

Headnote

MI 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 62-104 *Take-Over Bids and Issuer Bids* – relief from the restrictions on acquisitions after bid in NI 62-104 – issuer proposing to conduct a normal course issuer bid and concurrent repurchase of securities from its significant shareholder immediately following the expiry of its substantial issuer bid– relief granted, subject to certain conditions.

Applicable Legislative Provisions

National Instrument 62-104 *Take-Over Bids and Issuer Bids*, sections 2.5 and 6.1

Citation: Re Imperial Oil Limited, 2022 ABASC 71

Date: 20220617

In the Matter of
the Securities Legislation of
Alberta and Ontario (the **Jurisdictions**)

and

In the Matter of
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of
Imperial Oil Limited (the **Filer**)

Decision

Background

The securities regulatory authority or regulator in each of the Jurisdictions (each a **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) granting an exemption from the prohibition in section 2.5 of National Instrument 62-104 *Take-over Bids and Issuer Bids* (**NI 62-104**) from acquiring or offering to acquire common shares of the Filer (the **Shares**) during the twenty (20) business days following the expiry of a take-over bid or an issuer bid (the **Post Bid Period**), in connection with a proposed purchase of Shares pursuant to a normal course issuer bid and concurrent acquisition of Shares from the Filer's principal shareholder Exxon Mobil Corporation (**ExxonMobil**) (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

- (a) the Alberta Securities Commission is the principal regulator for this application;

- (b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, Yukon and Nunavut;
- (c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and NI 62-104 have the same meaning if used in this decision, unless otherwise defined herein.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation governed by the *Canada Business Corporations Act*.
2. The head office and registered office of the Filer are located in Calgary, Alberta.
3. The Filer is a reporting issuer in each of the provinces and territories of Canada and the Filer's Shares are listed for trading on the Toronto Stock Exchange (the **TSX**) and have unlisted trading privileges and trade on the NYSE American LLC (**NYSE American**).
4. The Filer is not in default of any requirement of the securities legislation in the jurisdictions in which it is a reporting issuer.
5. The authorized share capital of the Filer consists of 1,100,000,000 Shares. As of May 2, 2022, there were 669,143,714 Shares issued and outstanding.
6. On April 28, 2022, the last full trading day prior to the date of announcement of the Filer's intention to make the SIB (as defined below), the closing price of the Shares on the TSX was \$64.12 per Share and US\$50.08 per Share on NYSE American. Based on such closing price, the Shares had an aggregate market value of approximately \$42,905,494,942 on such date (or US\$33,510,717,197 based on the closing price on the NYSE American).
7. As at May 6, 2022, ExxonMobil beneficially owned 465,723,543 Shares, which in the aggregate represented approximately 69.6% of the issued and outstanding Shares.
8. The Filer commenced a substantial issuer bid on May 6, 2022 (the **SIB**), offering to purchase for cash up to \$2,500,000,000 in value of Shares at a purchase price of not less than \$62 and not more than \$78 (the **Price Range**) by way of a "modified Dutch Auction" process.
9. Holders of Shares (the **Shareholders**) wishing to tender to the SIB are able to do so in one of the following ways:

