

**IN THE MATTER OF
AN APPLICATION BY WILKS BROTHERS, LLC
FOR THE REVIEW OF A DECISION BY TSX INC.
RELATING TO CALFRAC WELL SERVICES LTD.**

AMENDED 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 pursuant to sections 8(3) and 21.7 of the *Securities Act*, RSO 1990, c. S.5 (the "*Securities Act*"):

- a. An order ~~varying or~~ setting aside the decision of the Toronto Stock Exchange ("**TSX**"), made on or about March 24, 2021, (the "**TSX Decision**") 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. In the alternative to paragraph a. above, an order varying the TSX Decision by imposing the following conditions on the grant of exemptive relief:
 - (i) that Calfrac be subject to enhanced review by the TSX Compliance & Disclosure group for the next twenty-four months, during which time all material press releases must be pre-cleared by TSX at least 24 hours prior to issuance;
 - (ii) that Calfrac be designated a "non-exempt issuer" by the TSX for a period of not less than twenty-four months;
 - (iii) that Calfrac be required to disclose in all quarterly financial news release disclosure during the twenty-four-month review period that it is subject to enhanced review by TSX pursuant to an order of the Commission; and
 - (iv) that Calfrac must disseminate a press release in form and content acceptable to staff of the Commission ("**Staff**") specifically disclosing that

the inclusion of Alberta Investment Management Corporation (“AIMCo”) votes on the 1.5 Lien Note Resolution (defined below) constituted a matter of significant non-compliance with TSX rules;

- c. An order that an independent, non-director chair be appointed by the independent directors of Calfrac to conduct and oversee the conduct of all Calfrac securityholder meetings, which oversight shall include the appointment and supervision of an independent scrutineer, for the next twenty-four months;
- d. An order that all Calfrac shareholder resolutions passed within the next twenty-four months must be certified by the independent chair of the applicable meeting to the TSX and accompanied by a certified scrutineer’s report;
- e. An order that Calfrac establish a disclosure committee of its board of directors, composed of at least two independent directors, to review and approve in advance all material disclosure of Calfrac for the next twenty-four months; and

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
- f. Such further and other relief orders as may be required to give effect to the orders sought above as counsel may advise upon its review of the TSX Record and TSX Reasons.

B. GROUNDS

The grounds for the requests 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 indenture 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 Executive Chair of Calfrac and held 19.8% of the Calfrac Shares prior to the Transaction.¹ 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”)~~ 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.²

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 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).

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

² Management information circular dated August 17, 2020 (“**Circular**”), 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.

11a. On July 29, 2020, the TSX listings committee approved the dilutive, deeply discounted private placement of Calfrac Shares issuable pursuant to the proposed private placement of the 1.5 Lien Notes.

11b. However, the TSX approval was conditional on Shareholder approval – excluding all Shareholders participating in the 1.5 Lien Note private placement (the “**TSX 1.5 Lien Note Resolution**”) because disinterested shareholder approval is specifically required by TSX policy since the 1.5 Lien Notes provided substantial benefits 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, held in excess of 10% of the then issued and outstanding securities of Calfrac.³

11c. 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. Wilks was a disinterested Shareholder because it did not subscribe for 1.5 Lien Notes.

11d. In an attempt to manipulate the outcome of the vote in advance and to disenfranchise Wilks, Calfrac tried to persuade the TSX listings committee that it should:

³ Circular, page 5; TSX 1.5 Lien Note Resolution, Circular, Appendix B.

- a. allow a non-insider who was participating in the 1.5 Lien Note private placement to vote; and
- b. disallow any votes cast by Wilks notwithstanding that Wilks was not participating in the 1.5 Lien Note private placement.

The TSX listings committee properly refused to do so.

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 securityholders 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 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, 2020, 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 the consideration to be paid to Shareholders ~~recovery~~ under the Transaction. Calfrac also postponed the Meetings twice, first to September 29, 2020 and then to October 16, 2020, 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.⁴ 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~~ cast at 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.

⁴ 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 2nd 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.”

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 the Transaction as described above.

