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A LOOK AT SOME KEY FINDINGS BY THE ALBERTA SECURITIES COMMISSION IN *RE BISON ACQUISITION CORP.*

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1. INTRODUCTION

On December 21, 2021, a panel of the Alberta Securities Commission ("**ASC**" or the "**Commission**") issued its written decision (the "**Decision**")[1] providing its reasons for the oral ruling it made on July 12, 2021 regarding applications brought by Bison Acquisition Corp. ("**Bison**") and Brookfield Infrastructure Corporation Exchange Limited Partnership ("**BICELP**"), as well as Inter Pipeline Ltd. ("**IPL**") and Pembina Pipeline Corporation ("**Pembina**"). Bison and BICELP are two of the several entities referred to in the Decision that are connected to Brookfield Asset Management Inc., which are collectively referred to as "**Brookfield**".

The applications related to competing proposals by Brookfield and Pembina to acquire IPL. With a view to protecting the market and the integrity of IPL shareholders' choice between Brookfield's and Pembina's proposals, the ASC dismissed Brookfield's application and issued a number of orders in favour of IPL.

In this paper, we review three key conclusions reached by the ASC that will clearly have an impact on contested M&A transactions in Canada, namely:

1. "tactical" shareholder rights plans (those adopted in the face of a hostile bid) may continue to be valid notwithstanding the 2016 amendments to the Canadian take-over bid regime,[2] and the decision of the Ontario Securities Commission (the "**OSC**") and the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**") in *Re Aurora*;[3]
2. regardless of a bidder's compliance with the early warning reporting ("**EWR**") obligations under National Instrument 62-104 *Take-Over Bids and Issuer Bids* ("**NI 62-104**"), it would be contrary to the public interest if the bidder uses derivatives to gain an economic interest in a target without making any disclosure until it makes its offer, in circumstances where such accumulation limits the alternatives the target could pursue (and thereby may negatively affect the ability of the target to maximize value for shareholders); and
3. the ASC may, in the public interest, modify the statutory minimum tender condition in NI 62-104 (the "**Minimum Tender Condition**")[4] to neutralize certain possible effects of derivatives on a bid.

Our goal is to consider the analysis undertaken, and conclusions reached, by the ASC in order to better understand the precedential value of the Decision. Our conclusions in that regard are set out in Section 7 below.

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[1] Re Bison Acquisition Corp., 2021 ABASC 188 [Re Bison].

[2] The key amendments being the imposition of the statutory minimum tender condition (see footnote 4), the mandatory 10-day extension following satisfaction of that condition and (subject to two conditions) the mandatory minimum initial deposit period of 105 days from the date of the take-over bid (increased from the previous 35-day minimum).

[3] Re Aurora Cannabis Inc., 2018 ONSEC 10 [Aurora].

[4] Take-over bids are subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors.

The views and opinions expressed in this paper are solely those of the authors, and are not made on behalf of McMillan LLP, or its clients.

2. BACKGROUND

In February 2021, Brookfield made an unsolicited take-over bid for IPL (the "**February Offer**"). At this time, Brookfield announced that it beneficially owned and exercised control and direction over approximately 9.75% of the common shares of IPL ("**IPL Shares**") and also had economic exposure to an additional 9.9% of the IPL Shares (the "**Swap Shares**") through certain cash-settled total return swaps ("**IPL Swaps**") referencing IPL Shares pursuant to certain agreements with a counterparty (the "**IPL Swap Letter Agreements**"). The February Offer stated that Brookfield had no "right to vote, or direct or influence the voting, acquisition, or disposition of" any Swap Shares, and that "no person acting jointly or in concert with [Bison] beneficially owns or exercises control or direction over any securities of IPL."

Brookfield had not filed any early warning report as it did not have beneficial ownership of, or control or direction over, 10% or more of the IPL Shares.

The swap counterparty was not publicly identified in the February Offer or supporting documents. The counterparty was Bank of Montreal and Brookfield had a series of relationships with Bank of Montreal and its affiliates, including having engaged BMO Nesbitt Burns Inc. ("**BMO NB**") as its financial advisor for the possible acquisition of IPL, which engagement provided for a $15 million completion fee payable on Brookfield's acquisition of IPL. The term "**BMO**" is used to refer to various Bank of Montreal entities, including Bank of Montreal, BMO NB and BMO Capital Markets.

The IPL Swap Letter Agreements between BMO and Brookfield stated that BMO could hedge the IPL Swaps by acquiring IPL Shares or otherwise. There was no evidence indicating how many IPL Shares BMO held.

Following the February Offer, a special committee of the board of directors of IPL (the "**IPL Board**") was formed to undertake a strategic review of IPL's options (the "**Strategic Review**") and to assist in responding to the February Offer.

On March 31, 2021, the IPL Board adopted a supplemental shareholder rights plan (the "**Supplemental SRP**"), which amended certain provisions in IPL's existing shareholder rights plan. The main change was to amend the definition of beneficial ownership to include certain derivative transactions for the purposes of the 20% triggering threshold, which would have the effect of including the Swap Shares in the calculation of Brookfield's beneficial ownership of IPL Shares, and effectively prevent Brookfield from acquiring any additional swaps or IPL Shares except pursuant to a successful conclusion of its take-over bid.

On May 31, 2021, Pembina and IPL entered into an arrangement agreement (the "**Pembina Arrangement**") pursuant to which Pembina agreed, subject to certain conditions, to acquire all the issued and outstanding IPL Shares in exchange for shares of Pembina.

Brookfield made subsequent offers on each of June 4, 2021 and June 21, 2021 (together with the February Offer, the "**Brookfield Offer**"). In its June 4, 2021 press release, Brookfield defined its 19.65% economic interest in IPL as the "Brookfield Block", which it noted would create "a substantial and protracted overhang on [the Pembina shares]",[5] should the Pembina Arrangement succeed.

On June 25, 2021, the IPL Board amended the Supplemental SRP so that it expired the day after the IPL shareholder vote on the Pembina Arrangement.

3. THE APPLICATIONS

Brookfield

Brookfield applied for orders under sections 179 and 198 of the *Securities Act* (Alberta) (the "**Act**") in connection with what it characterized as inappropriate defensive tactics taken by the IPL Board in response to the Brookfield Offer, including the adoption of the Supplemental SRP (the "**Brookfield Application**").

The relief sought by Brookfield included an order cease trading the Supplemental SRP.

IPL and Pembina

In its June 18, 2021 cross-application (the "**IPL Application**"), IPL asserted that Brookfield's conduct in connection with the IPL Swaps was abusive of IPL shareholders and the capital markets on the following four grounds: (i) using IPL Swaps to avoid EWR obligations under NI 62-104; (ii) failing to make proper public disclosure regarding the IPL Swaps, including as required under NI 62-104; (iii) using the IPL Swaps "held by a captive and compliant [swap] counterparty … to try to defeat shareholder approval of the Pembina Arrangement"; and (iv) using the IPL Swaps to try to meet the statutory Minimum Tender Condition of over 50% under the Brookfield Offer.

