Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
ABITIBIBOWATER INC. doing business as RESOLUTE FOREST PRODUCTS

- AND -

IN THE MATTER OF FIBREK INC.

- AND -

IN THE MATTER OF AN APPLICATION BY MERCER INTERNATIONAL INC.

REASONS FOR DECISION ON CONDUCTING A SIMULTANEOUS HEARING

Hearing: March 30, 2012

Decision: April 10, 2012

Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Mary G. Condon	- Vice-Chair
	Judith N. Robertson	- Commissioner
Counsel:	Joseph Groia Kevin Richard Tatsiana Okun Anthony Lung	- For Mercer International Inc.
	David Hausman Brad Moore	- For Fibrek Inc.
	Jeremy Devereux Ava Yaskiel Vasuda Sinha Sophie Melchers	- For AbitibiBowater Inc.

Andrew Gray James Tory David Chaikof Tom Yao	- For Fairfax Financial Holdings Limited
James Doris Alex Moore	- For Steelhead Partners, LLC
Brigitte Goueil	- For the Autorité des marchés financiers
Jane M. Waechter Naizam Kanj Leslie Milroy	- For Staff of the Ontario Securities Commission

REASONS FOR DECISION

I. BACKGROUND

1. Introduction

[1] On March 30, 2012, the Ontario Securities Commission (the "**Commission**") held a hearing to consider an application dated March 28, 2012 (the "**Application**") by Mercer International Inc. ("**Mercer**") requesting a simultaneous hearing with the Québec Bureau de décision et de révision (the "**Bureau**") to consider whether the offer by AbitibiBowater Inc. doing business as Resolute Forest Products (**"AbitibiBowater"**) to purchase all of the issued common shares of Fibrek Inc. ("**Fibrek**") should be cease traded pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") and whether relief should be granted pursuant to subsection 104(1) of the Act.

[2] On March 29, 2012, Mercer made a substantially similar application to the Bureau requesting similar relief (the **"Bureau Application"**).

[3] We dismissed the Application on March 30, 2012. These are our reasons for that decision.

2. Facts

[4] On November 28, 2011, AbitibiBowater announced its intention to make a take-over bid to acquire all of the issued and outstanding common shares of Fibrek for $1.00 per share payable in cash and AbitibiBowater shares (the "**AbitibiBowater Offer**"). On the same date, AbitibiBowater entered into irrevocable lock-up agreements (the "**Lock-Up Agreements**") with Fairfax Financial Holdings Limited ("**Fairfax**"), Oakmont Capital Inc. and Pabrai Investment Funds, the three largest shareholders of Fibrek (collectively, the "**Locked-Up Shareholders**"). Together, the Locked-Up Shareholders hold an aggregate of 59,502,822 Fibrek common shares, representing approximately 46% of the outstanding Fibrek shares. The Locked-Up Shareholders have irrevocably agreed to tender all of those shares to the AbitibiBowater Offer. The Locked-Up Shareholders are entitled to terminate the Lock-Up Agreements on or after April 13, 2012.

[5] On December 15, 2011, AbitibiBowater made the AbitibiBowater Offer. That offer has been extended twice and, as of the date of the hearing in this matter, it expired on the following Monday, April 2, 2012. The AbitibiBowater Offer was subsequently extended to April 11, 2012.

[6] On December 26, 2011, the board of directors of Fibrek recommended that shareholders reject the AbitibiBowater Offer, and Fibrek adopted a shareholders' rights plan.

[7] On February 9, 2012, after a hearing, the Bureau issued a cease trade order with respect to Fibrek's shareholders' rights plan, effective February 13, 2012. In its decision, the Bureau stated that it did not consider the AbitibiBowater Offer to be coercive or abusive.

[8] On February 10, 2012, Mercer and Fibrek each issued news releases announcing that they had entered into a support agreement (the **"Support Agreement"**) pursuant to which Mercer

agreed to offer to purchase all of the issued and outstanding common shares of Fibrek at $1.30 per share, payable in cash and Mercer shares (the "**Mercer Offer**"). Fibrek also announced that Mercer had agreed under the Support Agreement to subscribe for special warrants (the "**Special Warrants**") pursuant to a private placement at a price of $1.00 per Special Warrant, for an aggregate subscription price of $32.32 million. Each Special Warrant would entitle Mercer to acquire one Fibrek common share without any further payment.

