SHARE BUY-BACKS IN CANADA

Patricia L. Olasker
Jennifer F. Longhurst

Davies Ward Phillips & Vineberg LLP

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Under Canadian provincial securities legislation, the acquisition by an issuer of its own securities, other than non-convertible debt, is regulated as an issuer bid[1]. Unlike the take-over bid rules, the issuer bid rules do not provide for a "private agreement exemption" permitting the selective repurchase of shares from a limited number of sellers at a regulated price. Any purchase of a single common share by an issuer subjects it to the obligation to make a formal offer to all shareholders or find an applicable exemption.

Statutory exemptions are limited. Other than those available in unusual circumstances[2], there are only two relevant exemptions:

> *Normal Course Issuer Bid on Stock Exchange:* Section 93(3)(e) of the Ontario *Securities Act* allows an issuer to make an issuer bid through the facilities of a recognized stock exchange. Under the current rules[3] of the Toronto Stock Exchange ("**TSX**"), an issuer can purchase up to the greater of 5% of its outstanding shares or 10% of its public float (outstanding shares excluding shares held by insiders) in a 12-month period, but not more than 2% of the shares in any 30-day period.

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1 Generally, Canadian provincial securities legislation defines an "issuer bid" as an "offer to acquire" or redeem securities of an issuer made by the issuer to any person or company who is in the province or to any security holder of the issuer whose last address as shown on the books of the issuer is in the province and includes a purchase, redemption or acquisition of securities of the issuer by the issuer from any such person or company. An issuer bid does not include an offer to acquire or redeem debt securities that are not convertible into securities other than debt securities. An "offer to acquire" includes (a) an offer to purchase, or a solicitation of an offer to sell, securities and (b) an acceptance of an offer to sell securities, whether or not such offer to sell has been solicited, or any combination thereof. Also of relevance in the case of repurchase transactions is that a person or company accepting an offer to sell is deemed to be making an offer to acquire to the person or company that made the offer to sell, and therefore an issuer will be required to comply with the issuer bid requirements under the applicable law, even if the selling shareholder initiates the process for disposing of its shares.

2 Securities legislation generally exempts issuer bids where: (a) the terms or conditions attaching to the securities permit the purchase or redemption of securities without the prior agreement of the owners; (b) the purchase or redemption is required by the instrument creating or governing the securities or by the statute under which the issuer is incorporated, organized or continued; (c) the securities carry a right of the owner to require the issuer to redeem or repurchase the securities and are acquired pursuant to such right; (d) the securities are acquired from a current or former employee of the issuer or an affiliate and, if a published market for such securities exist, (i) the value of the consideration does not exceed the "market price" determined at the acquisition date in accordance with the applicable regulations (essentially, the 20-day average closing price) and (ii) the aggregate number of securities acquired within the preceding 12 months in reliance upon this exemption does not exceed 5% of the issued and outstanding shares; or (e) the number of holders in the jurisdiction is less than 50 and the number of securities held by such holders is less than 2% of the outstanding securities, and the bid is made in compliance with the laws of a jurisdiction that are recognized by the commission and all materials relating to such bid are sent to all holders of securities in the jurisdiction.

3 The TSX has published a number of requests for comment on proposed amendments to these rules, most recently in October 2005. See the discussion in section 3 below entitled "Proposed Amendments to TSX Issuer Bid Rules".

Notice of Intention: Section 93(3)(f) of the Ontario *Securities Act* allows an issuer, following publication of a notice of intention, to purchase up to 5% of its outstanding shares in a 12-month period in the normal course in the open market. For example, a Canadian issuer that is interlisted on the TSX and the New York Stock Exchange ("**NYSE**") could rely on this exemption to effect its normal course purchases on the NYSE, subject to the 5%-in-12-months limit under section 93(3)(f), but not subject to the limitation of the 2%-in-30-days rule on the TSX. An issuer might also elect to use both exemptions simultaneously, with shares purchased under one exemption counted towards the purchase limitations under the other exemption, although for interlisted companies that have adequate trading volumes on both the TSX and the NYSE, it would be more usual to effect the purchases on a single exchange. If the repurchases are made on the NYSE, the share repurchase program must be structured to come within the safe harbour provided by the U.S. Securities and Exchange Commission ("**SEC**") Rule 10b-18 which regulates the volume, timing and price of such purchases in a manner similar to the requirements of the proposed new TSX rules.

However, neither of these exemptions can be used to effect a selective, or private agreement, repurchase of the issuer's securities. All trades pursuant to these exemptions must be "normal course, open market purchases" which means they cannot be solicited, by either the issuer or the seller, and they cannot be pre-arranged or negotiated.

There are, however, two ways in which selective buy-backs can be effected in Canada. One of these techniques has evolved under a series of exemption orders and the other derives from the jurisdictional limits of provincial securities legislation. A third alternative may soon be available under the long-anticipated amendments to the TSX's normal course issuer bid rules. These techniques are discussed below under the following headings:

1. Private Agreement Issuer Bid Relief
2. Offshore Selective Buy-Backs
3. Proposed Amendments to TSX Issuer Bid Rules

1. Private Agreement Issuer Bid Relief

Over the last ten years, the securities regulators in Ontario, Alberta and Québec have issued a number of exemption orders permitting issuers to repurchase securities by private agreement without making an offer to all holders. What this line of orders reveals is that securities regulators will exempt repurchase transactions from compliance with the issuer bid rules if the following principal conditions are met: (i) the issuer must not pay a premium over the market price; (ii) "market price" is tested both at the time of the agreement between the parties and at the time of the buy-back; the price must be such that all other holders of shares are able to sell their shares in the market at a price no less than the price received by the selling shareholder in the repurchase transaction; (iii) there must be a liquid market in the issuer's shares; (iv) the issuer must have a business purpose in effecting the transaction; and (v) if the selling shareholder is a related party of the issuer, the transaction must be a approved by an ordinary resolution of the issuer's shareholders. There are also numerous other factors underpinning the relief granted in these orders.[4] These factors and the orders that spawned them are considered in detail below.

***Power Corporation of Canada*[5]**

In 1996, the Ontario Securities Commission (the "**OSC**") granted an exemption to permit Power Corporation of Canada ("**Power**") to repurchase 13.5% of Power's equity at a discounted price.

Power was a reporting issuer across Canada and its shares were listed for trading on the Toronto, Montreal and Vancouver Exchanges. Pursuant to the transaction, Power proposed to purchase from non-resident subsidiaries of Compagnie Benelux Paribas S.A. ("**Copeba**"), three Canadian subsidiaries of Copeba (headquartered in Ontario), whose sole assets consisted of shares of Power representing 13.5% of Power's equity. Following Power's acquisition of the three subsidiaries, the subsidiaries would be wound up and the shares of Power would be acquired by Power and cancelled. Because the shares held by Copeba represented only 7.5% of the voting rights of Power, Copeba was not a "related party".

