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Citation: Pearson (Re), 2018 ONSEC 53
Date: 2018-10-31
File No. 2018-53

IN THE MATTER OF
MICHAEL PEARSON

AND

IN THE MATTER OF
LEADFX INC.

REASONS FOR DECISION
(Section 127 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	September 28, 2018	
Decision:	October 31, 2018	
Panel:	D. Grant Vingoe	Vice-Chair and Chair of the Panel
	Frances Kordyback	Commissioner
	Lawrence P. Haber	Commissioner
Appearances:	Cynthia Spry Brendan Monahan	For Michael Pearson
	Alexander D. Rose Patrick Corney Matt Hunt	For LeadFX Inc.
	Robert Staley Jeff Kerbel Sander Grieve Jonathan Bell Andrew Disipio William A. Bortolin	For Sentient Executive GP III, Limited and Sentient Executive GP IV, Limited
	Robert Brush Clarke Tedesco Mitchell Fournie	For InCoR Energy Materials Limited
	Robert Gain Naizam Kanji Jason Koskela David Mendicino Jordan Lavi David Steinhauer	For Staff of the Commission

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REASONS FOR DECISION

I. BACKGROUND

A. The Application

[1] On September 28, 2018, a hearing was held before the Ontario Securities Commission (the **Commission**) with respect to preliminary motions in relation to an application brought under s. 127 of the *Securities Act*[1] (the **Act**) by Michael Pearson (**Pearson** or the **Applicant**), a minority shareholder of LeadFX Inc. (**LeadFX** or the **Respondent**), dated September 18, 2018 (the **Application**).

[2] The Application related to a special meeting of shareholders of LeadFX, scheduled for October 3, 2018, called to consider and approve LeadFX's going-private transaction, to be completed by means of a statutory plan of arrangement (the **Plan of Arrangement**) under s. 192 of the *Canada Business Corporations Act* (**CBCA**).[2] On August 10, 2018, LeadFX received an Interim Order from the Ontario Superior Court of Justice in relation to the Plan of Arrangement, which scheduled the consideration of the final approval of the Plan of Arrangement for October 5, 2018. The Applicant takes issue with the Plan of Arrangement being able to proceed without it having to be approved by a majority of the minority vote.

[3] The Plan of Arrangement permits InCoR Energy Materials Limited (**InCoR**) and Sentient Executive GP III, Limited, and Sentient Executive GP IV, Limited (collectively, **Sentient**) (together with InCoR, the **Controlling Shareholders**) to indirectly acquire all of the issued and outstanding common shares of LeadFX, cashing out all the remaining shareholders.

[4] The Applicant also takes issue with the **InCoR Transaction** (described below) which preceded the Plan of Arrangement in 2017. The Applicant alleges that the InCoR Transaction and Plan of Arrangement are linked. Pearson alleged that he was adversely affected by the InCoR Transaction because it resulted in a change in the equity ownership of the company, making it possible for LeadFX to rely on the exemption from the minority approval requirement in s. 4.6(1)(a) of MI 61-101 (**90 Percent Exemption**) for the later approval of the Plan of Arrangement.

[5] Pearson alleged that LeadFX structured its going-private transaction to circumvent the requirement to obtain majority of the minority shareholder approval under Multilateral Instrument 61-101 (**MI 61-101**). He requested that the Commission intervene and require that LeadFX minority shareholder approval be obtained. Specifically, Pearson sought the following relief from the Commission:

a. an order permitting this application to be heard;

b. an order that LeadFX has not complied with MI 61-101 – with respect to the Plan of Arrangement;

[1] RSO 1990, c S.5
[2] RSC 1985, c C-44

c. an order pursuant to section 127(1)3 of the Act that the 90 Percent Exemption is not available to LeadFX with respect to the Plan of Arrangement;

d. an order restraining LeadFX and its affiliates from completing the transaction (whether through a plan of arrangement or otherwise) without complying with MI 61-101, including, without limitation, the requirement of obtaining the approval of a majority of the minority shareholders in accordance with Part 8 of MI 61-101;

e. an order pursuant to section 127(1)5 of the Act requiring LeadFX to:

i. immediately disseminate to the public a news release advising that, as a result of the Commission's orders, LeadFX must obtain minority approval as a condition for approval of the Plan of Arrangement resolution;

ii. immediately amend or supplement its management information circular dated August 10, 2018 (the **Circular**) to reflect that minority approval is required as a condition for approval of the Plan of Arrangement resolution; and

iii. send such amended or supplemented Circular to shareholders of LeadFX as of the Record Date for the meeting not less than 10 days prior to the meeting, as adjourned or postponed;

f. an order pursuant to section 127(1)2 of the Act that trading cease in respect of any shares of LeadFX issued, or to be issued, under or in connection with the Plan of Arrangement, unless and until LeadFX satisfies the Commission that the provisions of paragraph "e." above have been complied with;

g. an order pursuant to section 127(1)2.1 of the Act that the acquisition of any shares of LeadFX by the Controlling Shareholders (as defined below) or their affiliates is prohibited unless and until LeadFX satisfies the Commission that the provisions of paragraph "e." above have been complied with; and

h. such alternative or further and other relief as counsel for the Applicant may request and the Commission may order.

