

# Update

## Corporate Securities Law

May 4, 2009

### OSC Reasons in HudBay Decision Include Comments on Financial Advisor Engagements

The Ontario Securities Commission released the full set of reasons for its decision earlier this year in connection with the proposed acquisition by HudBay Minerals Inc. of Lundin Mining Corporation. (The Commission's decision is discussed in our January 26, 2009 update - "*The HudBay Minerals Proceedings and the Return of Acquiror-Side Shareholder Approval Rights*".) In addition to setting out the analysis that led to its orders setting aside a decision of the Toronto Stock Exchange and prohibiting HudBay from issuing securities in connection with the proposed Lundin acquisition without first obtaining HudBay shareholder approval, the Commission's reasons include commentary that may be relevant to boards and their advisors in a broader context about a "concern" of the Commission in the context of financial advice received by the HudBay Special Committee.

In connection with the proposed Lundin acquisition, the HudBay Special Committee had obtained a fairness opinion from its transactional financial advisor stating that the transaction was fair, from a financial point of view, to the shareholders of HudBay. The financial advisor was to receive a "signing fee" when the transaction agreement was entered into and a "much larger success fee" that was payable if the acquisition was completed.

In the context of its opposition to the proposed Lundin acquisition, a shareholder of HudBay had made submissions suggesting that there were flaws in the processes followed by the HudBay Board and Special Committee. While the Commission's reasons are clear that these alleged flaws were not part of the application that was being considered and had not been addressed by the parties (other than the one shareholder) in their submissions, the Commission went out of its way to discuss its concern about the financial advice received by the Special Committee from its financial advisor.

The Commission panel stated that, in its view, where a financial advisor is entitled to a "signing fee" and a "success fee":

*Such fees create a financial incentive for an advisor to facilitate the successful completion of a transaction when the principal focus should be on the financial evaluation of the transaction from the perspective of shareholders. While the Commission does not regulate the preparation or use of fairness opinions, in our view, a fairness opinion prepared by a financial adviser who is being paid a signing fee or a success fee **does not** assist directors comprising a special committee of independent directors in demonstrating the due care they have taken in complying with their fiduciary duties in approving a transaction. [emphasis added]*

As a matter of good practice, boards and committees understand and assess the context in which their advisors are expressing their views and give appropriate weight to those views in that context. The Commission's statement appears to suggest that directors should not be

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able to exercise their business judgment and should not give any weight to opinions - the position of the Commission on other advice is unclear - given by advisors who are to receive fees only if a transaction moves forward. While the Commission's views are clearly *obiter* and are not law, they may result in additional advisors being engaged and opinions being sought from firms other than the principal transactional advisors, regardless of whether a board's fiduciary duties as a matter of corporate law would require such action.