Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor, 20 Queen Street West, Toronto ON M5H 3S8 | CP 55, 19e étage, 20, rue queen ouest, Toronto ON M5H 3S8

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

- and -

IN THE MATTER OF BAFFINLAND IRON MINES CORPORATION, IRON ORE HOLDINGS, LP AND ITS WHOLLY-OWNED SUBSIDIARY NUNAVUT IRON ORE ACQUISITION INC.

REASONS FOR DECISION

Hearing: November 18, 2010

Reasons: December 3, 2010

Panel:

James E. A. Turner	–	Vice-Chair and Chair of the Panel
Mary G. Condon	–	Commissioner
Paulette L. Kennedy	–	Commissioner

Counsel:

Katherine L. Kay Alexander D. Rose Jonathan Levy (Stikeman Elliott LLP)	–	For Baffinland Iron Mines Corporation
Kent Thomson William N. Gula Steven Harris Andrea Burke (Davies Ward Phillips & Vineberg LLP)	–	For Iron Ore Holdings, LP and Nunavut Iron Ore Acquisition Inc.
Alan Mark Dawn Whittaker Steve Tenai (Ogilvy Renault LLP)	–	For ArcelorMittal S.A.
James Sasha Angus Naizam Kanji Erin O'Donovan	–	For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

REASONS FOR DECISION

I. BACKGROUND

1. Introduction

[1] Nunavut Iron Ore Acquisition Inc. ("**Nunavut**") made an application to the Ontario Securities Commission (the "**Commission**") pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to cease trade a shareholder rights plan originally established by Baffinland Iron Mines Corporation ("**Baffinland**") on January 13, 2006.

[2] This application arises out of an unsolicited all-cash offer made by Nunavut to purchase all of the outstanding common shares of Baffinland for $0.80 per common share (the "**Nunavut Offer**"). That offer was made on September 22, 2010, extended on October 28, 2010 and further extended on November 8, 2010. The Nunavut Offer expires on November 22, 2010 unless further extended.

2. The Parties

Nunavut

[3] Nunavut is a corporation existing under the laws of Canada with its principal and head office located in Toronto, Ontario. Nunavut was incorporated on August 27, 2010 and has not carried on any material business other than in connection with matters directly related to the Nunavut Offer. Nunavut is wholly-owned by Iron Ore Holdings, LP, a limited partnership formed under the laws of Delaware. Iron Ore Holdings, LP was formed solely for the purpose of making the Nunavut Offer.

Baffinland

[4] Baffinland is a corporation existing under the laws of the Province of Ontario with its principal and head office located in Toronto, Ontario. Baffinland is a publicly-traded junior mining company currently engaged in the exploration of one mineral property, the Mary River Property, located on Baffin Island in Nunavut Territory, Canada. The Mary River Property is in the exploration and development stage and to date Baffinland has not established an operating mine on that property.

[5] The largest shareholder of Baffinland is Resource Capital Funds, which owns approximately 23% of the outstanding common shares. Resource Capital Funds has entered into a lock-up agreement with ArcelorMittal (referred to in paragraph 10 of these reasons).

[6] The authorized capital of Baffinland consists of an unlimited number of common shares. As of October 6, 2010, the outstanding share capital of Baffinland consisted of 343,097,949 common shares. As of October 6, 2010, Baffinland also had outstanding options and warrants to purchase an aggregate of up to 59,869,322 common shares.

[7] Baffinland's common shares are listed on the Toronto Stock Exchange under the symbol "BIM".

3. The Shareholder Rights Plan

[8] Baffinland entered into a shareholder rights plan agreement (the "**Rights Plan**") on January 27, 2009, as an amendment to, and restatement of, the rights plan agreement originally entered into on January 13, 2006. The Rights Plan was approved by Baffinland shareholders on March 24, 2009. The Rights Plan was adopted for the stated purpose of providing:

> … the Board of Directors with sufficient time to explore and develop alternatives for maximizing Shareholder value if a take-over bid is made for the Company, and to provide every shareholder with an equal opportunity to participate in such bid. The Amended Rights Plan encourages a potential acquirer to proceed by a Permitted Bid (as defined in the Amended Rights Plan), which requires the take-over bid to satisfy certain minimum standards designed to promote fairness …
>
> (Baffinland Management Information Circular dated February 2, 2009)

4. The ArcelorMittal Offer and Support Agreement

[9] On November 8, 2010, ArcelorMittal S.A. ("**ArcelorMittal**") announced that it had entered into a support agreement with Baffinland (the "**Support Agreement**") pursuant to which ArcelorMittal agreed to make an all-cash offer to acquire all of the outstanding Baffinland common shares for $1.10 per common share, and all of the outstanding warrants of Baffinland issued on January 31, 2007 for $0.10 per warrant (the "**ArcelorMittal Offer**").

