2010 BCSECCOM 181

**Severstal Gold NV, Bluecone Limited,
Endeavour Financial Luxembourg SARL, Endeavour Financial Corporation
and Crew Gold Corporation**

***Securities Act,* RSBC 1996, c. 418**

Panel	Brent W. Aitken	Vice Chair
	Don Rowlatt	Commissioner
	Suzanne K. Wiltshire	Commissioner
Date of application	March 30, 2010	
Date of ruling	March 30, 2010	
Date reasons issued	April 8, 2010	

Appearing

Craig A.B. Ferris Heather M. Cane	For Severstal Gold NV and Bluecone Limited
William C. Kaplan Sean K. Boyle	For Endeavour Financial Luxembourg SARL and Endeavour Financial Corporation
Robert W. Cooper	For Crew Gold Corporation
C. Paige Leggat Gordon R. Smith	For the Executive Director

Reasons for Ruling

¶ 1 In a ruling on March 30, 2010, we dismissed an application under section 165(3) of the *Securities Act*, RSBC 1996, c. 418, by Severstal Gold NV and Bluecone Limited for a hearing and review of the executive director's refusal to make temporary orders against Endeavour Financial Luxembourg SARL and Endeavour Financial Corporation (*see* 2010 BCSECCOM 168). Severstal and Bluecone applied in the alternative that the Commission make the orders.

¶ 2 These are the reasons for our ruling.

I Parties

¶ 3 Severstal is a Russian corporation in the international steel and mining business. It is listed on the Russian Trading System, Moscow Interbank Currency Exchange, and the London Stock Exchange. Bluecone is a wholly-owned subsidiary of Severstal.

¶ 4 Endeavour Financial is a Grand Cayman corporation in the merchant banking business. It is listed on the Toronto Stock Exchange and is a reporting issuer in British Columbia and Ontario. Endeavour Luxembourg is a Luxembourg corporation wholly owned by Endeavour Financial that invests in the gold mining sector.

¶ 5 For convenience, we refer to Severstal and Bluecone as Severstal, and to Endeavour Financial and Endeavour Luxembourg as Endeavour.

¶ 6 Crew Gold Corporation is a Yukon corporation in the gold mining and production business. It is listed on the TSX and the Oslo Børs in Norway and is a reporting issuer in British Columbia and Ontario.

II Background

¶ 7 Severstal made this application in the midst of what appears to be a contest for control of Crew by Severstal and Endeavour. The essential facts are not in dispute.

¶ 8 In late 2009 Crew implemented an equity-for-debt restructuring plan with its bondholders under which it issued 2 billion new common shares on conversion of the bonds. It had 107 million common shares outstanding before the restructuring. Crew filed a prospectus dated December 28, 2009 in connection with the distribution of the new shares to be issued on the restructuring.

¶ 9 Under Canadian securities rules, a four-month holding period applied to the new shares. The period expired on April 5, 2010, a few days after the hearing on March 30. To help ensure compliance with the holding requirement, the new shares were given a unique clearing number and were listed only on the Oslo Børs. The result was that during the hold period the new shares, which represented 95% of Crew's issued and outstanding common shares, could trade only outside Canada and not to Canadians.

¶ 10 On January 28, 2010, Endeavour acquired, in a private transaction with two financial institutions outside Canada, 810 million Crew new shares, representing

38% of Crew's common shares, at 0.66 Norwegian Kroner per share. The shares were transferred through the facilities of the Oslo Børs.

¶ 11 On February 12 Severstal announced it had acquired 336 million Crew shares, bringing its total holdings to 423 million, representing 19.8% of Crew's common shares.

¶ 12 On February 25 Severstal announced another acquisition of Crew shares, increasing its stake to 27%. On that day it also announced its intention to make a formal offer to purchase all Crew common shares it did not already own at a price of NOK 1.10. Severstal had not made a formal offer as of the date of the hearing. Severstal says it has not made any market purchases of Crew shares since February 25.

¶ 13 From February 25 until the date of the hearing, Endeavour purchased another 66 million Crew new shares through the Oslo Børs, increasing its stake in the company to 41%.

¶ 14 From January 28 until March 25, the Crew share price rose on both the Oslo Børs (to NOK 2.89) and the TSX (from $0.14 to $0.47).

III The application

¶ 15 On March 10 Severstal applied for temporary orders under section 161(2) of the Act prohibiting Endeavour from trading Crew securities until a hearing was held to consider the issues raised by Severstal in its application.

