Waterous quenches Greenfire's poison pill

September 02, 2025

The take-over bid regime is explored in the Alberta Securities Commission's recently published written reasons in *Re Greenfire*, highlighting that the regime must be understood as a complete framework, where statutory exemptions are not loopholes to be disregarded but essential components of the regulatory structure.

What you need to know

- The Alberta Securities Commission (ASC) confirmed that defensive tactics, such as shareholder rights plans, cannot be used to block or undermine private transactions that comply with the take-over bid regime, including its statutory exemptions. The decision reinforces that these exemptions are a deliberate and integral part of the regime on which market participants are entitled to rely.
- The decision underscores that the ASC (or other relevant regulators) will not use its public interest jurisdiction to revisit or unwind transactions that comply with securities laws unless the conduct is clearly abusive or undermines confidence in the capital markets.
- Securities regulators will not expand directors' fiduciary duties to involve themselves in internal corporate governance disputes in the absence of securities law violations.

Background

In 2024, Greenfire Resources Ltd. (Greenfire), a TSX-listed energy company, began conducting a formal strategic alternatives process, and engaged a financial advisor to solicit potential offers for the company. In September 2024, Waterous Energy Fund II (WEF), together with its affiliates, agreed to acquire approximately 43 percent of the outstanding shares of Greenfire from three major shareholders: Allard Services Limited, Annapurna Limited, and Modro Holdings LLC. Two of the selling shareholders were controlled by individual Greenfire directors who resigned prior to entering into the share purchase agreements (SPAs) at issue. The acquisition was not a TOB under Alberta securities laws because the selling shareholders did not reside in Alberta. Nevertheless, WEF intentionally structured the transaction to fit within the parameters of the Private Agreement Exemption under the TOB regime.

The SPAs were signed and publicly disclosed on September 16, 2024, with closing of the sales conditional upon *Competition Act* approval. On September 18, 2024, and before the SPAs had closed, Greenfire's board adopted a defensive shareholder rights plan (the SRP), colloquially known as a "poison pill", that would be triggered by any person acquiring ownership of greater than 20 percent of the outstanding Greenfire shares, unless done by way of a "Permitted Bid" (as defined in the SRP). Importantly, the SRP did not "grandfather" the pending SPAs and therefore would have significantly diluted WEF's interest once the SPAs had eventually closed.

WEF and the selling shareholders applied to the ASC to cease-trade the SRP. Greenfire brought a cross-application to challenge the SPAs, arguing that the transaction was in violation of the selling shareholders fiduciary duties in their capacities as directors of Greenfire, and circumvented protections for shareholders under the TOB regime.

The take-over bid framework and Private Agreement Exemption

Under Canadian securities laws, the TOB regime is designed to ensure equal treatment for shareholders in control transactions. It imposes conditions including, among other things, minimum tender conditions, identical consideration for all shareholders, and minimum deposit periods. At the same time, the framework includes certain exemptions to allow limited transactions to proceed without triggering a formal bid and the accompanying requirements.

One such exemption is the Private Agreement Exemption, which permits an acquiror to obtain more than 20 percent of a reporting issuer's shares from no more than five sellers, provided the price paid does not exceed 115 per cent of the market price. In Greenfire, it was not disputed that the SPAs complied with the letter of the exemption. Rather, the issue was whether Greenfire could use the SRP to override and render ineffective a lawful transaction on the basis of fairness, strategic disruption, or director conduct, despite full compliance with securities law.

In its decision, the ASC emphasized that the Private Agreement Exemption is an integral feature of the take-over bid regime, not a mere loophole, and that parties who intend to rely on it are entitled to its protection. The panel noted the robust history and policy rationale for the Private Agreement Exemption, which seeks to balance the principle of equal treatment of shareholders with the ability of large control-block positions to dispose of their securities in limited circumstances. This rationale is particularly relevant in illiquid markets or where major shareholders seek liquidity outside of a formal bid context.