The relief sought by IPL under sections 179 and 198 of the Act in relation to the IPL Swaps included an order directing that the Swap Shares be considered beneficially owned or controlled by Brookfield or a person acting jointly or in concert with Brookfield (and therefore excluding the Swap Shares from the statutory Minimum Tender Condition amount) (the "**Proposed Minimum Tender Order**").

Pembina adopted the IPL Application.

[5] *Re Bison*, *supra* note 1 at paras 422-423, 425.

4. REFUSAL TO CEASE TRADE SUPPLEMENTAL SRP

4.1 Commission Findings

In rejecting the Brookfield Application, the ASC declined to cease trade the Supplemental SRP, finding that the IPL Board's decision to adopt the Supplemental SRP was reasonable, notwithstanding that the practical effect of the Supplemental SRP was to deny Brookfield the ability to purchase up to 5% of the issued and outstanding IPL Shares during the course of its bid as permitted under NI 62-104 (the "**5% Exemption**").[6] In doing so, the ASC commented that even prior to the amendments to the take-over bid regime in 2016, "providing time for a board of directors facing a hostile take-over bid to conduct a strategic review process was not considered the only valid reason for a company to adopt a shareholder rights plan."[7] In the ASC's view, a shareholder rights plan that protects the *bona fide* interests of the shareholders of the target company "may be entirely appropriate, depending on the circumstances."[8]

The ASC found that the IPL Board had identified "legitimate concerns" with respect to the IPL Swaps and the effect of Brookfield's interest in IPL, including:[9]

1. the willingness of other bidders to take part in an auction;
2. the willingness of shareholders to vote on a competing transaction; and
3. the outcome of any vote that might take place.

The ASC agreed with the IPL Board's assessment that the Swap Shares "had the potential to unfairly distort the outcome whether they were voted against an alternative transaction or not voted at all."[10] As a result, the ASC was satisfied that the IPL Board acted reasonably in adopting the Supplemental SRP, and that the Supplemental SRP did not prejudice IPL shareholders, writing at paragraph 191:

> [T]he IPL SRPs operated to the shareholders' benefit and supported their interest in maximizing value for their IPL Shares. While the IPL SRPs did not preclude shareholders from tendering to the Brookfield Offer, <u>they did prevent Brookfield from accumulating a negative control position that could have blocked a genuine preference for the Pembina Arrangement or any other alternate transaction</u> (emphasis added).

Brookfield argued that in deciding not to cease trade the Supplemental SRP, the ASC was endorsing treating derivative interests as equivalent to beneficial ownership. The ASC disagreed, stating at paragraph 196:

[6] Ibid at para 203.
[7] Ibid at para 185.
[8] Ibid.
[9] Ibid at para 186.
[10] Ibid at para 187.

> Although that possibility is contemplated in s. 3.1 of NP 62-203 ("[a]n investor that is a party to an equity swap or similar derivative arrangement may under certain circumstances have deemed beneficial ownership, or control or direction, over the referenced voting or equity securities"), a decision whether to cease trade a shareholder rights plan is based on the facts and circumstances of the particular case. Our conclusions concerning the Supplemental SRP or the IPL Swaps more generally are not intended to be a general pronouncement on the treatment of derivative interests in all situations.

The ASC then noted that in arriving at its decision, it considered the factors set out in *Re Royal Host Real Estate Investment Trust.*[11] However, it also noted that a number of such factors were not relevant in the circumstances before it "since a number of [the factors] are oriented toward shareholder rights plans adopted for the purpose of giving a target company's board of directors time to conduct a strategic review."[12]

In particular, Brookfield argued that where a shareholder rights plan was adopted in the face of a hostile bid, and without approval of target shareholders, the target company is required to show that "it was necessary to do so because of the coercive nature of the [hostile bid] or some other very substantial unfairness or impropriety."[13] The ASC did not consider this a general principle applicable in all cases, but noted that in any event, "it was reasonable for the IPL Board to have concluded that it was necessary to implement the Supplemental SRP to address the potential unfairness posed by Brookfield's use and disclosure of the IPL Swaps."[14]

Furthermore, the ASC also rejected Brookfield's argument that the Supplemental SRP outlived its usefulness once IPL entered into the Pembina Arrangement because the Supplemental SRP was to be in place for four months, longer than in other cases. In the ASC's view, "although the length of time a plan has operated may be a significant consideration in some circumstances, there is no hard and fast rule in that regard."[15] Rather, the real question is "whether a plan continues to operate in the best interests of target shareholders."[16] The ASC was satisfied that the purpose of the Supplemental SRP continued until the shareholder vote in connection with the Pembina Arrangement.

Finally, the ASC was not persuaded that other shareholders would be denied liquidity as a result of the denial of the 5% Exemption to Brookfield. It noted that the evidence showed the IPL Share price was increasing at the relevant time, and the IPL Shares were already liquid.[17]

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[11] *Re Royal Host Real Estate Investment Trust* (1999), [1999] 47 BCSCWS 43, 1999 CarswellBC 3335 (BCSC) [*Royal Host*].
[12] *Re Bison, supra* note 1 at para 196.
[13] Ibid at para 200.
[14] Ibid.
[15] Ibid at para 202.
[16] Ibid.
[17] Ibid at para 193.

4.2 Analysis

In considering the impact of the Decision with respect to tactical rights plans, we start with the key finding that a plan which continues to operate in the best interests of target shareholders will not be cease traded. To expand on this principle, it would appear that the ASC is of the view that a board may adopt a tactical rights plan to prevent bidders from negatively impacting an auction process, even where such a tactical rights plan operates to deny the 5% Exemption to a bidder. As a result, the Decision suggests that provided rights plans operate to preserve shareholder choice and the auction process, a plan will not be cease traded even if the plan is not providing the board with any more time to find an alternative transaction. We would suggest that the Decision must have a more limited reach than suggested above for various reasons, including that it appears to be at odds with the OSC's and FCAAS's decision in *Aurora*. Surprisingly, in *Re Bison*, the ASC did not seek to grapple with the *Aurora* decision.

Aurora

In *Aurora*, the OSC and the FCAAS cease traded a tactical rights plan which sought to deem the bidder to beneficially own shares held by locked-up shareholders and prevent it from using the 5% Exemption. In coming to that conclusion, the OSC and the FCAAS stated that a rights plan "should not generally be utilized to deem a bidder to beneficially own locked-up shares in circumstances where they would not be deemed to be joint actors under the applicable rules."[18] Additionally, the OSC and the FCAAS found that lock-up agreements were "an established feature of the planning for M&A transactions in Canada, and are even more important in the bidder's planning after the adoption of the take-over bid amendments since the risks to the completion of a transaction have been increased by virtue of the lengthening of the period that a bid must remain open and since the minimum tender condition cannot be waived by the bidder." [19]

In contrast, the ASC in *Re Bison* was content to allow the adoption of a tactical rights plan that deemed Brookfield to beneficially own Swap Shares that Brookfield exercised no control or direction over, and notwithstanding the fact that the ASC declined to find that BMO was acting jointly or in concert with Brookfield. As the ASC noted, it was satisfied that "Brookfield did not have the legal right to control or direct the voting of the Swap Shares held by BMO [and that] Brookfield did not have a contractual right to influence BMO's voting decisions for its Swap Shares."[20] Therefore, we have in *Aurora* a situation where the OSC and the FCAAS declined to permit a rights plan to attribute shares subject to hard lock-up agreements to the bidder for the purposes of calculating beneficial ownership absent a finding of acting jointly or in concert. Yet in *Re Bison,* the ASC in effect takes the opposite position with the Swap Shares, for which there is no

[18] *Aurora*, *supra* note 3 at para 151.
[19] Ibid at para 150.
[20] *Re Bison*, *supra* note 1 at para 409.

obligation on the shareholder at all to vote with the bidder's interest (i.e. against alternative transactions).