[6] On September 24, 2018, Pearson made a request for disclosure to LeadFX and the Controlling Shareholders in connection with the Application consisting of:

a. All documents relating to the Umbrella Agreement (as described below) (for example, communications involving LeadFX, Sentient or InCoR regarding the potential participation by InCoR in LeadFX (whether by debt or equity), the licensing or transfer of lead technology by InCoR to LeadFX, the financing of the Definitive Feasibility Study, etc.);

b. The business case presented by Lincoln Greenidge to the Board of Directors of LeadFX opposing the InCoR transaction that ultimately became the Umbrella Agreement;

c. All documents relating to the termination of the employment of Lincoln Greenidge, the former Chief Financial Officer of LeadFX;

d. Any shareholders' agreement entered into between Sentient or InCoR in respect of LeadFX;

e. All records relating to efforts by LeadFX to source financing for the restart of the Mine (defined below) or the construction of the Hydrometallurgical Facility from third parties from April 26, 2016 to present;

f. All resolutions and/or minutes of meetings of the Board of Directors relating to the Umbrella Agreement or the Plan of Arrangement;

g. All documents relating to the resignation of any directors from the LeadFX Board from April 26, 2016 to present; and

h. All communications with INFOR Financial Inc., regarding its valuation and fairness opinion.

B. Preliminary Motions

[7] Before the merits of the Application could be heard, there were two preliminary matters to be addressed:

(1) Does the Applicant, a private party, have standing to bring the application? and

(2) If it is determined that the Application should be heard by the Commission, should the Applicant's request for further disclosure from LeadFX and the Controlling Shareholders be granted?

[8] At a first attendance held on September 24, 2018, the Commission decided to bifurcate the preliminary issues from a potential consideration of the merits of the Application and address these preliminary issues at a hearing on September 28, 2018. If Pearson was granted standing to advance his Application under section 127, a hearing could be scheduled to address the merits of the Application the following week.

[9] On September 28, 2018, after hearing the preliminary motions, the Commission dismissed the Applicant's motion for standing with reasons to follow. Consideration of Pearson's motion for disclosure thereby became unnecessary.

[10] These are our reasons on the preliminary motions.

C. The Parties

[11] Pearson resides in Toronto and is currently LeadFX's largest minority shareholder. Over the years, Pearson purchased over CAD $6 million of LeadFX shares and as of September 25, 2018, Pearson is the beneficial owner of 2,363,715 common shares of LeadFX, representing approximately 3.4% of the common shares issued and outstanding on a non-diluted basis. If the Plan of Arrangement is approved, Pearson will be paid CAD $2,363,715 for his investment and would no longer be a shareholder of LeadFX.

[12] LeadFX is a Canadian-based mining company focused on the operation and development of lead mines. Its principal asset and sole material mineral project is a 100% equity interest in Rosslyn Hill Mining Pty Ltd, an Australian-incorporated entity that owns a 100% interest in the currently non-producing Paroo Station Lead Mine in Western Australia (the **Mine**).

[13] InCoR and Sentient, the Controlling Shareholders, collectively own approximately 91.8% of the issued and outstanding shares of LeadFX.

[14] As set out in the Circular, as of August 10, 2018:

a. InCoR holds 27,306,475 common shares of LeadFX constituting 39.2% of the common shares outstanding, and

b. Sentient and its affiliates hold 36,609,182 common shares representing 52.6% of the common shares outstanding.

[15] InCoR describes itself as a privately held venture capital and technology company based in London, England. InCoR became a shareholder of LeadFX in May 2017 through participating in the InCoR Transaction (described below).

[16] Sentient Equity Partners SPC (**SEP**) describes itself as a segregated portfolio company incorporated under the laws of the Cayman Islands. SEP is described as an adviser to investment funds, which, through its affiliates, manages over US $2.7 billion involved in the development of metal, mineral and energy assets. Sentient Executive GP I, Limited & Sentient (Aust.) Pty Ltd, Sentient Executive GP II, Limited & Sentient Trustees PTC Limited, Sentient Executive GP III, Limited and Sentient Executive GP IV, Limited are described as either the general partner of the relevant investment fund that are limited partnerships or the trustee of the relevant investment fund that are unit trusts, which receive investment advice from SEP.

