

Contested private placements under new take-over bid regime: Securities regulators reject Hecla challenge of Dolly Varden private placement

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In a closely watched decision that follows the introduction of a new Canadian take-over bid regime earlier this year, Canadian securities regulators have declined to cease trade a private placement of equity securities by a target company implemented following the announcement of an unsolicited take-over bid. As defensive tactics were notably not addressed as part of the new bid regime, this decision (and more importantly, the detailed reasons that will follow) are of considerable interest to market participants considering the changing Canadian take-over bid landscape.

In the first contested transaction under the [new bid regime](#), Hecla Mining Company announced on June 27, 2016 its intention to acquire all of the shares of Dolly Varden Silver Corporation not owned by it, and subsequently formally launched a take-over bid on July 8, 2016. The bid was for C\$0.69 per share, representing a 55% premium to the closing price of the Dolly Varden common shares immediately prior to the June 27 announcement. Hecla at that time held about 15.7% of the Dolly Varden common shares on a fully diluted basis.

On July 5, 2016, Dolly Varden announced its intention to undertake a private placement financing to raise gross proceeds of up to C\$6 million through a sale of common shares at a price of C\$0.62 per common share and “flow-through” common shares at a price of C\$0.70 per share, with an anticipated closing date of July 15, 2016, representing potential dilution of up to 43% of the existing fully diluted share capital of Dolly Varden (not including an over-allotment option that formed part of the proposed private placement and that could result in further dilution). The proposed private placement did not require shareholder approval under the applicable rules of the TSX-V. Hecla subsequently filed applications with the British Columbia Securities Commission (BCSC) and Ontario Securities Commission (OSC) seeking an order cease-trading the securities to be issued in connection with the proposed private placement transactions, or in the alternative an order cease trading the private placement unless and until Dolly Varden obtained shareholder approval for the private placement at a duly convened meeting of shareholders.

Rare simultaneous hearings by each of the BCSC and OSC were held on July 20 and 21, 2016. Both commissions released separate orders on July 25 dismissing the Hecla application seeking to cease trade the proposed private placement. The Ontario order also (1) cease-traded the Hecla take-over bid for Dolly Varden pending the obtaining and inclusion of a formal valuation in accordance with section 2.3 of Multilateral Instrument 61-101, a remedy that had been sought by Dolly Varden as part of the proceedings; and (2) required Hecla to extend its offer, unless earlier terminated, until the latter of (x) 35 days from amending its offer to include a formal valuation of the Dolly Varden common shares, and (y) the original expiry time of its offer.

The principal reason for the wider interest in what is otherwise a tiny transaction (the initial value of the Hecla offer was C\$12 million) is that it appeared to raise squarely the question of whether private placements could serve a more prominent tactical purpose as a defensive tactic under the new Canadian take-over bid regime, in light of the likely disappearance of shareholders' rights plans from their historic tactical role.

The reasons for the decision will follow at a later date and will be of interest to the Canadian deal community, as defensive tactics were notably not addressed as part of the new bid regime. For the time being we can add the outcome to those of other decisions of Canadian securities regulators such as the *Re Red Eagle* decision of the BCSC in 2015 and the *Re ARC Equity Management* decision of the Alberta Securities Commission in 2009 as examples of contested private placements being allowed to proceed in the context of an M&A transaction. The decisions in this area tend to be highly dependent on their facts, and there have been other examples (notably the *Re Fibrek* decision in Quebec and the *Re Inmet Mining Corporation* decision of the BCSC in 2012 where private placement financings have been cease-traded by regulators). An important common thread in the decisions where private placements have been allowed to proceed is that each appeared to feature persuasive evidence as to the target's legitimate short-term need for financing – in other words, the regulators appeared to be more reluctant to intervene to cease-trade private placements where there appeared to be a legitimate business purpose to the financing, even where the tactical nature of private placement may have also been evident.

A further Osler Update will follow upon the release of the reasons in the *Re Dolly Varden* decision by the two securities commissions.