Furthermore, the OSC and the FCAAS in *Aurora* distinguished the circumstances before it with those in *Falconbridge*,[21] where the OSC had denied the availability of the 5% Exemption to the bidder. The OSC noted that in *Falconbridge* the bidder held 19.8% of the issuer's shares and possessed the ability to waive the minimum tender condition of the bid, with such waiver and subsequent taking up of shares tendered, together with the bidder's existing shareholdings, permitting the bidder to obtain a blocking position against the outstanding competing offer, thereby preventing the auction of the issuer from continuing. Therefore, the OSC intervened in the public interest in *Falconbridge* to prevent the bidder from prematurely ending the auction of the issuer. The OSC and the FCAAS in *Aurora* noted that the bidder there held no shares of the issuer, *notwithstanding* the fact that 38% of shares had been locked up, because the OSC and the FCAAS "declined to find that the Locked-up Shareholders are acting jointly or in concert with [the bidder], and therefore their stock holdings cannot be attributed to [the bidder] (emphasis added)."[22]

Moreover, the OSC and the FCAAS suggested that the 2016 amendments to the take-over bid regime had largely remedied the concerns in *Falconbridge*, writing at paragraph 86:

> The Canadian take-over bid regime now includes a non-waivable minimum tender condition, so that Aurora cannot obtain a blocking position through a partial bid in which it obtains less than 50% of the shares subject to the bid. Since the minimum tender condition is calculated to exclude shares held by the bidder and persons acting jointly or in concert with the bidder, any shares acquired by [the bidder] pursuant to the 5% exemption are excluded from the calculation of the minimum tender condition. The concern in *Falconbridge* that a bidder could obtain enough stock through a bid after waiving its minimum conditions, which, in conjunction with its pre-existing holdings, could give it a blocking position of less than 50% cannot arise under the rules now in effect in the absence of any exemption. The risk that shareholders of a target company will be denied the ability to participate in a control premium has been mitigated by these changes in the take-over bid regime.

The OSC and the FCAAS' statements in *Aurora* suggest that, at a minimum, to deny the availability of the 5% Exemption to the bidder (whether by order of a securities commission or through the adoption of a rights plan), the bidder must be found to actually beneficially own shares of the issuer (either on its own or through joint actors) that, when combined with purchases made under the 5% Exemption, would enable it to obtain a blocking position (or negative control position), or would otherwise undermine

[21] Re Falconbridge Ltd., 2006 ONSEC 21 [Falconbridge].
[22] *Aurora*, *supra* note 3 at para 86.

the elements of the take-over bid regime. On the other hand, the ASC found that the circumstances before it in *Re Bison* presented the same concerns as in *Falconbridge*,[23] notwithstanding that Brookfield did not beneficially own the Swap Shares (and thus only had a 9.75% voting interest in IPL – a stark contrast to the 19.8% voting interest the bidder held in the target in *Falconbridge*). Therefore, the ASC felt it was appropriate to permit the Supplemental SRP to operate and deny Brookfield access to the 5% Exemption.

With reference to the impact of the amendments to the take-over bid regime in 2016, in *Aurora* the OSC and the FCAAS stated that prior decisions such as *Royal Host* were of limited use, writing at paragraph 149:

> The rebalancing of the take-over bid regime by mandating the 105-day deposit period, the minimum tender condition and the mandatory 10-day extension following satisfaction of that condition, provides sufficient protections in this case for shareholder choice to occur while allowing bids to be made and management to respond to such bids in an appropriately predictable and even-handed manner. These amendments make the prior decisions of the Commission regarding shareholder rights plans of limited use in this case since the amendments have introduced features designed to provide sufficient time for other bids to surface without the need for Commission intervention to determine how long before a poison pill must be terminated.

It is difficult to reconcile the findings and reasoning of the ASC in *Re Bison* with those of the OSC and the FCAAS in *Aurora*. The ASC's failure to grapple with the obvious conflicts with the *Aurora* decision has introduced uncertainty with respect to the application of the take-over bid regime. One explanation may be that, as noted by the OSC and the FCAAS, lock-up agreements provide bidders with certainty and a counter-balance to the risks introduced by the amendments to the take-over bid regime. It is less clear that swaps provide any similar benefits to bidders, but have the potential to distort the auction process and therefore policy concerns may be minimized where a rights plan seeks to deem a bidder to own swap shares. Put another way, because of the important role lock-up agreements play in take-over bid planning and policy, they enjoy special protection from securities regulatory authorities. This explanation however does not assist with the application of the Decision to similar cases.

Conclusion

We expect that the Decision will be limited, at most, to cases where tactical rights plans seek to limit the accumulation of certain types of derivatives where such accumulation may impede a target's ability to successfully conclude an auction process. However, we do have some difficulty in articulating a more precise guiding principle that could assist issuers in determining when a tactical rights plan may be subject to the public interest

[23] *Re Bison, supra* note 1 at para 454.

power if it seeks to engage swaps. The ASC has provided little to no guidance as to when derivatives or what type of derivatives (including the nature of the relationship between the counterparty and the bidder) are the proper subject of tactical rights plans.

Based on the *Aurora* decision and the reasoning in *Re Bison*, we believe it is unlikely that the Decision will over time be affirmed to support either of the following principles: (i) a tactical plan that preserves shareholder choice and the auction process will not be cease traded if it provides the target board with more time to find an alternative transaction; and (ii) pre-2016 cases that considered whether rights plan should be cease traded continue to be relevant.

Finally, the failure to cogently address the reasoning in *Falconbridge* and *Aurora* with respect to the availability of the 5% Exemption, leaves us without a basis to clearly articulate when a tactical rights plan can be used to deny a bidder the right to use such exemption. We note, however, that the Canadian Securities Administrators ("**CSA**") may consider whether the 5% Exemption should continue to be available,[24] and as a result this aspect of the Decision may well become moot.

5. EXERCISE OF PUBLIC INTEREST POWER REGARDING BROOKFIELD'S USE OF SWAPS TO DELIBERATELY AVOID REPORTING OBLIGATIONS

5.1 Commission Findings

In concluding that Brookfield's use of the IPL Swaps was clearly abusive of investors and the capital market despite being in compliance with the EWR regime, the ASC made four key findings:

1. Brookfield had complied with the EWR regime in connection with its holding of IPL Shares and its acquisition of the IPL Swaps;[25]

2. by using the IPL Swaps, Brookfield was able to keep the IPL Share price suppressed until it made the Brookfield Offer, which limited the options IPL could pursue and thereby potentially affecting IPL's ability to find the maximum value available for its shareholders;[26]

3. in 2016, the CSA did not proceed with a proposal to include equity equivalent derivatives to the EWR regime because there was no evidence of abuse at that time and Brookfield must have been aware of this decision by the CSA; and this case demonstrated the sort of abuse that the CSA had expressed concerns about;[27] and

[24] Canadian Securities Administrators, *2022-2025 Business Plan*, at 13, online (pdf): *Canadian Securities Administrators* <https://www.securities-administrators.ca/wp-content/uploads/2022/10/2022_2025CSA_BusinessPlan.pdf> [CSA Business Plan].
[25] Ibid at paras 409-413.
[26] Ibid at para 446.
[27] Ibid at para 448.