[10] Shareholders holding approximately 26% of the outstanding Baffinland common shares have entered into lock-up agreements with ArcelorMittal under which they have agreed to tender their shares to the ArcelorMittal Offer.

[11] ArcelorMittal cannot take up and pay for shares deposited under the ArcelorMittal Offer until at least December 20, 2010.

[12] The Support Agreement includes terms to the following effect:

(a) ArcelorMittal has the right to terminate the ArcelorMittal Offer unless at least 66 2/3% of the outstanding Baffinland common shares (on a fully-diluted basis) are tendered to its offer, which minimum tender condition cannot be waived or modified to less than 50% of the outstanding common shares;

(b) Baffinland is not permitted to directly or indirectly solicit competing offers or proposals but it is permitted to engage in discussions or negotiations with or furnish information to any person that has made a *bona fide* acquisition proposal that the board of directors of Baffinland (the "**Baffinland Board**") has determined is, or could reasonably be expected to lead to, a "Superior Proposal", as defined in the Support Agreement;

(c) ArcelorMittal has the right for a period of five business days to at least match the price offered under any competing offer or proposal and thereby keep the Support Agreement in place;

(d) Baffinland has agreed to waive the Rights Plan immediately prior to the expiry of the ArcelorMittal Offer, or earlier if requested by ArcelorMittal; and

(e) Baffinland will pay ArcelorMittal a "break fee" of $11 million if, amongst other events, the Support Agreement is terminated in order for Baffinland to accept, approve or enter into a definitive agreement relating to a Superior Proposal.

II. RELIEF SOUGHT BY NUNAVUT

[13] By letter dated November 1, 2010, Nunavut made an application (the "**Application**") to the Commission pursuant to section 127 of the Act seeking:

(a) a permanent order that trading cease in respect of any securities issued, or to be issued, under or in connection with the Rights Plan, including without limitation, in respect of the rights issued under the Rights Plan (the "**Rights**") and any common shares to be issued upon the exercise of the Rights;

(b) a permanent order removing prospectus exemptions in respect of the distribution of Rights on the occurrence of the Separation Time (as defined in the Rights Plan) and in respect of the exercise of the Rights; and

(c) such further and other relief as the Commission deems appropriate.

[14] The Nunavut Offer is expressly conditional upon the termination or discontinuance of the Rights Plan. Nunavut says that the Rights Plan is the only impediment to increasing the price offered under the Nunavut Offer, although it has made no commitment to do so.

III. THE COMMISSION'S DECISION

[15] On November 18, 2010, we held a hearing on the Application and heard evidence and received submissions from Nunavut, Baffinland, ArcelorMittal and Staff.

[16] At the outset of the hearing, we were advised that Baffinland, Nunavut and Staff consented to ArcelorMittal being granted standing to make submissions. We granted standing to ArcelorMittal on the grounds that ArcelorMittal could be affected by the outcome of the Application.

[17] On November 19, 2010, we issued an order cease trading the Rights Plan, with full reasons to follow. We took that action quickly because the Nunavut Offer was set to expire on November 22, 2010. Our order provides:

(a) pursuant to subsection 127(1)2 of the Act, that trading in any securities issued or to be issued under or in connection with the Rights Plan shall cease permanently; and

(b) pursuant to subsection 127(1)3 of the Act, that any exemptions contained in Ontario securities law do not apply permanently to any securities issued or to be issued under or in connection with the Rights Plan.

A copy of our order is attached as Schedule "A" to these reasons.

[18] These are our reasons for issuing the cease trade order in respect of the Rights Plan.