- (a) by making an auction tender pursuant to which it agrees to sell to the Filer, at a specified price per Share within the Price Range, a specified number of Shares;
 - (b) by making a purchase price tender pursuant to which it does not specify a price per Share but rather agrees to have a specified number of Shares purchased at the purchase price to be determined by the auction tenders; or
 - (c) by making a proportionate tender pursuant to which it agrees to sell to the Filer, at the purchase price to be determined by the auction tenders, a number of Shares owned by it that will result in it maintaining its proportionate equity ownership in the Filer following the completion of the SIB.
- 10. ExxonMobil has advised the Filer that it made a proportionate tender in connection with the SIB in order to maintain its proportionate Share ownership at approximately 69.6% (the **Proportionate Share Ownership**) following completion of the SIB.
- 11. The SIB expired on June 10, 2022 (the **Expiry Date**).
- 12. The Filer has, for a number of years, implemented a share repurchase program pursuant to a NCIB through the facilities of the TSX. In order for ExxonMobil to maintain its Proportionate Share Ownership in the Filer, ExxonMobil participates outside of, but concurrent with, the NCIB in the sale of Shares to the Filer.
- 13. ExxonMobil participates outside of the NCIB because such repurchases, if effected in the open market, would be treated as a “distribution” for U.S. securities law purposes and prohibit the Filer from bidding for or purchasing the Shares until after the NCIB was completed (the **US Securities Restrictions**). The US Securities Restrictions do not prevent the concurrent purchase by the Filer by private agreement with ExxonMobil, including if effected through a private off-floor transaction on the TSX.
- 14. Repurchases from ExxonMobil concurrent with the NCIB are effected by the Filer in accordance with the following parameters (the **ExxonMobil Repurchase Conditions**):
 - (a) The Filer cannot make purchases from ExxonMobil on any day unless it has purchased Shares from other Shareholders that day pursuant to the NCIB, provided that if the trading rules of the TSX do not permit purchases from ExxonMobil to occur on any day, the purchase shall occur on the next business day on which the trading rules of the TSX permit the purchase to be made. The number of Shares which the Filer may repurchase from ExxonMobil on any given day cannot exceed the number of Shares that would reduce ExxonMobil’s percentage shareholdings to the Proportionate Share Ownership;
 - (b) The Filer must offer to purchase from ExxonMobil the number of Shares that would reduce ExxonMobil’s shareholding to its Proportionate Share Ownership;

- (c) The consideration per Share received by ExxonMobil on any day will be the price set by the market on close facility of the TSX;
 - (d) All trades between ExxonMobil and the Filer will be made by way of put-through on the TSX or alternative trading systems in Canada during the special trading session of the TSX;
 - (e) If for any reason ExxonMobil decides, on any given day, not to sell its pro rata portion of the Shares so as to reduce ExxonMobil's percentage shareholding to the Proportionate Share Ownership, the Filer shall issue a press release to that effect and shall state whether it intends to continue the NCIB and will not be permitted to purchase ExxonMobil's shares thereafter; and
 - (f) The Filer agrees to report directly to the Shareholders in its quarterly and annual reports as to the status of the NCIB and the purchased by the Filer of Shares held by ExxonMobil.
- 15. The parameters above outlining ExxonMobil's participation outside of, but concurrent with the NCIB, are intended to ensure the equal treatment of ExxonMobil and the public Shareholders of the Filer within the constraints imposed by the US Securities Restrictions.
- 16. The Filer intends to make application to the TSX shortly after the Expiry Date for approval to commence another NCIB as soon as practicable following the Expiry Date (the **Proposed NCIB**).
- 17. Under Section 2.6 of NI 62-104 (the **NCIB Exception**), purchases are exempt from the Post Bid Period restrictions if they are made by the issuer in the normal course on a published market and:
 - (a) no broker acting for the issuer performs services beyond the customary broker's functions in regard to the purchases;
 - (b) no broker acting for the issuer receives more than the usual fees or commissions in regard to the purchases than are charged for comparable services performed by the broker in the normal course;
 - (c) the issuer or any person acting for the issuer does not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the offeror or members of the soliciting dealer group under the bid; and
 - (d) the seller or any person acting for the seller does not, to the knowledge of the issuer, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

18. The Filer would be permitted to commence the Proposed NCIB immediately following the Expiry Date under the NCIB Exception.
19. However, absent the Exemption Sought, ExxonMobil would not be permitted to participate in the Proposed NCIB during the Post Bid Period. Therefore, to enable ExxonMobil's participation, the Filer would need to defer the Proposed NCIB until following the expiry of the Post Bid Period and its second quarter earnings blackout period. This would delay returning capital to its shareholders in the most timely and efficient manner.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that the ExxonMobil Repurchase Conditions are complied with in connection with repurchases of Shares from ExxonMobil concurrently with, but outside of, the Proposed NCIB.

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