4. Brookfield must also have been aware of the obiter comment in *Re Sears Canada Inc.*[28] that securities regulatory authorities may exercise their public interests power when swaps are used to "'park securities' in a deliberate effort to avoid reporting obligations" or to "[affect] an outstanding offer" – which, in the view of the ASC, are the facts in this case.[29]

EWR disclosure

The ASC held that swaps are generally not required to be included in the calculation of the EWR trigger. Pursuant to National Policy 62-203 *Take-Over Bids and Issuer Bids*, a swap investor may be deemed to have beneficial ownership, or control or direction, over the referenced securities as a result of the ability to obtain such securities or to direct the voting of them. The panel was satisfied that Brookfield did not have either the legal right to control or direct the voting of the Swap Shares or a contractual right to influence BMO's voting decisions for the Swap Shares.[30] Accordingly, Brookfield had not breached the EWR regime.

Amendments to the EWR regime

The ASC looked at the history of proposed amendments regarding the take-over bid regime that were relevant to the IPL Swap concerns, especially those involving "hidden ownership" and "empty voting."[31] For the purposes of calculating the EWR trigger, the CSA published proposed amendments to the EWR regime for comment in 2013 (the "**2013 Proposed Amendments**") to include certain types of derivatives, which would include the IPL Swaps, that affect an investor's economic interest in an issuer.[32] The rationale behind this proposal was to provide greater transparency of securities ownership in light of investors' rising usage of derivatives.[33] In 2016, the CSA announced in its notice of amendments (the "**2016 Notice of Amendments**") that it would not proceed with the 2013 Proposed Amendments because several comments were received opposing the idea for various reasons.[34]

The ASC observed that the CSA did not proceed with the proposal to include equity equivalent derivatives to the EWR regime because there was no evidence of abuse at that time. However, the ASC found that the facts in this case demonstrated the sort of abuse that the CSA had expressed concerns about.[35]

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[28] *Re Sears Canada Inc.* (2006), 35 OSCB 8781, 2006 CarswellOnt 6994 [*Sears* cited to CarswellOnt].
[29] *Re Bison, supra* note 1 at paras 443, 447-448.
[30] Ibid at paras 409-412.
[31] Ibid at paras 315-316.
[32] CSA Notice and Request for Comment – Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids, National Policy 62-203 Take-Over Bids and Issuer Bids, and National Instrument 62-103 Early Warning System and Related Take-Over Bid and Insider Reporting Issues, (2013) 36 OSCB 2675 at 2676, online (pdf): <http://www.osc.gov.on.ca/documents/en/Securities-Category6/mi_20130313_62-104_take-over-bids.pdf> [the 2013 Proposed Amendments].
[33] *Re Bison, supra* note 1 at para 317.
[34] Ibid at paras 319-320.
[35] Ibid at para 449.

Sears decision

The ASC also looked at *Sears*, noting that while the use of swaps in that case was not abusive, the *Sears* decision did leave the door open for the securities commissions to exercise their public interest power when "swaps could be deliberately used to avoid reporting obligations and to affect an outstanding offer."[36] The following passage was cited from the *Sears* decision:[37]

> We wish to underscore that there might well be situations, in the context of a take-over bid, where the use of swaps to "park securities" in a deliberate effort to avoid reporting obligations under the [Ontario's *Securities Act*] and for the purpose of affecting an outstanding offer could constitute abusive conduct sufficient to engage the [OSC's] public interest jurisdiction. This is not such a case.

Conclusion

The ASC believed that when Brookfield entered into the IPL Swaps, it was at least considering the possibility of an acquisition of IPL. As a result, Brookfield's reason for evading the 10% EWR threshold was not only to structure its affairs, but to structure its affairs in order to provide itself an advantage for a potential take-over bid.[38] In addition, Brookfield or its advisors would have been aware of the concerns noted in *Sears* and the 2013 Proposed Amendments.

The ASC concluded that by using the IPL Swaps, Brookfield was able to keep the IPL Share price suppressed until it made the Brookfield Offer, which limited the options IPL could pursue during the Strategic Review, potentially affecting IPL's ability to find the maximum value available for its shareholders.[39]

Consequently, the ASC ruled that Brookfield's use of the IPL Swaps to obtain a 19.65% economic interest in IPL without making any disclosure until the Brookfield Offer, was plainly abusive to IPL shareholders and the Alberta capital market, despite Brookfield's compliance with the EWR standards.[40]

5.2 Analysis

ASC's reliance on Sears

The ASC's decision, in finding Brookfield's use of the IPL Swaps was clearly abusive, despite being in compliance with the EWR regime, partly relied on an obiter comment

[36] Ibid at paras 332 -333.
[37] *Sears*, *supra* note 27 at para 111.
[38] *Re Bison*, *supra* note 1 at para 448.
[39] Ibid at para 446.
[40] Ibid at para 450.

in *Sears*, that the securities regulatory authorities may exercise their public interest power when swaps are used to "park securities' in a deliberate effort to avoid reporting obligations" or to "[affect] an outstanding offer."[41]

At the outset, we should note that the *Sears* decision was rendered 10 years prior to the 2016 Notice of Amendments, which did not adopt any aspect of the obiter comment. Is it reasonable to assume that Brookfield and its advisors knew of the *Sears* decision and considered that the omission to address that concern in the 2016 Notice of Amendments may well be a reflection of the fact that the public interest power would not be engaged by such conduct? In any event, we consider below whether the ASC's reliance on *Sears* was otherwise justified.

In *Sears*, the OSC concluded that there was insufficient evidence to support a conclusion that Pershing Square Capital Management L.P. ("**Pershing"**) had used swaps to "park securities" to avoid disclosure obligations or to affect an outstanding offer. In that case, "parking securities" was used to refer to a situation when one party (the "**parker**") places shares in friendly hands (the "**parkee**") to avoid reporting obligations, yet still informally has access to voting rights, as the parkee will either unwind the parked shares and return them to the parker, or vote as directed by the parker or not vote at all.[42]

Pershing provided evidence that the swaps were used only to "retain economic ownership" to benefit from the appreciation of the stock without "undesirable tax consequences."[43] Additionally, evidence had been provided that the swaps were also entered into because of concerns with respect to antagonizing Edward Lampert (the Chairman of Sears Holdings Corporation, the bidder in *Sears*), with whom William Ackman (the principal of Pershing) wished to have a future business relationship.[44] In addition, the OSC noted that there was no evidence adduced to support the finding that "Pershing and its Swap counterparties had an understanding that the shares would be returned or otherwise made available to be voted so that Pershing could be said to exercise 'control or direction' over the shares."[45] Considering this evidence, the OSC found that Pershing did not "park securities" to avoid disclosure obligations or to affect a take-over bid.

