

**IN THE MATTER OF  
CALFRAC WELL SERVICES LTD.**

**APPLICATION**

(for Hearing and Review of a Decision under Sections 8 and  
21.7 of the *Securities Act*, RSO 1990, c S.5)

**A. ORDER SOUGHT**

The Applicant, Wilks Brothers, LLC ("**Wilks**"), requests that the Ontario Securities Commission (the "**Commission**") make the following orders:

- a. An order varying or setting aside the decision of the Toronto Stock Exchange ("**TSX**"), made on or about March 24, 2021, granting exemptive relief in respect of one of the shareholder approvals required by the TSX for the recapitalization transaction ("**Transaction**") involving Calfrac Well Services Ltd. ("**Calfrac**");
- b. An order requiring the TSX to provide Wilks with a record of the TSX Decision (the "**TSX Record**") and the reasons for the TSX Decision (the "**TSX Reasons**"); and
- c. Such further and other relief as counsel may advise upon its review of the TSX Record and TSX Reasons.

**B. GROUNDS**

The grounds for the request and the reasons for seeking a hearing and review are:

**The Parties**

1. Calfrac is a provider of international oilfield services, with its head office in Calgary, Alberta. Calfrac was incorporated under the *Alberta Business Corporations Act*, RSA 2000, c B-9 and prior to the Transaction, its capital structure consisted of: (a) a first lien revolving credit facility provided by a syndicate of financial institutions pursuant to a credit agreement; (b) second lien notes issued pursuant to a trust indentures dated February 14, 2020 ("**Second Lien Notes**"); (c) unsecured notes (the "**Unsecured Notes**"); and (d) common shares ("**Calfrac Shares**").

2. Ronald Mathison is the founder and Chair of Calfrac and held 19.8 % of the Calfrac Shares prior to the Transaction.<sup>1</sup> Mathison was (and is) an “insider” of Calfrac under the TSX Company Manual.

3. Wilks has been a shareholder of Calfrac since 2014 and was Calfrac’s second largest shareholder prior to the Transaction, holding approximately 19.72% of the Calfrac Shares. Wilks also holds a majority (in principal amount) of the Second Lien Notes.

4. Alberta Investment Management Corporation (“**AIMCo**”) is one of Canada’s largest institutional investment managers and is responsible for significant investments of pension, endowment, and government funds in Alberta. Prior to the Transaction, AIMCo held approximately 16.54% of the Calfrac Shares and over US\$30M in Unsecured Notes.

### **Background to the Transaction**

5. In early 2020, Calfrac engaged legal and financial advisors to review and evaluate potential options and alternatives available to improve its capital structure, reduce its annual interest expense and increase its working capital and liquidity. Calfrac completed a debt restructuring exchange offer in February 2020, under which it issued approximately US\$120 million principal amount of Second Lien Notes in exchange for approximately US\$218 million principal amount of Unsecured Notes.<sup>2</sup>

6. In April 2020, Calfrac announced significant reductions to its 2020 capital program and that it would reduce its headcount by approximately 1,000 employees.

7. The Calfrac Board (without the benefit of an independent special committee or independent advisors) subsequently negotiated the Transaction, which conferred significant benefits on Mathison/MATCO and certain self-selected holders of Unsecured Notes (the “**Unsecured Noteholders**”).

8. Calfrac proceeded to implement the Transaction under the plan of arrangement provisions of section 192 of the *Canada Business Corporations Act*, RSC 1985 c. 44 (“**CBCA**”). In order to do so, it incorporated a shell company under the CBCA (since at the time, no Calfrac entity was incorporated under the CBCA).

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<sup>1</sup> Held by Mathison directly and through his private investment firm MATCO Investments Ltd. (“**MATCO**”).

<sup>2</sup> Management information circular dated August 17, 2020, page 14.

9. On July 13, 2020, Calfrac and related entities (including the CBCA shell company) obtained a Preliminary Interim Order from the Court of Queen's Bench of Alberta (the "**Court**") on an *ex parte* basis, in the context of advising the Court that they were developing a proposed plan of arrangement under the CBCA.

### **The Transaction**

10. On July 14, 2020, Calfrac disclosed details of the Transaction. Calfrac only provided Unsecured Noteholders and holders of the Calfrac Shares (the "**Shareholders**") with the right to vote on the Transaction (with the first lien lenders having provided a waiver of defaults). Calfrac maintained that holders of the Second Lien Notes were "unaffected".

