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Citation: Wilks Brothers, LLC (Re), 2021 ONSEC 25
Date: 2021-10-06
File No. 2021-12

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.

REASONS FOR DECISION
(Section 21.7 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	July 12, 2021	
Decision:	October 6, 2021	
Panel:	Timothy Moseley Lawrence P. Haber Frances Kordyback	Vice-Chair, and Chair of the Panel Commissioner Commissioner
Appearances:	Lara Jackson John M. Picone Stephanie Voudouris	For Wilks Brothers, LLC
	Robert Staley Chris Simard Brent Kraus Jason M. Berall	For Calfrac Well Services Ltd.
	David D. Conklin Robert J. Chadwick Bradley Wiffen	For the Noteholder Intervenors
	Eliot Kolers Alexander D. Rose Ben Muller	For TSX Inc.
	Yvonne Chisholm Jason Koskela David Mendicino Vivian Lee Ashley Hsu	For Staff of the Commission

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REASONS FOR DECISION

I. OVERVIEW

[1] Wilks Brothers, LLC (**Wilks**) is a long-time and significant shareholder of TSX-listed Calfrac Well Services Ltd. (**Calfrac**). Wilks asks the Commission to review a decision by TSX Inc. (the **TSX**) to grant exemptive relief to Calfrac.

[2] That relief essentially allowed Calfrac to correct, retroactively, a shareholder vote related to Calfrac's recapitalization. At the time the vote was conducted, Calfrac inadvertently included votes from a shareholder whose votes should have been excluded. The shareholder was ineligible to vote because it had earlier subscribed for certain of Calfrac's debt securities that allowed for conversion to common shares at a discounted price. The error was not discovered until four months after the vote.

[3] The TSX's decision permitted the shareholder to rescind the subscription for the debt securities, thereby qualifying the shareholder's votes for inclusion in the recapitalization vote.

[4] Wilks submits that the TSX erred in granting relief and that we should intervene. Calfrac disagrees, and contends that Wilks does not have standing to bring this application. We issued an order[1] after the hearing of this application, by which we confirmed Wilks's standing to bring this application but dismissed the application, for reasons to follow. These are our reasons.

[5] As we explain below, we concluded that Wilks had standing because it was directly affected by the TSX's decision. However, we reject Wilks's contentions that the TSX erred by considering irrelevant grounds when reaching its decision, or by imposing an illegal condition, or by overlooking material evidence. We also disagree with Wilks's submission that the TSX's perception of the public interest conflicts with that of the Commission.

II. BACKGROUND FACTS

[6] Calfrac provides oilfield services in Canada and elsewhere. Its head office is in Calgary. In 2020, Calfrac sought to raise new capital and to reduce its outstanding indebtedness. It undertook a recapitalization transaction, effected pursuant to an arrangement under the *Canada Business Corporations Act*[2] (the **Arrangement**). The Arrangement had the following results, among others:

a. holders of certain of Calfrac's unsecured notes received, in aggregate, approximately 90% of Calfrac's common shares in exchange for their notes;

b. existing common shareholders could elect to have Calfrac repurchase any or all of their shares, following which any common shares retained were consolidated on a 50:1 basis; and

c. Calfrac completed a $60 million private placement of 10% 1.5 lien senior secured convertible notes (the **Lien Notes**).

[1] (2021) 44 OSCB 6041
[2] RSC 1985, c C-44

[7] It is the last of the above three elements that gives rise to this proceeding. The shares that would be issued upon conversion of the Lien Notes were to be listed on the TSX. TSX regulations required that a majority of disinterested holders of common shares vote to approve that listing. Because only disinterested shareholders could vote, parties who had subscribed for the Lien Notes were to be excluded.

[8] One shareholder who subscribed for the Lien Notes was Alberta Investment Management Corporation (**AIMCo**), a large institutional investment manager. AIMCo manages significant investments of pension, endowment and government funds in Alberta.

[9] AIMCo is a long-time investor in Calfrac. In mid-2020, AIMCo held approximately 17% of Calfrac's shares and more than US$30 million of its unsecured notes. AIMCo subscribed for $1.05 million of the $60 million Lien Note private placement, an amount that was immaterial to AIMCo, Calfrac, and the private placement.

[10] However, because AIMCo had subscribed for Lien Notes, its shares ought to have been excluded from the October 2020 vote to approve the TSX listing. Instead, as we explain in more detail below, AIMCo's shares were erroneously included in the vote. This error was not discovered until four months later, after the Arrangement had been approved by the Court of Queen's Bench of Alberta.

[11] The erroneous inclusion of AIMCo's votes occurred despite:

a. Calfrac's issuance of an August 2020 management information circular about the Arrangement, which explicitly stated that common shares held by shareholders who subscribed for Lien Notes would be excluded from the vote;

b. September 2020 advice from Calfrac's proxy solicitation agent, in response to an inquiry from Calfrac's outside counsel, that the proxy solicitation agent's audit "identified no entities to suggest AIMCo" had subscribed for the Lien Notes; and

c. a further confirmation from the proxy solicitation agent, the day before the October 2020 vote, that AIMCo had not been identified as a participant in the offering of the Lien Notes.