In granting relief to permit this indirect issuer bid to proceed, the OSC recited the following factors:

- The agreed purchase price represented a 10% discount to the market price for the shares. It was also a condition of the relief that the agreed price continue to represent a discount of not less than 5% of the market price following the announcement of the buy-back. As a result, the repurchase could not take place unless the other shareholders would, on the closing date, be able to sell their shares at a "market price" in excess of the price for the repurchased shares.
- The market for the shares was "extremely liquid", having an average aggregate daily trading volume in excess of 160,000 shares.
- Control of Power would not be materially affected by the acquisition.[6]
- The acquisition would improve Power's financial position, thereby benefiting shareholders other than Copeba, and would not adversely affect Power.
- There were no undisclosed material facts or material changes regarding the affairs of Power or the shares, other than some other "proposed transaction" (which is vaguely alluded to in the order) that would not represent an adverse change in Power's affairs or to the shares.

In several respects, Power was an "easier" case than those that followed. First, the consideration payable by Power was negotiated at arm's length with Copeba, and represented a discount to the "market price" of the shares. Second, the selling shareholder was not a related

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[4] See the discussion in the section below entitled "Principal Factors Underlying Private Agreement Issuer Bid Relief".

[5] *Re Power Corp.* (1996), 19 O.S.C.B. 3713 (the "**Power Order**").

[6] In this case, control of the issuer would not materially change since Copeba only held 7.5% of the voting rights of Power, which was not sufficient to materially affect control of Power.

party of the issuer. Third, as argued by Power in its application, had Power purchased the shares directly from Copeba or its non-resident subsidiaries, the acquisition would not constitute an issuer bid as none of the entities was a person or company resident in Ontario; accordingly, the imposition of the resident subsidiaries, being mere holding companies with their only assets consisting of the shares, should arguably not then alter the end result and attract the application of the issuer bid requirements.

Morrison Middlefield Resources Limited[7]

In 1998, the Alberta Securities Commission (the "**ASC**") granted an exemption to permit Morrison Middlefield Resources Limited ("**MMRL**") to repurchase 21.5% of its outstanding common shares and an option to purchase additional common shares from Northstar Energy Corporation ("**Northstar**") and Northstar's wholly-owned subsidiary, Morrison Petroleums Ltd. ("**Morrison**") in exchange for certain assets of MMRL.

In light of its 21.5% shareholding in MMRL and the fact that Northstar managed MMRL (as discussed further below), Northstar would appear to have been a "related party" of MMRL. However, no reference to this fact is contained in any of the materials pertaining to this transaction. In fact, the order states that Northstar dealt at arm's length with MMRL.

MMRL was a reporting issuer listed on the TSX. Similar to the CanOxy and CGI transactions discussed below, Northstar had, earlier that year, filed a notice of intention with the Canadian securities administrators to sell its control block thereby creating a market overhang effect. The ASC placed importance on the issuer's desire to eliminate the market overhang as a legitimate business purpose of the buy-back. The buy-back was also intended to effect another business purpose of MMRL. MMRL was jointly managed by Northstar and Middlefield Resources Limited ("**Middlefield**") under a management agreement. The repurchase of securities from Northstar appears to have been triggered by the parties' desire to terminate this relationship. In connection with its termination, Northstar and MMRL entered into a share exchange agreement whereby MMRL agreed to sell certain assets to Northstar in exchange for all of the common shares of MMRL held by Northstar and termination of the MMRL option. The issuer focused on the fact that absent the sale of these assets to Northstar, it would not likely have secured another purchaser; as such, an additional benefit was secured by MMRL in connection with the transaction which would not otherwise have been available.

In granting relief to permit this indirect issuer bid to proceed, the ASC was influenced by the following factors set forth in MMRL's application:

- MMRL's activities would, going forward, largely occur outside of Canada (again, bolstering the business rationale for the repurchase of shares in exchange for the disposition of assets), whereas Northstar would continue to operate exclusively within Canada.

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7 *Re Morrison Middlefield Resources Ltd.* (1998), 7 A.S.C.S. 2338, Order #07/27 (the "**MMRL Order**").

- Control of MMRL would not be materially affected by the transaction.[8]
- The price was negotiated between arm's length parties.
- The transaction was approved by independent directors of MMRL.

In contrast to other orders granted in related party circumstances, the order did not contemplate that a meeting of MMRL shareholders would be called to approve the transaction. However, MMRL had, prior to obtaining the order from the ASC, obtained the written consent from holders of 56.8% of MMRL's outstanding common shares (other than those held by Middlefield and Northstar), thereby providing the Commission with sufficient evidence of shareholder support for the transaction.

Also atypically, MMRL had not retained a financial advisor and had not obtained a fairness opinion in respect of the transaction. This may have been acceptable for two reasons. Both Middlefield and Northstar were co-managers of MMRL. The senior officers of MMRL were all individuals associated with Middlefield and were involved in MMRL's day-to-day affairs and therefore had full knowledge of the fair market value of MMRL's shares and the assets proposed to be transferred by MMRL. Similarly, Northstar considered itself able to evaluate the proposed transaction without the assistance of an issuer bid circular or valuation. Secondly, because a majority of the disinterested shareholders had already consented to the transaction, the shareholders of MMRL did not need the protection offered by a valuation or fairness opinion.

The MMRL Order was also unusual in that it did not require that the MMRL shares be valued at their market price. In fact, there is no discussion of the issue of price in either the application or the order. However, the ASC relied on the fact that the transaction was negotiated at arm's length between Northstar and MMRL, both of whom had full knowledge concerning the fair market value of MMRL's shares and assets.

While no specific mention is made in the order or application of Northstar's status as a "related party" it would appear, as mentioned above, that Northstar was in fact a "related party" under OSC Policy 9.1 (the predecessor to Rule 61-501). However, MMRL was presumably exempt from the related party transaction valuation and minority shareholder approval requirements on the basis that neither the fair market value of the subject matter, nor the fair market value of the consideration for the transaction, exceeded 25% of its market capitalization. It is possible the issuer was exempt pursuant to other enumerated categories, although the materials relating to this transaction do not provide any information on this point.

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[8] Control would remain substantially unchanged because MMRL's single largest shareholder after giving effect to the transaction would be corporations affiliated with, or managed by, Middlefield with approximately 12% of the shares of MMRL. In addition, as in other cases where emphasis was placed on the absence of a material effect on control, what appears to be of importance is that the significant shareholder's shares did not, generally, form part of the public float of common shares and, therefore, ultimately, the number of shares available for trading would not be affected by the repurchase.

BioChem Pharma Inc.[9]

In 1999, the OSC granted an exemption to permit BioChem Pharma Inc. ("**BioChem**") to repurchase common shares of BioChem held by Glaxo Wellcome plc ("**Glaxo**") for a purchase price of US$20.00 per share payable one-half in cash and one-half payable by way of a promissory note 18 months following closing.

Initially, Glaxo owned approximately 14.5% of the outstanding common shares; as such, Glaxo would appear to have been a "related party" of the issuer. In May 1999, Glaxo disposed of 2.3% of the common shares reducing its holdings to 12.3% of the outstanding shares. In Glaxo's application to the OSC in June 1999 and in its materials for the shareholders meeting called to approve the repurchase, emphasis was placed on the overhang effect resulting from this disposition and the attendant market perception that Glaxo would sell the rest of its holdings, producing a depressive effect on the market price of BioChem's common shares.

