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

AND

IN THE MATTER OF CONSOLIDATED PROPERTIES LTD.

Hearing:	**October 26, 2000**		
Panel:	**John A. Geller, Q.C.**	**-**	**Vice-Chair**
	Morley P. Carscallen, F.C.A.	**-**	**Commissioner**
Counsel:	**Steven H. Leitl** **Charles Berard**	**-**	**For Aspen Properties Ltd.**
	Kevin T. Williams **Norman K. Snyder**	**-**	**For Consolidated Properties Ltd.**
	Christopher Besko	**-**	**For the Staff of the Manitoba Securities Commission**
	Stanley Magidson **Terrence Moore**	**-**	**For the Staff of the Ontario Securities Commission**

REASONS FOR DECISION

Background

On September 22, 2000, Aspen Properties Ltd. ("Aspen") made a take-over bid for approximately 30% of the outstanding shares of Consolidated Properties Ltd. ("Consolidated"), and associated rights, at a bid price of 38¢ per share (including rights), payable in cash, and expiring on October 17, 2000. Aspen already held approximately 5% of the outstanding shares of Consolidated. In the bid documents, it was stated that "The purpose of the Offer is to enable Aspen to acquire at least 30% of the outstanding Consolidated Shares in addition to the approximately 5% already held by Aspen, and its affiliates, thereby allowing Aspen to take a more active role in attempting to increase shareholder value." and that "If the Offer is successful, Aspen intends to requisition a shareholder meeting and propose that one or more of the directors of Consolidated be replaced with one or more nominees of Aspen at such meeting. The new board of directors would then conduct a comprehensive re-assessment of management and management strategies, margins, and dispositions, geographic expertise and potential increased revenue growth.".

Consolidated had in effect a "shareholders protection rights plan" (the "Plan"), put in place by its directors on April 16, 1999 and ratified by its shareholders on September 9, 1999. The implementation of such a plan was originally authorized by the Consolidated board on January 12, 1999. It was a condition of the Aspen bid that, in effect, the Plan not be applicable in respect of the Aspen bid when it came time for Aspen to take-up and pay for the Consolidated shares tendered to the Aspen bid.

In a Directors' Circular dated October 2, 2000, the Consolidated board stated that it would provide advice to shareholders as to the Aspen bid on or before October 10, 2000.

By letter dated October 5, 2000, Macleod Dixon LLP, Aspen's counsel, applied to the Alberta Securities Commission, the Manitoba Securities Commission (the "MSC") and the Commission for the issuance of permanent cease trade orders in respect of any securities issued or to be issued pursuant to or in connection with the Plan in relation to the Aspen bid.

In a Notice of Change dated October 6, 2000, Aspen provided further information as to its source of funds for the payments to be made by it under the Aspen bid.

In a Supplement to Directors' Circular dated October 10, 2000, the Consolidated board stated that it had received the opinion of Trilon Securities Corporation ("Trilon") that the Aspen bid was inadequate from a financial point of view to holders of Consolidated shares other than Aspen and its subsidiaries and affiliates, that the board was continuing to actively explore alternative strategies to maximize shareholder value, including the sale of 100% of the Consolidated shares, the sale all of Consolidated's assets and other strategic alternatives recommended by Trilon and the Special Committee of the Consolidated board, and that the Consolidated directors recommended that the Consolidated shareholders reject the Aspen bid.

By a Notice of Variation dated October 16, 2000, Aspen extended the Aspen bid to October 27, 2000. In the Notice, Aspen, at the request of the staff of the MSC and of the Commission, provided additional information with respect to Aspen.

In a Second Supplement to Directors' Circular dated October 23, 2000, the Consolidated board again recommended the rejection of the Aspen bid.

Decision

A hearing on Aspen's request for a cease-trade order was held by the MSC and the Commission on October 26, 2000. At the conclusion of the hearing, the following decision was read by the Chair of the MSC on behalf of the MSC and the Commission.

> We have carefully considered the evidence and the submissions. We are all of the view and are satisfied that the time has not yet come for the Rights Plan to be cease-traded. However, that time is coming soon and, in fact, we will issue an order cease-trading at the close of business Friday, November 3rd, being 5:00 p.m. Central Standard Time, in the event that the offer from Aspen is extended.

