

# Update

## Corporate Securities Law

February 20, 2009

### Implications of the Rusoro Decision for Potential Bidders and Financial Advisors

On February 10, 2009, the Ontario Superior Court granted a temporary injunction restraining Rusoro Mining Ltd. (“Rusoro”) from proceeding with a take-over bid for Gold Reserve Inc. (“Gold Reserve”). The court’s order also restrained Endeavour Financial International Corporation (“Endeavour”), Rusoro’s financial advisor, from having any involvement in a hostile bid for Gold Reserve.

The Rusoro decision is significant because, like the recent decision of the Ontario Superior Court in *Certicom* (see our “*Implications of the Certicom Decision for Confidentiality Agreements*” of January 23, 2009), it illustrates that Ontario courts will strictly enforce confidentiality obligations arising in the context of M&A transactions. The case highlights the importance of careful drafting of confidentiality provisions, and of care in management of actual and potential conflicts.

The decision arose in the context of a hostile take-over bid by Rusoro for all of the issued and outstanding securities of Gold Reserve. Endeavour was retained by Rusoro to provide financial advisory services in connection with the bid. Endeavour, however, had acted as Gold Reserve’s financial advisor for the four years preceding the Rusoro bid and, in fact, remained subject to an advisory agreement with Gold Reserve

at the time that Rusoro launched the bid (this agreement was terminated by email seven minutes after Rusoro publicly announced its intention to commence the bid). The same three individuals at Endeavour who had previously acted as advisors to Gold Reserve and had access to Gold Reserve’s confidential information were the primary advisors to Rusoro on its bid.

The advisory agreements between Endeavour and Gold Reserve contained confidentiality provisions requiring Endeavour to protect Gold Reserve’s confidential information, and further provided that “...Endeavour shall not knowingly act against the interests of Gold Reserve in a material way” and that, in the event of a conflict, “...Endeavour will inform Gold Reserve of the conflict and will either act solely for Gold Reserve, agree with Gold Reserve an appropriate resolution to the matter at hand or it will terminate this Agreement in accordance with its terms.”

Given the nature of the proceeding, the crux of the applicable legal test was whether or not Gold Reserve had established that there was a serious issue to be tried. The court’s decision was based on the following conclusions:

- *Breach of Contract* – In the court’s view, Endeavour, contrary to the provisions of its agreements with Gold Reserve, had knowingly acted against the interests of Gold Reserve in a material way and did not inform Gold Reserve in advance of the bid of the conflict. In addition, although Endeavour argued that it had not had access to any non-public information relating to Gold Reserve since the beginning of 2007 and had only relied on public information in advising Rusoro on the take-over bid, the court was highly suspicious of these claims and concluded that, absent evidence to the contrary, it was not

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plausible that Endeavour had not relied on confidential information in advising Rusoro. In this regard, the court emphasized the fact that the same three individuals who were the primary advisors to Rusoro had previously been key advisors to Gold Reserve, rejecting the argument that the individuals could “compartmentalize their minds.”

- *Breach of Confidence and Duty of Loyalty* – The court concluded that, in addition to its contractual obligations, Endeavour owed a duty of loyalty to Gold Reserve and a duty to maintain Gold Reserve’s confidences.

The court expressed its view of the harm that may arise from the misuse of Gold Reserve’s confidential information: “Rusoro and Endeavour have created an unfair imbalance of knowledge. They have knowledge of confidential information which other potential bidders do not have. Given the uneven knowledge base, other potential bidders, and Gold Reserve’s own shareholders, are all at an unfair disadvantage relative to Rusoro and Endeavour.” The court cites expert testimony provided by Stanley M. D. Beck, a former Chair of the Ontario Securities Commission, who emphasized that absent a level playing field in terms of equal access to confidential information, a corporation’s shareholders are not likely to achieve an active auction that maximizes value.

The Rusoro decision confirms that Ontario courts will strictly enforce confidentiality obligations arising in the context of M&A transactions. Additionally, the decision cautions issuers and advisors to carefully consider and manage actual and potential conflicts of interest.

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

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