In granting relief from the issuer bid rules to permit BioChem to buy-back Glaxo's block, the OSC recited the following factors:

- An "overhang effect" was triggered by Glaxo's disposition of a portion of its stake in the issuer, thus adversely affecting the market price of the issuer's shares.
- The board of directors retained financial advisors who advised the board and provided a fairness opinion.
- BioChem had established that the market for its shares was highly liquid, with an aggregate trading value on the NASDAQ (BioChem's primary market) of at least 1 million shares involving at least 1,000 trades at an aggregate trading price of at least Cdn$15 million for the preceding 12 months.
- As in the CGI transaction and other transactions where the selling shareholder retains some stake following the transaction, Glaxo entered into a standstill agreement with respect to its remaining shares, which prohibited Glaxo from disposing of those shares for one year except upon certain events, such as an issuer bid made to all shareholders.
- Materials relating to a special meeting of shareholders of BioChem to approve the repurchase included the fairness opinion and also discussed the *pro forma* effects of the transaction.
- The approval of shareholders other than Glaxo was secured.
- The issuer had sufficient cash on hand and accounts receivable to fund the repurchase transaction without adversely affecting the issuer's financial condition.

The most notable difference in this transaction was that the purchase price for the repurchased shares (being US$20.00 per share, the price at which Glaxo disposed of the 2.3% block) was actually at a slight premium over the closing price of the common shares on the NASDAQ. What is, however, unique and of significance in this case, is that as opposed to merely signalling an intention to dispose of shares, Glaxo had in fact disposed of some shares, and was therefore able to demonstrate the actual adverse impact on the market price for

9 *Re BioChem Pharma Inc.* (1999), 22 O.S.C.B. 3877 (the "**BioChem Order**").

BioChem's shares. BioChem established that for the 20 trading days immediately prior to the initial disposition of common shares, the average closing price on the NASDAQ was US$21.77 per share. Immediately following Glaxo's disposition, and for the 20 trading days thereafter, the average closing price for the common shares had dropped to US$19.44. On this basis, it may be argued, that the US$20-per-share price agreed to by the parties was really not a premium at all, but rather reflected a discount to what the market price would have been had the initial disposition by Glaxo not created the overhang effect. In addition, the fact that BioChem was entitled to defer the payment of one-half of the purchase price for 18 months following closing may have justified the slight premium paid in this transaction.

Similar to the MMRL Order, there is no reference to Glaxo's related party status in the materials pertaining to this transaction. Presumably, however, BioChem would have been exempt from the "related party transaction" valuation and minority shareholder approval requirements on the basis of its market capitalization and established liquidity in respect of its common shares, or pursuant to some other exemption under OSC Policy 9.1.

Canadian Occidental Petroleum Limited[10]

In 2000, the ASC granted an exemption to permit Canadian Occidental Petroleum Limited ("**CanOxy**") to repurchase approximately 14.5% of its outstanding common shares held by Occidental Petroleum Corporation ("**Oxy**").

CanOxy was a Canadian public company headquartered in Calgary and listed on the TSX. Approximately 29.2% of its outstanding shares were held by Oxy, a public corporation headquartered in Los Angeles, California. Oxy was therefore a "related party" and control block holder of CanOxy. It is noteworthy that, in its application, CanOxy questioned whether the proposed repurchase transaction even constituted an "issuer bid" under the Alberta *Securities Act* since the shares indirectly owned by Oxy (a California company) were held by two non-resident Delaware corporations; none of Oxy or its shareholding subsidiaries involved in the transaction had registered offices in Alberta. On this basis, CanOxy argued that the transaction likely did not fall within the definition of an "issuer bid" under the Act, which requires, among other things, that the selling shareholders be "holders in Alberta". Notwithstanding this argument, the application was submitted in the event that the ASC were to take a more expansive interpretation of the phrase "holder in Alberta" and determine that the proposed repurchase constituted an "issuer bid" within the Province.

Pursuant to the proposed transaction, and as set out in CanOxy's February 24, 2000 application, Ontario Teachers' Pension Plan Board ("**Teachers**") would acquire 20.2 million common shares from Oxy at the 20-day average trading price per share and CanOxy would repurchase from Oxy the remaining 20.0 million common shares at the same price. In addition, CanOxy also agreed to transfer to Oxy, CanOxy's 15% interest in an Equadorian joint venture (which was 85% controlled by Oxy) and Oxy would in turn transfer to CanOxy, Oxy's 15% interest in a North American chemical business (which was 85% owned by CanOxy).

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[10] *Re Canadian Occidental Petroleum Limited* (2000), A.S.C. Order #2000/37 (the "**CanOxy Order**").

The proposed transaction arose following a public announcement and the filing of an early warning report in which Oxy disclosed that it was examining alternatives with respect to its investment in CanOxy, including a possible disposition of all or part of its stake in CanOxy. The elimination of the resulting market overhang effect was identified in the application and order as an important factor warranting relief from the issuer bid rules. Other factors cited in the application and order were:

- CanOxy established an independent committee of its board of directors.
- The independent committee retained independent legal and financial advisors.
- It was a condition to the closing of the transaction that each advisor deliver an opinion to the independent committee that the transactions were fair, from a financial point of view, to CanOxy and its shareholders (other than Oxy and Teachers).
- An information circular including the fairness opinions, *pro forma* financial statements giving effect to the transaction, and the requisite "related party" disclosure under OSC Policy 9.1 was mailed to shareholders of CanOxy.
- The proposed transaction was submitted for approval by ordinary resolution of the shareholders (other than Teachers and Oxy) at an annual and special meeting of shareholders.
- After completion of the repurchase there would be a highly liquid market in CanOxy shares.
- The pricing of the repurchase was determined through arm's length negotiations between Oxy and Teachers' and was equal to the 20-day average closing price on the TSX (prior to the announcement of the transaction).
- The buy-back would not materially affect the control of CanOxy.[11]
- The issuer identified the availability of sufficient credit facilities to effect the repurchase using its existing lines of credit and without creating any undue financial burden on CanOxy.
- Oxy agreed that for a period of one year following closing, it would not acquire CanOxy shares except pursuant to an offer made to all CanOxy shareholders to acquire all outstanding CanOxy shares.

CanOxy was also able to establish its exemption from the "related party transaction" valuation and minority approval requirements of OSC Policy 9.1 on the basis that (i) there would continue to be a highly "liquid market" for CanOxy shares following completion of the transaction and (ii) both the fair market value of the transaction and the consideration payable thereunder constituted less than 25% of CanOxy's market capitalization.

[11] The basis on which the ASC accepted the argument set out in the CanOxy Order, that control of CanOxy would not be materially affected, is unclear. Teachers was, prior to the closing of the proposed transaction, a shareholder in CanOxy, holding approximately 1.5% of the outstanding common shares. The transfer of shares to Teachers by Oxy would, ultimately, result in Teachers holding at least 16% of the common shares, with Oxy decreasing its holdings from 29% to 0%. Unfortunately, no further information concerning the basis for this claim is included in CanOxy's application, order or the related meeting materials although it nonetheless appears to be a significant factor cited in these types of orders.