It is clear that in *Sears* the OSC was not focused purely on whether swaps were used to avoid disclosure obligations or to affect an outstanding offer. Pershing was clearly using swaps to avoid disclosure and for its own economic benefit. The OSC appeared focused on whether there was an intent to "park securities." That intent at first blush appeared missing from the Decision. However, in connection with the decision to modify the Minimum Tender Condition (see Section 6 below), the ASC made two important factual findings that could be considered to bring the facts in *Re Bison* within the obiter of

[41] Ibid at paras 332 -333.
[42] *Sears*, *supra* note 27 at para 92.
[43] Ibid at para 98.
[44] Ibid at para 102.
[45] Ibid at para 105.

Sears: (i) BMO was deemed to have fully hedged its IPL Swaps position and (ii) such hedged shares would be tendered to Brookfield and voted against the Pembina Arrangement.

The ASC assumed that BMO would fully hedge the IPL Swaps by acquiring a corresponding number of IPL Shares. The ASC accepted evidence that swap dealers generally "would be expected" to hedge their swaps position; as the only identifiable swap dealer in *Re Bison*, BMO would be expected to do the same.[46] The ASC noted that Brookfield "whether through deliberate obfuscation or carelessness in adducing its evidence, left [the ASC] with little choice in how to treat the Swap Shares."[47] As a result, the ASC felt the fairest approach was to assume that BMO hedged all the IPL Swaps by acquiring Swap Shares representing 9.9% of the IPL Shares.[48] We note that the ASC made this finding notwithstanding that the evidence showed that BMO had at least hedged part of its position through swaps with other swap dealers.[49]

The ASC accepted evidence that BMO would act in its own commercial interest.[50] The ASC then pointed toward the existing commercial relationship between BMO and Brookfield, stating that it was "highly unlikely that BMO would reject the Brookfield Offer and refuse to tender the Swap Shares."[51] Based on this relationship and without any evidence of BMO's intentions, the ASC assumed that all of BMO's deemed holding of Swap Shares would be tendered to the Brookfield Offer.[52]

It is only through these findings that one can possibly conclude that Brookfield had parked the Swap Shares in BMO's hands to avoid reporting obligations and impact the offer, and therefore enable the facts in *Re Bison* to be applicable to the obiter in *Sears*. Some may find the use of such tortured findings to underpin the exercise of the public interest power problematic, particularly when such power "must be used cautiously."[53]

The ASC oversimplified the CSA's rationale for not proceeding with the 2013 Proposed Amendments

In finding Brookfield's use of the IPL Swaps was clearly abusive despite being in compliance with the EWR regime, the ASC referred to the CSA's policy concern when the CSA proposed to include certain types of derivatives in the calculation of the EWR trigger in the 2013 Proposed Amendments and its reasons for not proceeding with such proposed amendment.[54] The ASC stated that the CSA's rationale for not including equity equivalent derivatives in the EWR calculation was because at that time, there was no clear evidence that swaps were being used to accumulate substantial economic

[46] *Re Bison, supra* note 1 at para 513.
[47] Ibid.
[48] Ibid.
[49] Ibid at para 512.
[50] Ibid at para 409.
[51] Ibid at para 515.
[52] Ibid.
[53] Ibid at para 75, citing Re Canada Tire Corp. (1987), 10 OSCB 857 at paras 126, 130, 151.
[54] Ibid at para 449.

positions without disclosure "to exert influence over the issuers or voting outcomes"[55] and there was no evidence of abuse.[56] The ASC then drew the conclusion that, in contrast, Brookfield's use of the IPL Swaps constituted "exactly the type of abuse about which the CSA raised concerns."[57]

However, the ASC focused on just one of the CSA's stated rationales, being the lack of evidence that derivatives were used "to exert influence over the issuers or voting outcomes".[58] When the CSA decided to abandon the inclusion of certain types of derivatives in the calculation of the EWR trigger in the 2013 Proposed Amendments, they articulated three reasons:

1. a number of market participants indicated that the use of derivatives in Canada is not generally to facilitate hidden ownership or to influence voting outcomes;
2. the inclusion of "equity equivalent derivatives" could unduly complicate reporting and compliance obligations; and
3. the application of the proposal could allow the market to deduce investment strategies and this could be detrimental to investors with certain derivative positions.[59]

When discussing these three reasons, the CSA did not indicate whether any one reason was of more importance.[60] Yet a reading of the Decision suggests that the *only reason* the CSA abandoned the inclusion of certain types of derivatives in the calculation of the EWR trigger in the 2013 Proposed Amendments was because it did not have evidence of abuse in the form of swaps being used to hide ownership or influence voting outcomes.[61] In other words, the ASC appears to suggest that had there been such evidence before the CSA, the CSA would have necessarily adopted the 2013 Proposed Amendments. This disregards the other reasons for the abandonment of the 2013 Proposed Amendments as noted above, and there is nothing in the 2016 Notice of Amendments to suggest that this would have been the case.[62] We believe the ASC should have considered *all* of the CSA's reasons for abandoning the 2013 Proposed Amendments(including that the application of the proposal could allow the market to deduce investment strategies and this could be detrimental to investors with certain derivative positions), and evaluated the impact its decision would have in light of the totality of these reasons.

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[55] Ibid at para 443.
[56] Ibid at para 449.
[57] Ibid.
[58] Ibid at para 443.
[59] CSA Notice of Amendments to Early Warning System – Amendments to MI 62-104 Take-Over Bids and Issuer Bids, NI 62-103 The Early Warning System and Related Take-Over Bid and Insider Reporting Issues, and Changes to NP 62-203 Take-Over Bids and Issuer Bids, (2016) 39 OSCB 1745 at 1758, online (pdf): <https://www.osc.ca/sites/default/files/pdfs/bulletins/20160224_oscb_3906_toc.pdf> [the 2016 Notice of Amendments].
[60] Ibid.
[61] *Re Bison, supra* note 1 at para 449.
[62] The 2016 Notice of Amendments, *supra* note 58 at 1745.

Furthermore, it is important to note that in the 2013 Proposed Amendments, the reference to "hidden ownership" and "influencing voting outcomes" referred to circumstances not in play in *Re Bison*:[63]

> We believe that changes to the scope of the early warning framework are required in order to ensure proper transparency of securities ownership in light of the increased use of derivatives by investors.
>
> A sophisticated investor may be able, through the use of equity swaps or similar derivative arrangements, to accumulate a substantial economic interest in an issuer without public disclosure and then potentially convert this interest into voting securities in time to exercise a vote (this is referred to as "hidden ownership").
>
> It is also possible for an investor, through derivatives or securities lending arrangements, to hold voting rights in an issuer and possibly influence the outcome of a shareholder vote, although it may not have an equivalent economic stake in the issuer (this is referred to as "empty voting").
>
> These types of arrangements may not be disclosed under current securities law requirements since these requirements are generally based on the concept of beneficial ownership of, or control or direction over, voting or equity securities. The disclosure of these arrangements would be helpful in maintaining transparency and market integrity.