[17] Sentient regards LeadFX as one of its portfolio companies, in which Sentient holds a significant equity stake. Until March 2016, Sentient's common shares were held indirectly, through Enirgi Group Corporation (**Enirgi**), a wholly-owned subsidiary of Sentient. In March 2016, Enirgi's common shares of LeadFX were redistributed among Sentient I, II, III and IV. Sentient is also LeadFX's primary lender.

[18] While the Application did not specifically name the Controlling Shareholders as parties, they are identified in the Application. Specifically, the Applicant's requested order, if granted, would apply to them, and the Application scrutinizes the conduct of the Controlling Shareholders, specifically the events surrounding the InCoR Transaction that resulted in the Controlling Shareholders holding 91.8% of the company. In essence, the Controlling Shareholders are *de facto* respondents to the Application.

[19] At the outset of the hearing on September 28, 2018, the status and participation of the Controlling Shareholders was addressed. We found that the Controlling Shareholders should be granted full intervenor status and have the ability to provide evidence and make submissions and have full participatory rights as parties. We indicated, however, that as a matter of scheduling, approximately half of the day would be reserved for submissions on behalf of Pearson and half of the day would be reserved for the Respondent and Controlling Shareholders, and we urged that duplication of submissions be avoided.

[20] Staff of the Commission (**Staff**) participated in the hearing by providing written and oral submissions.

[21] None of the parties objected to granting the Controlling Shareholders full party status or to the scheduling direction.

[22] The Panel was also advised by the parties that no additional evidence would be offered during this phase of the Hearing and that the parties would limit themselves to materials filed, without any cross-examination and to the submissions made by their respective counsel.

D. Transactional History

[23] On December 6, 2016, Sentient and InCoR entered into a confidentiality agreement relating to a potential transaction. A preliminary term sheet was provided on December 14, 2016. The term sheet would form the basis for the Umbrella Agreement that would reflect the elements of the InCoR Transaction (described below).

[24] On January 17, 2017, the first draft of the Umbrella Agreement was circulated. A special committee of independent directors of LeadFX was appointed to review the transaction (**Umbrella Agreement Special Committee**) on April 14, 2017. The Umbrella Agreement Special Committee retained independent counsel to represent it. By May 4, 2017, the Umbrella Agreement Special Committee had determined that the Umbrella Agreement and the proposed transaction were in the best interests of LeadFX.

[25] On May 12, 2017, LeadFX issued a news release announcing that the board of directors of LeadFX approved entering into an arm's length transaction with InCoR related to the transfer of lead refining technologies to LeadFX for the initial development of a lead refinery at the Mine, as reflected in the Umbrella Agreement (the **InCoR Transaction**). As set out in the May 12, 2017 news release, the rational for the InCoR Transaction is to benefit all LeadFX shareholders by providing an opportunity to increase: (1) the Mine's life of mine and economics (2) the likelihood of a successful and profitable restart of the Mine, and (3) financing options for the Mine.

[26] As part of the overall InCoR Transaction, the Umbrella Agreement would be entered into by LeadFX and InCoR. The key components of the InCoR Transaction are described in paragraphs 27 to 30.

[27] The Umbrella Agreement provides that InCoR will undertake and pay for a DFS for the development of a lead refinery at the Mine. SNC-Lavalin will be contracted by InCoR to conduct the Definitive Feasibility Study (the **DFS**). The estimated cost of the DFS and associated works is US$5 million to be funded solely by InCoR.

[28] The Umbrella Agreement also provides that LeadFX will issue two separate common share purchase warrants to InCoR (the **Warrants**) that would allow InCoR to acquire up to 28,750,000 common shares, representing approximately 42.9% of the outstanding common shares on a non-diluted basis. The Warrants would be exercisable, for no additional consideration, subject to the occurrence of the following triggering events:

a. 80% of the Warrants are to be exercised only on completion of the DFS (if it meets strict criteria and delivers a superior economic outcome for LeadFX) and fully funded by InCoR; and

b. the remaining 20% of the Warrants are to be exercisable only upon the receipt of definitive environmental approvals by LeadFX to construct a lead refinery at the Mine.

[29] InCoR will transfer its proprietary hydrometallurgical technology for recovering lead from mixed oxide material to unlock previously unrealizable value at the Mine upon the successful completion of the DFS and exercise of 80% of the Warrants. LeadFX would then have the exclusive rights to use and sub-license InCoR's lead refining technologies worldwide.

[30] LeadFX will also nominate an InCoR representative to its board and following the delivery of a successful DFS, LeadFX will nominate a second InCoR representative to its board.

[31] Between May 12, 2017 and June 19, 2017, the Umbrella Agreement and warrant certificates were finalized and approved by the Toronto Stock Exchange. On June 20, 2017, the parties executed the Umbrella Agreement.

