ALBERTA SECURITIES COMMISSION

DECISION

Citation: ARC Equity Management (Fund 4) Ltd., Re, 2009 ABASC 390 Date: 20090810

ARC Equity Management (Fund 4) Ltd. and ARC Equity Management (Fund 5) Ltd.
Applicants

- and -

Profound Energy Inc. and Paramount Energy Trust
Respondents

Panel:	Glenda Campbell, QC Stephen Murison
Appearing:	Peter Howard, Craig Story, Charles Kraus, Amanda Linett and Christie Innes for the Applicants
	Michael Donaldson and Edward Brown for Profound Energy Inc.
	Robert Staley, Brett Code, John Kousinioris and Brent Kraus for Paramount Energy Trust
	Tracy Clark and Blaine Young for Commission Staff
Date of Hearing:	4 August 2009
Date of Decision:	10 August 2009

I. INTRODUCTION

[1] ARC Energy Management (Fund 4) Ltd. ("ARC 4") and ARC Energy Management (Fund 5) Ltd. ("ARC 5") seek certain relief from the Alberta Securities Commission (the "Commission"). The relief sought would relate to Profound Energy Inc. ("Profound"); Paramount Energy Trust ("Paramount"); 1463072 Alberta Ltd. ("1463072"); certain common shares of Profound (the "Private Placement Shares") acquired by Paramount under a private placement (the "Private Placement") announced concurrently with the announcement of a proposed take-over bid (the "Bid") by Paramount for all outstanding common shares of Profound (the "Profound Shares"); and the voting of the Private Placement Shares in connection with a proposed amalgamation of Profound and 1463072 (the "Merger"). For simplicity we refer to the Bid, the Private Placement and the Merger together as the "Transaction".

[2] Specifically, ARC 4 and ARC 5 sought orders under section 198(1) of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") that:

- would bar Paramount, 1463072 and their affiliates from acquiring any additional Profound Shares as part of the Merger if Paramount, 1463072 or their affiliates "purport to vote the Private Placement Shares in favour of" the Merger; and

- would stay any meeting of Profound shareholders with respect to the Merger or "the implementation of any resolution passed thereat in connection with" the Merger, pending the final disposition of the application to the Commission and any appeals.

[3] A special meeting of Profound shareholders has been called for 13 August 2009 (the "Special Meeting"), at which they will be asked to vote on the Merger. In view of the relief sought in the application and the imminent Special Meeting, an expedited Commission hearing was held on 4 August 2009. We received written and oral submissions from ARC 4, ARC 5, Paramount, Profound and staff of the Commission ("Staff").

[4] For the reasons set out below, the application is denied.

II. BACKGROUND

A. The Parties

1. ARC

[5] ARC 4 and ARC 5 are private corporations subsisting under the *Canada Business Corporations Act* and owned directly or indirectly by their officers and employees. ARC 4 is the general partner of certain limited partnerships comprising ARC Energy Venture Fund 4 ("ARC Fund 4"), and also the fund manager of ARC Fund 4. ARC 5 is the general partner of three ARC Energy Fund 5 limited partnerships (collectively, "ARC Fund 5"). ARC Fund 4 and ARC Fund 5 are private equity funds that invest in securities of various issuers active in the energy industry. Although ARC 4, ARC 5, ARC Fund 4 and ARC Fund 5 are separate entities, the application was made jointly by ARC 4 and ARC 5 and disclosed no divergence of interests among these four entities of significance to the application. Therefore, for simplicity we make

no distinction among the four entities, referring below to each or all of them, in the singular, as "ARC".

2. Profound

[6] Profound is a junior oil and gas company based in Calgary, Alberta. It explores for and produces oil and natural gas in Alberta. The company subsists under the *Business Corporations Act* (Alberta) (the "ABCA"). It is a reporting issuer in Alberta, British Columbia, Saskatchewan, Manitoba, Ontario, Québec and New Brunswick. Profound Shares are listed on the Toronto Stock Exchange (the "TSX").

3. Paramount

[7] Paramount is an unincorporated energy trust subsisting under the laws of Alberta. It is a reporting issuer in all provinces and territories of Canada. Trust units of Paramount are listed on the TSX.

4. 1463072

[8] 1463072, an indirect wholly-owned subsidiary of Paramount subsisting under the ABCA, is the vehicle used by Paramount to acquire Profound Shares under the Bid. There is no suggestion that 1463072 operates independently of Paramount in relation to matters in issue before us and therefore, for simplicity we make no distinction between them, referring below to either or both as "Paramount".

B. Relationship Between ARC and Profound

[9] On 24 April 2009 Profound reported 37 129 008 Profound Shares outstanding; the current total is approximately 47 000 000. ARC exercises control or direction over a total of 11 522 149 Profound Shares, representing approximately 31% of the Profound Shares outstanding before the Private Placement (as calculated by ARC), and approximately 24.8% after (as calculated by ARC; Paramount's calculation was approximately 24.45%). According to ARC, it acquired its ownership in Profound "well in advance of the announcement of the proposed Transaction, having acquired the majority of [its] shares in predecessor companies more than two years ago". A senior officer of ARC is also a director of Profound (the "ARC Nominee").

C. Paramount's Interest in Profound

[10] A 24 April 2009 directors' circular (the "April Profound Directors' Circular") issued by the board of directors of Profound (the "Profound Board") indicated that, in late 2008, "poorer than expected drilling results, increasing bank debt and falling commodity prices" had Profound's management considering strategic alternatives. Profound approached a limited number of parties (including, according to Paramount, ARC) who might have an interest in completing a strategic transaction. In February 2009 Paramount's management communicated Paramount's interest in a possible strategic transaction with Profound, and Paramount and Profound entered into a confidentiality agreement.

[11] ARC learned from Profound, also in February 2009, "that Paramount was interested in an acquisition transaction with Profound".

[12] According to the April Profound Directors' Circular:

- Profound received a non-binding proposal from Paramount on 4 March 2009 (the "First Proposal");
- the Profound Board considered the First Proposal on 4 March 2009 and authorized Profound's management to continue negotiations with Paramount to determine whether Paramount would be willing to increase the consideration proposed under the First Proposal;
- the Profound Board appointed a committee of independent directors (the "Profound Special Committee") on 4 March 2009 to consider strategic alternatives for Profound;
- the mandate of the Profound Special Committee was broad, including consideration of the status quo; the appropriateness of any take-over, arrangement, sale or merger of Profound by, with or to any interested party; completion of an equity or debt financing; a joint venture with a strategic partner; a sale of all, substantially all or a substantial part of Profound's assets; or any combination of such alternatives;
- the Profound Special Committee retained FirstEnergy Capital Corp. ("FirstEnergy") as its financial advisor, which in turn identified and approached or considered 18 possible candidates as potential acquirers of Profound;
- the First Proposal expired on 6 March 2009;
- Profound received another non-binding proposal from Paramount on 12 March 2009 (the "Second Proposal"), which increased the proposed consideration and set out terms under which Paramount would be prepared to make an offer for all Profound Shares;
- after consideration of the Second Proposal by the Profound Special Committee and a review and consultation with FirstEnergy, Profound accepted the Second Proposal, all on 14 March 2009;
- the Profound Special Committee met formally on nine occasions (the first such meeting was on 11 March 2009 and the last on 29 March 2009, according to meeting minutes before us) and informally numerous other times, and also met several times (in person or by telephone) with ARC; and
- from 14 to 30 March 2009 agreements in relation to the Second Proposal were negotiated and Profound completed its due diligence review of Paramount.