[9] The proposed issue of the Special Warrants would have had the effect of diluting the shareholdings of the Locked-Up Shareholders from approximately 46% of the outstanding Fibrek common shares to approximately 40%. As a result, the Mercer Offer would have been viable notwithstanding the Lock-Up Agreements.

[10] On February 13, 2012, AbitibiBowater applied to the Bureau for an order to cease trade the Mercer Offer and the Special Warrants.

[11] On February 23, 2012, after a hearing, the Bureau issued a cease trade order prohibiting Fibrek from proceeding with the issue of the Special Warrants. On March 6, 2012, the Bureau issued reasons for its decision in which it found that the Special Warrants and the break-up fee provided for under the Support Agreement constituted inappropriate defensive tactics. The Bureau concluded, however, that there was no reason to prevent Mercer from proceeding with its offer.

[12] The Bureau decision was appealed to the Court of Québec and the Bureau's decision was reversed on March 9, 2012, thereby permitting the issue of the Special Warrants. The decision of the Court of Québec was in turn appealed, and on March 27, 2012, the Québec Court of Appeal allowed the appeal and reinstated the Bureau's decision. On March 28, 2012, Fibrek announced its intention to apply for leave to appeal to the Supreme Court of Canada.

II. THE ISSUE

[13] The question we must address is whether the Commission should convene a simultaneous hearing with the Bureau to consider the Application on the merits.

III. SUBMISSIONS OF THE PARTIES

1. Mercer

[14] Mercer confirmed that the Bureau Application is substantively the same as the Application, the primary changes being with respect to the relevant section numbers of applicable Québec securities laws.

[15] Mercer submitted that the following facts demonstrate that the Application has a real and substantial connection to Ontario:

(i) Fibrek, AbitibiBowater, Fairfax and Mercer are all reporting issuers in Ontario;

(ii) Fairfax is located in Ontario and its investments are managed by an investment manager registered in Ontario;

(iii) the Lock-up Agreements entered into between AbitibiBowater and the Locked-Up Shareholders are to be construed pursuant to the laws of Ontario;

(iv) the trading in the Fibrek common shares by Steelhead Partners, LLC ("**Steelhead**"), which Mercer alleges was improper and contrary to Ontario securities law, was conducted on the Toronto Stock Exchange (the "**TSX**"); and

(v) Fairfax and AbitibiBowater sought a hearing and review by the Commission of the TSX decision to permit the issue of the Special Warrants; that application was adjourned to April 3, 2012, and later, to April 12, 2012.

[16] Mercer submitted that a real and substantial connection to Ontario is all that is required to ground the Commission's jurisdiction to consider the Application. The fact that the Application may also have a connection to Québec does not negate Ontario's jurisdiction. The question of jurisdiction is not determined based on a comparative consideration of which jurisdiction is more closely connected to the matter. Counsel for Mercer referred to the following passage from the Ontario Court of Appeal's decision in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (1992) 15 OSCB 4973 (**"*Asbestos (CA)*"**):

> … If Ontario tribunals are without jurisdiction in this case because the transactions involved are more closely connected to the province of Québec, then in all cases where Ontario wishes to regulate the operation of its capital markets, it must first determine whether the transaction or series of transactions involved are more closely connected to Ontario or to some other province or country. If this is so, individuals and corporations need only structure their transactions in such a way that the test of "closest connection" is met, and then, regardless of whether the transactions involved are detrimental to persons resident in Ontario or are contrary to the trading policies established by the government of Ontario, they can be carried out with impunity.
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> On the totality of the facts conceded for the purpose of this appeal, I am not prepared to hold that those facts have a more significant connection to the province of Québec than to the province of Ontario. However, even were I prepared to so hold, I do not consider that the jurisdiction of the OSC is ousted by that consideration alone. To hold otherwise would be to severely limit the ability of the province of Ontario to regulate the operation of capital markets within its borders.
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> (*Asbestos (CA)* at paras. 15-16)

[17] Mercer further submitted that the Commission's exercise of jurisdiction over the Application will enhance the Commission's policy objectives because the Application raises issues governed by the take-over bid rules under Ontario securities law, specifically the rules concerning the equal treatment of shareholders.