IV. KEY FACTS

[19] The facts that we consider most relevant to our decision are that:

(i) the Rights Plan has in fact provided sufficient time for the Baffinland Board to obtain a competing offer: the ArcelorMittal Offer. Accordingly, the Rights Plan has accomplished the objective of stimulating an auction by obtaining a competing offer for the benefit of Baffinland shareholders;

(ii) the Nunavut Offer is an unsolicited offer that has been outstanding for 57 days as of the date of this hearing; if that offer is amended to increase the price offered, it will remain open for an additional period of ten days from such variation;

(iii) the ArcelorMittal Offer is at a cash price of $1.10 per common share, which is approximately 38% higher than the cash price of $0.80 per common share under the Nunavut Offer. As a result, there is currently no realistic possibility that Baffinland shareholders will tender to the Nunavut Offer or that such offer will be successful at the current price;

(iv) at the date of the hearing, the Baffinland common shares were trading in the market at a price higher than the $1.10 offered under the ArcelorMittal Offer;

(v) as noted above, Baffinland has entered into the Support Agreement which provides, among other things, that:

(a) Baffinland will not solicit any competing offers but may terminate the Support Agreement if a financially superior offer or proposal is made that ArcelorMittal does not at least match;

(b) the Baffinland Board will waive the rights plan immediately prior to the expiry of the ArcelorMittal Offer (or earlier if requested by ArcelorMittal). As a result, the Rights Plan will remain outstanding against all offers until that time;

(vi) The Nunavut Offer has a significant timing advantage over the ArcelorMittal Offer because the Nunavut Offer was made first. Absent the Rights Plan, Baffinland common shares can be taken up under the Nunavut Offer on November 25, 2010, although Nunavut would have to extend the offer for at least ten days if it increases the price offered; ArcelorMittal cannot take up shares under its offer until at least December 20, 2010 and that take-up could be further delayed by the need for regulatory approvals;

(vii) Nunavut says that the Rights Plan is the only impediment to Nunavut increasing the price offered under the Nunavut Offer; Nunavut has not disclosed whether it intends to increase the price under its offer or on what terms it might do so;

(viii) No Baffinland shareholders have expressed any views in this hearing as to whether or not issuing an order cease trading the Rights Plan would be to their benefit or disadvantage; shareholder approval of the Rights Plan occurred prior to the making of either the Nunavut Offer or the ArcelorMittal Offer; and

(ix) Nunavut currently owns approximately 6% of the common shares of Baffinland. Nunavut entered into lock-up agreements with certain Baffinland shareholders under which those shareholders agreed to tender approximately 9.3% of the outstanding common shares to the Nunavut Offer. It appears that those agreements have now terminated as a result of the making of the ArcelorMittal Offer.

[20] As a practical matter, Nunavut cannot take up any Baffinland common shares under its offer until the Rights Plan is terminated. The Support Agreement prevents Baffinland from terminating the Rights Plan until the expiry of the ArcelorMittal Offer (or earlier if requested by ArcelorMittal).

V. LEGAL FRAMEWORK

[21] The Application is made by Nunavut pursuant to subsection 127(1) of the Act to cease trade the Rights Plan. In order to issue such a cease trade order, we must conclude that it is in the public interest to do so. That necessarily requires us to give careful consideration to all of the relevant facts and circumstances in this matter.

1. National Policy 62-202

[22] National Policy 62-202 *Defensive Tactics* ("**NP 62-202**") provides guidance to market participants as to the principles the Commission will apply in exercising its public interest discretion in respect of defensive tactics implemented by an issuer in response to a take-over bid. NP 62-202 is a policy and not a rule, and should be interpreted and applied as such.

[23] NP 62-202 sets forth the objectives of our take-over bid regime as follows:

> The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision.

[24] NP 62-202 goes on to state that:

> The Canadian securities regulatory authorities consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to

> intervene in contested bids. *However, they will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.* [emphasis added]

[25] Accordingly, our focus in deciding the Application is to protect the interests of Baffinland shareholders and one of the issues we must consider is whether the Rights Plan will likely result in Baffinland shareholders being deprived of the ability to respond to the Nunavut Offer.