The Chair advised that reasons would follow in due course.

Testimony

Counsel for Aspen called one witness, R. Scott Hutcheson, the President and Chief Executive Officer of Aspen.

Mr. Hutcheson's testimony included the following. Commencing on March 30, 1999 and through mid-September 2000, he had at least 25 meetings and discussions, and exchanged correspondence, with various officer and directors of Consolidated, and he believes that Consolidated has been "in play" since late March, 1999. By press release dated August 14, 2000, Consolidated announced that its board had instructed its management to seek offers for its assets or shares which would enhance shareholder value. At the request of Consolidated's management, by letter dated September 6, 2000, Aspen wrote to Consolidated's President and Chief Financial Officer, setting out proposed terms and conditions of a pre-acquisition agreement with a view to making an offer to purchase 100% of Consolidated's shares. Management of Consolidated indicated that Aspen's offer had been considered by the Consolidated board and rejected on the basis that Consolidated was considering pursuing a strategy whereby most of its assets would be sold. On September 11, 2000 Aspen issued a press release announcing its intention to make the Aspen bid, and on September 22, 2000, Aspen mailed the Aspen bid to Consolidated's shareholders. Consolidated did not engage a financial advisor until September 28, 2000. He believes that Consolidated is not a complex company, that there are few potential bidders other than Aspen who have not already looked at buying Consolidated, and that there is very little likelihood that, if given more time, the Consolidated Special Committee will be able to solicit a superior bid. Aspen was informed, during various discussions with Consolidated that Consolidated's board controls approximately 30% or more of Consolidated's shares. There does not appear to be a real and substantial probability that, given a period of time after October 26, 2000 and up to 60 days following the Aspen bid, the Consolidated board can increase shareholder choice and maximize shareholder value.

Consolidated's counsel called two witnesses, Cyrus Madon, a vice-president of Trilon, and Larry M. Hurtig, a member of the Consolidated board and of its Special Committee, which advised the board in connection with its value maximization efforts and the Aspen bid.

Mr. Madon's testimony included the following. On September 28, 2000 the Consolidated board retained Trilon to act as the exclusive external financial advisor to the Special Committee and to explore strategic alternatives to the Aspen bid with a view to providing a superior alternative transaction or combination of transactions. On October 10, 2000, Trilon issued an opinion which concluded that the Aspen bid was inadequate from a financial point of view to the shareholders of Consolidated other than Aspen and its subsidiaries and affiliates. Consolidated has entered into confidentiality agreements with a number of prospective purchasers, exceeding seven. A 60 day period as contemplated for "permitted bids" in the Plan is not an unreasonable period of time for the board to have to investigate other transactions aimed at maximizing shareholder value.

In response to questions from Mr. Besko, Mr. Madon testified that in his view there was a substantial likelihood that a bid would be forthcoming from two parties who had indicated an interest in making a bid for 100% of Consolidated's shares at a price higher than that offered by Aspen in its partial bid, and that 60 days wasn't an unreasonable period to try to maximize shareholder value. In the context, it is clear to as that he meant 60 days from the date of the Aspen bid to bring an offer forward.

Mr. Hurtig is a director of Consolidated and a member of its Special Committee. His testimony included the following. Discussions with respect to the adoption of the Plan initially took place at a meeting of the Consolidated board on January 12, 1999. The board then voted to commence steps toward the implementation of a shareholder protection rights plan and to authorize management to contact legal counsel with a view to creating such a plan. Further discussion with respect to the content of the Plan took place at a board meeting on March 11, 1999. On April 16, 1999, the board adopted the Plan. The shareholders of Consolidated ratified the Plan on September 9, 1999. Aspen made a formal offer to the board of Consolidated by a letter dated September 6, 2000 in respect of the potential purchase of 100% of Consolidated's shares. The Consolidated board considered the offer and because it was conditional on financing and contained several other unacceptable conditions, instructed management to reject the offer. At a meeting on August 11, 2000, the board decided to instruct management to seek out buyers for the assets or shares of Consolidated. No time frame was set for completing this. Following the issuance of a press release on August 11, 2000, Consolidated began the process of exploring strategic