11. The basic terms of the Transaction were:

- a. Mathison/MATCO and a group of Unsecured Noteholders would provide financing to Calfrac through a \$60 million loan facility (the "**1.5 Lien Notes**"). The 1.5 Lien Notes are convertible (at the option of the holder) into Calfrac Shares at approximately \$0.02 per share (a deep discount to the then current share price of \$0.18 per share). The majority of the proceeds of the 1.5 Lien Notes (approximately \$45 million) would be used to reduce Calfrac's first lien debt. Unsecured Noteholders would also exchange the Unsecured Notes (in an amount of US\$420 million) for Calfrac Shares;
- b. Of the \$60 million from the 1.5 Lien Notes financing, \$45 million would be provided by Mathison/MATCO and certain self-selected Unsecured Noteholders (the "**Initial Commitment Parties**"). The remaining \$15 million would be offered to the remaining Unsecured Noteholders on a pro rata basis (the "**Pro Rata Offering**"). The Initial Commitment Parties would also be entitled to participate in that \$15 million tranche on a pro rata basis and agreed to "backstop" that amount in any event; and
- c. The Transaction would significantly dilute the interests of Calfrac's existing Shareholders. Upon completion, the existing Shareholders would hold approximately 8% (pre-dilution) of the Calfrac Shares, and the Initial Commitment Parties would hold in excess of 52% of the Calfrac Shares. If the 1.5 Lien Notes are converted (as permitted by their terms), the Initial Commitment Parties would

own approximately 69% of Calfrac Shares, and the existing Shareholders would hold approximately 3% of Calfrac Shares.

12. On August 6, 2020, the Court granted an Interim Order with respect to the holding of meetings of the Unsecured Noteholders and Shareholders (the “**Meetings**”) to be held on September 17, 2020 to approve the federal continuance of Calfrac, the arrangement, and any Shareholder approvals required by the TSX in connection with the issuance of common shares pursuant to the arrangement or pursuant to the conversion of the 1.5 Lien Notes, among others.

### **Shareholder Opposition and Adverse Market Commentary**

13. Wilks concluded that the Transaction did not offer a fair restructuring for all security holders and would not adequately solve Calfrac’s leverage issues and on August 4, 2020, provided an alternative proposal (the “**Alternative Proposal**”), which would have reduced Calfrac’s total debt significantly more than the Transaction while providing increased equity participation to existing Shareholders. The Alternative Proposal was confirmed by a number of leading independent analysts.

14. Given the Wilks’ public opposition to the Transaction and the Alternative Proposal, it was clear to Calfrac and all interested stakeholders that the Meetings would be highly contested and that Shareholder approval for the Transaction would be of critical importance. In this context, Calfrac retained Kingsdale Advisors (“**Kingsdale**”) as its “proxy information and exchange agent” in connection with the Meetings and distributed a management information circular dated August 17, 2020 (the “**Circular**”).

15. In its capacity as proxy information agent, Kingsdale was identified in the Circular as a party who would be soliciting proxies on behalf of the management of Calfrac for the approval of the Transaction. In its capacity as “exchange agent”, Kingsdale was also responsible for receiving elections from Unsecured Noteholders to participate in the Pro Rata Offering (and its related agent, Kingsdale Partners LP, acted as escrow agent for the receipt of subscriptions for the 1.5 Lien Notes pursuant to the Pro Rata Offering).

16. Finally, Kingsdale also acted as scrutineer for the Meeting of the Unsecured Noteholders.

17. On September 10, 2021, Wilks offered to acquire all of the outstanding Calfrac Shares at a significant premium to the market price of the Calfrac Shares at the time and the value offered under the Transaction (the “**Offer**”). The Offer received favourable market commentary and

ultimately caused Calfrac to announce an increase in Shareholder recovery under the Transaction. Calfrac also postponed the Meetings twice, first to September 29, 2021 and then to October 16, 2021, in an effort to obtain the necessary stakeholder support (with the active participation of Kingsdale).

18. The independent proxy advisory firms Glass Lewis and ISS both found that the Alternative Proposal and the Offer provided better value to Calfrac Shareholders and recommended that Shareholders vote against the Transaction. There was also significant adverse market commentary regarding the Transaction.<sup>3</sup> Leading to the Meetings, Shareholder approval for the Transaction was far from certain. This was the important context in which votes were being solicited for the meetings.