[12] Wilks, which had been a shareholder of Calfrac since 2014, held approximately 20% of Calfrac's common shares. Wilks opposed the recapitalization for several reasons, including that it would be dilutive, that it would not adequately address the challenges Calfrac was facing, and that it would confer significant benefits on certain parties, including Calfrac's founder and executive chair.

[13] The resolution to approve the listing passed, with support from 57% of the voting shareholders, including AIMCo. Had AIMCo's votes been excluded, as they should have been, the resolution would have failed.

[14] When the error was discovered in February 2021, it became clear that AIMCo had subscribed for the Lien Notes through a custodian that had a Toronto address and in the beneficial name of an entity that had no apparent connection to AIMCo. There is no evidence to suggest that this was done for any improper purpose. It was an immaterial transaction for AIMCo. AIMCo supported Calfrac's efforts and did not want to be excluded from the vote.

[15] After Calfrac discovered the error, it notified the TSX, the Alberta Securities Commission, and the Alberta court that had approved the Arrangement. Calfrac also issued a press release.

[16] In March 2021, Calfrac applied to the TSX for exemptive relief. Calfrac proposed to enter into an agreement with AIMCo (the **AIMCo Agreement**) that would fully rescind AIMCo's subscription for the Lien Notes. In essence, Calfrac asked the TSX to recognize AIMCo's desire to treat the vote as if AIMCo had not subscribed for the Lien Notes, thereby validating the inclusion of AIMCo's votes in support of the resolution, and confirming the previously announced approval of that resolution.

[17] Soon after Calfrac applied to the TSX for relief, Wilks's counsel sent a letter to the TSX, responding to and opposing Calfrac's application. Later in March, the TSX advised that it was granting the exemptive relief that Calfrac sought. For the purposes of this proceeding, that decision by the TSX (the **TSX Decision**) comprises two documents – a memo prepared by TSX staff (the **Staff Memo**), and minutes of a meeting of the TSX's Listings Committee (the **Committee Minutes**), at which that committee considered the Staff Memo.

III. LEGAL FRAMEWORK

[18] We turn now to the legal framework that applies to Wilks's request that we review the TSX Decision.

[19] Wilks brings this application under s. 21.7 of the *Securities Act*[3] (the **Act**). That section permits a company that is directly affected by a decision of various listed entities, including a recognized exchange (*e.g.*, the TSX), to bring such an application.

[20] On an application of this kind, the Commission conducts a hearing *de novo* rather than an appeal. In other words, the Commission exercises original jurisdiction rather than a more limited appellate jurisdiction.[4] The Commission may confirm the decision under review or make such other decision as it considers proper.[5]

[21] The Commission need not defer to decisions of entities listed in s. 21.7 of the Act.[6] However, the Commission has chosen as a matter of practice to limit the circumstances under which it will substitute its own decision.[7] We expand on this choice below in our analysis of the merits of the application.

IV. PRELIMINARY MATTERS

[22] Before we analyze the merits, we set out our reasons for concluding that Wilks has standing to bring this application, and we address the request by three entities for intervenor status in this proceeding.

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[3] RSO 1990, c S.5
[4] *HudBay Minerals Inc. (Re)*, 2009 ONSEC 15, (2009) 32 OSCB 3733 (***HudBay #2***) at paras 106-107
[5] Act, s. 8(3)
[6] *Johal v Funeral Services*, 2012 ONCA 785 at para 4
[7] *Pariak-Lukic v Investment Industry Regulatory Organization of Canada*, 2016 ONSC 2564 (Div Ct) at para 14

A. Wilks's standing to bring this application

1. Introduction

[23] Calfrac contended that Wilks should not have standing, because Wilks was not "directly affected by" the TSX Decision and therefore fails to meet the test in s. 21.7 of the Act. The parties agreed that the question should be resolved by a motion brought by Calfrac (the **Standing Motion**).

[24] Calfrac submitted that the Standing Motion should be heard separately, before the hearing of the merits of Wilks's application. Wilks and Staff of the Commission disagreed.

[25] We issued an order on June 9, 2021,[8] by which we communicated our decision not to bifurcate the two hearings, for reasons to follow. We set out our reasons here, and then address the question of Wilks's standing.

2. Whether to bifurcate the hearings

(a) Factual background

[26] At the first attendance in this proceeding on May 18, 2021, Calfrac, Wilks and Staff agreed that the standing issue should be determined after all parties had filed both their evidence and their written submissions on the main application. In advance of those steps, the parties would file separate submissions on the question of whether to bifurcate the hearings.

[27] A few days after the first attendance, the parties advised that they had agreed on a schedule for the main application, should it proceed. Wilks and Calfrac would file all their evidence by June 22. No other party would file any evidence. The main application would be heard on July 12 and 13, at which time the parties could cross-examine those who had submitted affidavits.

[28] The agreed-upon schedule contemplated two alternatives:

a. if the hearing of the Standing Motion were to be bifurcated from the hearing of the main application, then all written submissions on the main application would be filed by July 2, and the Standing Motion would be heard on July 7 (three business days before the hearing of the main application); or

b. if the hearings were not to be bifurcated, then all written submissions on the main application would be filed by July 7 (three business days later than would have been the case under the first alternative), and the Standing Motion and main application would be heard together on July 12 and 13.