21a. AIMCo also voted for the Transaction notwithstanding the Glass Lewis and ISS recommendations. 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.⁵~~

~~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.~~

23. Calfrac was well aware that Wilks would vote against the TSX 1.5 Lien Note Resolution due to its opposition to the Transaction. It was for that reason Calfrac attempted, unsuccessfully,

⁵ Circular, page 5; TSX 1.5 Lien Note Resolution, Circular, Appendix B.

to disenfranchise Wilks by requesting that the TSX exclude Wilks from voting (despite the fact that Wilks was a disinterested Shareholder) and to allow a non-insider receiving direct benefits in the 1.5 Lien Transaction to vote (despite the fact that disinterested shareholder approval was specifically required by TSX policy).

24. Accordingly, AIMCo would have 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 as not “disinterested”. However, AIMCo’s votes were also required by the TSX to be excluded, as a result of its own subscription for 1.5 Lien Notes.

~~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. As it turned out, these steps were not taken, and as a result, the Company~~

25. As Calfrac has now revealed, AIMCo’s votes were in fact wrongfully included in the vote tally and, as a result, Calfrac 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, which they should have been as required by the TSX, the TSX 1.5 Lien Note Resolution failed (with only 39% of the required disinterested Shareholder vote).

26. The TSX provided final approval of the 1.5 Lien Note private placement and listed the underlying common shares on the basis of Calfrac’s untrue representations that the conditions imposed for listing of the common shares underlying the 1.5 Lien Notes by Calfrac had been met. These representations included (i) an incorrect certified copy of the Shareholders’ resolution evidencing their approval of the 1.5 Lien Note Private Placement, on a disinterested basis, excluding the votes of Shareholders and their associates and affiliates participating directly or indirectly in the 1.5 Lien Note Private Placement; and (ii) an incorrect copy of the scrutineer’s report evidencing the disinterested Shareholder approvals referred to above.

Court Approval

27. Calfrac filed an affidavit sworn by 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, 2020.⁶ 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, but leave to appeal was not granted.

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”.⁷ 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 purchase of such Notes was somehow not discovered at the time of subscription. Calfrac did not explain the consequence of this discovery in this news release.

29a. In fact, the news release was so intentionally vague, describing the issue as one of “modified disclosure”, that even a sophisticated investor could not reasonably discern from its contents what the implications or consequences of this announcement was as it related to the Transaction and the prior representations of Calfrac regarding its fulfillment of the conditions imposed for listing of the common shares underlying the 1.5 Lien Notes.

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

⁶ 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**”).

⁷ Calfrac news release dated March 1, 2021.

Notes and to cancel the applicable 1.5 Lien Notes (the “**AIMCo Subscription**”).⁸ 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.

30a. Calfrac has failed to offer any adequate explanation for its failure to exclude AIMCo from the vote. Calfrac asserted that the “proper execution of the vote exclusions was top of mind for Calfrac and Kingsdale”, which was obviously not the case given the severity of the error, and that Kingsdale had confirmed from their audit that they had “identified no entities to suggest AIMCo...participated” in the vote. However, the importance of AIMCo’s position to the result of the vote required that Calfrac and/or Kingsdale do more than the very bare minimum to ascertain whether AIMCo was a disinterested Shareholder.

30b. In fact, even the simplest of procedures could have been used to verify that subscribers for 1.5 Lien Notes (and their affiliates) were not also voting as “disinterested shareholders” – a single question to AIMCo would have sufficed. However, Calfrac’s procedures were so incredibly inadequate that nothing of the sort was done, despite the critical importance of the vote, demonstrating a completely irresponsible approach to corporate governance.

30c. The TSX record demonstrates clearly that the subscription by AIMCo for the 1.5 Lien Notes was not a mistake or clerical error. AIMCo intended to subscribe for the 1.5 Lien Notes and appears to have subscribed for the maximum amount that could have been allotted to them. The agreement to rescind the purchase of the 1.5 Lien Notes is, therefore, an attempt to rewrite history on an *ex post facto* basis and create a Shareholder approval that was never obtained.

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.~~ Wilks’ concerns are only amplified having reviewed the TSX Record and Reasons.

32. On March 29, 2021, Calfrac announced that the TSX had granted the exemptive relief requested by Calfrac (the “**Exemptive Relief**”).⁹ According to Calfrac, the Exemptive Relief

⁸ Calfrac news release dated March 12, 2021.

