

Corporate Securities Law

March 5, 2014

Osisko/Goldcorp Highlights the Importance of Confidentiality Agreements

On March 3, 2014, each of Osisko Mining Corporation (“**Osisko**”) and Goldcorp Inc. (“**Goldcorp**”) announced the settlement of proceedings that Osisko commenced in the Quebec Superior Court in connection with Goldcorp’s unsolicited take-over bid for Osisko. Osisko alleged that Goldcorp breached a standstill agreement allegedly existing between the two parties and improperly used confidential information in making the bid. Although the litigation was settled, the dispute highlights the critical importance of confidentiality and standstill agreements in M&A transactions.

Issues

The issues raised in the proceeding included:

- Whether the parties orally agreed to extend the standstill under an earlier agreement that had expired. This highlights the realities that, while oral agreements are enforceable, their existence and terms can be difficult to prove and depend on the credibility of the parties’ evidence. This underlines the importance of clarifying any intended understanding concerning confidentiality and standstill arrangements.
- The challenges in dealing with allegations of improper use or disclosure of confidential information in a hostile bid (given the evidentiary challenges that will often be faced by parties attempting to enforce a confidentiality agreement).
- Whether a confidentiality agreement can restrict the parties’ activities after the agreement has terminated because of potentially continuing limitations on the purpose for which information can be used. Although this issue has been previously considered by the courts in both Canada

(in the decision of the Ontario Superior Court of Justice decision in *RIM v. Certicom*; see our update entitled “*Implications of the Certicom Decision for Confidentiality Agreements?*”) and Delaware (in the decision of the Court of Chancery in *Martin Marietta Materials, Inc. v. Vulcan Materials Company*; see our update entitled “*Stuck in “Between”: Delaware Court Stops Bid Due to Breach of Confidentiality Agreements?*”), practical issues remain. For example, the need (and if so how) to effectively sequester individuals who had access to the target’s confidential information to insulate the bidder from claims that confidential information has been improperly used.

Settlement

According to public disclosures made by Osisko and Goldcorp, in the uncertainty associated with the litigation:

- Goldcorp agreed not to take up and pay for shares deposited to its take-over bid before April 15, 2014 (just slightly longer than three months from the January 13, 2014 launch date).
- Osisko agreed (i) to terminate the Quebec court proceedings, (ii) to waive the application of its shareholder rights plan on the earlier of April 15, 2014 and the date Osisko enters into or announces any third party transaction, (iii) to provide Goldcorp access to due diligence materials beginning on the earlier to occur of April 1, 2014 and the date that Osisko enters into or announces any third party transaction, and (iv) not to close an alternative transaction before April 15, 2014.

Conclusion

The dispute between Osisko and Goldcorp relating to confidentiality understandings reaffirms the importance of having clear, thoughtfully conceived and well drafted confidentiality and standstill agreements. Ambiguities in agreements of that nature can have profound and often unintended effects on M&A transactions. Additionally, where an unsolicited transaction is a possibility, care should be taken to understand the possible implication of less formal communications.

Please contact any member of our Corporate Securities Group to discuss these Confidentiality Agreements.