SIMULTANEOUS HEARINGS OF

THE BRITISH COLUMBIA SECURITIES COMMISSION (BCSC) AND THE ONTARIO SECURITIES COMMISSION (OSC)

IN THE MATTER OF HECLA MINING COMPANY

- AND -

IN THE MATTER OF DOLLY VARDEN SILVER CORPORATION

***SECURITIES ACT*, RSBC 1996, c 418 (BC Act)**
***SECURITIES ACT*, RSO 1990, c S.5 (Ontario Act)**

REASONS FOR DECISION

Hearing:	July 20 and 21, 2016	
Decision:	October 24, 2016	
BCSC Panel:	Nigel Cave	- Vice-Chair and BCSC Coordinating Chair
	George C. Glover, Jr.	- Commissioner
	Audrey T. Ho	- Commissioner
OSC Panel:	D. Grant Vingoe	- Vice-Chair and OSC Coordinating Chair
	Monica Kowal	- Vice-Chair
	Deborah Leckman	- Commissioner
Appearances:	David Di Paolo Robert J.C. Deane Caitlin Sainsbury Hunter Parsons Maureen Doherty Graham Splawski	- For Dolly Varden Silver Corporation
	Wendy Berman Lara Jackson Christopher Horkins Jeffrey Roy	- For Hecla Mining Company
	Swapna Chandra Pamela Foy Naizam Kanji Jason Koskela Jordan Lavi Krstina Skocic Christina Galbraith	- For Staff of the OSC
	Gordon Smith Nazma Lee	- For Staff of the BCSC

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REASONS FOR DECISION

I. INTRODUCTION

[1] Hecla Mining Company, through its indirect wholly-owned subsidiary, 1080980 B.C. Ltd. (collectively, Hecla), made an all-cash offer for all of the outstanding common shares (DV Shares) of Dolly Varden Silver Corporation (referred to as DV or Dolly Varden) at a price of $0.69 per share (Offer).

[2] Hecla first announced its intention to proceed with the Offer on June 27, 2016. The price of the bid represented a premium of approximately 55% over the closing price on the TSX Venture Exchange (TSX-V) for the DV Shares on the last trading day before Hecla's announcement.

[3] The Offer was formally commenced 11 days later, on July 8, 2016. The Offer was subject to a number of conditions, one of which, importantly for these Reasons, was that a private placement of DV Shares announced by Dolly Varden on July 5, 2016, involving gross proceeds of up to $6 million (Private Placement), be abandoned.

[4] The Private Placement was priced at $0.62 for up to approximately 7.26 million DV Shares, and $0.70 for up to approximately 2.14 million DV Shares qualified as "flow-through shares" under the *Income Tax Act*. The Private Placement was arranged by an independent finder and would potentially result in dilution of existing shareholders of approximately 43%. Hecla had a participation right that assured that it could purchase shares in the Private Placement and avoid dilution of its own position.

[5] In accordance with amendments to the take-over bid regime applicable throughout Canada that became effective on May 9, 2016, the Offer was subject to a minimum tender condition that required that at least 50% of the total number of outstanding DV Shares, not under the control of Hecla and its affiliates, be tendered in the Offer (Required Minimum Condition). Since this condition is a regulatory requirement, it could not be waived by Hecla.

[6] The Offer was an "insider offer", as defined in Multilateral Instrument 61-101 - *Protection of Minority Shareholders in Special Transactions* (MI 61-101), since Hecla is an insider of Dolly Varden. As of July 8, 2016, Hecla owned DV Shares and warrants to acquire additional DV Shares, representing approximately 19.8% of the issued and outstanding DV Shares as of that date.

[7] On July 8, Hecla filed an application with the BCSC under subsection 161(1) of the BC Act, seeking to cease trade the Private Placement on the basis that it was an abusive defensive tactic under National Policy 62-202 - *Take-Over Bids - Defensive Tactics* (referred to as NP 62-202 or the Policy) (BC Hecla Application). The same application was filed by Hecla with the OSC on July 16, seeking the same relief under sections 104 and 127 of the Ontario Act (Ontario Hecla Application; the BC Hecla Application and the Ontario Hecla Application being the Hecla Applications).

[8] At the time of the Hecla Applications, Dolly Varden had not received approval from the TSX-V for the Private Placement, nor had Dolly Varden closed the transaction. Dolly Varden gave an undertaking to the BCSC not to close the Private Placement until the BCSC rendered its decision on the BC Hecla Application.

[9] On July 16, 2016, Dolly Varden filed an application with the OSC under subsections 104(1) and 127(1) of the Ontario Act, seeking, among other relief, to cease trade the Offer on the basis that Hecla's take-over bid circular did not include a formal valuation as required by MI 61-101 and that the exemption provided by section 2.4(1)(a) of that instrument was not available to Hecla (Ontario DV Application). This exemption would be available if neither Hecla nor any of its affiliates or joint actors has or has had, since July 8, 2015 any board or management representation in respect of Dolly Varden or knowledge of any material information concerning Dolly Varden or DV Shares that has not been generally disclosed.

[10] Although the BCSC has not adopted MI 61-101, Dolly Varden's application was also filed with the BCSC seeking the same relief under the BCSC's public interest authority (BC DV Application; the Ontario DV Application and the BC DV Application being the DV Applications).

[11] OSC Staff made a request pursuant to Rule 13.1 of the OSC's *Rules of Procedure* for the OSC to hold simultaneous hearings on the Hecla Applications. BCSC Staff joined in that request.

[12] As a preliminary matter, the OSC and BCSC Panels determined to hold simultaneous hearings on the Hecla Applications on the basis that the consideration of the issues raised in the Hecla Applications, in light of the recent amendments to the take-over bid regime in Canada, involved matters for which it was in the public interest for "securities administrators [to] strive to achieve consistency in … decision-making", as set out in subparagraph (c) of OSC Rule 13.1(4). In addition, the urgency in making decisions affecting a live bid and the overlapping evidence required in order to provide a complete narrative of events leading up to the Hecla Applications favoured a simultaneous hearing. This determination was then extended to the DV Applications as well, on the basis of the urgency in making decisions affecting Hecla's bid and the efficiency in presenting common evidence.

[13] The simultaneous hearings were conducted by video conference on July 20 and 21, 2016. At the simultaneous hearings, we heard testimony from two witnesses, Dolly Varden's current Interim President and Chief Executive Officer, Rosalie Moore (Moore), and Hecla's Chief Executive Officer, Phillips S. Baker Jr. (Baker). We received oral and written submissions on the Hecla Applications and DV Applications from Hecla, Dolly Varden and jointly from OSC Staff and BCSC Staff.

[14] Each Panel was separately constituted and each rendered its own decision. The parties were informed that, given the effort to promote consistency, the two Panels would communicate with one another and engage in separate and shared deliberations.

[15] On July 22, 2016, the OSC issued its Order denying the Ontario Hecla Application, and cease trading the Offer until the requirements of MI 61-101 are satisfied, including the preparation and inclusion of a formal valuation. In order to allow sufficient time for Dolly Varden shareholders to consider this additional information, the bid was required, under the terms of the Order, to remain open for at least 35 days after the information was provided as an addendum to the Hecla take-over bid circular, notwithstanding the point in time that it was delivered during the term of the Offer.

[16] On the same date, the BCSC issued its Order denying both the BC Hecla Application and the BC DV Application.

[17] These are the collective reasons of the BCSC and OSC with respect to the Hecla Applications and the DV Applications. In particular, these are the common reasons of the BCSC and OSC in denying the Hecla Applications. Separate reasons are included herein with respect to: (1) the OSC's order for the Ontario DV Application, and (2) the BCSC's order denying the BC DV Application.

II. FACTS

A. Parties

1. *Hecla*

[18] Hecla is a US silver producer incorporated pursuant to the laws of the state of Delaware and is a reporting issuer in all of the provinces and territories of Canada. Hecla's common shares are listed on the New York Stock Exchange.

[19] Hecla, through its wholly-owned subsidiary Hecla Canada Ltd., beneficially owns and exercises control and direction over 2,620,291 DV Shares and share purchase warrants to acquire 1,250,000 DV Shares. At all times relevant to our hearings, this ownership of Dolly Varden securities represented more than 10% of the issued and outstanding DV Shares.

2. *Dolly Varden*

[20] Dolly Varden is a junior mineral exploration company focused on the exploration of a silver property located in Northwestern British Columbia. This property is Dolly Varden's only project. Dolly Varden is a reporting issuer in British Columbia, Ontario and Alberta and the DV Shares are listed on the TSX-V.

[21] The main portion of Dolly Varden's property is adjoined on three sides by mineral claims known as the Kinskuch Project (Kinskuch Claims) on to which alteration, structural and mineralization trends from the Dolly Varden project extend.

B. Chronology of Events

[22] Hecla and Dolly Varden, and Moore, have a history going back to 2012. Over the years, Hecla and Dolly Varden's relationship evolved and it is important to understand the shared history of the two companies and Moore. A chronology of relevant events follows below.