[32] On August 15, 2017, LeadFX issued the Warrants to InCoR to acquire up to 28,750,000 common shares in the capital of LeadFX.

[33] On August 23, 2017, the Umbrella Agreement was posted on SEDAR as a schedule to the applicable warrant certificate.

[34] Subsequent to the InCoR Transaction, a number of private placements occurred. On August 29, 2017, LeadFX announced the first private placement with Sentient and InCoR for the issue of up to 3,125,000 common shares for gross proceeds of $2.5 million to close in two separate tranches. The closing of the first and second tranches occurred on August 31, 2017 and October 27, 2017, respectively.

[35] With the completion of the private placement on October 27, 2017, Sentient held approximately 82.3% of the issued and outstanding common shares and InCoR held approximately 3.9% of the issued and outstanding common shares.

[36] On December 14, 2017, LeadFX announced a second private placement with Sentient and InCoR for the issue of up to 2,374,301 units for gross proceeds of $1,163,407 to close in two separate tranches. The closing of the first and second tranches occurred on December 19, 2017 and January 12, 2018, respectively.

[37] With the completion of the private placement on January 12, 2018, Sentient held approximately 80.5% of the issued and outstanding common shares and InCoR held approximately 6.5% of the issued and outstanding common shares.

[38] On February 28, 2018, InCoR exercised 80% of the Warrants from the InCoR Transaction after the completion of the DFS, which met the success criteria outlined in the Umbrella Agreement. At the same time, InCoR signed the Technology Transfer Agreement under which InCoR will exclusively license its lead refining technology rights to LeadFX. After the exercise of Warrants, Sentient held a 52.8% interest in the common shares and InCoR held a 38.7% interest in the common shares, for a total of 91.8%.

[39] On March 1, 2018, LeadFX announced that they had issued an Early Warning Report, filed pursuant to National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* in connection with the acquisition of securities of LeadFX by InCoR.

[40] On April 9, 2018, LeadFX announced a third private placement with Sentient and InCoR for the issue of up to 488,208 units for gross proceeds of $683,491. The offering closed on May 17, 2018.

[41] In April 2018, the Controlling Shareholders raised the idea of a going private transaction with LeadFX.[3] The idea of a going private transaction was only previously discussed internally at InCoR sometime in February 2017.[4]

[42] On May 10, 2018, a special committee of independent directors was appointed by the board of directors of LeadFX to consider and evaluate a potential going private transaction (the **Going Private Special Committee**).

[43] On June 4, 2018, Sentient exercised 1,153,554 warrants at $0.61 for 1,153,554 common shares of LeadFX.

[44] On July 18, 2018, InCoR exercised 1,220,747 warrants at $0.61 for 1,220,747 new common shares in LeadFX. After the exercise of Warrants, Sentient held 52.6% interest in the common shares and InCoR held 39.2% interest in the common shares, for a total of 91.8%.

[45] On July 23, 2018, LeadFX issued a news release announcing a proposed going private transaction to be completed by way of a statutory plan of arrangement pursuant to section 192 of the CBCA, following the recommendation of the Going Private Special Committee. Under the Plan of Arrangement, the common shares of LeadFX will be consolidated on the basis of five million pre-consolidation common shares to one post-consolidation common share (the **Consolidation**). In lieu of fractional common shares, shareholders other than the Controlling Shareholders, who would otherwise receive less than one whole post-Consolidation common share will be entitled to receive cash consideration of $1.00 for each pre-Consolidation common share, thereby cashing out minority shareholders, including Pearson.

[46] The July 23, 2018 news release also indicated that: (1) the Controlling Shareholders intended to rely on the exemption from the minority approval requirement pursuant to section 4.6(1)(a) of MI 61-101, (2) INFOR Financial Inc. provided LeadFX with a Valuation and Fairness Opinion for the going private transaction, (3) the Going Private Special Committee unanimously recommended that the Board approve the Plan of Arrangement and that shareholders vote in favour of the Plan of Arrangement resolution, and (4) the special meeting of shareholders to approve the Plan of Arrangement was anticipated to be held on October 3, 2018 (the **Special Meeting**).

[47] The result of the Special Meeting was a foregone conclusion by virtue of the holdings of the Controlling Shareholders if a majority of the minority vote was not required or other court or regulatory intervention did not occur.

[48] The Circular confirmed October 3, 2018 as the date for the Special Meeting. In addition, it set out the steps taken by the Going Private Special Committee, specifically that on August 5, 2018 the Going Private Special Committee reaffirmed their July 23, 2018 recommendation and conclusion that the Plan of Arrangement is in the best interest of LeadFX and fair to LeadFX's shareholders.