⁹ 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~~

“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”.¹⁰

33. Calfrac has not disclosed to the market that, in granting the Exemptive Relief, the TSX concluded that Calfrac had materially failed to comply with TSX rules – referring to the matter as one of “significant non-compliance”.

~~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”.~~

TSX Decision

34. In considering Calfrac’s request for the Exemptive Relief, the TSX improperly emphasized and misapprehended the uncertainty in the marketplace that would result if the Exemptive Relief were not granted while ignoring the diminished quality of the marketplace if the Exemptive Relief were granted. In doing so, the TSX largely disregarded Calfrac’s clear breaches of TSX requirements and the precedent set by failing to hold Calfrac to account for its wrongful conduct. 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. The TSX recognized that the “inclusion of AIMCO’s votes on the 1.5 Lien Note Resolution constitutes a matter of significant non-compliance with the TSX rules...” and yet granted the Exemptive Relief because of its misplaced concerns regarding market uncertainty if the relief was not granted.

~~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”.~~

¹⁰ Calfrac also filed a March 29, 2021 affidavit of Mathison with the Court to correct the Meeting Affidavit.

35a. The TSX is Canada's premier stock exchange. The listing by a company of its securities on the TSX is a privilege, not a right. Investors trade in securities listed on the TSX with the expectation that listed companies will be held to strict compliance with the exchange's rules and policies as these rules and policies have been put in place to protect investors and ensure the integrity of the market. The "quality of the market" provided by the TSX is wholly dependent on the extent to which the TSX enforces compliance with these rules and policies by listed companies. In fact this Commission has stated that "The interpretation and application of the provisions of the TSX Manual are not just matters affecting the relevant issuer and the TSX. Those provisions form part of the fabric of securities regulation and involve broader market integrity, investor protection and public interest considerations".¹¹

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'

¹¹ HudBay Minerals Inc., Re, 32 OSCB 1089, para. 36.

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.

Remarkably, Calfrac also attempted to disenfranchise Wilks – one of its major shareholders – simply because Wilks disagreed with the Transaction. That affront to shareholder democracy shows not only that Calfrac's corporate governance practices fall well below the standard expected of issuers listed on the TSX but also calls for enhanced scrutiny of the circumstances surrounding the vote on the TSX 1.5 Lien Notes Resolution and calls into question whether Calfrac acted in good faith in pursuing the Transaction, including in its dealings with the TSX.

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.

The TSX Record reveals that the TSX reviewed and approved the Calfrac press releases notwithstanding the deficient disclosure. The TSX failed to provide appropriate oversight in this regard.

Further, it is apparent that the imposition of enhanced compliance and disclosure review of Calfrac in the TSX Decision has not had its intended effect. The TSX granted the Exemptive Relief on March 24, 2021, but Calfrac failed to disclose it until March 29, 2021.

37. Second, the TSX did not identify or consider it is not known whether Calfrac's submissions to the TSX resolved concerns that the rescission (repurchase) of the notes could be was 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. Calfrac's solution to the problem of its initial breach of TSX requirements was to commit a further serious breach of Ontario securities laws. However, Calfrac failed or refused to identify that issue for the TSX, including in a legal opinion provided to the TSX. As a result, the TSX did not even consider the requirements of National Instrument 62-104. Ensuring compliance by issuers with applicable securities laws is obviously central to the "quality of the marketplace", but in this case the matter was not considered at all given Calfrac's failure or refusal to raise it with the TSX.

37a. Third, the TSX relied on the absence of shareholder complaints made to Calfrac. However, Calfrac's opaque and insufficient disclosure did not properly inform Shareholders about the impact of the failure to exclude AIMCO's vote, or that such failure was a matter of significant non-compliance with TSX rules. In other words, Calfrac's Shareholders did not know there was anything to complain about. In any event, it is unclear why this factor was relied on or considered at all given that the TSX had Wilks' complaint in hand. Wilks' complaint should not have been given less weight or less consideration because it was made to the TSX directly and not to Calfrac.

