

# Court blocks hostile takeover bid

## The risks of misuse of confidential technical information

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Confronted by a hostile takeover bid, target companies often employ various defensive tactics against the bidder. Some better known tactics have colourful names (e.g. “The Nancy Reagan Defence” when the target company’s board recommends that shareholders “just say no”).

In countering an unusual hostile takeover bid launched by Rusoro Mining Ltd., Gold Reserve Inc. needed an extraordinary remedy: a court-ordered injunction against the bid ordered by an Ontario judge. The defendant, Endeavour International Financial Corporation, was also enjoined from having any involvement with the hostile takeover bid. This case was described in the March/April 2009 issue of *CIM Magazine* (p. 14). On April 6, 2009, another Ontario judge refused to permit the defendants to appeal the injunction order.

### Background to the bid

Endeavour had acted as Gold Reserve’s financial advisor for four years, until shortly after Rusoro launched its hostile bid, and were granted access to significant Gold Reserve confidential information. Agreements between Endeavour and Gold Reserve contained covenants preventing Endeavour from knowingly acting against Gold Reserve’s interests in a material way, as well as a requirement that Endeavour inform Gold Reserve of any potential conflict of interest.

Rusoro engaged Endeavour to act as its financial advisor in 2007, and in August 2008, it made a friendly offer to acquire the shares of Gold Reserve — an offer that was declined. On December 15, 2008, Rusoro launched a hostile takeover bid for Gold Reserve’s shares. Gold Reserve regarded the bid as being tainted by Endeavour’s possession of Gold Reserve confidential information and

began proceedings against Endeavour and Rusoro in December 2008, seeking injunctive relief and damages.

### The injunction

On February 10, 2009, Mr. Justice Cumming noted that: “The practice of the mining industry reportedly is that confidential information is not provided to any third party in the absence of a confidentiality agreement. If it is anticipated that the recipient of the confidential information might be in a position to make an offer to acquire the shares of the mining company, then the confidentiality agreement typically also contains additional so-called ‘standstill’ provisions, that is, the company receiving the confidential information will not acquire the shares of the disclosing company for a specified period of time.”

The judge noted that the same people at Endeavour advised both Gold Reserve and Rusoro. He found that: “There is a serious issue established that Endeavour breached the express contractual terms of the Second Advisory Agreement and its implicit duties of loyalty and maintaining confidence as a professional advisor to its client...by acting as expert financial advisor to Rusoro’s hostile takeover bid...A person in Endeavour’s position must avoid conflicting interests and must not act against the interests of the person confiding in him by utilizing confidential information without the informed consent of that person. Rusoro is arguably liable as a knowing and willing recipient of these services in breach of Endeavour’s duties to Gold Reserve.”

Justice Cumming also held that fiduciary obligations (including that of loyalty) can arise even without a confidentiality agreement and can exist in professional advisory relationships.

### Lessons learned

In seeking permission to appeal Justice Cumming’s decision, Endeavour stated that it regards the decision as having far-reaching implications including: (a) for all advisors in receipt of confidential information; and (b) with respect to what measures should be put in place before an advisor acts for a client’s competitor.

The Gold Reserve litigation certainly provides an important lesson for professional advisors regarding how to handle confidential information and the risks associated with failing to take all appropriate steps to protect such information. It also provides not merely an example of when the courts will intervene to stop a hostile bid from proceeding but also valuable guidance as to the factors that companies and their professional advisors should consider when establishing the scope of services and their respective duties to each other.

The complete decision of the Court on the injunction motion can be seen at [www.goldreserveinc.com](http://www.goldreserveinc.com). **CIM**



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