Ontario

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: *Aimia Inc (Re)*, 2024 ONCMT 17
Date: 2024-07-05
File No. 2024-2

IN THE MATTER OF
AIMIA INC.

-and-

IN THE MATTER OF
MITHAQ CAPITAL SPC

REASONS FOR DECISION

(Section 104 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Timothy Moseley (chair of the panel) Andrea Burke Dale R. Ponder	
Hearing:	By videoconference, April 10, 2024	
Appearances:	Andrew Gray Sarah Whitmore Hanna Singer	For Mithaq Capital SPC
	Orestes Pasparakis James Renihan Mark Laschuk	For Aimia Inc.
	Kirsten Thoreson Jason Koskela David Mendicino Jordan Lavi Gbemi Adekola Maryam Shahid	For Ontario Securities Commission

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REASONS FOR DECISION

1. OVERVIEW

[1] Mithaq Capital SPC is the largest common shareholder of Aimia Inc., a publicly traded company. Mithaq and Aimia have been engaged in extensive litigation in court and before this Tribunal about Aimia's governance and strategy.

[2] On eleven different days in February 2023, Mithaq added to its shareholdings of Aimia. At that time, Mithaq's own shareholdings of Aimia were below but approaching the 20% level that would trigger certain provisions of Ontario securities law relating to take-over bids.

[3] Eventually, in October 2023, a wholly-owned subsidiary of Mithaq made a formal, unsolicited take-over bid for Aimia. That bid expired in February 2024 and was unsuccessful.

[4] Two days before that formal bid expired, Aimia brought this application under s. 104 of the *Securities Act* (the ***Act***).[1] Aimia asked us to find that Mithaq's share acquisitions a year earlier, in February 2023, violated Ontario securities law. Aimia said that Mithaq had, at the time, been acting jointly with others, and that the joint actors' combined shareholdings of Aimia exceeded 20%. As a result, said Aimia, those February 2023 acquisitions are deemed to have been take-over bids, and Mithaq was required to make an offer to all shareholders to acquire their shares. Mithaq did not do that. In this application, Aimia asked us to order Mithaq to do now what Aimia says Mithaq should have done then.

[5] Mithaq responded to Aimia's application by moving to dismiss it on a preliminary basis, without a merits hearing. Mithaq submitted that Aimia did not have standing to bring this application, and that the application was an abuse of process.

[6] We heard Mithaq's motion. Shortly afterward, we issued an order granting the motion and dismissing this application, for reasons to follow.[2] These are our

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[1] RSO 1990, c S.5 (***Act***)

[2] (2024) 47 OSCB 3389

reasons for that decision. We concluded that while Aimia did have standing to bring this application, Aimia's long delay in seeking the specific relief it asks us to grant should disentitle Aimia from obtaining that relief, and should therefore preclude Aimia from proceeding with the application.

2. ANALYSIS

2.1 Introduction

[7] A threshold issue was whether it was proper for us even to consider Mithaq's motion to dismiss the application preliminarily, without a full record or a merits hearing. As we explain below, we concluded that it was proper for us to consider Mithaq's request at this early stage. Having decided that, we then had to address two issues:

a. Does Aimia have standing as an offeree issuer to bring its application?

b. Even if Aimia has standing, should we dismiss the application because it is a misuse of s. 104 of the *Act*?

[8] We address each of these issues in turn.

2.2 Is it appropriate to consider Mithaq's motion on a preliminary basis?

[9] We begin our analysis by explaining why it was proper for us, over Aimia's objection, to consider Mithaq's motion on a preliminary basis.

[10] Section 104 of the *Act* authorizes the Tribunal to make various orders if it finds that a person or company has not complied with a provision of Ontario securities law that relates to take-over bids. The section allows "an interested person" to apply for such an order.

[11] However, even when an interested person applies under s. 104, it does not necessarily follow that we must allow that application to proceed to a full merits hearing.[3] In its motion, Mithaq said that we should dismiss Aimia's application preliminarily because Aimia lacked standing and its application was an abuse of process.

