Cameron, "Gee, I don't know what I am going to do. I'm going to go back and think about it." However, before leaving for his cruise, Bregman went back to Cameron and said, "I'm going to come back and pull together a bid that can beat this bid but I am where I am. I have got to go on this cruise and all the banks go on holidays anyways."

[42] On January 4, counsel for the special committee sent Commission staff and counsel for Cara a supplementary affidavit by Cameron that was prepared on or after January 2 but was not yet sworn. In it, Cameron stated:

> "As indicated in my affidavit of December 13, 2001, as financial advisor to the Special Committee, I have been directly engaged in negotiations with an alternative bidder. Discussions with this bidder and the legal and financial advisors to this bidder continued even after my affidavit of December 13, 2001, although the nature of our discussions changed dramatically after the Amended Offer was made and our discussions were affected by the two weeks of holidays that have intervened. In order to improve upon the Amended Offer for the Second Cup shareholders, this bidder will have to come up with more financing than was required to improve upon the original Cara Offer and I have been advised that this is being considered by this bidder's financial advisors and I still believe that there is a reasonable prospect that continued negotiations with this bidder could result in an offer to the Second Cup shareholders that is financially superior to the Amended Offer."

Later in the document, Cameron stated:

> "Mr. Gula, on behalf of Cara, and I had discussed the possibility of Cara amending the Cara Offer even before the Amended Offer was announced. While he has indicated to me that Cara is reluctant to 'bid against itself' (which is not unexpected), the Cara Offer was clearly not Cara's final and best offer. I still believe there is a reasonable prospect that Cara would consider further amending the Amended Offer. . . .

Discussions about a further amended Cara offer are ongoing."

Further down, Cameron confirmed that he advised Haft as follows:

> "Mr. Bregman, the alternative prospective bidder who RBC and the Special Committee have been in discussions with, and his financial advisor, have confirmed to me since the Amended Offer was made that he continues to be interested in and is working towards an alternative financially superior transaction to Cara's Amended Offer. However, because the Amended Offer is for a greater total consideration than the original Cara Offer, further time will be required to arrange for financing for any superior bid, which could not be secured over the holidays and efforts to secure these arrangements have only been able to resume in earnest this week. Although asked for, Mr. Bregman has not been able to commit to when we might expect to receive any alternative bid."

[43] On January 7, Cameron swore a revised version of the supplementary affidavit. His original statement that discussions about a further amended Cara offer were ongoing was absent and the following was added: "I understand that discussions about a further amended offer took place with Cara, at the initiative of the special committee, last week. In the last discussion on Friday, January 4, 2002, Cara said that there was no reason to pursue the matter any further." Nevertheless, Cameron still stated in that paragraph that he believed that a further amendment to Cara's amended offer was a reasonable prospect.

[44] On January 7, the day before the hearing, in a statement of anticipated additional evidence, Cameron indicated that earlier in the day, he had received two expressions of interest by telephone from new parties. Regarding the first phone call, Cameron stated:

> "I received a telephone call from an individual who indicated that he was interested in exploring the possibility of his company joining with Michael Bregman to make a bid superior to Cara's Amended Offer. This individual is known to me and is the CEO and significant shareholder of a TSE-listed investment company . . . . He indicated to me that he was seriously interested in pursuing a transaction, but only as a partner with Michael Bregman. We discussed providing him with timely access to Second Cup's data room under a suitable form of confidentiality agreement. A form of that agreement was presented to him in the early afternoon on January 7, 2002 for his lawyers to review. This bidder will be given immediate access to the data room, a confidential memorandum and management interviews following the execution of the confidentiality agreement. I then contacted Mr. Bregman, who confirmed that he is working on a joint bid with this bidder."

Regarding the second phone call, Cameron stated:

> "About two hours later, I received another telephone call . . . from another individual who indicated a desire to explore the possibility of making a competing (superior) bid for Second Cup. Our discussions were in confidence and I am not at liberty to disclose his identity at this time. I can say that this individual is already a shareholder of

> Second Cup. I know this individual to be an investor of substantial net worth. I also know him to have considerable experience in the food service industry. He is also familiar with Second Cup's business operations. This individual has also been given a confidentiality agreement to sign, after which he will be given access to the data room, a confidential memorandum and management interviews."

[45] On January 8, during his testimony at the hearing, Cameron indicated that Bregman's equity partner in an intended joint bid "just got back to town yesterday. . . . So Michael is back in the saddle now and we're going to try to pull together a bid here in the next few weeks that beats [Cara's] bid."