[49] On August 10, 2018, LeadFX received an Interim Order from the Ontario Superior Court of Justice in relation to the Plan of Arrangement.

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[3] Exhibit 3, Affidavit of David Warner, sworn September 26, 2018 at paras 52-53.
[4] Exhibit 4, Affidavit of Jocelyn Bennett, sworn September 27, 2018 at para 53.

[50] The application for the final order approving the Plan of Arrangement was scheduled to be heard on October 5, 2018.

II. THE ISSUES

[51] The issues before us were as follows:

a. Should the Commission hear the Application under s. 127 of the Act?

b. If the Commission permits the Application to proceed to a hearing on the merits, should the Commission order LeadFX and the Controlling Shareholders to produce some or all of the documents requested by the Applicant?

III. POSITIONS OF THE PARTIES ON THE PRELIMINARY MOTIONS

A. Pearson

[52] Pearson submits that the Commission should exercise its discretion to hear this Application as the conduct of LeadFX and the Controlling Shareholders is abusive to minority shareholders and that a consideration of the factors set out in *MI Developments*[5] weighs in favor of considering the Application.

[53] Pearson alleges that the Plan of Arrangement is part of a long-term deliberate strategy to take LeadFX private and force minority shareholders out at the lowest possible price. He submits that LeadFX deliberately structured its affairs to take advantage of the 90 Percent Exemption by issuing a substantial amount of equity to the Controlling Shareholders through the InCoR Transaction. This transaction ultimately led to the Controlling Shareholders reaching a total of 91.8% of the outstanding common shares, thus permitting the availability of the 90 Percent Exemption. Pearson alleges that this was an essential element of a long-term strategy to enable the Controlling Shareholders to take LeadFX private without a minority vote.

[54] Pearson takes the position that he should not be denied the ability to participate in future appreciation of LeadFX without having a say through a majority of the minority vote.

[55] Pearson submits that the Commission is best suited to determine the issues raised in his Application. It is his view that other avenues, including an oppression remedy, objecting to the application for the final order approving the Plan of Arrangement, exercising dissent rights and asking the Court to establish the fair value of his shares are not sufficient to protect Pearson from the unfair and improper practices of LeadFX and the Controlling Shareholders.

[56] Pearson also submits that his Application was brought in a timely manner. He submits that the Application was brought on September 18, 2018, 14 days before the date of the Special Meeting and that this was not a case like *Catalyst*[6] where the application was brought only five days before the shareholder meeting. Further, Pearson submits that there is no prejudice to LeadFX or the Controlling Shareholders by virtue of his Application being commenced on September 18, 2018.

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[5] *MI Developments (Re)*, 2009 ONSEC 47, (2009), 32 OSCB 126 (***MI Developments***).
[6] *Catalyst Capital Group Inc. (Re)*, 2016 ONSEC 14, (2016) 39 OSCB 4079 (***Catalyst***).

[57] With respect to the disclosure motion, Pearson submits that his request for documents is not overbroad. All the categories of documents requested are relevant to the issues raised in his Application and he will be prejudiced if he is required to go to a hearing on the merits without the benefit of the documents.

B. LeadFX

[58] LeadFX submits that this is not an extraordinary circumstance where a private party should be granted standing to bring an application under s. 127 because: (1) Pearson waited too long to bring his Application; (2) the Application raises no novel or fundamental issues that need to be heard in the public interest; (3) Pearson's complaints regarding price, oppressive conduct and fairness of the transaction can be fully addressed through statutory dissent rights under the CBCA; and (4) there is no realistic chance of success on the Application as Pearson has failed to make out a *prima facie* case in support of his claim for an order under s. 127 of the Act.

[59] LeadFX takes the position that they are properly relying upon the 90 Percent Exemption as the Controlling Shareholders hold 91.8%, LeadFX obtained an independent valuation and dissent rights are available to its minority shareholders.

[60] Regarding the disclosure motion, LeadFX takes the position that except for the request for resolutions and minutes of the meetings of the Umbrella Agreement Special Committee and the Going Private Special Committee, which have already been provided to Pearson, the other documents requested are not relevant, necessary or within LeadFX's control. Further, Pearson's document request amounts to a 'fishing expedition' to obtain documents that are intended to be used both in the Commission proceeding and subsequent Court and dissent proceedings.

C. The Controlling Shareholders

[61] The Controlling Shareholders take the position that the Commission should not exercise its discretion to hear the Application. In addition to the Application being brought in an untimely manner, the Applicant has not brought his grievances to the correct forum. Since the Applicant takes issue with the fairness and reasonableness of the consideration offered in the Plan of Arrangement, he has standing to appear before a judge and oppose its approval on that basis, or he can exercise his dissent and appraisal rights. Since he also claims the company has historically operated in a way that unfairly prejudiced minority shareholders, he can commence an oppression application. Further, the Controlling Shareholders submit that the Application should not be heard as the Applicant has not demonstrated a *prima facie* case and the Application is based on speculation and conjecture relating to the conduct of the Controlling Shareholders in conjunction with the InCoR Transaction and Plan of Arrangement.

