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A done deal undone

By Neill May

Corporate lawyers in general have a high tolerance for suspended logic where considered necessary. Consider if you will the subsequent condition precedent, a patent oxymoron. Closing of a transaction will not occur unless a certain event happens *before* the closing, but if *after* that event is considered to have occurred the closing doesn't happen then the *completed* prior event is deemed never to have occurred. Unless Doc Brown is waiting on the curb with the Delorean and a fuelled-up flux capacitor, that sequencing should be a challenge. But no. It's the same kind of logic that leads corporate lawyers to think that the longer disclosure is better disclosure, in an era of fleeting attention spans.

Those types of logic challenges have been raised in the recent proxy battle for Eco Oro Minerals Corp. The recent decisions in the dispute rendered by the Ontario Securities Commission (itself reviewing a decision of the Toronto Stock Exchange) and the British Columbia Supreme Court may shed some light on how so-called tactical private placements will fare under regulatory or judicial scrutiny. The dispute has been a law school exam of topical issues in Canadian M&A, including: how securities regulators will treat tactical private placements generally, how those regulators might deal with a placement that has been approved by the stock exchange and implemented and how the courts and securities regulators might deal with different aspects of the same dispute. There are a lot of questions; it's like a special *Jeopardy* episode devoted to securities law that would probably drop a lot of viewers after the first commercial break.

Eco Oro is a TSX-listed company whose main asset is an arbitration claim. The company, in need of capital, entered into a series of investment agreements with a small number of institutional investors, providing for investment in two stages. The first tranche was comprised of an issuance of common shares and the second tranche was comprised of convertible notes, plus, if TSX and shareholder approval were obtained, additional common shares, and if such approvals were not obtained, CVRs — contingent value rights — entitling the investors to a substantial portion of any proceeds from Eco Oro's arbitration proceedings. At a subsequent shareholders meeting, more than 93 per cent of disinterested shareholders voted against the issuance of shares for the second tranche. Accordingly, Eco Oro issued notes (convertible into shares by Eco Oro) and CVRs to the investors.

Early this year, dissident shareholders requisitioned a shareholders' meeting to replace the board. Shortly thereafter, Eco Oro applied to the TSX to convert part of the convertible notes held by the investors (who had confirmed their support for the incumbent board) into common shares (in an amount that would avoid the technical requirement for a shareholder vote under the TSX rules). The company's position was that the conversion was needed to "de-risk" its balance sheet. The TSX conditionally approved the note conversion; as a result, the investors' voting interest in Eco Oro increased to 46 per cent from approximately 41 per cent. The dissenting shareholders filed a petition with the British Columbia Supreme Court seeking to set aside the note conversion as oppressive, and they applied to the OSC for an order to set aside the TSX's decision to approve the conversion.

The OSC set aside the TSX's decision to approve the note conversion. In order to give effect to that decision (given that the conversion had already been completed), the OSC also ordered that:

- a meeting of Eco Oro's shareholders be held to either ratify the conversion or instruct the Eco Oro board to take all necessary steps to reverse the note exchange,
- trading in the new shares issued pursuant to the conversion be cease-traded unless and until Eco Oro's shareholders ratify the conversion, and
- Eco Oro disregard the new shares for the purposes of voting at any meeting of Eco Oro's shareholders, including the requisitioned meeting.

The impact of the OSC's decision will be clearer when the OSC's detailed reasons are released. Hopefully, the decision will provide guidance as to:

- the framework for evaluations of tactical private placements (where the additional factor of the benefits of the capital raise to the company must be considered), and
- the scope of the OSC's authority (not just in the steps taken to unwind a completed deal but also in perhaps clarifying how the regulator's public interest jurisdiction can be used to deal with tactical private placements and the breadth of the OSC's authority to review TSX decisions).

The British Columbia Supreme Court, meanwhile, concluded that, despite its timing, there was no evidence to suggest that the note conversion was not in Eco Oro's best interests, that it was not oppressive and that the directors' decision was entitled to deference under the business judgment rule.

The OSC's remedy itself, in seeking to neuter the effect of a completed transaction, is interesting. On the theme of lawyerly logic, and bearing in mind that the path to reversing a done deal is unclear, it is as if the classic nursery rhyme were rewritten so that Humpty Dumpty sat on a wall, Humpty Dumpty had a great fall, he couldn't be put back together again, so let's pretend it didn't happen at all. **CL**

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