19. With Mathison/MATCO supporting the Transaction and Wilks opposing it, AIMCo, as the third largest (16.54%) Shareholder of Calfrac, effectively held the deciding vote. The importance of AIMCo's vote was apparent to all parties well before the Shareholders' Meeting was held. In the result, AIMCo voted for the Transaction, notwithstanding the Glass Lewis and ISS recommendations.

### **The Meetings**

20. The Meetings were held in person on October 16, 2020. Kingsdale and Computershare Trust Company ("**Computershare**") acted as the scrutineers with respect to the Senior Unsecured Noteholders' Meeting and the Shareholders' Meeting, respectively, despite the fact that Kingsdale had acted as Calfrac's proxy solicitation agent in the highly publicized and contentious proxy battle.

21. The Transaction was only approved by 68.75% of the votes cast by Shareholders, barely meeting the minimum two-thirds threshold required by the Interim Order. Of the votes cast in favour of the Transaction, 38% were held by Mathison/MATCO, a significant beneficiary under

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<sup>3</sup> Independent analysts also commented on the superiority of the Wilks proposal. For example, on August 4, 2020, Raymond James Ltd. commented: "In our view, the new Wilks Bros restructuring proposal is unambiguously superior to the original proposal for equity holders and 2<sup>nd</sup> lien noteholders". On August 5, 2020, Cormark Securities Inc. commented: "We believe that should the Wilks proposal succeed, Calfrac's survivability would be materially improved and have raised our target from zero to \$0.15 (13.5x 2021 EV/EBITDA) and rating to Market Perform from Reduce on the potential success of the deal and deleveraging of the Company."

the Transaction as described above. If AIMCo had voted against the Transaction, it would not have been approved.

### **TSX 1.5 Lien Note Resolution Fails**

22. The TSX required that Shareholder approval be provided for the issuance of the 1.5 Lien Notes and the issuance of Calfrac Shares on conversion of the 1.5 Lien Notes (the “**TSX 1.5 Lien Note Resolution**”), since the offering of the 1.5 Lien Notes provided substantial benefit to the Initial Commitment Parties and Mathison/MATCO, an insider of Calfrac, and would result in the issuance of Calfrac Shares that:

- a. would materially affect control of Calfrac;
- b. would exceed 25% of the issued and outstanding securities and the price at which listed securities are to be issued is less than the market price of the listed securities;
- c. would convert at a price per listed security that would be lower than the discount to the market price permitted by the TSX (\$0.02 per share representing an 86% discount to the then current market price of Calfrac Shares); and
- d. were issuable to insiders of Calfrac that, as a group, exceeded 10% of the then issued and outstanding securities of Calfrac.<sup>4</sup>

23. The TSX required that the TSX 1.5 Lien Note Resolution receive 50% of the disinterested Shareholder vote. Shareholders who subscribed for 1.5 Lien Notes (either as Initial Commitment Parties or through the Pro Rata Offering) were not disinterested since those Shareholders would benefit from the offering of the 1.5 Lien Notes.

24. AIMCo held a fulcrum position relative to approval of the TSX 1.5 Lien Note Resolution, since the votes of Mathison/MATCO and the supportive self-selected Unsecured Noteholders who financed (at least) \$45 million of the \$60 million 1.5 Lien Notes offering would be excluded.

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<sup>4</sup> Circular, page 5; TSX 1.5 Lien Note Resolution, Circular, Appendix B.

25. As a result, the importance of AIMCo's vote was apparent to all parties, including Calfrac and its agents, well before the Shareholders' Meeting, and steps should have been taken to ascertain whether or not AIMCo's votes would be counted in the TSX 1.5 Lien Note Resolution.

26. As it turned out, these steps were not taken, and as a result, the Company incorrectly reported that the TSX 1.5 Lien Note Resolution passed with 57% of the required disinterested Shareholder vote. However, as later revealed, AIMCo's Shares were improperly counted in this vote, since AIMCo had in fact subscribed for 1.5 Lien Notes and was not a disinterested Shareholder. When AIMCo's Shares are excluded, as required by the TSX, the TSX 1.5 Lien Note Resolution failed (with only 39% of the required disinterested Shareholder vote).

