Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor, 20 Queen Street West, Toronto ON M5H 3S8
CP 55, 19e 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 PATHEON INC.**

**- and -**

**IN THE MATTER OF AN OFFER TO PURCHASE FOR CASH ANY AND ALL OF THE RESTRICTED VOTING SHARES OF PATHEON INC. BY JLL PATHEON HOLDINGS, LLC**

**- and -**

**IN THE MATTER OF AN APPLICATION BY THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF PATHEON INC. FOR CERTAIN RELIEF UNDER SECTIONS 104(1) and 127**

# REASONS FOR DECISION
## (Sections 104(1) and 127 of the Act)

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| **Hearing:** | April 15, 16, 2009 | |
| **Decision:** | April 16, 2009 | |
| **Reasons:** | August 6, 2009 | |
| **Panel:** | James E. A. Turner<br>Mary G. Condon | - Vice-Chair and Chair of the Panel<br>- Commissioner |
| **Counsel:** | J. Sasha Angus<br>Naizam Kanji<br>Michael Tang | - For the Ontario Securities Commission |
| | Katherine Kay<br>Eliot Kolers<br>Alex Rose<br>Ron Ferguson<br>David Weinberger | - For JLL Patheon Holdings, LLC |
| | Luis Sarabia<br>William Gula<br>Patrick Moyer<br>Philippe Rousseau | - For The Special Committee of Patheon Inc. |

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## REASONS FOR DECISION

## I. Background

### A. Introduction

[1] This matter arises from two applications made to the Ontario Securities Commission (the "**Commission**") relating to an unsolicited offer by JLL Patheon Holdings, LLC ("**JLL**") to purchase for cash any and all of the outstanding restricted voting shares (the "**Restricted Voting Shares**") of Patheon Inc. ("**Patheon**") pursuant to a take-over bid dated March 11, 2009 (the "**Offer**"). The Offer expires at 6:00 p.m. (Toronto time) on April 16, 2009 unless it is extended or withdrawn by JLL.

[2] On April 3, 2009, JLL made an application for a decision pursuant to subsection 104(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") for exemptions from the requirements relating to identical consideration under subsection 97(1) of the Act and the prohibition against collateral agreements under subsection 97.1(1) of the Act (the "**JLL Application**"). The JLL Application was made because it was the view of Staff of the Commission ("**Staff**") that the following agreements violated those provisions of the Act: (i) a voting agreement dated March 10, 2009 (the "**Voting Agreement**") between JLL, JLL Patheon Holdings II, LLC, Joaquin Viso ("**Viso**"), Viso's spouse and certain other shareholders of Patheon who acquired Restricted Voting Shares in connection with the acquisition by Patheon of MOVA Pharmaceuticals Corporation in 2004 (the "**MOVA Group**"), and (ii) a stockholders' agreement (the "**Stockholders' Agreement**") to be entered into between JLL and the MOVA Group in the circumstances provided for in the Voting Agreement.

[3] On April 6, 2009, the Special Committee of the Board of Directors of Patheon (the "**Special Committee**") made an application for certain relief under sections 104(1) and 127 of the Act (the "**Special Committee Application**"). The Special Committee sought the following orders in the Special Committee Application:

1. Orders under subsection 104(1) of the Act:

    i. restraining JLL from contravening sections 97(1) and 97.1 of the Act;

    ii. directing JLL to comply with sections 97(1) and 97.1 of the Act; and

    iii. directing Ramsey A. Frank ("**Frank**"), the sole manager of JLL and JLL Patheon Holdings II, LLC, to cause those companies to comply with and cease contravening sections 97(1) and 97.1 of the Act;

2. An order under section 127 of the Act prohibiting the acquisition by JLL of any securities under the Offer until such time as identical consideration is offered to all

holders of Restricted Voting Shares and all deficiencies in JLL's take-over bid circular dated March 11, 2009 (the "**Take-over Bid Circular**") are corrected; and

3. Such other orders as counsel may request and the Commission thinks fit.

**B. Our Order and Decision**

[4] As discussed more fully below, JLL decided not to proceed with the JLL Application.

[5] On April 15 and 16, 2009, we held a hearing to consider the Special Committee Application at which we received submissions from counsel for JLL, the Special Committee and Staff. The oral hearing was necessarily abbreviated and we were required to make our decision before the Offer expired at 6:00 p.m. on April 16, 2009. We are satisfied that we had adequate materials and submissions to permit us to do so.

[6] On April 16, 2009, after the close of trading on the Toronto Stock Exchange (the "**TSX**"), we issued our decision and gave oral reasons in this matter. We dismissed the Special Committee Application provided JLL complies with the following conditions:

1. JLL shall terminate the Voting Agreement;

2. JLL shall certify that no oral or written agreement, arrangement or understanding, formal or informal, direct or indirect, currently exists or will be entered into or agreed to during the period of the Offer and for a period of 120 days following the expiry of the Offer with any shareholder of Patheon in respect of (i) the Offer or any second-step or compulsory acquisition transaction following the Offer, or (ii) Patheon or any of its securities, including the acquisition or voting thereof, other than in connection with a second-step or compulsory acquisition transaction in which all shareholders of Patheon are to receive the same consideration as the consideration under the Offer or all shareholders tendering to the Offer receive the same consideration as that paid to shareholders in such second-step or compulsory acquisition transaction;

3. The MOVA Group shall certify that no oral or written agreement, arrangement or understanding, formal or informal, direct or indirect, currently exists or will be entered into or agreed to with JLL during the period of the Offer and for a period of 120 days following the expiry of the Offer in respect of (i) the Offer or any second-step or compulsory acquisition transaction following the Offer, or (ii) Patheon or any of its securities, including the acquisition or voting thereof, other than in connection with a second-step or compulsory acquisition transaction in which all shareholders of Patheon are to receive the same consideration as the consideration under the Offer or all shareholders tendering to the Offer receive the same consideration as that paid to shareholders in such second-step or compulsory acquisition transaction;

4. JLL shall amend the Take-over Bid Circular to make full disclosure of the terms of this decision and of any consequential changes resulting from it;

5. JLL shall issue a news release no later than the date of mailing of the amendment to the Take-over Bid Circular summarizing the matters referred to in paragraph 4; and

6. JLL shall extend its Offer such that the Offer remains open for acceptance by shareholders for a period ending not less than 15 days following the mailing of the amendment to the Take-over Bid Circular referred to in paragraph 4.

[7] We received a request for written reasons in this matter. These are the full reasons for our decision.

## II. The Parties

### A. Patheon

[8] Patheon is a provider of contract development and manufacturing services to the global pharmaceutical industry, with operations in Canada, the United States, Puerto Rico and Europe. Its registered office is located in Mississauga, Ontario. It is a reporting issuer in all provinces and territories of Canada.

[9] Patheon's share capital consists of two classes of shares: the Restricted Voting Shares and preferred shares issuable in series. The Restricted Voting Shares are listed for trading on the TSX under the symbol "PTI". As at March 20, 2009, there were 91,149,388 Restricted Voting Shares outstanding. The outstanding preferred shares consist of 150,000 convertible preferred shares and 150,000 special voting preferred shares.

[10] Approximately 13.7% of the outstanding Restricted Voting Shares are owned by the MOVA Group, which acquired them when it sold MOVA Pharmaceutical Corporation to Patheon in 2004.

### B. JLL

[11] JLL is a limited liability company organized under the laws of the State of Delaware. JLL is an affiliate of JLL Partners Fund V, L.P. and its fund manager, JLL Partners, Inc., a private equity investment firm organized under the laws of the State of Delaware and based in New York. None of these entities are reporting issuers in any jurisdiction in Canada.

[12] As of April 2009, JLL and its affiliates owned 1,650,000 Restricted Voting Shares, representing 1.8% of the issued and outstanding Restricted Voting Shares. JLL and its affiliates also owned 150,000 convertible preferred shares and 150,000 special voting preferred shares of Patheon, representing 100% of each such class. The preferred shares were acquired pursuant to a private placement completed in April, 2007. On an as-converted basis, JLL's holdings of Restricted Voting Shares, the convertible preferred shares and the special voting shares represent approximately 30% of the currently issued and outstanding Restricted Voting Shares. Accordingly, JLL is an insider of Patheon. JLL has three representatives on the board of directors of Patheon.

## III. Background Facts

### A. Chronology of Events

#### 1. Events Prior to the Announcement of the Offer

[13] On November 19, 2008, representatives of JLL disclosed to Eric W. Evans, the Chief Financial Officer of Patheon, who subsequently advised Wesley P. Wheeler, the Chief Executive Officer of Patheon, that JLL was considering possible transactions through which it would increase its ownership interest in Patheon.

[14] On December 1, 2008, JLL contacted Viso to discuss a potential offer for the outstanding Restricted Voting Shares.

