CAPITAL MARKETS TRIBUNAL DECISION REVISITS PRIVATE PLACEMENTS AS DEFENSIVE TACTICS

Posted on March 20, 2024

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Overview

On March 11, 2024, the Capital Markets Tribunal of the Ontario Securities Commission (the "**Tribunal**") delivered the written reasons for its December 14, 2023 ruling, wherein it dismissed the application and cross-application by Mithaq Canada Inc. ("**Mithaq**") and Aimia Inc. ("**Aimia**"), respectively, seeking various relief which arose as part of their ongoing conflict marked by a proxy battle, unsolicited take-over bid and other disputes.

Mithaq sought to cease trade Aimia's private placement completed in October 2023 (the "**Private Placement**"). Mithaq contended that the Private Placement constituted an improper defensive measure aimed at hindering Mithaq's unsolicited take-over bid for Aimia (the "**Mithaq Bid**"). Additionally, Mithaq sought the Tribunal's intervention to annul the Toronto Stock Exchange's ("**TSX**") decision approving the Private Placement without the need for Aimia to obtain shareholder approval. Aimia brought a cross-application asking that Mithaq be prevented from relying on an exemption that permits a bidder to acquire up to 5% of the target's shares in the course of a take-over bid if certain conditions are met (the "**5% Exemption**").

The decision provides additional guidance on the circumstances when a dilutive share issuance can proceed in the face of an unsolicited take-over bid and reemphasizes the Tribunal's view that, other than in exceptional circumstances or where there is abusive or improper conduct, it must be cautious in granting relief that alters the carefully calibrated take-over bid regime under National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**").

Background

On September 15, 2023, Aimia requested conditional approval of the TSX for the Private Placement, which approval was provided on September 28, 2023. Thereafter, on October 5, 2023, Mithaq launched the Mithaq Bid, which was an all-cash offer to acquire all of the outstanding common shares of Aimia which it did not own. The Mithaq Bid was evaluated by Aimia through a Special Committee of the board formed on October 10, 2023. On October 11, 2023, the TSX maintained its earlier decision to conditionally approve the Private Placement but required that Aimia give advance notice to the market (the "**TSX Decision**"). On October 13, 2023, Aimia

announced its intention to complete the Private Placement with undisclosed (but arm's length) investors, scheduled to close on October 19, 2023.

The Private Placement involved issuing up to 10,475,000 Aimia common shares and an equal number of common share purchase warrants. The investor group could also potentially secure up to three of the eight board seats. If fully subscribed and all warrants were exercised, the issued shares would constitute 24.89% of the then-outstanding common shares of Aimia. The Private Placement aimed to raise up to $32.5 million in gross proceeds and was intended for funding Aimia's operations over the next 12 to 24 months and supporting its strategic investment plan and other contingencies. Following Aimia's announcement, Mithaq initiated legal proceedings against Aimia before the Tribunal, and Aimia made a cross-application.

When Private Placements could be blocked

In *Hecla Mining Company (Re)* ("***Hecla***"), the Tribunal, in considering a private placement in the face of an unsolicited bid, established that a private placement should only be blocked in cases of "clear abuse of the target shareholders and/or the capital markets." This ruling introduced a two-stage test for assessing whether a private placement is a defensive tactic in response to a take-over bid:

i. First, the panel determines if the private placement is "clearly not" a defensive tactic aimed at whole or in part at altering the dynamics of the bid process. If not, the guidelines outlined in National Policy 62-202 - *Take-Over Bids - Defensive Tactics* ("**NP 62-202**") do not apply, and the Tribunal will not halt the private placement unless other valid reasons exist. If uncertainty remains, the analysis progresses to the second stage.
ii. Second, the Tribunal weighs the corporate objectives behind the private placement against the promotion of shareholder choice, considering various factors to strike a balance.

The Tribunal noted that the "clearly abusive" standard predated the 1994 amendments to the *Securities Act* ("**Act**"), which added investor protection against "unfair" practices and the promotion of "fair" capital markets as purposes of the Act. The Tribunal seemingly encouraged the possibility of revising this standard in future proceedings.

