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## Judicial Willingness to Enforce Standstill Provisions

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### **Introduction**

Acquirors of Canadian targets should take note of the recent decision in *Quebecor Media Inc v Osprey Media Income Fund*<sup>(1)</sup> regarding the use of standstill agreements as a deal protection mechanism. Recent decisions have demonstrated judicial willingness to enforce standstill provisions requiring potential acquirors to obtain the target's consent prior to making an offer, even where this may inhibit the usual auction process associated with takeover bids. This trend means that a bidder may obtain an important deal protection tool by requiring the target to enter into and to enforce standstill agreements with competing bidders. However, as *Osprey Media* demonstrates, such contractual provisions are likely to be construed strictly. Therefore, careful attention must be paid to both the terms of the standstills that have been given by potential competing bidders and the scope of the target's obligation to enforce those standstills.

### **Facts**

In March 2007 Osprey Media Income Fund announced that it was for sale and that it was conducting a targeted auction process. Osprey required that any interested party seeking to conduct due diligence had to enter into a confidentiality agreement including a standstill provision. Under the standstill provision, the interested party agreed not to acquire any of Osprey's assets or securities for a two-year period unless it had Osprey's written approval. Additionally, the interested party agreed that it would not act jointly or in concert with any other party making a bid in this restricted period.

Torstar Corporation, Quebecor Media Inc, Black Press Ltd and about 32 other interested parties entered into confidentiality agreements with Osprey. Quebecor and Torstar eventually made an offer in the first round of the auction, which Quebecor won. Osprey entered into a support agreement for Quebecor's bid. The support agreement required Osprey to enforce any standstill agreements with other potential acquirors (subject to a fiduciary out on legal advice), and additionally required Osprey to obtain a standstill agreement with any maker of an unsolicited superior proposal that wished to access Osprey's confidential information.

Two things happened next. First, Torstar resurfaced and reminded Quebecor of previous discussions between them about making a joint bid for Osprey. Torstar demanded that Quebecor sell it part of Osprey's assets. Quebecor took the position that it either was not obligated to Torstar or was prevented by the terms of its agreements with Osprey from agreeing to sell any of the assets to Torstar.

Second, Black Press, which had sat on the sidelines for the first round of the auction, saw an opportunity when the Quebecor offer was announced. Black Press knew that Torstar had failed in round one of the auction. Torstar was also the beneficial owner of about 20% of Black Press. Torstar and Black Press had previously agreed not to compete with each other so Black Press would need a release from that covenant. Black Press's chief executive officer (CEO) approached Torstar's CEO to determine whether Torstar would still be interested in purchasing some of Osprey if Black Press succeeded in buying it. No discussion was held about price or what assets Torstar might acquire, but Torstar was clearly interested.

Black Press then approached Osprey with a superior bid. Quebecor protested after Osprey announced it was supporting the Black Press offer. Quebecor alleged Black Press and Torstar were acting jointly or in concert, in violation of the standstills that both Torstar and Black Press had signed in the auction's first round. Quebecor noted that when it had refused to accede to Torstar's demands for a part of Osprey's assets, Torstar had said that it would make a pact with a third party to submit a competing bid for Osprey unless it agreed to sell the assets. Quebecor also demanded that Osprey require Black Press to refresh its standstill before letting it back in to conduct further due diligence.

### **Recent Judicial Interpretations of Standstills**

Previous authorities have permitted standstills to be used defensively to prevent unsolicited bids or to protect active deals. In *Aurizon Mines Ltd v Northgate Minerals Corp.*<sup>1</sup> Aurizon Mines and Northgate entered into discussions respecting a potential business combination. The parties entered into reciprocal confidentiality agreements containing standstill provisions. Northgate agreed to a standstill provision on the following terms:

*"No Purchase of Securities or Act of Control: The receiving party [Northgate] hereby agrees that for a period of one...year from the date hereof; neither the receiving party, receiving party representatives or any affiliate (as that term is defined in Rule 405 under the United States Securities Act of 1933, as amended, or under Section 1(2) of the Securities Act (Ontario)) of the receiving party (regardless of whether such person or entity is an associate or affiliate on the date hereon) will, without the prior written approval of the board of directors of Aurizon:*

*(a) acquire, directly or indirectly, by purchase or otherwise, any voting securities or securities convertible into or exchangeable for voting securities, or direct or indirect rights or options to acquire any voting securities, of Aurizon;*