1. *Moore's Consulting Agreement*

[23] On May 23, 2012, Moore entered into a consulting agreement (Consulting Agreement) with Hecla, which agreement was extended multiple times and most recently renewed in January 2015. Moore's consulting relationship with Hecla only formally ended earlier this year, in January 2016, when the Consulting Agreement's term expired, without Hecla or Moore taking any previous steps to terminate the agreement.

[24] The scope of work under the Consulting Agreement remained unamended through the term of the contract and provided that the "Consultant shall perform consulting services as agreed to from time to time by Hecla and the Consultant". In addition, the Consulting Agreement contained a condition that "[d]uring the term of this Agreement or any extension thereof, (i) Consultant agrees not to engage in any activity either independently or by agreement which would be adverse to Hecla or its mineral properties or operating interests …."

2. *Hecla's Initial Investment in Dolly Varden*

[25] Hecla's investment in Dolly Varden commenced in September 2012, when Hecla acquired a significant interest in Dolly Varden by way of a private placement of 2 million DV Shares at a price of $1.60 per share, providing Dolly Varden with $3.2 million cash proceeds and resulting in Hecla's ownership of approximately 19.9% of the then-outstanding DV Shares.

3. *Ancillary Rights Agreement*

[26] Concurrently with the completion of its initial investment, Hecla entered into an Ancillary Rights Agreement with Dolly Varden, dated September 4, 2012. Under the Ancillary Rights Agreement, Hecla has a right to:

- nominate one person to the Dolly Varden Board of Directors (so long as Hecla owns at least 10% of the aggregate DV Shares and number of shares issuable upon the exercise, exchange or conversion of securities (on an undiluted basis)),
- nominate one person to the Dolly Varden Technical Committee (Technical Committee), and
- participate in any future proposed equity offering of Dolly Varden in order to maintain its *pro rata* interest.

4. *Hecla's Nominee on the Dolly Varden Technical Committee and the Technical Committee Meetings*

[27] Following the execution of the Ancillary Rights Agreement, Dr. Dean W.A. McDonald (McDonald) was appointed as Hecla's nominee to the Technical Committee of Dolly Varden in September 2012. McDonald acted as Hecla's nominee on the Technical Committee at all times since the Ancillary Rights Agreement was entered into.

[28] The Technical Committee's mandate was limited to the review, planning and implementation of technical exploration work completed at the Dolly Varden project, which included mapping, drilling and sampling, as well as making recommendations to Dolly Varden's Board with respect to future exploration activities.

[29] The Technical Committee met approximately 20 times between October 2012 and February 2016. Meetings were held on an irregular schedule two to six times per year. The subject matter covered by the Technical Committee at its meetings included information related to Dolly Varden's assessment of the value of its properties and other neighboring properties. The minutes for the Technical Committee meetings held on December 16, 2014, September 10, 2015, and February 2, 2016 indicate that McDonald

and Moore were present at the meetings. In addition to its membership on the Technical Committee, Hecla also participated in three site visits to the Dolly Varden property, beginning in October 2012, including a site visit attended by Curt Allen, Hecla's Director of New Projects, on October 21-23, 2015.

5. *Hecla's Subsequent Investments in Dolly Varden*

[30] Following Hecla's initial investment in Dolly Varden, Dolly Varden undertook various additional staged equity financings in 2013 and 2014 to fund costs associated with various stages of its planned exploration program and general corporate expenses.

[31] Specifically, Dolly Varden undertook private placements in March 2013, April 2013, December 2013, and August 2014. In April 2013, Hecla subscribed pursuant to its pre-emptive rights, re-establishing its approximately 19.9% ownership interest, and invested a further $2.7 million into Dolly Varden.

6. *Hecla's Nominee on the Dolly Varden Board*

[32] On June 24, 2013, while under contract as a consultant for Hecla, Moore was appointed to Dolly Varden's Board as Hecla's nominee in accordance with the Ancillary Rights Agreement. She was elected to Dolly Varden's Board on July 26, 2013. Moore has served on Dolly Varden's Board continuously since that time.

7. *Moore Becomes Dolly Varden's Interim President and CEO*

[33] From November 2014 to March 2015, Dolly Varden announced a series of changes in its senior executive team and Board of Directors. As part of these management changes, on January 23, 2015, Moore was seconded by Hecla to Dolly Varden and appointed Interim President and Chief Executive Officer of Dolly Varden.

[34] Hecla did not exercise its right to nominate another person to the Dolly Varden Board since Moore assumed the position of Interim President and CEO. As further discussed below in paragraph [142], this decision was made, at least in part, because if Hecla appointed a new nominee, then it would be complicated for Moore to return to the position if her CEO role was not permanent.

[35] An exchange of e-mails between Moore, Hecla's CEO and Hecla's General Counsel addressed the characterization of Moore's position as a secondment and the risk that Moore would not ever be seen as fully independent from Hecla. The relevant e-mail excerpts state:

- "… [A]s to [Moore's] independence from Hecla, notwithstanding the plan going forward, it probably will always be the case based on the past arrangements that [Moore] is never perceived as 100% independent from Hecla. However, perception aside, there could be other legal issues which arise in the event Hecla seeks to acquire Dolly Varden in the future, e.g. the need for an independent valuation I mentioned earlier in the week." (e-mail from Hecla's General Counsel dated January 15, 2015);
- "It seems like the term "secondment" is being used loosely to just refer to the plan going forward and reflected in the corresponding disclosure by Dolly Varden that reflects the following: "Rosie is a consultant to Hecla. Hecla designated Rosie as its

DV Board representative. DV needs stronger management, and would like to name Rosie as interim CEO. Hecla has supports [*sic*] its consultant - Rosie - becoming interim CEO in order to strengthen DV's management, while still maintaining her consulting relationship with Hecla." From Hecla's perspective, this arrangement would be accomplished thru [*sic*] a simple amendment to the consulting agreement…" (e-mail from Hecla's General Counsel dated January 15, 2015);

- "The more the Hecla connection is highlighted [in the press release], so too will be the independence issue. But as Phil and I discussed today, I'm not sure you [Moore] will ever be perceived as fully independent from Hecla (although we of course reserve all arguments that you are statutorily independent from Hecla in certain situations" (e-mail from Hecla's General Counsel dated January 15, 2015); and
- "I have no delusion that I'll ever be seen as fully independent but I'm comfortable wearing both hats" (e-mail from Moore to Hecla dated January 15, 2015).

8. *Dolly Varden's Financial Difficulties and Efforts to Source a Corporate Transaction*

[36] At the time of Moore's appointment as Dolly Varden's Interim President and CEO, Dolly Varden had insufficient funds in its accounts to be able to discharge its obligations pursuant to the terms of outstanding flow-through shares, land holding and lease costs and, in general, to remain a going concern through 2015.

[37] By the end of August 2015, Dolly Varden had still not secured funds to complete its field program necessary to discharge its obligations pursuant to the flow-through share issuance and the company was in a desperate financial state.

[38] Dolly Varden's Consolidated Interim Financial Statements for the three- and nine-month periods ending September 30, 2015 stated that:

> At September 30, 2015, the Company had incurred accumulated losses of $11,138,297 (December 31, 2014: accumulated loss of $9,878,858) since inception, and has a working capital deficiency of $496,311 (December 31, 2014: Working Capital $1,342,756). The Company expects to incur further losses in the development of its business and accordingly there is a material uncertainty in the Company's ability to continue as a going concern. The Company's ability to continue as a going concern is dependent upon its ability to continue to raise adequate financing in the future to meet its obligations and repay its liabilities arising from normal business operations when they come due.

[39] At the hearings, we were provided with evidence that Dolly Varden was still experiencing financial difficulties and, as of June 30, 2016, Dolly Varden had $203,310 in current cash and $2,336, 876 in current liabilities. Given the terms of the New Loan (as defined below), which was concluded after this date and the repayment of the Senior Loan (as defined below), Dolly Varden's financial position remained precarious up to the time of the hearings.

9. *Senior Loan*

[40] In early September 2015, Hecla and another large Dolly Varden shareholder, who we will refer to by the initial G, agreed to provide Dolly Varden with a loan so that Dolly Varden could meet its obligations pursuant to the flow-through share issuance.

[41] Hecla and G, as lenders, and Dolly Varden, as borrower, entered into a credit agreement (Credit Agreement), dated September 30, 2015 (the Senior Loan). The Senior Loan provided Dolly Varden with a senior, non-revolving secured loan of $1,500,000 with the option to increase to $2,000,000 and was secured by first ranking security interest over all of Dolly Varden's assets. The Senior Loan was subject to repayment in one year. In connection with the Credit Agreement, and as consideration for the advance of their respective portions of the Senior Loan, each of Hecla and G were issued 1,250,000 warrants. Each warrant entitled the holder to acquire one DV Share at a price of $0.30 per share exercisable for a period of three years from the date of issuance.

[42] The Senior Loan had a one-year term expiring October 1, 2016. It also included the following conditions:

> **Negative Covenants of the Borrower**
>
> 8.2 The Borrower hereby covenants and agrees that, except with prior written consent of Agent (in accordance with the instructions of the Majority Lenders) or as otherwise contemplated in this Section 8.2, the Borrower will not:
>
> (a) directly or indirectly issue, incur, assume or otherwise become liable for or in respect of any Indebtedness other than Permitted Indebtedness;
>
> …
>
> (i) issue any securities of the Borrower (other than (i) the Warrants and pursuant to the exercise by the lenders thereof and (ii) pursuant to the exercise of options previously granted pursuant to the Borrowers stock option plan existing on the date of this Agreement).