[15] On December 5, 2008, Frank telephoned certain directors of Patheon and notified them that JLL intended to make an offer for the outstanding Restricted Voting Shares not already owned by JLL or its affiliates. After the close of business on December 5, 2008, JLL sent a letter to Patheon, signed by Frank, stating JLL's intention to make the Offer (the "**JLL Letter**").

#### 2. Events from the Announcement of the Offer to the Commencement of the Offer

[16] Shortly after the opening of trading on the TSX on December 8, 2008, JLL issued a news release announcing its intention to make the Offer at a price of US $2.00 per Restricted Voting Share. Shortly thereafter, Patheon issued a news release acknowledging receipt of the JLL Letter and stating that the Board of Directors would form a special committee of independent directors to review and evaluate the proposed Offer. The Special Committee was formed at a meeting of the Board of Directors held on December 11, 2008.

[17] On January 9, 2009, the Special Committee announced that it had engaged (i) BMO Nesbitt Burns Inc. ("**BMO**") to review and evaluate the Offer and, among other things, to prepare an independent valuation of the Restricted Voting Shares, as required under Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**"), and (ii) Goldman, Sachs & Co. as financial advisor to the Special Committee. On February 19, 2009, BMO delivered to the Special Committee an independent valuation which concluded that, as of February 16, 2009, the fair market value of the Restricted Voting Shares was in the range of US $4.20 to US $5.00 per share.

[18] On or about March 5, 2009, Viso advised certain members of the Special Committee that he had been having discussions with JLL to "protect his interests" in connection with the Offer. In a subsequent conversation on March 9, 2009 between Frank and Paul W. Currie ("**Currie**"), the Chair of the Special Committee, Currie asked JLL to increase its proposed offer price, to add a minimum tender condition and to clarify how public shareholders would be protected if JLL increased its ownership of Patheon. Frank responded that JLL was not prepared to do any of those things.

[19] As of March 10, 2009, JLL entered into the Voting Agreement with Viso, as representative of the MOVA Group. The Voting Agreement was entered into subsequent to the public

announcement of JLL's intention to make the Offer and one day prior to the formal commencement of the Offer.

**3. Events After the Commencement of the Offer**

[20] JLL formally commenced the Offer on March 11, 2009. The Offer was made at a price of US $2.00 per Restricted Voting Share and was made on an "any and all" basis with no minimum tender condition. The Offer was made at a premium of approximately 138% to the U.S. dollar equivalent of the closing market price of the Restricted Voting Shares on December 5, 2008. The Offer was not made for Restricted Voting Shares held by JLL, "its affiliates, associates or any person acting jointly or in concert [with JLL] within the meaning of the [*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended]" (the "**CBCA**"). The Offer indicated that it was JLL's current intention, if it acquired Restricted Voting Shares under the Offer, to carry out one or more transactions to acquire all of the Restricted Voting Shares not deposited under the Offer (referred to as the "**JLL Subsequent Acquisition Transaction**").

[21] The Voting Agreement between JLL and the MOVA Group was first publicly disclosed on March 11, 2009.

[22] On March 19, 2009, the Special Committee met with Staff to discuss its concerns regarding the legality of the Offer. The Special Committee submitted a written complaint on March 26, 2009 asking the Commission to review the legality of the Offer.

[23] On March 25, 2009, the Special Committee received an e-mail from JLL stating that the Offer would be extended to all holders of Restricted Voting Shares and to the MOVA Group. JLL stated that it intended to issue a news release to that effect.

[24] The Special Committee and the Board of Directors of Patheon approved a Directors' Circular at a meeting held on March 25, 2009. The Directors' Circular recommended that shareholders of Patheon not tender to the Offer. The Directors' Circular was filed on SEDAR on March 26, 2009.

[25] On April 1, 2009, JLL responded to the Special Committee's March 26, 2009 submissions to Staff. Additional submissions were subsequently made by both the Special Committee and JLL.

[26] On April 9, 2009, the Commission decided, as a procedural matter, not to consider the JLL Application except pursuant to a public hearing. In making this determination, the Commission expressed no view on the merits of the JLL Application.

[27] On April 13, 2009, JLL submitted a letter to the Commission stating that JLL would prefer to have the Offer put before Patheon's shareholders on a timely basis and did not want to proceed to a hearing on the JLL Application. As a result, without admitting any contravention of the Act, JLL proposed to take the following steps (the "**JLL Proposal**"):

1. immediately terminate the Voting Agreement in its entirety (including the agreement to enter into the Stockholders' Agreement), it being understood that JLL and the MOVA

Group would treat the Voting Agreement as void *ab initio*, so that the MOVA Group is no longer considered an "offeror" under the CBCA;

2. extend the Offer to April 27, 2009;

3. prepare and file a notice of change to the Offer and the Take-over Bid Circular to reflect: (i) that the Offer has been extended; (ii) that the Voting Agreement has been terminated; (iii) that the MOVA Group is no longer considered an "offeror" under the CBCA or to be acting jointly or in concert with JLL under subsection 91(1)(b) of the Act; (iv) that in order to effect a subsequent "compulsory acquisition", JLL will have to acquire under the Offer 90% of the outstanding Restricted Voting Shares, other than any Restricted Voting Shares held by JLL (which term will not be deemed to include the MOVA Group) and its associates and affiliates; and (v) such other disclosure matters as Staff and JLL shall agree upon; and

4. withdraw the JLL Application.

[28] JLL stated in its letter that the Commission ought to decline to hold a hearing on the Special Committee Application. If the Commission determines that the Special Committee Application should proceed, JLL stated that it would have no reason to take the steps contemplated by the JLL Proposal. Accordingly, in that case, JLL would not terminate the Voting Agreement and would proceed with the JLL Application.

[29] On April 13, 2009, the Special Committee submitted a letter to the Commission stating that the JLL Proposal was not sufficient to remedy JLL's breaches of the Act and other conduct in connection with the Offer. The Special Committee indicated, however, that it was prepared to withdraw the Special Committee Application (the "**Special Committee Proposal**") if certain requirements were met. The Special Committee Proposal required JLL and the MOVA Group to certify that:

1. the only consideration that the MOVA Group is entitled to receive in respect of the Offer is US $2.00 in cash per Restricted Voting Share or such additional consideration as is offered by JLL to all holders of Restricted Voting Shares pursuant to the Offer in accordance with the Act;

2. no oral, written or other agreement, commitment or understanding, formal or informal, currently exists or will be entered into during the term of the Offer and for a period of 120 days following the expiry of the Offer between JLL and any member of the MOVA Group in respect of (i) the Offer or any second-step or compulsory acquisition following the Offer, or (ii) Patheon or any of [its] securities, including the acquisition or voting thereof; and

3. the MOVA Group will not be entitled to receive any collateral benefit or other consideration that is not also available to, and shall not be treated differently than, the other shareholders of Patheon in any subsequent acquisition transaction or compulsory acquisition following the Offer.

[30] The Special Committee expressed the view that, if JLL was unable or unwilling to agree to its conditions, the Special Committee Application should proceed to a hearing.

[31] The Special Committee set out two fundamental concerns with JLL's proposal to terminate the Voting Agreement:

1. it would be difficult in the circumstances for Patheon's shareholders to be confident that, if the Voting Agreement was simply terminated, it would not be replaced with a tacit agreement that, to the extent possible, similar arrangements would be put in place after the Offer is completed; and

2. if JLL were permitted to proceed with the Offer notwithstanding its breach of the Act, it would encourage other capital market participants to structure an offer in the same way.

[32] On April 15, 2009, JLL wrote to the Commission stating that, while in its view the Voting Agreement did not violate subsections 97(1) and 97.1(1) of the Act, it was prepared to immediately terminate it, extend its Offer, prepare and file a notice of change, and withdraw the JLL Application. JLL stated its belief that the two remaining matters in dispute between the parties (the specifics of any certification and the period of extension of the Offer) could be resolved without proceeding to a hearing.

**B. The Voting Agreement**

[33] Viso is one of the nine directors of Patheon. The members of the MOVA Group are parties to an agreement dated March 10, 2009 pursuant to which Viso has control or direction over the Restricted Voting Shares held by the MOVA Group.

[34] Relevant excerpts from the Voting Agreement are set out in Schedule A and relevant excerpts from the Stockholders' Agreement are set out in Schedule B.

[35] The Voting Agreement protects the position of the MOVA Group as a minority shareholder if it decides not to tender to the Offer. Two types of benefits arise. First, if the MOVA Group does not tender to the Offer it will not have its share interest eliminated as part of any JLL Subsequent Acquisition Transaction. Second, if the MOVA Group remains a shareholder of Patheon following the Offer, the Stockholders' Agreement provides certain shareholder protections to the MOVA Group as a minority shareholder as described in paragraph 76 of these reasons and in Schedule B.

