



OSC clarifies when merger negotiations must be disclosed

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Companies do not have to disclose merger negotiations as a material change until there is sufficient likelihood that the deal will close, the Ontario Securities Commission held recently in *Re AiT Advanced Information Technologies Corp.*¹ The decision follows

the Supreme Court of Canada's recent decision on disclosure of a material change in *Danier Leather*.²

The proceedings arose from a merger between AiT and the US-based 3M Company following negotiations between the parties in early 2002. On April 25, 2002, AiT's board voted to recommend AiT's acquisition by 3M to its shareholders subject to a fairness opinion from its financial adviser and the board's approval of the final terms of the transaction. The next day, the parties signed a non-binding letter of intent (LOI) that was conditional on 3M's due diligence report, final approval from 3M's board, 3M's CEO and AiT's key shareholders, and re-negotiation of the final terms of the deal. 3M completed its due diligence on May 9. Its directors approved the transaction on May 14, and its CEO on May 21, 2002. The final merger agreement was signed on May 23, 2002, at which point AiT reported the deal publicly.

The Commission's prosecutorial staff alleged that the ongoing negotiations, AiT's approval of the deal on April 25, or the signing of the LOI constituted a material change which should have been publicly reported by AiT earlier under Ontario securities law. The Commission's hearing panel disagreed. It held that merger negotiations or related developments prior to a binding agreement may constitute a material change in certain circumstances. However, prior to 3M's final approval of the deal in this case, AiT's directors did

not have sufficient grounds to believe that the transaction would be completed. In the merger context, material change occurs when there is "sufficient commitment" by the parties and a "substantial likelihood" that the transaction will close.

The panel found that these criteria were not satisfied based on the evidence. First, the AiT's board recommendation to shareholders and the non-binding LOI were conditional. AiT's directors did not know whether the conditions would be met. Second, they were not fully assured of the acquirer's commitment to the deal considering the complex, multi-layered approval process 3M had in place as a large corporation. In the panel's view, the proposed merger was far from a definitive, finalized deal when AiT's board approved the proposal and signed the LOI. Thus, no material change occurred at that time. Thus, the panel found AiT did not breach the Securities Act by not disclosing its merger negotiations.

The panel emphasized, however, that there is no "bright-line" test for determining when a development in the affairs of a company becomes a material change. The outcome will largely depend on the specific facts and circumstances of each case. The panel warned that a LOI with more definitive provisions or negotiations with a "smaller, less process-driven" acquirer may imply a greater degree of commitment thus triggering the disclosure obligation in appropriate circumstances.

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¹ *AiT Advanced Information Technologies Corp. (Re)* (2008), 31 OSCB 712,
http://www.osc.gov.on.ca/Regulation/Orders/2008/ord_2008_index.jsp

² *Kerr v. Danier Leather Inc.* [2007] SCC 44, <http://scc.lexum.umontreal.ca/en/2007/2007scc44/2007scc44.html>.
See “Canada’s top court dismisses shareholder class action against Danier Leather but rejects Business Judgment Rule as a defence in securities cases”,
http://www.agmlawyers.com/litigatorca.asp?file=archive/reslibrary_archives_danier20071017_content



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