2. Principles Derived From Previous Decisions

[26] The decision in *Re Canadian Jorex Ltd.* (1992) 15 OSCB 257 ("***Canadian Jorex***") was the first decision in which Canadian securities commissions considered the circumstances in which they would cease trade a shareholder rights plan or "poison pill". The Commission held in *Canadian Jorex* that there comes a time when a shareholder rights plan "has got to go". In our view, it is generally time for a shareholder rights plan "to go" when the rights plan has served its purpose by facilitating an auction, encouraging competing bids or otherwise maximizing shareholder value. A rights plan will be cease traded where it is unlikely to achieve any further benefits for shareholders.

[27] The Commission stated in *Canadian Jorex* that:

> For us, the public interest lies in allowing shareholders of a target company to exercise one of the fundamental rights of share ownership – the ability to dispose of shares as one wishes – without undue hindrance from, among other things, defensive tactics that may have been adopted by the target board with the best of intentions, but that are either misguided from the outset or, as here, have outlived their usefulness.
>
> (*Canadian Jorex, supra,* at p. 5)

[28] At the same time, the Commission has recognized the principle that:

> … The rules of the game should be clear and consistently applied to encourage bidders to come forward and the game must be played in an acceptable timeframe.
>
> (*Re Cara Operations Ltd. and The Second Cup Limited* (2002) 25 OSCB 7997 at para. 58)

[29] Notwithstanding the principles referred to above, at the end of the day, there is no one test or consideration that constitutes the "holy grail" when deciding whether a rights plan should remain in place or be cease traded. The outcome of a poison pill hearing depends on the specific facts and circumstances involved. Ultimately, the Commission must decide in the particular circumstances whether cease trading a shareholder rights plan is in the public interest.

[30] The Commission has identified the following factors as generally being relevant in considering whether it is time for a rights plan "to go":

(i) whether shareholder approval of the rights plan was obtained;

(ii) when the plan was adopted;

(iii) whether there is broad shareholder support for the continued operation of the plan;

(iv) the size and complexity of the target company;

(v) the other defensive tactics, if any, implemented by the target company;

(vi) the number of potential, viable offerors;

(vii) the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;

(viii) the likelihood that, if given further time, the target company will be able to find a better bid or transaction;

(ix) the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;

(x) the length of time since the bid was announced and made; and

(xi) the likelihood that the bid will not be extended if the rights plan is not terminated.

(*Re Royal Host Real Estate Investment Trust*, 1999 LNONOSC 594 at p. 19) ("***Royal Host***")

Almost all of those considerations are relevant, to one extent or another, in the circumstances before us.

VI. ANALYSIS

1. The Auction is Coming to an End

[31] In this case, the Nunavut Offer has been outstanding for 57 days and has resulted in a higher priced competing offer being made by ArcelorMittal. Baffinland has entered into the Support Agreement with ArcelorMittal and has agreed not to solicit competing offers. The auction is not yet over although, as a practical matter, it is unlikely that a third bidder will be prepared to make an offer. Clearly, Nunavut is considering its response to the ArcelorMittal Offer and may increase that offer.

[32] Accordingly, in our view, it is not necessary for the Rights Plan to remain in place in order to facilitate an auction; there are now two competing bids on the table. To us, the most important consideration in these circumstances is that Baffinland has agreed in the Support Agreement not to solicit further offers and, accordingly, it needs no further time to do so. That suggests that the auction process is coming to an end. It seems unlikely that the Rights Plan will achieve more for shareholders in terms of inducing a further offer from a new bidder.

[33] Based on the evidence before us, we have concluded that there is no real and substantial possibility that Baffinland will be able to increase shareholder choice by keeping the Rights Plan in place (see *Re MDC Corp.*, 1994 LNONOSC 211).

2. Nunavut's Timing Advantage

[34] The Commission has concluded in the past that it will not permit a rights plan to be used for the purpose only of eliminating the timing advantage available to a first bidder. The Commission has stated that:

> The Act sets out minimum time periods during which a bid must remain open. That time period is not related to the existence of any other bid. Both *Lac Minerals Ltd.* and *Tarxien supra*, have considered timing issues and in both cases the pill was ceased traded immediately. It was our opinion the Commission should not interfere with the timing issues as between the bidders. To do so would require the Commission to attempt to equalize the expiry dates for all existing and potential bids. Such an equalization, however, would result in a situation where the last bidder would dictate the timing for all previous bidders. Not only would this have a detrimental effect on the bidding process, but such an approach was not contemplated under the Act.
>
> (*Re Chapters Inc. and Trilogy Retail Enterprises L.P.* (2001) 24 OSCB 1657 at para. 37) ("***Chapters***")

[35] We note that the Rights Plan does not by its terms expressly contemplate that it would be used to eliminate the timing difference between multiple bids.

