Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Mithaq Canada Inc (Re)*, 2023 ONCMT 48
Date: 2023-12-06
File No. 2023-28

IN THE MATTER OF
MITHAQ CANADA INC.

-and-

IN THE MATTER OF
AIMIA INC.

REASONS FOR DECISION

(Subsections 127(1) and (2) of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Timothy Moseley (chair of the panel) James D. G. Douglas Dale R. Ponder	
Hearing:	By videoconference, October 19, 2023	
Appearances:	Andrew Gray Sarah Whitmore Hanna Singer John Emanoilidis	For Mithaq Canada Inc.
	Orestes Pasparakis James Renihan Mark Laschuk	For Aimia Inc.
	Teresa Tomchak	For Eagle 1250 Investments Group LLC
	Cullen Price Jason Koskela	For Staff of the Ontario Securities Commission

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REASONS FOR DECISION

1. OVERVIEW

[1] Mithaq Capital SPC (**Mithaq Capital**) is the largest common shareholder of Aimia Inc., a publicly traded company. Since at least the spring of 2023, Mithaq Capital, together with its wholly-owned subsidiary Mithaq Canada Inc. (**Mithaq Canada**), has been engaged in litigation in court and more recently before this Tribunal over various questions relating to Aimia's governance and strategy.

[2] In the dispute before us, Mithaq Canada has asked this Tribunal to, among other things:

a. cease trade a shareholder rights plan that Aimia adopted; and

b. make orders about a private placement of Aimia securities, for which Aimia was in the process of seeking approval from the Toronto Stock Exchange.

[3] Mithaq Canada says that the shareholder rights plan and private placement are improper defensive tactics that Aimia's board adopted in response to Mithaq Canada's unsolicited take-over bid of Aimia. Aimia asserts that these measures were adopted in good faith, for legitimate corporate purposes.

[4] Mithaq Canada asked for interim relief pending the full hearing of its application. We heard submissions on October 19, 2023, following which we issued an order granting some of that relief, for reasons to follow.[1] These are our reasons for that decision, in which we took into account an undertaking Aimia gave us about steps it would take to unwind the intended private placement if Mithaq Canada's application were ultimately successful. We also considered Aimia's representation about what securities would be issued under the private placement.

[5] With those in mind, we decided that unless Aimia gave an additional undertaking, we would cease trade the private placement. The primary element of that additional contemplated undertaking was that any securities issued under the private placement could not be tendered to any alternative take-over bid or

[1] *Mithaq Canada Inc (Re),* (2023) 46 OSCB 8654

issuer bid that a third party or Aimia might commence. In our view, such an undertaking was necessary to preserve the rights of Aimia shareholders should Mithaq Canada be successful on its application.

2. BACKGROUND

[6] Aimia is a reporting issuer, whose common shares are listed on the Toronto Stock Exchange. Mithaq Capital filed early warning reports in February and May 2023, disclosing that it owned or controlled 19.99% and 30.96%, respectively, of Aimia's common shares.

[7] In advance of an April 2023 annual general meeting of Aimia shareholders, Mithaq Capital issued a news release stating that it would be voting against the re-election of the Aimia board. As reported by Aimia, the board chair was not re-elected at the meeting, and none of the other director nominees received more than 52.41% of the votes cast. Mithaq Capital's request for a proxy review of these voting results was denied. Mithaq Capital then applied to the Superior Court of Justice, seeking relief to facilitate its requested proxy review.

[8] Aimia responded by commencing a proceeding in the Superior Court of Justice to prevent Mithaq Capital from, among other things, requisitioning a special shareholder meeting, voting its Aimia shares, and acquiring additional Aimia shares.

[9] In June 2023, Aimia adopted a shareholder rights plan, which it stated publicly was in response to Mithaq Capital's increased shareholdings. As of the hearing before us, Aimia had neither sought nor obtained shareholder approval of the plan. Among other things, the shareholder rights plan provides that in order for a take-over bid not to trigger the plan, that bid must have a minimum tender condition of more than 50% of the Aimia shares held by "independent" shareholders.