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[3] *AbitibiBowater Inc (Resolute Forest Products) (Re)*, 2012 ONSEC 12 (***AbitibiBowater***) at para 49; *Western Wind Energy Corp (Re)*, 2013 ONSEC 25 at para 47

[12] Those two issues were worth addressing at a preliminary stage, before the parties had to assemble materials and prepare for a full merits hearing. We decided that hearing Mithaq's motion would align with the Tribunal's goal, set out in the *Rules of Procedure*, to conduct proceedings expeditiously and cost-effectively.[4]

2.3 Did Aimia have standing to bring this application?

[13] Mithaq's first objection was that Aimia had no standing to bring the application. We disagree. We concluded that Aimia did have standing, because Aimia was "an interested person", and therefore entitled to apply under s. 104 of the *Act*.

[14] An "interested person" is defined under s. 89(a) of the *Act* to include an "offeree issuer." In turn, an "offeree issuer" is defined to include an issuer whose securities are the subject of a take-over bid.

[15] Were Aimia's securities the subject of a take-over bid when Aimia brought the application? The answer to that question might conceivably have been "yes" as a result of one or both of:

a. Mithaq's subsidiary's October 2023 formal bid; or

b. Mithaq's February 2023 acquisitions, which Aimia said were take-over bids, as defined in National Instrument 62-104 *Take-over Bids and Issuer Bids*, because Mithaq and its alleged joint actors collectively owned 20% or more of Aimia at the time (in these reasons, we refer to the February acquisitions as **deemed bids**).

[16] We did not accept Aimia's submission that the October formal bid could give Aimia standing under s. 104 to bring the application framed in the way that it was. We reached that conclusion not because the October bid had expired before we heard Mithaq's motion, but because Aimia's application does not depend on the making of that bid. Aimia's complaint is, instead, about the acquisitions that happened in February. In addition, the relief that Aimia seeks (*i.e.*, an order requiring Mithaq to make an offer to shareholders at the highest acquisition price) is inextricably tied to the February acquisitions, and to those acquisitions

[4] *Rules of Procedure*, r 1

alone. The relief sought neither relates to, nor depends in any way on, the October bid.

[17] We turn then to explain why Mithaq's February acquisitions give Aimia standing to bring its application.

[18] Under the take-over bid framework in Ontario securities law, any acquisition of a class of voting or equity securities of an issuer, once the acquiror already holds 20% or more of that class, constitutes a take-over bid (unless an exemption is available). If an acquisition does constitute a take-over bid, then an offer at the same price must be made to all holders of that class of securities. This is what Aimia said should have happened.

[19] In making that submission, Aimia relied on the fact that in calculating whether the 20% threshold has been met, one considers not only the acquiror's own shareholdings, but also those of any person or company who acted jointly or in concert with the acquiror in making the acquisitions. Aimia contended that at the time of the February acquisitions, the shares held by Mithaq and by others acting jointly with Mithaq totaled more than 20% of Aimia's shares.

[20] Mithaq has consistently denied the allegations of joint actorship. Whether those allegations are true was not before us at this stage of the proceeding, and we make no finding about that issue. However, for the sole purpose of deciding the question of standing, we assumed the allegations to be true.

[21] With that assumption made, could Mithaq's February acquisitions give Aimia standing to bring this application? To use the words in the definition of "offeree issuer" in s. 89 of the *Act*, would it have been correct to say that Aimia's "securities <u>are</u> [emphasis added] the subject of" the alleged deemed bids at the time that Aimia brought this application, about a year after the acquisitions?

[22] Answering that question is more difficult for deemed bids than it is for conventional, formal bids. Unlike a deemed bid, a formal bid has an expiry date. One can easily know whether a formal bid is still live, and therefore whether the offeree issuer's shares are, at any given time, still the subject of the formal bid. The same cannot be said about a deemed bid. If an acquisition by Mithaq of shares of Aimia is deemed to have been a bid, how long does Aimia have to apply for related relief under s. 104 of the *Act*? Apart from the general six-year

limitation period for all proceedings under the *Act*,[5] we are not aware of any provision of Ontario securities law, or any prior Tribunal decision, that answers that question.

[23] We answer the question by first looking to the purpose of s. 104. Its purpose is not to provide a basis for an enforcement proceeding in respect of a bid that is no longer live, and especially not an enforcement proceeding brought by a party other than the Commission. Rather, the provision enables an offeree issuer (among others) to apply for relief in connection with a live bid.[6] How long is a deemed bid "live"?