[36] It is clear that one of the effects of the Support Agreement is to eliminate the timing advantage of the Nunavut Offer by maintaining the Rights Plan in the face of that offer. In effect, Nunavut cannot take up common shares under its offer until the expiry of the ArcelorMittal Offer. In our view, Nunavut is entitled as the first bidder to the timing advantage its offer has under our take-over bid regime. In our view, cease trading the Rights Plan now will allow the current offers to proceed in a fair and even-handed manner as contemplated by NP 62-202.

3. Forced Extension of the Nunavut Offer

[37] The effect of leaving the Rights Plan in place would be to force Nunavut to extend its offer for a substantial period of time if Nunavut wishes to compete with the ArcelorMittal Offer. That would expose Nunavut to potential costs and market risks in doing so. By making the Application, Nunavut has indicated that it may not be prepared to accept those costs and risks. In considering the same issue in *Chapters*, the Commission made the following comment:

> We do not consider it unreasonable that Trilogy might have withdrawn its offer. Mr. Wright testified as to the costs and risks associated with keeping an offer outstanding for a longer period of time. As a result, it was unlikely that an extension of the pill would lead to an increase in either the Future Shop Proposed Offer, or the Trilogy bid. In fact, the evidence demonstrated that the maintenance of the pill was precisely the obstacle preventing Trilogy from

> increasing its offer. Consequently, Trilogy chose not to amend its offer unless the pill was removed. Instead, Trilogy announced its intention to enhance its offer if and when the Commission cease traded the shareholders rights plan.
>
> (*Chapters, supra,* at para. 28)

[38] Accordingly, there is an obvious potential benefit to Baffinland shareholders if the Commission immediately issues an order cease trading the Rights Plan: Baffinland shareholders may potentially receive a higher offer from Nunavut. In our view, the fact that Nunavut has not disclosed whether and on what terms it would be prepared to increase its offer does not change that analysis.

4. Coercion

[39] Baffinland made a number of submissions with respect to the coercive nature of the Nunavut Offer, focused primarily on the reservation by Nunavut of the right to waive at any time the minimum tender condition in its offer and take up whatever Baffinland common shares are tendered at the time. The vast majority of take-over bids in this jurisdiction are made with a minimum tender condition that may be unilaterally waived by the offeror. A take-over bid is not inherently coercive for that reason. Baffinland shareholders are not being coerced or forced in any way to tender to the Nunavut Offer. To the contrary, it is unlikely that any shareholders are going to be enticed to tender to the Nunavut Offer given the current price per share under that offer. Baffinland shareholders who do not wish to take the risk that the ArcelorMittal Offer will not be completed can sell their shares in the market (as of the date of the hearing, the market price of the Baffinland common shares was higher than the price offered under the ArcelorMittal Offer). Accordingly, there is nothing to suggest that the Nunavut Offer is fundamentally unfair to or abusive of shareholders.

[40] Baffinland says, however, that Nunavut has not indicated its intentions with respect to varying its offer and that it is possible that future acts by Nunavut could be coercive of Baffinland shareholders. There is no doubt that currently there is uncertainty as to what Nunavut will do. But that uncertainty is inherent in a competitive bidding process. We are not prepared to speculate or assume that Nunavut will take actions in the future that would be coercive of or abusive to Baffinland shareholders. If Nunavut did so, we would intervene to protect the interests of shareholders.

[41] Baffinland has also argued that Nunavut could acquire a number of shares sufficient to block the ArcelorMittal bid and that could result in the premature end to the auction, to the disadvantage of Baffinland shareholders. Presumably, Nunavut would do that by taking up shares under its offer (having waived its minimum tender condition) and/or by purchasing shares in the market. Baffinland submits that the facts in this respect are similar to the facts in *Re Falconbridge Ltd.* (2006) 29 OSCB 6783 ("***Falconbridge***"), where the Commission allowed a rights plan to remain in place in order to prevent an offeror from acquiring shares (under the bid or in the market) that could have put an early end to an auction. In *Falconbridge*, the competing bidder owned 19.9% of the outstanding shares of the target. As a result, the acquisition of a relatively small number of shares by that bidder could have ended the auction.