Methanex Corporation[12]

In May 2003, the ASC granted an exemption to Methanex Corporation ("**Methanex**") from the issuer bid requirements in connection with the repurchase by Methanex of 7.1% of its outstanding common shares from NOVA Chemicals Corporation ("**NOVA**").

Prior to completion of the transaction, NOVA held approximately 37% of the outstanding shares; as such, NOVA was "a related party" and control block holder of Methanex. Both Methanex and NOVA were Alberta companies and reporting issuers across Canada. NOVA intended to dispose of shares representing approximately 30% of the outstanding shares of Methanex through an underwritten secondary offering by prospectus. Methanex agreed to purchase for cancellation the remaining 7.1% block of shares of Methanex held by NOVA at the same price at which the secondary offering would be underwritten. After completion of the secondary offering and the purchase transaction, NOVA would no longer have any equity interest in Methanex.

The ASC's decision to grant relief from the issuer bid rules in respect of the transaction was based on the following factors:

- An independent committee of Methanex's board, composed entirely of members independent of NOVA and Methanex's management, was established to evaluate, review and advise upon the desirability of the transactions (and unanimously determined that the repurchase transaction was in the best interests of Methanex and its shareholders (other than NOVA and its affiliates)).
- As a condition to proceeding with the transaction, the independent committee received a fairness opinion from an investment banking firm that the repurchase transaction was fair, from a financial point of view, to the common shareholders other than NOVA.
- The independent committee retained legal counsel.
- A special meeting of the shareholders of Methanex was called to obtain approval for the repurchase transaction from shareholders (other than NOVA and its affiliates) by ordinary resolution.
- An information circular describing the structure of the reorganization and repurchase transactions and including a copy of the fairness opinion and the required "related party" disclosure was delivered to shareholders.
- The issuer had sufficient cash on hand to implement the repurchase transaction without subjecting itself to an imprudent financial burden.

In addition to the above factors, it is also noteworthy that, based on a comparison of Methanex's original application to the ASC and the final order granted, it appears the ASC placed great importance on ensuring the purchase price for the repurchased shares was the equivalent of the "market price" and that there was some business purpose, particularly having regard to the proposed secondary offering by NOVA, for exempting the repurchase transaction

12 *Re Methanex Corporation* (2003), A.S.C. Order #2003/33 (the "**Methanex Order**").

from the issuer bid requirements. In its application, Methanex did not disclose the price at which the shares would be repurchased, but rather stated that it was "yet to be determined". As part of the final order, Methanex was required to represent that the price of the repurchased shares would be *the same as the price in the offering*. In addition, Methanex's application made no mention of the overhang effect; however, the final order emphasized that the market price of Methanex shares had been adversely affected by the market perception that NOVA would sell all or a portion of its holdings by way of a market transaction, and that it would be in the best interests of Methanex and its shareholders (other than NOVA) to remove this overhang and allow the market to value the common shares based on the company's economic fundamentals and not in anticipation of a temporary excess supply of shares.

Finally, while the Methanex repurchase constituted a "related party transaction" pursuant to OSC Rule 61-501 and Québec Policy Q-27, an exemption was available from the valuation and minority approval requirements on the basis that the fair market value of the repurchased shares did not exceed 25% of Methanex's market capitalization, as required by Rule 61-501 and Policy Q-27.

George Weston Limited[13]

In October 2003, the OSC granted an exemption to permit George Weston Limited ("**Weston**") to repurchase approximately 1.5% of its outstanding common shares at a discount from Wittington Investments Limited ("**Wittington**"). Wittington held 62.5% of the outstanding common shares of Weston. As such, Wittington was a control block holder and "related party" of Weston.

Weston was anticipating the receipt of substantial cash proceeds from its unwinding of swaps and the board of Weston determined that the best use of these proceeds was to buy back common shares. At the same time, Wittington expressed an interest in selling some of its common shares back to Weston. Weston's board established an independent committee to consider whether, and on what terms, Weston would repurchase shares from Wittington.

The following standard factors were relied upon by the OSC in granting relief from the issuer bid rules:

- The independent committee determined that the transaction was in the best interests of Weston.
- Weston represented that the transaction would not adversely affect Weston or any rights of any other security holders and would not materially affect control of Weston (given that only 1.5% of the shares outstanding were being reacquired).
- The issuer established its ability, through the use of the anticipated proceeds from the unwinding of its swap arrangements, to fund the reacquisition.
- The market for Weston's shares was extremely liquid, with an average daily trading volume of more than 57,000 shares with a value in excess of Cdn$6 million.

[13] *In the Matter of George Weston Limited* (2003), 26 O.S.C.B. 7597 (the "**Weston Order**").

- Wittington represented that it was not aware of any undisclosed material information in respect of Weston or the common shares that could reasonably be expected to affect the value of the common shares, thereby protecting against the risk of a related party transaction proceeding on the basis of some informational or other advantage enjoyed by the selling shareholder.

In contrast to other transactions, however, no fairness opinion or shareholder approval was obtained. The need for a fairness opinion may have been obviated by the presence of other indicia of fairness. First, the transaction was priced so as to ensure that the buy-back would be effected at a discount to the market price determined both before and after the announcement of the buy-back. Wittington offered to sell the shares to Weston at a price equal to 96% of the lesser of (a) the volume weighted average price on the TSX for the 20 business days prior to acceptance by Weston of the offer to sell (after which the buy-back would be publicly announced) and (b) the volume weighted average closing price for the shares on the TSX for the three trading days prior to the closing of the transaction, thereby ensuring the transaction could not proceed unless it was at a discount to the market price available to other shareholders on the date of closing. Secondly, the independent committee concluded that the transaction was beneficial to Weston because Weston could purchase the common shares from Wittington at a price lower than the price at which it could purchase the common shares under its existing normal course issuer bid. The independent committee also concluded that the public shareholders of Weston were not disadvantaged because they would be able to sell their common shares on the TSX at a price that, after commissions, would be no less than the price Wittington would receive under the buy-back.

It is not entirely clear why shareholder approval was not required in this case whereas it was in Methanex, a similar related party transaction. Perhaps it was because the repurchase involved only 1.5% of the outstanding common shares, which would otherwise have been permitted under the company's normal course issuer bid, or perhaps it was because, unlike in Methanex, the repurchase was effected at a discount to current market. The other curious aspect of the order is that, unlike the previous orders, this order does not cite a market overhang concern or any other business purpose for the transaction.

Like the Methanex transaction, this transaction constituted a "related party transaction" under Rule 61-501. However, similar to the BioChem and MMRL transactions, it appears likely that Weston would have been exempt from the valuation and minority shareholder approval requirements of the rule on the basis that the fair market value of the repurchased shares would not have exceeded 25% of Weston's market capitalization. Again, however, because the materials pertaining to this order do not provide any information on this point, the precise basis for the exemption from the related party transaction requirements is unknown.

Cossette Communication Group Inc.[14]

In March 2004, the OSC granted an exemption to Cossette Communication Group Inc. ("**Cossette**") from the issuer bid requirements of securities legislation in Ontario and Québec to permit the repurchase, at a discounted price, by Cossette of subordinate voting shares from

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14 *In the Matter of Cossette Communication Group Inc.* (2004), 27 O.S.C.B. 3758 (the "**Cossette Order**").

two employees, Larivière and Saville representing 6.81% and 10.13% of the outstanding voting rights, respectively. Cossette is the most recent order in Ontario on private agreement issuer bids.

