

Ontario Capital Markets Tribunal clarifies considerations for a private placement in the face of an unsolicited takeover bid in Aimia



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On March 11, 2024, the Ontario Capital Markets Tribunal (Tribunal) released the [reasons \[PDF\]](#) for its order dated December 14, 2023 dismissing the application of Mithaq Capital Inc. (Mithaq) to cease trade a private placement that Aimia Inc. (Aimia) completed in October 2023¹. Mithaq asserted that the private placement was an improper defensive tactic designed to thwart its takeover bid for Aimia. The Tribunal found that the private placement addressed Aimia's serious and immediate need for financing and was not planned or modified in response to or in anticipation of Mithaq's bid. Although the private placement changed the dynamics of the bid environment in a way that was unfavourable to Mithaq, the Tribunal found this was secondary to the main purpose and did not warrant interfering with the private placement.

The decision also addresses the Tribunal's determination not to set aside a decision of the Toronto Stock Exchange (the TSX) approving the private placement, as well as the Tribunal's denial of Aimia's request to preclude Mithaq from making market purchases during the pendency of its takeover bid.

The decision provides helpful guidance in assessing whether a private placement undertaken in the face of a takeover bid is an improper defensive tactic and illustrates that, under appropriate circumstances, dilutive share issuances can be completed in such circumstances.

Background

Aimia and Mithaq had a lengthy history of animosity and disagreement, including a proxy contest and litigation, in the lead up to the announcement of a private placement by Aimia.

The announcement of the private placement followed months of negotiations, as well as conditional approval from the TSX, which was provided on September 28, 2023. On October 5, 2023, before the private placement was publicly announced, Mithaq commenced an unsolicited all-cash offer for all outstanding common shares of Aimia.

On October 11, 2023, having considered the impact of the Mithaq takeover bid, the TSX determined to maintain its earlier decision to conditionally approve the private placement and added a condition that Aimia give advance notice to the market before closing. On October 13, 2023, Aimia publicly announced that it intended to complete the private placement on October 19, 2023. If fully subscribed, the private placement would represent aggregate dilution of 24.89% of the then outstanding common shares of Aimia. The company disclosed that the proceeds of the private placement were to fund Aimia's operations over the next 12–24 months and to support its strategic investment plan and other contingencies. Under the terms of the private placement, the investor group received certain governance rights, including board nomination rights.

Mithaq brought an application to the Tribunal to cease trade the private placement on the grounds that it was an improper defensive tactic designed to thwart its bid, and to set aside the decision of the TSX to approve the private placement without requiring shareholder approval. Following an initial expedited hearing, the Tribunal allowed the private placement to close on the undertaking to unwind it if the Tribunal ultimately concluded that it was an improper defensive tactic.

The Tribunal's decision

The Tribunal provided lengthy and detailed reasons for ultimately concluding not to cease trade and unwind the private placement. The Tribunal applied the requirements of National Policy 62-202 – *Take-Over Bids – Defensive Tactics* (NP 62-202) and the test set out in *Hecla Mining Company (Re)* (Hecla), discussed in our previous [Osler Update](#), to assess whether the private placement was a clear abuse of Aimia shareholders or the capital markets. The Tribunal raised the issue of whether the standard of “clear abuse” should persist in light of amendments to the *Securities Act* (the Act) and particularly those relating to the purposes of the Act, but did not ultimately express a view on that question. The Tribunal concluded that the private placement was designed primarily to meet Aimia's “serious and immediate need” for financing and that the “private placement's original and main purposes related to a need for financing rather than any existing or anticipated bid.” However, the Tribunal also noted that “as time went on, the private placement acquired a defensive character.”

In applying Hecla, the Tribunal first assessed whether the private placement was “not clearly a defensive tactic”, in which case the principles of NP 62-202 would not apply. The Tribunal recognized that normally the applicant, Mithaq, bears the burden of establishing this but, that at the first stage, the burden could shift to Aimia if Mithaq were to demonstrate that the private placement's impact on the bid environment was material. In assessing materiality, the Tribunal considered the private placement's impacts on the cost of the bid, the likelihood of success of the bid and other potential bids. As the Tribunal found a material impact and that Aimia did not establish that the private placement was clearly not a defensive tactic, the Tribunal found that the principles of NP 62-202 were engaged, and those principles must be applied in deciding whether to cease trade the private placement.

