OCMT chokes on Bitfarms 15 per cent poison pill

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The Ontario Capital Markets Tribunal (OCMT) cease traded the Bitfarms Ltd. (Bitfarms) shareholder rights plan pursuant to its public interest powers. The OCMT's decision found the Plan "undermined, in a real and substantial way, the principles underlying the take-over bid regime." The reasons for the decision provide important insights into the use of shareholder rights plans to prevent hostile take-over bids.

What you need to know

- The purpose of the take-over bid regime is to provide certainty and predictability to capital markets participants, and a shareholder rights plan which is a significant departure from the standards set is considered to undermine the principles of the regime.
- The OCMT's public interest jurisdiction under s.127(1) of the Act may be engaged even without direct contravention of the Act and only requires (i) conduct which undermines the principles of the Act, and (ii) sufficient connection to the public interest.
- Any significant departure from an established regime, absent exceptional circumstances, must avoid causing harm to the predictability, confidence and fairness in the capital markets.

Background

- Riot Platforms, Inc. (Riot), the largest shareholder of Bitfarms, holding nearly 15 per cent of its outstanding shares, had unsuccessfully approached Bitfarms to discuss a possible combination between the two companies in 2023 and again in early 2024. Subsequently, Bitfarms adopted a shareholder rights plan (the Plan) with a "trigger" at 15 per cent, meaning that the acquisition by any person of more than 15 per cent of Bitfarms' outstanding shares would trigger the provisions contained in the Plan. The Plan provided that all Bitfarms shareholders, except for the shareholder that triggered the Plan, would become entitled to purchase from Bitfarms additional shares at half price.
- Riot applied to the OCMT under s. 127(1) of the Act for an order to cease trade the Plan contending that it was in the public interest to do so, even absent any

direct contravention of Ontario securities law. Riot's core argument was premised on the fact that the Plan's 15 per cent trigger was significantly below the take-over bid regime's 20 per cent threshold, as discussed below.

Take-over bids and shareholder rights plans

Under National Instrument 62-104 *Take-Over Bids and Issuer Bids*, an individual or entity (alone or in concert with any joint actors) who accumulates 20 per cent of the shares of any class of a company must, subject to certain exemptions, make a formal take-over bid. This means that the bidder must make an offer to acquire the outstanding securities of all other shareholders of the target for identical consideration. Such an offer must be made through a take-over bid circular and is required to be open for acceptance for a minimum of 105 days. The bidder may not acquire any securities until at least 50 per cent of the shares owned by holders other than the bidder and its joint actors have been tendered to the bid.

A shareholder rights plan, informally known as a "poison pill", is a board-adopted defensive strategy to thwart potential hostile take-over bids by shareholders. The plan discourages the accumulation of shares of a company by providing the board of directors with a tool to offer all other shareholders, other than the hostile bidder, the option to purchase securities at a substantial discount. In practice, such plans typically will preclude the acquisition of shares beyond its pre-determined threshold, typically 20 per cent, even though such acquisition may be exempt from the formal offer requirements of applicable securities laws, including the take-over bid regime. As a result, the plan can be triggered with or without the subsequent engagement of the take-over bid rules, preventing the launch of a formal bid and increasing the cost of acquisition.

The OCMT's public interest jurisdiction

The OCMT is granted broad powers under s. 127(1) of the Act to make a range of orders when it is of the opinion that it is "in the public interest" to do so. The test under this section has two features which applies across all proceedings:

- No contravention of Ontario securities law is required to make an order under s. 127(1); and
- The conduct undermines the "animating" principles of the Act, including those set out in sections 1.1 and 2.1, along with other fundamental principles underlying Ontario securities law.

The OCMT, in determining the appropriate standard to invoke its public interest power, sought to reconcile its past decisions. In *Canadian Tire*, when making a public interest order, absent a contravention of securities law, the OCMT required the conduct under scrutiny to be abusive, as opposed to being merely unfair. Later decisions, including *Magna*, attempted to apply a lower standard, equal to simply "engaging" with the animating principles of the Act.