[13] ARC understood that the First Proposal "was conditioned on [ARC locking up] its Profound Shares to the transaction", something that ARC "declined to do at that time". Between

13 and 27 March 2009 ARC had several discussions with Profound, FirstEnergy and Paramount. According to ARC, in one such discussion with FirstEnergy on 27 March 2009 ARC was asked whether it would sign lock-up agreements committing its support for Paramount's proposed acquisition of Profound and was told that, if it did not sign such agreements, the proposed acquisition would proceed by way of a take-over bid and "a concurrent private placement would be included as part of the structure of the transaction, thereby giving Paramount sufficient shares to hold 19.9% of the pro forma outstanding Profound Shares".

[14] On 27 March 2009 the Profound Special Committee concluded that the Bid and concurrent Private Placement were in the best interests of Profound and recommended that the Profound Board approve the Bid and concurrent Private Placement. According to meeting minutes, in so concluding and recommending, the Profound Special Committee considered that Profound's net debt was $61.5 million, its credit facility of $70 million was under review and its bank line could be reduced to between $56 and $62 million (possibly less, we were told, than had already been borrowed under the facility); considered alternatives that might provide Profound with additional funds to continue its operations in the normal course; and considered the interests of Profound shareholders and other stakeholders.

[15] On 31 March 2009 Paramount and Profound announced that they had entered into a support agreement (the "Support Agreement") under which Paramount agreed to make the Bid for all Profound Shares, offering Profound shareholders either or both cash or Paramount trust units (subject to caps on each). The Support Agreement provided that Paramount's obligation to make the Bid was conditional on, among other things, the completion of the Private Placement.

[16] The same announcement disclosed the Private Placement, under which Paramount agreed to pay cash to purchase 9 224 310 special warrants of Profound (the "Special Warrants"), convertible one-for-one into Profound Shares (as noted, we refer to these Profound Shares as the "Private Placement Shares"). The announcement elaborated:

> . . . Conversion is automatic in certain events and otherwise at the option of [Paramount]. The [S]pecial [W]arrants are also redeemable by [Paramount] at their subscription price in certain events. The proceeds from the [P]rivate [P]lacement will be deposited in trust on closing of the [P]rivate [P]lacement and will be releasable to Profound on conversion of the [S]pecial [W]arrants to [Private Placement Shares] or to [Paramount] on redemption. Proceeds from the [P]rivate [P]lacement are intended to be initially used by Profound to reduce net debt and for working capital purposes. Completion of the [P]rivate [P]lacement and the conversion of the [S]pecial [W]arrants to [Private Placement Shares] is subject to a number of conditions but is not conditional on the successful completion of the [Bid]. The [P]rivate [P]lacement as well as the issuance of the [Private Placement Shares] upon conversion of the [P]rivate [P]lacement are subject to the approval of the [TSX].
>
> In the event the [Bid] is not completed, the [P]rivate [P]lacement provides Profound with necessary funding to continue operations, priced at an attractive premium in excess of 15% of Profound's current share price.

[17] Consistent with this description, the agreement governing the Special Warrants (the "Special Warrant Agreement") provided that the Special Warrants would automatically convert into Private Placement Shares in specified circumstances including Paramount not taking up (under the Bid) at least 50.1% of the Profound Shares. There were also specified "Redemption

Events" – one being Paramount taking up (under the Bid) at least 50.1% of the Profound Shares – the occurrence of which would give Paramount the option of either converting Special Warrants into Private Placement Shares (its Special Warrant subscription money then being released to Profound) or redeeming Special Warrants and receiving back its subscription money. The Special Warrant Agreement also contemplated that, if a "Superior Proposal" (as defined in the Support Agreement)was accepted by holders (other than Paramount) of a majority of Profound Shares, Paramount would be required to tender or vote all Private Placement Shares to or in favour of such Superior Proposal. By 6 April 2009 the Support Agreement and the Special Warrant Agreement were publicly available on SEDAR.

[18] Also on 31 March 2009, Profound announced the immediate implementation of a shareholder rights plan (the "Profound Rights Plan"), which would be submitted for ratification at the next annual and special meeting of Profound shareholders and be subject to TSX acceptance. Under the Profound Rights Plan, rights would be triggered – with dramatic dilutive effect – in the event of an acquisition of 20% or more of the Profound Shares, or in the event that an existing holder of 20% or more of the Profound Shares were to acquire more than an additional 0.25% of the outstanding Profound Shares, unless either such acquisition was a "Permitted Bid". In announcing the Profound Rights Plan, Profound confirmed that the Bid was a Permitted Bid. The Profound Rights Plan would effectively come to an end with the expiry of a successful Permitted Bid.

[19] By letters dated 31 March and 1 April 2009 ARC requested that the TSX not accept the Profound Rights Plan, and further that the TSX exercise its discretion under section 603(i) of the TSX Company Manual not to conditionally approve the issuance of the Special Warrants (and the Private Placement Shares issuable on their exercise) or alternatively require Profound shareholder approval of the Private Placement as a condition of approval. Between 6 and 8 April 2009 the parties made written submissions to the TSX.

[20] By an 8 April 2009 letter to Profound's counsel (copied to Staff), ARC's counsel stated that they had instructions to seek relief from the Commission and anticipated making a filing in that regard by 9 April 2009; that ARC might also appeal to the Ontario Securities Commission (the "OSC") any TSX decision approving the Private Placement; and that ARC had not ruled out bringing a court application for oppression and breach of fiduciary duty.

[21] On 9 April 2009 the TSX verbally informed Profound's counsel, who in turn informed ARC's counsel, that the TSX had approved the Private Placement, and by a 13 April 2009 letter to Profound's counsel the TSX confirmed its conditional approval of the listing of the Private Placement Shares (together, the "Listing Approval"). The Listing Approval apparently imposed no conditions on how the Private Placement Shares (if issued) might be voted. On 12 or 13 April 2009 ARC's counsel communicated (apparently to Paramount and Profound) that ARC would not at that time be pursuing a challenge to the Listing Approval; ARC so informed Staff on 13 April 2009.

[22] On 14 April 2009 Profound issued the Special Warrants – relying, Paramount contended, on ARC's acquiescence. In contrast, ARC contended that, due to ARC's continuing attempts to resolve the situation with Paramount, "Paramount could never have realistically been under the

impression that [ARC's] opposition to the Private Placement had been dropped". It was forcefully argued before us by ARC that Paramount and Profound had proceeded with the Private Placement and that Paramount had exercised the Special Warrants in the knowledge that ARC did not approve, and by Paramount and Profound that ARC had led them to believe that ARC acquiesced to the Private Placement and its foreseeable consequences. However, it is clear to us that ARC never abandoned its opposition to the Private Placement and that Paramount and Profound never had good reason to believe that ARC had. That said, Paramount and Profound made no secret of their respective objectives and never suggested to ARC that what transpired would not.