### **Court Approval**

27. Calfrac filed a Mathison affidavit reporting on the results of the meeting (the "**Meeting Affidavit**"), which included the incorrect outcome of the vote on the TSX 1.5 Lien Note Resolution, in support of its contested application for a final court order approving the Transaction under the CBCA (the "**Final Order**").

28. A hearing on the Final Order was held on October 28, 2020 and the Final Order was granted on October 30, 2020.<sup>5</sup> Wilks appealed the Final Order to the Alberta Court of Appeal, which upheld the approval of the Transaction. The Transaction closed on December 18, 2020. Wilks has filed an application for leave to appeal to the Supreme Court of Canada on the discrete issue of the Deemed Waiver.

### **Calfrac Application to TSX**

29. On March 1, 2021, more than four months after the Meetings and more than two months after the closing of the Transaction, Calfrac announced the "modification of its prior disclosure" and its intention to make an application to the Court in relation to this "modified disclosure".<sup>6</sup> Specifically, Calfrac announced that it recently became aware that one "institutional shareholder" of Calfrac (which, through subsequent press coverage, has been revealed to be AIMCo) purchased approximately \$1 million of the 1.5 Lien Notes via the Pro Rata Offering and that the

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<sup>5</sup> Wilks opposed the granting of the Final Order on a number of grounds, including, among other things, that holders of the Second Lien Notes were in fact affected as a result of a clause in the order that deemed as waived (and released and enjoined) the legal rights of, and any future claims or actions by, the Second Lien Noteholders against Calfrac including defaults triggered by the implementation of the Transaction (the "**Deemed Waiver**").

<sup>6</sup> Calfrac news release dated March 1, 2021.

purchase of such Notes was not discovered at the time of subscription. Calfrac did not explain the consequence of this discovery in this news release.

30. On March 12, 2021, Calfrac announced that it and the institutional Shareholder were proposing, subject to regulatory approval, to rescind the purchase of the \$1,050,000 of 1.5 Lien Notes and to cancel the applicable 1.5 Lien Notes (the “**AIMCo Subscription**”).<sup>7</sup> Calfrac also announced that it had applied to the TSX for exemptive relief confirming that the terms of the TSX’s conditional listing approval shall have been satisfied in respect of the common shares issuable upon conversion of the remaining \$58,950,000 original principal amount of 1.5 Lien Notes, subject to completion of the rescission and cancellation of the AIMCo Subscription.

31. Wilks had significant concerns with the proposed exemptive relief, which are described further below. Wilks raised its concerns regarding the exemptive relief directly to the TSX in a telephone call on March 14, 2021 and by a letter delivered March 15, 2021.

32. On March 29, 2021, Calfrac announced that the TSX had granted the exemptive relief requested by Calfrac (the “**Exemptive Relief**”).<sup>8</sup> According to Calfrac, the Exemptive Relief “confirms that the terms of the TSX’s conditional listing approval have been satisfied in respect of the Common Shares issuable upon conversion of the remaining \$58,950,000 of 1.5 Lien Notes issued by Calfrac in connection with its Recapitalization Transaction, subject to, among other conditions, completion of the rescission and cancellation of the previously described \$1,050,000 of 1.5 Lien Notes acquired by an institutional Shareholder”.<sup>9</sup>

33. Wilks requested the reasons for the TSX Decision from the TSX in order to determine the basis upon which the TSX acted and assess whether to contest the decision but was advised “... we have never provided reasons prior to a request pursuant to an appeal”.

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<sup>7</sup> Calfrac news release dated March 12, 2021.

<sup>8</sup> Calfrac news release dated March 29, 2021. In fact, the TSX granted the Exemptive Relief on March 24, 2021. Ironically, Calfrac did not disclose the Exemptive Relief in a timely manner, even though the March 29, 2021 news release disclosed that a condition of the TSX in granting the requested relief was that “*Calfrac will be subject to enhanced review by the TSX Compliance and Disclosure Group for the following 12 months, subject to extension in the TSX’s discretion*”.

<sup>9</sup> Calfrac also filed a March 29, 2021 affidavit of Mathison with the Court to correct the Meeting Affidavit.

## TSX Decision

34. There are several very serious problems with the TSX Decision.

35. First, the TSX Decision to grant exemptive relief from its earlier imposed conditions raises serious issues regarding the “quality of the marketplace” provided by the TSX within the meaning of section 603 of the TSX Company Manual. The approval of the Transaction through the TSX 1.5 Lien Note Resolution was clearly a significant consideration of the TSX in granting listing approval for the 1.5 Lien Notes. Calfrac failed to discharge its obligation, as a TSX listed company, to administer a voting procedure that ensured the integrity of the voting results.