[36] The Special Committee submits that the Voting Agreement is a sham and was entered into in order to permit JLL to be able to acquire, under the CBCA, all of the Restricted Voting Shares not tendered to the Offer by public shareholders even if the MOVA Group does not tender its shares to the Offer. It accomplishes that by constituting the MOVA Group technically as an "offeror" in respect of the Offer within the meaning of section 206 of the CBCA. That means that to complete a compulsory acquisition under section 206 of the CBCA, JLL needs to acquire only 90% of the shares not owned by it, excluding the shares owned by the MOVA Group. As a result, JLL can make use of section 206 even if the MOVA Group does not tender to the Offer.

[37] The Stockholders' Agreement is put in place only if the MOVA Group does not tender to the Offer and JLL successfully acquires 50.1% of the aggregate voting power of Patheon's Restricted Voting Shares and other voting securities (pursuant to the Offer or any compulsory acquisition or JLL Subsequent Acquisition Transaction).

## IV. Issues

[38] The Special Committee is prepared to accept the JLL Proposal subject to the resolution of the following questions:

1. Should JLL be restricted in its ability to enter into agreements, arrangements or understandings with the MOVA Group for some period following the completion of the Offer? If so, what form of certifications should be required of JLL and the MOVA Group to evidence that restriction?

2. For how long should the Offer be extended as a result of the variation required to reflect the JLL Proposal?

[39] In addition, we are asked to consider whether the JLL Proposal sufficiently addresses the violations of the identical consideration requirement in subsection 97(1) of the Act and the prohibition against collateral agreements under subsection 97.1(1) as alleged by the Special Committee.

## V. Positions of the Parties

### A. The Special Committee

#### 1. Identical Consideration and Collateral Benefits

[40] The Special Committee submits that the Voting Agreement violates subsections 97(1) and 97.1(1) of the Act in that (i) the MOVA Group has been offered consideration that is not being made available to all shareholders of the same class of shares, and (ii) JLL and the MOVA Group are party to a collateral agreement (the Voting Agreement) that provides consideration of greater value to the MOVA Group than to other shareholders.

[41] The Special Committee also submits that the Offer is coercive to public shareholders because it:

1. is an "any and all" offer with no minimum tender condition;

2. is made at a price substantially below the fair market value of the Restricted Voting Shares as determined pursuant to the formal valuation referred to in paragraph 17 of these reasons;

3. JLL has said that it would like to take Patheon private if it acquires enough shares, but that it may, instead, buy a block of shares which will allow it to control Patheon without paying a control premium;

4. JLL announced its intention to make a US $2.00 offer only four days prior to the public disclosure of fourth quarter results that would have caused the Restricted Voting Shares to be trading at a markedly higher price;

5. JLL has made the Offer while acting jointly or in concert with the MOVA Group in violation of the standstill restrictions contained in the investor agreement between Patheon and JLL dated April 27, 2007; and

6. JLL has admitted that the Voting Agreement was part of a scheme to allow it to avoid complying with the strict compulsory acquisition requirements of the CBCA by making the MOVA Group an "offeror" within the meaning of subsection 206 of the CBCA.

We did not receive oral submissions from the Special Committee with respect to items 4, 5 and 6 above.

[42] Section 97 of the Act provides as follows:

> 97(1) If a formal bid is made, all holders of the same class of securities shall be offered identical consideration.
>
> (2) Subsection (1) does not prohibit an offeror from offering an identical choice of consideration to all holders of the same class of securities.
>
> (3) If a variation in the terms of a formal bid before the expiry of the bid increases the value of the consideration offered for the securities subject to the bid, the offeror shall pay that increased consideration to each person or company whose securities are taken up under the bid, whether or not the securities were taken up by the offeror before the variation of the bid.

We refer to section 97 of the Act as the "identical consideration" provision.

[43] Section 97.1 of the Act provides as follows:

> 97.1(1) 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.
>
> (2) Subsection (1) does not apply to such employment compensation arrangements, severance arrangements or other employment benefit arrangements as may be specified by regulation.

We refer to section 97.1 of the Act as the "collateral benefit" provision or prohibition.

[44] The Special Committee submits that the fundamental purpose of the take-over bid provisions of the Act is to protect the integrity of the capital markets and the interests of shareholders of an offeree issuer.

[45] The Special Committee submits that the term "consideration" in subsection 97(1) of the Act should not be interpreted narrowly. The language is broad in order to ensure that all shareholders have the opportunity to make the same investment decision with respect to their securities. A narrow reading of the term undermines the fundamental purpose for which the section was adopted. Accordingly, sections 97 and 97.1 do not merely require an identical dollar amount per security to be offered or that the term consideration "be confined to the four corners of [a] formal bid." The Special Committee relies on *Re Sears Canada Inc.* (2006), 22 B.L.R. (4th) 267 (O.S.C.) ("*Sears*") at para. 242, where the Commission stated that "consideration" is "something which is of value in the eyes of the law and could include an act, or promise of an act, which is incapable of being given monetary value, though it has some value or benefit in the sense of advantage for the party who is the present or future recipient or beneficiary of the act."

[46] The Special Committee also refers us to three cases where the Commission has held that "identical consideration" within the meaning of subsection 97(1) of the Act and the fundamental principles underlying it extend beyond the specific consideration offered to purchase shares in a bid: *Re CDC Life Sciences Inc.* (1988), 11 O.S.C.B. 2541 ("*CDC Life Sciences*"); *Re Noverco Inc.* (1990), 13 O.S.C.B. 3243; and *Re NCG Acquisition Corp. et al.* (1992), 15 O.S.C.B. 5355. It also encompasses other consideration including, in particular, rights and benefits that may arise from not tendering to an offer.

[47] The Special Committee also submits that the differential treatment afforded to the MOVA Group has the effect of conferring consideration of greater value on the members of the MOVA Group in contravention of subsection 97.1(1) of the Act. The consideration in question conferring the greater value need not arise from or in connection with the acquisition of a security holder's shares by a bidder, nor does a bidder need to perceive there to be greater value in the consideration. Value is measured in the eyes of the security holder to whom the consideration is given and "can be inferred from the very fact that a shareholder entered into [a collateral] agreement" (*Sears*, *supra* at para. 214).

[48] The Special Committee submits that, unlike other shareholders who do not wish to accept the Offer, the MOVA Group has been afforded the benefits contained in the Voting Agreement, including the right to continue to hold their shares and to benefit from the potential upside of Patheon's business in the future and the opportunity to dispose of its Restricted Voting Shares in the future at potentially a higher price than under the Offer.

**2. Extension of the Offer**

[49] Initially, the Special Committee submitted that JLL should be required to extend the Offer, and not take up any Restricted Voting Shares tendered, until at least 21 days have elapsed after the mailing of the notice of change and variation in respect of the amendments to the Take-over Bid Circular. The Special Committee submitted that this period was necessary to ensure that there was sufficient time for shareholders to receive and digest the amended disclosure, and to have an adequate opportunity to exercise their withdrawal rights should they choose to do so. During the hearing, however, the Special Committee informed us that it agreed with Staff's

position that a 15-day period would be sufficient, determined from the date of the notice of variation.

[50] The Special Committee opposes JLL's position that a 10 day extension (as provided for in the Act) is sufficient, given that, as a practical matter, that period would include two weekends, effectively "short-changing" shareholders by giving them only five or six business days to consider the changes to the Take-over Bid Circular.

[51] The Special Committee submits that the changes resulting from the termination of the Voting Agreement are so fundamental that making the necessary changes is tantamount to making a new bid.

**3. Ability to Enter into Future Agreements, Arrangements and Understandings**

***No New Agreement for the Period of 120 Days***

[52] The Special Committee submits that Patheon shareholders may be concerned that an explicit agreement (the Voting Agreement) that violates the identical consideration provision may be replaced by a similar tacit agreement, arrangement or understanding. To address this concern, the Special Committee submits that JLL and the MOVA Group ought to certify that there currently are no such agreements, arrangements or understandings and there will not be any for a period of 120 days following the expiry of the Offer. The Special Committee relies on *Re Royal Trustco Ltd. and Campeau Corporation (No. 2)* (1980), 11 B.L.R. 298 (O.S.C.) ("*Royal Trustco*") where the Commission imposed a similar condition upon finding similar breaches of the Act.

***No Collateral Benefits***

[53] In addition, the Special Committee submits that JLL and the MOVA Group ought to also certify that the MOVA Group will not receive any collateral benefit or other consideration that is not also available to, and shall not be treated differently than, the other shareholders of Patheon in any JLL Subsequent Acquisition Transaction or compulsory acquisition following the Offer.

***Special Committee Concerns***

[54] The Special Committee submits that if JLL is not required to make these certifications, JLL could, as early as the day following the completion of the Offer, enter into a new agreement with the MOVA Group that would provide substantially the same benefits to the MOVA Group and to JLL as the Voting Agreement.

