

Update

Corporate Securities Law

January 23, 2009

Implications of the Certicom Decision for Confidentiality Agreements

In a ruling released on January 19, 2009, the Ontario Superior Court of Justice effectively ruled that Research in Motion Limited (“RIM”) could not proceed with its hostile take-over bid for Certicom Corp. (“Certicom”) because the bid contravened confidentiality agreements between the companies.

The decision is notable because in the two effective confidentiality agreements between the companies (i) the “standstill” provision (generally speaking, a provision that prevents the party receiving confidential information from making a hostile bid or similar unsolicited initiative for the ownership or control of the disclosing party) in the earlier confidentiality agreement had lapsed, and (ii) the more recent confidentiality agreement did not have a “standstill” provision at all. The central issue in the case, therefore, was whether, notwithstanding the expiry of the standstill provision, RIM was still precluded from using confidential information it had obtained from Certicom to make a hostile take-over bid.

The court ruled that because under the agreement the permitted uses of the disclosed information by RIM did not include a non-consensual transaction, the hostile take-over bid contravened the confidentiality agreement. Though the decision turned in part on the specific facts of the transaction and wording of the parties’ agreements, there are important implications for confidentiality agreements generally:

- The standstill provision is not a comprehensive code of when the party receiving information can make an unsolicited bid for the disclosing party. In the Certicom decision the court ruled that the standstill provision provides additional protection because the disclosing party does not have to prove that its confidential information is being misused, but the absence or expiry of a standstill provision does not mean that the disclosing party cannot insist that hostile take-over bids made with the benefit of its confidential information be stopped.
- Care should be taken in drafting confidentiality agreements to address what the parties can and cannot do after the expiry of standstill periods.

Confidentiality agreements are widely used tools. The Certicom decision may prompt users of these tools to take a closer look at elements of these agreements.

Please contact any member of Goodmans corporate securities team should you wish to discuss this decision further:

Gesta Abols gabols@goodmans.ca	416.597.4186
Lawrence Chernin lchernin@goodmans.ca	416.597.5903
John Connon jconnon@goodmans.ca	416.597.5499
Caroline Cook ccook@goodmans.ca	416.597.5926
Jonathan Feldman jonfeldman@goodmans.ca	416.597.4237
Sheldon Freeman sfreeman@goodmans.ca	416.597.6256
Susan Garvie sgarvie@goodmans.ca	416.597.4141
Allan Goodman agoodman@goodmans.ca	416.597.4243
William (Bill) Gorman wgorman@goodmans.ca	416.597.4118

Goodmans^{LLP} Update

Avi Greenspoon agreenspoon@goodmans.ca	416.597.4236	Grant McGlaughlin gmcgloughlin@goodmans.ca	416.597.4199
Francesca Guolo fguolo@goodmans.ca	416.597.4238	Shevaun McGrath smgrath@goodmans.ca	416.597.4217
Stephen Halperin shalperin@goodmans.ca	416.597.4115	Michael Partridge mpartridge@goodmans.ca	416.597.5498
Tim Heeney theeney@goodmans.ca	416.597.4195	Stephen Pincus spincus@goodmans.ca	416.597.4104
Jonathan Lampe jlampe@goodmans.ca	416.597.4128	Meredith Roth meroth@goodmans.ca	416.597.6260
Dale Lastman dlastman@goodmans.ca	416.597.4129	Michelle Roth miroth@goodmans.ca	416.597.6261
Victor Liu vliu@goodmans.ca	416.597.5141	Neil Sheehy nsheehy@goodmans.ca	416.597.4229
Kari MacKay kmackay@goodmans.ca	416.597.6282	Mark Spiro mspiro@goodmans.ca	416.597.5140
David Matlow dmatlow@goodmans.ca	416.597.4147	Bob Vaux rvaux@goodmans.ca	416.597.6265
Neill May nmay@goodmans.ca	416.597.4187	Kenneth Wiener kwiener@goodmans.ca	416.597.4106