37b. Fourth, the TSX was improperly concerned with the harm that would result from "delisting securities and unwinding almost three months of trading..." This misapprehension of the logical outcome of a refusal to grant the Exemptive Relief, together with the "unique" nature of the fact scenario and submissions by Calfrac, appears to have led to the TSX concluding that it had no choice but to grant the Exemptive Relief. That was not the case. The TSX could have exercised

its discretion to delist the securities without unwinding any of the trading that had taken place. That outcome would have both addressed the significant non-compliance by Calfrac while entirely protecting the quality of the marketplace.

37c. Fifth, the TSX did not adequately consider the impact on the marketplace of the precedent set by the TSX Decision, which sends a strong signal to market participants that the TSX rules can be ignored wholesale or retroactively modified when necessary to simply accomplish a desired result. The TSX concluded as follows: “The facts in this instance are very unique (the Committee noted that it has not previously encountered such a scenario). As a result, the likelihood of setting a bad precedent for issuer conduct appears to be limited.” That is simply wrong. Regardless of whether a fact situation is “unique”, a strong signal must be sent to the market to prevent setting a bad precedent for issuer conduct in the future,

38. Finally, the TSX focused on the deprivation of any benefit to AIMCo as a result of the rescission. The proper focus should be on the consequences imposed on Calfrac as a result of its substantial failure to comply with TSX requirements. Had the TSX been provided with and applied the law correctly, been provided with and considered the facts in their entirety, and exercised its discretion reasonably, it would not have granted the Exemptive Relief.

38a. The TSX Decision sends a strong message that issuers can be careless in their approach to shareholder votes and, as long as the mistake has had enough time to crystallize in the marketplace, the TSX will not impose meaningful consequences.

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 Securities 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.

39a. Calfrac described its own failure to exclude AIMCo's votes as "undoubtedly regrettable". This is a gross understatement. The incorrect tabulation of the TSX 1.5 Lien Note Resolution vote was entirely preventable. If Calfrac had taken its obligations as a TSX-listed issuer seriously, it would have (and very easily could have) determined whether AIMCo qualified as a disinterested shareholder. Calfrac has acknowledged that it has broken the rules in a very serious way, but as a result of the TSX Decision it will not suffer any meaningful consequence for its conduct and other issuers may avail themselves of a similar approach in the marketplace. The Commission cannot allow the TSX Decision to stand.

39b. The relief requested from the Commission does not result in the harm the TSX was concerned about. None of the remedies proposed will unwind the Transaction. Even if Calfrac's securities were delisted by the TSX, the Transaction would stand, the trades made prior to delisting would remain settled, and Calfrac would remain free to pursue an alternative listing. Wilks has proposed focused remedies that are directly responsive to Calfrac's failure to comply with the TSX rules and are designed to ensure that, in the future, Calfrac conducts its affairs in a manner consistent with the expectations of investors who trade in securities of TSX-listed companies.

40. Wilks fully anticipates that Calfrac will respond to this application by impugning Wilks' motivation. This is predictable and consistent with Calfrac's animus towards Wilks in connection with Wilks' opposition to the Transaction, including its wholesale attacks on Wilks' credibility and its recently-discovered attempt to disenfranchise Wilks by excluding its vote. Wilks was the second largest stakeholder of Calfrac before the Transaction and as the Alberta Court of Appeal recognized, "stakeholders are not required to acquiesce in a proposed arrangement; opposing an arrangement is not improper. If nothing else, Wilks Brothers' opposition caused Calfrac to sweeten the deal for the shareholders".¹² Calfrac should avoid conducting itself by continuing to place what the Alberta Court of Appeal described as "an unfortunate focus on the perceived legitimacy of Wilks Brothers' opposition..."¹³ Wilks remains a shareholder of Calfrac and brings this application in good faith for the purpose of preventing the harm to the marketplace that will result if the TSX Decision stands.

¹² 12178711 Canada Inc. v Wilks Brothers, LLC ("12178711 Canada Inc."), 2020 ABCA 430, para. 73.

¹³ 12178711 Canada Inc., para. 73.

~~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, affidavits to be filed, and such further evidence as counsel may advise.

~~Dated this 22nd day of April, 2021,~~
31st day of May, 2021

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