[42] The important difference in this case is that Nunavut owns only 6% of the outstanding common shares of Baffinland. Given the current price offered under the Nunavut offer, we have to assume that there are virtually no shares tendered to that offer. Accordingly, waiving the minimum tender condition and taking up shares tendered is not a viable strategy for Nunavut at this time. In respect of the possibility of market purchases, there is a 5% limit on the number of shares that Nunavut may purchase and, in any event, the fact that those shares are trading at a market price substantially higher than its offer may be an impediment to Nunavut acquiring shares in the market. As a result, given its current ownership of Baffinland common shares, it seems unlikely that Nunavut would be able to acquire sufficient common shares to frustrate the ArcelorMittal Offer and put an end to the auction. We note, in this respect, that Nunavut's stated objective is to acquire all of the outstanding common shares of Baffinland. Accordingly, we do not view these circumstances as falling within the principle adopted by the Commission in *Falconbridge*.

[43] We also note in this respect that the lock-up agreements originally entered into by Nunavut have now terminated. It is ArcelorMittal that currently has the benefit of lock-up agreements relating to approximately 26% of the outstanding common shares.

[44] Accordingly, we reject any suggestion that the Nunavut Offer is currently coercive of or abusive to Baffinland shareholders.

5. Deference to the Terms of the Support Agreement

[45] Baffinland and ArcelorMittal entered into the Support Agreement under which ArcelorMittal agreed to make the ArcelorMittal Offer. The terms of that agreement were the price Baffinland had to pay for obtaining the ArcelorMittal Offer for the benefit of Baffinland shareholders. Baffinland's agreement to the delayed termination of the Rights Plan, in effect, modifies the rules of the game as they relate to the timing of competing offers. We are not suggesting that there is anything inappropriate in Baffinland having agreed to that. We recognise that all of the parties to this hearing are advancing positions that are to their own strategic advantage.

[46] We do not agree, however, that we should defer to the decision of the Baffinland Board in having agreed to leave the Rights Plan in place until the expiry of the ArcelorMittal Offer. The primary objective of the Baffinland Board was to induce ArcelorMittal to make a higher priced competing offer and they achieved that objective by negotiating and entering into the Support Agreement. It is clear that the Support Agreement provides a number of strategic advantages to ArcelorMittal, including control over when the Rights Plan will be terminated. In any event, in our view, the terms of the Support Agreement cannot restrict our ability to act in the public interest.

6. Deference to the Business Judgment of the Baffinland Board

[47] Baffinland has also submitted that we should consider the factors discussed in *Royal Host* (see paragraph 30 of these reasons) "through the lens of deference to the reasonable business judgment of the target company's directors" as contemplated in *Re Neo Material Technologies Inc.* (2009), 63 BLR (4th) 123 (OSC) ("***Neo***"). We do not agree.

[48] In *Neo*, the Commission concluded that it would defer to the wishes of shareholders who had overwhelmingly voted to keep the relevant rights plan in place in the face of the specific bid that was before shareholders at the time of the vote. The vote was held only two weeks before the hearing. NP 62-202 states that "prior shareholder approval of corporate action would, in appropriate cases, allay" concerns with respect to a defensive tactic. In *Neo*, the Commission concluded that it should defer to the wishes of shareholders as expressed by the recent shareholder vote.

[49] Having concluded that it should do so, the Commission then asked whether there were any circumstances that would lead it to a different conclusion. One such consideration was whether or not the board of directors of Neo was acting in accordance with its fiduciary duties in having decided not to solicit competing bids. If the board was not complying with its fiduciary duties that might have led the Commission to cease trade the Neo rights plan regardless of the shareholder vote (although whether the Commission would have done so is an open question).