[62] With respect to the disclosure motion, the Controlling Shareholders supported the submissions made by LeadFX that disclosure should not be ordered and requested that if the Commission did order disclosure, then they would like to have the opportunity to make further submissions on the scope of such disclosure.

D. Staff

[63] Staff's submissions addressed the law for granting standing to private parties under s. 127 of the Act. Staff's submissions emphasized that applications by private parties under s. 127 are an exception to the general rule that only Staff may commence such a proceeding. Staff agreed in their written submissions that the first five factors listed in *MI Developments* (described in paragraph 70 below) are satisfied, however Staff takes the position that the sixth public interest factor is not satisfied.

[64] Having regard to the timeliness of the Application, the nature of the issues raised, and the standard that would be required to prohibit the Respondent from relying on the 90 Percent Exemption, Staff took the position that the Applicant has not presented sufficient *prima facie* evidence supporting its allegations that would warrant a hearing on the merits.

[65] Staff also expressed concerns that granting standing in this case would encourage other parties to make similarly broad claims at a late stage in the future and without a sufficient evidentiary foundation.

[66] With respect the disclosure motion, Staff did not take a position on which of the requested categories of documents, if any, should be ordered, as the outcome of the disclosure motion is dependent on the scope of the merits hearing, should the Applicant be granted standing.

IV. THE LAW

[67] Section 127 of the Act grants the Commission jurisdiction to intervene in the capital markets and make certain orders when the Commission determines that it is in the public interest to do so.

[68] The Supreme Court of Canada has observed that the Commission has broad discretion to intervene in Ontario capital markets if it is in the public interest.[7] Exercise of the public interest power does not require a breach of the Act, regulations or any policy statement.[8]

[69] However, a private party cannot bring an application as a matter of right under section 127 of the Act. Rather, in the extraordinary circumstance in which a private party chooses to bring an application under section 127 of the Act, the Commission has discretion whether to permit it to do so.[9]

[70] The Commission has considered the following factors from *MI Developments* when deciding whether to exercises its discretion in favour of permitting an application by a private party:

a. the applications related to both past and future conduct regulated by Ontario securities law;

b. the applications were not, at their core, enforcement in nature;

c. the relief sought is future looking;

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[7] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 SCR 132 at para 45.

[8] *Patheon Inc. (Re)*, 2009 ONSEC 13, (2009), 32 OSCB 6445 at para 114; *Mithras (Re)* (1990), 13 OSCB 1600.

[9] *MI Developments* at paras 248, 108 and 127; *Catalyst* at para 25.

d. the Commission has the authority to grant an appropriate remedy; the applicants were directly affected by the conduct (past and future); and

e. the Commission concluded it was in the public interest to hear the applications.[10]

[71] An applicant bears the onus of establishing that it is in the public interest to grant such an extraordinary remedy and must tender "sufficient *prima facie* evidence to satisfy that onus."[11]

[72] With respect to the public interest factor, the Commission has considered the following non-exhaustive factors:

a. whether the application raises a novel issue[12];

b. whether the issues raised could have been addressed in previous applications[13];

c. whether the application demonstrates that there is a *prima facie* case[14]; and

d. whether the timing of the application would interfere unduly with the justified expectations of market participants and affect fairness, efficiency and confidence in the capital markets[15].

V. ANALYSIS

A. Standing: Application of the Law to the Facts

1. *MI Developments* Factors

[73] We agree with Pearson that all of the factors for the Commission exercising its jurisdiction set out in *MI Developments* are satisfied, other than, crucially, that it is in the public interest to exercise such jurisdiction on the facts of this case. LeadFX and the Controlling Shareholders only contested that the public interest standard was satisfied in this case.

[74] The question of whether it is in the public interest to hear the Application is determinative in this case. In conducting our public interest analysis, we have considered: (i) the timing in bringing the Application, (ii) whether there is a *prima facie* case, and (iii) the proper forum for the Applicant's complaints.