Greenfire's SRP and defensive rationale

Greenfire's board adopted the SRP with the stated purpose of preventing WEF from acquiring more than 20 percent of Greenfire's shares unless it made a formal offer to all shareholders under a "Permitted Bid" structure, as outlined in the SRP. As is generally the case with poison pills, closing of the SPAs would have allowed existing shareholders, other than the acquiror, to purchase additional shares at a significant

discount as WEF would have crossed the 20 per cent triggering threshold. The SRP did not grandfather the SPAs on the basis that WEF did not yet hold beneficial ownership of the purchased shares.

Greenfire argued that the SRP was a proportionate response to a transaction that while technically in compliance with the rules, posed a risk to the integrity of the strategic alternatives process. This position was resoundingly rejected by the ASC for a variety of reasons:

- **Timing:** The SRP was reactive, not preventative, and Greenfire previously declined to adopt an SRP when first informed of WEF's interest in acquiring a block of shares. Further, had it not been for *Competition Act* approval being required, the transaction would have closed before Greenfire was notified of it, and no SRP would have been in place.
- **Purpose:** The adoption of the SRP was an effort to frustrate a lawful and disclosed transaction, not a legitimate response to an unsolicited take-over bid.
- **Selective Application:** Defensive tactics must be evaluated in context, and they are not a valid means of obstructing private transactions that are in compliance with securities laws.

The ASC held that allowing the SRP to stay in place would send a message to the capital markets that an issuer could implement an SRP after a private transaction has been signed and all but finalized, despite that private transaction complying with both the law and the animating principles underlying the law. Therefore, allowing the SRP would run contrary to both fairness and market certainty. Further, the ASC found that the SRP was abusive in that it upended the carefully balanced TOB regime by preventing parties such as WEF and the selling shareholders to rely on the parameters of, and underlying rationale for, the Private Agreement Exemption.

A pattern of regulatory intervention to overreaching SRPs

Cease-trading a shareholder rights plan is not uncommon for Canadian securities regulators, including following the 2016 amendments to the TOB regime. Most recently, in 2023, the Ontario Capital Markets Tribunal (OCMT) ordered a cease-trade of Bitfarms Ltd.'s shareholder rights plan that imposed a 15% threshold, below the statutory threshold, and interfered with a shareholder's ability to increase its stake. Similar to the decision in *Bitfarms*, the ASC in this case confirmed that SRPs cannot override or narrow legal rights granted by the carefully developed and historically important TOB regime. Notwithstanding these recent holdings, the ASC noted that SRPs may still play a role for various reasons, if considered and implemented at an appropriate time for proper reasons.

The ASC's exercise of public interest jurisdiction

A central issue in the proceeding was whether the ASC should intervene to cease-trade the SRP pursuant to its broad power under section 119 of the *Securities Act* (Alberta) to grant orders when it is in the "public interest" to do so.

The ASC reiterated that a crucial factor for a panel considering the exercise of its public interest jurisdiction is market certainty. As stated in *Canadian Tire*, the public interest mandate "is not to interfere in market transactions under some presumed rubric of insuring fairness", as such interference "would wreak havoc in the capital markets". The panel highlighted that the appropriate standard for public interest intervention – clearly abusive or animating principles – has been questioned in various ASC decisions and those of other Canadian jurisdictions. It was also noted that in *Bitfarms*, the OCMT panel discussed the two standards and developed an approach to reconcile them in some circumstances.

However, because that decision was issued after the arguments and oral ruling in this case, the ASC did not address the newly formulated OCMT approach and left that for a case in which all parties are able to present submissions on whether the OCMT approach should be adopted by ASC panels. The ASC ultimately decided to use the "clearly abusive" standard in its analysis in the present case, noting that it is generally viewed as applying when securities laws set out specific acts which constitute misconduct, whereas the animating principles standard may be applied when the impugned conduct is contrary to certain underlying principles and when securities laws are generally silent with respect to such conduct.