[50] One can perhaps do no better in this respect than quote from the Commission's summary of its conclusions in *Neo*. The Commission stated that, in all of the circumstances, it was not satisfied that it was in the public interest to cease trade the Neo rights plan at the particular time. It stated that:

> While we will expand on these points below, we are influenced by the following considerations, as we noted in our decision of May 11, 2009:
>
> (a) the Second Shareholder Rights Plan was adopted by the Neo Board in the context of, and in response to the Pala Offer;
>
> (b) there is no evidence that the process undertaken by the Neo Board to evaluate and respond to the Pala Offer, including the decision to implement the Second Shareholder Rights Plan, was not carried out in what the Neo Board determined to be the best interests of the corporation and of Neo's shareholders, as a whole;
>
> (c) an overwhelming majority of Neo's shareholders (excluding Pala) approved the Second Shareholder Rights Plan while the Pala Offer remained outstanding;
>
> (d) the evidence supports a finding that Neo's shareholders were, or were provided with a reasonable opportunity to be, sufficiently informed about the Second Shareholder Rights Plan prior to casting their votes, and there is no evidence that Neo's shareholders were insufficiently informed; and
>
> (e) there is no evidence to suggest that management or the Neo Board coerced or unduly pressured Neo's shareholders to approve the Second Shareholder Rights Plan.
>
> (*Neo, supra,* at para. 31)

[51] Accordingly, in our view, *Neo* does not stand for the proposition that the Commission will defer to the business judgment of a board of directors in considering whether to cease trade a rights plan, or that a board of directors in the exercise of its fiduciary duties may "just say no" to a take-over bid. Such a conclusion would have been inconsistent with the provisions of NP 62-202 and the relatively long line of regulatory decisions that began with *Canadian Jorex*. To the contrary, the Commission in *Neo* deferred to the wishes of shareholders as contemplated by NP 62-202. *Neo* suggests only that whether or not the board of directors of a target issuer is acting in the best interests of that issuer and its shareholders, and is complying with its fiduciary duties, is a relevant, although secondary, consideration for the Commission in deciding whether to cease trade a rights plan. Whether a board of directors is complying with its fiduciary duties does not determine the outcome of a poison pill hearing.

7. Does the Rights Plan Deny Shareholders the Ability to Tender to the Nunavut Offer?

[52] As noted above, one of the principal questions we must address is whether the Rights Plan is currently denying Baffinland shareholders the ability to respond to the Nunavut Offer. In our view, there is a reasonable argument that the Rights Plan is not denying Baffinland shareholders that ability. There is no doubt that Nunavut has a current offer outstanding. However, as a result of the ArcelorMittal Offer, that offer is not viable in practical terms unless Nunavut increases the price under that offer. Accordingly, no Baffinland shareholders would have any current interest in tendering to the Nunavut Offer. The Rights Plan is not, in any real sense, preventing the Baffinland shareholders from accepting the Nunavut Offer. Put another way, in the circumstances, the Application by Nunavut is premature.

[53] It would have been an easier decision for us if Nunavut had indicated that it was prepared to increase its offer to some specified amount if we cease traded the Rights Plan. That would have blunted a number of the submissions made to us by Baffinland and ArcelorMittal. Obviously, Nunavut does not have any obligation to do that.

[54] While Baffinland's submission in this respect has some resonance with us, we concluded, on balance, in weighing the various considerations discussed above, that it is preferable to allow events with respect to the two competing offers to unfold without hindrance by the Rights Plan. Had we left the Rights Plan in place, we would likely have had the Application back before us in the event that Nunavut increased its offer. That could have put the Commission in the position of having to assess the viability of an amended Nunavut offer and whether Baffinland shareholders might wish to tender to it. The Commission has clearly stated in the past that it is not its role to assess the financial terms or desirability of a particular offer or transaction. That is the role of shareholders. While there is no assurance that there will ultimately be a clear winner between the ArcelorMittal Offer and the Nunavut Offer, Baffinland shareholders are capable of making the relevant choices. As stated by the Commission in *Canadian Jorex*:

> … we have every confidence that the shareholders of a target company will ultimately be quite able to decide for themselves, with the benefit of the advice they receive from the target board and others, including their own advisers, whether or not to dispose of their shares and, if so, at what price and on what terms. And to us the public interest lies in allowing them to do just that.
>
> (*Canadian Jorex, supra,* at p. 6)

[55] It is the Baffinland shareholders who should determine the outcome of the two competing bids for their shares. It is our role to ensure that the two offers proceed in an open, fair and even-handed environment in accordance with applicable securities law. In doing that, we have considered and applied the principles reflected in NP 62-202.

VII. CONCLUSION

[56] For these reasons, we concluded that it was in the public interest to cease trade the Rights Plan immediately. Accordingly, we issued the order attached as Schedule "A" to these reasons.