Brookfield had neither empty votes nor hidden ownership with respect to the Swap Shares since it did not beneficially own or exercise control or direction over such shares nor was it able to obtain such privileges or rights. Accordingly, even if the ASC was correct in focusing on only one reason for the CSA's abandonment of the 2013 Proposed Amendments, that concern raised by the CSA was not strictly at play in *Re Bison*.

Arguing from first principles

Without the arguments put forward by the ASC regarding the obiter comment in *Sears* and the 2013 Proposed Amendments, we have a simple question regarding whether Brookfield should be sanctioned for complying with the EWR regime while pursing a course of action in its own interest. Would the public interest power have been engaged without the arguments noted above and the finding of improper disclosure against Brookfield?

We also note that the Securities and Exchange Commission (the "**SEC**") is currently proposing a new Rule 10B-1 under the *Securities Exchange Act of 1934* which would require disclosure of certain information with respect to cash-settled security-based

[63] The 2013 Proposed Amendments, *supra* note 31 at 2678.

swap positions by persons who exceed specified reporting thresholds.[64] This proposed amendment has been subject to a comment period in the United States, with over a hundred comment letters received by the SEC from institutions and individuals with a diverse background, offering various reasons to support or oppose the proposed amendments.[65] It is clear that derivative reporting is a contentious and nuanced issue, which requires careful consideration by the legislature after appropriate stakeholder consultation. The ASC, through its public interest power in *Re Bison*, has in effect side stepped the legislature and the consultation process a mere 6 years after such a process did not result in the inclusion of derivatives for purpose of calculating the EWR trigger.

Conclusion

We have argued elsewhere that the public interest power is a powerful, necessary and important tool that has been given to securities regulatory authorities and that it is incumbent on such authorities to exercise the public interest power in a manner that is transparent and cogent, where the results are predictable and easily understood by securities law practitioners and market participants alike.[66] We would respectfully suggest that in *Re Bison* the ASC has failed to meet this goal. First, the finding that the 2013 Proposed Amendments foreshadowed the concerns triggered by Brookfield's conduct are not borne out by the facts. Second, the obiter in *Sears* is only relevant based on tortured findings of fact. Third, and most importantly, the ASC has sought to impose regulatory change that was rejected during a fairly robust legislative process that occurred over a 3 year period (ending just 7 years ago) and interestingly is now the subject of a very robust legislative process in the United States. The use of the public interest power in such circumstances may well create uncertainty and ultimately not serve the public interest.

Finally, we note that the CSA has announced in its most recent business plan that its strategic goals include:[67]

> Review[ing] the early warning reporting regime to consider, among other things, the appropriate current scope of disclosure requirements concerning equity derivatives and the sufficiency of the current disclosure and timing requirements concerning acquirers' "plans and future intentions". Also consider the use of equity derivatives under the take-over bid regime

[64] *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Release No 34-93784; File No. S7-32-10, online: *US Securities and Exchange Commission* <https://www.sec.gov/rules/proposed/2021/34-93784.pdf>.
[65] "Comments on Proposed Rule 10B-1", online: *US Securities and Exchange Commission* < https://www.sec.gov/comments/s7-32-10/s73210.htm>.
[66] See Paul Davis et al, "Justifiable Expectations Standard: The Basis for the Exercise of the Public Interest Power of the Ontario Securities Commission" (22 August 2014), online (pdf): *McMillan LLP* <http://mcmillan.ca/wp-content/uploads/2021/01/Paul_Davis_Justifiable_Expectations_Standard.pdf>.
[67] *CSA Business Plan, supra* note 24 at 13.

This is a laudable effort, but it also highlights the problem of having a securities regulatory authority imposing legislative change through the exercise of the public interest power.

6. THE MODIFIED MINIMUM TENDER CONDITION

6.1 Commission Decision

In grappling with an appropriate remedy to "cure the clearly abusive way in which Brookfield used the IPL Swaps," the ASC focused on whether an order modifying the Minimum Tender Condition was "necessary and appropriate."[68]

The ASC referenced *ARC Equity Management (Fund 4) Ltd., Re*[69] at para. 66 (citing *Re Cablecasting Ltd*., [1978] O.S.C.B. 37 at p. 43) in considering the novelty of the conduct and the appropriateness and extent of orders made in the public interest for clearly abusive conduct.[70]

> If the transaction under attack was of an entirely novel nature, Commission action might seem more appropriate. Another relevant consideration in assessing whether to act against a particular transaction is whether the principle of the new policy ruling that would be required to deal with the transaction is foreshadowed by principles already enunciated in the [Ontario's *Securities Act*], the regulations or prior policy statements. Where this is the case the [OSC] will be less reluctant to exercise its discretionary authority than it will be in cases that involve an entirely new principle.[71]

The ASC dismissed Brookfield's contention that the Proposed Minimum Tender Order was inconsistent with the CSA's determination regarding equity equivalent derivatives in the 2016 Notice of Amendments. The ASC stated at paragraph 509 that:

> As noted, the CSA did not proceed with the proposed addition of equity equivalent derivatives because there was no evidence at that time that Swaps were being used in a way that would undermine take-over bid regulation. However, what had not yet happened then was precisely the situation presented here – we found that Brookfield used the IPL Swaps to avoid the EWR's 10% reporting threshold and to gain a tactical advantage in the battle for control of IPL, thus engaging in clearly abusive conduct.

The ASC then found that Brookfield's conduct was of an entirely novel nature stating: "Brookfield's conduct fit squarely within the above description from *ARC Equity* – Brookfield's use of the IPL Swaps to further the Brookfield Offer was novel, and the

[68] *Re Bison*, *supra* note 1 at para 507.
[69] Re ARC Equity Management (Fund 4) Ltd., 2009 ABASC 390 [ARC Equity].
[70] *Re Bison*, *supra* note 1 at para 508.
[71] Re Cablecasting Ltd., [1978] OSCB 37 at 43 [Cablecasting].

concerns it raised were foreshadowed by the CSA policy discussions several years ago, even though no policy changes were made at that time." [72] The ASC reasoned that the concerns regarding Brookfield's conduct were foreshadowed by the 2013 Proposed Amendments, even though such amendments were ultimately rejected.[73]

The ASC was satisfied that it would be unfair to regular IPL shareholders to allow the Swap Shares to be included in the Minimum Tender Condition because "the tendering rights of those Swap Shares were separated from the economic interest in those shares (as were the voting rights). Accordingly, in deciding whether to tender the Swap Shares, the holder of those shares would be influenced by different considerations than those influencing holders of regular IPL Shares. Similarly, there would be different considerations influencing decisions about IPL Shares beneficially held by Brookfield – which is precisely why an offeror's shares are excluded from the Minimum Tender Condition (emphasis added)."[74] The ASC therefore believed that because the considerations impacting a decision to tender would be different in respect of the Swap Shares and the IPL Shares held by Brookfield, when compared to other holders of IPL Shares, that such shares should be excluded from the Minimum Tender Condition calculation.