[43] At the time of the Senior Loan, Dolly Varden represented to Hecla that:

- it required funds of $1.6 million to complete the committed 2015 exploration program and for general corporate expenses; and
- upon completion of the 2015 exploration program, it would implement a hibernation plan, including reducing corporate expenses and putting the Dolly Varden project on a maintenance plan, given market conditions.

[44] Under the terms of the Senior Loan, Dolly Varden was also required to provide Hecla with monthly reports on Dolly Varden's activities. These reports provided updates on Dolly Varden's use of the funds provided under the Senior Loan, field program, drill results, lease negotiations, possible future financings, possibility of business combinations, budget, and cash position. While these reports were required to be provided monthly, in reality they were provided on a more *ad hoc* basis.

10. *Dolly Varden's Objectives to Eliminate Debt, Convert Debt to Equity and Raise Capital*

[45] In late 2015 and early 2016, Moore began to have concerns with respect to Dolly Varden's ability to eventually eliminate its debt. While Dolly Varden accepted the funds provided through the Senior Loan, Moore believed that it was in the long-term interest of Dolly Varden to become debt-free. She believed that it was important for a junior exploration company to continue to conduct exploration to create value and that an exploration company in "hibernation" had no prospects to increase shareholder value or to raise capital other than a dramatic increase in commodity prices.

[46] As a result, on December 17, 2015, when requesting a further drawdown on the Senior Loan, Moore asked whether Hecla and G would convert $500,000 of their loan into equity of Dolly Varden. Moore's December 17, 2015 letter explained that:

> We see this conversion as carrying mutual benefits for all parties:
>
> 1) Requires no additional out-of-pocket money,
> 2) Reduction in Dolly Varden's debt will reduce the hurdle to attracting new capital investment,
> 3) Top up each lender's equity ownership position at a very low market price,
> 4) Expression of continued support by Dolly Varden's largest shareholders to encourage other investors.

[47] On January 12, 2016, Moore met with Hecla's CEO to discuss converting $500,000 of the Senior Loan into equity of Dolly Varden. Hecla's CEO refused, stating that "debt has more value to us since it gives us control".

[48] In early 2016, Dolly Varden's management began to realize that Hecla was not going to allow Dolly Varden to achieve its long-term goal of eliminating its debt.

[49] The fact that Dolly Varden was actively pursuing ways to eliminate its debt through conversion of debt to equity, seeking a corporate transaction or engaging in equity financing was evidenced in five of the reports provided to Hecla pursuant to the Credit Agreement.

11. *Moore's Consulting Agreement Expires*

[50] On January 16, 2016, Moore's Consulting Agreement with Hecla expired. There was no evidence of any reaction by any of the parties at the time of this event.

12. *Further Drawdown on the Senior Loan*

[51] On January 22 and 25, 2016, Hecla and G advanced an additional $500,000 to Dolly Varden, bringing the total outstanding principal amount of the Senior Loan to $2 million. No additional consideration was sought or obtained by the lenders at that time. Hecla advised Dolly Varden that it did not want to convert debt to equity as it was dilutive to other Dolly Varden shareholders and the conversion would not be permitted under the TSX-V policies without shareholder approval. Hecla expressed concerns with respect to any equity raise or conversions of debt.

13. *Dolly Varden Requires Further Funding*

[52] In February 2016, Moore provided an updated hibernation budget forecast that would allow Dolly Varden to maintain its TSX-V listing and keep its property position in good standing to the end of 2017. Moore advised Hecla that Dolly Varden's funding requirement under this scenario was $350,000 through 2017.

[53] Hecla confirmed its commitment to extend the maturity of the Senior Loan to the end of 2017 and to increase the amount of the loan facility to cover the additional funding requirement of $350,000. On February 29, 2016, Hecla provided Dolly Varden with a proposed amendment to the Credit Agreement to increase the size of the facility from $2 million to $2.35 million and to extend the term to December 31, 2017. However, G could not be convinced to agree to the Senior Loan extension. He was apparently not opposed to extending the Senior Loan, but was inclined to do so closer to its maturity. Dolly Varden's Board was strongly opposed to postponing the loan extension discussions until August or September 2016, at which time Dolly Varden would be in a weaker negotiating position.

14. *Silver Prices Rise and the Parties Become Active*

[54] In April 2016, silver prices rose and Dolly Varden came, at least partially, out of "hibernation". Moore stated that, as early as May 2016, Dolly Varden was discussing a possible private placement. Moore began contacting potential investors to test interest in an equity issuance. On May 6, 2016, Moore also presented Hecla with options for a potential $3 million financing. Hecla responded that it would not support a financing of that size and indicated that Hecla did not want to be bought out of the Senior Loan.

[55] On May 9, 2016, Hecla indicated that it was willing to extend the term of the Senior Loan into 2017 and to increase the loan amount to $3 million. Hecla also offered to buy out G's position in the Senior Loan. Dolly Varden again raised the possibility of an equity financing to repay the Senior Loan. Hecla responded that it was opposed to this plan under present market conditions.

[56] Within the next few weeks, the Dolly Varden Board instructed Moore to investigate options for terminating the Senior Loan without breaching its conditions. By the end of May 2016, Dolly Varden's Board had arrived at a plan to obtain an additional loan sufficient to pay the Senior Loan in full. Moore approached one of the investment firms she had contacted earlier that month about potential equity financing, Sprott Resource Lending Corp. (Sprott), and inquired whether Sprott would consider a short-term debt financing instead.

[57] Meanwhile, on May 26, 2016, Hecla purchased the Kinskuch Claims, a number of adjacent mineral properties to the Dolly Varden property, without Dolly Varden's knowledge or involvement. After the completion of the purchase, on June 7, 2016, Hecla advised Moore of the transaction and indicated that Hecla's ultimate goal was to consolidate the district.

15. *Dolly Varden Obtains a New Loan and Moves to Repay the Senior Loan*

[58] After a few weeks of negotiations, on June 13, 2016, Dolly Varden entered into agreements for new senior secured term loans with Sprott and two other lenders (New

Loan). The New Loan provided Dolly Varden with short-term loan proceeds of $2.5 million, bearing interest of 4% per annum, and provided the lenders with 2.5 million common share purchase warrants at an exercise price of $0.384 per share and an exercise period of two years. Repayment of the New Loan was due within six months, but unlike the Senior Loan, Dolly Varden could repay the New Loan through an equity financing, which could be obtained without the lenders' consent. In addition, Dolly Varden paid a 2.5% finder's fee on a portion of the New Loan's proceeds.

[59] Dolly Varden's evidence was that the intended purpose of the New Loan was always to enable Dolly Varden to repay the Senior Loan, and that it then planned to raise equity through a private placement.

[60] On the same day the New Loan was entered into, Dolly Varden provided Hecla with formal notice of its intention to prepay the outstanding balance of the Senior Loan within 10 business days. Dolly Varden also publicly announced the terms of the New Loan and Dolly Varden's intention to immediately repay the Senior Loan. The press release noted the importance of the greater flexibility that Dolly Varden gained from repayment of the New Loan but did not specifically indicate an intention to do so through a private placement.

16. *Hecla Offers to Amend the Senior Loan*

[61] On June 22, 2016, Hecla made an offer (open for acceptance for two days) to amend the Senior Loan. The offer was conditional on Dolly Varden not moving ahead with the New Loan. The terms of Hecla's offer included, among other things:

- an additional loan of $1 million,
- a reduced interest rate, from 5% to 3%,
- an extension of the term of the Senior Loan by 15 months, to December 31, 2017, and
- Dolly Varden's issuance of 664,642 warrants to Hecla.

[62] On June 23, 2016, the Dolly Varden Board met and decided to reject Hecla's offer to amend the Senior Loan. Moore e-mailed Hecla's CEO, Baker, to advise him of the decision, noting that Hecla's offer did not address "the fundamental issue of debt repayment" and, specifically, did not "permit Dolly Varden to issue equity to repay the loan without obtaining Hecla's consent". Moore confirmed that Dolly Varden would be proceeding with the New Loan.

17. *Hecla Announces an Intended Unsolicited Take-over Bid*

[63] On June 27, 2016, Hecla issued a press release announcing its intention to make the Offer. At the time of the announcement, Hecla already owned a significant portion of the outstanding DV Shares, as follows:

Dolly Varden Shareholdings	**Without exercise of Hecla's warrants**	**With exercise of Hecla's warrants**
Outstanding Common Shares	18,286,963	19,518,963
Hecla Ownership – shares	2,620,291	3,870,291
Hecla Ownership – percentage	14.3%	19.8%

[64] Hecla would offer $0.69 per share in cash, reflecting a premium of approximately 55%, based on the closing price of the DV Shares on June 24, 2016.

[65] Hecla also announced that it had entered into support agreements with other shareholders (G and his spouse) who collectively held 2,500,000 DV Shares and 1,250,000 DV warrants. G and his spouse agreed to tender their shares and warrants into the Offer and to otherwise support the take-over bid. Together, G and his spouse and Hecla held 34.4% of the DV Shares on a fully-diluted basis.