[55] The Special Committee submits that such certifications are appropriate and necessary to (i) address the reasonable concern that shareholders may have that JLL will replace the Voting Agreement with a tacit agreement, arrangement or understanding with the MOVA Group, and (ii) ensure that JLL and the MOVA Group do not achieve through a subsequent agreement the very things that they have agreed not to do during the period of the Offer, that undermine the protection of minority shareholders. The Special Committee submits that not requiring these certifications would undermine public confidence in Ontario's capital markets.

***Do Not Wait and See***

[56] The Special Committee also submits that it is critical that appropriate conditions be placed on JLL's ability to enter into a new or revised agreement with the MOVA Group following the Offer. The Commission should not wait to address this issue until a specific JLL Subsequent Acquisition Transaction is proposed. Shareholders are entitled to make a decision on whether to tender their shares to the Offer with full information about whether any agreements, arrangements or understandings will be put in place between JLL and the MOVA Group. The Commission cannot "unscramble the egg" once shares have been taken up under the Offer. The ability of JLL to exercise control over Patheon if the Offer is successful makes it unlikely that there would be an effective challenge of these arrangements, even if such a transaction treats the other shareholders of Patheon unfairly.

[57] The Special Committee submits that it is ineffective and impractical, given the circumstances, to wait and see whether JLL enters into an inappropriate agreement because the parties would find themselves back before the Commission making the same submissions. The Commission is in a position now to identify with precision the conditions to which JLL should be subject and to provide shareholders with certainty by dealing with this issue and avoiding the potential need for a future hearing.

**4. Allegations that the Take-over Bid Circular is Materially Deficient and Misleading**

[58] The Special Committee also submits that the disclosure in the Take-over Bid Circular is confusing, misleading and materially deficient and that the Take-over Bid Circular fails to fully and properly disclose material information in accordance with applicable securities legislation. We did not receive any oral submissions at the hearing with respect to these disclosure issues and we do not address them in these reasons.

**5. Alternative to Certification**

[59] The Special Committee submits that an alternative means to achieve the purpose of the certification requirement referred to above, while permitting JLL to enter into an agreement with the MOVA Group, is to require JLL to agree that, if it does enter into such an agreement following the completion of the Offer, the Restricted Voting Shares acquired from the MOVA Group under the Offer will not be counted as part of Minority Approval for purposes of MI 61-101.

[60] The effect of this alternative would be that JLL could effect a JLL Subsequent Acquisition Transaction in which the MOVA Group is treated differently than other shareholders only if the transaction is approved by the holders of a majority of the Restricted Voting Shares held by shareholders other than the MOVA Group who have full information regarding the arrangements made by JLL with the MOVA Group. Notwithstanding this submission, certification was the principal focus of the Special Committee's oral submissions.

**6. Section 8.2 of MI 61-101**

[61] The Special Committee submits that because JLL wants to count the shares acquired under the Offer (as a first step) as part of any majority of the minority shareholder approval of a JLL

Subsequent Acquisition Transaction (as a second step), one cannot simply de-link the first step from the second step transaction. In this context, the Offer and any JLL Subsequent Acquisition Transaction represent a single, integrated transaction. Accordingly, the Special Committee submits that what JLL is prohibited from doing in the first step should not be allowed in the second step of that integrated transaction. Otherwise, public confidence in Ontario's capital markets would be undermined and a clear message would be sent to market participants that bidders can disregard Ontario's take-over bid laws and then simply remove the offending agreement or stop the conduct when challenged.

[62] The Special Committee submits that if an offeror wishes to rely on section 8.2 of MI 61-101 and count shares tendered in a first step offer as part of the minority shareholder approval in a second step subsequent acquisition transaction, side deals are not permitted unless they are fully disclosed in the circular prepared for the first step offer, and the offeror has to comply with the identical consideration and collateral benefit provisions of the Act with respect to that offer.

[63] In addition, if JLL is permitted to enter into a new arrangement with the MOVA Group, the Special Committee submits that public shareholders, in determining whether to accept the Offer, should be fully informed of that arrangement. They should know the terms of any new agreement, the identity of the parties, the number of shares involved, and the effect on the number of shares that JLL would need to acquire in order to take Patheon private (all consistent with the disclosure required by section 8.2 of MI 61-101).

[64] The Special Committee submits that shareholders are entitled to make a decision on whether to tender their shares to the Offer based on full information. This principle is all the more important because the Offer is a coercive bid in the view of the Special Committee. It is a fundamental element of the ability to count shares tendered to a prior bid as part of majority of the minority shareholder approval under MI 61-101 that shareholders be fully informed.

**B. JLL**

**1. Extension of the Offer**

[65] JLL submits that the Offer should be extended for 10 days following the date of the notice of extension and variation, which is the time period set out in subsection 98.1(1) of the Act. The effect of the termination of the Voting Agreement on the decision of Patheon's shareholders to accept or reject the Offer is not so complex or unique as to require a longer withdrawal period. Further, following the news release issued by the Special Committee on April 14, 2009, shareholders of Patheon are aware of the proposed extension as well as the proposal to terminate the Voting Agreement.

**2. Certification Regarding Future Agreements, Arrangements and Understandings**

[66] JLL submits that it has already, and will again, certify that upon termination of the Voting Agreement there will be no agreement, arrangement or understanding with the MOVA Group. JLL submits that there is no need to certify that no such agreement, arrangement or understanding will be entered into during the 120 days following the expiry of the Offer. Such a certification is based on the Special Committee's unjustified assertion that the certification proposed by JLL cannot be believed.

[67] JLL submits that, in any case, it is impossible to demonstrate that there are no tacit agreements with the MOVA Group, other than to provide a certification that there are none, which JLL has already done. In JLL's submission, the Commission has previously accepted that as enough. In *Royal Trustco*, the Commission made an order cease-trading a take-over bid that would terminate if, amongst other things, certification was provided that there were no collateral agreements or undertakings. No certification was required as to conduct following the expiry of that offer.

[68] JLL submits that if it does ultimately enter into an agreement with the MOVA Group following the expiry of the Offer, the Commission can examine all of the circumstances surrounding such an agreement at that time, when the facts will have crystallized and the Commission can consider the matter without having to assume that JLL is being untruthful in making its certification. JLL is prepared to notify the Commission if an agreement is proposed to be entered into with the MOVA Group within 120 days of the expiry of the Offer and to make full disclosure of that undertaking.

[69] In essence, JLL submits that there is no need for the Commission to do anything at the present time. There is no basis for the Commission to require an additional JLL certification. Doing so would ask JLL to "prove a negative" since JLL has already stated that no agreement exists with other shareholders of Patheon.

[70] JLL submits that there is no legal or policy justification for the imposition of such a term. There is nothing in the Act, regulations or policy statements precluding JLL from entering into an agreement with a third party to facilitate a second-step acquisition after the expiry of the Offer.

**3. The Commission's Public Interest Jurisdiction**

[71] JLL submits that the Commission's public interest jurisdiction is derived from the broad mandate conferred upon the Commission under the Act to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets. The Commission's public interest jurisdiction is not unlimited (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("*Asbestos*") at para. 41). Intervention on public interest grounds is warranted only where a transaction is abusive to investors or the capital markets generally.

[72] JLL submits that the threshold for the Commission to make an order under section 127 of the Act is a high one that cannot be satisfied in the present circumstances. JLL proposes to terminate the Voting Agreement and the termination agreement to be entered into will contemplate deeming the MOVA Group no longer to be an "offeror" under the CBCA for purposes of the Offer. That puts the MOVA Group in the identical position it was in prior to the Offer. In such circumstances, it cannot be said that any shareholder is receiving any different consideration than any other shareholder.

[73] Furthermore, JLL submits that there is no breach of the underlying "spirit" of the take-over bid provisions of the Act. Without a breach of the rules or the spirit underlying them, there is no basis for the Commission to exercise its public interest jurisdiction. Moreover, in the circumstances, there is no basis to conclude that the Offer is abusive to investors or the capital

markets generally, therefore making it unwarranted for the Commission to take the extreme measure of invoking its public interest jurisdiction.

### 4. Termination of the Voting Agreement

[74] JLL submits that the Voting Agreement does not contravene sections 97 and 97.1 of the Act. JLL also submits that terminating the Voting Agreement, as JLL proposes to do in accordance with the JLL Proposal, resolves all of the alleged problems identified by the Special Committee and will allow investors to decide the merits of the Offer.

## C. Staff

### 1. Identical Consideration and Collateral Benefits

[75] Staff submits that the Voting Agreement provides the MOVA Group with a meaningful advantage in deciding whether to tender shares to the Offer, by eliminating the structural disadvantages that other Patheon shareholders face in response to an "any and all" bid. Those disadvantages include protection for a shareholder who does not tender to the Offer from being "squeezed out" and ending up receiving identical consideration to that under the Offer but at a later time.