Greenfire urged the ASC to look beyond technical compliance with the TOB regime and consider the broader fairness of the transaction in light of the potential impact it would have on control, governance and ongoing strategic alternatives process. The ASC firmly rejected this approach and reiterated that the public interest mandate is not a supervisory override of private transactions that comply with securities law. Rather, invention is only warranty where the impugned conduct is "clearly abusive" or undermines confidence in the integrity of the capital markets. In this case, there was no evidence of such conduct. The ASC further emphasized that the existence of a significant share block transfer alone is not sufficient to invoke the public interest jurisdiction. Matters such as the frustration of a strategic alternative process or concern about post-closing influence also did not justify a public interest order, particularly where the transaction neatly fit into the regulatory framework.

Fiduciary duty allegations and board process

In its cross-application, Greenfire asserted that certain of the selling shareholders were also directors of Greenfire at the time of signing the SPAs, breaching their fiduciary duty by negotiating a private sale that undermined Greenfire's long-term strategy and interests of other shareholders. Greenfire argued that the board, in conjunction with their financial advisor, was pursuing a formal strategic alternatives process and the private sale to WEF interfered with this process and was inconsistent with their obligations as directors. Greenfire urged the ASC to consider expanding the scope of directors' fiduciary duties in this context during ongoing board-les processes, The ASC declined to do so, holding that:

- The involved directors disclosed the proposed transaction to the board well in advance of signing;
- The directors had recused themselves from all board activity following execution of the SPAs and resigned prior to closing;
- There was no evidence of trading on material non-public information or an active blackout period during the time; and

- The fiduciary duty framework was not engaged in a manner justifying regulatory intervention.

Importantly, the ASC reiterated that its role is not to adjudicate internal governance disputes. Matters such as director misconduct, board process disputes or fairness of a negotiated sale are matters for civil courts and not securities regulators, unless there is a rise to a misuse of the capital markets. The ASC, once again relying on the public interest jurisdiction powers and "clearly abusive" test, refused to impose a fiduciary overlay on otherwise lawful exemptions to the take-over bid regime.

Limited role for expert evidence

Finally, the ASC gave rare extensive reasons on the role of expert evidence in TOB litigation. The parties filed expert reports from two senior securities lawyers, one law professor, and one senior banker, who opined on whether the transactions had a legitimate purpose, directors' duties, and the capital markets context. The ASC admitted all the evidence, but for very limited purposes, and found it generally unhelpful.

The ASC urged parties to tender less expert evidence in the future, holding, "ASC panels have expertise on, experience with, and knowledge of capital market matters. While expert evidence may be helpful in some circumstances, it is generally not necessary. In some situations, the tendering of excessive expert evidence can cause significant efficiency concerns that outweigh any potential usefulness. This was such a case" (para. 161).

Implications for issuers, investors and boards

- **Exemptions serve a fundamental role:** In its analysis, the ASC emphasized that the objectives of the TOB regime must be considered in their entirety. This includes not only the broader regulatory provisions but also the purpose and role of the Private Agreement Exemption. Exemptions are not peripheral, they are foundational elements that reflect a deliberate policy balance within the TOB regime and broader securities regulation.
- **Regulators respect their mandates:** The ASC's decision reinforces the principal that securities regulators are primarily guided by their statutory mandate. Regulators frequently assess the precedent they would be setting, and in this case, the precedent of permitting a shareholder rights plan that would undermine a private agreement. Doing so would undermine market predictability and certainty, which runs contrary to the stated goals and objectives of the regulators.
- **Boundaries of regulatory oversight:** The ASC confirmed that it does not serve as an arbiter of internal governance or boardroom decisions unless such matters raise concerns about market integrity. The focus remains on compliance with securities law, not resolving disputes better addressed through established corporate law mechanics.

By

Laura Levine, Graham Splawski, Matthew Shuman

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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