[46] Cameron also indicated that after negotiating through the day on January 7, RBC DS now had a signed confidentiality agreement from Bregman's potential partner, and that that individual would be receiving due diligence materials first thing in the morning on January 9. Cameron stated that the bidder's interest was conditional on being able to work with Bregman to mount some form of joint bid. Cameron was told that the bidder "would require at least two weeks of rapid due diligence and working with lenders and Michael to be able to put something, hopefully formal but possibly not formal, in front of the Board." Later in his testimony, Cameron stated that the joint bid involving Bregman was the most definitive bid that RBC DS was looking at that moment, and that after two to six weeks, a deal might happen.

[47] Cameron stated at the hearing that confidentiality agreements had been entered into by the four parties who had chosen to stay on the sidelines, with another one involving Bregman's would-be partner entered into the day before, plus one more being negotiated with the second person who had called him on January 7. When asked if it was uncommon for a party to sign a confidentiality agreement but not proceed further, Cameron replied, "Sure, it happens all the time." He also stated, however, that "you can often be surprised at the end of the process by someone who went quiet early in the process."

[48] Haft stated that, generally, people who are interested in purchasing a company sign a confidentiality agreement, go and look at a data room and have discussions with the company, and that it would be unusual for anyone to ask to come before the Commission at a hearing to state its desire to make a bid. He was aware that two parties contacted Cameron on the day before the hearing. His understanding was that one of them had executed a confidentiality agreement and both of them may have, but he only knew that one of them had done so because he had been so advised. The two most recent parties were going through the typical procedure.

[49] Haft stated that the special committee now had two "substantive people" before it. Haft said, "I would think it might take them two weeks, three weeks to decide whether they want to make a bid." One of the interested parties was "an entity of more than a billion dollars who has expressed an interest in the company; another is a rival to Cara who, again, a sophisticated party who has the financial resources to complete an offer; and we understand that one of the parties would like to enhance the Bregman offer and could very well help Mr. Bregman, or in some way the two of them might go together to conclude an offer; and one of the parties may be bidding separately on their own."

[50] On numerous occasions before November 29, the board considered whether to adopt a rights

plan and decided not to do so for the time being. When asked whether the Rights Plan was brought about as a result of Cara's offer, Haft answered, "the Cara offer in August started the process, so if you're saying [the Rights Plan] is in response to a Cara action, I would say yes." In addition, in his affidavit dated December 12, 2001, Haft stated that adoption of a rights plan was considered at the board meeting on October 26, 2001, but Second Cup's directors considered it premature to adopt one and ask shareholders to vote on it.

IV. Authorities Cited

[51] Counsel for Cara, counsel for Second Cup and staff all referred us to National Policy 62-202: Take-Over Bids – Defensive Tactics. We were also referred to *Re Chapters Inc. and Trilogy Retail Enterprises L.P.* (2001), 24 O.S.C.B. 1657; *Re Consolidated Properties Ltd.* (2000), 23 O.S.C.B. 7981; *Re Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819 (*Royal Host*); *Re BGC Acquisition Inc. and Argentina Gold Corp.*, [1999] 25 B.C.S.C.W.S. 44; *Re Samson Canada, Ltd.* (1999), 8 A.S.C.S. 1791; *Re Ivanhoe III Inc. and Cambridge Shopping Centres Limited* (1999), 22 O.S.C.B. 1327 (*Ivanhoe*); *Re CW Shareholdings Inc. and WIC Western International Communications Ltd.* (1998), 21 O.S.C.B. 2899; *Re MDC Corporation and Regal Greetings & Gifts Inc.* (1994), 17 O.S.C.B. 4971; *Re Lac Minerals Ltd. and Royal Oak Mines Inc.* (1994), 17 O.S.C.B. 4963; and *Re Canadian Jorex Limited and Mannville Oil & Gas Ltd.* (1992), 15 O.S.C.B. 257.

V. Analysis

A. Guiding Considerations

[52] Rights plans may perform a useful function in limited cases, but are rightly scrutinized with suspicion.

[53] While it may be important for shareholders to receive advice and recommendations from the directors of the target company as to the wisdom of accepting or rejecting a bid, and for directors to be satisfied that a particular bid is the best likely bid under the circumstances, in the last analysis the decision to accept or reject a bid should be made by the shareholders, and not by the directors or others.

[54] The Commission's role in determining whether a rights plan is in the best interest of shareholders is to be an impartial referee in the take-over bid process, not to be drawn into the game tactically to the advantage of one or more of the interest groups involved in a struggle for control.

[55] The paramount consideration in deciding whether a rights plan should be allowed to stand in the way of a take-over bid is the best interest of the shareholders generally.

[56] What is in the best interests of the shareholders cannot be determined in the abstract, but must be ascertained in the context of our existing legal and business environment as reflected in the rules

and policies for take-over bids under the Act and as reflected in the various cases.