*(b) make, or in any way participate, directly or indirectly, in any 'solicitation' of 'proxies' to vote (as such terms are used in the proxy rules of the United States Securities and Exchange Commission or in the proxy rules contained in the Securities Act (Ontario) and regulations thereto) or seek to advise or influence any other person or entity with respect to the voting securities of Aurizon;*

*(c) form, join or in any way participate in a 'group' within the meaning of Section 13(d)(3) of the United States Securities Exchange Act of 1934, as amended, with respect to any voting securities of Aurizon;*

*(d) otherwise act, alone or in concert with others, to seek to control the management, board of directors or policies of Aurizon; or*

*(e) contact or otherwise communicate with any shareholder of Aurizon with a view to discussing any possible transaction or any other direct or indirect purchase of voting securities of Aurizon."*

After a several months of tepid negotiations, Aurizon told Northgate that it was not interested and that Northgate should come back "in a couple of years". Northgate wrote to Aurizon and said that it had not received any confidential information and therefore did not consider itself bound by the terms of the standstill.

When Northgate commenced an offer for all of Aurizon's shares, Aurizon sought an injunction. The British Columbia Superior Court agreed that Northgate was entitled to enforce the standstill provision, which was severable from the confidentiality obligations. The British Columbia Court of Appeal affirmed the superior court's ruling.

In *Ventas Inc v Sunrise Senior Living Real Estate Trust*,<sup>3</sup> the Ontario Superior Court of Justice permitted a standstill provision to be used to inhibit an auction. The potential acquiror, Ventas Inc, sought to require the target, Sunrise Senior Living Real Estate Trust, to enforce its standstill agreement with Health Care Property Investors, Inc. Health Care was attempting to make an unsolicited superior proposal. However, Ventas had required, by the terms of its purchase agreement with Sunrise, that Sunrise would enforce its pre-existing standstill agreements. In its standstill agreement with Sunrise, Health Care had agreed the following:

*"In consideration of the evaluation material being furnished to the interested party [Health Care], the interested party agrees that from the date hereof until the date that is 18 months from the date hereof (the 'standstill period'), without the prior written consent of Sunrise REIT, the interested party shall not and shall cause its affiliates not to:*

*(a) in any manner acquire, agree to acquire or make any proposal to acquire, directly or indirectly, by means of purchase, merger, business combination or in any other manner, beneficial ownership of any securities or all or any assets of Sunrise REIT or any of its subsidiaries;*

*(b) make, or in any way participate, directly or indirectly, in any solicitation of proxies to vote, or seek to advise or influence any person with respect to the voting of, any voting securities of Sunrise REIT;*

*(c) form, join or in any way participate in a 'group' (within the meaning of Section 13(d)(3) of the United States Securities Exchange Act of 1934) or act jointly or in*

*concert with any other person with respect to any voting securities of Sunrise REIT;*

*(d) otherwise act, alone or in concert with others, to seek to control, advise, change or influence the management, board of trustees or governing instruments of Sunrise REIT;*

*(e) make any public disclosure of any intention in connection with the foregoing;*

*(f) make any public disclosure, or take any action that could require Sunrise REIT to make any public disclosure, with respect to any of the matters set forth in this agreement;*

*(g) disclose any intention, plan or arrangement inconsistent with the foregoing;  
or*

*(h) advise, assist or encourage any other persons in connection with any of the foregoing.*

*The interested party also agrees during such period not to request Sunrise REIT or any of its representatives, directly or indirectly, to amend or waive any provision of this paragraph (including this sentence)."*

Sunrise and Health Care did not dispute strongly that the Health Care standstill continued to be in force. However, both argued that Sunrise could elect not to enforce it based on a fiduciary out. Sunrise argued that the express terms of its agreement with Ventas gave it a fiduciary out where it received a *bona fide* superior proposal. Health Care argued that the directors of Sunrise could not, as a matter of public policy, bargain away their fiduciary obligations to entertain the higher Health Care bid. Ventas argued that it was entitled to enforce its agreement with Sunrise.

The Ontario Superior Court of Justice agreed with Ventas. According to the terms of the Ventas/Sunrise agreement, Sunrise was required to enforce the Health Care standstill. The fiduciary out applied only to unsolicited bids from parties that had not previously signed standstills. The Ontario Court of Appeal agreed. A standstill provision could be used legitimately to force participating bidders to come to the table with their best offer, knowing that they would not be allowed to return to the auction later.