Cossette was a Québec company and a reporting issuer in each of the provinces of Canada, with its subordinate voting shares listed for trading on the TSX.

At the time of the transaction, Larivière held approximately 6.81% of the voting rights attached to all outstanding voting shares of Cossette (consisting of the subordinate voting shares and multiple voting shares) and was neither a director nor an officer of Cossette and, therefore, was not an insider or "related party" of Cossette. Saville held 10.13% of the voting rights attaching to all outstanding voting shares of Cossette; as such, although he also was neither a director nor an officer of Cossette he was, on the basis of his percentage holdings, an insider and a "related party" of Cossette.

Pursuant to the transaction, Larivière and Saville would convert almost all of their multiple voting shares into subordinate voting shares and, thereafter, Cossette would purchase 700,000 subordinate voting shares from each individual for cancellation. The purchase price payable in respect of the repurchased shares was to be at a discount to the market price of the shares both pre- and post-announcement, as it was in the Weston Order.

The repurchase transaction was initiated by the two selling shareholders who made irrevocable offers to sell to Cossette at a price per share equal to 90% of the lesser of (A) the volume weighted average closing price on the TSX of the shares for the 20 business days prior to acceptance of the offer by Cossette (after which the transaction would be announced) and (B) the volume weighted average closing price of the shares on the TSX for the three trading days immediately prior to the closing date, subject to a floor price. As such, the OSC took comfort from the fact that the other shareholders would not be prejudiced and could, at the date of closing, dispose of their shares in the market at a price that, after payment of commissions, would not be less than that obtained by Larivière and Saville.

In addition, the following factors were recited by the OSC in granting relief from the issuer bid requirements:

- The board of Cossette formed an independent committee to review, evaluate and make recommendations to the board with respect to the transaction and the independent committee approved the transaction.
- The independent committee retained independent financial and legal advisors.
- The independent committee obtained an opinion from its financial advisors that the sale price would be such that all other holders of subordinate voting shares could sell their shares on the TSX at a price, after payment of commissions, that would not be less than the sale price and that the transaction was fair, from a financial point of view, to all holders of subordinate voting shares other than Larivière and Saville.
- The issuer established that it had excess cash available for the purposes of funding the reacquisition.

- The management of Cossette represented in the order that the repurchase was in the best interests of Cossette and its shareholders for several reasons including that the transaction would rebalance the debt/equity structure of Cossette at a level considered more optimal by management, the market overhang on the shares created by the shareholders' desire to dispose of their shares would be eliminated and the transaction would be accretive to earnings per share for all shareholders and would increase the return on equity for all shareholders by increasing the earnings per share and reducing the book value of the shareholders' equity.
- The number of multiple voting shares outstanding would be reduced.
- The transaction would not negatively affect the liquidity of the market for the subordinate voting shares.
- The share ownership structure of Cossette would not be materially affected and the transaction would not materially affect the control of Cossette, presumably since the shares held by Cossette and Saville were relatively small in number.

Unlike other cases involving a related party of the issuer, no shareholder approval of the buy-back was required here. This was probably because Saville was a related party only in the most technical sense – with voting rights just in excess of 10%. Moreover, because he was not a director or officer, Saville probably did not have informational or other advantages over other shareholders of Cossette that needed to be addressed through proxy circular disclosure and shareholder approval. Finally, since Saville was required to convert his multiple voting shares into subordinate voting shares before the transaction could proceed, his voting rights would have been well below the related party threshold at the time of the repurchase.

The Cossette Order appeared to establish something of a formula, setting out the applicable criteria drawn from earlier orders for determining when issuer bid relief would be granted and on what terms. Québec then issued the CGI Order, discussed below, which took a surprisingly different approach.

CGI Group Inc.[15]

In December 2005, the Québec Authorité des marchés du financiers (the "**AMF**") granted an exemption to CGI Group Inc. ("**CGI**") from the issuer bid requirements under the Québec *Securities Act* in connection with the repurchase by CGI of subordinate voting shares held by BCE Inc. ("**BCE**") representing 25.5% of CGI's outstanding subordinate voting shares.

BCE was a control block shareholder and a "related party" of CGI holding approximately 30% of the outstanding subordinate voting shares. The repurchase transaction contemplated that BCE would sell to CGI approximately 25.5% of the outstanding subordinate voting shares. Following closing of the transaction, BCE would continue to own shares representing approximately 9.5% of the outstanding subordinate voting shares and certain warrants to purchase subordinate voting or multiple voting shares of CGI. The parties agreed that following closing of the repurchase transaction, BCE would dispose of its remaining

15 *Re Groupe CGI Inc.* (2005), 2005-SMV-0164 (the "**CGI Order**").

subordinate voting shares in an orderly fashion. Similar to other instances where a departing shareholder continues to hold some portion of shares following completion of the repurchase transaction, BCE also agreed to a 120-day standstill period from the date of closing, during which BCE was not permitted to dispose of or acquire securities in the capital of CGI (other than pursuant to its warrants, if entitled).

In permitting the repurchase to proceed without compliance with the issuer bid rules, the AMF noted the presence of the following factors:

- An independent committee of CGI's board was established and retained the services of legal counsel and independent financial advisors.
- The financial advisors provided a fairness opinion to the independent committee.
- The independent committee unanimously determined that the transaction was in the best interests of CGI and its shareholders (other than BCE) and was fair to CGI's shareholders.
- Arrangements to fund the transaction were secured in advance by increasing CGI's bank facilities by $200 million up to $1 billion.
- CGI and BCE each represented that neither party was aware of any material change susceptible of having a material impact on the value or trading of the shares of CGI that had not already been publicly disclosed.
- CGI represented that the transaction would not have a negative impact on the liquidity of its shares and would not diminish the public float of CGI, and that there would exist a liquid market for its shares following completion of the transaction.

The application also cited benefits to CGI arising from the repurchase, including the elimination of the market overhang effect generated by the anticipation that BCE might sells its block and also the elimination of certain rights BCE had as a significant shareholder, including pre-emptive rights, registration rights and the right to three board seats.

While the structure of the CGI repurchase transaction was not itself unique, the order secured by CGI from the AMF has been the subject of some attention, as it appears to deviate from the standards established in the Cossette line of orders. The principal departure was that the order permitted the buy-back to proceed without shareholder approval, notwithstanding that BCE was a major control block holder and "related party" of CGI. This result is particularly curious since, on November 10, 2005, when CGI filed its application with the Québec Commission, it clearly *expected* that shareholder approval would be required.