[57] We appreciated the very helpful materials provided, and submissions made, by all of the counsel in this matter.

Dated at Toronto this 3rd day of December, 2010.

"James E. A. Turner"

James E. A. Turner

"Mary G. Condon"

Mary G. Condon

"Paulette L. Kennedy"

Paulette L. Kennedy

Schedule "A"

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor, 20 Queen Street West, Toronto ON M5H 3S8 | CP 55, 19e étage, 20, rue queen ouest, Toronto ON M5H 3S8

Web site: www.osc.gov.on.ca

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

AND

IN THE MATTER OF BAFFINLAND IRON MINES CORPORATION, IRON ORE HOLDINGS, LP AND ITS WHOLLY-OWNED SUBSIDIARY NUNAVUT IRON ORE ACQUISITION INC.

ORDER
(Section 127)

WHEREAS Nunavut Iron Ore Acquisition Inc. ("**Nunavut Iron**" or the "**Applicant**") applied to the Ontario Securities Commission (the "**Commission**") by way of an application dated November 1, 2010 (the "**Application**") for a permanent order pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") that trading cease in respect of any securities to be issued under or in connection with a Baffinland Iron Mines Corporation ("**Baffinland**") shareholder rights plan approved by shareholders on March 24, 2009;

AND WHEREAS on September 22, 2010, an unsolicited offer was made by Nunavut Iron to purchase all of the outstanding common shares of Baffinland (the "**Baffinland Shares**") for $0.80 in cash per share and such offer was extended on October 28, 2010 and further extended on November 8, 2010 (the "**Nunavut Offer**");

AND WHEREAS on November 8, 2010, ArcelorMittal S.A. ("**ArcelorMittal**") announced that it had entered into a support agreement with Baffinland (the "**Support Agreement**") pursuant to which it agreed to make an offer to acquire all of the outstanding Baffinland Shares for $1.10 cash per share, and all of the outstanding warrants of Baffinland issued on January 31, 2007 (the "**2007 Warrants**") for $0.10 cash per 2007 Warrant (the "**ArcelorMittal Offer**");

AND WHEREAS following the announcement of the ArcelorMittal Offer on November 8, 2010, Nunavut extended its offer to November 22, 2010;

AND WHEREAS on November 9, 2010, a Notice of Hearing was issued by the Office of the Secretary setting down the hearing of the Application on November 18, 2010;

AND WHEREAS the Application was heard on November 18, 2010 and Nunavut Iron, Baffinland, ArcelorMittal and Staff appeared at such hearing;

AND WHEREAS at the outset of the hearing, ArcelorMittal was granted standing to make oral submissions, on consent of the parties, and on the grounds that ArcelorMittal could be directly affected by the outcome of the Application;

AND WHEREAS Baffinland implemented a shareholder rights plan (the "**Rights Plan**") that was adopted by its board of directors (the "**Baffinland Board**") on January 27, 2009 and was subsequently approved by Baffinland shareholders on March 24, 2009;

AND WHEREAS the Applicant submits that it is in the public interest for the Commission to cease trade the Rights Plan in order to allow Baffinland shareholders to decide for themselves whether to accept the Nunavut Offer or the ArcelorMittal Offer;

AND WHEREAS Baffinland submits, among other things, that maintaining the Rights Plan would protect the interests of Baffinland shareholders and would facilitate the auction for the Baffinland Shares;

AND WHEREAS the Commission considered the evidence, relevant case law and the submissions of Nunavut Iron, Baffinland, ArcelorMittal and Staff at the hearing;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this order and the Commission will issue reasons for this order in due course;

IT IS HEREBY ORDERED:

1. pursuant to subsection 127(1)2 of the Act, that trading in any securities issued or to be issued under or in connection with the Rights Plan shall cease permanently; and

2. pursuant to subsection 127(1)3 of the Act, that any exemptions contained in Ontario securities law do not apply permanently to any securities issued or to be issued under or in connection with the Rights Plan.

DATED at Toronto this 19th day of November, 2010.

"*James E.A. Turner*"

James E.A. Turner

"*Mary G. Condon*"

Mary G. Condon

"*Paulette L. Kennedy*"

Paulette L. Kennedy