The defensive use of standstills either to defeat a bid or to protect a bid creates significantly different rules for takeover bids in Canada than in the United States. In the recent decision of the Delaware Court of Chancery in the *Topps Company Shareholders Litigation (In re)*,<sup>(4)</sup> Vice-Chancellor Strine concluded that standstills can serve legitimate purposes if they are used to find and curtail misuse by potential bidders, to promote an orderly auction or to extract concessions from a bidder. However, a board would be misusing its power if it used or allowed the standstill to prefer an existing bidder or to block a higher bid once it was reasonable to conclude that no further improvements could be extracted.

## Decision

First, the Ontario Superior Court of Justice distinguished *Ventas* from the situation in *Osprey Media* on the basis that the Health Care standstill did not contain a 'spring' provision once *Ventas* had made a bid. The *Osprey* standstill agreements were all identical and stated as follows:

*"Except with our [Osprey's] prior written approval, during the period commencing the date hereof and ending on the date that is two years after the date hereof (the 'restricted period'), you will not, and you will not assist or encourage others to, acquire or agree, offer, seek or propose to acquire, directly or indirectly, by purchase or otherwise, beneficial ownership of any of the assets, businesses or securities of Osprey, or any rights or options, whether from Osprey or a third party, to acquire such ownership...Except with our prior written approval, during the restricted period you will not: ...*

*(ii) initiate, or induce or attempt to induce any other person, entity or group acting together, to initiate any unit-holder proposal in respect of Osprey or takeover bid for Osprey securities or any change of control of or convening of a unit-holders meeting of Osprey;*

*(iii) otherwise seek or propose to influence or control the management or policies of Osprey; or*

*(iv) enter into any discussions, negotiations, arrangements or understandings with any third party with respect to any of the foregoing.*

*Notwithstanding the foregoing, nothing in this Paragraph 7 shall prevent you or your affiliates from...(ii) taking any action otherwise prohibited by this paragraph at any time after a public announcement of an offer from a third party not affiliated, or acting jointly or in concert, with you to acquire 20% or more of the outstanding [Osprey] securities or all or substantially all of [Osprey's] assets."*

The court concluded that the terms of the standstills meant that as soon as Quebecor made its bid for more than 20% of *Osprey*, all of the other parties bound by standstills were sprung. The court concluded that the intent of the parties to the standstills must have been that *Osprey* would be unencumbered in entering into a second round of bidding once the Quebecor offer was accepted.

This meant that *Black Press* and *Torstar* had been free to talk with one another once Quebecor had made its bid. Moreover, *Black Press* was free to come back into the auction in round two. Whatever Quebecor thought it was getting from a requirement that *Osprey* enforce existing standstills, it was not getting the same deal protection that *Ventas* had obtained in its agreement with *Sunrise*.

However, Quebecor had another argument based on the amended standstill that *Black Press* had signed when it came back to *Osprey* in the second round. Quebecor tried to argue either that the amended standstill provisions were retroactive or that *Black Press* was acting jointly or in

concert with Torstar in violation of the amended standstill provisions. The court sided with Black Press. It would take clear wording in the standstill to cover discussions that had already taken place during the period in which Black Press and Torstar had been sprung from their previous standstills. The court held that Black Press and Torstar had been careful not to have any discussions after Black Press entered into the amended standstill. The court concluded that any understanding between Black Press and Torstar was too vague to qualify as acting jointly and in concert and therefore fall foul of the amended standstill.

## Comment

Requirements that the target enforce standstill agreements are still important elements of deal protection, at least in Ontario. However, as *Osprey Media* demonstrates, the extent of that deal protection will depend on the terms of the standstills negotiated by the target with other potential acquirors. The court is also likely to construe strictly a standstill agreement where the target is being required to enforce it for deal protection purposes. Potential acquirors will want disclosure of the terms of the target's standstills with other potential bidders during the due diligence process or will at least want to insist on representations as to what the terms of the standstills are in order to assess the scope of the possible use of them for deal protection.

## Endnotes

- (1) 2007 CanLII 32669 (Ont SCJ).
- (2) 2006 CarswellBC 1651 (SC) affirmed 2006 CarswellBC 1734 (CA).
- (3) 2007 CarswellOnt 1704 (SCJ) affirmed 2007 CarswellOnt 1705 (CA). See "[Takeover Battles: New Limits on Maximizing Shareholder Value?](#)".
- (4) Court File: CA No 2786-VCS (Del Ch June 14 2007).

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