On the date CGI filed its application with the AMF, it also filed notice of an annual and special meeting of shareholders. While the notice itself does not set forth the special business to be conducted, CGI's application reveals that the company anticipated that shareholder approval for the repurchase transaction would be required. CGI stated in its application that [as translated]:

> 1.41 It is *presently expected that approval by shareholders of [CGI] will be asked for* at [CGI's] next annual meeting, expected January 31, 2006. The information circular to be mailed to shareholders will contain all information

> relevant to the proposed transaction, including the recommendation of the independent committee and the fairness opinion, from a financial point of view, of the proposed transaction. […]
>
> 3.7 *CGI will not proceed with the proposed transaction without…the proposed transaction having been approved by class A and class B shareholders* (excluding the votes of securities held directly or indirectly by BCE), voting together, conforming to the terms and conditions of the securities described [above]. [emphasis added]

At some point between the November 10, 2005 application and the December 15, 2005 order being issued, CGI persuaded the AMF to grant an exemption notwithstanding the absence of the otherwise fairly standard requirement that shareholder approval be obtained in these types of related party transactions. The public disclosure does not indicate the rationale for such change or, more importantly, the arguments advanced by CGI to persuade the AMF to grant the exemption in these circumstances.

It may have been a factor that the repurchase transaction arose in the context of the renegotiation of commercial agreements between CGI and BCE. In the material change reports, press releases and early warning reports filed in connection with the transaction, and in CGI's proxy circular for its 2006 annual meeting, emphasis was placed on the importance of securing an extension until 2016 of certain commercial arrangements between BCE and CGI in connection with the repurchase transaction. These extended commercial arrangements, consisting of CGI remaining as Bell Canada's preferred IS/IT supplier and CGI outsourcing its Canadian communications network management requirements to Bell, in each case until June 2016, are described as reinforcing their key strategic partnership and providing CGI with an important source of revenues as well as $1.1 billion of additional backlog. In light of the inter-connectedness of the repurchase transaction and the extension of the commercial arrangements (creating significant benefits for both parties), it may have been that the AMF was persuaded that requiring CGI to incur the cost, delay and uncertainty associated with obtaining shareholder approval was, in the circumstances, not in CGI's interest. However, because the discussions between CGI, BCE and the AMF are not a matter of public record and the public disclosure provides no further insight, it is difficult, in the end, to determine what might have prompted the issuance of an order permitting the repurchase without shareholder approval.

The other significant departure from the Cossette formula was price. Under the Cossette formula, the buy-back must be priced at market, or at a discount to market price, tested both on the date of the agreement and on the closing date. The second component of the test is necessary to ensure that on the day the repurchase occurs, other shareholders of the issuer are able to sell their shares on the market at a price not less than that paid in the repurchase transaction. In the CGI Order, the AMF accepted that market price would be tested on the date of execution of the repurchase agreement, and not again on closing. Interestingly, in its application, CGI contemplated that the repurchase would be made at a premium to the market price, with the premium to be determined by negotiations between CGI and BCE. The final order, however, did not allow for a premium over market price but rather required that the price be equal to the weighted average price of the shares on the TSX during the 20 business days preceding the execution of the agreement.

Similar to the CanOxy and Methanex transactions, while the CGI repurchase constituted a "related party transaction" under Rule 61-501 and Policy Q-27, CGI was exempt from the applicable valuation and minority approval requirements on the basis that the repurchase transaction would not have a negative impact on the liquidity of its subordinate voting shares as required by Policy Q-27.

Principal Factors Underlying Private Agreement Issuer Bid Relief

The Cossette line of orders granted by the Ontario, Alberta and Québec securities regulators over the past ten years has established a set of criteria designed to minimize the potential unfairness inherent in a selective buy-back and to promote the principle underlying the issuer bid requirements that shareholders be treated equitably and fairly. For an issuer to obtain an order exempting a private agreement issuer bid, ideally, the following factors should be present:

- <u>*Establish an independent committee of the board*</u> – the board of directors of the issuer should establish a special committee composed exclusively of directors who are independent of the selling shareholder and the management of the issuer to evaluate the repurchase transaction;[16]
- <u>*Retain independent legal counsel and financial advisors*</u> – the independent committee (or, if an independent committee has not been established, the board of directors) should retain separate legal counsel and financial advisors who are independent from the issuer and the selling shareholder;[17]
- <u>*Identify the issuer's business purpose in effecting the transaction*</u> – if the business purpose is to eliminate a market overhang, the issuer should identify an event or circumstance that might have created a market expectation that the shareholder was likely to dispose of its block, thereby depressing the market price for the issuer's shares. The business purpose might include securing some other benefit not likely to be otherwise obtained such as, in the case of CGI, the extension of an important commercial arrangement;[18]
- <u>*Agree to effect the buy-back at a price no greater than the "market price"*</u> – absent special circumstances, the purchase price should be no greater than the lesser of (i) the 20-day average trading price of the issuer's shares on the date of the buy-back agreement and (ii) the price of the shares (typically, under the orders, a three-day average price) on the date of closing of the repurchase. This may be subject to a floor price, as in the Cossette Order, so that if the issuer's stock price

[16] See the CanOxy Order, the Methanex Order, the CGI Order, the Cossette Order and the Weston Order.

[17] *Supra* note 16 above.

[18] See the CanOxy Order, the Methanex Order, the CGI Order, the BioChem Order, the Cossette Order and the Weston Order.

drops below a minimum, the selling shareholder will not be obliged to sell at that price;[19]

- *Ensure sufficient funds are available to finance the repurchase transaction without creating an imprudent financial burden* – the issuer should establish in its application that it has sufficient cash on hand or has arranged for financing to repurchase the shares and that the expenditure of the funds will not impose an imprudent financial burden on the issuer;[20]

- *Obtain a fairness opinion with respect to the repurchase transaction and the consideration payable for the repurchased shares* – the independent committee should obtain a fairness opinion from its financial advisors that the transaction and consideration payable is fair, from a financial point of view, to the issuer and its shareholders (other than the selling shareholder);[21]

- *If the selling shareholder is a related party, obtain shareholder approval* – the approval of the issuer's shareholders by ordinary resolution (having regard to the classes of securities affected, but excluding the significant shareholder and any of its affiliates) should be obtained where the transaction constitutes a "related party transaction" involving a significant shareholder disposing of a significant proportion of its shares. The information circular for the meeting should include a copy of the fairness opinion, *pro forma* financial statements giving effect to the repurchase transaction and any necessary "related party" disclosure; the information circular should also include the independent committee's reasons for recommending that shareholders approve the repurchase transaction;[22]

- *Neither the issuer nor the selling shareholder had any material non-public information about the issuer or its securities* – in most cases, the regulator has required that the issuer and the selling shareholder represent that neither is aware of any material non-public information concerning the issuer or its securities not already publicly disclosed to the remaining shareholders;[23]

- *The market for the issuer's shares must be liquid* – both before and after the repurchase transaction, there must be a liquid market for the issuer's shares, to be

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19 See the CanOxy Order (market price), the Methanex Order (market price) and the CGI Order (market price). See the Cossette Order, the Power Order and the Weston Order for examples of discounted repurchase transactions.

20 *Supra* note 16 above.

21 See the CanOxy Order, the Methanex Order, the CGI Order, the BioChem Order and the Cossette Order.

22 For examples of related party transactions where shareholder approval was obtained, see the MMRL Order (written consent of a majority of shareholders obtained), the CanOxy Order (29.2% holder), the Methanex Order (37% holder) and the BioChem Order (14.5% holder). Even in a related party transaction, however, it may be possible to avoid the requirement of shareholder approval if the related party is selling only a very small portion of its shares (see the Weston Order where the 62.5% holder sold back to the issuer only 1.5% of the outstanding shares, at a discount).