[18] In addition, Mercer stated that Fairfax and AbitibiBowater have attorned to the Commission's jurisdiction by virtue of the application for a hearing and review of the decision of the TSX with respect to the issue of the Special Warrants.

[19] In response to arguments advanced by AbitibiBowater, Fairfax and Steelhead to the effect that the legal issues raised by the Application are effectively *res judicata*, Mercer submitted that the Application is a matter of first instance with respect to the AbitibiBowater Offer. The prior proceeding before the Bureau that resulted in the cease trade order of February 23, 2012 concerned an application by AbitibiBowater challenging the Mercer Offer and the private placement of the Special Warrants. Mercer argued that AbitibiBowater's application did not raise the issue of the propriety of the AbitibiBowater Offer and should not affect its right to raise such issues before the Commission on the Application.

[20] Mercer conceded that there is no material difference between Québec securities law and Ontario securities law with respect to the issues raised by the Application.

2. Staff of the Commission

[21] Staff of the Commission ("**Staff**") submitted that the Commission is not required to conduct a hearing on the merits of the Application. In Staff's submission, the Commission has the power to govern its own processes and that power includes the authority to decline to conduct a hearing on the merits in the circumstances of this case.

[22] Staff submitted that the Commission is required by clause 5 of section 2.1 of the Act to have regard to the principle that "[t]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes".

[23] Staff submitted that the principle of harmonization and efficiency requires that applications with respect to take-over bids be made solely to the jurisdiction of the target's principal office, avoiding multiple proceedings in multiple jurisdictions.

[24] Staff submitted (and Mercer conceded) that the principal securities regulator for matters pertaining to the AbitibiBowater Offer and the Mercer Offer (jointly referred to as the "**Bids**") is the Bureau. Staff submitted that the AbitibiBowater Offer is part of the larger factual context before the Bureau in the proceeding that resulted in the cease trade order relating to the issue of the Special Warrants. Staff submitted that the Bureau has been seized of this matter for almost two months and all parties, including Mercer, have accepted the Bureau's jurisdiction. Staff submitted that it would not be in the public interest for the Commission to hear the Application, either alone or simultaneously with the Bureau.

[25] Staff submitted that while there are common parties to the prior proceedings before the Bureau, a simultaneous hearing relating to those matters was not held.

[26] Finally, Staff rejected Mercer's submission that the parties have attorned to the jurisdiction of the Commission by reason of Fairfax's application for a hearing and review of the decision of the TSX permitting the issue of the Special Warrants. Staff submitted that the Act requires that any review of a decision of the TSX be brought before the Commission. Fairfax, having no

choice as to which provincial jurisdiction in which to bring its application for a hearing and review, cannot be held to have attorned to the Commission's jurisdiction.

3. AbitibiBowater

[27] AbitibiBowater adopted the submissions made by Staff and requested that the Application be dismissed.

[28] AbitibiBowater submitted that the Commission has jurisdiction to hear the Application, but argued that it is not appropriate in the circumstances of this matter for the Commission to exercise that jurisdiction. In particular, AbitibiBowater submitted that the Commission should refrain from exercising its jurisdiction to hear this matter because (i) the Bureau is already seized with the matter and has scheduled a hearing to consider the Bureau Application for April 2, 2012; (ii) a simultaneous hearing is not necessary; and (iii) a simultaneous hearing would be neither efficient nor appropriate.

[29] AbitibiBowater cited portions of the February 23, 2012 decision of the Bureau with respect to the issue of the Special Warrants to demonstrate that the Bureau had already heard evidence and submissions relating to the AbitibiBowater Offer. AbitibiBowater submitted that the issues Mercer now seeks to have the Commission address may be subject to the doctrines of *res judicata*, issue estoppel and abuse of process. AbitibiBowater submitted that the Bureau is best situated to decide whether its prior proceeding, and the order resulting from it, effectively precludes Mercer from now seeking to challenge the AbitibiBowater Offer.

[30] Finally, AbitibiBowater submitted that Mercer failed to move expeditiously to commence the Application and the Bureau Application before the Commission and the Bureau, respectively. AbitibiBowater submitted that Mercer had knowledge of the AbitibiBowater Offer as early as November 2011, and participated in lengthy proceedings before the Bureau in February 2012, yet did not seek to challenge the AbitibiBowater Offer until March 28, 2012, mere days before the April 2, 2012 expiry date of that offer. For this reason, AbitibiBowater submitted that a simultaneous hearing by the Commission is neither efficient nor appropriate.