In the present case, the OCMT took the position that neither the standard applied in *Canadian Tire* nor *Magna* is appropriate. On one end of the spectrum, requiring "abusive" conduct as part of the test creates too high of a bar, implying some level of

intentionality. In practice, this standard could prevent OCMT intervention where conduct was not necessarily abusive, despite such intervention being in the public's interest. Alternatively, simply "engaging" with the animating principles does not sufficiently address whether investors or the capital markets were harmed by the conduct. As such, the OCMT settled on the appropriate standard as being conduct that "undermines" the animating principles of the Act.

The decision sets Ontario apart from the securities commissions in Alberta and British Columbia, both of which have utilized an abuse standard when choosing to invoke its public interest powers.

An important final point is while the above two features apply to all public interest proceedings, the OCMT noted that the analysis within individual proceedings may differ depending on the context. For example, the OCMT disregarded applying the reasoning in *Hecla* since the nature of that proceeding was in the context of a private placement, and not a take-over bid.

The Plan undermined the animating principles of the take-over regime

The OCMT first determined that the Plan's 15 per cent trigger undermined, in a real and substantial way, the animating principles underlying the take-over bid regime.

To apply this newly refined and established standard, the OCMT posed the important question of whether the conduct engages the principles in a positive, neutral or negative way. The OCMT was able to answer this question by identifying that the conduct undermined one or more clearly discernible animating principles of the take-over bid regime in a real (i.e., well-grounded, reasonably likely, and not illusory) and substantial (i.e., serious and non-trivial) way.

In its analysis, the OCMT determined that the take-over bid regime, including the 20 per cent threshold, creates certainty and predictability for market participants, contributing to the efficiency of capital markets, and is justifiable to be used as a bright-line test. This position was supported by reference to *Aurora*, where, as described in our previous bulletin, the OCMT determined that tactical shareholder rights plans would only be permitted in rare circumstances.

The Plan had a clear connection to the public interest

The wording of s.127(1) of the Act makes it clear that for the public interest jurisdiction to be invoked, there must be a sufficient connection to the public interest. This requires satisfying the OCMT that it is in the public interest to make the requested order, by establishing that:

- the impugned conduct has a harmful effect on investors generally, on the capital markets as a whole, or on the pool of actual and potential investors in a public issuer; or
- the impugned conduct, if condoned, would likely have a negative effect in future transactions.

Conduct which seriously undermines an animating principle may, by its nature, also have a harmful effect on the capital markets generally because that conduct, if left unaddressed, would weaken confidence in the capital markets. In this case, the OCMT held that permitting the 15 per cent trigger would undermine the predictable operation of the take-over bid regime and erode the efficiency of the capital markets. Further, this could open the door to floodgates of litigation about shareholder rights plans, undoing much of what the bid regime seeks to accomplish.

The OCMT also established that there would be systemic implications of permitting the 15 per cent trigger to stand and such a significant departure could create a precedent for other issuers to adopt similarly restrictive shareholder rights plans.

There were no exceptional circumstances to justify a departure from the 20 per cent take-over bid threshold

As a final stage of the analysis, the OCMT considered whether any exceptional circumstances existed to justify the Plan's departure from the 20 per cent threshold. Drawing on reasoning from prior decisions involving shareholder rights plans, the OCMT emphasized that the burden to establish exceptional circumstances is high, given the well-established nature of the take-over bid regime's fundamental principles.

While the OCMT did not explicitly define what would constitute exceptional circumstances, it referenced to prior decisions and principles to guide its analysis. Such circumstances could involve, for example, the need to protect shareholder choice or responding to abuse or harm to market integrity. The OCMT made clear that the presence of a strategic review by the issuer, alone, does not in itself constitute exceptional circumstances. Further, an accumulation of shares and refusal to engage in a strategic review, similar to the conduct engaged in by Riot, also does not indicate exceptional circumstances, as such conduct is lawful and even typical in the capital markets.

Ultimately, the OCMT concluded that there no allegations or evidence to suggest that Riot failed to comply with securities laws or that they undermined the integrity of the take-over bid regime. Without clear evidence of abuse, harm, or another compelling justification, the OCMT concluded that there were no exceptional circumstances to justify a departure from the established 20 per cent threshold.

Conclusion

The OCMT concluded that it was in the public interest to cease trade the Plan. Central to the OCMT's reasoning was fostering predictability and certainty inherent in the take-over bid regime and the importance of promoting confidence in the capital markets.

We strongly encourage consulting legal counsel to help navigate through this complex and dynamic landscape.

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