[29] Either way, the Standing Motion would be heard after all evidence and written submissions had already been filed. As we explain below, this fact was central to our decision not to bifurcate the hearings.

(b) Analysis

[30] Calfrac submitted that the hearings should be bifurcated for two reasons.

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[8] (2021) 44 OSCB 5138

[31] First, there is no urgency to this proceeding that would require a compressed timetable. It was common ground that this was so. There was no live transaction or similar source of time pressure.

[32] However, we see no connection between that fact and the question of whether the hearings in this case should be bifurcated. The overall timetable was established by agreement of all parties. The main application was to be heard on July 12 and 13 (if at all), whether the hearings were bifurcated or not. In the unusual circumstances of this case, the lack of urgency was not relevant to the question of bifurcation.

[33] Second, Calfrac submitted that the issue of standing could be determined preliminarily, and that doing so would avoid the unnecessary effort that would be required to resolve most of the issues on the main application.

[34] For us, this was the core issue. There is no question that we have the discretion to bifurcate the hearings. In determining whether we should do so, we considered the anticipated evidence and identified the issues relating to standing and to the merits of the application itself. Having done that, the question was whether it would be impractical or inefficient to separate the hearings.[9]

[35] We began our analysis by considering the two issues presented by the Standing Motion:

a. Did the TSX Decision have an immediate effect on Wilks as opposed to a speculative effect?[10]

b. Were Wilks's rights or economic interests directly affected in a way that is more than incidental and that is distinct from a general interest in the outcome?[11]

[36] Our decision not to separate the hearings was based primarily on our conclusions that:

a. the two issues presented by the Standing Motion were intertwined with the issues that would arise at the hearing on the merits;

b. contrary to Calfrac's submission that the outcome of the Standing Motion should depend almost entirely on a single fact, *i.e.*, that Wilks was not a holder of Lien Notes, in our view the outcome might well depend on a more extensive factual matrix; and

c. therefore, it might well assist us to have all the evidence, including any cross-examination, and any such cross-examination would have to take place at the hearing of the Standing Motion.

[37] In addition, we were not persuaded that bifurcation would result in a more efficient process. If the Standing Motion were heard separately, the hearing of that motion would likely take most or all of a day. If we dismissed the motion and the merits hearing proceeded, the merits hearing would likely take at least a day. The total hearing time would therefore be approximately two days whether

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[9] *Catalyst Capital Group Inc. (Re)*, 2016 ONSEC 14, (2016) 39 OSCB 4079 at para 45
[10] *Reuters Information Services (Canada) Limited (Re)*, (1997) 20 OSCB 2277 at 2281; *Independent Financial Brokers of Canada*, 2009 ONSEC 42, (2009) 32 OSCB 9048 at para 36
[11] *HudBay #2* at para 73; *Kasman (Re)*, 2008 ONSEC 26, (2008) 31 OSCB 11605 at paras 65-66

or not we ordered bifurcation. There would also be a risk of duplication of submissions between the two hearings.

[38] Further, bifurcation would not reduce preparation time by this panel. The materials were likely to be voluminous. If the hearings were separated, the Standing Motion would be heard only three business days before the merits hearing. Either way, we would have had to review all the materials before the hearing of the Standing Motion. Presumably, the same would go for all parties. No appreciable efficiency would be gained by bifurcation.

[39] For all these reasons, we ordered that the Standing Motion and the merits of the application be heard together.

[40] We turn now to our analysis of the Standing Motion itself.

3. Whether Wilks has standing

[41] Wilks has standing to bring this application if it can establish that it is "directly affected by" the TSX Decision. We agree with Wilks that it meets this test.

[42] As this Commission has previously held, one whose rights or economic interests have been affected by a decision of the TSX is directly affected by that decision.[12]

[43] The TSX Decision affected Wilks's rights and economic interests. It changed the parameters of a shareholder vote in which Wilks had participated. The TSX required that only disinterested shareholders approve the Lien Note private placement because the private placement would directly affect those disinterested shareholders.

[44] Wilks was a disinterested shareholder holding approximately 20% of Calfrac's common shares at the time of the Arrangement. Wilks opposed the dilutive effect of the transaction. Wilks and other disinterested shareholders were entitled to assume that only disinterested shareholders would vote. A correction to the determination of which shareholders were truly disinterested and therefore entitled to vote was fundamental to that vote, whether or not that correction would change the result.

[45] We reject Calfrac's attempt to characterize the TSX Decision as having had no impact on Wilks's right to vote. Of course, Wilks voted, and its votes were counted. But Wilks's interests do not stop there. Wilks had the right to know that the vote was open only to disinterested shareholders.

[46] Calfrac further argues that Wilks failed to adduce sufficient evidence of the extent of its interest in Calfrac. We reject this submission as well. While it is true that we had no evidence of the extent of Wilks's interest when Wilks brought this application or when we heard the application, we heard no persuasive reason why that information would matter.