alternatives aimed at maximizing shareholder value. The process involved discussions with a variety of parties. However, it was only after the issuance of Aspen's bid that the board retained a financial advisor. The board did not believe the retention of a financial adviser was necessary, because of the high cost which this would entail, until after the Aspen bid was issued. At a board meeting on September 25, 2000, the Special Committee was constituted, and it was given the mandate to review and respond to the Aspen bid and to review and consider all alternatives available to maximize shareholder value. At a board meeting on September 28, 2000, the board confirmed the retention of Trilon to provide financial advice to the Special Committee regarding the Aspen bid and other strategic alternatives available to Consolidated. As part of its retainer, Trilon was to provide an opinion as to the fairness of the Aspen bid from a financial perspective. Trilon developed a preliminary list of prospective offerors in consultation with management and the Special Committee, and the latter instructed Trilon to actively pursue these prospective offerors. On October 5, 2000, Trilon presented its report to the Special Committee, and at a meeting on October 6, 2000, the Special Committee decided to recommend Trilon's report to the board, and that the board issue a supplement to its Directors' Circular advising shareholders to reject the Aspen bid. On October 7, 2000, Trilon presented the Special Committee with Trilon's strategic recommendations and its opinion that the Aspen bid was inadequate from a financial perspective to Consolidated's shareholders other than Aspen and its subsidiaries and affiliates. On October 10, 2000, the board issued the Supplement to the Director's Circular. Since October 7, 2000, Trilon has been actively engaged in pursuing alternative strategies to maximize shareholder value, including, in particular, the sale of the entire company, either through the sale of 100% of the common shares, the sale of Consolidated's assets to one or more buyers, or through some form of merger or restructuring. With the assistance of Trilon, Consolidated has entered into confidentiality agreements with a number of prospective offerors, and Trilon anticipates that further such agreements will be executed. Meetings have been held with certain of these prospective offerors, data rooms have been established, and visits to these rooms by some of the prospective offerors have taken place and more have been scheduled. There is a reasonable likelihood that with the assistance of Trilon an offer involving a transaction more favourable to the Consolidated shareholders will be obtained during the 60 days contemplated in the "permitted bid" concept under the Plan.

In response to a question from Vice-Chair Geller, Mr. Hurtig said that the control group of Consolidated (including siblings of directors, who might or might not vote with other members of the group) controlled 20 to 22% of the outstanding Consolidated shares.

Authorities

In *In the Matter of Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819, the British Columbia Securities Commission, the Alberta Securities Commission and the Commission, after reviewing previous decisions of Canadian securities regulatory authorities on shareholder rights plans, said the following at p. 7828:

> We now turn to the issue raised by Royal Host's application. That issue was whether it was in the public interest for us to make orders that would terminate the operation of the CHIP rights plan against the Royal Host bid and thus allow the bid to proceed for consideration by the unitholders of CHIP. In other words, was it time for the CHIP pill to go?
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> The general principles we applied in making that determination are set out in National Policy 62-202 and have been interpreted in the series of decisions reviewed above. In the policy, we emphasize that the primary objective of the regulatory scheme governing take over bids is the protection of the bona fide interests of the shareholders of the target company. We recognize that the board of a target company facing a hostile bid may adopt defensive tactics in a genuine attempt to increase shareholder value. However, we also confirm that we will step in if their tactics appear likely to deny or severely limit the opportunity of the shareholders to respond to the bid.
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> In applying these principles to the determination of the public interest in a particular case, the challenge we face is finding the appropriate balance between permitting the directors to fulfill their duty to maximize shareholder value in the manner they see fit and protecting the right of the shareholders to decide whether to tender their shares to the bid. We can make this determination only after considering all of the relevant factors in that particular case. While it would be impossible to set out a list of all of the factors that might be relevant in cases of this kind, they frequently include:
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> - whether shareholder approval of the rights plan was obtained;
> - when the plan was adopted;
> - whether there is broad shareholder support for the continued operation of the plan;
> - the size and complexity of the target company;
> - the other defensive tactics, if any, implemented by the target company;
> - the number of potential, viable offerors;
> - the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
> - the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
> - the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
> - the length of time since the bid was announced and made;
> - the likelihood that the bid will not be extended if the rights plan is not terminated.
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> This is the approach that was taken in *Jorex* and that served as the starting point for the analysis in the subsequent decisions. However, a number of those decisions - *Regal, WIC* and *Cambridge* - have attempted to refine this approach by focussing on certain of these factors and using them as the basis for specific tests to be applied in determining whether it is time for the pill to go.