4. Other Interested Parties

[31] Fibrek adopted the submissions made by Mercer and asked the Commission to convene a simultaneous hearing with the Bureau in respect of the Application.

[32] Fairfax and Steelhead adopted the submissions made by Staff and AbitibiBowater, and requested that the Commission decline to exercise its jurisdiction to hold a simultaneous hearing in this matter.

IV. RELEVANT LAW

1. The Commission's Jurisdiction

[33] Section 1.1 of the Act sets out the purposes of the Act to be:

(1) to provide protection to investors from unfair, improper or fraudulent practices; and

(2) to foster fair and efficient capital markets and confidence in capital markets.

[34] Clause 5 of section 2.1 of the Act provides that, in pursuing the purposes of the Act, the Commission shall have regard to the following fundamental principles:

> 5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.

[35] The Commission has jurisdiction under subsection 127(1) of the Act to intervene in a transaction where it concludes that it is in the public interest to do so (*Re Canadian Tire Corp.* (1987), 10 OSCB 857 ("***Re Canadian Tire***") at p. 29, *Re H.E.R.O. Industries Ltd.* (1990), 13 OSCB 3775 ("***Re H.E.R.O.***") and *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos* (SCC)**") at para. 39).

[36] The Commission's public interest jurisdiction is animated by the purposes set out in section 1.1 of the Act. Accordingly, the Commission must consider the fair treatment of investors, capital market efficiencies and public confidence in capital markets when exercising its public interest jurisdiction (*Asbestos* (SCC)*, supra,* at para. 41).

[37] The Supreme Court of Canada has confirmed that the Commission has broad jurisdiction to intervene in a transaction on public interest grounds. That Court has noted, however, that the Commission's jurisdiction is constrained by the purposes of the Act and the regulatory nature of section 127. One of the primary purposes of an order under section 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets (*Asbestos* (SCC)*, supra,* at paras. 42, 43 and 45; see also *Re Patheon Inc.* (2009), 32 OSCB 6445 at para. 114).

[38] The Bids constitute take-over bids within the meaning of the Act and are being made to, amongst others, shareholders in Ontario.

[39] Accordingly, it is clear that the Commission has jurisdiction to consider the Application.

2. What Factors Are Relevant to the Commission Exercising Its Jurisdiction

[40] The Supreme Court of Canada in *Asbestos* (SCC) considered the circumstances in which the Commission would exercise its jurisdiction in respect of a transaction that took place in the Province of Québec. The following factors were considered relevant to the Commission taking such jurisdiction:

(i) whether the transaction was designed to avoid the animating principles of securities legislation and the rules respecting take-over bids;

(ii) whether the transaction was manifestly unfair to public minority shareholders;

(iii) whether there was a sufficient nexus with Ontario to warrant the Commission's intervention, or whether the transaction was structured to make an Ontario transaction appear to be a non-Ontario one; and

(iv) whether the transaction was abusive of the integrity of Ontario capital markets.

(*Asbestos* (SCC), *supra,* at para. 23)

These are simply examples of a number of the factors the Commission will consider relevant in determining whether to exercise its jurisdiction in particular circumstances.

[41] While the Commission placed significant emphasis on the more limited transactional connections to Ontario in *Asbestos* (SCC), the Supreme Court of Canada found that it was entitled to do so in order to avoid using the open-ended nature of its section 127 powers as a means to police out-of-province transactions too broadly. The Supreme Court of Canada concluded that the Commission had taken into account factors relevant to the exercise of its jurisdiction and had not inappropriately adopted any preconditions to the exercise of that jurisdiction (see paragraph 52 of these reasons).