[76] Staff submits that the proposed provisions of the Stockholders' Agreement mitigate any coerciveness of the Offer to the MOVA Group because it provides the MOVA Group with certain tag-along, drag-along and board representation rights, which address concerns the MOVA Group may have about remaining a minority shareholding in an issuer with a small and illiquid public float. The MOVA Group is protected from the loss of liquidity and has the potential opportunity to obtain a control premium in the future that will not be available to public shareholders.

### 2. Extension of the Offer

[77] Staff submits that 15 days is a reasonable period of time for extending the Offer because the minimum 10-day period is not adequate in the circumstances. Ten days does not provide shareholders sufficient time to fully consider the variation of the Offer in light of the complexity of the disclosure contemplated.

### 3. Certification Regarding Future Agreements, Arrangements and Understandings

[78] Staff agrees with the Special Committee that JLL should, in addition to terminating the Voting Agreement, also be required to certify that no other oral, written or other agreement, arrangement or understanding, formal or informal, with any member of the MOVA Group, currently exists or will be entered into during the period of the Offer or with respect to any JLL Subsequent Acquisition Transaction or compulsory acquisition for a period of 120 days following the expiry of the Offer.

[79] Staff submits that the Commission must consider two issues in addressing the issue of certification:

1. the application of section 8.2 of MI 61-101 to the Offer; and

2. the application of the Commission's public interest jurisdiction in the context of the identical treatment and minority approval principles underlying MI 61-101.

## 4. Application of MI 61-101 to the Offer and a Subsequent Acquisition Transaction

[80] Staff submits that a JLL Subsequent Acquisition Transaction will be a business combination under MI 61-101 because it will terminate the interests of the holders of Restricted Voting Shares who do not tender to the Offer, without their consent, and JLL, a related party of Patheon, would be acquiring Patheon. As a result, the transaction must be approved by a majority of the Restricted Voting Shares held by shareholders, other than those held by JLL, any related parties of Patheon that receive a collateral benefit, and their respective joint actors ("**Minority Approval**").

[81] Section 8.2 of MI 61-101 allows JLL to vote or treat as voted, for purposes of Minority Approval, any Restricted Voting Shares that it acquires under the Offer if certain conditions are met. Staff submits that, assuming section 8.2 is complied with, the combination of the Offer and any JLL Subsequent Acquisition Transaction is considered to be the equivalent of a single transaction that is subject to Minority Approval. The shares acquired by JLL under the Offer can be treated as voted as part of the Minority Approval. Therefore, if sufficient Restricted Voting Shares are tendered to the Offer, JLL will be certain that it can obtain Minority Approval and will be guaranteed the ability to eliminate through a JLL Subsequent Acquisition Transaction the Restricted Voting Shares that are not tendered to the Offer by public shareholders.

[82] Staff agrees with the Special Committee regarding the concerns underlying the request that JLL certify that it will not enter into future agreements with the MOVA Group that would provide JLL and the MOVA Group with the same benefits that are reflected in the current Voting Agreement. Under subsections 8.2(f)(iv) and (v) of MI 61-101, a bidder who wants to count shares tendered to a bid as part of the minority approval required for a subsequent acquisition transaction must make reasonable inquiries about the identity and holdings of persons who may be excluded from the vote. Staff submits that it is unreasonable for JLL to state that it does not know whether it will decide to negotiate a new agreement with the MOVA Group once the Offer is completed and a JLL Subsequent Acquisition Transaction is proposed. Staff supports the Special Committee Proposal, or the alternative suggested by the Special Committee, which Staff sees as addressing the possible violation of subsections 8.2(f)(iv) and (v) of MI 61-101.

## 5. Application of Commission's Public Interest Jurisdiction

[83] Staff submits that the Commission should exercise its public interest jurisdiction to cease trade the Offer unless it is amended to address the concerns raised by the Special Committee and Staff in this proceeding. The Supreme Court of Canada has affirmed the Commission's broad jurisdiction to intervene on public interest grounds where it would further the purposes of the Act (*Asbestos*, *supra* at 148, 149).

[84] Staff also refers to *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37 ("*Cablecasting*") where the Commission applied its public interest jurisdiction to a going private transaction carried out in compliance with the requirements of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 but not in compliance with the disclosure requirements applicable to issuer bids under Commission Policy 3-37 (a predecessor to MI 61-101).

[85] Staff submits that the Commission can intervene on public interest grounds even if there is no breach of the Act, the regulations or a policy statement. The Commission should intervene in the public interest where a market participant initiates a transaction that is designed to exploit a loophole in securities legislation.

[86] Staff submits that an order in the public interest under subsection 127(1) of the Act may be appropriate when there is abuse. In the take-over bid context, this can occur where a transaction is artificial and defeats the reasonable expectations of investors (*Re Financial Models Co.* (2005), 28 O.S.C.B. 2184 ("*Financial Models*")).

[87] Staff submits that a key factor in determining whether the Commission should exercise its public interest jurisdiction to impose the additional conditions set out in the Special Committee Proposal, or the alternative proposed by the Special Committee, is whether the MOVA Group received preferential treatment in the nature of collateral benefits, as that term is defined in MI 61-101. Staff is of the view that a voting agreement entered into by JLL and the MOVA Group in connection with a JLL Subsequent Acquisition Transaction would be a collateral benefit within the meaning of MI 61-101. As the MOVA Group would not have tendered to the Offer and would not be voting on a JLL Subsequent Acquisition Transaction, excluding its votes from Minority Approval would be an insufficient remedy. Staff submits that the purpose of the Voting Agreement and any similar future agreement is inconsistent with the rationale behind the identical consideration requirement and the prohibition against collateral benefits.

[88] The Commission has contemplated the possibility, in subsection 2.1(5) of the Companion Policy to MI 61-101, that it may need to intervene on public interest grounds where an arm's length security holder is receiving preferential treatment for its support of a business combination.

[89] Staff submits that JLL has used the Voting Agreement, and may use a future agreement with the MOVA Group, to neutralize the possibility that the MOVA Group would veto a potential privatization of Patheon (by not tendering to the Offer) to obtain a higher price for its shares under the Offer, to the detriment of minority shareholders. This is similar to novel and abusive schemes that the Commission has addressed in prior decisions, including *Sears*, in that it violates the principle of identical treatment underlying the bid regime.

[90] Therefore, Staff submits that the Commission should intervene on public interest grounds to either prohibit the entering into of future agreements as recommended by the Special Committee or, in the alterative, treat a second-step business combination of Patheon as a separate transaction in which JLL would not be able to count the Restricted Voting Shares acquired under the Offer as part of any Minority Approval.

[91] Staff submits that the Commission should not permit JLL to undermine the principle of identical treatment underlying both the take-over bid regime and the business combination requirements of MI 61-101. In particular, JLL should not be permitted to resolve the concerns raised by the Special Committee Application by treating the Voting Agreement as void *ab initio*, while keeping open the option of entering into a similar agreement in the future in connection with a JLL Subsequent Acquisition Transaction. The Commission should either prohibit such an agreement or treat such an agreement as part of a business combination that is not linked to the

Offer. In the latter case, JLL would not be able to count Restricted Voting Shares acquired under the Offer as part of any Minority Approval.

[92] Staff submits that, unless the parties reach an agreement on the outstanding issues no later than 12:00 p.m. on April 16, 2009, the Commission should make an order under subsection 127(1)2 of the Act cease trading the Offer until such time as (i) JLL takes the steps set out in the JLL Proposal, except that JLL shall extend the Offer for at least 15 days from the date it files the notice of variation, and (ii) JLL amends the Take-over Bid Circular to include the certifications requested by Staff.

### 6. The JLL Proposal Creates Uncertainty

[93] Staff submits that the JLL Proposal creates uncertainty for public shareholders of Patheon. A shareholder deciding whether to tender to the Offer must consider the value that is being given up by doing so. A shareholder cannot make that assessment if there is uncertainty as to whether a future agreement may be entered into between JLL and the MOVA Group.

## VI. Analysis and Conclusions

### 1. The Issues

[94] The issues we have to address in this matter are significantly narrowed as a result of the JLL Proposal, which JLL confirmed to us it was prepared to honour. That proposal includes the agreement of JLL to terminate the Voting Agreement on the basis that it is void *ab initio*. The two outstanding issues about which the Special Committee and JLL do not agree are (i) whether JLL should be free to enter into a new agreement, arrangement or understanding with the MOVA Group or other shareholders within the period of 120 days following the expiry of the Offer, and (ii) the period the Offer should be required to remain open following the necessary variation to the Offer as a result of our decision in this matter. Related to the first issue is the question of the proper interpretation of section 8.2 of MI 61-101.