[23] FirstEnergy provided the Profound Board with a 23 April 2009 fairness opinion, which indicated that "the consideration to be received by the Profound shareholders" under the Bid was "fair, from a financial point of view, to the Profound shareholders".

[24] On 24 April 2009 Paramount formally launched the Bid by mailing a take-over bid circular and offer to purchase, which contained summaries of the terms of the Support Agreement and the Special Warrant Agreement. The Bid, which was to expire on 1 June 2009, was conditional on 66⅔% of the outstanding Profound Shares being tendered.

[25] In the April Profound Directors' Circular the Profound Board recommended that Profound shareholders tender to the Bid. The Profound Board noted that, in reaching its decision to recommend acceptance of the Bid, it considered several factors, including that the Bid "provides for a significant premium (approximately 100%) to market price of Profound Shares on the date prior to the announcement of" the Bid.

[26] On 1 June 2009 Paramount announced that approximately 53% of the outstanding Profound Shares had been tendered to the Bid – less than the 66⅔% required by the minimum tender condition – and extended the Bid for two weeks to 15 June 2009.

[27] On 15 June 2009 Paramount announced that the 66⅔% minimum tender condition had not been satisfied – at that time approximately 56.8% of the outstanding Profound Shares had been tendered or acquired through permitted market purchases over the TSX – and extended the Bid for two further weeks to 29 June 2009.

[28] However, two days later, on 17 June 2009, Paramount announced that approximately 58.3% of the outstanding Profound Shares had then been tendered or acquired, that the minimum tender condition was being varied from 66⅔% to 50.1% – that is, to below the percentage already tendered or acquired – and that the Bid was being further extended to 30 June 2009.

[29] On 30 June 2009 Paramount announced that it had taken up the Profound Shares tendered to the Bid – those together with the Profound Shares acquired by Paramount (not counting Private Placement Shares issuable on conversion of the Special Warrants) representing approximately 59.4% of the outstanding Profound Shares – and that the Bid was being extended two further weeks to 14 July 2009. Paramount concurrently announced the conversion of the Special Warrants for an additional 9 224 310 Profound Shares. These Private Placement Shares,

together with those tendered under the Bid or otherwise acquired, gave Paramount an aggregate of approximately 67.34% of the outstanding Profound Shares as at 30 June 2009.

[30] According to Paramount, immediately on the release to Profound of Paramount's Private Placement subscription proceeds – approximating $6.9 million – that money became subject to a security interest in favour of Profound's lender and was used to reduce Profound's outstanding debt.

[31] Having acquired the majority of Profound Shares, Paramount installed its people in Profound's management and on the Profound Board. On 30 June 2009 Profound announced the resignation of two senior officers. On 3 July 2009 Profound announced the resignation of directors and the appointment of replacements, one such replacement also being appointed as Profound's president and chief executive officer. ARC noted that each of the new directors was a director or officer (or both) of Paramount Energy Operating Corp., the "administrator of Paramount", and that the ARC Nominee continued as a director of Profound.

[32] On 2 July 2009 Valiant Trust Company, as agent for Profound, filed a notice concerning the Special Meeting, with a record date for shareholder participation of 14 July 2009.

[33] A modest number of additional Profound Shares – 477 940 – was tendered to and taken up under the Bid by its expiry on 14 July 2009. Paramount announced on that date that it then owned, directly or indirectly, approximately 68.36% of the outstanding Profound Shares. (Paramount calculated that this represented 87.14% of the Profound Shares not owned by ARC, not counting the Private Placement Shares.)

[34] On 16 July 2009 Paramount and Profound announced that the Profound Board had approved the execution of an amalgamation agreement setting out the terms of the Merger: Profound would amalgamate with Paramount; and Profound Shares of holders other than Paramount would be exchanged one-for-one for redeemable preference shares in the resulting amalgamated corporation, which would then be automatically redeemed for the same consideration as was offered under the Bid. The Merger would be presented for shareholder approval at the Special Meeting to be held on 13 August 2009. (Under the ABCA, the Merger requires approval by a special resolution passed by at least 66⅔% of the votes cast.) Paramount advised that it would vote all its Profound Shares (as ARC noted, that would include the Private Placement Shares) in favour of the Merger.

[35] Profound issued a 15 July 2009 notice and management information circular in relation to the Special Meeting.

[36] ARC commenced the application before us by a letter dated 20 July 2009.

III. THE APPLICATION: COMPETING POSITIONS

A. Position of ARC

[37] ARC attacked the conduct of Paramount and the Profound Board as improper, unfair, "abusive to the capital markets and contrary to the public interest". Focusing on the Private Placement and the fact that Paramount acquired only 58.3% of the Profound Shares under the

Bid, ARC stressed that it is the Private Placement Shares that put Paramount (absent our intervention) in the position of being able to ensure the necessary 66⅔% approval of the Merger.

[38] ARC characterized the Private Placement as little more than a mechanism designed to ensure that Paramount could, one way or another, effect the Merger. The essence of ARC's position was that the Private Placement was an improper "device . . . to impact a change of control transaction", effectively "tak[ing] the decision away from the shareholders". More specifically, ARC contended that the Private Placement was used "to artificially engineer the Transaction to frustrate and circumvent Profound shareholders' expectations of a legitimate 66⅔% approval threshold" – or, as ARC also suggested, that it effectively (but improperly) lowers the threshold of required shareholder support for the Merger below that prescribed by corporate law – and, as such, "is manifestly unfair to Profound shareholders". ARC contended that this is fundamentally more important than "deal or regulatory certainty".

[39] In ARC's implicit contention, the ability of the remaining minority Profound shareholders (who did not tender to the Bid) to block the Merger – to have their opposing votes genuinely count – would be subverted were Paramount allowed to vote its Private Placement Shares in favour of the Merger.

[40] In its written submissions, ARC argued that the Private Placement was not in the nature of a true capital-raising venture – "not completed for a proper purpose (e.g.[,] the need for financing)" and not apparently "offer[ing] a significant level of financial comfort for Profound". The Redemption Event mechanism under the Special Warrant Agreement, ARC suggested, gave Paramount a cost-free option: its subscription payment would be refunded to it if it did not need to convert or exercise the Special Warrants to obtain additional Profound Shares, but those additional shares were available if needed. ARC noted that the Private Placement "was implemented" only after it was apparent that ARC would not sign lock-up agreements supporting the Bid, and contended that the Private Placement "severely restricted the ability of a third party to tender a competing offer" and "was designed to ensure transactional success" for Paramount.