[47] Wilks's shareholdings of Calfrac at the time of the vote were clearly specified in the TSX Decision. It is those shareholdings that should be considered when deciding whether Wilks was directly affected by the TSX Decision. Wilks objects to the TSX Decision based on the record that was before the TSX, not based on any later developments.

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[12] *HudBay #2* at para 73

[48] A subsequent change in Wilks's shareholdings might, under some circumstances, affect the outcome of this application. However, Calfrac identified no such circumstances in this case. In any event, the question of whether there might be an effect on the outcome of this application is unrelated to the question of whether Wilks has standing to bring the application in the first place.

[49] Finally, we decline Calfrac's invitation to apply the distinction, made by the Commission in *Re HudBay Minerals Inc.,* between a "general interest" and a "personal and individual interest",[13] for two reasons:

a. First, we reject Calfrac's assertion that Wilks is no differently situated than any other Calfrac shareholder. The extent of Wilks's shareholdings and the resulting leverage that Wilks might be able to apply in a shareholder vote distinguish Wilks from other shareholders.

b. Second, even if Wilks's shareholdings were less significant, it is unlikely that we would conclude that Wilks's interest was "general", in the way the Commission used that term in *HudBay*.

[50] Wilks was directly affected by the TSX Decision. It therefore has standing to bring this application.

B. Intervenors

[51] Before turning to the substantive issues on this application, we address the request for intervenor status in this proceeding by three entities:

a. Glendon Capital Management LP;

b. Signature Global Asset Management, a division of CI Investments Inc.; and

c. EdgePoint Investment Group, Inc.

[52] The three proposed intervenors are all investment management companies who were holders of Calfrac's unsecured notes prior to the recapitalization, and who supported Calfrac's intended recapitalization. Together, the three proposed intervenors subscribed for almost 30% of the Lien Notes.

[53] The three entities sought standing to make oral and written submissions in this proceeding, as contemplated by Rule 21(4) of the *Ontario Securities Commission Rules of Procedure and Forms*.[14]

[54] All parties to this proceeding consented to the proposed intervenors' request. In light of that consent, and in light of the fact that the proposed intervenors did not seek to adduce evidence, we concluded that they would bring a perspective different from that of the parties to the application, without appreciably lengthening the hearing or adding to its complexity. We therefore granted the request.

[13] *HudBay #2* at para 73
[14] (2019) 42 OSCB 9714

V. ANALYSIS

A. Introduction

[55] We turn now to the issues at the heart of this application. We begin by expanding on our earlier comments about the Commission's restraint with respect to decisions of self-regulatory organizations and exchanges. We then review each of Wilks's objections to the TSX Decision.

[56] We mentioned above that while the Commission need not defer to a self-regulatory organization or exchange, it has chosen to do so as a matter of practice. While a recognized exchange such as the TSX is not a self-regulatory organization as that term is used in the Act, the Commission's restraint regarding recognized exchanges aligns with the principle applicable to self-regulatory organizations, whose expertise the Commission is required by the Act to recognize.[15] With respect to the TSX in particular, the Commission's restrained approach is "based on the expertise of the exchange" and the care with which the TSX's listings committee "approaches its responsibilities".[16]

[57] The Commission has often stated[17] that it will interfere with a decision of a self-regulatory organization or recognized exchange only if:

a. the decision maker proceeded on an incorrect principle;

b. the decision maker erred in law;

c. the decision maker overlooked some material evidence;

d. new and compelling evidence is presented to the Commission that was not presented to the decision maker; or

e. the decision maker's perception of the public interest conflicts with that of the Commission.

[58] The TSX submits that this approach is a "reasonableness standard". While there are some similarities, there are also differences. We decline to adopt the suggested reformulation.

[59] Wilks submits that the TSX erred in four ways:

a. it considered irrelevant grounds in exercising its discretion, and thereby proceeded on an incorrect principle and erred in law;

b. it imposed a condition that was contrary to law, and thereby proceeded on an incorrect principle and erred in law;

c. it overlooked material evidence; and

d. it adopted a flawed view of the public interest.

[60] We will now address these four alleged errors.

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[15] Act, s. 2.1 para 4

[16] *Eco Oro Minerals Corp (Re)*, 2017 ONSEC 23, (2017) 40 OSCB 5321 (***Eco Oro***) at para 79

[17] *HudBay #2* at para 105; *Canada Malting Co. (Re)*, (1986) 9 OSCB 3565 (***Canada Malting***) at para 24; *Marek (Re)*, 2017 ONSEC 41, (2017) 40 OSCB 9167 at para 24

B. Did the TSX consider irrelevant grounds, and thereby proceed on an incorrect principle and err in law?

1. Introduction

[61] The first error that Wilks alleges is that the TSX considered irrelevant grounds. We disagree.

[62] The TSX granted the exemptive relief under section 603 of the *TSX Company Manual*, which makes "the quality of the marketplace" the central consideration. The manual states that when the TSX exercises its discretionary authority under that section, the TSX will assess the effect the transaction may have on the quality of the marketplace it provides.

[63] As the Commission has previously noted, "the 'quality of the marketplace' is a broad concept of market integrity that requires a careful consideration of all the relevant factors in the particular circumstances".[18] These considerations go beyond the issuer: "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".[19]

[64] The manual says that the TSX will base its assessment of the quality of the marketplace on six enumerated factors, among others. Wilks submits that the TSX addressed the six factors only perfunctorily and instead focused on irrelevant considerations. Wilks says that in doing so, the TSX proceeded on an incorrect principle and erred in law.