[95] JLL did not proceed with the JLL Application and takes the position that, if the JLL Proposal is approved, there is nothing for this panel to decide with respect to the issues raised by the Special Committee Application. Accordingly, JLL did not make substantial oral submissions with respect to the implications of the Voting Agreement for purposes of the identical consideration provision or the collateral benefit prohibition. We did receive the written submissions of both parties with respect to these issues filed in connection with the JLL Application.

[96] JLL submits that, where there has been no breach of the Act, our public interest jurisdiction can be exercised only where there is a clear abuse of shareholders. JLL submits that there is no abuse of shareholders here. As a result, it is necessary for us to address the concerns we have with the Voting Agreement.

### 2. Identical Consideration and Collateral Benefits

[97] Clearly, the MOVA Group is receiving through the Voting Agreement an opportunity and benefits not available to other shareholders of Patheon. That opportunity is the ability to

remain as a minority shareholder of Patheon subsequent to the Offer (reflected in an assurance that its shares will not be acquired by JLL pursuant to a JLL Subsequent Acquisition Transaction) on terms that provide basic shareholder protections to the MOVA Group, including those related to the possible lack of liquidity of the Restricted Voting Shares after the Offer (see the relevant excerpts from the Voting Agreement in Schedule A and the relevant excerpts from the Stockholders' Agreement in Schedule B). That opportunity and those benefits make it easier for the MOVA Group to decide not to tender to the Offer. The MOVA Group has protected its interests through the Voting Agreement and the Stockholders' Agreement and JLL has neutralized the MOVA Group in terms of whether or not JLL will be able to acquire under the CBCA the Restricted Voting Shares not tendered to the Offer if the MOVA Group does not accept the Offer.

[98] As a result, the MOVA Group is receiving preferential treatment that mitigates any coercion that may be inherent in the Offer.

[99] In contrast, public shareholders of Patheon are receiving only the Offer. They must decide whether to tender to the Offer knowing that if they do not, they may end up as minority shareholders holding an illiquid stock, with very limited shareholder rights or protections, or they may have their shares acquired at the same price as under the Offer pursuant to a JLL Subsequent Acquisition Transaction. To the extent that the Offer is coercive, public shareholders are suffering that coercion with no mitigation.

[100] The public shareholders of Patheon are being offered the same cash consideration as the MOVA Group under the terms of the Offer. However, they are not being offered the same opportunity as the MOVA Group to remain as a shareholder of Patheon with the benefit of the Stockholders' Agreement. We believe that opportunity and that benefit have significant value to the MOVA Group, although those benefits may be difficult to quantify.

[101] *Royal Trustco* established that agreements that confer collateral benefits on a shareholder, even though the benefit is structured to be conferred outside a bid, are nonetheless subject to the collateral benefit prohibition. The Commission went further in *Sears* and stated (at para. 241) that:

> As a matter of principle and policy, it should not be possible for an offeror to avoid the application of the Collateral Benefits Prohibition by agreeing to provide collateral benefits to a shareholder whose shares are to be acquired outside the bid in a SAT [subsequent acquisition transaction] or other transaction. There is nothing in the language of subsection 97(2) which expressly requires or even implies that the shares at issue must be acquired under the bid. To interpret the provision otherwise where avoidance of its intent could so easily be achieved would be to undermine the fundamental principle of equal treatment of shareholders.

[102] We believe that the *Sears* principle applies to the circumstances before us. In our view, it is not necessary for the shares of the MOVA Group to be acquired by JLL under the Offer or otherwise in order for the collateral benefit prohibition to apply. In our view, the opportunity and benefits given to the MOVA Group in this case can constitute collateral benefits within the

meaning of subsection 97.1(1) of the Act regardless of whether the MOVA Group tenders to the Offer or remains a Patheon shareholder following the Offer. To conclude otherwise in these circumstances would undermine the fundamental principle of equal treatment of shareholders where a formal bid is made.

[103] In *CDC Life Sciences*, the Commission held that an agreement between a bidder and a major shareholder that provided mutual rights of first refusal, consultation arrangements and a put option was a prohibited collateral benefit.

[104] Where on its face the identical consideration requirement applies, the onus is on the bidder to establish that the consideration being given to a particular shareholder is not greater than that offered to other shareholders (see *Royal Trustco* at para. 309 and *Sears* at paras. 208 and 216). JLL has not satisfied that onus.

[105] In our view, the term "consideration" used in subsections 97(1) and 97.1(1) of the Act should be interpreted broadly in accordance with the regulatory objectives of the take-over bid regime contained in the Act. One of the principal animating objectives of that regime is the fair and equal treatment of public shareholders when a formal bid is made. That principle underlies and is the reason for many of the specific provisions of the Act applicable when a formal bid is made (see the commentary in paragraph 116 of these reasons).

[106] The important point is that the MOVA Group is receiving an opportunity and benefits outside the terms of the Offer that are not being offered to and are not available to public shareholders. Subsection 97(1) of the Act requires that all shareholders be offered identical consideration. JLL is offering different consideration to the MOVA Group through the opportunity to remain as a shareholder with the benefits of the Voting Agreement and the Stockholders' Agreement. Subsection 97.1(1) requires that no collateral agreement, commitment or understanding entered into by an offeror have the effect of providing a shareholder consideration of greater value than that offered to other shareholders. JLL has entered into the Voting Agreement with the MOVA Group which provides the MOVA Group consideration of greater value than that offered to public shareholders. In our view it is not an answer to say that, if the MOVA Group accepts the Offer, they will receive the identical cash consideration as the public shareholders. That response ignores the legal and economic reality of the circumstances and what we consider to be the proper interpretation of the term "consideration" used in subsections 97(1) and 97.1(1) of the Act. It also ignores the opportunity and benefits the MOVA Group is receiving through the Voting Agreement.

[107] In our view, the entering into of the Voting Agreement in these circumstances may well have breached subsections 97(1) and 97.1(1) of the Act. We have not come to a final conclusion, however, because we have not received sufficient evidence and submissions with respect to that issue and because we do not need to decide that issue for purposes of our decision.

### 3. Fairness to Shareholders

[108] Generally, when a significant shareholder tenders to an offer, that gives at least some comfort that the offer is fair to shareholders. This is particularly so when the tendering shareholder is an insider with better access to corporate information than other public shareholders. Where a significant shareholder that is an insider is not prepared to accept an offer,

and is given benefits not available to other public shareholders to remain as a shareholder after completion of an offer, that raises a question as to the fairness of the offer to public shareholders. Rather than convincing the MOVA Group to tender to the Offer by increasing the Offer price, JLL has provided the opportunity to the MOVA Group to remain as a shareholder after completion of the Offer with the benefit of the Stockholders' Agreement.

[109] In addition, where a shareholder remains a shareholder after completion of an offer and a subsequent acquisition transaction, the offeror is legally entitled to subsequently acquire that shareholder's shares at whatever price the offeror and the shareholder negotiate, assuming the acquisition occurs at least 20 business days following the expiry of the offer (see subsection 93.3(1) of the Act). There is no limit in those circumstances on the premium that JLL could pay in the future to the MOVA Group for the acquisition of their shares.

[110] These concerns about fairness to public shareholders are magnified where an insider makes an "any and all" bid (with no minimum condition) at a cash price that is substantially less than the fair market value of the relevant shares based on an independent valuation. These circumstances raise the question whether the Offer is coercive to public shareholders. While we are not prepared to conclude that the Offer is coercive, these circumstances squarely raise that issue.

**4. Remedying Possible Default**

[111] We do not accept that it is sufficient for JLL to remedy the regulatory issues raised by the Voting Agreement simply by "tearing it up" and treating it as "void *ab initio*". Having entered into that agreement, JLL may well have made an illegal offer in breach of the Act. Whether tearing up the Voting Agreement would be an adequate and appropriate remedy to a possible breach of the Act in these circumstances is a matter for the Commission to determine. Even if the Voting Agreement is terminated, the parties to it know the terms to which they were willing to agree. That makes it far simpler to resurrect those terms in a future agreement.

**5. Disclosure**

[112] We accept the proposition that full, accurate and timely disclosure of relevant information must be made to shareholders in connection with a take-over bid. That permits shareholders to make an informed decision whether to tender to the offer. One of our concerns in this case is the possibility that JLL and the MOVA Group could enter into a new agreement, arrangement or understanding of some kind after completion of the Offer and prior to a JLL Subsequent Acquisition Transaction, of which shareholders tendering to the Offer would have no notice or disclosure. Without knowing what the terms of any such agreement might be, it is impossible to assess the relevance of such an agreement and its implications in terms of disclosure in the Take-over Bid Circular. JLL is taking the position that it wants a completely free hand as to its ability to enter into any new agreement, arrangement or understanding with the MOVA Group. In our view, JLL lost that free hand by entering into the Voting Agreement in the first place.