[10] On October 5, 2023, Mithaq Canada made an all-cash offer for all outstanding common shares of Aimia at $3.66 per share (the **Offer**). The Offer remains open for acceptance until January 18, 2024, unless extended. On October 10, 2023, Aimia announced that it had formed a special committee of the Board to assess the Offer.

[11] On October 13, 2023, Aimia announced that it intended to complete a private placement to a group of undisclosed investors, and to close that transaction on October 19, 2023. The private placement would be for up to 10,475,000 Aimia common shares, and an equal number of common share purchase warrants.

[12] Aimia also announced that under the terms of the private placement, the investor group would get up to three of the eight board seats and, if the private placement were fully subscribed and all warrants exercised, the shares issuable would represent 24.89% of the then-outstanding Aimia common shares (on an undiluted basis). The private placement was expected to raise up to $32.5 million in gross proceeds, the stated purpose of which was to fund Aimia's operations over the next 12 to 24 months and to support its strategic investment plan and other contingencies.

3. INTERVENOR

[13] Eagle 1250 Investments Group LLC (**Eagle**), the lead investor in the private placement, appeared at the hearing. It had intended simply to observe the hearing, but on seeing the proposed undertakings decided to ask for the right to make oral submissions.

[14] Rule 21(4) of the *Capital Markets Tribunal Rules of Procedure and Forms* authorizes a panel to grant intervenor status to any person or company who is not a party to the proceeding and who brings a motion seeking that status. Eagle had not served or filed any motion or other material, but we agreed to hear brief oral submissions. Those submissions related to the form of undertakings that Aimia might give. However, Aimia and Eagle had not discussed the proposed undertakings before the hearing. Eagle's submissions therefore had no influence on our decision.

4. ANALYSIS

4.1 Introduction

[15] At the hearing, Aimia emphasized its desire to go ahead with the private placement. It was common ground among Mithaq Canada, Aimia and Staff that

Aimia could do so if there were measures in place, pending the hearing of Mithaq Canada's application, to ensure that:

a. until this Tribunal hears and decides the application, there would be some limitations on the use that could be made of any securities issued under the private placement, either directly or by the exercise of warrants; and

b. if Mithaq Canada were to succeed in its application, it would be possible to unwind the transaction and return Aimia and its investors to the position they had previously been in.

[16] It was also common ground that such protections could be achieved in the form of undertakings that Aimia would give to this Tribunal. All that was in dispute at the hearing was how extensive those undertakings should be.

[17] With respect to the time period between this initial hearing and the date on which this Tribunal will issue its decision on Mithaq Canada's application, Aimia was prepared to undertake that any securities issued under the private placement, either directly or by the exercise of warrants, could not be:

a. traded;

b. voted at a meeting of Aimia shareholders; or

c. included in a calculation to determine whether Mithaq Canada had satisfied the minimum tender condition associated with Mithaq Canada's take-over bid, should the deposit period for that bid be shortened.

[18] Aimia was also prepared to undertake that if Mithaq Canada were to succeed in its application:

a. Aimia would promptly rescind the private placement and return to the investors any consideration paid;

b. Aimia would cancel any securities that had been issued under the private placement; and

c. any agreements connected to the private placement, including to confer rights on private placement investors, would terminate.

[19] Mithaq Canada was satisfied with those undertakings as far as they went, but submitted that additional undertakings were required, to give all Aimia

shareholders sufficient protection against potential abusive effects of the private placement, and against the application being rendered moot. Mithaq Canada submitted that we should cease trade the private placement unless Aimia gave further undertakings:

a. to make private placement investors aware of Aimia's various undertakings and of the risk that the private placement would be unwound;

b. to provide greater certainty about any rights to be conferred on private placement investors, including rights to acquire additional securities;

c. to address a possible intervening bid for Aimia shares; and

d. to facilitate an unwinding of the private placement, should that be required.

[20] Aimia submitted that Mithaq Canada's requested additional undertakings were unnecessary and overly invasive to Aimia's operations. We address that submission in our analysis below.

[21] Aimia further submitted that we ought to be influenced by what Aimia described as the unusual nature of Mithaq Canada's Offer, given the large number of conditions attached to it, including:

a. a due diligence condition that Aimia says gives a "free option" to Mithaq Canada to withdraw its bid; and

b. a condition that existing court proceedings between Aimia and Mithaq be resolved to Mithaq Canada's satisfaction.