[24] Where an issuer asserts that an acquiror made a deemed bid but failed to follow up with an offer to all shareholders as required, that alleged deficiency persists until cured. We therefore had to decide whether an issuer would continue to have standing under s. 104 until the deficiency is cured, or only until some earlier time. The issuer must logically have standing the day after the impugned acquisition, but what about one month, or one year, later?

[25] We concluded that there is no principled basis for imposing a specific time limit. In particular, we rejected Mithaq's submission that we should import the default minimum deposit period of 105 days that applies to formal bids. Both the context and the purpose are different between the formal bid deposit period and the deadline, if any, for the use of s. 104 for a deemed bid.

[26] Where, as here, a long time has elapsed between the deemed bid and the s. 104 application, that delay would be relevant to whether the application can proceed to a merits hearing or ultimately succeeds. However, the delay does not preclude the issuer having standing to bring the application. We therefore concluded that Aimia had standing in respect of the February acquisitions.

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[5] *Act*, s 129.1

[6] *AbitibiBowater* at para 43

2.4 Even though Aimia had standing, should we dismiss the application because it is a misuse of s. 104 of the *Act*?

[27] The fact that Aimia has standing to bring the application does not mean that we must proceed to hear the merits of the application.[7] We therefore turn to our reasoning for our conclusion that we should dismiss the proceeding because it is a misuse of s. 104 of the *Act*.

[28] Mithaq characterized Aimia's application as an "abuse of process". As the Supreme Court of Canada has held, that doctrine embodies a court's inherent power "to prevent the misuse of its procedure".[8] There is therefore no conceptual difference between "abuse of process" and "misuse of procedure".

[29] This Tribunal has a similar statutory power, to "prevent abuse of its processes".[9] We reject Aimia's argument that by implementing Rule 36 of its *Rules of Procedure*, the Tribunal has imposed a constraint on that statutory power. Rule 36 permits summary dismissal, without a hearing, of applications or motions on certain specified grounds. The rule expands rather than limits the Tribunal's authority and is irrelevant here.

[30] In submitting that the application is an abuse of process, Mithaq alleged that Aimia had intentionally moved slowly, expensively and disruptively, and that Aimia brought the application as a deliberate tactic to frustrate shareholder activism, after having deliberately chosen not to pursue the relief earlier in other court and Tribunal proceedings. In reaching our decision, however, we did not need to draw inferences about Aimia's motives. Viewing the application objectively, in the context of all the relevant circumstances, led us to conclude that the application is a misuse of our procedure.

[31] Section 104 of the *Act* empowers the Tribunal to fix a wrong that is occurring, or has occurred, in the context of a live take-over bid. Each of the possible orders set out in s. 104 is targeted to that objective. None of them is in the nature of a sanction that would be imposed after the fact.

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[7] *AbitibiBowater* at para 49

[8] *Toronto (City) v CUPE Local 79*, 2003 SCC 63 at para 37, citing *Canam Enterprises Inc v Coles*, 2000 CanLII 8514 (ON CA) at para 55 (*per* Goudge JA, dissenting)

[9] *Statutory Powers Procedure Act*, RSO 1990 c S.22, s 23(1)

[32] Therefore, if Aimia wanted to fix the situation arising from the impugned acquisitions, *i.e.*, by forcing Mithaq to comply with its alleged obligation to extend an offer to all shareholders, then it was incumbent upon Aimia to move expeditiously for an order to that effect. From the time an impugned acquisition is completed, each passing day could introduce new circumstances that would diminish the suitability and effectiveness of the requested order as a way to fix what Aimia says needed to be fixed.

[33] We have found for the purposes of determining standing that there is no specific time limit to the availability of s. 104 that would apply in all cases (other than the six-year limitation period under the *Act*). However, in any given case, there must be a time limit, given the nature of the relief available in s. 104. The limit will vary from case to case and will depend on the facts of each case.