2. Timing in Bringing the Application

[75] We agree with Staff's submissions that applications for relief under section 127 by private parties brought close in time to a definitive event such as a shareholder vote or Court approval should be closely scrutinized to determine whether there was a reasonable basis for the delay. This delay should then be weighed against the public interest issues at stake and whether an applicant has established a *prima facie* case to support its allegations. This scrutiny is

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[10] *MI Developments*, at paras 109-110; *Central GoldTrust et al (Re)*, 2015 ONSEC 44, (2015), 38 OSCB 10768 at para 16 (***Central GoldTrust***); *Catalyst* at paras 26, 40-48
[11] *Catalyst* at para 30.
[12] *Central GoldTrust* at para 18; *Catalyst* at para 49.
[13] *Central GoldTrust* at para 19.
[14] *Catalyst* at para 58
[15] *Catalyst* at paras 60-61.

necessary to protect reasonable expectations for certainty in corporate transactions that could be inappropriately frustrated through such delays. It is also necessary to avoid incentivizing tactical delays that would affect the ability of the Commission and other parties to adequately prepare during a compressed hearing schedule.

[76] In this case, the Applicant could have commenced his application in a timelier manner following the July 23, 2018 press release announcing the going private transaction. This press release stated explicitly that the 90 Percent Exemption was being relied upon. Instead, the Applicant waited almost two months -- to September 18th, to bring the Application, requiring a very compressed filing schedule in advance of a September 28th hearing date, and with a shareholders meeting scheduled to occur within three business days thereafter and Court approval within five business days.

[77] Pearson denies that there was delay in bringing the Application. He argues, first, that the time period should be measured from the date that the Circular was issued -- August 10, 2018, or even later, posted on SEDAR -- August 16, 2018. We reject this view since the going private transaction and reliance on the 90 Percent Exemption were clearly announced on July 23, 2018 and Pearson had a strong incentive by virtue of being the largest minority shareholder to carefully follow events involving his investment. To use these later dates as a measure of timeliness would be unrealistic in these circumstances.

[78] Second, Pearson argues that if the Application is regarded as late, there is no prejudice to the Respondent and the Controlling Shareholders since the Special Meeting could be adjourned or the vote proceed subject to the possibility of a second vote being required, and the hearing for the final approval of the Plan of Arrangement could be postponed. To the contrary, our concern that delay not unduly interfere with reasonable expectations in connection with corporate transactions are directly implicated by suggestions that a vote be postponed or proceed on a partial basis, or Court approval be postponed in the face of regulatory uncertainty resulting from a proceeding of this kind. Both the Special Meeting and the Court approval involve considerable planning and communications with shareholders and others, and changes in the timetable are not inconsequential. Any such changes can cause uncertainty for investors and other participants.

[79] Third, Pearson argues that the decision to retain counsel to seek the remedies he is seeking was a major decision for him as an individual, and that it took time to retain counsel. We view Pearson as an experienced individual who can reasonably be expected to make such decisions in a timely manner. His process of retaining counsel does not afford a basis for us to disregard the delay in this case.

3. Absence of a *Prima Facie* Case

[67] Pearson alleges that:

> Since at least 2015, one of LeadFX's Controlling Shareholders, Sentient, has executed a long-term, deliberate strategy to

> take LeadFX private and force the minority shareholders out at the lowest possible price.[16]

Pearson alleges, and is supported in these allegations by his own affidavit and an affidavit of Wayne Richardson, a former Chief Executive Officer and director of LeadFX, that the elements of this strategy consist of the following:

a. The use of a "death spiral" debt financing technique allowing Sentient to convert debt to equity and gain control of LeadFX, an approach for which Sentient is alleged to be well-known;

b. False assurances to Pearson that he would be able to participate in the upside resulting from the re-opening of the Mine when market conditions improved;

c. The Umbrella Agreement and resulting InCoR Transaction was the mechanism used to commence this squeeze-out strategy, and should be linked as part of a multi-step transaction with the Plan of Arrangement;

d. If this was not the motivation, LeadFX would have instead moved to reopen the Mine without the need for the InCoR Transaction;

e. Sentient and InCoR must be joint actors since Sentient would not give up equity as it did to InCoR without a shareholders' agreement or understanding in place to protect its interests, which would mean that the Umbrella Agreement itself should have been subject to majority of minority approval and therefore everything that followed, including the share issuances to InCoR and the Plan of Arrangement, are tainted and legally impermissible; and

f. The Special Committees conducted flaw processes and oversaw flawed valuations.

[80] We regarded the 'death spiral' language as no more than an emotionally-loaded label. There is no evidence that Sentient's behaviour as a shareholder and secured creditor, providing debt financing to keep LeadFX afloat after the collapse of lead prices, involved anything other than an effort to protect its investment.

[81] The Umbrella Agreement brought in a new refining technology that promised enhanced performance of the Mine through the placement of a new, extensive refinery immediately adjacent to the Mine, avoiding the need to transport the mined material to a distant refinery at greater cost and environmental risks. The technology license conferred on LeadFX the exclusive right to market this technology to others on a world-wide basis. In order to exercise the Warrants to acquire LeadFX stock included under the Umbrella Agreement, specific conditions had to be met by InCoR, including the successful completion of the DFS financed by InCoR and the receipt of environmental approvals. None of this appeared to us to be part of a long-term strategy to squeeze out Pearson. Our role is not to insert ourselves in the comparative business judgment regarding whether it was more advantageous to restart the Mine with or without this deal in place.