[65] We disagree with Wilks's characterization. In our view, the TSX properly considered the enumerated factors and the impact of the relief sought on the quality of the marketplace.

[66] The six factors set out in the manual are as follows:

a. the involvement of insiders or other related parties of the issuer in the transaction;

b. the material effect on control of the issuer;

c. the issuer's corporate governance practices;

d. the issuer's disclosure practices;

e. the size of the transaction relative to the liquidity of the issuer; and

f. the existence of an order issued by a court or administrative regulatory body that has considered the security holders' interests.

[67] While Wilks asserts broadly that the TSX addressed these factors perfunctorily, Wilks does not point to any of the factors specifically and explain how a more thorough examination of that factor might have changed the outcome.

[68] The Staff Memo reviews in detail sections 607(e) and (g) of the TSX manual, which deal with discount from market price and the need for approval by disinterested security holders in private placements. The Staff Memo notes that "both insiders, specifically, and shareholders 'participating in the private

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[18] *HudBay #2* at para 212

[19] *HudBay Minerals Inc. (Re),* (2009) 32 OSCB 1089 (***HudBay #1***) at para 36

placement', generally, were required to be excluded from the vote for TSX approval purposes."[20] It goes on to consider each of the six factors set out above, as well as two additional factors (*i.e.*, the need to unwind other transactions, and the unlikelihood that granting the discretionary relief would undermine the notion of predictability).

[69] Instead of specifying how a different consideration of the six factors ought to have changed the outcome, Wilks makes two main objections to the TSX's approach:

a. First, the TSX Decision contemplated that if the Lien Note private placement were not permitted to stand, related transactions and a listing would need to be reversed. Wilks submits that this consideration is an extraneous and irrelevant factor.

b. Second, while the TSX cited the importance of predictability and enforcement of TSX rules, Wilks says that the TSX then ignored that factor in its decision. Wilks submits that the TSX improperly distinguished between purposeful and inadvertent breaches of its rules.

[70] We examine each of these two objections in turn.

2. Alleged need to reverse related transactions and listing

[71] As Wilks observes, the TSX referred to a need to reverse related transactions, including a listing, if the Lien Note private placement were not permitted to stand. TSX staff highlighted this point in the Staff Memo by noting that the Arrangement included the following aspects, relevant to this issue:

a. the Lien Note private placement was a condition of closing; and

b. it included three related transactions:

   i. the issuance of publicly listed warrants;

   ii. the consolidation of publicly traded shares; and

   iii. the additional listing of publicly traded shares (the **Conversion Shares**) in exchange for debt.

[72] The Staff Memo contemplates that if the Lien Note private placement were not allowed to stand, all three of these related transactions would "presumably need to be reversed, meaning that all post-Arrangement trading in the [three securities mentioned]… would need to be unwound." TSX staff observed that doing so "would result in great uncertainty in the market."[21]

[73] Wilks submits that the concern with unwinding the transactions and any subsequent trades should have had no place in an evaluation of the quality of the marketplace.

[74] We do not accept that as a general proposition. We agree with the intervenors' submission that the quality of the marketplace is enhanced where stakeholders can be certain that court-approved arrangements, and in particular the attributes of securities issued in connection with such arrangements, will not be subject to retroactive modification.

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[20] TSX Listings Committee Memo dated March 22, 2021, TSX Record, Tab 1A, pp. 11-12

[21] Staff Memo, p. 10

[75] The passage of time between the listing of the Conversion Shares and Calfrac's application to the TSX did limit the TSX's ability to unwind the entire group of transactions. If any noteholder were to exercise the conversion option, the Conversion Shares issued as a result would join the pool of fungible common shares of Calfrac. There would be no way to trace the Conversion Shares after their issuance, and similarly, there would be no practical way to reverse the listing of those shares. The Committee Minutes acknowledge that the TSX had the jurisdiction to rescind its approval of the listing. However, the minutes also record the TSX's conclusion that the quality of the marketplace could be greatly harmed if the TSX were to do so.

[76] In response, Wilks submits that in this case, the above analysis by the TSX is based on a false premise. Wilks argues that nothing the TSX could have done would have taken the Lien Notes out of the hands of their holders. The TSX had no authority to unwind the private placement and related transactions. Had the TSX refused exemptive relief, there would have been no need to reverse related transactions, there would have been no impact on post-arrangement trading, and there would have been no need to unwind anything. All settled transactions and trades would have remained settled. In that regard, says Wilks, the analysis set out in the TSX Decision is simply wrong.

[77] We agree with Wilks that there may not have been a need to unwind related transactions if the Lien Note private placement had not been allowed to stand. However, we also agree with the intervenors that there would have been real consequences suffered by investors if the TSX had denied Calfrac's request for relief. In any event, we do not find that the TSX based its decision primarily on the need to unwind transactions. That consideration was but one of many.