[22] We determined at this preliminary stage not to seek further submissions in response to Aimia's concerns about the Offer. We did not consider those concerns to be relevant to our decision about interim relief.

[23] We now turn to address each of the four categories of undertakings at issue.

4.2 Undertakings to inform private placement investors

[24] Mithaq Canada submitted that Aimia should undertake to ensure that the private placement investors were aware of the extent of any undertakings Aimia gave in connection with the private placement. In particular, the disclosure should make

clear that if Mithaq Canada succeeds on its application, the private placement would be fully unwound. Mithaq Canada was indifferent as to how the disclosure was made (*i.e.*, in the subscription agreement or otherwise), so long as the investors were put on notice.

[25] Mithaq Canada's objective was to ensure that those who would be directly affected by a reversal of the transaction, should that be ordered, would not later say that they had been unduly prejudiced. The disclosure would be important so that those investors:

a. entered into the transaction knowing the likelihood of objections to it; and

b. had an opportunity to make submissions.[2]

[26] Aimia submitted in response that Eagle, the lead investor in the proposed private placement, was present at the hearing and fully understood the risks of proceeding with the investment. Further, Ontario securities law would require Aimia to make the requested disclosure in any event and Aimia's assertion at the hearing that it intended to comply with its disclosure obligations would make it unnecessary and inappropriate to require a further undertaking to that effect.

[27] We agreed with Aimia and therefore dismissed this request by Mithaq Canada.

4.3 Undertakings to provide greater certainty

[28] Aimia agreed to undertake that if Mithaq Canada's application were successful, and the Tribunal so directed, Aimia would cancel the common shares and warrants issued under the private placement as well as all common shares issued upon the exercise of the warrants.

[29] Mithaq Canada was concerned that Aimia might, in connection with the private placement, grant to investors some rights that would themselves result in the issuance of securities not covered by Aimia's proposed undertaking. Mithaq Canada's uncertainty resulted from its inability to see the agreements relating to the private placement. The concern was underscored by Aimia's press release announcing the private placement, which referred to "investor rights", and by Aimia's advice at the hearing that investors were to have the ability to nominate

[2] *Eco Oro Minerals Corp (Re)*, 2017 ONSEC 23 (***Eco Oro***) at para 169

board members. Mithaq Canada and Staff expressed uncertainty about whether a suspension of "investor rights" would affect that ability.

[30] At the hearing, Aimia confirmed that no securities would be issued under the private placement, other than the up to 10,475,000 common shares and associated share purchase warrants, as had been publicly disclosed. With Aimia's agreement, we included this representation in the preamble to our order. With that representation included, no further undertaking was necessary, and we dismissed this request.

4.4 Undertakings to address a possible intervening bid

[31] As noted above, Aimia advised at the hearing that it was prepared to undertake that until this Tribunal issues its decision on Mithaq Canada's application, any securities issued under the private placement could not be voted at a shareholders' meeting, and would not be included for the purposes of Mithaq Canada satisfying the minimum tender condition.

[32] Mithaq Canada sought to expand this undertaking's reach, so that any such securities could not be tendered to an alternative take-over bid or issuer bid.

[33] Aimia submitted that such a request was speculative and unnecessary. If any bid were to arise, the parties could return to this Tribunal for any necessary relief.

[34] We decided that that this requested undertaking was core to Mithaq Canada's application, which is about alleged abusive defensive measures. Mithaq Canada argued that the securities issued under the private placement would materially affect control of Aimia, entrench the Aimia board, and manipulate the outcome of Mithaq Canada's offer. We agree that the issuance of a material number of securities of an issuer can have an impact on both control of an issuer and outcomes in the context of shareholder meetings and take-over bids. It was important, and not unduly prejudicial to Aimia, to have this additional protection.

[35] Accordingly, we ordered that the private placement would be cease traded unless, by noon the day after this initial hearing, Aimia undertook that the securities issued under the private placement could not be tendered to any alternative take-over bid or issuer bid that might be commenced by a third party

or by Aimia. We also required that Aimia would have to disclose this additional undertaking in a news release.