¶ 16 The executive director considered Severstal's March 10 application and on March 19 Commission staff responded as follows:

> "We reviewed the issues raised in . . . your application . . . about certain purchases of common shares of Crew . . . made by Endeavour . . . .
>
> We do not have evidence that any of these purchases constituted a "take-over bid" as that term is defined in Multilateral Instrument 62-104 *Take-over Bids and Issuer Bids*. We also reviewed your complaint about possible insider trading on undisclosed material information and we will not be pursuing that complaint.
>
> The Executive Director will not be issuing temporary orders in this matter at this time."

¶ 17 On March 19 Severstal applied to the Commission for a hearing and review of the executive director's refusal to issue the temporary orders. In that application it asked the Commission to issue the temporary orders instead, and "further or in the alternative" to make orders:

- prohibiting Endeavour from acquiring any Crew shares until it completes a take-over bid under MI 62-104 for all of the shares of Crew at the highest price Endeavour has paid for Crew shares at the time of the order;
- prohibiting Endeavour from trading any Crew shares except to tender its Crew shares to Severstal's offer;
- requiring Endeavour to submit to a review of its procedures and practices; and
- reprimanding Endeavour.

¶ 18 Severstal alleged that Endeavour may have traded on undisclosed material information, and that Crew may have failed to meet its continuous disclosure obligations, but it did not pursue these allegations at the hearing. It concerns us that Severstal made these serious allegations without producing any evidence in support of them at the hearing.

IV Analysis

¶ 19 There are four issues:

- Is the executive director's refusal to make the temporary order reviewable under section 165(3)? If so, is Severstal a person "directly affected"?
- Does Severstal have standing to apply to the Commission for orders under section 161(1)?
- Is it in the public interest for the Commission to make the orders Severstal requests?

A Is the executive director's refusal to make the temporary order reviewable under section 165(3)?

¶ 20 Section 165(3) says:

> "Except if otherwise expressly provided, any person directly affected by a decision of the executive director may . . . request and be entitled to a hearing and a review of the decision . . . ."

¶ 21 Section 1(1) of the Act defines "decision" as follows:

> " 'decision' means a direction, decision, order, ruling or requirement made under a power or right conferred by this Act or the regulations".

¶ 22 Under section 161(1), the executive director may, considering it to be in the public interest, order that a person cease trading, or be prohibited from purchasing, any securities. Section 161(2) says:

> "(2) If the commission or the executive director considers that the length of time required to hold a hearing under subsection (1) . . . could be prejudicial to the public interest, the commission or the executive director may make a temporary order, without a hearing, to have effect for not longer than 15 days after the date the temporary order is made."

¶ 23 If the executive director makes an order under section 161(2), that is a decision because it is made under a power conferred by the Act.

¶ 24 It does not follow, as Severstal says, that if the executive director chooses not to make an order under section 161(2), that choice is also a decision within the meaning of the Act.

¶ 25 This issue was considered in *Ironside* [2002] ASCD No 158, a decision of the Alberta Securities Commission, in which a complainant appealed the Alberta executive director's choice not to proceed with enforcement action. The ASC said the executive director's choice was not a "decision" under the legislation because it was not made "under a power or right conferred by [the] Act or the regulations". It said that whether the executive director chooses to proceed with an enforcement action is part of the general administrative function of staff and the executive director.

¶ 26 In *Mercury Partners* 2002 BCSECCOM 597, this Commission agreed with the ASC's reasoning in *Ironside*. In analogous circumstances, the panel decided that the refusal by the Canadian Venture Exchange to take enforcement action was not a decision made under power given to it under "a bylaw, rule or other regulatory instrument or policy". The Commission said,

> "Like staff of our Commission and the ASC, staff of the Exchange regularly make decisions whether to commence, move forward or stop their enforcement process. This type of decision must be contrasted with decisions made by the Exchange pursuant to a power that is specifically given to it . . . ."

¶ 27 Here, the executive director's refusal to issue a temporary order under section 161(2) is in the same category of decision-making described in *Ironside* and *Mercury*.

¶ 28 We find that the executive director's refusal to issue temporary orders is not a decision as defined in the Act, and is therefore not reviewable under section 165(3). We therefore need not consider whether Severstal was directly affected.

B Does Severstal have standing to apply to the Commission for orders under section 161(1)?

¶ 29 Section 161 does not grant any member of the public the right to apply for orders under section 161(1).

¶ 30 The Commission has made orders under section 161(1) in dealing with applications under section 114, which allows any "interested person" to make an application to the Commission in connection with a take-over bid. These are the only circumstances under which the Commission has made orders under section 161(1) as a result of an application by a member of the public.