18. *Dolly Varden's Relevant Board Meetings*

[66] The Dolly Varden Board received a copy of Hecla's press release during its meeting on June 27, 2016. The draft minutes of that meeting indicated that, having already discussed several matters (including, of note, a potential press release regarding a contemplated private placement and the Board's instructions for Moore to advance the private placement with the proposed finder, then to report back), the Board received Hecla's press release and the meeting was briefly adjourned. Upon reconvening, the Board minutes reflect that Moore reported on her communications with a proposed finder, who had contacted potential private placees who might be willing to invest in DV Shares at a price of $0.69 per share. The Board instructed Moore to follow up with the finder to further advance the private placement.

[67] On June 29, 2016, the Dolly Varden Board met again. The draft minutes of that meeting indicated that the Board discussed Hecla's intention to make a take-over bid, as well as proceeding with the private placement. The Board decided to schedule a meeting with potential financial advisors with respect to the Offer. The Board also discussed potential members of a special committee. Later that same day, Dolly Varden's counsel sent a letter to alert Hecla of its obligations to provide a formal valuation under MI 61-101. Dolly Varden indicated that it was initiating a process to select a valuator through its Special Committee and that arrangements should be made for Hecla to pay for the valuator's engagement. Hecla promptly responded with its view that Hecla was exempt from formal valuation obligations and that it declined to pay for any valuator.

[68] The Dolly Varden Board met again on June 30, 2016. The draft minutes of that meeting indicated that financing alternatives were discussed, including a private placement through the finder that had been previously identified. Discussions also considered the risk of legal action by Hecla and Dolly Varden's need for cash.

[69] Another Dolly Varden Board meeting was held on July 2, 2016. The draft minutes of that meeting indicated that the Board discussed the resolutions appointing the Special Committee, whose mandate would be to review and evaluate the Offer and provide recommendations to the Board. The Board then considered two options for an equity offering. Discussions noted an uncertainty regarding whether Hecla would proceed with the Offer. Ultimately, the Board decided to proceed with an equity financing through the finder. The Board instructed Moore to negotiate a finder's agreement.

19. *Dolly Varden Repays Senior Loan and Announces a Private Placement*

[70] On July 4, 2016, Dolly Varden repaid the balance of the Senior Loan, delivering approximately $2 million to Hecla. It also issued a press release announcing Dolly Varden's appointment of a Special Committee to evaluate the Offer and "actively investigate all possible alternatives". The release noted that "Hecla has not made any formal offer" and advised shareholders to wait before making any decisions.

[71] On July 5, 2016, Dolly Varden announced its intention to undertake the Private Placement. Dolly Varden announced that it would use the net proceeds to repay the New Loan (thereby eliminating its debt) and to explore the Dolly Varden property. Some proceeds would also be used for working capital.

20. *Hecla's Formal Take-over Bid is Filed*

[72] On July 8, 2016, within days of the Private Placement announcement, the Offer was formally commenced.

[73] On July 11, 2016, Dolly Varden wrote Hecla to formally advise, for the first time, that Dolly Varden was asserting claims in respect of the Kinskuch Claims. Dolly Varden alleged that Hecla breached a confidentiality provision in the Ancillary Rights Agreement when it acquired the Kinskuch Claims. Accordingly, Dolly Varden alleged that Hecla held the Kinskuch Claims pursuant to a constructive trust in favor of Dolly Varden.

III. HECLA APPLICATIONS

A. <u>BCSC and OSC Analysis of Hecla Applications</u>

1. *Law*

[74] This was the first instance in which the Commissions have had to consider whether a contemplated private placement is an inappropriate defensive tactic after the adoption of the changes to the Canadian take-over bid regime that became effective in May 2016. These changes require that all take-over bids:

a. remain open for a minimum period of 105 days unless the target board reduces the bid period (to a minimum of 35 days) or agrees to certain competing transactions (in which case the minimum bid period will automatically be 35 days);

b. be subject to the Required Minimum Condition; and

c. be extended for at least 10 days after the Required Minimum Condition is satisfied.

[75] These changes did not modify NP 62-202 regarding defensive take-over bid tactics, which must now be interpreted in light of these changes to the basic requirements for all bids.

[76] Subsection 1.1(2) of NP 62-202 provides that the primary objective of the take-over bid provisions "is the protection of the bona fide interests of the shareholders of the target company" and that "[a] secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment." The Policy

expresses concern that certain defensive measures taken by a target's management may have the effect of denying shareholders the ability to make a decision whether to tender or not and "frustrating an open take-over bid process". In subsection 1.1(3) of the Policy, the Commissions state that they are "prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights."

[77] The Policy goes on to state, in part, at subsection 1.1(4):

> Without limiting the foregoing, defensive tactics that may come under scrutiny if undertaken during the course of a bid, or immediately before a bid, if the board of directors believe that a bid might be imminent, include
>
> (a) the issuance … of … securities, …
>
> (b) entering into a contract other than in the normal course of business or taking corporate action other than in the normal course of business …

[78] The Policy states, at subsection 1.1(5), that we will:

> [t]ake appropriate action if [we] become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or a competing bid.

[79] The Policy states expressly that a securities issuance, could, in certain circumstances, constitute a defensive tactic attracting regulatory scrutiny on the basis that it may frustrate the ability of shareholders to respond to a bid or a competing bid.

[80] Much of the activity by Commissions involving defensive tactics has involved shareholder rights plans and the focus has been upon when the plans no longer serve the purpose of maximizing shareholder value and choice and should be cease traded.

[81] Private placement transactions, in contrast, may serve multiple corporate objectives. They are therefore more challenging for securities regulators to review than cases involving shareholder rights plans, where the corporate objective is only to alter the dynamics of a bid environment.

[82] When reviewing a private placement in accordance with NP 62-202, the Commissions need to balance: 1) the extent to which the private placement serves bona fide corporate objectives, for which corporate law gives significant deference to a board of directors in exercising its business judgment, with 2) the securities law principles of facilitating shareholder choice with regard to corporate control transactions and promoting open and even-handed bid environments.

[83] The appropriate balancing of these considerations promotes certainty in corporate decision-making, while deterring a target's board of directors and management from entering into abusive transactions that deny shareholders the ability to participate in an offer or that improperly alter bid dynamics.

[84] Securities regulatory review of private placements is further complicated by the varied circumstances and options available for presenting and addressing the issue. Outside of securities commissions, a private placement may be: 1) the subject of a court proceeding,

and 2) subject to stock exchange review and approval. Varying remedies are available in each of these forums.

[85] Once completed, unwinding a completed financing transaction will involve potentially difficult issues denying the target and its shareholders and the investors in the private placement of the benefits of the contractual commitments that have been made.

[86] In this case, the TSX-V had not approved the Private Placement at the time of our hearings, so the issue of forum did not arise. As a result of the undertaking by Dolly Varden not to close the Private Placement prior to the issuance of a decision in this matter, we were afforded the opportunity to consider these issues without concern about what remedy could be afforded after a transaction has closed. Those issues can be reserved for other cases.

[87] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 (*Asbestos*), the Supreme Court of Canada stated at paragraph 45:

> … [T]he OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally.

[88] Public confidence in the capital markets requires us to consider the responsibilities of boards of directors in implementing corporate actions, including the duties owed by directors to the corporation, the standard of care imposed on directors, and the deference afforded to the business judgment of properly informed directors following appropriate governance processes. We must consider these corporate law principles when our discretion is sought to be invoked to prevent shareholder abuse of the kind that NP 62-202 is intended to address. We must also take into account that corporate law has its own remedies, available through the courts, for actions that fall short of corporate law standards, including, in appropriate cases, the oppression remedy found in many Canadian corporate law statutes. Contract law may also afford remedies in particular cases as between corporations and their shareholders. It is not the role of securities regulators to offer redress on these grounds or duplicate these remedies.

[89] We agree with the BCSC's decision *Re Red Eagle*, 2015 BCSECCOM 401 (*Red Eagle*) at paragraph 89, which cited with approval the approach stated by the Alberta Securities Commission in *Re ARC Equity Management (Fund 4) Ltd.*, 2009 ABACC 390 (*ARC*), as follows:

> We agree with the policy perspective in *ARC*, that securities regulators should tread warily in this area and that a private placement should only be blocked by securities regulators where there is a clear abuse of the target shareholders and/or the capital markets.

[90] It should be noted that in *Red Eagle*, the private placement being reviewed took place in respect of a take-over bid initiated while the take-over bid amendments were only

proposals and not yet effective. Red Eagle's bid for CB Gold nonetheless included a 50% minimum condition. The private placement to Batero Gold Corp, the competing bidder and a related party to CB Gold, resulted in the shares tendered to the Red Eagle bid at the time of the BCSC hearing being reduced from 52% to 48%. The minimum condition was satisfied before giving effect to the private placement, but not after. However, Red Eagle had waived that condition prior to the hearing. The BCSC declined to cease trade the private placement because it was not clearly a defensive tactic, based on evidence that CB Gold needed financing to remain a going concern. In addition, without the private placement, Batero Gold Corp may not have made its offer and therefore the private placement may have helped bring about the competing offer.