[41] In oral submissions, ARC refined its position – submitting that the issues before us were narrow and straightforward, turning, in essence, on whether a principle of securities laws was known to Paramount and Profound but contravened, the remedy for which lies in the relief sought by ARC. The "principle" that ARC cited was that enunciated by an OSC panel in *Re HudBay Minerals Inc*. (2009), 32 O.S.C.B. 3733 (at para. 266):

> . . . an acquirer should not generally be entitled, through a subscription for shares carried out in anticipation of a merger transaction, to significantly influence or affect the outcome of the vote on that transaction.

[42] ARC contended that this panel is presented with the following five questions that must be answered:

- Is that statement by the *HudBay* OSC panel correct and does it constitute a "principle" forming "part of the regulation of the capital markets of Canada"?

- Did Paramount have reasonable notice of that principle when it structured the Bid?

- Does the proposed course of action contravene that principle?

- Is there any reason why we should not require compliance with that principle?

- What is our jurisdiction and how do we effect compliance with minimal intrusiveness?

[43] Our answers to these questions, ARC contended, would determine the outcome of the application – that is, whether we would act to bar Paramount from voting its Private Placement Shares in favour of the Merger. ARC argued that no investigation into the merits of the Private Placement or of the Profound Board's conduct, nor a rehearing or reconsideration of the Listing Approval, would be necessary.

[44] ARC also emphasized that this is not an appeal of (or "collateral" attempt to appeal) the Listing Approval, and that Paramount was aware throughout the process that ARC remained concerned about the Private Placement.

[45] In support of its position, ARC proffered letters of support from a fellow Profound shareholder (associated with ARC) and two institutional investors, who are apparently ARC investors.

B. Position of Paramount

[46] Paramount argued first that ARC's application is effectively barred because it amounts to an improper collateral attack on the Listing Approval or an improper attempt to have reheard the issues that the TSX had already decided and for which decision "the TSX is entitled to deference". Paramount contended that ARC advanced the same arguments in this proceeding (although reframed to reflect the public interest) as before the TSX. Paramount asserted that the granting of the Listing Approval amounted to an adjudication by the TSX on ARC's arguments. ARC, in Paramount's submission, had an available avenue to challenge that decision, namely by appeal, but did not pursue such an appeal during the available appeal period, which has expired.

[47] Second, Paramount argued that no contraventions of Alberta securities laws have been alleged. Accordingly, the relief ARC seeks can only be granted in the exercise of the Commission's public interest jurisdiction, but no grounds exist here for such exercise. Paramount stressed, in essence, that each element of the Transaction was (or would be) effected in compliance with law – including Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*, a rule in force in Ontario (and some other provinces, but not Alberta) that Paramount described as "represent[ing] the culmination of the OSC's efforts to balance the interests of the minority against a 'tyranny of the minority'" – and with the consent needed from the TSX. It would, in Paramount's submission, be inappropriate to give ARC a veto "to which [it is] not entitled".

[48] Among Paramount's arguments were that the relief ARC seeks would deprive Paramount of a key attribute of the Private Placement Shares it bargained, paid and put capital at risk for – the attached voting right (in context, specifically the ability to exercise that right in favour of the Merger); that this would amount to unwinding – but only partly – a completed transaction "well after its closing" (emphasis in original); that the principle adduced by ARC is in fact only an expression of a view explicitly identified as obiter dicta by an OSC panel whose decision was really focused on entirely other matters; that a reading of that obiter must take into account the key word "generally"; and that the circumstances here, including the purpose and terms of the Private Placement, are not such as would invoke that obiter. Paramount did not accept ARC's characterization of the Private Placement, submitting instead that the Private Placement had been negotiated at arm's length, that the Profound Special Committee and Profound Board deliberated appropriately in exercising their business judgment, that "Profound had acute funding issues" and that the money it received from the Private Placement "provided Profound with the necessary funding it would require in the event the [Bid] failed". Granting the relief sought by ARC would, in Paramount's contention, "harm the confidence of capital market participants".

[49] Paramount further submitted that granting ARC's application would be particularly unfair to Paramount – and troubling to market participants generally – in that it would retroactively alter an understanding on which Paramount relied, reasonably believing it had certainty (based on the Listing Approval, the absence of an appeal therefrom and ARC's own indication that it would not pursue such an appeal). Paramount stressed "that there is a public interest in having transactional certainty" and in enforcing statutory deadlines (such as the deadline for appealing the Listing Approval).

[50] Were the Commission minded to implement a principle as broad as that urged by ARC, Paramount essentially suggested that a far more appropriate approach would be through the policy-making process, in which opinions can be elicited from a variety of sources, on the basis of which an informed and balanced response could be formulated.

C. Position of Profound

[51] Profound echoed and adopted the positions advanced by Paramount and essentially emphasized its view that the Private Placement was the result of a rigorous and fair process that it characterized as both necessary and beneficial to the company. If there is nothing "abusive", according to Profound, the Commission should not – indeed cannot – make the orders sought under section 198(1) of the Act.

[52] Profound suggested that acceding to ARC's application would involve our second-guessing, improperly, the exercise of business judgment by the Profound Board. It also expressed strongly its view that ARC's application represents an abuse of process invoking legal principles of res judicata and issue or action estoppel and is contrary to the public interest, given that the TSX has already decided the issues and that ARC waited until July to make its application.

[53] Profound also argued that the relief sought would prejudice Profound, its shareholders and others that it termed "stakeholders", including its employees and its lender, and would give

ARC "a veto that it has not bargained for". According to Profound, it is essential to balance all interests and factors, including "deal certainty".

D. Position of Staff

[54] Staff shared some of the positions adopted by Paramount and Profound. Staff was concerned that the orders sought may not be appropriate because not all minority Profound shareholders may support ARC's position or desire to remain in a company with two large shareholders (by implication, ARC and Paramount) hostile to each other.

[55] Staff emphasized the Commission's broad public interest jurisdiction and noted that the "business judgment rule" in corporate law should not trump that jurisdiction. However, Staff cited jurisprudence that, they contended, makes clear that the exercise of our public interest jurisdiction is warranted only when conduct in issue is abusive, not merely unfair. Here, Staff submitted, the Private Placement "was not abusive and, as such, does not warrant the exercise" of our public interest jurisdiction. This was, according to Staff, in some measure because of the adequate level of disclosure by Paramount in the Bid and during the process. Non-abusive matters, in Staff's view, are better addressed through policy development.

[56] Staff also submitted that events had reached a stage at which the issues – specifically, voting on a special resolution and the remedies of any unhappy shareholder – fall more under the rubric of corporate law than securities laws.

IV. ANALYSIS

A. Application Barred by Operation of Law?

[57] We consider first the question of whether ARC's application is barred by operation of law, on one or more of the grounds of res judicata, estoppel, collateral attack or abuse of process.