> After reviewing these decisions and the fact patterns on which they were based, we have come to the conclusion that it is fruitless to search for the "holy grail" of a specific test, or series of tests, that can be applied in all circumstances. Take over bids are fact specific; the relevant factors, and the relative importance to be attached to each, will vary from case to case. As a result, a test that focuses on certain factors to the exclusion of others will almost certainly be inappropriate in some of the cases to which we attempt to apply it.

We agree with this analysis of the approach which we should adopt in deciding when "the pill has got to go", to use the language of *Jorex*.

Analysis

The principal factors which, in our view, are relevant in the matter before us are the following.

The Plan is not a "tactical" plan, ie. one put into effect in the face of the Aspen bid. It was first considered by Consolidated's board before discussions with Aspen commenced and was put in place by the Consolidated board and ratified by its shareholders before the announcement of the Aspen bid.

Certainly, Consolidated's board did not rush to conclude a transaction once it determined that it should attempt to enhance shareholder value by seeking offers for its assets or shares on August 14, 2000. However, we accept Mr. Hurtig's explanation for not immediately retaining a financial advisor, and do not find anything in the evidence which would lead us to conclude that the Consolidated management or board adopted improper defensive tactics.

Although, in our view, Consolidated's businesses are not unusually complex, there are several different ones, and this could have some impact on the number and types of potential buyers.

Once having retained Trilon, Consolidated has, in our view, taken reasonable steps to find a better bid or transaction.

Aspen's bid is a partial one. Although it would, if successful, effectively give Aspen "negative control", ie. the power to block fundamental changes, it would not give Aspen legal control of Consolidated. In view of the percentage of shares controlled by Consolidated's control group, it might not even give Aspen effective control. In light of these factors, we are unable to say that the Aspen bid is coercive.

On the evidence, we concluded that if Consolidated was allowed a further reasonable period, there was a reasonable possibility that it could come forward with an alternative bid or transaction superior to the Aspen bid.

Mr. Leitl argued that the only periods which we should consider were 21 days (the minimum statutory period) from the date of the bid and 35 days (the "Zimmerman" period) from the date of the announcement of the bid. Mr. Williams argued that the appropriate period would be 60 days from the date of the making of the bid (the "permitted bid" period in the Plan). We accepted neither argument. Although the length of time that a bid has been outstanding is a relevant factor, as the Commission has said in the past it is not merely a matter of counting days.

The question is, of course, how much additional time would be reasonable in the circumstances, if the decision is made to allow additional time. As was said in *Royal Host*, the primary objective of the regulatory scheme governing take-over bids is the protection of the *bona fide* interests of the shareholders of the target company. As the Commission said in *In the Matter of MDC Corporation and Regal Greetings & Gifts Inc.* (1994), 17 O.S.C.B. 4971 at page 4979:

> If there appears to be a real and substantial possibility that, given a reasonable period of further time, the board of the target corporation can increase shareholder choice and maximize shareholder value, then, absent some other compelling reason requiring the termination of the plan in the interests of shareholders, it seems to us that the Commission should allow the plan to function for such further period, so as to allow management and the board to continue to fulfil their fiduciary duties.

On the basis of the decisions since *Regal*, "reasonable possibility" would appear to us to be a more appropriate description than "real and substantial possibility", although both may in practice amount to the same thing.

On the other hand, we must recognize and take into account the fact that there is a real financial cost to a bidder in extending the period during which the bid remains open, and not make this cost so prohibitive as to discourage bids.

There was no evidence before us that, if we postponed our cease-trade order for a reasonable period, the Aspen bid would not be extended for that period. Indeed, given the lengthy period over which Aspen has been after Consolidated, we would have found such an argument difficult to believe.

Conclusion

We concluded that Consolidated should be given a brief period in which to ascertain whether it could in fact produce a better transaction for its shareholders, and made the decision quoted above.

November 15th , 2000

“J. A. Geller” **“Morley P. Carscallen”**