Assessment of Defensive Tactics

In assessing whether the Private Placement was a defensive tactic, the Tribunal considered several factors, beginning with the burden of proof and the materiality of the placement's impact on the Mithaq Bid. Some of the key points from the Tribunal's reasons are discussed below.

1. Burden of Proof and Materiality

Although the applicant typically bears the burden of establishing elements of whether a private placement has been used as a defensive tool, the onus may shift to the opposite party where the private placement's impact on the existing bid environment was material. In the present case, the Tribunal concluded that the Private Placement's impact on the Mithaq Bid's success was material. As a result of the Private Placement, the number of shares needed to be tendered to satisfy the statutory minimum tender condition would increase from approximately 29 million to approximately 34.3 million (an 18.28% increase). If the Private Placement investors abstained from tendering, Mithaq would need 59% of all remaining Aimia shares tendered to meet the condition. Additionally, the Tribunal acknowledged the material impact on potential competing bids, as highlighted by Mithaq's concern regarding the warrants' exercise price being four cents higher than its offer price. Consequently, the onus shifted to Aimia to prove that the Private Placement was not a defensive tactic.

2. Aimia's Defense – Application of the different stages of the Hecla test

Stage – 1: *Aimia was unable to show that the Private Placement was '**clearly not**' a defensive tactic.*

Based on the *Hecla* test, the Tribunal considered the following three relevant factors for stage one of the test, each of which alone could be determinative:

i. **Was the Private Placement designed to respond to Aimia's serious and immediate need for financing? Yes.** The Tribunal clarified that the word "immediate" does not necessarily imply urgency. Instead, "it does imply that the need currently exists, as opposed to being speculative." The Tribunal found that the Private Placement was designed primarily to meet Aimia's serious and immediate need for financing. The Tribunal observed that Aimia had failed to secure other debt financing options for itself due to the challenging market conditions. As an investment business, Aimia purchases interests in other companies and thus requires a cash surplus to invest in suitable opportunities. This, coupled with Aimia's projected growing deficits of $18.7 million and $43.5 million by the end of 2024 and 2025, justified a finding of a serious and immediate need for financing.

ii. **Was the Private Placement planned or modified in response to, or in anticipation of, a take-over bid? No.** According to NP 62-202, an indicator of whether Aimia took any steps "in anticipation of" a bid would be whether Aimia's board had "reason to believe that a bid might be imminent." Here, the Tribunal clarified that a bid is "imminent" when there is likelihood that a specific bid will materialize without having a threshold that would be too low to stall a company's effort to raise capital. Further, the Tribunal considered the timing of Aimia's initiation of the planning process for the Private Placement, which was much prior to the announcement of the Mithaq Bid, and noted that there was no indication of any impending take-over bids during this period. Mithaq had noted that it had specifically warned Aimia that a bid was possible, and that any private placement would be viewed as a defensive tactic. The Tribunal

was not inclined to weigh that factor in favour of Mithaq in light of the four-month time period that had elapsed between such warning and the initiation of the bid.

iii. **Was the Private Placement part of a good faith, non-defensive, business strategy? Yes.** The Tribunal found that the Private Placement directly responded to Aimia's serious and immediate need for financing. It also noted that the Private Placement supported Aimia's strategy to strengthen its board as the investment group involved would potentially secure up to three of the eight board seats. While the Tribunal did not conclude that the Private Placement was primarily designed as a defensive measure, it noted that once the bid was announced, the Private Placement took on a more defensive character. Accordingly, the Tribunal found that the Private Placement could not be considered as "**clearly not**" a defensive tactic.

As Aimia was unable to discharge its onus of proving that the Private Placement was "**clearly not**" a defensive tactic, the Tribunal proceeded to the second stage of the *Hecla* analysis.

Stage 2: *The Private Placement was not Clearly Abusive.*

The Tribunal applied principles from NP 62-202 to determine whether to cease trade the Private Placement. Specifically, the Tribunal considered whether the Private Placement was "clearly abusive" by examining five factors: (i) the benefit to shareholders, (ii) the effect on bid dynamics, (iii) the relationship between Aimia and the Private Placement investors, (iv) the views of shareholders, and (v) the board's consideration of the interplay between the Private Placement and the Mithaq Bid.