[113] We are also concerned that the disclosure arising from the issues before us and their resolution may be complex and that shareholders and market participants may need more than 10 days to consider the resulting disclosure and its implications in deciding whether to tender to the

Offer. We note the submission made to us that as a practical matter shareholders of Patheon may have only five or six business days to consider the variation amending the Take-over Bid Circular.

**6. The Law as to Our Public Interest Jurisdiction**

[114] In considering the Commission's power to make orders in the public interest under section 127 of the Act, the Supreme Court of Canada has observed that "the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so" (*Asbestos*, *supra* at para. 45). The Court indicated that this discretion is subject to two constraints:

> In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals.
>
> (*Asbestos*, *supra* at para. 45)

Our public interest jurisdiction allows us to intervene in a bid even if there is no breach of the Act, the regulations or any policy statement. We recognise, however, that our public interest jurisdiction must be exercised with caution and restraint.

[115] In *Cablecasting*, the Commission applied its public interest jurisdiction to a going private transaction that was not effected in compliance with the disclosure requirements applicable to issuer bids under a policy that was the predecessor to MI 61-101. In its decision, the Commission provided guidance as to when it is more likely to intervene on policy grounds under the rubric of its public interest jurisdiction despite the absence of any breach of Ontario securities law. The Commission stated that:

> Another relevant consideration in assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements. Where this is the case the Commission will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle.
>
> (*Cablecasting*, *supra*, at 43)

[116] There should be no doubt in the minds of market participants that the Commission will intervene in the public interest where the take-over bid rules have been complied with but the animating principles underlying those rules have not. In *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1617 and 1618, the Commission stated that:

> It should be clear to all that the underlying purpose of Part XIX of the Act is the protection of the integrity of the capital markets in which take-over bids are

> made, and in particular the protection of investors who are solicited in the course of a takeover bid. Those purposes are carried out through provisions which, among other things, attempt to ensure that equal treatment is accorded to all offerees in a bid, that offerees have a reasonable time within which to consider the terms of a bid, and that adequate information is available to offerees to allow them to make a reasoned decision as to whether to accept or reject a bid. These provisions exist to protect investors, of course, but their over-arching purpose is the protection of the integrity of the capital markets in which those investors have placed their money – and their trust.

That conclusion is consistent with the "foreshadowing" principle referred to in *Cablecasting*.

[117] In *Re H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775 ("*H.E.R.O.*"), the Commission intervened in a bid which offended the animating principle of equality of treatment of offerees. The Commission concluded in that case that the relevant transaction was "manifestly unfair to the public minority shareholders of H.E.R.O." (*H.E.R.O.* at 3794). The Commission stated that the conduct in that case was "clearly abusive of the integrity of the capital markets, which have every right to expect that market participants … will adhere to both the letter and the spirit of the rules that are intended to guarantee equal treatment of offerees … when a bid is made".

[118] The Commission has also previously indicated that when considering the use of its public interest jurisdiction, "the Commission needs to have regard to all of the facts, all of the policy consideration [sic] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought" (*Re Sterling Centrecorp. Inc*. (2007), 30 O.S.C.B. 6683 at para. 212).

[119] JLL referred us to *Financial Models* where the Commission declined to exercise its public interest jurisdiction to intervene in a bid. In our view, that case is distinguishable from the present circumstances on at least two grounds. In that case, the relevant shareholders agreement providing the right of first refusal was in place before the bid was contemplated and all shareholders were receiving the same offer and identical consideration. Further, no collateral benefits were being given to the significant shareholder. In *Financial Models*, the Commission stated that orders in the public interest may be appropriate where there is abuse, which "could occur where a transaction is artificial and defeats the reasonable expectation [sic] of investors" (*Financial Models, supra* at para. 50).

**7. Conclusion as to our Public Interest Jurisdiction**

[120] In our view, the issues raised by this matter directly engage the animating principles underlying our take-over bid regime. As discussed above, those principles focus on the fair and equal treatment of shareholders when a formal bid is made. We believe that the circumstances before us are quite different from those in *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 and other similar Commission decisions where it was clear that the relevant offer or transaction fully complied with the Act (or, in the case of *Sears*, was assumed to be in full compliance). Here, we have real concerns that subsections 97(1) and 97.1(1) of the Act may have been contravened, that public shareholders are not being treated fairly and equally in connection with the Offer and that there may not be sufficient time for public shareholders to consider the disclosure to be made to

shareholders of the matters before us and of our decision. Those are all issues that, in our view, directly engage our public interest jurisdiction under section 127 of the Act.

[121] Accordingly, we are satisfied that we have authority in these circumstances to decide the two issues outstanding between the parties and to issue an order in the public interest giving effect to the JLL Proposal and our resolution of those issues. In doing so, we are acting in the public interest to protect the integrity of our capital markets and the confidence of investors in those markets.

[122] We should emphasize that we are not imputing any improper motive or intention to JLL in entering into the Voting Agreement. We assume that JLL entered into that agreement in good faith for appropriate business purposes and not with an intention to breach the Act or circumvent the animating principles of our take-over bid regime. Nor do we mean to suggest that the representations made, or to be made, by JLL in this matter, are or will be other than truthful and reliable. We are simply concerned that the entering into of the Voting Agreement has consequences under the Act and practical implications.

[123] We would add that we do not accept that JLL should be able to simply say that it is "tearing up" the Voting Agreement and, accordingly, this panel does not need to decide whether the entering into of that agreement contravened the Act; and at the same time argue that our public interest jurisdiction is not engaged in the circumstances. As of the hearing, the Offer is outstanding and the Voting Agreement remains in place.

**8. For How Long Should the Offer be Extended?**

[124] As noted above, we believe that our decision requires potentially complex disclosure that must be reflected in a variation to the Offer. The implications of that disclosure may not be readily apparent to public shareholders. Certainly the variation will not be as simple to understand as, for example, a variation increasing the Offer price. In our view, in these circumstances, it is appropriate that the Offer remain open for acceptance for a period longer than the 10 day period required by the Act. We believe that a reasonable period would be at least 15 days following the date of the variation to the Take-over Bid Circular.

**9. Should JLL Be Restricted in Entering Into a New Agreement with the MOVA Group?**

[125] We have identified above our concerns in the circumstances with the possibility that JLL might enter into a new agreement with the MOVA Group in the future. In our view, if JLL and MOVA Group are "tearing up" the Voting Agreement, it is only fair to shareholders of Patheon to know, when making their decision whether to tender to the Offer, that no new agreement, arrangement or understanding will be entered into for an appropriate period after the expiry of the Offer and prior to any JLL Subsequent Acquisition Transaction.

**10. Interpretation of Section 8.2 of MI 61-101**

[126] It is not disputed that a JLL Subsequent Acquisition Transaction would be a "business combination" subject to MI 61-101. We heard arguments as to the appropriate interpretation of section 8.2 of MI 61-101 (the terms of which are set out in Schedule C).

[127] The question raised is whether section 8.2 allows an offeror to complete a subsequent acquisition transaction at a price higher than that paid pursuant to the prior offer, without providing that price to the shareholders who accepted the prior offer. The language of paragraph (e) of section 8.2 of MI 61-101 appears to leave open that possibility by requiring that the consideration pursuant to the subsequent acquisition transaction must be "at least equal in value" to the consideration received under the prior offer.

[128] We note that section 8.2 sets forth rules to determine what shares can be counted in obtaining minority shareholder approval under MI 61-101. It is not a substantive provision imposing legal obligations or restrictions.

[129] In our view, paragraph (e) of section 8.2 is intended to address, among other things, the coercion inherent if an offer were to be made at a higher price than the price to be paid pursuant to a subsequent acquisition transaction. If that structure were permitted, it could coerce shareholders to accept the offer in order to avoid the possibility of being squeezed out pursuant to a subsequent acquisition transaction at a lower price. We also agree with the submission of the Special Committee and Staff that, where section 8.2 is relied upon, the effect of the section is to integrate as a single transaction the prior offer and the subsequent acquisition transaction. The Commission concluded in *Sears* (at para. 241) that the predecessor to MI 61-101 "treats the combination of the Offer and the SAT [subsequent acquisition transaction] as the equivalent of a single transaction for purposes of determining whether the Minority Approval requirement has been satisfied."

[130] In addition, in our view, disclosure in a take-over bid circular should generally relate to the integrated transaction and, to the extent reasonably possible, should not leave uncertainty with respect to issues that may be important to shareholders considering the offer that relate to a subsequent acquisition transaction. We note in this respect that paragraph (f) of section 8.2 requires specified disclosure in a take-over bid circular of information related to a subsequent acquisition transaction, including the number of shares that must be excluded in determining minority shareholder approval for the subsequent acquisition transaction.