[36] After we released our decision, but before noon on October 20, 2023, Aimia gave the additional undertaking. Accordingly, our order did not result in the private placement being cease traded.

4.5 Undertakings to facilitate the unwinding of the private placement

[37] The final area of dispute about the extent of any undertakings related to two measures Mithaq Canada submitted should be in place to ensure that it would be practical to unwind the private placement,[3] should this Tribunal order that.

[38] The first such measure would be a requirement that Aimia set aside the proceeds of the private placement, so that the funds would be available to reverse the transaction. Mithaq Canada referred us to *Geosam Investments Limited (Re)*, a 2009 decision of the British Columbia Securities Commission, in which that Commission imposed such a condition.[4]

[39] Aimia responded that such a requirement would be an unnecessary and unwarranted intrusion into Aimia's operations. Aimia asserted that funds it would raise through the private placement would have the lowest cost of capital of any funds available. If Aimia were ultimately required to repay the proceeds, it might need to acquire more expensive capital to make that repayment, but it did not want to have to seek more expensive capital unless and until the private placement has to be rescinded.

[40] We decided that an undertaking to hold the private placement proceeds in a segregated account was not required in this case. The parties were united in their intention to have Mithaq Canada's application heard expeditiously, and there was no evidence before us that the proceeds would be at risk during that short time.

[41] We do not consider the British Columbia decision in *Geosam* to be persuasive authority in this case. That decision dealt with a request for a stay of a TSX Venture Exchange decision approving a private placement. There is no mention

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[3] *Eco Oro* at para 169

[4] 2009 BCSECCOM 695

of any undertakings having been given from the issuer, either to unwind the private placement if necessary, or to do anything else. The legal and factual contexts in *Geosam* are different from those in this case, in meaningful ways.

[42] The second measure Mithaq Canada requested was Aimia's undertaking that Aimia would be responsible for any private placement investor's breach of the terms of the undertakings. Aimia responded that it is not the guarantor of the conduct of any private placement investor. Aimia's own undertakings would be to the Tribunal; neither Aimia nor its investors would be giving undertakings to Mithaq Canada.

[43] Mithaq Canada referred us to a 2014 order of the Commission, issued without reasons, which dismissed an interim request for a cease trade order in respect of a private placement.[5] The order's preambles reflect the issuer's representation that it had the legal ability to obtain agreement by the private placement investor to comply with undertakings that the issuer gave to the Commission. Mithaq Canada submitted that its request was similar.

[44] We do not accept that order as persuasive in this case. We must always be reluctant to give much weight to orders made without reasons. Further, we note that one of the undertakings in the 2014 order purported explicitly to impose an obligation directly on the private placement investor, even though it was the issuer, not the investor, who gave the undertaking. In those circumstances, there appears to have been a logical basis for the issuer's assumption of responsibility for the investor's conduct. In this case, no party proposes an undertaking that would purport to impose a similar obligation on any Aimia investor.

[45] Requiring Aimia to assume responsibility for any breaches by private placement investors would be overreaching and is insufficiently connected to the stated objective of facilitating the unwinding of the private placement if necessary. We therefore dismissed this request.

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[5] *Access Holdings Management Company LLC and Tuckamore Capital Management Inc (Re),* (2014) 37 OSCB 7477

5. CONCLUSION

[46] For the reasons above, we ordered that:

a. Eagle have intervenor status for the purpose only of making brief oral submissions at the initial hearing;

b. the private placement would be cease traded unless by noon on October 20, 2023, Aimia undertook to the Tribunal that the common shares and warrants issued under the private placement, as well as all shares issued upon exercise of warrants, may not be tendered to any alternative take-over bid or issuer bid that may be commenced by a third party or Aimia in respect of the Aimia common shares; and

c. if Aimia were to give the additional undertaking, Aimia would forthwith issue a news release that included disclosure of that additional undertaking.

Dated at Toronto this 6th day of December, 2023

"Timothy Moseley"

Timothy Moseley

"James D. G. Douglas"

James D. G. Douglas

"Dale R. Ponder"

Dale R. Ponder