In assessing the private placement, it was significant for the Tribunal that Aimia had begun planning the private placement months before the announcement of Mithaq's bid, at a time when there was no reason to believe a takeover bid was imminent and that Aimia did have a demonstrable “serious and immediate” need for financing, which was supported by the evidence of Aimia's cash position, its difficulty in obtaining debt financing, and the opinion of its financial advisor. Importantly, the Tribunal determined that “immediate” does not necessarily imply urgency, but that it implies the need currently exists, as opposed to being speculative. This finding was made despite submissions that implied an equivalency between “immediate” and “financial distress”.

The Tribunal also found that, even though the private placement did end up changing the bid

environment unfavourably for Mithaq, that outcome was “secondary to the main purpose” of obtaining financing for Aimia’s ongoing and projected liquidity needs and was insufficient to justify cease trading the private placement.

The Tribunal assessed a variety of factors in making its determination, including whether the placement would benefit Aimia shareholders, the extent to which the placement altered pre-existing bid dynamics, the relationship of the investors to Aimia and each other, whether the views of other Aimia shareholders should influence the decision, and whether the board of directors of Aimia appropriately considered the interplay between the private placement and Mithaq’s takeover bid.

After applying the first stage of the Hecla analysis and concluding that Aimia could not show that the private placement was clearly not a defensive tactic, the Tribunal moved to the second stage of the Hecla analysis. The second stage is a multi-factor balancing test of the corporate objectives of the private placement against the interest of facilitating shareholder choice (i.e., whether the private placement would preclude Aimia shareholders from choosing Mithaq’s bid).

In the second stage of the Hecla analysis, the Tribunal concluded that, while the private placement did have an impact on the bid environment, that impact was ultimately outweighed by the benefit of the private placement to the Aimia shareholders. Two important findings in reaching this conclusion were the demonstrated need of Aimia for financing and the fact that almost every step of the private placement, including TSX approval, preceded Mithaq’s public bid announcement. Accordingly, the Tribunal found that the private placement was not “clearly abusive” under the Hecla standard.

The Tribunal concluded that Mithaq did not establish that the private placement was abusive, let alone clearly abusive (the standard set in Hecla for cases involving a takeover bid). The Tribunal also held that, the Hecla test aside, Mithaq had not persuaded the Tribunal that the circumstances were sufficient to justify the exercise of the public interest jurisdiction.

In its decision, the Tribunal also concluded that there was no basis to interfere with the TSX decision, finding that the decision was thorough and contained no error in principle, with no new and compelling evidence brought forward that was not before the TSX. The Tribunal reiterated that the TSX does not generally have an obligation to conduct an investigation or carry out due diligence.

The Tribunal effectively reiterated and applied the Hecla analysis, confirming that assessment of a private placement in the context of an unsolicited takeover bid will be highly fact-specific. In this case, while the private placement negatively impacted Mithaq’s bid, there were clear benefits to Aimia and its shareholders that led the Tribunal to conclude it wasn’t clearly abusive.

Consideration of the ‘5% exemption’ and alterative relief

In responding to Mithaq’s application to cease trade the private placement, Aimia also sought an order from the Tribunal denying Mithaq’s ability to make market purchases during the pendency of its takeover bid. Mithaq also sought a declaration that it be entitled to rely on the 5% exemption and that the private placement shares not be counted in the number of outstanding shares for the purposes of satisfying the 50% minimum tender condition or any minority shareholder approval requirements for a second step business combination.

The takeover bid regime permits a bidder to acquire up to 5% of the outstanding securities of the class of securities subject to the bid through market trades during the pendency of the

bid, provided that a number of conditions are met. Aimia sought to deny that exemption from the takeover bid requirements on the basis that Mithaq's offer was too conditional and, according to Aimia, could not be considered to have been made in good faith. Aimia submitted that Mithaq should not be able to use the highly conditional offer as a shield to increase its ownership.

After two conditions were removed from Mithaq's bid, the Tribunal concluded that it would not be in the public interest to deny Mithaq access to the 5% exemption.

The Tribunal reiterated its previous statements from *ESW Capital, LLC (Re)*, as discussed in our earlier [Osler Update](#), that predictability is important and it must be cautious in granting relief that alters the carefully calibrated bid regime, and such relief should only be granted where there are exceptional circumstances or abusive or improper conduct. The Tribunal also refused to grant Mithaq's requested alternative relief.

[i] Eagle 1250 Investments Group LLC, the lead investor in the private placement, was granted intervenor status in the proceedings. Osler, Hoskin and Harcourt LLP represented the lead investor both in the private placement and in the Tribunal proceedings.