



## BCSC allows shareholder rights plan to survive almost 160 days

May 04, 2014

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On May 2, the **British Columbia Securities Commission** (BCSC) ruled on an application by HudBay Minerals Inc. to cease-trade Augusta Resource Corporation's shareholder rights plan (the Pill). While the BCSC panel granted an order cease-trading the Pill as at 5:00pm Vancouver time on July 15, 2014, the decision is a clear victory for Augusta, providing Augusta with nearly 160 days (from the date on which HudBay commenced its hostile bid) to find a competing offer. Prior to this decision, you would have been hard-pressed to find a securities lawyer that would have bet that a poison pill could survive for more than 90 days in the face of a hostile bid.

By way of background, Augusta adopted the Pill in the spring of 2013, and sought shareholder approval for the Pill in the fall of 2013 (within the 6 month time limit required under TSX rules). The Pill had many unusual features, including that it prohibited any acquisition of more than 15% of Augusta's shares, except by "permitted bid". The adoption of the Pill prevented HudBay, which held 16% of Augusta's shares, from acquiring any further shares except by way of permitted bid.

Hudbay sought to privatize Augusta and commenced a hostile take-over bid on February 9, 2014 (the Bid). Augusta's board determined that the Bid was inadequate and opportunistically attempted to acquire Augusta just before completion of permitting and financing of Augusta's only material asset - the Rosemont copper project. In addition, a group of Augusta shareholders who held approximately 33% of Augusta's shares announced that they would not tender to the Bid, with the result that HudBay's minimum tender condition could not be met. However, as a result of the bid, Augusta's board implemented a value maximizing process, putting the company in play.

In response to these actions, HudBay extended its Bid to May 5, but waived the minimum tender condition, resulting in its Bid no longer being a "permitted bid" under the Pill. Augusta scheduled a shareholder meeting for May 2 to re-affirm the Pill. The showdown between the two finally arrived on April 29: the date on which the BCSC heard HudBay's application to cease-trade the Pill to enable HudBay to take-up any shares tendered before expiry of its offer on May 5.

Hudbay's principal arguments followed established precedent: a Canadian securities regulator will always balance the ability of a target board to generate competing bids against the possibility of losing the existing bid, and will cease-trade a rights plan when a target board has had a reasonable opportunity to generate competing bids and the existing bid has been outstanding for a reasonable period of time. In this case, consistent with precedent, a sufficient period of time had passed (85 days) without a competing bid, so the balance had shifted and the rights plan should be cease-traded to limit the possibility of losing the existing bid.

Augusta needed novel arguments to prevail in the face of established precedent. It presented the following: (a) the Bid was opportunistic in its timing, attempting to complete the privatization before Augusta had unlocked the value in the Rosemont project through permitting and financing – therefore the Pill should not be cease-traded before Augusta had a chance to unlock that value and present it to competing bidders; (b) the Bid was coercive in that, without a minimum tender condition, HudBay could acquire a smaller number of shares that, when added to its existing 16% holding, would give HudBay a veto over any other transaction; and (c) most importantly, advance proxy results in respect of the shareholder meeting indicated that Augusta shareholders, who had been presented with all the relevant information by Augusta, HudBay and others, overwhelmingly (approximately 95%) supported continuation of the Pill.

The BCSC adjourned the April 29 hearing to Friday May 2 in order to obtain the actual voting results from the Augusta shareholder meeting. After convening on May 2 and receiving evidence that the actual voting results closely paralleled the advance proxy results, the BCSC concluded that the Pill should not be cease-traded before the May 5 expiry of the Bid. However, the BCSC provided HudBay with some certainty, ordering that if HudBay extended the Bid to July 16, 2014, the Pill would expire on July 15, 2014 to enable Hudbay to take-up any shares tendered to the Bid.

The BCSC decision is not remarkable, except for the length of time it permitted the Pill to survive. However, the length of time the BCSC provided the Augusta board is supported by the unique facts and circumstances of the case. The full reasons for the decision will be released in due course and at that time we expect to be able to ascertain which facts weighed most heavily in allowing the BCSC panel to reach the conclusion that it did.

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