David Defeats Goliath

July 25, 2016

Commissions Affirm Dolly Varden can Proceed with a Private Placement in the Face of Hecla's Insider Bid and Require Hecla to Provide a Formal Valuation

On July 22, 2016, after a simultaneous hearing, the British Columbia Securities Commission and Ontario Securities Commission confirmed that Dolly Varden Silver Corporation could close a C$6 million private placement offering (the "Private Placement") notwithstanding that a take-over bid (the "Insider Bid") had been launched by Hecla Mining Company and its affiliates, for all of Dolly Varden's common shares ("Shares"). Also, the OSC cease traded Hecla's Insider Bid until Hecla obtains (at its own expense) a formal valuation required by Multilateral Instrument 61-101 Protection of Minority Shareholders in Special Transactions and delivers such formal valuation to holders of Shares ("Shareholders") as an addendum to the Insider Bid circular dated July 8, 2016 (the "Amended Insider Offer"). The OSC ordered that the Amended Insider Offer shall, unless earlier terminated, remain open until the later of 35 days after the delivery of the Amended Insider Offer or the "Expiry Time" defined in the Insider Offer. Following the announcement of the Commissions' decisions, Hecla withdrew and terminated the Insider Bid.

The Parties

Dolly Varden is a junior mining exploration company, with its Shares listed and trading on the TSX Venture Exchange. As of July 15, 2016, Dolly Varden had a market capitalization of C$10.9 million.

Hecla is a senior silver mining company and has been one of Dolly Varden's largest holders of Shares since 2012, continuously maintaining a greater than 10% interest in the voting Shares. As of July 15, 2016, Hecla had a market capitalization of US$2.38 billion.

Background

In September, 2012, Hecla first became a Shareholder by participating in a private placement resulting in it holding 19.9% of the Shares and entered into an ancillary rights agreement with Dolly Varden (the "Ancillary Rights Agreement"), whereby Hecla was granted certain rights, such as the ability to nominate a member of the board of directors of Dolly Varden, maintain its pro rata equity interest in Dolly Varden in connection with any issuance of equity securities, and appoint a member to Dolly Varden's technical committee (the "Technical Committee").

At the Shareholders' meeting on July 26, 2013, Ms. Rosalie C. Moore, then a consultant to Hecla, was elected to the Board as Hecla's nominee. On January 23, 2015, Hecla amended Ms. Moore's consulting agreement to allow her secondment to Dolly Varden and Ms. Moore has served as Interim President and CEO of Dolly Varden since that date. She ceased to be a consultant to Hecla on January 16, 2016, and is currently Dolly Varden's only full time employee.

In September 2015, Dolly Varden entered into a credit agreement with Hecla, as agent and lender, and Mr. Robert L. Gipson, as lender (the "Restrictive Loan") with an initial advance of C$1.5 million. The Restrictive Loan was secured by Dolly Varden's property, and prohibited Dolly Varden from (i) issuing, incurring, assuming or otherwise becoming liable for or in respect of additional indebtedness, or (ii) issuing any securities without consent of Hecla. The use of proceeds for the Restrictive Loan was strictly limited to cover Dolly Varden's obligations for flow-through spending in 2015 and, thereafter, for bare minimum working capital purposes.

From December, 2015 to April, 2016, Dolly Varden tried to obtain the consent of Hecla and Gipson to either convert the Restrictive Loan to equity or allow Dolly Varden to conduct an equity financing in an effort to repay the Restrictive Loan and have additional funding to explore the Dolly Varden silver property. Hecla and Gipson declined to consent to either alternative.

In May, 2016, the Board developed a plan to raise the funds required to eliminate the Restrictive Loan and continue exploration of the Dolly Varden silver property. Dolly Varden would take out an additional loan sufficient to pay out the Restrictive Loan in full, and upon full payment and discharge of the Restrictive Loan, announce a private placement issuance to pay for the new loan and provide Dolly Varden with capital for exploration, staff augmentation and working capital.

On June 13, 2016, Dolly Varden entered into a loan agreement (the "New Loan Agreement"), which provided short-term loan proceeds of C$2.5 million from new lenders. The New Loan Agreement allowed Dolly Varden to repay it with an equity issuance without lenders' consent. Dolly Varden provided the 10-day notice period required by the Restrictive Loan notifying Hecla that it would be prepaying the outstanding balance of the Restrictive Loan.

