THE UPDATE

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Corporate Securities

JUNE 28, 2001

The Ontario Securities Commission and Out-of-Province Securities Transactions

The Supreme Court of Canada has affirmed the broad discretion of the Ontario Securities Commission to refuse to regulate transactions that, although abusive of minority shareholders and contrary to the principles of Ontario securities law, are insufficiently connected to Ontario. Consequently, persons trading in securities of companies that are reporting issuers in Ontario may not be required to comply with Ontario securities law where such transactions take place outside of Ontario.

In *Committee for Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)*, the SCC held that the OSC acted reasonably and within its jurisdiction when it decided not to interfere in a transaction pursuant to which a non-resident purchaser acquired, from a U.S. shareholder, a majority interest in an Ontario reporting issuer, without making the same offer to minority shareholders.

Background

In 1977, the Quebec government decided to take control of Asbestos Corp, a leading asbestos producer in Quebec whose shares traded on The Toronto Stock Exchange and the Montreal Exchange. Through the *Société nationale de l'amiante*, the Quebec government negotiated with a U.S. seller to acquire voting control of a private company holding 54.6 percent of the common shares in Asbestos, thereby obtaining indirect control of Asbestos. Under Ontario securities law, subject to certain exceptions, a direct or indirect offer to any person in Ontario to acquire such a block would be a "take-over bid" that would have to be made to all holders. Alleging that Quebec and SNA had violated the Ontario take-over bid rules, the minority shareholders of Asbestos applied to the OSC seeking, among other things, to have the OSC exercise its public interest jurisdiction and sanction Quebec and the SNA until a follow-up offer was made to the minority shareholders.

OSC Decision

The OSC determined that the acquisition by SNA of the Asbestos block was not technically a "take-over bid" under Ontario law, as the offer to acquire was not made to an Ontario resident. The OSC also declined to exercise its public interest jurisdiction to impose sanctions, principally on the basis that the transaction lacked sufficient "nexus" or connection to Ontario to warrant intervention. The OSC reached this conclusion despite its finding that the actions of the Quebec government and SNA failed to comply with the spirit of the take-over bid rules and were abusive of, and manifestly unfair to, the minority shareholders of Asbestos.

SCC Review

In upholding the OSC's decision, the SCC stated that the OSC has broad discretion to decide whether to exercise its authority and jurisdiction to intervene in Ontario capital markets in the public interest and such decisions by the OSC will be upheld so long as they are reasonable and supported by the evidence. The SCC decision, therefore, affirms the significant discretion vested in the OSC in determining whether to exercise its authority to act in the public interest even where a transaction fails to comply with the "spirit underlying the take-over bid rules," and is "abusive of the minority shareholders," and "manifestly unfair to them."

Implications

There is no clear formula for determining when the OSC will choose to intervene in out-of-province securities transactions that otherwise would offend Ontario securities law. Certainly, whether the transaction has a sufficient nexus to Ontario to warrant intervention is an important criterion. However, the decision in *Asbestos* stressed that the existence of an Ontario nexus is not a precondition to the exercise of the OSC's authority; it is only one of several factors that may be considered. In deciding whether to exercise its authority, the OSC referred to a number of other relevant factors, including:

- whether the transaction was intentionally structured to avoid the principles of Ontario law;
- whether manifest unfairness occurred to the minority; and
- whether the transaction was abusive to the integrity of the Ontario capital markets.

Neither the courts nor the OSC has enunciated an exhaustive list of circumstances that would create sufficient nexus for the OSC to intervene. The predominant consideration appears to be whether or not the transaction has been structured to make an Ontario transaction appear to be a "non-Ontario" one. Other factors cited as being relevant to nexus are whether or not the issuer is listed on the TSE, the proportion of shareholders residing in Ontario, and the issuer's history of financing activity in Ontario. Ultimately, and not surprisingly, the determination as to nexus will depend on the particular facts of each case.

Our lawyers would be pleased to consider with you the application of Ontario securities laws to transactions you are structuring.

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