Despite its effect on bid dynamics, and the fact that the Tribunal took issue with the Aimia Special Committee's process, and the board's process, with respect to their consideration of the interplay between the Private Placement and the Mithaq Bid, the Tribunal determined that this was outweighed by the placement's benefits to Aimia's shareholders and the fact that almost every step involved in the Private Placement preceded the Mithaq Bid. Therefore, Mithaq failed to demonstrate that the Private Placement was abusive, let alone clearly abusive.

The Tribunal also concluded that absent the *Hecla* test, it was not persuaded that the circumstances surrounding the Private Placement were sufficient to justify the exercise of its public interest jurisdiction to cease trade the Private Placement.

Deference to the TSX Decision

In considering Mithaq's request to set aside the TSX Decision, the Tribunal noted that it maintained rigorous intervention criteria for such matters, intervening only when certain criteria are met, including procedural errors, overlooked material evidence, new and compelling evidence presented to the Tribunal that was not

presented to the decision maker, or the Tribunal's perception of the public interest conflicts with that of the decision maker. The Tribunal found no errors in principle and little to criticize about the process undertaken by the TSX or the TSX Decision, and concluded that Mithaq had failed to meet the heavy burden imposed on it.

Refusal of Relief Relating to the Minimum Tender Condition

The Tribunal dismissed Mithaq's request to exclude shares issued pursuant to the Private Placement from the minimum tender condition calculation contained in NI 62-104. Citing the need for predictability and caution in modifying bid frameworks, it emphasized that such relief should only be granted in exceptional circumstances or as a result of abusive or improper conduct that undermined minority shareholder choice. The Tribunal found that the Private Placement did not deny shareholders the opportunity to tender. Interestingly, the Tribunal made no reference to the Alberta Securities Commission decision in *Re Bison Acquisition Corp., 2021 ABASC 18*, which is the only other decision that has addressed this issue and held that the minimum tender condition could be modified in the circumstances before that tribunal.

Refusal of Relief Relating to the 5% Exemption

Aimia's attempt to deny Mithaq the ability to purchase up to 5% of the issued and outstanding shares of Aimia during the course of its bid as permitted under NI 62-104 was rejected by the Tribunal. Aimia argued that Mithaq was using the highly-conditional Mithaq Bid as a shield to access the 5% Exemption and acquire a negative control position over Aimia and that the Mithaq Bid was not made in good faith. Following adjustments to certain conditions to the Mithaq Bid, the Tribunal held that the Mithaq Bid was not so conditional that it cannot be considered to have been made in good faith. The Tribunal also held that if Mithaq does not exercise its discretion regarding the conditions in a reasonable manner, there was the prospect of regulatory intervention. As a result, the Tribunal saw no public interest issue in Mithaq having access to the 5% Exemption.

Observations

The decision provides additional guidance, particularly to issuers when faced with the possibility of an unsolicited take-over bid at a time when financing may be needed or simply is being considered. In this regard, we note the following:

1. This first application of the two-stage test in *Hecla* since that decision highlights the limitations of such test. In the decision, notwithstanding that the Tribunal found the three relevant factors in the first stage of the test in favour of Aimia, the Tribunal proceeded to the second stage of the test, where much of the analysis appeared to be underpinned by the findings in the first stage. A singular, broader contextual analysis may well be more appropriate.

2. In examining whether a financing can withstand an application for a cease trade order if done in the face of an unsolicited take-over bid, the key factors appear to be that the financing needs to have a clear business purpose and the key steps involved in the financing precedes the initiation or announcement of the bid.
3. Prospective bidders cannot seek comfort in simply issuing a warning that a take-over bid may be undertaken. Such warnings must be timely, or they may simply be viewed by a securities regulator as tactical.
4. Bidders face a heavy burden in seeking to overturn a decision of the TSX to approve a private placement without shareholder approval.

Finally, consistent with its decision in *Aurora Cannabis Inc (Re)*, 2018 ONSEC 10, the Tribunal once again noted that, at least in Ontario, it will be difficult for applicants to seek relief that serves to amend or alter the take-over bid regime under NI 62-104.

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A Cautionary Note