¶ 31 Since neither Severstal nor Endeavour has made a bid under the Act, Severstal has no standing to apply for orders under section 114.

¶ 32 That disposes of Severstal's application. However, we will comment briefly on the public interest in the context of this application, in case it is of use to the parties.

C Is it in the public interest for the Commission to make orders?

No contravention of MI 62-104

¶ 33 Severstal says Endeavour's acquisitions contravened MI 62-104. We disagree.

¶ 34 This is the definition of "take-over bid" in MI 62-104:

> " 'take-over bid' means an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction . . . where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20% or more of the outstanding securities . . . ."

¶ 35 MI 62-104 defines "offer to acquire" as an offer to purchase securities or an acceptance of an offer to sell securities.

¶ 36 Endeavour has purchased only Crew new shares that were issued under the restructuring. Endeavour purchased almost all of its Crew shares from two sellers outside Canada, one from London and one from New York. It purchased its remaining Crew shares only through the facilities of the Oslo Børs. There is no

evidence that any of the Crew shares Endeavour acquired through the Oslo Børs were sold by Canadians.

¶ 37 We find that none of Endeavour's acquisitions of Crew shares was a take-over bid as defined in MI 62-104.

No abusive conduct

¶ 38 Securities commissions in Canada have considered whether to intervene in take-over bids where there has been no contravention of the legislation. The cases in which they have done so are rare, and with good reason. As the Ontario Securities Commission said in *Canadian Tire Corp.* (1987) 10 OSCB 857:

> "154 . . . Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the commission took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its view of fairness . . . .
>
> 155 . . . To invoke the public interest test of section 123, particularly in the absence of a demonstrated breach of the Act . . . the conduct or transaction must be clearly demonstrated to be abusive of the shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation."

¶ 39 Here, the application boils down to nothing more than a complaint of unfairness, but we have no evidence of that, much less abusive conduct. Unlike other cases where regulators have intervened in the absence of a contravention of the legislation, this is not a case of a person making a take-over bid who, despite technical compliance with the legislation, is circumventing the rules that shareholders would reasonably expect to have applied.

¶ 40 Crew's prospectus disclosed the 95% dilution that its existing shareholders would suffer on the restructuring, as well as the four-month hold period that applied to Canadian residents. As a result of these two factors, 95% of Crew's common shares could trade only on the Oslo Børs, where Endeavour did all its trading.

¶ 41 The 2 billion Crew new shares issued were held by Crew lenders; not only would it be reasonable to believe they would be motivated to sell the shares, it would be clear that any purchases of those shares would be outside Canada, because they could trade only through the Oslo Børs.

¶ 42 If there were anomalous circumstances here, they arose from those two things: the terms of the debt-for-equity restructuring, which resulted in the issue of 20 times as many common shares as were then outstanding, and the four-month hold period imposed by Canadian securities rules which, rather than anything that Endeavour did, prevented Canadian shareholders from selling into Endeavour's bids on the Oslo Børs.

¶ 43 Severstal's submissions attempted to cast Endeavour's conduct as an attempt to thwart a take-over bid by Severstal to the prejudice of Crew's shareholders, but that rings false for three obvious reasons. First, Endeavour acquired its 38% stake in Crew before Severstal announced its intention to make a take-over bid. Second, the market price of the Crew shares soon exceeded by a wide margin the NOK 1.10 Severstal said it would offer. Third, and perhaps most important, Severstal has yet to make a bid.

¶ 44 Severstal also says that Canadian shareholders have been denied the price paid by Endeavour in its acquisitions. That may be so, but Canadian shareholders who held freely-tradeable Crew shares during the period had the opportunity to realize significant gains. Crew's stock price appreciation was not as great on the TSX as it was on the Oslo Børs, but that likely has more to do with the impact of the four-month hold period than any conduct by Endeavour.

No failure of regulatory oversight

¶ 45 Severstal urged that we intervene because otherwise there would be no securities regulator monitoring the trading.

¶ 46 Rules apply to take-over bids made in our jurisdiction. Endeavour's acquisitions are not take-over bids under those rules. The circumstances dictated the potential for high trading volumes in the market for Crew new shares, drove that volume to the Oslo Børs, and ensured that none of the sellers would be Canadians.

¶ 47 That said, even where our take-over bid rules are not contravened, we have the power to intervene when the public interest demands it. For the reasons we have stated, this is not such a case.

V Disposition

¶ 48 We therefore dismissed the application.

¶ 49 April 8, 2010

For the Commission

Brent W. Aitken
Vice Chair

Don Rowlatt
Commissioner

Suzanne K. Wiltshire
Commissioner