



BCSC decides Red Eagle poison pill case as take-over bid amendments loom

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The [British Columbia Securities Commission](#) (BCSC) released its reasons in [Re Red Eagle](#), 2015 BCSECCOM 401, in which it cease-traded a rights plan in the face of a hostile bid. As perhaps one of the last rights plan cases to be decided before the proposed amendments to [Multilateral Instrument 62-104 – Take-Over Bids and Issuer Bids](#) (MI 62-104) come into force, its conclusions regarding rights plans are not surprising and may be of limited relevance in the future. However, the reasons do set out some timeless principles in relation to the other issues the BCSC faced in this case.

1. The Decision

There were three issues before the BCSC.

A. Cease-Trading the Rights Plan

CB Gold had adopted a rights plan in August 2014, that was subsequently approved by a 98% positive vote of the CB Gold shareholders in January 2015. Red Eagle made a hostile bid for the shares of CB Gold and, by the time of the hearing of its application to cease-trade the rights plan, the bid had been outstanding for 72 days. In the interim, CB Gold had found a white knight, Batero Gold, that made a competing bid. CB Gold entered into a support agreement with Batero that prohibited it from soliciting additional competing bids.

There was little argument before the BCSC that, on any objective analysis, the time had come for the rights plan to be cease-traded. Given the passage of time and the solicitation prohibition in the support agreement, no additional competing bid would likely arise. CB Gold's principal argument against cease-trading the rights plan was predicated on the theory that the only possible auction that would benefit CB Gold shareholders was the inherent auction between Red Eagle and Batero: if both parties were required to have a minimum 50% tender condition (which would be the case in order for their bids to be a "permitted bid" under the rights plan), then an auction would result between the two bidders in order for one or the other to obtain a clear majority of the CB Gold shares. Waiving the rights plan would allow the bidders to avoid an auction between them by each taking-up less than 50% of the shares (as turned out to be the case).

The BCSC did not accept this rationale, and cease-traded the rights plan after obtaining Red Eagle's commitment to provide a 10-day secondary offering period after Red Eagle initially took-up and paid for the CB Gold shares.

B. Private Placement

As a condition of entering into the support agreement with Batero, CB Gold required Batero to subscribe for US\$575,000 of CB Gold shares (representing approximately a 4% shareholding) in order to provide CB Gold with the funds to continue as a going concern. Red Eagle sought to have the BCSC unwind the private placement on the basis that it was an inappropriate defensive tactic and that the private placement was in violation of applicable securities laws.

The BCSC decided that it did not have to assess Red Eagle's allegations that the private placement violated applicable securities laws – a contravention of securities laws was not a pre-condition to the exercise of the BCSC's public interest jurisdiction. The BCSC therefore focused on two key questions: was the private placement clearly a defensive tactic; and did the private placement "inappropriately alter the basic dynamics of an M&A transaction"? On the first question, there was ample evidence that the proceeds of the private placement were legitimately required in order to for CB Gold to continue as a going concern.

On the second question, at the time of the BCSC hearing, approximately 48% of the CB Gold shares had been tendered to the Red Eagle bid. Hence, an excellent argument could be made that it was the 4% private placement that was what was blocking Red Eagle from being able to achieve greater than a 50% tender.

However, since Red Eagle had waived the minimum tender condition prior to the hearing, the BCSC determined that the Private Placement could no longer be a bar to CB Gold shareholders having their shares taken-up and paid for under the Red Eagle bid, and declined to take any action in respect of the Private Placement.

C. Batero Bid

Finally, Red Eagle sought to have the competing Batero bid cease-traded as being in violation of securities laws. Once again, the BCSC determined that it did not have to consider Red Eagle's allegations in this regard – even if the violations as alleged had occurred, there was no material prejudice to the CB Gold shareholders and the remedy sought – the termination or delay of the Batero bid - would be a far greater prejudice. Therefore, the BCSC declined to take any action in respect of Batero's competing bid.

2. Lessons Learned

The BCSC continues to follow the now well-established analysis as to whether the time has come to cease trade a rights plan, an analysis that will likely become irrelevant when the proposed amendments to MI 62-104 come into force. Indeed, of much greater interest is:

- the BCSC confirms its public interest jurisdiction gives it the power to deal with defensive tactics other than rights plans (such as private placements);
- an applicant does not need to allege or prove any violation of securities laws to have the BCSC engage its public interest jurisdiction, and conversely, a violation of securities laws that does not lead to material prejudice to affected shareholders or the capital markets is not sufficient to support a remedy; and
- applicants should focus on the effect of defensive tactics or other actions, to show that there is a material prejudice to affected shareholders or the capital markets and, if successful, will enjoy the remedies they seek.

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