3. Importance of predictability and enforcement of TSX rules

(a) Introduction

[78] Wilks's second submission in support of its contention that the TSX focused on irrelevant factors relates to the importance of predictability and enforcement of TSX rules. We begin by considering that submission generally, following which we address Wilks's submission that the TSX impermissibly distinguished between deliberate and inadvertent breaches of rules.

(b) Enforcement of TSX rules generally

[79] The Staff Memo explicitly refers to the importance of the enforcement of TSX rules. It states that a "key factor in a quality marketplace is predictability i.e. participants should be able to rely on marketplace standards being adhered to".

[80] Wilks is more absolute in its submissions. It begins by making the uncontroversial assertion that the listing by a company of its securities on the TSX is a privilege, not a right. However, Wilks then goes on to state categorically that issuers that do not follow the rules should not be listed on the TSX.

[81] Wilks also submits that the quality of the market provided by the TSX is "wholly dependent" on the extent to which the TSX enforces compliance with its rules by listed companies, and that investors who trade in TSX-listed securities expect that listed companies will be held to "strict compliance" with the exchange's rules. Those quoted phrases from Wilks's written submissions are neither supported by authority nor helpful in this context.

[82] On the contrary, the TSX manual expressly provides that the TSX can exercise discretion when it applies its rules or waives its requirements, including the requirements of section 607 of the manual relating to the exclusion of shareholders from a vote. In our view, that discretion forms part of the framework of the TSX rules. In this case, it was open to the TSX to choose not to strictly apply section 607 of the manual in circumstances where AIMCo was clearly not motivated to vote by its "interest" in the Lien Note private placement, a fact clearly established by the existence of the AIMCo Agreement.

[83] Wilks submits that even though the Staff Memo describes predictability as a "key factor", the Listings Committee ignored that factor when making its decision. However, we note that the Committee Minutes explicitly state that:

a. the committee considered the factors set out in the Staff Memo; and

b. the committee concluded that "the likelihood of setting a bad precedent for issuer conduct appears to be limited."[22]

[84] This latter conclusion is consistent with the nuanced approach evident in the Staff Memo. That memo acknowledges that describing the vote as having been limited to disinterested shareholders would be outside the predictable interpretation of TSX policy, given AIMCo's participation. However, the memo notes that the risk of creating an "unfortunate marketplace precedent" by granting exemptive relief would be low, given the unusual circumstances.

[85] Given these references in the Staff Memo and the Committee Minutes, it cannot fairly be said that the TSX ignored predictability.

[86] Administrative decision makers need not provide perfect and complete detail when recording the reasons for their decisions. They need only provide a reasonable explanation for their decision.[23] The TSX benefits from that latitude in this case, especially given that the TSX did not conduct a hearing in the conventional sense. In our view, the Staff Memo and Committee Minutes, taken together, adequately consider the importance of predictability and enforcement.

(c) Distinction between purposeful and inadvertent breaches of TSX rules

[87] We now consider the TSX's conclusion that it would be prepared to delist an issuer in order to prevent it from "purposefully" breaching TSX rules, but not when an issuer does "not act with 'mala fides'". Wilks submits that this is highly problematic and contrary to the TSX's own acknowledgement that "participants should be able to rely on marketplace standards being adhered to".[24]

[88] As we have explained above, we do not accept Wilks's reformulation of the applicable test. It is true that participants should be able to rely on adherence to marketplace standards. That does not preclude the exercise of reasonable discretion, and nor should it. The public interest demands a nuanced approach, as opposed to strict enforcement without exception. The distinction between

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[22] TSX Listings Committee Meeting Summary dated March 24, 2021, TSX Record, Tab 1, p. 2

[23] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16 and 18; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para 1

[24] Staff Memo, p. 14

purposeful and inadvertent breaches of rules is an important element of the discretion associated with enforcement.

[89] In this case, the TSX had an adequate factual basis to apply that principle. The TSX was entitled to make its decision on that basis.[25] We reject the suggestion that because the TSX decision-making process does not include a thorough investigation, the TSX is precluded from relying on the facts before it. In this case, the facts before the TSX were detailed and were uncontested in every material respect.

[90] Those uncontested facts reveal that even though AIMCo's votes were erroneously included, the error was truly inadvertent and there was no hint of bad faith. It is true, as Wilks emphasizes, that the Committee Minutes describe the error as "a matter of significant non-compliance with TSX rules". However, that description is not inconsistent with the isolated and inadvertent nature of the error.

[91] It was not only appropriate for the TSX to take into account the true nature of the error – it was important for it to do so.

4. Conclusion that the TSX did not consider irrelevant grounds

[92] In our view, the TSX appropriately considered the six factors set out in section 603 of the manual, as well as the additional factors noted above, when it exercised its discretion to grant the exemptive relief. In particular:

a. the TSX appropriately defined the "quality of the marketplace" and applied the relevant factors, as set out in the manual, to the case before it;

b. the TSX Decision protects the quality of the marketplace by providing a remedy that respects the court-approved arrangement;

c. the TSX adequately addressed the importance of predictability and enforcement; and

d. the TSX appropriately noted that the rule breach in this case was neither purposeful nor accompanied by bad faith.

[93] We turn now to consider the second of Wilks's four alleged errors; namely, that the TSX imposed an illegal condition.