[58] We are in no doubt that the TSX, when granting the Listing Approval, had before it many, perhaps most, of the essential facts and arguments presented to us. Further, the task before the TSX was more than merely mechanical or technical: the TSX is obliged by its own rules, before approving a transaction or related listing application, to consider the effect that the transaction may have on the "quality of the marketplace". As the OSC panel in *HudBay* noted (at para. 229): "The concept of the quality of the marketplace is not necessarily the same as the public interest under securities laws. However, both concepts raise similar issues and the considerations in applying the two concepts in any particular circumstances will be similar". Moreover, as noted in *HudBay* (at para. 128), the TSX (like this Commission) has discretion to impose conditions as part of a decision it makes.

[59] We do not have before us an exposition of the analysis and reasoning that led the TSX to grant the Listing Approval, but much of what ARC asked us to do in this proceeding might also reasonably be expected to have been asked of, and considered and decided by, the TSX.

[60] In the circumstances, Paramount and Profound contended, if ARC was dissatisfied, its recourse lay in an appeal of the Listing Approval. As noted, ARC at one point communicated its contemplation of such action. However, ARC did not appeal and the period for doing so is past. Paramount and Profound argued vigorously that it is a collateral attack or an abuse of legal

process to reargue the same facts and issues – and thereby attempt to obtain a different outcome – here.

[61] We would be inclined to agree, were it clear that the issues before the TSX at the time were indeed the same as those before us now. However, that clarity is lacking. The underlying facts are not entirely the same. Before the TSX, an ultimate merger was a hypothetical prospect. Subsequent to the Listing Approval: (i) Paramount exercised its Special Warrants to acquire the Private Placement Shares; (ii) the Merger has taken more tangible form and is being put to an imminent vote; and (iii) Paramount has expressed its intention to vote the Private Placement Shares in favour of the Merger. In the absence of an exposition of the TSX's reasoning, we simply do not know how it foresaw the future nor, in particular, what focus or importance it attached at the time to the present eventuality – the imminent prospect of Paramount voting the Private Placement Shares at the Special Meeting. Moreover, and notably, we reiterate that "[t]he concept of the quality of the marketplace is not necessarily the same as the public interest under securities laws". The jurisdictions of the TSX and the Commission, despite some parallels, are distinct.

[62] In short, in our view the extent of duplication between, on the one hand, what the TSX decided on the facts before it in the exercise of its jurisdiction and, on the other, the application and the relief sought here is not sufficient, or sufficiently apparent, to render the present proceeding an abuse of legal process or otherwise legally barred. Accordingly, we consider the application on its merits, to which we now turn.

B. Exercise of Public Interest Jurisdiction Warranted?

1. Relief Sought

[63] To achieve its objective of barring Paramount from voting the Private Placement Shares in favour of the Merger, ARC sought an order or orders under section 198(1) of the Act. The Act does not expressly empower us to prohibit voting of a security. Instead, ARC asks that we apply section 198(1)(a) (our power to order the cessation of trades in securities) with some creativity, to effectively block Paramount and its affiliates from acquiring any additional Profound Shares as part of the Merger (thereby foiling the Merger) if Paramount votes the Private Placement Shares in favour of the Merger.

2. Public Interest Jurisdiction

[64] None of the parties alleged that any of the circumstances or conduct surrounding the Transaction involved contraventions of Alberta securities laws. That, however, does not dispose of the application or preclude us from taking action we consider appropriate in the public interest.

[65] The Commission is charged with administering Alberta securities laws in the public interest with a view to protecting investors, facilitating a fair and efficient capital market, and fostering confidence in that capital market and among capital market participants generally. Our authority to make orders under section 198(1) of the Act is not restricted to instances in which we find a specific contravention of a specific provision of securities laws; the test, always, is whether the public interest is best served by the making of an order. We have, therefore, a broad

public interest jurisdiction. It is sufficiently broad to enable us, were we to consider it appropriate, to effect the result sought by ARC.

[66] That said, our public interest jurisdiction is to be exercised with care. The scope of the comparable jurisdiction in Ontario, and its use, have been discussed in several OSC decisions. Thus, in *Re Cablecasting Ltd.*, [1978] O.S.C.B. 37 (at 43) the OSC gave guidance as to when it might intervene in a transaction through the exercise of its public interest jurisdiction in the absence of a contravention of securities laws:

> If the transaction under attack was of an entirely novel nature, Commission action might seem more appropriate. Another relevant consideration in assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements. Where this is the case the Commission will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle.

[67] In *Re Canadian Tire Corp*. (1987), 10 O.S.C.B. 857 (affirmed (1987), 35 B.L.R. 117 (Ont. Div. Ct.), leave refused (1987), 35 B.L.R. xx (Ont. C.A.)) the OSC commented on the same issue. There the OSC recognized that it should "move with caution" (at 932) but would act if necessary to prevent an abusive transaction from occurring (at 947-48):

> . . . Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the Commission took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its view of fairness through the use of the cease trade power . . . . The Commission's mandate under section 123 [the counterpart to our section 198] is not to interfere in market transactions under some presumed rubric of [ensuring] fairness.
>
> The Commission was cautious in its wording in [*Cablecasting*] and we repeat that caution here. To invoke the public interest test of section 123, particularly in the absence of a demonstrated breach of the Act, the regulations or a policy statement, the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.

[68] More recently, the OSC in *Re Sears Canada Inc.* (2006), 22 B.L.R. (4th) 267 (affirmed (2006), 21 B.L.R. (4th) 311 (Ont. Div. Ct.)) similarly ruled (at paras. 304-08) that, in the absence of a contravention, it would intervene on public interest grounds only if there were a finding that the conduct under scrutiny was abusive of shareholders particularly and the integrity of the capital market generally.

[69] In our view, this cautious approach recognizes the danger that a well-intentioned panel minded to address a harm discerned in a particular set of facts could inadvertently respond too aggressively or with too broad a brush, with unintended and undesirable consequences, including consequences for participants in other, unobjectionable transactions or circumstances. Accordingly, we believe that a panel would be ill-advised to rely solely on its public interest authority to intervene in a transaction and interfere with negotiated, and otherwise legal,

arrangements or outcomes unless there is compelling evidence that a failure to intervene would truly be abusive to investors and the integrity of the capital market.

[70] In short, our public interest jurisdiction is available to address a clearly demonstrated abuse of investors and the integrity of the capital market, even in the absence of a contravention of Alberta securities laws. However, our public interest jurisdiction is to be exercised with restraint.

3. Scope of Analysis Required

[71] As mentioned, ARC suggested that once we determine whether the Transaction is governed by the mentioned obiter statement in *HudBay* (and we answer the five related questions put forward), the outcome of the application will automatically be determined without the need for analysis of the Transaction as a whole. We agree with ARC that consideration of *HudBay* is appropriate here, but we do not agree that our task requires that we ask or answer ARC's five questions, nor that those questions set the parameters of our task.

[72] Stated simply, the obiter on which ARC relies is neither as definite in its terms, nor as clearly a governing principle, as ARC suggested.