[131] For purposes of this matter, we do not need to decide whether section 8.2 would ever permit a subsequent acquisition transaction to be carried out at a higher price than the prior offer. To answer that broader question, we would want to receive submissions on the interpretation and implications of other provisions of the Act.

[132] We have concluded in the circumstances before us that JLL should not be permitted to pay a higher price per share to the MOVA Group or other shareholders in a JLL Subsequent Acquisition Transaction (integrated with the Offer) than is to be paid to public shareholders under the Offer. In our view, it would undermine confidence in the integrity of our capital markets if JLL is permitted to do so during the period of 120 days following the expiry of the Offer. Accordingly, the certification we are requiring as a condition to our order prevents JLL from entering into any agreement, arrangement or understanding with any shareholder of Patheon for a period of 120 days after expiry of the Offer, unless the agreement provides the same consideration to shareholders under the Offer as is provided pursuant to the JLL Subsequent Acquisition Transaction. We have chosen the 120-day period as the appropriate timeframe because that is the period established in MI 61-101 in which an offer can be integrated

with a subsequent acquisition transaction for purposes of obtaining minority shareholder approval (see paragraph (d) of section 8.2 of MI 61-101).

**11. Our Order**

[133] The Special Committee requested that we issue an order cease trading the Offer, subject to the conditions discussed above. We were reluctant to issue a cease trade order because such an order could be misunderstood by the market. Our preference was to issue a less intrusive order dismissing the Special Committee Application subject to conditions giving effect to the JLL Proposal and our decisions above. We ordered that if JLL failed to comply with the conditions to our order, we would entertain an application for an alternative remedy.

[134] Accordingly, we issued an order dismissing the Special Committee Application conditional upon the matters referred to in paragraph 6 of these reasons including termination of the Voting Agreement and the certifications by JLL and the MOVA Group discussed above. Any disclosure issued by JLL as a result of this decision should be vetted with Staff.

Dated at Toronto this 6th day of August, 2009.

| | |
|---|---|
| *"James E. A. Turner"* | *"Mary G. Condon"* |
| James E. A. Turner | Mary G. Condon |

## Schedule A

## Relevant Excerpts from the Voting Agreement

Under the Voting Agreement, among other things:

(a) JLL agreed that, to the extent permitted by law, it will not, in a compulsory acquisition or subsequent acquisition transaction undertaken as part of any take-over bid, acquire the MOVA Group's Restricted Voting Shares if they are not tendered to the Offer;

(b) JLL and the MOVA Group agreed that, subject to obtaining prior regulatory approval and to the extent otherwise permitted by law, upon JLL acquiring voting securities of Patheon representing at least 50.1% of the aggregate voting power of Patheon's outstanding voting securities pursuant to a take-over bid and any related compulsory acquisition or subsequent acquisition transaction, JLL and the MOVA Group will enter into the Stockholders' Agreement;

(c) JLL and the MOVA Group agreed to (i) vote all of their Patheon shares in favour of any resolution concerning any offering of Patheon's equity securities in the United States or listing of such securities on one or more securities exchanges in the United States, (ii) not exercise any rights of dissent in respect of such matters, (iii) consult with each other prior to exercising any voting rights attached to the Patheon shares in connection with such matters, and (iv) not acquire any securities of Patheon other than pursuant to an offer to acquire all of the Restricted Voting Shares; and

(d) the members of the MOVA Group agreed that they will either (i) deposit 100% of their Restricted Voting Shares under the Offer, or (ii) deposit none of their Restricted Voting Shares under the Offer.

## Schedule B

## Relevant Excerpts from the Stockholders' Agreement

The Stockholders' Agreement contemplates, among other things:

(a) (i) if JLL proposes to transfer 10% or more of its Patheon shares in any six-month period, the MOVA Group may require that JLL cause the purchaser to purchase a proportionate amount of the MOVA Group's Restricted Voting Shares on identical terms, and (ii) if JLL proposes to transfer Patheon shares in any six-month period and such transfer has the effect of causing a person to hold voting securities representing more than 50% of aggregate voting power of Patheon's outstanding voting securities, the MOVA Group may require that JLL cause the purchaser to purchase all of the MOVA Group's Restricted Voting Shares on identical terms (collectively, the "Tag-Along Rights");

(b) that (i) certain registration rights previously granted by Patheon to JLL and two members of the MOVA Group will remain in effect (subject to certain limitations), (ii) to the extent any member of the MOVA Group does not have the right to exercise incidental registration rights in connection with a public offering, JLL will use commercially reasonable efforts to cause Patheon to provide such member with such rights on terms no less favourable than those provided to the other members of the MOVA Group under the existing registration rights agreement between such members and Patheon, and (iii) upon a request for demand registration by JLL which results in a public offering by Patheon, JLL will use commercially reasonable efforts to cause any shares sought to be included by any member of the MOVA Group to be included therein on a pro rata basis with the shares held by JLL (such additional registration rights referred to in clauses (ii) and (iii) being referred to as the "Incidental Registration Rights");

(c) JLL will use commercially reasonable efforts (i) while Patheon is a public company, to cause Joaquin Viso to be represented on Patheon's Board, and (ii) while Patheon is a private company, to cause a person designated by Joaquin Viso to be represented on Patheon's Board;

(d) in the event that JLL effects a compulsory acquisition or subsequent acquisition transaction in connection with the Offer, JLL shall cause the Restricted Voting Shares held by the MOVA Group to be excluded and not cashed out in such transaction (together with the covenant against compulsory or subsequent acquisitions set out in the Voting Agreement, the "Second Step Forbearance");

(e) if JLL shall enter into any stockholders' agreement with any other existing or future holder of Restricted Voting Shares having a similar purpose to the Stockholders' Agreement and which contains material terms that are superior in any material respect to the material terms of the Stockholders' Agreement, JLL shall offer to the

MOVA Group to amend the Stockholders' Agreement such that such material terms are no less favourable, in aggregate, than those in such other agreement;

(f) that after the Restricted Voting Shares cease to be listed on the TSX and Patheon is no longer a reporting issuer, the members of the MOVA Group may not sell their Patheon shares, except pursuant to the tag-along and drag-along rights described above; and

(g) if JLL proposes to transfer more than 50% of its Patheon shares in any six-month period, JLL may require the MOVA Group to sell a proportionate amount of the MOVA Group's Restricted Voting Shares on identical terms.

## Schedule C

## Section 8.2 of MI 61-101

8.2 Second Step Business Combination — Despite subsection 8.1(2), the votes attached to securities acquired under a bid may be included as votes in favour of a subsequent business combination in determining whether minority approval has been obtained if

(a) the security holder that tendered the securities to the bid was not a joint actor with the offeror in respect of the bid,

(b) the security holder that tendered the securities to the bid was not

(i) a direct or indirect party to any connected transaction to the bid, or

(ii) entitled to receive, directly or indirectly, in connection with the bid

(A) consideration per offeree security that was not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,

(B) a collateral benefit, or

(C) consideration for securities of a class of equity securities of the issuer if the issuer had more than one outstanding class of equity securities, unless that consideration was not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities,

(c) the business combination is being effected by the offeror that made the bid, or an affiliated entity of that offeror, and is in respect of the securities of the same class for which the bid was made and that were not acquired in the bid,

(d) the business combination is completed no later than 120 days after the date of expiry of the bid,

(e) the consideration per security that the holders of affected securities would be entitled to receive in the business combination is at least equal in value to and is in the same form as the consideration that the tendering security holders were entitled to receive in the bid, and

(f) the disclosure document for the bid

(i) disclosed that if the offeror acquired securities under the bid, the offeror intended to acquire the remainder of the securities under a statutory right of

acquisition or under a business combination that would satisfy the conditions in paragraphs (d) and (e),

(ii) contained a summary of a formal valuation of the securities in accordance with the applicable provisions of Part 6, or contained the valuation in its entirety, if the offeror in the bid was subject to and not exempt from the requirement to obtain a formal valuation,

(iii) stated that the business combination would be subject to minority approval,

(iv) disclosed the number of votes attached to the securities that, to the knowledge of the issuer after reasonable inquiry, would be required to be excluded in determining whether minority approval for the business combination had been obtained,

(v) identified the holders of securities specified in subparagraph (iv) and set out their individual holdings,

(vi) identified each class of securities the holders of which would be entitled to vote separately as a class on the business combination,

(vii) described the expected tax consequences of both the bid and the business combination if, at the time the bid was made, the tax consequences arising from the business combination

(A) were reasonably foreseeable to the offeror, and

(B) were reasonably expected to be different from the tax consequences of tendering to the bid, and

(viii) disclosed that the tax consequences of the bid and the business combination may be different if, at the time the bid was made, the offeror could not reasonably foresee the tax consequences arising from the business combination.