[16] Memorandum of Fact and Law of Michael Pearson, dated September 25, 2018 at para 5.

[82] On the assurances allegedly given to Pearson that he would be able to participate in the upside, these appeared to consist of general discussions. He could reasonably have sought formal legal assurances, including pre-emptive rights, but did not obtain these protections in connection with his investment.

[83] There was no evidence advanced by Pearson, only conclusory statements, that the Umbrella Agreement commenced a multi-stage scheme. If such a plan was being implemented it would have had to involve Sentient and InCoR, as well as the many professional advisors, including the lawyers and investment bankers, and boards of directors and executive officers of both entities, who would have had to be complicit in the false disclosures being made as a public company and substantial regulatory violations and other potential misconduct involved. This scenario involves very serious allegations, requiring some evidence to support moving to a hearing on the merits. Instead, the Applicant provided only speculation to support such bold inferences.

[84] It appeared to us that there were many more direct means by which Sentient could acquire the Mine using its power either as a controlling shareholder and first lien, secured creditor to achieve this objective rather than a circuitous route involving InCoR. Pearson has not shown a *prima facie* case that the 90 Percent Exemption should be unavailable. The inference that no multipart transaction or plan by joint actors is involved is at least as sustainable as the contrary theories advanced by Pearson.

[85] We have no basis to draw an inference that there was a long-term objective of squeezing out the minority arising from the entering into of the Umbrella Agreement rather than implementing other courses of action such as the restart of the Mine on a more expeditious basis.

[86] It appeared to us that the absence of an apparent shareholders agreement between Sentient and InCoR was evidence pointing away from either a multi-part transaction or joint actor status rather than the contrary. Sentient was certainly in a position as a secured creditor to exercise its rights in a manner making it highly questionable whether Sentient also required some type of voting agreement to be in place. It could be just as readily inferred that InCoR needed protection against Sentient exercising its rights as a creditor, but could not secure such an agreement, than Sentient needed an agreement with InCoR when it was diluting its control position. Counsel for Sentient and InCoR, after making inquiries of their clients, each represented on behalf of their respective clients, that there was no voting agreement or understanding in place. Given the evidence before us, we did not see a need to have this reflected in affidavits to be delivered to us for the purposes of this decision.

[87] The flaws that Pearson outlines in the processes leading to the Umbrella Agreement and the Plan of Arrangement are disagreements with regard to business strategy and the outcome of the valuation process. There is no evidence that these processes were flawed so as to require regulatory intervention or were part of a long-term scheme to squeeze-out the minority shareholders, including Pearson.

[88] On the basis of the foregoing, we do not find that Pearson has made out a *prima facie* case supporting moving to a merits hearing. Given our determination that

there was no *prima facie* case, there was no need to decide whether the issues raised by the Applicant were novel.

4. Proper Forum for the Applicant's Complaints

[89] Pearson's primary complaint is about the price fixed in the Plan of Arrangement. At various times Pearson was completely transparent about his focus on recouping at least his original investment in his exchanges with representatives of LeadFX.[17] The primary purpose of the 90 Percent Exemption is to prevent a minority shareholder with a relatively small percentage interest from holding up a transaction sought by the majority – to prevent that holder to block a transaction unless that shareholder's price is met. If there was substantial evidence that a scheme had been employed to attain 90% without proper disclosure or as a result of non bona-fide multipart transactions as an end-run around a requirement of minority shareholder approval, we would have good reason to exercise our jurisdiction both to protect investors and the integrity of capital markets. However, here the evidence of such misconduct is lacking, and the policy preventing a shareholder from exercising a blocking power in a transaction once 90% is attained governs in this case. Pearson has other remedies, if appropriate, to his complaints about price either through the fairness hearing conducted by the Court set to approve the Plan of Arrangement, in an oppression action or pursuant to an appraisal remedy, in each case under the CBCA.

B. Disclosure

[90] As we did not grant standing, it was unnecessary to further address the Applicant's disclosure motion.

VI. CONCLUSION

[91] Therefore, in the circumstances of this case, we decline to grant standing to the Applicant, a private party, to bring a section 127 application.

Dated at Toronto this 31st day of October, 2018.

"D. Grant Vingoe"
D. Grant Vingoe

"Frances Kordyback"
Frances Kordyback

"Lawrence P. Haber"
Lawrence P. Haber

[17] Exhibit 3, Affidavit of David Warner, sworn September 26, 2018 at paras 68-75.