[73] *HudBay* dealt with aspects of a proposed combination of two companies. A shareholder of HudBay Minerals Inc. complained that shareholders were not given an opportunity to vote on the proposal, which the complainant saw as heavily dilutive. In a lengthy and thorough decision the OSC panel considered the complaint and issued orders. At the same time, the OSC panel discussed certain matters that it considered worthy of comment; these discussions did not determine the OSC panel's decisions on the issues before it, as it made clear (at para. 268):

> In any event, the matters discussed in this Part X [including the statement relied on by ARC] were not directly raised in the [HudBay Minerals Inc. shareholder's application before the OSC panel] and were not addressed by any of the parties in their submissions. We are not influenced by these issues in making our decision in this matter; we are simply expressing our views.

[74] While acknowledging that the OSC panel's statement was obiter, ARC argued that this did not diminish – rather, it elevated – its status and effect. In ARC's contention, the fact that the OSC panel saw fit to make the statement when it was not necessary to a determination of the issues it decided demonstrated how strongly the OSC panel felt on the point. This effect was heightened, in ARC's view, by the OSC panel's having expressed its view not once but twice – first, in a summary decision rendered shortly after the time-sensitive hearing and again, after time for careful thought and editing, in the OSC panel's more extensive final reasons. Moreover, ARC characterized the statement as a firm exposition of a principle that has since found its way into Canadian securities regulation.

[75] This intriguing argument is ultimately not persuasive. Obiter is obiter. This obiter in *HudBay* merits careful reading and thoughtful attention, but by its very nature it is not and cannot be taken as determinative. Moreover, the plain wording of the statement must not be ignored. It was a "view" of what an OSC panel – having been immersed in the facts of the particular case then before it – thought should "generally" (not invariably) occur in generically-

described circumstances. It was implicit in the wording that the OSC panel foresaw that particular other circumstances might lead to a different view or conclusion.

[76] In short, we do not discern in the *HudBay* obiter anything amounting to an invariable principle binding participants in the Canadian capital market. Contrary to ARC's suggestion, it does not essentially dispose of the issue before us. Nor is it our task to adjudicate on the correctness of that obiter.

[77] Our task is different, and broader. It involves assessing the public interest in light of all the circumstances of the present case, to determine whether there is such an abuse as to warrant our intervention. The scope of our analysis must therefore include not only what may happen at the Special Meeting, but all the circumstances of and surrounding the Transaction and, specifically, the Private Placement.

4. The Public Interest in the Circumstances of This Case

[78] ARC argued that it and other Profound Shareholders had no say in the Private Placement when it was implemented (in the sense of a decision to sell or tender their own shares). It was common ground that, if we do not intervene and Paramount carries through with its declared intention to vote the Private Placement Shares at the Special Meeting, approval of the Merger is a foregone conclusion despite ARC's opposition. This might be said to make the vote itself little more than a formality. ARC contended that this amounts to a form of shareholder disenfranchisement warranting our intervention. Expressed in these terms, the position in which ARC finds itself does appear uncomfortable, perhaps even unfair. But does it constitute, or demonstrate, an abuse?

[79] In answering this question we scrutinize key aspects of the Transaction and surrounding circumstances to place events in their context.

(a) Profound's Circumstances When Paramount Initially Approached

[80] When Paramount first approached Profound with the idea of an acquisition, Profound faced a challenging business environment and the expectation that its primary lender would soon reduce Profound's line of credit limit to an amount potentially below what had already been borrowed. Profound was going to need some new funding, at an unpropitious time. Profound Special Committee meeting minutes (from 13 March 2009) indicated "recognition" by ARC (ARC being Profound's largest shareholder at the time) that "the status quo [was] not the answer for [Profound] going forward".

[81] The approach from Paramount was, therefore, timely. In general terms Paramount proposed to acquire Profound Shares, paying at least in part with Paramount trust units. The Profound Board (but for the ARC Nominee) agreed that the Paramount approach should be explored; the objection stemmed from ARC's apparent resistance to becoming an investor in Paramount.

[82] As discussions progressed, a modification was introduced: a cash injection by Paramount by way of a subscription for equity in Profound. The Profound Board (not including the ARC Nominee) welcomed the idea, particularly given its expectation that funds could be raised in this

way at a premium to the market price (without the discount that might be expected were Profound to rely on a rights offering, an option alluded to by ARC).

(b) The Transaction Takes Form

[83] As mentioned, the essential elements of the Transaction as they came together in March 2009 included the soon-to-be-launched Bid (to be recommended by the Profound Board) and the Private Placement.

[84] Profound also implemented the Profound Rights Plan. ARC in its written submissions criticized the Profound Rights Plan, arguing that it and the Private Placement "were designed to cause and maintain dilution of" ARC's Profound shareholding – and apparently only ARC's, inasmuch as ARC understood that it was the only holder of 20% or more of Profound Shares at the time. Clearly, given their history and ARC's representation on the Profound Board, this was not unknown to Profound.

[85] We observe that shareholder rights plans are neither unusual nor necessarily improper. We accept Profound's submission to the effect that the Profound Rights Plan was designed to ensure that anything that would amount to a new take-over bid under Alberta securities laws – whether the bidder began with nothing and sought more than 20%, or sought to move up from an existing 20% position – would have the characteristics of a Permitted Bid. To the extent that the Profound Rights Plan was not inappropriate, at the time, in respect of a hypothetical new bid by an outsider, we do not think that, conceptually, an existing 20%-plus Profound shareholder (here, ARC) was necessarily prejudiced by being similarly treated. We therefore attach little importance to the terms of the Profound Rights Plan viewed in isolation, and instead consider them as part of our analysis of the Transaction as a whole.

[86] In our view, the relevant circumstances include the financial circumstances of Profound and the financial terms of the Private Placement.

[87] The Private Placement price apparently amounted to a 15% premium to the then-prevailing trading price for Profound Shares. The Profound Board welcomed this timely and seemingly attractively-priced source of funding. Even so, Profound negotiated some not-insignificant terms. On the one hand, Paramount would be able to unwind the Private Placement in certain eventualities including on commercially-typical triggers such as a breach or failure of Profound's covenants or representations, but also in the event of Paramount itself (through the Bid) or some other acquirer with a Superior Proposal taking up more than half of the Profound Shares. More significant in context, in our view, was that Paramount would have to complete the Private Placement, exercise its Special Warrants and see its subscription payment released to Profound if Paramount failed to obtain more than half of the Profound Shares under its Bid. In this way, Profound negotiated certainty into the funding commitment: even (or especially) if the Bid failed to deliver Paramount majority ownership, the Private Placement would be completed and some $6.9 million released to Profound.

[88] Paramount, of course, would acquire new Profound Shares amounting to almost 20% of the total outstanding – unless it were to gain majority ownership under the Bid, in which case it could (but would not have to) acquire those Private Placement Shares.