The ASC could not identify the holder or holders of all of the Swap Shares. BMO was the only identified swap dealer.[75] The ASC blamed Brookfield for having no evidence of the number of Swap Shares held by BMO and therefore concluded it was reasonable to hold that all Swap Shares were held by BMO despite evidence confirming that "BMO hedged at least part of its position through ownership of Swap Shares and part through swaps with other swap dealers."[76]

The ASC "accepted the evidence that BMO would consider its own commercial interests in dealing with the Swap Shares. In the context of the Brookfield Offer, the choice was binary – either accept the offer and tender the Swap Shares, or reject the offer and decline to tender the Swap Shares."[77] The ASC believed it was highly unlikely that BMO would reject the Brookfield Offer and refuse to tender the Swap Shares, instead assuming that all of BMO's deemed holding of Swap Shares would be tendered to the Brookfield Offer.[78] The ASC reasoned that BMO's extensive commercial relationship with Brookfield justified this conclusion.

Based on the conclusion that Brookfield's conduct was clearly abusive, the ASC determined that the public interest called for the protection of IPL shareholders (other than Brookfield and BMO). The ASC reasoned that the effect of the Swap Shares could be neutralized by modifying the Minimum Tender Condition to arrive at a similar outcome

[72] *Re Bison*, *supra* note 1 at para 510.
[73] Ibid.
[74] Ibid at para 511.
[75] Ibid at para 513.
[76] Ibid at para 512.
[77] Ibid at para 514.
[78] Ibid at para 515.

as if the Swap Shares could have been identified and excluded with Brookfield's 9.75% of the IPL Shares.[79] As a result, the ASC decided to use its public interest jurisdiction to modify the statutory Minimum Tender Condition from a majority to more than 55% of the issued and outstanding IPL Shares, excluding the Brookfield-owned IPL Shares, in order to neutralize the effect of all of the Swap Shares being tendered.[80]

6.2 Analysis

History of the Minimum Tender Condition

It may be helpful to review the rationale behind the introduction of the Minimum Tender Condition to better assess the merits behind the ASC's decision to grant the Proposed Minimum Tender Order.

On March 14, 2013, the CSA published for comment a draft of *Regulation 62-105 respecting Security Holder Rights Plans* and draft *Policy Statement to Regulation 62-105 respecting Security Holder Rights Plans* (together, the "**CSA Proposal**"). The Autorité des marchés financiers (the "**AMF**"), while participating in the publication for comment of the CSA Proposal, concurrently published a consultation paper entitled *An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics* (the "**AMF Proposal**"). The CSA Proposal and the AMF Proposal sought to address, in different ways, concerns raised with respect to the CSA's approach to reviewing defensive tactics adopted by offeree boards in response to, or in anticipation of, unsolicited or "hostile" take-over bids.

The AMF Proposal suggested that certain provisions of standard form "permitted bid" rights plans that are "meant to address the structural coercion of our take-over bid regime"[81] be implemented, including the Minimum Tender Condition for bids:[82]

> An irrevocable minimum tender condition for bids on all securities of a class, and for any partial bids, of more than 50% of the outstanding securities owned by persons other than the offeror and those acting in concert with it would be akin to a collective "voting mechanism." It would serve to mitigate, if not eliminate, the pressure to tender as the bid can only succeed if a majority of "independent" security holders in effect "vote" for the bid, irrespective of how many securities are taken-up at the end of the process.

At the time, most rights plans appeared to define "independent securityholders" generally as beneficial holders of voting shares, other than beneficial holders of 20% or

[79] Ibid at para 516.
[80] Ibid at para 517.
[81] Consultation Paper: An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics (14 March 2013), online (pdf): Autorité des marchés financiers <https://lautorite.qc.ca/fileadmin/lautorite/consultations/fin-2013-06/2013mars14-avis-amf-62-105-cons-publ-en.pdf > [AMF Proposal].
[82] Ibid at 16.

more of the voting shares, bidders, affiliates and associates of bidders and such beneficial holders and those acting jointly or in concert with bidders and such beneficial holders.[83]

The CSA in its first proposal putting forward the Minimum Tender Condition (referred to as the Minimum Tender Requirement) noted as follows:[84]

> The Minimum Tender Requirement establishes a mandatory majority acceptance standard for all take-over bids, whether a bid is made for all or only a portion of the outstanding securities. The purpose of the majority standard is to address the current possibility that control of, or a controlling interest in, an offeree issuer can be acquired through a take-over bid without a majority of the independent security holders of the offeree issuer supporting the transaction if the offeror elects, at any time, to waive its minimum tender condition (if any) and end its bid by taking up a smaller number of securities (emphasis added).
>
> The Minimum Tender Requirement allows for collective action by security holders in response to a take-over bid in a manner that is comparable to a vote on the bid. Collective action for security holders in response to a take-over bid is difficult under the current bid regime, where an unsolicited offeror's ability to reduce or waive its minimum tender condition may impel security holders to tender out of concern that they will miss their opportunity to tender and be left holding securities of a controlled company. Coupled with the 10 Day Extension Requirement, the Minimum Tender Requirement is intended to mitigate this "pressure to tender" (emphasis added).

Similar to the AMF Proposal, the CSA was focused on preventing coercive conduct by ensuring that independent shareholders have an effective majority vote to approve a bid. Shareholder independence is determined in NI 62-104 by a finding of acting jointly or in concert, not with reference to differing considerations influencing a decision to tender. In this respect, the ASC's focus in *Re Bison* on exclusion of certain shareholders from the minimum tender calculation based on differing considerations impacting a decision to tender appears misplaced and it is not clear how this principle could be applied in future decisions. It is likely that many shareholders would have differing considerations influencing their decision to tender to a bid. This was not the concern of the CSA, but instead that independent shareholders be able to decide themselves whether to tender through a collective voting mechanism, rather than being coerced

[83] CSA Notice and Request for Comment – Proposed NI 62-105 Security Holder Rights Plans, Proposed Companion Policy 62-105CP, and Proposed Consequential Amendments, (2013) 36 OSCB 2643, online (pdf): <https://www.osc.ca/sites/default/files/pdfs/irps/ni_20130314_62-105_security-holder-rights-plan.pdf>.

[84] CSA Notice and Request for Comment Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids Proposed Changes to National Policy 62-203 Take-Over Bids and Issuer Bids and Proposed Consequential Amendments, (2015) 38 OSCB 3020, online (pdf): <https://www.osc.ca/sites/default/files/pdfs/irps/csa_20150331_62-104_rfc-proposed-admendments-multilateral-instrument.pdf>.

through the prospect of a partial bid. Again, we underscore that independence is measured statutorily through a finding of acting jointly or in concert. Therefore, the ASC's bold assertion that the differing considerations influencing decisions about IPL Shares held by Brookfield is "precisely why an offeror's shares are excluded from the Minimum Tender Condition" seems to lack any foundation in law and is detached from the policy rationale for the imposition of the Minimum Tender Condition.

Factual findings to support exercise of public interest power

In connection with the decision to modify the Minimum Tender Condition, the ASC made two important factual findings: (i) BMO had fully hedged its IPL Swaps position and (ii) such hedged shares would be tendered to Brookfield and voted against the Pembina Arrangement. As reviewed in Section 5.2 above, the reasoning that led to these findings appeared contorted and result driven.