[34] In this case, more than a year passed between the time of the impugned share acquisitions and the hearing before us. This lengthy period was central to our conclusion that allowing Aimia to proceed with its application would be a misuse of s. 104. We did not conclude that mere delay, by itself, was fatal to the application. Rather, we were influenced by the significant changes that occurred in the year that elapsed:

a. Mithaq's shareholding of Aimia rose from almost 20% to almost 31% before dropping to about 28%;

b. Aimia completed a significant private placement of shares and warrants to what Aimia described as "blue-chip investors";

c. there were significant changes to Aimia's board and senior management;

d. Mithaq's subsidiary had commenced an unsolicited formal take-over bid for Aimia that did not succeed and that expired in February 2024;

e. Aimia reached settlements with the alleged joint actors (other than Mithaq), thereby preventing Aimia from including them as respondents to this application, even though findings on the merits of this application might well have significant implications for them;

f. Aimia's share price dropped from above $4.00 in February 2023 to a closing price of $2.52 on the date of the hearing before us;

g. an unknown number of investors bought or sold shares of Aimia; and

h. Mithaq and Aimia commenced, and took steps in, various court and Tribunal proceedings against each other.

[35] The court proceedings include an action in which, in mid-May 2023, Aimia added Mithaq as a defendant. In doing so, Aimia renewed an allegation that it had previously communicated to Commission staff on March 23, 2023. Specifically, Aimia alleged that Mithaq had engaged in undisclosed joint actor conduct, including by surreptitiously coordinating the acquisition of Aimia shares, in breach of the *Act*. Aimia expressly pleaded that because of these acquisitions, Ontario securities law required Mithaq to make an offer to acquire all of Aimia's shares. However, despite making those allegations, Aimia did not seek an order from the court requiring Mithaq to comply.

[36] It is therefore clear that by no later than March 23, 2023, Aimia believed that Mithaq had an obligation to offer to buy all the shares of Aimia. Despite this, it was not until Aimia brought this application in February 2024 that it asked anyone for an order requiring Mithaq to comply.

[37] We heard no persuasive reason from Aimia why it could not have sought this relief sooner. Aimia's submission that it should not have done so because it had made the joint actor allegations in the court litigation, and it would therefore be improper to make the same allegations before this Tribunal, is not a satisfactory answer. Aimia cannot have it both ways. It chose to make the joint actor allegations in court but to seek different relief from the Court in connection with those allegations. It cannot then use those allegations as an excuse for not seeking the relief it is now seeking sooner. Either the Court could or could not grant this type of relief. If the Court could grant the relief, likely under s. 105 of the *Act*, then Aimia could have sought the relief from the Court long before it sought it from this Tribunal. If the Court could not grant the relief, then the presence of the joint actor allegations in the court litigation would not have been a bar to seeking that relief, much earlier, from this Tribunal.

[38] We were equally unpersuaded by Aimia's submission that we should be influenced by the Tribunal's decision in *Central Goldtrust (Re)*,[10] in which the Tribunal decided to hear a bid-related application even after a court proceeding had addressed similar issues arising from the same facts. There are many relevant differences, but the important distinction here is that Aimia sought the requested relief in neither forum – neither the Court nor this Tribunal – until almost a year after the acts complained of. Nothing in *Central Goldtrust* helps Aimia with that problem.

[39] We therefore concluded that even assuming Aimia would succeed in proving its joint actor allegations at a merits hearing, this application was a misuse of s. 104. The application cannot achieve s. 104's purpose of fair treatment of shareholders. Rectification of the allegedly non-compliant situation simply did not make any sense at this stage, given the passage of time and the intervening events.

2.5 Other grounds raised by Mithaq

[40] In addition to Mithaq's objections about abuse of process, Mithaq submitted that we should dismiss Aimia's application preliminarily because:

a. cause of action estoppel should prevent Aimia from raising the allegations of joint actorship; and

b. Aimia's application was a collateral attack on an earlier decision of the Tribunal.

[41] Because we concluded that the application was a misuse of s. 104, we need not analyze these additional grounds, neither of which we found persuasive.

3. CONCLUSION

[42] We concluded that Aimia had standing to bring this application under s. 104 of the *Act* because of its allegations that Mithaq did not comply with obligations arising from the share acquisitions made in February 2023.

[43] However, we concluded that the specific kind of relief Aimia was seeking in this application must be sought expeditiously. Because of Aimia's long delay in

[10] 2015 ONSEC 44

seeking this relief, and the intervening events, Aimia's application was a misuse of s. 104. We therefore granted Mithaq's motion and dismissed Aimia's application.

Dated at Toronto this 5th day of July, 2024

"Timothy Moseley"

Timothy Moseley

"Andrea Burke"

Andrea Burke

"Dale R. Ponder"

Dale R. Ponder