[89] The Bid price amounted to a substantial (references ranged from approximately 100% to 117%) premium over the previous trading prices for Profound Shares. Profound cited published comments by market analysts not involved with the Bid or the Private Placement. One such commenter suggested that, at the time, "transactions" among ten junior oil and gas companies, including Profound, could reflect "premiums of 25%-75% above the current market" whereas, for entities in Profound's position "that do not transact, we see the potential for drifting [presumably, in context, referring to equity trading prices] sideways or down over the next two quarters". On 1 April 2009 (after the Support Agreement and Private Placement were publicly announced) the same commenter recommended the expected Bid in the following terms: "Given the current state of the market for levered, gas weighted juniors, these are very attractive deal metrics". On the same date another commenter, also recommending the Bid, said ". . . Profound found itself in a difficult financial situation. [It] effectively had two choices[:] to raise enough equity at extremely dilutive levels to survive or to merge with a larger industry player. We feel they made the right move . . .".

[90] The Bid circular disclosed the Private Placement and alerted readers to the prospect that Paramount might, were the Bid successful, take steps to effect a full combination (what would become the proposed Merger) with Profound.

[91] ARC suggested that the Transaction exposed it to both dilution and disenfranchisement. We do not perceive the Profound Rights Plan – although it would dramatically dilute the position of anyone triggering its provisions other than by a Permitted Bid – as clearly inappropriate or prejudicial. The Private Placement would (at least once the Special Warrants were exercised) also dilute Profound shareholders other than Paramount, inasmuch as new shares would be issued but only to Paramount. A complaint of dilution, though, could be levelled at almost any significant private placement; that does not demonstrate that private placements are improper. This one, as mentioned, appeared (to the Profound Board and outside observers) timely and financially attractive. In short, the Transaction did indeed involve both potential and actual dilution but, in our view, it did not (at this stage of the analysis) involve clear abuse.

[92] As mentioned, the dilutive effects of the Profound Rights Plan would not be triggered by a Permitted Bid. Under the Support Agreement, the Profound Board's commitment to support the Bid would be superseded in the event of a Superior Proposal, and Paramount itself was committed to tendering its Private Placement Shares to such a proposal. These provisions indicate that some attention had been given to the interests of the Profound shareholders should a hypothetical better offer materialize. While we are not in a position to judge the likelihood of such a prospect, it was not clearly precluded.

[93] By the time it formally launched the Bid, Paramount had at most assured itself of a less-than-20% position in Profound. Attaining its objective – not just majority, but eventual complete ownership (implicit in the Bid disclosure concerning a possible future combination of Paramount and Profound) – still depended on success in the Bid.

(c) Events After Launch of the Bid

[94] Although Paramount's Bid was initially for 66⅔% of the Profound Shares, that proportion was never achieved, despite repeated Bid extensions. On 17 June 2009 Paramount reduced the "minimum tender" percentage to just over 50% (a level already achieved). On 30 June 2009 Paramount took up (or had acquired through permitted secondary-market purchases) a total of approximately 59.4% of the Profound Shares. This 59% gave Paramount majority ownership of Profound, but not enough to compel a full merger (requiring 66⅔% approval).

[95] This 59% was, however, sufficient to give Paramount the option of unwinding the Private Placement by redeeming its Special Warrants. Paramount did not do so. Instead, it exercised the Special Warrants and thereby acquired an additional block of Profound Shares sufficient, when added to those acquired under the Bid or in permitted purchases, to put Paramount comfortably over the 66⅔% threshold.

(d) Consideration of Motive

[96] ARC would have us view the Private Placement as merely a tactical tool. Paramount and Profound would prefer that we view the Private Placement as merely a financing, wholly legitimate and not now to be revisited. Staff contended that it was a hybrid or combination of the two. The undisputed fact that, given the outcome of the Bid, Paramount would not be able to ensure the required 66⅔% approval of the Merger at the Special Meeting without voting its Private Placement Shares does not determine this question. The appropriate characterization – and, with it, possibly the determination of whether there is an abuse warranting intervention – in our view requires us also to inquire into the thinking of the parties (Paramount in particular). Although we do not have direct evidence on such thinking, reasonable inferences can be drawn from the facts, the timing and the sequence of events.

[97] It is apparent to us that, from its first approach to Profound, Paramount at least contemplated seeking full ownership of Profound. We believe that this was and remained an ultimate objective throughout the negotiation of the Transaction and the conduct of the Bid.

[98] We do not doubt that, when the idea of the Private Placement was first broached, Paramount already had in mind the potential ultimate utility of a block of Profound Shares (and their votes) should events reach the stage at which a Merger became a tangible prospect. We believe that Paramount even anticipated that, were that prospect to arise, success would require support from 66⅔% of those voting. These considerations were, in our view, factors in Paramount's determination to agree to the Private Placement, as large a transaction as could be effected without triggering (under take-over bid rules) the obligation to offer the same deal to existing Profound shareholders, and on terms seemingly favourable to Profound (the price and the commitment to complete it even were the Bid to fail). We therefore conclude that the Private Placement was, at least in part, a tactical tool designed to assist Paramount (if needed or desired) in acquiring all of Profound.

[99] At some point Paramount obviously foresaw that it would have difficulty obtaining 66⅔% of the Profound Shares through the Bid. Crossing that threshold (and thereby ensuring that it could later gain full ownership of Profound) would likely require two things: (i) changing the terms of the Bid by reducing the minimum tender level (otherwise the Bid would fail); and

(ii) declining the opportunity (which would be delivered by a 50.1% Bid take-up) to unwind the Private Placement. This, of course, is exactly what Paramount did. We conclude that, in so doing, Paramount had in mind the voting level that would later be required for approval of what would become the Merger. As such, Paramount used the Private Placement as the tactical tool that, we concluded above, was at least part of its purpose.

[100] However, we do not view the Private Placement as solely a tactical acquisition tool. We think that Staff were correct in characterizing the Private Placement as something of a hybrid. Paramount made a financial commitment and Profound obtained a high degree of financing certainty (specifically, that Profound would receive the subscription money were Paramount not to obtain 50.1% of the Profound Shares under the Bid). The money was indeed paid to Profound, and used. This was a real financing, not a sham.

[101] Moreover, it was a financing of some apparent benefit not only to Profound and, by extension, its shareholders (ARC among them) – as a new source of funding, well-timed and seemingly attractively-priced in the circumstances – but also to Paramount itself, to the extent that it offered a lifeline to its intended target while the overall acquisition plan progressed. Although not put to a shareholder vote (none being required), the financing was approved by the Profound Board, which under corporate law bore responsibility to Profound and all its shareholders. In our view, based on the information provided to us, it appears that the directors on the Profound Board fulfilled that responsibility; we are inclined to wonder where Profound would be today without the financial injection delivered by the Private Placement.

[102] We do not consider that the Private Placement can be said, at the time it was negotiated, to have assured Paramount of success in obtaining full ownership of Profound. Neither alone nor as a constituent of the Transaction did the Private Placement, in our view, inevitably preclude ARC or anyone else from coming forward with a more enticing deal. Although failure in the Bid would leave Paramount on the hook for the Private Placement, the converse was not true: the Private Placement could not guarantee (and, as was seen, it did not deliver) Paramount success in the Bid.