[57] At least two underlying principles emerge from the rules, policies and cases.

[58] First, there is the principle of procedural fairness for all: bidders, potential bidders, existing shareholders, management, and those whose business fortune is tied to any one of these groups. The rules of the game should be clear and consistently applied to encourage bidders to come forward. And the game must be played in an acceptable timeframe.

[59] A fair process with clear rules and timelines for take-over bids is in the best interest of shareholders generally: it encourages bidders to come forward and gives shareholders opportunities to realize upon their investment at optimum values.

[60] 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.

[61] Secondly, there is the principle of the fiduciary duty of directors, members of a special committee of directors, and their advisors. Adherence to this principle should be reflected in conduct and recommendations that are based upon the best interest of the shareholders generally and not those of any group of shareholders, bidders, potential bidders or others.

[62] 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.

[63] Tactical rights plans generally will not be found to be in the best interest of the shareholders.

[64] 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.

[65] 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.

[66] 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.

[67] Where a rights plan has delayed significantly a take-over bid and no competing bid obviously superior to the bid has actually emerged, the rights plan will almost certainly be considered to no longer be in the best interest of the shareholders, even if it once had been in their interest.

B. Application of Guiding Considerations to the Facts

[68] In the case before us, the Rights Plan was tactical. It was adopted by the directors of Second Cup well after Cara announced its intention to make a bid, and after the bid was made.

[69] Even if we were prepared to view the Rights Plan as not being tactical just because it was introduced after the Cara bid was made, we still would have regarded it as tactical because, although the concept of a rights plan was considered by the directors after the announcement of Cara's intention to make a bid, the Rights Plan was not developed expeditiously and presented to the shareholders at the earliest practical time. Rather, the directors waited and acted tactically in introducing the plan and in finally preparing to seek shareholder approval 30 days after the bid would expire.

[70] The Rights Plan had not been approved by the shareholders.

[71] We were not convinced that it was even supported by a significant number of shareholders. In the absence of a shareholder vote, we were asked to ascertain whether the shareholders were in favour of the Rights Plan by considering the letters referred to earlier in these reasons. However, we believe it is inappropriate for us to consider the views of those shareholders that may be motivated by interests other than those relevant to shareholders generally. Accordingly, we discounted the views of Haft, Lastman, Bergman and his family members, the members of the special committee, and the directors, as well as Cara's.

[72] Michael Bregman was the chairman of the board of directors of Second Cup and a large shareholder. He and Cara were for some time contending over control of the direction that Second Cup was going. He was keen to defeat the Cara bid, and to make a bid of his own. He wanted to keep the current management of Second Cup in place. He had a special interest in Second Cup, different from the interest of the other shareholders. His interests were adverse to Cara's and its bid.

[73] Haft, the chair of the special committee of directors of Second Cup, was a former classmate, long-time friend, and business associate of Michael Bregman, and a director. While these facts raised a suspicion whether Haft was acting on the special committee solely in the best interest of the shareholders, without favouritism to Bregman, his support of the reimbursement of Bregman by Second Cup of expenses of $100,000 for Bregman's efforts to advance a bid that would not be a permitted bid under the Rights Plan convinced us that he was not acting solely out of consideration for the best interest of the shareholders.

[74] Lastman was counsel to Second Cup for a long time. He was a director. If Cara's bid succeeded his retainer with Second Cup would very likely cease. Notwithstanding the consent of the president of Cara to Lastman's acting as counsel to the special committee, we were concerned that his role as a longstanding advisor to Second Cup raised the possibility of a compromise in his role as an independent advisor to the special committee. It is of utmost importance that any advisor to a special committee be independent.

[75] The decision of the special committee to recommend, and the decision of the full board of

directors to approve, the reimbursement of $100,000 of Bregman's expenses for a potential bid that would not be a permitted bid under the Rights Plan, showed conduct that caused us to believe that the special committee and the directors who approved the reimbursement were not motivated solely by the best interest of the shareholders.

[76] Finally, in our case, 148 days had elapsed since Cara announced its intention to make a bid. Without the emergence of an actual competitive bid, it was no longer appropriate for us to assume that there was a real and substantial possibility that a better offer was imminent. In fact, the evidence convinced us that there was no imminent bid.

[77] For these reasons, we determined that the Rights Plan was not in the best interest of the shareholders and made the order requested by Cara: that trading cease in respect of any securities issued, or to be issued, under or in connection with the Rights Plan, and that the exemptions from the prospectus and registration requirements shall not apply to any trade in securities of Second Cup pursuant to or in connection with the Rights Plan.

Dated at Toronto this 19th day of November, 2002.

"Paul M. Moore" "H. Lorne Morphy"