[91] In addressing the effect of the waiver of the 50% minimum condition, the BCSC stated in *Red Eagle*, at paragraph 95:

> Without the waiver of the 50% minimum tender condition by Red Eagle, it was likely that this application would have become considerably more difficult to decide. If the shares issued under the Private Placement were acting as a bar to Red Eagle meeting a mandatory 50% minimum tender condition, then the objectives in the Policy of ensuring target shareholders have an opportunity to tender to bids would have become more directly engaged.

[92] Now that the Required Minimum Condition is in effect, it is not open to a party to voluntarily waive this condition, as in *Red Eagle*. However, in considering remedies to be granted in respect of particular applications, a party could potentially seek alternative relief from the Commissions, such as not including the shares issued in a private placement with a tactical motivation in the number of outstanding shares (*i.e.*, the denominator in the calculation), for the purpose of the satisfaction of the Required Minimum Condition. This is a less drastic remedy, but also one that may be unsatisfactory to a bidder seeking a defined percentage of legal or *de facto* control of the target. In these proceedings, Hecla affirmatively declined to request such relief, and we did not consider the availability of this relief in this case. We were therefore presented with a binary decision to cease trade the Private Placement or allow it to proceed. If the request for alternate relief had been made, there may have been different considerations that would apply; however, we did not have to consider that issue in this case.

2. *The Applicable Test: Is the Private Placement a Defensive Tactic?*

(a) If the Private Placement is clearly <u>not</u> a defensive tactic

[93] We heard submissions from the parties concerning the factors that they proposed we should take into account in assessing whether or not a private placement was an inappropriate defensive tactic under the Policy for which we should exercise our public interest jurisdiction to cease trade the issuance. The factors presented required us to bear in mind the balance of interests discussed above in the context of the prevailing take-over bid regime in effect in our jurisdictions.

[94] The starting point for the analysis of a private placement in the bid context is first whether the principles set out in NP 62-202 are engaged at all. The first question is: does

the evidence clearly establish that the private placement is not, in fact, a defensive tactic designed, in whole or in part, to alter the dynamics of the bid process?

[95] If the private placement is not such a defensive tactic, then the principles in NP 62-202 are inapplicable and it would only be left to consider whether there was some other reason, under the Commissions' broader public interest mandate to interfere with the private placement.

[96] In considering whether the private placement is a defensive tactic, there is the question of evidentiary onus. Where the applicant is able to establish that the impact of a private placement on an existing bid environment is material, as was the case with a potential 43% dilution in this instance, then it would seem appropriate for the target board to have the onus of establishing that the private placement was not used as a defensive tactic.

[97] A non-exhaustive list of considerations that would be relevant to answering this first question would include:

a. whether the target has a serious and immediate need for the financing;

b. whether there is evidence of a bona fide, non-defensive, business strategy adopted by the target; and

c. whether the private placement has been planned or modified in response to, or in anticipation of, a bid.

(b) If the Private Placement is or may be a defensive tactic

[98] Where a panel is unable to clearly find that the private placement was not used as a defensive tactic, either because there appear to be multiple purposes or there is insufficient evidence as to purpose, then the principles set out in NP 62-202 are engaged. In this circumstance, it will be necessary to find the appropriate balance between those principles and respecting a board's business judgment.

[99] As the recent amendments to the take-over bid rules represent a material readjustment of the bid dynamics in favour of allowing target boards more time to respond to hostile bids and allowing for majority shareholder approval of bids, we think, generally, that defensive tactics other than shareholder rights plans will become more common and will attract a high level of regulatory scrutiny.

[100] If a transaction is or may be a defensive tactic, in addition to the considerations listed in paragraph [97] above, the following is a non-exhaustive list of considerations that are relevant to whether a private placement should be interfered with:

a. would the private placement otherwise be to the benefit of shareholders by, for example, allowing the target to continue its operations through the term of the bid or in allowing the board to engage in an auction process without unduly impairing the bid?

b. to what extent does the private placement alter the pre-existing bid dynamics, for example by depriving shareholders of the ability to tender to the bid?

c. are the investors in the private placement related parties to the target or is there other evidence that some or all of them will act in such a way as to enable the target's board to "just say no" to the bid or a competing bid?

d. is there any information available that indicates the views of the target shareholders with respect to the take-over bid and/or the private placement?

e. where a bid is underway as the private placement is being implemented, did the target's board appropriately consider the interplay between the private placement and the bid, including the effect of the resulting dilution on the bid and the need for financing?

[101] As noted above, separate and apart from any evaluation of a private placement under the Policy, a panel must also consider whether there are any other capital markets policy considerations or other public interest considerations that are relevant under the circumstances.

[102] As market participants implement transactions under the modified take-over bid regime, the considerations we apply, and how they are applied, will necessarily evolve based on the facts presented.

3. *Application of the Law*

[103] In this case, we found that the Private Placement was instituted for non-defensive business purposes. The evidence established that Dolly Varden was contemplating an equity financing considerably in advance of Hecla's announcement of the Offer. Further, the size of the Private Placement was not inappropriate given Dolly Varden's current liabilities (including the obligation to repay the New Loan) and what would be required (as acknowledged by Hecla itself) to carry out the next phase of the exploration work on the Dolly Varden silver property. Finally, there was evidence that Dolly Varden considered a larger financing and decided not to pursue that opportunity.

[104] Under the Credit Agreement dated September 30, 2015, Hecla and G provided Dolly Varden with enough funds to discharge its 2015 obligations under its flow-through shares to avoid default and, thereafter, to only cover the bare minimum of its general and administrative costs (*i.e.*, a hibernation budget), in the short term.

[105] A renewed exploration program required Dolly Varden to seek additional equity capital. With the price of silver increasing in April 2016, raising equity capital for this purpose became an increasingly realistic option. Dolly Varden was, however, subject to the terms of the Senior Loan that required the lenders' consent to any equity issuance. The Senior Loan was due and payable on September 30, 2016. In the months preceding the Private Placement, it was unclear whether the lenders were willing to extend the Senior Loan. G, in particular, indicated to Moore that he would not agree to extend the Senior Loan until closer to its maturity, exacerbating the uncertainty in respect of Dolly Varden's financial position.

[106] Moore also raised with Baker on multiple occasions the possibility of Dolly Varden raising equity capital or converting debt to equity, but Baker repeatedly and adamantly rejected this possibility. Hecla could enforce its objections since its consent was required under the Senior Loan. Hecla's stated objections arose from a concern for excessive

dilution and a belief that market conditions were not yet ripe for Dolly Varden to undertake the longer-term equity financings needed to restart and sustain Dolly Varden's relatively expensive exploration program, which Baker estimated to be $4-5 million per year.

[107] In light of these discussions, Dolly Varden embarked on a plan to be in a position to raise equity capital by paying off the Senior Loan with the New Loan and then seeking equity capital to pay off the New Loan. Dolly Varden sought to conduct these steps in a manner that would not breach the Senior Loan's restriction on equity issuances without lenders' consent.

[108] Given the prior discussions between Dolly Varden and Hecla concerning equity placements, and the six-month term of the New Loan, Hecla could reasonably expect that Dolly Varden would seek equity capital during this period, as market conditions permitted. In fact, Baker testified that he knew by June 24, 2016 that Dolly Varden would be doing an equity financing in the next six months as a consequence of paying off the Senior Loan.

[109] By the end of June 2016, as Dolly Varden was implementing its plans, its cash position had been reduced to approximately $200,000, making the raising of capital a very pressing matter for Dolly Varden in order to implement its plans.

[110] Hecla attempted to reassure Dolly Varden that it would extend the Senior Loan and takeout G's portion of the loan. It offered to improve the terms of the Senior Loan by increasing the amount by $1 million, extending the term and reducing the interest rate. It would not budge on the restriction on equity issuances. Dolly Varden rebuffed Hecla's offer.

[111] Dolly Varden was concerned during this period that Hecla's views concerning Dolly Varden restarting its exploration program were influenced by Hecla's acquisition in May 2016 of the properties adjoining the Dolly Varden property and by the potential for Hecla to consolidate the mining district under common ownership.

[112] Baker testified that approximately $4-5 million would be needed per year to fund a reasonable sustained exploration program on the Dolly Varden property. The Private Placement, together with the amount paid by Hecla if it exercised its participation rights, resulting in aggregate gross proceeds of approximately $7.19 million, provided sufficient proceeds to pay off the $2.5 million New Loan and provide funds for additional exploration. These uses reasonably support the size of the Private Placement being for bona fide business purposes, consistent with the strategy developed by Dolly Varden when it came out of "hibernation" in early May 2016.

[113] The development of Dolly Varden's strategy recounted above took place well before Hecla even announced its intention to proceed with its bid, let alone its actual commencement of the bid. Our point in recounting these events from earlier in the year is not to analyze whether Dolly Varden's strategy and plans were reasonable in the exercise of business judgment or not, but to demonstrate that Dolly Varden was implementing a bona fide strategy that its Board developed in the exercise of its business judgment. The Private Placement was not implemented for the purpose of circumventing any bid, since none had yet been advanced when the strategy had crystallized. There was no evidence

presented to us that the Private Placement was modified in response to the bid so as to become defensive in character. The financing was not planned (nor modified) in response to, or in anticipation of, a bid and was therefore not pursued as a defensive tactic.