23 See the Power Order, the Weston Order and the CGI Order.

measured against the standards established under Ontario Rule 61-501 and Québec Policy Q-27;[24] and

- <u>*The repurchase transaction will not adversely affect the issuer or its shareholders, or materially alter the control of the issuer*</u> – the repurchase transaction must not have an adverse effect on the issuer, its securities, its shareholders, or the liquidity or market price of its common shares.

As is evident from the orders discussed above, although the presence of all of these factors should virtually assure the availability of the exemption order, the absence of one or more of the factors is not necessarily fatal. Moreover, it is apparent from the recent CGI Order that Québec is more lenient in this area than Ontario or Alberta. The CGI Order exempted CGI from compliance with the issuer bid requirements under the Québec *Securities Act* in connection with its repurchase of shares from BCE without obtaining shareholder approval notwithstanding that BCE was a 30% control block holder and a related party of CGI and was selling a substantial portion of its holdings back to the issuer. It is doubtful that the CGI Order would have been granted in similar circumstances by the OSC. On the other hand, there may be circumstances where a more lenient approach is warranted; for example, where the issuer's inability to effect the private agreement issuer bid would result in some prejudice to minority shareholders or some loss of benefit to the issuer.

2. Offshore Selective Buy-Backs

A share buy-back constitutes an issuer bid under the Ontario *Securities Act* only if the offer to acquire is made to a "person or company who is in Ontario or to any security holder of the issuer whose last address as shown on the books of the issuer is in Ontario". Accordingly, if the shareholder with whom the issuer proposes to deal on a selective basis is outside the jurisdiction, in theory at least the issuer ought to be able to repurchase the securities without complying with Ontario issuer bid requirements. However, issuers and their advisors have generally been wary of boldly relying on this technical interpretation.[25] A series of decisions[26] in the 1980's on the extra-territorial reach of take-over bid legislation has established the proposition that securities regulators will exercise their public interest jurisdiction over an offshore transaction if there is a sufficient Ontario connection and the transaction is prejudicial to

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24 See the Power Order, the BioChem Order, the CanOxy Order, the Weston Order, the Cossette Order and the CGI Order.

25 See, for example, the CanOxy Order, discussed above, in which CanOxy sought relief to repurchase a 14.5% stake from a shareholder in the United States.

26 *Re Humboldt Energy Corporation* (1983), 5 O.S.C.B. 8c; *Re Atco Ltd.*, [1980] 15 O.S.C.B. 412; *Re Kaiser Resources Limited* (1981), 1 O.S.C.B. 13c; *Re Caisse de Depot et Placement du Quebec* (1982), 4 O.S.C.B. 498c; *Re Electra Investments (Canada) Limited* (1983), 6 O.S.C.B. 417; *Re Turbo Resources Limited* (1982), 4 O.S.C.B. 403c; *H.E.R.O. Industries Ltd.* (1990), 13 O.S.C.B. 3775; and *Re Asbestos Corp. Ltd.* (1988), 11 O.S.C.B. 3419; affirmed (1991), 1 O.R. (3d) 723 (Div. Ct.); affirmed (1992), (sub nom. *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*) 10 O.R. (3d) 577, 15 O.S.C.B. 4973 (C.A.); leave to appeal to S.C.C. refused (May 27, 1993), [1993] 2 S.C.R. x.

the public interest in Ontario. The regulator does not need to find a breach of the *Securities Act* in order to exercise its public interest jurisdiction.[27]

The Supreme Court of Canada[28] in quoting with approval from the Ontario Court of Appeal's decision in *Re Asbestos Corp. Ltd.*[29] reinforced the sandbox theory of jurisdiction ("if you play in my sandbox, you play by my rules") when it stated in its reasons supporting the OSC's jurisdiction over the purchase by a Québec crown corporation of a control block of a TSX listed company at a substantial premium from a seller outside the country:

> "I am of the view that territorial jurisdiction of the OSC under section 124 [withdrawal of exemptions] did not depend solely upon the province or country in which relevant transactions may have taken place, but rather upon whether or not persons availing themselves of the benefits of trading in the Ontario capital markets act in a manner consistent with the provisions of the Act."

On this basis, the argument would go, an issuer that carries on business in Ontario, finances in the Ontario capital markets and lists on the TSX should comply with Ontario securities law, including rules which govern issuer bids, regardless of where the transaction takes place.

After the Supreme Court of Canada confirmed the OSC's jurisdiction to regulate the offshore transaction, the OSC reconvened the *Asbestos* hearing in 1994 to determine whether it would, in fact, exercise its public interest jurisdiction against the Québec government. In its reasons, the OSC said it would consider four factors in determining to regulate an offshore transaction: (i) whether the transaction had been designed to avoid the animating principles behind the legislation and the rules respecting take-over bids, (ii) whether the transaction was manifestly unfair to public minority shareholders, (iii) whether there was a sufficient nexus with Ontario to warrant the OSC's intervention, or whether the transaction was structured to make an Ontario transaction appear to be a non-Ontario one, and (iv) whether the transaction was abusive of the integrity of the capital markets in the province.

The OSC determined as a factual matter that the offer to acquire made by the Québec government was not made to a person in Ontario and therefore did not constitute a take-over bid and that, although the transaction was contrary to the spirit of the takeover bid rules and abusive and unfair to the minority shareholders of Asbestos Corporation, there was not a sufficient Ontario connection to warrant intervention. Asbestos Corporation was not an Ontario corporation, its registered office and Canadian operations were in Québec and the change of control transactions took place in Québec between non-Ontario parties. The fact that Asbestos Corporation shares were listed on the TSX and that there were a substantial number of shareholders in Ontario did not establish a sufficient nexus. Moreover, the OSC noted that the transaction was not deliberately structured to avoid the application of Ontario securities law by

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27 *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857.

28 *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission,* [2001] 2 S.C.R. 132.

29 *Supra* note 26.

turning an Ontario transaction into a non-Ontario transaction. The OSC decision was upheld in the Court of Appeal and in the Supreme Court of Canada.

Whether or not the Ontario Securities Commission correctly decided the jurisdictional nexus question in the *Asbestos* case is open to debate. In any event, with the sandbox theory of jurisdiction confirmed by the Supreme Court of Canada, the OSC's decision provides little comfort to an Ontario-based issuer, listed on the TSX, with Ontario resident shareholders seeking to purchase a block of stock in an offshore transaction. Although such a transaction is clearly not an issuer bid under the *Securities Act*, the fact that it is offshore will not preclude securities regulators from intervening to prevent it if:

(i) the transaction is designed to avoid the "spirit" of securities legislation and the rules respecting issuer bids;

(ii) the transaction is manifestly unfair to public minority shareholders;

(iii) the transaction has a sufficient jurisdictional nexus with Ontario or was structured to make an Ontario transaction appear to be a non-Ontario transaction; and

(iv) the transaction is abusive of the integrity of the capital markets in Ontario.