C. Did the TSX impose a condition that was contrary to law, and thereby proceed on an incorrect principle and err in law?

1. Introduction

[94] Wilks submits that we should intervene because the TSX imposed a condition that was contrary to law, and thereby proceeded on an incorrect principle and erred in law. The condition in question is the AIMCo Agreement, which Calfrac proposed to the TSX when Calfrac applied for exemptive relief.

[95] The TSX accepted Calfrac's proposal that exemptive relief be dependent upon the AIMCo Agreement, pursuant to which Calfrac would repurchase and cancel the Lien Notes issued to AIMCo, with a payment to AIMCo of $1.05 million less the interest payment made by Calfrac to AIMCo on March 15, 2021.

[25] *HudBay #2* at para 139

[96] Wilks submits that the AIMCo Agreement was in substance an issuer bid that did not comply with National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**). As a result, the condition was an impermissible violation of s. 21.6 of the Act, which provides that no "policy, procedure, interpretation or practice of a recognized exchange… shall contravene Ontario securities law".

[97] NI 62-104 is part of Ontario securities law, as that term is defined in s. 1(1) of the Act. It was common ground among the parties, and we agree, that if the AIMCo Agreement condition contravenes NI 62-104, the condition was impermissible.

[98] The parties answer Wilks's submission in two ways:

a. Calfrac observes that Wilks did not make this argument to the TSX, raising it for the first time in the hearing before us. Calfrac says that the TSX cannot be faulted for not addressing an issue that was not identified at the time.

b. Calfrac submits that the AIMCo Agreement is not an issuer bid. Staff adds that even if the AIMCo Agreement can be said to fall within a technical reading of NI 62-104, it does not engage the policy purpose of NI 62-104 and should therefore not be found to contravene that instrument.

[99] Our analysis of those submissions follows. Through that analysis, we conclude that:

a. Wilks was entitled to make this argument before us; and

b. the AIMCo Agreement is not an issuer bid, as that term is defined in NI 62-104.

2. Wilks was entitled to argue at this hearing, for the first time, that the AIMCo Agreement condition is illegal

[100] Calfrac submits that it is "inappropriate for an issue of this nature to be raised for the first time in an application for hearing and review."[26]

[101] Calfrac offers no authority for that submission. We reject it. We infer that Calfrac seeks to have us apply constraints that appellate courts sometimes impose when reviewing decisions of lower courts. In some circumstances, appellate courts will decline to hear arguments on an issue that was not raised in the court below.

[102] That kind of limitation does not suit the Commission's review of decisions of recognized exchanges such as the TSX, for three reasons. First, as we explained above, our review of a TSX decision under s. 21.7 of the Act is a hearing *de novo*, not an appeal. Second, unlike a court proceeding, the TSX's decision-making process features neither open preliminary discovery of opposing parties' positions nor a hearing at which those positions are aired and tested by the decision-maker. Third, imposing that kind of limitation in circumstances such as these would preclude an objection that the TSX did something it did not have the authority to do. The Commission must be able to consider an argument that the TSX imposed an illegal condition.

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[26] Calfrac's written submissions at para 132

[103] For these reasons, there is no bar to Wilks raising this issue before us for the first time. We will therefore turn to review the parties' submissions on the issue.

3. The AIMCo Agreement is not an issuer bid, as that term is defined in NI 62-104

[104] An "issuer bid" is defined in NI 62-104 as "an offer to acquire or redeem securities of an issuer made by the issuer to one or more persons."[27]

[105] Wilks submits that the AIMCo Agreement comes within this definition, in that the agreement provided for an acquisition or redemption of AIMCo's Lien Notes by Calfrac, the issuer of those notes.

[106] While that argument has superficial appeal, we disagree that NI 62-104, properly interpreted, applies to the AIMCo Agreement.

[107] Importantly, the AIMCo Agreement restored Calfrac and AIMCo to the positions they would have been in had AIMCo not subscribed for Lien Notes. The agreement effectively rendered AIMCo's contract to purchase the Lien Notes as void *ab initio* (from the beginning). The agreement netted interest that AIMCo had received on the notes. It was a true rescission.

[108] A rescission is not the same as an offer to acquire or redeem. A rescission acts to annul an earlier transaction. An offer to acquire or redeem is a subsequent and separate transaction.

[109] This conceptual distinction is exemplified in, among other places, s. 128(3) of the Act, which gives the Superior Court of Justice the power to make various orders where a person or company has not complied with Ontario securities law. Among the enumerated options are an "order rescinding any transaction entered into… including the issuance of securities"[28] and an "order requiring the… cancellation… or disposition of any securities."[29]

[110] The existence of those two separate options reinforces the distinction between a rescission and an offer to acquire or redeem.

[111] Furthermore, there is no sound reason to apply NI 62-104 to a situation that clearly falls outside the policy rationale underlying that instrument. That policy rationale is reflected in National Policy 62-203 *Take-Over Bids and Issuer Bids*, which refers to itself together with NI 62-104 as the "Bid Regime". Section 2.1 of the National Policy states that the Bid Regime is designed to establish a framework for the conduct of bids in a manner that achieves, among other things, "equal treatment of offeree issuer security holders".