ASC's exercise of public interest power

We note that in evaluating the appropriateness of exercising its public interest power, the ASC referred to and applied *Cablecasting*.[85] We believe that the ASC may have misapplied that decision and as a result may have not acted with caution in exercising its public interest jurisdiction.

In *Cablecasting*, the OSC sets out three general circumstances each with a different threshold for the OSC to intervene using its public interest power.[86] The three different circumstances, from the highest threshold to the lowest threshold, can be summarized as follows:

1. the transaction has happened in the past accompanied by publicity, but the Legislature has not acted to regulate[87] (the "**Highest Threshold**");
2. the transaction was "entirely novel";[88] and
3. the new policy principle "that would be required to deal with the transaction is foreshadowed by principles already enunciated in the Act, the regulations or prior policy statements"[89] (the "**Lowest Threshold**").

The OSC explained that it would be reluctant to intervene pursuant to its public interest power in cases that attracted the Highest Threshold,[90] but would be less reluctant to exercise its discretionary power in the other two circumstances, especially when the case was in the Lowest Threshold category.[91]

[85] *Re Bison, supra* note 1 at para 508.
[86] Cablecasting, supra note 69 at 43.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.

Citing *ARC Equity* which referenced *Cablecasting*, the ASC found that Brookfield's conduct was entirely novel.[92] Additionally, the ASC reasoned that the concerns Brookfield's conduct raised "were foreshadowed by the CSA policy discussions several years ago, even though no policy changes were made at that time."[93] In effect, the ASC categorized Brookfield's use of the IPL Swaps under the Lowest Threshold, permitting the ASC to have more latitude to intervene.

However, we believe Brookfield's use of swaps should likely have attracted the Highest Threshold standard of intervention - the transaction had occurred in the past accompanied by publicity, but the Legislature did not act.[94] First, the use of swaps, and the issue of swap disclosure in a take-over bid context has occurred previously. For example, *Sears* also involved swaps in a take-over bid context. In *Sears*, Pershing held swaps when Sears Holdings Corporation announced its bid to buy out Sears Canada Inc.'s minority shareholders.[95] Second, the CSA sought to include equity equivalent derivatives in the EWR calculation with its 2013 Proposed Amendments, and such a proposal had attracted over 70 comment letters.[96] Clearly, swap transactions and the issue of their disclosure had received publicity. Third, in 2016, the CSA announced that it would not adopt the 2013 Proposed Amendments, having considered the various comments.[97] Thus, Brookfield's use of the swaps was a transaction that had previously occurred, accompanied by publicity, but the Legislature considered and decided not to regulate. Therefore, we are of the view that the ASC should have applied the Highest Threshold standard when assessing whether to exercise its public interest power.

We have not considered whether the use of the public interest power was a legally viable remedy open to the ASC. A review of that issue would on its own require a paper of greater length than this one. In any event, it is of interest to note that in the IPL Application, the applicant had assumed that a finding of acting jointly or in concert or beneficial ownership in connection with the Swap Shares would be required for the imposition of the Proposed Minimum Tender Order.

Conclusion

The key findings that underpin the ASC's decision to impose the Proposed Minimum Tender Order appear problematic - starting with the fact that the level of abuse required for the exercise of the public interest power on these facts appears to be understated. In circumstances where the ASC seeks to, in effect, amend regulations that are only 6 years old and had undergone a rigorous consultation process, we believe that overwhelming evidence and proof of abusive conduct would need to be shown.

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[92] *Re Bison, supra* note 1 at para 510.
[93] Ibid.
[94] Cablecasting, supra note 69 at 43.
[95] *Sears*, *supra* note 27 at paras 1-8.
[96] See "Comment Letters for CSA Notice and Request for Comment Proposed Amendments to Multilateral Instrument 62-104 Take-Over Bids And Issuer Bids Proposed Changes to National Policy 62-203 Take-Over Bids and Issuer Bids and Proposed Consequential Amendments", online: *Ontario Securities Commission* < https://www.osc.ca/en/securities-law/instruments-rules-policies/6/62-104/csa-notice-and-request-comment-proposed-amendments-multilateral-instrument-62-104-take-over-bids/comment-letters>.
[97] The 2016 Notice of Amendments, *supra* note 58 at 1758.

7. PRECEDENTIAL VALUE OF THE DECISION

Since its issuance, there has been much discussion among capital market participants and advisors regarding the impact of the Decision, particularly as it relates to the use of tactical rights plans and total return swaps in connection with contested M&A transactions.

However, the reasoning in the Decision does not lend itself to the application of clear principles and as a result may have limited precedential value. The ASC itself noted that the Decision was "not intended to be a general pronouncement on the treatment of derivative interests in all situations."[98] Nevertheless, with a dearth of decisions relating to rights plan after the 2016 amendments to the take-over bid regime and even fewer decisions relating to swaps in a take-over bid context, the Decision has been carefully reviewed by many in the hope that it will provide needed guidance.

With respect to the use of "tactical" shareholder rights plans for the purpose of deeming shares underlying total return swaps to be beneficially owned, we expect that most securities regulatory authorities will uphold such plans in circumstances where the shares underlying such swaps together with shares held by the bidder (if any) impede a target's ability to successfully conclude an auction process, including by creating confusion in the marketplace regarding the bidder's ability, directly or indirectly, to exercise control or direction over such shares. We would not be surprised if securities regulatory authorities in different jurisdictions reach different conclusions. We would not expect that the *Royal Host* line of cases will assist in this analysis. We would also expect that where the bidder has provided significant disclosure regarding derivatives, the target issuer will have a more difficult time withstanding a cease trade order than in *Re Bison*.

With respect to the conclusion that even if a bidder complies with the EWR obligations under NI 62-104, if the bidder uses derivatives to gain an economic interest in a target without making any disclosure until it makes its offer, such conduct could be contrary to the public interest, we have significant concerns with the application of this principle and the analysis that led the ASC to reach its conclusion. We are also concerned that securities regulatory authorities in different jurisdictions may reach different conclusions on the same facts. Nevertheless, bidders must now tread carefully if they are to pursue this course of conduct. We do expect that ultimately this ruling will be tested unless, in the interim, the securities regulatory authorities address this issue in the proper forum – that is through the legislative process, much like what the SEC is now doing.

Finally, with respect to the use of the public interest power to modify the statutory Minimum Tender Condition in NI 62-104 in order to neutralize certain possible effects of derivatives on a bid, we do not believe that this positon is supportable. Our hope is that securities regulatory authorities would not follow this line of reasoning. From our perspective, modifying the Minimum Tender Condition does not appear to be linked to

[98] *Re Bison, supra* note 1 at para 196.

the “abusive conduct” in the Decision and in fact the remedy is an affront to the policy rationale for the Minimum Tender Condition. In grappling with an appropriate remedy to “cure the clearly abusive way in which Brookfield used the IPL Swaps”, the ASC issued an order that was in our view neither “necessary” nor “appropriate”. While there could be facts where such an extraordinary remedy and analytical gymnastics are required, this was not such a case. We have repeatedly supported the need for the public interest power, as a powerful, necessary and important tool; however, the legitimacy of this tool must certainly be dependent on its use in a manner that is transparent and cogent and where the results are predictable and easily understood by securities law practitioners and market participants alike.

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