

Corporate Securities Law

November 25, 2010

***Baffinland* - The End of the Auction Generally Means the Time has Come for a Pill to Go**

On November 19, 2010 the Ontario Securities Commission cease traded the shareholder rights plan of Baffinland Iron Mines Corporation (“Baffinland”), three days ahead of the scheduled expiry of the unsolicited bid for Baffinland that had been made by Nunavut Iron Ore Acquisition Inc. (“Nunavut”). While the Commission’s reasons have not been released, its decision to cease trade the Baffinland rights plan would appear to reaffirm that the Commission will be inclined to find that the “time has come for a plan to go” if a target has agreed to support a transaction - thereby ending an “auction” and a search for alternative transactions - and will not, in the absence of “coercion”, allow a rights plan to be used to “level the playing field” between competing transactions.

The relevant facts in Baffinland were relatively straightforward:

- On September 22, 2010, Nunavut made an unsolicited offer to purchase all of the outstanding common shares of Baffinland for \$0.80 per share. A condition of the offer was that the Baffinland rights plan, which had been adopted by the Board and approved by shareholders in 2009, be terminated or cease traded. The offer was initially set to expire on October 28, 2010 but was subsequently extended to 7:00 p.m. on November 8, 2010.
- On November 1, 2010, Nunavut applied to the Commission to cease trade Baffinland’s rights plan.
- On November 8, 2010, the day on which Nunavut’s

offer was to expire but prior to the hearing to consider Nunavut’s application, Baffinland entered into an agreement to support ArcelorMittal S.A. making a bid to acquire all of Baffinland’s common shares for \$1.10 cash per share.

- Following the announcement of ArcelorMittal’s offer, Nunavut further extended its offer to November 22, 2010, and the Commission scheduled a hearing for November 18, 2010 to consider Nunavut’s application for an order cease trading the rights plan.

In this context, it appears that:

- Baffinland had concluded its search for alternative transactions when it agreed to support the ArcelorMittal transaction, and
- the principal argument for the continued operation of the rights plan was that the impending expiry of the Nunavut bid might coerce shareholders to accept the \$0.80 per share that it offered rather than waiting for the ArcelorMittal bid which would offer them \$1.10 for each of their shares.

The rejection by the Commission of this argument is consistent with its decision in the context of the bid in 2001 by Trilogy Retail Enterprises L.P. for Chapters Inc., where the Commission indicated that it is not acceptable to use a rights plan to ensure that competing bids are open to shareholders simultaneously.

More recent decisions had suggested that a more flexible approach might be adopted. For example, in the unique circumstances of the contest for control of Falconbridge Inc. in 2005, the Falconbridge shareholder rights plan was permitted to survive to prevent one of its suitors, Xstrata plc, from acquiring an auction-ending blocking position. In the summer of 2010, the Commission had declined to cease trade a rights plan adopted by Spider Resources Inc. - the Commission saying that it was premature “considering all the circumstances, and in particular, the ongoing auction” between two competing bidders to cease trade a rights plan – which appeared to indicate that rights plans *could* be used for purposes other than to permit the development of alternatives (in that case, apparent-

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ly contrary to the *Chapters* decision, to align the timing of transaction proposals). Please see our July 12, 2010 client update entitled “*OSC Spider Decision Muddies the Waters for Rights Plans*”.

More generally, the Commission’s decision concerning the shareholder rights plan in Neo Material Technologies Inc. had suggested that, in unusual circumstances, rights plans might be sustainable for broader purposes.

The OSC’s *Baffinland* decision appears to confirm that the “traditional” test for the appropriate time for a rights plans “to go” continues to be relevant - plans will generally be permitted to stay in place only where they could reasonably be considered to be facilitating the possibility of a value-maximizing alternatives.

Please contact any member of the Goodmans’ Corporate Securities Group to discuss this decision.