[112] The AIMCo Agreement does not engage this policy consideration. There is no suggestion that holders of the Lien Notes, other than AIMCo, ought to have been offered the opportunity to rescind their subscription. Nor is there any evidence that Calfrac and AIMCo entered into the AIMCo Agreement with the intention of avoiding the issuer bid requirements.

[113] Accordingly, we conclude that the AIMCo Agreement is not an issuer bid. We therefore reject Wilks's contention that the TSX imposed an illegal condition.

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[27] NI 62-104, s. 1.1
[28] Act, s. 128(3) para 4
[29] Act, s. 128(3) para 5

D. Did the TSX overlook material evidence?

[114] We turn now to the third of Wilks's four grounds in support of its request that we interfere with the TSX Decision. Wilks submits that the TSX overlooked material evidence, although in particularizing that submission, Wilks identifies four concerns, none of which falls into the category. This branch of the test for the Commission's interference with a TSX decision contemplates that the TSX had before it evidence that was material to the issues that the TSX had to resolve, but the TSX missed considering that material evidence.

[115] The first of Wilks's four concerns is that the TSX misunderstood evidence relating to the possible need to reverse related transactions. However, misunderstanding evidence is not the same as overlooking evidence. We have already addressed the question of the need to reverse related transactions, and Wilks has pointed to no material evidence that was missed by the TSX in coming to its conclusion on this issue.

[116] Wilks's second concern is that the TSX overlooked the requirements of NI 62-104 relating to issuer bids. Those requirements are not evidence, and we earlier concluded that the AIMCo Agreement was not an issuer bid.

[117] Wilks's third concern arises from a reference in the Staff Memo to Calfrac's representation to the TSX that Calfrac had undertaken proper due diligence to ensure that only eligible shareholders were allowed to vote on the resolution relating to the Lien Notes. Wilks asserts that this representation was false, as is evidenced by the erroneous inclusion of AIMCo among eligible voting shareholders. Once again, Wilks fails to identify material evidence that the TSX overlooked. Wilks simply disagrees with the TSX's conclusion that Calfrac acted in good faith.

[118] Wilks's fourth concern is that the TSX, in making its decision, relied on the absence of shareholder complaints to Calfrac. Wilks submits that the TSX ought not to have relied on this fact, because shareholders were not properly informed.

[119] It does not appear to us that the absence of shareholder complaints was a determining factor in the TSX Decision. In any event, we would not consider the presence or absence of shareholder complaints in this case to have been material to the TSX. That makes the question of whether shareholders were properly informed an irrelevant one, although we note that at the TSX's request, Calfrac issued a press release on March 12, 2021, announcing that it had filed its request for relief with the TSX.

[120] Wilks did not persuade us that any of its four concerns amount to the TSX having overlooked material evidence in coming to its decision.

E. Should the Commission find that the TSX's perception of the public interest conflicts with that of the Commission?

[121] Finally, Wilks submits that the TSX incorrectly perceived the public interest in reaching its decision. We disagree.

[122] There is no question that the application of TSX rules invokes important public interest considerations,[30] and that an evaluation of those considerations requires an assessment of whether conduct "thwart[s] the justified expectations of

[30] *HudBay #1* at para 36

shareholders trusting in a system that appropriately promotes shareholder democracy…”.[31]

[123] However, we do not accept Wilks's characterization of the TSX Decision; namely, that it effectively provides that matters of significant non-compliance with TSX rules, if claimed by an issuer to be inadvertent, should essentially be excused. As we explained above, the TSX adopted a nuanced and proportionate approach to enforcement of its rules. It did so with appropriate reference to all the relevant circumstances, including:

a. the severity and inadvertent character of Calfrac's non-compliance;

b. the time that had elapsed since the non-compliance;

c. the interests of other involved parties, including the intervenors in this proceeding, who had advanced funding to Calfrac on the understanding that all common shares of Calfrac, including any shares obtained by conversion of the Lien Notes, would be listed on the TSX;

d. remedial measures, including the AIMCo Agreement and other conditions imposed on Calfrac;

e. the unlikelihood of a recurrence; and

f. the effect on the quality of the marketplace generally.

[124] Accordingly, we reject the suggestion that the TSX Decision thwarts the justified expectations of market participants. The TSX properly considered the public interest.

VI. CONCLUSION

[125] We found that none of the concerns raised by Wilks justified our interfering with the TSX Decision. In particular, we concluded that:

a. the TSX did not inappropriately consider or focus on irrelevant grounds in reaching its decision;

b. the AIMCo Agreement was a true rescission of AIMCo's earlier subscription for Lien Notes, was not an issuer bid by Calfrac, and therefore was not an illegal condition imposed by the TSX;

c. the TSX did not overlook material evidence; and

d. the TSX appropriately considered the public interest in reaching its decision.

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[31] *Eco Oro* at para 125

[126] For these reasons, we dismissed Wilks's application.

Dated at Toronto this 6th day of October, 2021.

"Timothy Moseley"

Timothy Moseley

"Lawrence P. Haber"

Lawrence P. Haber

"Frances Kordyback"

Frances Kordyback