Against these criteria, it should be possible, however, to structure an offshore buy-back in such a way that it does not warrant intervention on public interest grounds. Helpfully, staff at the Ontario Securities Commission have provided a no-action letter (in 2003 or thereabouts), establishing parameters for an offshore repurchase transaction that would not be regarded by staff as abusive or unfair. Although the writer has not seen the no-action letter, based on discussions with staff of the OSC, it appears that the OSC will not exercise its public interest jurisdiction to sanction an offshore selective buy-back of shares by an Ontario reporting issuer so long as:

<u>*No premium*</u>: The repurchase must be made at a price no greater than the market price of the shares on the date of the trade. As the private agreement relief orders establish, it is not sufficient that it be at market price on the date of the agreement.

<u>*No Canadian*s</u>: The selling shareholders must not be Canadians. It is essential that the shares not be purchased from any person or company in Canada or from any person or company whose registered address on the books of the issuer is in Canada. As a result, the buy-back must be negotiated with known counterparties and cannot be made as a normal course trade on a stock exchange.

<u>*Size of Buy-Back*</u>: Although the no-action letter did not stipulate a limit on the percentage of shares that could be repurchased in this manner, size alone could render the offshore repurchase abusive or unfair if, for example, it were sufficiently large to affect control of the issuer or create an imprudent financial burden for the issuer. In addition, if the selling shareholder is a related party, compliance with Rule 61-501 and Policy Q-27 would also have to be considered.

The factors identified in the private agreement issuer bid exemption orders discussed above should provide some additional guidance to issuers considering offshore buy-backs. In addition, having regard to the *Asbestos* principles, the repurchase must not have been structured to make an Ontario transaction appear to be a non-Ontario one, or be designed to avoid compliance with Ontario securities law. For this reason, back-to-back or synthetic structures designed to interpose a non-Canadian seller may be outside the safe harbour established by the no-action letter.

In the most benign cases, involving a small percentage of shares (less than 5%) in a negotiated offshore transaction with a non-related party of the issuer at no premium to market where the issuer's stock is liquid and the transaction has a business purpose of the type discussed above under private agreement issuer bid relief, an issuer should be able to proceed to effect the offshore buy-back without seeking a no-action letter from OSC staff. For transactions that deviate from this standard, an issuer may wish the comfort of a no-action letter, or even an exemption order in appropriate cases.

3. Proposed Amendments to TSX Issuer Bid Rules

On October 21, 2005, the TSX published its fourth request for comments on proposed amendments (the "**Proposed Amendments**") to its normal course issuer bid rules. The Proposed Amendments are intended to provide issuers with the ability to buy back their own securities in a cost effective way that treats public security holders fairly while not adversely affecting the market. If adopted, these changes will facilitate share buy-backs and the use by issuers of accelerated share repurchase programs, forward purchase contracts, call options and put options on the issuer's own shares and otherwise increase an issuer's flexibility to repurchase its shares on a selective basis.

The TSX is proposing to replace the current 2%-in-30-days restriction with a daily repurchase restriction for all issuers, other than investment funds. Issuers would be permitted to purchase up to 25% of the average daily trading volume ("**ADTV**") of the listed securities on any trading day. ADTV will be calculated based on trading on the TSX over the most recently completed six months immediately preceding acceptance by the TSX of the normal course issuer bid notice. Issuers would continue to be subject to the restriction limiting aggregate purchases in a 12-month period to the greater of 10% of an issuer's public float or 5% of its issued and outstanding securities.

In an effort to harmonize the normal course issuer bid rules with the SEC’s safe harbour Rule 10b-18, a block purchase exemption from the daily repurchase restriction has been added to the rule. Accordingly, issuers will be permitted to buy one block per calendar week which exceeds the daily repurchase restrictions. A "block" is defined in the Proposed Amendments as a quantity of securities that either (a) has a purchase price of $200,000 or more, (b) is at least 5,000 securities and has a purchase price of at least $50,000, or (c) is at least 20 board lots of the security totalling 150% or more of the ADTV for that security. The block purchase exemption may only be used on a day during which the issuer has not made any other purchases under its normal course issuer bid. Securities purchased under the block purchase exemption will count towards the 5%-in-12-months limit. The block purchase can be a negotiated prearranged trade. Accordingly, the block purchase exemption should enable issuers to repurchase shares on a private agreement basis, albeit in the context of a normal course issuer bid available to all holders and subject to the 5% limit. Once the Proposed Amendments are in effect, some transactions that previously would have required a private agreement issuer bid relief order will be capable of being effected under the TSX's normal course issuer bid rules.

The TSX is also proposing to formalize as part of the Proposed Amendments its internal guidelines with respect to the use of forward purchase contracts, put option agreements and call option agreements in conjunction with normal course issuer bids. In a forward purchase transaction, the issuer and a third-party, usually a dealer, agree that the dealer will be obligated to sell shares of the issuer to the issuer at a future date at an agreed price, typically a price in excess of the current trading price of the shares. In a put option transaction, the issuer will agree with the seller, again usually a dealer, that the dealer will be entitled to put shares back to the issuer at some future date at an agreed price, generally less than the current trading price of the shares at the time the parties enter into the put contract. In both transactions, the repurchase constitutes an issuer bid. It is not effected as a normal course, open market transaction but rather as a private agreement sale. However, the TSX has permitted these transactions, currently on a discretionary basis, and will now authorize them under the Proposed Amendments, on the theory that the related hedging activity by the dealer will occur in the normal course in the open market.

The Proposed Amendments will prescribe requirements regarding the acceptable terms of derivatives, purchase restrictions and reporting and disclosure requirements. Only derivatives which are settled by physical delivery of the underlying securities, and not those which provide for exclusive cash settlement, will be subject to the normal course issuer bid rule. Settlement of a derivative contract, but not the hedging activity associated with the contract, will be exempt from the daily repurchase restriction and restrictions on prearranged trades and private agreements.

In a further effort to align the normal course issuer bid rule with the SEC rules, additional provisions have been incorporated into the Proposed Amendments to allow for accelerated buy-backs. In an accelerated buy-back, an issuer repurchases a block of its shares at the current market price, typically from a dealer in a short sale. The dealer agrees to subsequently adjust the price based on the trading price of the shares over a future period. The repurchase from the dealer is clearly not an open market purchase, but rather a private agreement repurchase. What makes it acceptable to the TSX from a policy perspective is that the dealer's hedging activity will occur in the market as normal course purchases. Under the Proposed Amendments, accelerated buy-backs will be specifically permitted but will be subject to a number of restrictions related to open market purchases, including restrictions related to pricing and quantity, similar to those restrictions proposed for the use of derivatives.

The TSX is also proposing to regulate the repurchase by issuers of non-convertible listed debt securities, even though these transactions are not otherwise regulated under securities legislation. Debt repurchases on the TSX would be subject to requirements demanding advance notification of the terms of the bid, identical consideration for the repurchase of securities and pro-rata repurchases.

The proposed changes to the TSX's normal course issuer bid rules have been under discussion since 2002 and were expected to be effective by March 2006. It now appears that the Proposed Amendments have been delayed as a result of comments received from the OSC. It is not known what issues are of concern to the OSC, nor has a new publication date been promised.