(e) No Deceit

[103] We do not consider that Profound shareholders were deceived. With sufficient attention to publicly-disclosed information – and with the awareness that bidders can and sometimes do amend the terms of their take-over bids – a Profound shareholder could have come to a reasonable understanding that Paramount had (through the Private Placement) boosted its chances of achieving ultimate full ownership of Profound. Once the Bid tender threshold was lowered – to below the level already announced as achieved – the present circumstance was foreseeable, even highly probable. We do not believe that the current situation could reasonably have come as a surprise to any interested observer carefully reading the public disclosure and following the Transaction.

[104] We do not discern an abuse grounded in deception or failure to inform.

(f) Profound Shareholders Had Multiple Options

[105] Information alone is of little avail without an opportunity to act on it. In our view, Profound shareholders (ARC among them) did, and do, have multiple opportunities to act in response to the Transaction. We observe that each step in the Transaction appears to have been conducted in accordance with a framework of laws under which ARC and other shareholders had (or have) options – to vote, sell or tender their Profound Shares to the same extent as every other holder – and are protected by fiduciary obligations of the Profound Board or given avenues to challenge decisions or outcomes. Not every opportunity involved a vote, but we are satisfied that the now-minority Profound shareholders were not held captive or left helpless as the Transaction proceeded.

[106] For example, from the outset Profound shareholders had (and presumably retain today) the option of simply selling Profound Shares into the secondary market (the TSX). (ARC, in differentiating a Private Placement from, for example, the "toe-hold" share position that a prospective acquirer is allowed to purchase in the secondary market, seemed to suggest that the toe-hold is justified precisely because it involves a selling decision by an existing shareholder.)

[107] Once it was publicly known that the Bid would be forthcoming, and after it was launched, Profound shareholders had the opportunity to decide whether to tender to the Bid. Various Bid adjustments (extensions and the changed minimum tender level) provided opportunities to reconsider that decision.

[108] Throughout, Profound shareholders who chose not to sell or tender their Profound Shares may have made that decision (in context, even passivity – which we do not attribute to ARC – amounts to a decision) based on their assessments of the chances that the Bid would fail entirely or that its terms would be enhanced, that their company could operate well as a controlled public company with a significant minority shareholder, that the terms of the Merger would be more attractive than the Bid, or that an exercise of dissent rights would be beneficial.

[109] Shareholders have other rights. Those who believe they have been treated unfairly or oppressively by their company or its directors (for example, in connection with a share issuance) may have a cause of action for monetary recompense under corporate law or otherwise. As has been seen, the TSX had a decision-making role in respect of the Private Placement; there was an avenue to challenge its decision, namely an appeal. Securities laws and corporate law both recognize that business combinations may affect different shareholders differently, and provide certain protections for the benefit of those thought potentially more vulnerable. This accounts for the ABCA requirement that a transaction like the Merger can go forward only if approved by a special or super majority of shareholders (66⅔%). The law also expressly provides for "going-private" transactions (or, as they are sometimes more evocatively described, "squeeze-outs"); while these can offer business efficiencies, their undeniably coercive aspect is recognized in mechanisms for dissenting shareholders to obtain fair-value recompense.

[110] ARC, citing authority in support, claimed that the dissent right, in particular, is inadequate. That was not fully argued before us and we make no such determination. In any event, the issue is not whether the existing law and available mechanisms are ideal but rather

whether the circumstances here amount to something (as the OSC put it in *Canadian Tire*) beyond even unfairness – namely, a clear abuse.

[111] It appears to us that ARC and its fellow minority Profound shareholders made a series of decisions. They chose to retain their Profound Shares. They apparently have not, thus far, chosen to pursue avenues of recourse (if merited) against Profound or the Profound Board. Even now, facing the prospect of being outvoted on the Merger and consequently being forced out of Profound, there remains open to them a legal avenue of dissent and recompense. They had, and have, options. Their present situation and eventual outcome may not be to ARC's satisfaction, but that falls short of a demonstration that ARC or other minority Profound shareholders have been the subject of abuse.

[112] Indeed, given ARC's and Paramount's apparent business sophistication and their access to able advisors, it is difficult to discard the suspicion that what has happened here is the result of these two well-informed business players having engaged in a determined business battle to achieve their preferred, but different, aims. Business hardball, played legally, does not in and of itself amount to abuse.

(g) Conclusion on Abuse

[113] We have sympathy for ARC's concerns. Obviously, were the Private Placement Shares not to be voted, ARC's position vis-à-vis Paramount would be much stronger: ARC and its fellow minority Profound shareholders might then have greater hopes of obtaining from Paramount a financially more attractive inducement to exit the company.

[114] Although we identified merits in the Private Placement, we do not consider its use as seen here to have been ideal. We think that some of the conceptual simplicity of the take-over bid regime can be lost when a private placement is inserted. Unhappiness on the part of remaining minority shareholders may result, as it did here.

[115] However, our understanding of, and sympathy for, ARC's position falls short of a determination that this is a clear case of abuse warranting our direct intervention. For the reasons given, we conclude that there is not compelling evidence of an abuse of ARC or other Profound shareholders, or of the integrity of the capital market, warranting the exercise of our public interest jurisdiction to bar Paramount from voting its Private Placement Shares in favour of the Merger. Moreover, we believe that the relief sought by ARC could – by depriving Paramount of an existing right legally acquired – itself be detrimental to investors or capital market integrity. The relief sought is not warranted in the public interest in this case.

(h) Policy Response Not Precluded

[116] Having concluded that this is not a clear case of an abuse warranting the exercise of our public interest jurisdiction, we consider that ARC has raised issues worthy of analysis and debate. Private placements of voting securities negotiated in such circumstances may come under deserved scrutiny. Depending on all the circumstances, a future effort to follow Paramount's approach might encounter not just serious challenge, but possibly also a different outcome.

[117] That said, this case demonstrated that there are circumstances when even a bid-related private placement can plausibly deliver benefits to minority shareholders. A blanket limitation on the exercise of the voting power otherwise obtained through such a placement could diminish or "chill" the options available in the future to other companies facing financial stress. This is the very sort of risk that dictates caution in the exercise of our public interest jurisdiction; given this risk, even had we found an abuse warranting our intervention, it is not certain that ARC would have obtained precisely the relief it sought.

[118] A thorough policy review of the role of such private share placements in connection with proposed acquisitions, with opportunity for the airing of competing views from an array of informed market participants and observers, could prompt the development of new or refined policy positions or law – conceivably including some constraints on the voting of private placement shares. Whatever the result, an advantage of the policy-development route would be prospective, not retrospective, application: capital market participants would know the ground rules going into a negotiation or transaction, and be in a position to act on the basis of a common understanding of those rules.

V. CONCLUSION

[119] This application raised serious and difficult issues, which were presented and argued ably by all we heard from.

[120] In the result, for the reasons given we are not persuaded that there is a clear abuse of ARC, its fellow minority Profound shareholders or the capital market generally such as to warrant the exercise of our public interest jurisdiction as urged by ARC. ARC's application is therefore dismissed.

10 August 2009

For the Commission:

"original signed by"
Glenda Campbell, QC

"original signed by"
Stephen Murison