[114] Dolly Varden's Board made the judgment that it did not want to extend the Senior Loan, even on more attractive financial terms, and that it preferred equity financing without the restrictive covenants, and the resulting control that the debt financing had conferred on Hecla. In the circumstances, it is not appropriate for us to second guess the Dolly Varden Board's decision to implement an equity financing versus an extended loan from Hecla that included restrictive covenants.

[115] As discussed above, Hecla knew or would reasonably have known that Dolly Varden was planning to raise equity capital once the New Loan was announced. Once the offer of an extended loan was rejected and the repayment of the Senior Loan was imminent, Hecla announced and then later implemented its bid. The bid materialized after Dolly Varden's Private Placement plans had been put in motion. We accept that the bid was announced in response to the planned repayment of the Senior Loan and the Private Placement and not *vice versa*.

[116] In addition, there was no evidence presented that the Private Placement was modified in response to the bid so as to become defensive in character.

[117] Based on the foregoing evidence, Dolly Varden was pursuing a bona fide corporate objective of increasing its flexibility by seeking to terminate the restrictive covenants in the Senior Loan and to seek equity capital in order to repay indebtedness and implement a considered exploration program. In doing so, it was adjusting its strategy based on changes in commodity prices and market conditions and was seeking to develop shareholder value as an independent company.

[118] Having reached this finding, we did not need to pursue the balancing of factors set out in paragraph [100].

[119] In this case, we found the application of NP 62-202 to be relatively straight forward given the extensive evidence supporting a non-defensive purpose for the Private Placement. We recognize that other cases may involve a record where there is evidence of mixed motivations that will require the balancing of the other factors we have identified, and other factors applicable in new circumstances.

B. **Public Interest Considerations**

[120] We have noted the market reality that listed junior companies may often engage in dilutive equity transactions for bona fide business purposes. It may become a recurrent theme in the take-over bid landscape to determine how these issuances will interrelate with the Required Minimum Condition, since relatively small cash investments can swing a bidder from success to failure. This will require the Commissions to closely examine the facts in each case to determine whether the issuance is for an abusive defensive purpose, and then to fashion appropriate remedies, when warranted. Those issues do not arise in this case.

[121] We did not see any reason to interfere with the Private Placement under our broader public interest mandate.

C. OSC and BCSC Orders on Hecla Applications

[122] For the above reasons, the OSC and the BCSC issued their Orders denying the Ontario Hecla Application and the BC Hecla Application, respectively.

IV. DV APPLICATIONS

A. OSC Reasons for the Ontario DV Application

1. *Issues*

[123] The issues raised in the Ontario DV Application are as follows:

a. Did Hecla, an insider of Dolly Varden, qualify for an exemption to the formal valuation requirement? Specifically, was Hecla exempt because it had neither:

i. board nor management representation at Dolly Varden in the 12 months preceding the Offer, nor
ii. knowledge of material information concerning Dolly Varden or its securities that had not been generally disclosed?

b. Was the Offer deficient due to the omission of material undisclosed information in Hecla's possession that would reasonably be expected to affect the decision of Dolly Varden security holders to accept or reject the Offer?

2. *Law*

(a) Insiders are required to obtain a formal valuation

[124] MI 61-101 and Companion Policy 61-101CP (CP 61-101) are only in force in Ontario and Québec. Section 1.1 of CP 61-101 explains the purpose behind MI 61-101:

> 1.1 General - The Autorité des marchés financiers and the Ontario Securities Commission (or "we") regard it as essential, in connection with the disclosure, valuation, review and approval processes followed for insider bids, issuer bids, business combinations and related party transactions, that all security holders be treated in a manner that is fair and that is perceived to be fair. We are of the view that issuers and others who benefit from access to the capital markets assume an obligation to treat security holders fairly, and that the fulfillment of this obligation is essential to the protection of the public interest in maintaining capital markets that operate efficiently, fairly and with integrity.
>
> We do not consider that the types of transactions covered by this Instrument [MI 61-101] are inherently unfair. We recognize, however, that these transactions are capable of being abusive or unfair, and have made the Instrument [MI 61-101] to address this.

[125] Part 2 of MI 61-101 sets out enhanced disclosure requirements for insider bids. Specifically, subsection 2.3(1) of MI 61-101 states that the offeror in an insider bid must,

among other things, obtain a formal valuation at its own expense. The independent formal valuation is supervised by an independent committee of the target, and the valuation can form the basis of arm's-length negotiations between the special committee and the bidder and also provide target shareholders with sufficient information to determine whether the offer appropriately values the target considering the nature of the acquirer.

[126] The policy rationale for the formal valuation requirement was described in the OSC decision *Re Western Wind Energy Corp.* (2013), 36 OSCB 6749 (*Western Wind*) at paragraph 19, as follows:

> The policy rationale for the formal valuation requirement is that **insiders may have access to more or better information about an issuer than other shareholders**, including undisclosed material information. That may give the bidder an unfair advantage in valuing the securities of the target. **The purpose of the formal valuation requirement is to ensure that all target shareholders are able to make an informed decision whether or not to tender to the bid and that shareholders have the benefit of an independent assessment of the fair market value of an issuer when assessing an insider bid for the issuer**. This rationale is consistent with the overall policy objectives of the take-over bid regime, which include, in particular, protecting the interests of target shareholders. **In our view, the failure to provide a formal valuation when one is required is a serious allegation**. [emphasis added]

[127] The requirement for an insider to provide a formal valuation is an important one. The disclosure of information provided through a formal valuation serves to address the asymmetry of information between the insider and other shareholders. A formal valuation is necessary to provide all shareholders with sufficient information to permit them to make an informed decision about whether or not to tender to the insider bid.

[128] Insider bids that do not contain a formal valuation are non-compliant bids, unless an exemption is available, as discussed below. Bids that fail to meet this fundamental requirement harm the integrity of the market. Bidders should carefully consider whether they can reasonably satisfy their burden of proof that an exemption from this requirement is available and should engage with Staff as appropriate. If, instead, the bidder proceeds with its bid without a valuation and without firm grounds for the availability of an exemption under MI 61-101, and waits for the outcome of a hearing before the OSC, the issue of the valuation may well become intermixed with other issues involving the public interest, as in this case. Bidders may then have the incentive to "roll the dice" and, if any material matter goes against them, to have the option of walking away from their bid. This could, in some cases, promote the initiation of tactical bids to interfere with corporate objectives of a target company, while avoiding the significant time, effort and expense involved in producing a formal valuation. We discourage potential bidders and their counsel from taking this approach.

(b) Exemptions to the formal valuation requirement

[129] Section 2.4 of MI 61-101 provides exemptions from the formal valuation requirement in three categories of circumstances: 1) lack of knowledge and representation, 2) previous arm's length negotiations, and 3) auctions.

[130] In this case, only the first category was at issue: lack of knowledge and representation. That exemption is provided for in subsection 2.4(1)(a) of MI 61-101:

> **2.4 Exemptions from Formal Valuation Requirement**
>
> (1) Section 2.3 does not apply to an offeror in connection with an insider bid in any of the following circumstances:
>
> (a) **Lack of Knowledge and Representation** - neither the offeror nor any joint actor with the offeror has, or has had within the preceding 12 months, any board or management representation in respect of the offeree issuer, or has knowledge of any material information concerning the offeree issuer or its securities that has not been generally disclosed.

[131] The existence of any of the factors listed in subsection 2.4(1)(a) of MI 61 101 results in the exemption being unavailable to the bidder. In other words, if the bidder either had board or management representation or knowledge of material information concerning the target or its securities, the bidder cannot rely on the exemption.

[132] The phrase "board or management representation" refers to the bidder having an individual who is an employee of the bidder or in a contractual or close relationship with the bidder who is placed on the target board or target management by the bidder to fulfil their duties to the target while mindful of the bidder's interests. Such arrangement may be formal or informal. Information asymmetry is presumed in circumstances where a bidder has access to the inner workings of the target through representatives on the board of directors or management of the target. The onus falls on the insider bidder to demonstrate that it did not have board or management representation in the preceding 12 months and that it therefore fits into the four corners of the exemption on which it seeks to rely.

[133] As set out in paragraphs 30 and 31 of *Western Wind*, knowledge of material information concerning the offeree issuer or its securities that has not been generally disclosed encompasses:

a. a material fact or material change that would reasonably be expected to have a significant effect on the market price or value of the target's securities, or

b. information, the disclosure of which would reasonably affect the decision of a shareholder to accept or reject an offer, as required by item 23 of *Form 62-504F1 - Take-Over Bid Circular*.

Again, if an insider bidder seeks to rely on the exemption, the onus falls on the bidder to demonstrate that it did not have knowledge of such information.

[134] If an insider bidder does not qualify for an exemption set out in section 2.4 of MI 61-101, it may alternatively seek discretionary relief from the OSC for an exemption from the

formal valuation requirement. Pursuant to subsection 9.1(2) of MI 61-101, the OSC may grant an exemption, in whole or in part, subject to conditions. Hecla did not seek such discretionary exemptive relief in this case.