36. The TSX Decision fails to consider or give proper weight to the relevant factors set out in section 603 of the Company Manual, including:

a. The involvement of insiders or other related parties in the transaction:

The issuance of the 1.5 Lien Notes is an insider transaction that provides a substantial benefit to insiders of Calfrac, including Mathison/MATCO. Among these substantial benefits is the right of the holder to convert the 1.5 Lien Notes into Calfrac Shares at a price that was a substantial discount to the market price of the Calfrac Shares at the time of issue of the notes. The approval by disinterested Shareholders was clearly a significant consideration for the TSX in granting listing approval.

b. The material effect on control of the listed issuer:

One of the grounds on which the vote was required by the TSX was that the Transaction would have a material effect on control of the issuer. This has not changed.

c. The listed issuer’s corporate governance practices:

Calfrac failed to design and implement a voting procedure that would accurately identify Unsecured Noteholders who were also Shareholders and who had subscribed for 1.5 Lien Notes. The scrutineer for the vote at the Shareholders’ Meeting was Computershare, Calfrac’s transfer agent. In its capacity as such it was responsible for ensuring that, in respect of the TSX 1.5 Lien Note Resolution,

only the votes of disinterested Shareholders were counted. However, since Calfrac made Kingsdale responsible for the administration of the Pro Rata Offering, it is not clear how Computershare would be aware if any Shareholder, who was also an Unsecured Noteholder, had elected to purchase 1.5 Lien Notes in the Pro Rata Offering and thereby ceased to be a disinterested Shareholder.

As we now know, AIMCo had elected to participate in the Pro Rata Offering and, by doing so, had ceased to be a disinterested Shareholder. Calfrac's decision to divide responsibility (and information) between Computershare and Kingsdale compromised the voting process and Calfrac must accept the consequences of its flawed procedure.

d. The listed issuer's disclosure practices:

The Circular did not contain sufficient disclosure of the voting requirements in connection with the TSX 1.5 Lien Note Resolution. If the Circular did not make it clear to AIMCo that any Unsecured Noteholder/Shareholder who subscribed for 1.5 Lien Notes would thereby cease to be a disinterested Shareholder then Calfrac and the Initial Commitment Parties with whom it acted must accept the consequences of that failure.

After the fact, Calfrac's press releases relating to the failed vote provided unclear and ambiguous disclosure to the market regarding the failed vote and its consequences. Instead, the press releases speak in terms of "modifying" previous "disclosure" as if the issue was the manner in which the vote had been disclosed rather than the fact that the vote was fundamentally flawed, had in fact failed, and that Calfrac was forced to seek extraordinary and unprecedented relief from the TSX in order to remedy this deficiency.

37. Second, it is not known whether Calfrac's submissions to the TSX resolved concerns that the rescission (repurchase) of the notes could be contrary to the "issuer bid" provisions of National Instrument 62-104 since it involves the repurchase of a debt security that is convertible into equity shares. Ensuring compliance by issuers with applicable securities laws is central to the "quality of the marketplace".

38. Had the TSX applied the law correctly, considered the facts in their entirety, and exercised its discretion reasonably, it would not have granted the Exemptive Relief.

39. The patent shortcomings of the TSX Decision compel the Commission to intervene and review Calfrac's request for exemptive relief *de novo* pursuant to section 21.7 of the Act and the decision of *Canada Malting Co., Re* (1986) 9 OSCB 3566. In particular:

- a. The TSX proceeded on an incorrect principle and erred in law in its interpretation and application of section 603 of the TSX Company Manual; and
- b. The TSX demonstrated that its perception of the public interest fundamentally conflicts with that of the Commission in these circumstances by granting Exemptive Relief despite the harm to the quality of the marketplace caused by granting listing approval in the face of a deficient vote that failed to include only disinterested Shareholders as required by the TSX.

40. Wilks reserves its right to amend or supplement this Application once the TSX Record and TSX Reasons have been made available to it.

### **C. DOCUMENTS AND EVIDENCE**

41. Wilks intends to rely on the TSX Record, the TSX Reasons, the documents referred to in this Application, Calfrac's public disclosure, and such further evidence as counsel may advise.

Dated this 22nd day of April, 2021

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