[42] In *Re BioCapital BioTechnology and Healthcare Fund* (2001), 24 OSCB 2844 ("***Re BioCapital***"), the Commission considered whether to opt out of the decision of the principal regulator under the Mutual Reliance Review System. The Commission stated:

> One of the fundamental principles we are directed to have regard to in pursuing the purposes of the Act is set out in item 5 of section 2.1 of the Act. This requires us to have regard for the fact that "the integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes." This, in our view, involves not only the legislative aspect of designing rules but also the administrative and enforcement aspects of applying rules. Accordingly, it is in the public interest that the rules we administer be applied in a harmonious manner with the way the rules of other jurisdictions are applied in the particular circumstance, unless there is a clear and certain public policy reason for a contrary application.
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> …
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> In considering the question of harmonization, we asked ourselves whether there is anything particular to the Ontario capital markets that is sufficiently different to the capital markets in the other provinces to justify a different result in Ontario. We have not been able to identify any particular difference which would justify a different position being taken by Ontario with respect to this Application.
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> (*Re BioCapital, supra,* at pp. 2846 and 2848)

While the circumstances in *Re BioCapital* related to whether Ontario should opt out of a discretionary order proposed to be issued by other Canadian securities regulators under the Mutual Reliance Review System, the principles identified have broader application.

3. Bringing Applications under Subsection 104(1) and Section 127 of the Act

[43] The Application is made under subsection 104(1) of the Act. That section provides that an "interested person" may apply to the Commission for a relevant remedy where a person or company has not complied with, or is not complying with, the take-over bid or issuer bid provisions of the Act. As noted above, the Bids constitute take-over bids for purposes of the Act. Subsection 104(1) grants very broad authority to the Commission to intervene in and regulate take-over bids (see *Re MI Developments Inc.* (2009), 32 OSCB 126 at para. 80). That section is intended to address issues "while a take-over bid or issuer bid is in progress or still running its course" (*Re Asquith*, (2004) 27 OSCB 2745 at para. 42). That is the circumstance before us.

[44] The Commission has held that persons other than Staff are not entitled as of right to bring an application under section 127 of the Act. However, the Commission has discretion to permit such an application (see *Re MI Developments Inc.*, (2010) 33 OSCB 126).

[45] The Commission may exercise its public interest jurisdiction under section 127 of the Act if it concludes that a take-over bid is not being made in compliance with the Act, where the bid is abusive of Ontario shareholders or Ontario capital markets, or is contrary to the animating principles of the take-over bid regime under the Act. A transaction will warrant the Commission's intervention where such intervention would "enhance the pursuit of the policy objectives" of the Commission, including the protection of "the integrity of the capital markets in the province" (*Re H.E.R.O., supra,* at para. 19).

V. ANALYSIS AND CONCLUSION

[46] This is an application by Mercer to the Commission to hold a simultaneous hearing with the Bureau to consider the Application.

[47] Fibrek is a reporting issuer in Ontario that is listed on the TSX, Fibrek has Ontario shareholders and the Bids are being made to those shareholders. Accordingly, the Application raises issues that potentially affect Ontario investors and our capital markets. Those issues appear to us to raise potentially important matters that should be appropriately considered by securities regulators.

[48] It is clear that the Commission has jurisdiction to hear the Application on the merits. None of the parties to this matter disputed our jurisdiction. We would likely have heard the Application on the merits, but for the considerations discussed below.

[49] In our view, the Commission is not required to hold a hearing on the merits simply because an interested person has made an application under subsection 104(1) of the Act. We are required to consider that application and to give an applicant an opportunity to be heard. However, our inherent authority to govern our own processes allows us to dismiss an application on any appropriate grounds, including a decision not to assert our jurisdiction. An opportunity to be heard on the Application has been given to Mercer in this matter.

[50] As noted above, one of the fundamental principles to which we are required to have regard in administering the Act is that "[t]he integration of capital markets is supported and promoted

by the sound and responsible harmonization and co-ordination of securities regulation regimes" (clause 5 of section 2.1 of the Act).

[51] A simultaneous hearing with another Canadian securities regulator may not advance that principle because such a hearing can result in two different outcomes. In a simultaneous hearing, while the evidence and submissions made to the two panels will likely be the same, each panel is entitled to come to its own decision in the circumstances. The Commission has no authority to participate in a joint hearing (where the panels are required to come to a single decision). Accordingly, a simultaneous hearing may not promote the harmonization of securities regulatory regimes or of decisions made under them. Further, a simultaneous hearing may subject the parties to additional expense and complexity.

