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Covert defences: reassessing the regulation of private placements in Canadian takeover bids

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Topic and importance

Hostile takeover bids, unsolicited attempts by one company to buy another, give shareholders the opportunity to decide for themselves whether to sell their shares at a premium. Canadian securities law protects this opportunity. The guiding policy, National Policy 62-202 (NP 62-202), places shareholder choice at the center of the regulatory framework and empowers securities commissions to intervene against tactics that unfairly prevent shareholders from responding to a bid.

The best-known defensive tactic is the “poison pill,” which has been extensively studied. However, this article focuses on a less examined tactic: the private placement. A private placement occurs when a company issues new shares to a small group of friendly investors, diluting the existing shareholders’ stakes and making it harder (sometimes impossible) for a hostile bidder to succeed. Unlike a poison pill, a private placement can be disguised as a legitimate business need for financing, making it harder for regulators to scrutinize. And unlike a poison pill, once

done, a private placement is essentially irreversible. As such, this article argues that Canadian securities commissions have failed to adequately police this tactic.

Main arguments

Through a close analysis of two decisions, *Hecla* (2016) and *Mithaq* (2024), this article argues that securities commissions have improperly deferred to target company boards by evaluating private placements through the lens of business judgement and fiduciary duties. Fiduciary duties are the legal obligations directors owe to act in the best interest of the company; business judgement refers to regulators' tendency to defer to board decisions that fall within a "reasonable" range of choices. This article contends that applying these corporate law concepts is the *wrong* approach for securities regulators, whose mandate is not to judge whether a board acted properly, but to protect the public interest by ensuring shareholders can respond to a bid.

In both *Hecla* and *Mithaq*, the commissions permitted significant share issuances to private investors, which diluted all existing shareholders and ultimately caused the hostile bids to be withdrawn before shareholders could accept them. In *Hecla*, the target company's own management later described the private placement proceeds as used to "combat" the takeover bid, directly contradicting the commission's finding that the placement was a genuine financing decision. In *Mithaq*, the target announced share buybacks shortly before the private placement (a sign of financial health, not distress) yet the commission still accepted the board's claim of "urgent" financial need.

This article proposes a clearer, effects-based framework. Once it is established that a company does not need financing to remain viable as

an immediate concern, regulators should ask two questions: was the private placement timed during or in anticipation of a bid, and does its dilutive effect prevent shareholders from being able to respond to the offer? If so, the placement should be blocked, unless it genuinely serves to improve the offer or attract competing bids.

Conclusion and additional considerations

The core purpose of Canada's takeover bid regime is to ensure that shareholders (not management) have the final say over whether a hostile bid succeeds. Private placements that effectively hand that decision to a board, by diluting bidders out of contention before shareholders can vote with their shares, undermine this purpose. The proposed effect-focused framework would keep securities regulators from using financing as a cover for self-preservation and restore shareholder choice to the center of Canada's takeover bid regulation.