3. Application of Law

(a) Did Hecla have board or management representation at Dolly Varden in the 12 months preceding the Offer?

[135] We found that Hecla had board representation at Dolly Varden, via Moore, within the 12 months preceding the Offer. Hecla did not meet the onus of demonstrating that it qualified for the exemption set out in subsection 2.4(1)(a) of MI 61-101.

[136] In this case, the need to include a formal valuation was not a "close call" under MI 61-101, and the considerations outlined in paragraph [128] should have resulted in a different process.

[137] As a junior mineral exploration company, Dolly Varden had only one project and very few employees. Indeed, at the time of the hearings, Moore was Dolly Varden's sole full-time employee and Dolly Varden shared offices in Vancouver with Hecla. However, well before any involvement with Dolly Varden, Moore was a consultant for Hecla, an international senior silver mining company that is exponentially larger than Dolly Varden. Hecla is Dolly Varden's largest shareholder and was a lender to Dolly Varden, with significant contractual rights in respect of Dolly Varden's affairs.

[138] Until recently, Moore was Hecla's consultant. Beginning in 2012, Moore entered into the Consulting Agreement with Hecla, which agreement was extended multiple times and most recently renewed in January 2015. Under the terms of the Consulting Agreement, Moore was prohibited from engaging in activities adverse to Hecla or its mineral properties or operating interests. Moore's consulting relationship with Hecla only formally ended earlier this year, in January 2016, when the Consulting Agreement's term expired, without Hecla or Moore taking any previous steps to terminate the agreement. The expiry seems to have passed without any discussion or particular notice by either party. As late as May 2016, Moore's e-mail signature continued to self-identify Moore as simply a "Consulting Geologist & Analyst".

[139] Formerly, Moore was also Hecla's formal representative on the Dolly Varden Board. In June 2013, Moore became Hecla's first and only nominee to Dolly Varden's Board of Directors. The Ancillary Rights Agreement with Dolly Varden gave Hecla the right to nominate a director to Dolly Varden's Board, as long as Hecla owned at least 10% of the DV Shares. Hecla exercised that right by nominating Moore. Accordingly, Moore was elected to the Dolly Varden Board in July 2013, a position she held continuously to the present. The scope of work provided for in Moore's Consulting Agreement was not amended after her election to the Dolly Varden Board. We inferred that the Board nominee role was undertaken in the normal course of Moore's consulting work for Hecla.

[140] Moore's current position as a director and then as Interim President and Chief Executive Officer of Dolly Varden was arranged by Hecla. In January 2015, a year and a half after becoming Hecla's nominee to the Dolly Varden Board, Hecla seconded Moore to Dolly Varden to become its Interim President and CEO, a position she continues to hold. At the same time as the secondment, Hecla made a conscious decision to extend Moore's

Consulting Agreement for an additional year, amending the agreement in contemplation of a continuing consulting relationship with Moore, even after her appointment as an officer of Dolly Varden. Again, the scope of work provided for in Moore's Consulting Agreement was not expressly amended, but it was discussed that Moore would continue to consult with Hecla on non-Dolly Varden matters. No separate secondment agreement was entered into.

[141] Although Moore's employment was intentionally characterized by Hecla as a secondment, Moore was not seconded in the traditional sense because she was not a Hecla employee and Hecla did not pay her salary as Dolly Varden's Interim President and CEO. Nonetheless, Hecla exerted influence over Moore's compensation, as Moore's affidavit indicated that Hecla requested that Moore be put on "hibernation" wages in March 2016, essentially seeking to limit her work to one week per month. This fact was not challenged in responding affidavits from Hecla or on Moore's cross examination.

[142] We found that it was anticipated, at least initially, by all parties that Moore may return to Hecla upon completion of her indefinite secondment to Dolly Varden. At the same time as Moore's secondment began, Moore stepped down as Hecla's nominee to the Dolly Varden Board and alerted Hecla to its right to nominate another representative immediately. Hecla declined to do so. In an e-mail exchange in late January 2015, Hecla's President noted that if Hecla appointed a new nominee, then it would be complicated for Moore to return to the position if her CEO role was not permanent. He suggested waiting to nominate a new representative if Moore became Dolly Varden's permanent CEO.

[143] Hecla's failure to nominate a replacement Board member was a deliberate choice not to exercise a contractual right. At the hearing, Hecla was unable to provide any explanation for why Hecla failed to exercise its right. Based on the correspondence, we infer that Hecla declined to do so, at least in part, because Hecla was satisfied that its interests were adequately addressed by Moore continuing to serve on the Board, though not formally as Hecla's nominee, and Moore serving as Interim President and CEO of Dolly Varden. Following her secondment, Moore continued to provide Hecla with all the advantages of a board representative through regular communications that would not likely have differed if she had formally been Hecla's board nominee, while not continuously through to the present, then at least within the 12 months preceding the Offer. In the context of a junior exploration company on a hibernation budget, it is not surprising that Hecla would view Moore's role as a convenient form of doing "double duty", even if it could generate potential conflicts of interest.

[144] Hecla's insider advantages included close communications and a good reporting relationship, both of which were intentionally maintained throughout Moore's secondment. There was evidence of continuing conversations between Hecla and Moore, even after Moore became Dolly Varden's Interim CEO. In cross examination, Moore explained that:

> … I continued to stay close with Hecla. I will say that the relationship became strained in the early part of 2016 when our -- the Dolly Varden Board got the distinct impression that we were never meant to escape the loan, and the relationship became strained at that time. **But I always kept in close contact with**

> **Hecla, certainly throughout all of 2015 and well into 2016**.
> [emphasis added]

[145] Specifically, Moore's Affidavit sworn July 14, 2016 sets out the ways in which Moore shared information with Hecla. Part of Moore's communications with Hecla involved providing reports pursuant to a requirement of the Credit Agreement with Hecla. But Moore's communications were more than just reporting obligations to a lender. As set out in paragraph 15 of her Affidavit:

> Since January 2015, I had numerous discussions with other Hecla representatives (including, but not limited to, Philip S. Baker, Jr., Don Poirier and Kurt Allen) during casual visits to Hecla's Vancouver office, at industry conferences and at social gatherings.

[146] Internally, Hecla was always aware of the repercussions of characterizing Moore's position at Dolly Varden as a Hecla "secondment". Hecla insisted on the secondment arrangement regardless of the known risk that it would undermine a characterization of Moore down the road as independent of Hecla. Hecla's correspondence, both internally and with Moore, made early acknowledgement of the significance of the secondment and the issue of whether Moore would ever be perceived as fully independent from Hecla. E-mails between Moore, Hecla's CEO and Hecla's General Counsel demonstrated that the issue was live in their minds at the outset of the secondment, as described in paragraph [35] of these reasons.

[147] At the time of the hearings, Moore had been seconded by Hecla as Dolly Varden's "interim" CEO for over a year and a half. We drew an adverse inference from the fact that Moore had been labeled "interim" for so long. We found that both parties accepted that Moore would wear two hats pursuant to her secondment and that her ultimate return to Hecla was in everyone's contemplation.

[148] In the affidavit of Baker, Hecla's President and CEO, sworn July 18, 2016, he asserted that, though the Consulting Agreement remained in effect, Moore ceased acting as Hecla's consultant and that Moore "… did not have any responsibilities, duties or obligations to Hecla as a consultant following such appointment [as Interim CEO and President of Dolly Varden]." This assertion did not counter Moore's history with Hecla, nor the circumstances surrounding the secondment, which point to a continuing close association by Moore with Hecla.

[149] While Hecla also argued that Moore could not do both jobs or "wear both hats", as she would face unresolvable conflicts of interest, that was not the reality of how Moore's duties were performed. The fact that Moore negotiated with Hecla on behalf of Dolly Varden concerning financing alternatives after her secondment only suggests that the conflict was not raised and addressed at that time. The approach that was taken by having Moore "wear two hats" was one involving short cuts in governance practices, compliance with which would otherwise involve extra time and costs. When that approach is taken, it is not reasonable to expect that the OSC will undermine fundamental investor protections requiring an insider bidder to produce a formal valuation.

[150] Hecla pointed to the fact that Moore did not invoice Hecla for consulting services in the 12 months preceding the Offer to suggest that Moore was no longer providing any

services to Hecla. The lack of invoices to Hecla from Moore after February 2015 was not persuasive evidence of any change in the nature of their relationship, especially in the circumstances of Dolly Varden's "hibernation" during a period of the secondment.

[151] Though a breakdown in the relationship between Moore and Hecla was evident by the time of the hearings, Hecla still had board representation within the year preceding the Offer. Although we found it unnecessary to pinpoint the exact time of the relationship breakdown, we found it likely occurred when it became clear that Hecla would resist Dolly Varden's efforts to raise equity and gain independence from the restrictive covenants in the Senior Loan, sometime in 2016, well within the 12 months preceding the Offer.

[152] Finally, as noted above, if an issuer believes that it is entitled to an exemption from the insider's formal valuation requirement, then the issuer can engage in discussions with Staff and apply to the OSC for that exemptive relief if appropriate. Hecla chose not to take this approach.