On June 27, 2016, the Board met and decided to proceed with a private placement offering as soon as the Restrictive Loan was paid in full.

Later on June 27, 2016, Hecla issued a press release announcing its intention to make an offer for all of the outstanding Shares not already owned by Hecla.

On June 29, 2016, Dolly Varden's legal counsel, Borden Ladner Gervais LLP, notified Hecla that its Insider Bid required preparation of a Formal Valuation to be overseen by a committee of independent directors of Dolly Varden pursuant to MI 61-101.

On July 4, 2016, Dolly Varden used the proceeds from the New Loan to pay off and extinguish all obligations of the Restrictive Loan. The Board met and appointed a special committee consisting of independent directors to consider the formal offer, if and once it was received.

On July 5, 2016, Dolly Varden announced its intention to conduct the Private Placement. Dolly Varden did not place any restrictions on whether investors in the Private Placement would be able to tender their Shares to an offer, if an offer was made by Hecla or any other bidder. Under the Ancillary Rights Agreement, Dolly Varden sent required notifications so that Hecla could participate in the Private Placement to maintain its pro rata shareholding in Dolly Varden.

On July 8, 2016, 1080890 British Columbia Limited, a wholly owned indirect subsidiary of Hecla Mining Company, formally launched the Insider Bid by filing a take-over bid circular. The Insider Bid was subject to a condition that Dolly Varden would not issue, sell or authorize the issuance of any securities of Dolly Varden. On the same day, Hecla applied to the BCSC for an order to cease trading the Private Placement (the "Private Placement Hearing").

On July 11, 2016, Dolly Varden filed an application to cease trade of the Insider Bid with the OSC (the "Insider Bid Hearing") as the take-over bid circular for the Insider Bid did not include a Formal Valuation as required by MI 61-101.

On July 12, 2016, Hecla notified Dolly Varden of its intention to maintain its pro rata interest and participate in the Private Placement.

On July 15, 2016, the Commissions issued a notice of hearing setting the simultaneous hearing of the Private Placement Hearing and the Insider Bid Hearing for July 20 and 21, 2016.

On July 22, 2016, the Commissions issued orders for the simultaneous hearing, with reasons for the decision to follow. The Commissions dismissed Hecla's application to cease trade the Private Placement, and the OSC cease traded the Insider Bid until the Amended Insider Offer is delivered to Shareholders.

Commentary

Defensive tactics adopted in response to take-over bids are regulated in Canada under National Instrument 62-104 Take-Over Bids and Issuer Bids . The Dolly Varden decision is the first case to address an alleged defensive tactic since that instrument came into force in May 2016, which includes a 50% minimum tender condition, a ten (10) day extension period and a 105-day deposit period. There has been considerable speculation in the financial press that tactical private placements may become the next "poison pill", as a preferred defensive strategy in response to hostile take-over bids in Canada. This ruling, however, should not be taken as carte blanche for targets to adopt private placements in response to such bids.

There were a number of factual circumstances in this case (a genuine and immediate need for financing by Dolly Varden, the Private Placement having been planned prior to the Insider Bid, no restrictions from tendering to the Insider Bid being placed on the subscribers to the Private Placement and the right of Hecla to maintain its pro rata shareholding in Dolly Varden), which suggested that Dolly Varden's Private Placement was not an abusive defensive tactic.

The Commissions have yet to release their reasons, but it is likely the analysis will be fact-specific and contextual in light of the foregoing circumstances. Boards should continue to be careful and take focused advice in such circumstances. The forthcoming reasons will likely provide valuable practical guidance for bidders, targets, and their advisors.

BLG Team

BLG is counsel to Dolly Varden and represented Dolly Varden at the simultaneous hearing.

The BLG securities team was led by Fred Pletcher and Melanie Bradley with support from Warren Learmonth, Stephen P. Robertson, Julie Bogle, Joelle Dudelzak, and students Kelsey McIntyre, Breanne Lehodey and Lauren DeGoey.

The BLG litigation team in British Columbia was led by Robert Deane with support from Steve Warnett, Hunter Parsons and student Benjamin Reedijk and in Ontario was led by David Di Paolo with support from Caitlin Sainsbury, Maureen Doherty, and Graham Splawski.

By

Fred Pletcher, Melanie Bradley, Julie Bogle

Expertise

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