[52] The Supreme Court of Canada recognized in *Asbestos* (SCC) that there are circumstances in which it is appropriate for the Commission not to assert its jurisdiction where other Canadian securities regulators are engaged in a matter or where a regulatory proceeding in another Canadian jurisdiction will be held. In this respect, the Court stated that:

> [T]he integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes. A transaction that is contrary to the policy of the Ontario Securities Act may be acceptable under another regulatory regime. Thus, the OSC's insistence on a more clear and direct connection with Ontario in this case reflects a sound and responsible approach to long-arm regulation and the potential for conflict amongst the different regulatory regimes that govern the capital markets in the global economy.
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> (*Asbestos* (SCC), *supra*, at para. 62)

In applying that principle, we must consider the particular circumstances of each matter and balance competing interests.

[53] The question we must decide is whether we should assert our jurisdiction in these circumstances to hold a simultaneous hearing with the Bureau on the Application. If the only considerations relevant to that question were the factors referred to in paragraph 47 of these reasons, the Commission would hold a simultaneous public hearing in almost all cases where another Canadian securities regulator holds an administrative hearing involving a take-over bid. That has not been the Commission's practice or the practice of other Canadian securities regulators. The Commission has held very few simultaneous hearings with other Canadian securities regulators over the years.

[54] In making our decision in this matter, we have considered the following factors:

(i) Fibrek is a corporation with its principal office in the Province of Québec;

(ii) generally, Canadian securities regulators take jurisdiction with respect to take-over bids and transactions involving multiple Canadian jurisdictions based on the location of the principal office of the relevant issuer; in this case, the principal office of Fibrek as the target of the Bids;

(iii) securities regulators in the Province of Québec are actively engaged in considering the issues arising from the Bids;

(iv) the Bureau has already held two hearings addressing issues arising from the Bids and has scheduled a third hearing to consider the Bureau Application on April 2, 2012;

(v) the securities laws of the Province of Québec applicable to the issues raised by the Application are substantially the same as the securities laws of the Province of Ontario;

(vi) any disposition by the Bureau of the Bureau Application is likely to accrue to the benefit of Ontario investors and Ontario capital markets; and

(vii) efficiency in holding hearings on an expedited basis when dealing with outstanding take-over bids.

[55] The strongest nexus and jurisdictional connections to the transactions that are the subject matter of the Application are to the Province of Québec. That does not determine whether we should exercise our jurisdiction, but that is a relevant consideration.

[56] In our view, a simultaneous hearing should only be held in compelling circumstances. Such hearings may not advance the harmonization and co-ordination of securities regulatory regimes and they may create added costs and complexity for the parties (see paragraph 51 above). The issues raised by the Application are not so fundamentally important to Ontario investors or Ontario capital markets, or so notorious, as to outweigh the considerations referred to in paragraphs 52 and 54 of these reasons. Our decision with respect to this question may have been different if the applicable Ontario securities laws were not substantially the same as the securities laws of the Province of Québec or if Ontario investors or capital markets were being affected in a fundamentally different or unique way.

[57] The Bureau is seized of the matters raised by the Bids and has scheduled a hearing to address the Bureau Application on April 2, 2012. In the interests of harmony, co-ordination of securities regulatory regimes and efficiency, we conclude that we should not hold a simultaneous hearing with the Bureau on the Application. In our view, the public interest is not served in these circumstances by holding such a hearing.

[58] We would add that we do not agree that the parties responding to the Application have attorned to Ontario jurisdiction as a result of the appeal of the TSX decision approving the private placement of the Special Warrants. Generally, appeals of decisions of the TSX come before the Commission under the Act. That does not answer the question whether the Commission should hold a hearing on a different but related matter such as the Application. We would also add that it does not appear to us that Mercer should be barred from bringing the Application because of the other previous proceedings relating to the Bids and the private placement of the Special Warrants. Those proceedings were brought by other parties and addressed different issues. That does not, however, change our view as to whether we should assert our jurisdiction in respect of the Application.

[59] Accordingly, we dismissed the Application.

[60] Our decision not to assert jurisdiction in these circumstances does not, of course, restrict our discretion to address in the future any additional or other issues that may arise out of this matter that may affect Ontario investors or Ontario capital markets or engage our public interest jurisdiction. Any such assertion of our jurisdiction would, however, be subject to the principles and considerations discussed in these reasons.

DATED at Toronto this 10th day of April, 2012.

"James E. A. Turner"

James E. A. Turner

"Mary G. Condon"

Mary G. Condon

"Judith N. Robertson"

Judith N. Robertson