[153] Hecla bore the onus of demonstrating that it satisfied the exemption. It failed to satisfy this onus. It was aware of this risk, as demonstrated in the e-mails from its counsel, from the outset of Moore's secondment.

(b) Did Hecla have knowledge of material information concerning Dolly Varden or its securities that had not been generally disclosed or that was required to be included in the circular?

[154] In light of our finding that Hecla was not exempt from the formal valuation requirement due to its board representation, it is unnecessary for us to determine whether Hecla had knowledge of undisclosed material information received from Dolly Varden and whether any such information needed to be included in the circular. Regardless of Hecla's possession of undisclosed material information, or lack thereof, Hecla did not qualify for the exemption in MI 61-101 and was required to obtain a formal valuation for its Offer.

4. *OSC Order on Ontario DV Application*

[155] For the reasons set out above, we, the OSC Panel found, that Hecla had board and management representation at Dolly Varden through Moore. As a result, Hecla did not qualify for the exemption in subsection 2.4(1)(a) of MI 61-101 and was required to obtain a formal valuation.

[156] Pursuant to subsection 104(1) of the Ontario Act, we had the authority to order, among other things, compliance with the requirements of the bid regime in MI 61-101 and an amendment or variation to any document or communication used or issued in connection with a take-over bid. We found it appropriate to order that Hecla obtain, at its own expense, a formal valuation of the offeree securities, to include such valuation as an addendum to the Amended Offer (as defined in the OSC Order) and to comply with section 2.3 of MI 61-101. We also ordered that the Amended Offer shall, unless earlier terminated, remain open for acceptance until the later of: (1) 4:00 p.m. (Toronto time) on the date that is 35 days after the delivery of the Amended Offer, or (2) the "Expiry Time", as defined in the Offer. In our view, these time requirements for keeping the Amended

Offer open provided adequate time for shareholders to digest the new information that a formal valuation would provide.

[157] Disclosure in the Offer was deficient due to the lack of the formal valuation and it was non-compliant with Ontario securities law. Accordingly, we cease traded the Offer pursuant to subsection 127(1)2 of the Ontario Act until a formal valuation was obtained and Hecla otherwise complied with the requirements of MI 61-101.

B. **BCSC Reasons for the BC DV Application**

1. *Was the Offer deficient due to its omission to include a valuation of the DV Shares?*

[158] MI 61-101 has not been adopted by the BCSC. Therefore, this issue came before the BCSC on the basis that the failure to include a valuation in the Hecla take-over bid circular was contrary to the public interest and that the BCSC should cease trade the Offer, under its public interest jurisdiction until the disclosure deficiency was rectified.

[159] Therefore, the BCSC Panel's analysis of this issue proceeded in a different manner, with different considerations, than that of the OSC Panel.

[160] We note, however, that MI 61-101 does apply to issuers listed on the TSX-V, as the exchange has adopted that instrument as applicable to its listed issuers.

[161] In their joint written submissions, OSC Staff and BCSC Staff asserted that the BCSC could consider the breach of an exchange policy (assuming that there was in fact a breach of MI 61-101) as part of our public interest jurisdiction. While we agree generally with that submission (*i.e.*, it is in the public interest to support compliance with exchange policies), in this case, the exchange's policy would apply to Dolly Varden (being the listed issuer) and not Hecla. In the BC DV Application, any breach of MI 61-101 would be a breach committed by Hecla and not Dolly Varden. It is hard to see where it would be in the public interest to have the BCSC, indirectly, enforce an exchange rule against Hecla that the TSX-V could not itself enforce against Hecla.

[162] It is clear the BCSC has the authority to make an order in the public interest without finding a contravention of the BC Act (*Asbestos*). The issue is determining the circumstances when a panel should exercise that authority.

[163] In the recent case of *Re Carnes*, 2015 BCSECCOM 187, a panel of the BCSC, after reviewing various cases where panels have exercised or refused to exercise the public interest jurisdiction, without a contravention of the applicable Act, both in BC and Ontario, made the following comments at paragraph 129:

> We recognize that when a panel issues an order in exercise of its public interest jurisdiction, the order has the effect of restraining or prohibiting conduct that is not prohibited specifically by legislation. Market participants should be able to structure their affairs within the context of the specific provisions of the Act, without fear of enforcement actions alleging wrongdoing that is not encoded in the Act, regulation or rules of the Commission.

[164] In so doing, the panel was advocating for a narrow view of the scope of the public interest jurisdiction in enforcement cases. This is not an enforcement case. However, the potential impact of the requested order in the BC DV Application, a cease trade of the Offer, would be significant not only for Hecla but also for the Dolly Varden shareholders. A cease trade order of the Offer until a valuation could be prepared would likely necessitate a delay in the Offer and might potentially result in a termination of the Offer. Given the potentially significant impact on the Dolly Varden shareholders, we believe this is another situation which advocates for a narrow application of the public interest jurisdiction. A narrow application of this jurisdiction has traditionally required a finding that the impugned conduct constitutes an abuse of the capital markets or investors.

[165] In the DV Applications, Dolly Varden was advocating that the Offer should be cease traded because the Dolly Varden shareholders required the inclusion of a valuation in Hecla's bid circular in order to be able to make an informed decision as to whether to tender to the Offer or not. They made this submission notwithstanding that the Board of Dolly Varden had priced a Private Placement, which would result in over 40% dilution, at a lower price than the price of the Offer. Given the valuation exercise undertaken by the Board of Dolly Varden to price the Private Placement, we did not agree with this submission of Dolly Varden.

[166] Dolly Varden further suggested that the purpose of the valuation requirement in MI 61-101 was to equalize information, and access to information, between the insider making the bid and the target shareholders. Dolly Varden submitted that Hecla had access to material undisclosed information that was not otherwise publicly available to the Dolly Varden shareholders.

[167] However, we did not find that Hecla possessed material undisclosed information regarding Dolly Varden that would make us concerned that the Offer, without a valuation, would constitute an abuse of the capital markets or investors.

[168] Further, the price of the Private Placement was negotiated between Dolly Varden and the placees with the aid of a finder. All of the evidence suggested that this was an arm's length negotiation. We do not believe that a formal valuation would offer better insight into the valuation of the DV Shares than a freely negotiated transaction between arm's length parties.

[169] The BCSC therefore dismissed this aspect of the BC DV Application.

2. *Was Hecla's Offer deficient due to the omission of material undisclosed information in Hecla's possession?*

[170] Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids* contains a requirement that a bidder send to all target shareholders a bid circular in the form set out in Form 62-104 F1.

[171] Item 23(b) of Form 62-104 F1 contains a requirement that the bidder include in its circular "any other matters not disclosed in the take-over bid circular that has not previously been generally disclosed, is known to the offeror, and that would generally be expected to affect the decision of the security holders of the offeree issuer (the target) to accept or reject the offer".

[172] Dolly Varden submitted that Hecla's take-over bid circular was not in compliance with Form 62-104 F1 because Hecla possessed information that would be expected to affect the decision of the Dolly Varden shareholders and that information was not included in the Hecla take-over bid circular. In particular, Dolly Varden alleged that the following information should have been included in the circular:

- that Dolly Varden had a constructive trust claim over the Kinskuch Claims and that the value of that claim would be material to the Dolly Varden shareholders;
- the purchase price that Hecla paid for the Kinskuch Claims; and
- certain geological information pertaining to the Kinskuch Claims.

[173] The Dolly Varden property is surrounded on three sides by the Kinskuch Claims. Dolly Varden uses the physical proximity of the Kinskuch Claims as a basis for asserting the materiality of the three items set out above.

[174] However, Dolly Varden did not present any persuasive evidence that any of these suggested deficiencies were material. The materiality of the constructive trust claim is dependent upon the merits of that claim and the value of the Kinskuch Claims. We had no evidence before us to make any findings with respect to either of those items. If anything, the evidence raised questions about the merits of the constructive trust claims, as there was no dispute that Hecla was aware of the Kinskuch Claims prior to its original investment in Dolly Varden.

[175] The materiality to a Dolly Varden shareholder of the price paid by Hecla for the Kinskuch Claims and its geological information regarding those properties is dependent upon the geological connection between the Kinskuch Claims and the Dolly Varden property. Again, we did not have persuasive evidence before us to establish a connection. Moore testified specifically that sufficient work had not been done to establish any material geological connectivity between the properties.

[176] Given all of the above, we did not have sufficient evidence to find that Hecla had information in its possession, that was not included in its bid circular, that could affect the decision of the Dolly Varden shareholders to tender or not to the Offer. Therefore, the BCSC dismissed this aspect of the BC DV Application.

3. *BCSC Order on BC DV Application*

[177] For the above reasons, the BCSC issued its Order denying the BC DV Application.

Dated this 24th day of October 2016.

BCSC PANEL:

"Nigel Cave"

Nigel Cave

"George C. Glover, Jr." *"Audrey T. Ho"*

George C. Glover, Jr. Audrey T. Ho

OSC PANEL:

"D. Grant Vingoe"

D. Grant Vingoe

"Monica Kowal" *"Deborah Leckman"*

Monica Kowal Deborah Leckman