

## Headnote

Multilateral Instrument 11-102 *Passport System – National Policy 11-203 Process for Exemptive Relief in Multiple Jurisdictions* – Dual application – Issuer bid – Modified Dutch auction – Application for relief from the requirement to take up and pay for shares on a pro rata basis and the related disclosure requirements for the issuer bid circular (Section 2.26 of National Instrument 62-104 *Take-Over Bids and Issuer Bids* and Item 8 of Form 62-104F2 *Issuer Bid Circular*) – Application for relief from the requirement that the Offer not be extended if all the terms and conditions of the Offer have been complied with or waived unless the issuer first takes up all Shares deposited under the Offer and not withdrawn (Section 2.32 of NI 62-104).

## Applicable Legislative Provisions

National Instrument 62-104 *Take-Over Bids and Issuer Bids*, sections 2.26 and 6.1 and subsection 2.32(4)

**Citation: Re Imperial Oil Limited, 2022 ABASC 145**

**Date: 20221031**

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 the Filer, in connection with the proposed purchase of a portion of its outstanding common shares (the **Shares**) pursuant to an issuer bid (the **Offer**), an exemption from the following requirements (the **Exemption Sought**):

- (a) the proportionate take-up requirements in section 2.26 of National Instrument 62-104 *Take-over Bids and Issuer Bids* (**NI 62-104**) (the **Proportionate Take-Up Requirement**);
- (b) the requirements in Item 8 of Form 62-104F2 *Issuer Bid Circular* to provide disclosure of the proportionate take-up and payment in the issuer bid circular (the **Proportionate Take-Up Disclosure Requirement**);

- (c) the requirements in subsection 2.32(4) of NI 62-104 that an issuer bid not be extended if all the terms and conditions of the issuer bid have been complied with or waived unless the Filer first takes up all securities deposited under the issuer bid and not withdrawn (the **Extension Take-Up Requirement**).

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 each jurisdiction of Canada, other than Alberta and Ontario; and
- (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 head office and registered office of the Filer are located in Alberta.
2. The Filer is a reporting issuer in each jurisdiction of Canada. 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 (the **NYSE American**). The Filer is not in default of securities legislation in any jurisdiction of Canada.
3. The authorized share capital of the Filer consists of 1,100,000,000 Shares. As of September 30, 2022, there were 611,515,571 Shares issued and outstanding.
4. On September 30, 2022, the closing price of the Shares on the TSX was \$59.81 and US\$43.27 on the NYSE American.
5. As at September 30, 2022, Exxon Mobil Corporation (**ExxonMobil**) beneficially owned 425,614,397 Shares, which represented approximately 69.6% of the issued and outstanding Shares.
6. The Filer intends to make the Offer pursuant to which it would offer to purchase that number of Shares having an aggregate purchase price of up to \$1,500,000,000 (the **Specified Dollar Amount**).
7. The board of directors of the Filer has determined that the Offer is in the best interests of the Filer.

8. The purchase price per Share will be determined by the Filer through a modified "Dutch auction" procedure in the manner described below, but will not be less than \$72.50 and not more than \$87.00 per Share (the **Price Range**).
9. The Specified Dollar Amount has been determined and will be announced by the Filer in a press release issued on October 31, 2022. Both the Specified Dollar Amount and the Price Range will be specified in the Circular.
10. The Filer expects to fund the purchase of Shares pursuant to the Offer, together with the fees and expenses of the Offer, with cash on hand. In any event, the Offer will not be conditional upon the receipt of any financing.
11. Any holder of Shares (**Shareholder**) wishing to tender to the Offer will be able to do so in the following ways:
  - (a) by making auction tenders in which the tendering Shareholders specify the number of Shares being tendered at a specified price per Share (the Auction Price) within the Price Range (the **Auction Tenders**);
  - (b) by making purchase price tenders in which the tendering Shareholders do not specify a price per Share, but rather agree to have a specified number of Shares purchased at the Purchase Price (as defined below) to be determined by the Auction Tenders (the **Purchase Price Tenders**);
  - (c) by making proportionate tenders in which the tendering Shareholders agree to sell to the Filer, at the Purchase Price to be determined by the Auction Tenders, a number of Shares that will result in them maintaining their respective proportionate equity ownership in the Filer following completion of the Offer (the **Proportionate Tenders**).
12. Shareholders may make multiple Auction Tenders but not in respect of the same Shares (i.e. Shareholders may tender different Shares at different prices but cannot tender the same Shares at different prices). Shareholders may also make an Auction Tender in respect of certain of their Shares and a Purchase Price Tender in respect of other Shares. Shareholders who make an Auction Tender or a Purchase Price Tender may not make a Proportionate Tender and *vice versa*.
13. A registered Shareholder who makes a Proportionate Tender must deposit either all of its Shares or a sufficient number of Shares to satisfy the Shareholder's Proportionate Tender. A beneficial Shareholder who wishes its nominee to make a Proportionate Tender must deposit all of its Shares.
14. Any Shareholder who owns fewer than 100 Shares and tenders all of such Shareholder's Shares pursuant to an Auction Tender at or below the Purchase Price or makes a Purchase Price Tender will be considered to have made an "**Odd-Lot Tender**".
15. The Filer will determine the purchase price payable per Share (the **Purchase Price**) based on the Auction Prices and the number of Shares deposited pursuant to valid Auction

Tenders and Purchase Price Tenders. The Purchase Price will be the lowest price that enables the Filer to purchase that number of Shares tendered pursuant to valid Auction Tenders and Purchase Price Tenders having an aggregate purchase price not to exceed an amount (the **Auction Tender Limit Amount**) equal to

- (a) the Specified Dollar Amount, less
  - (b) the product of
    - (i) the Specified Dollar Amount, and
    - (ii) a fraction, the numerator of which is the aggregate number of Shares owned by Shareholders making valid Proportionate Tenders, and the denominator of which is the aggregate number of Shares outstanding at the time of expiry of the Offer.
16. If the aggregate purchase price for Shares validly tendered pursuant to Auction Tenders at Auction Prices at or below the Purchase Price and Purchase Price Tenders is less than or equal to the Auction Tender Limit Amount, the Filer will purchase at the Purchase Price all Shares so deposited pursuant to Auction Tenders at or below the Purchase Price and Purchase Price Tenders.
17. If the aggregate purchase price for Shares validly tendered pursuant to (i) Auction Tenders at Auction Prices at or below the Purchase Price; and (ii) Purchase Price Tenders is greater than the Auction Tender Limit Amount, then the Filer will purchase at the Purchase Price a portion of the Shares so deposited pursuant to Auction Tenders at or below the Purchase Price and Purchase Price Tenders, determined as follows:
- (a) first, the Filer will purchase all such Shares tendered by Shareholders at or below the Purchase Price pursuant to Odd-Lot Tenders;
  - (b) second, the Filer will purchase on a *pro rata* basis that portion of such Shares tendered pursuant to Auction Tenders at or below the Purchase Price and Purchase Price Tenders having an aggregate purchase price, based on the Purchase Price, equal to
    - (i) the Auction Tender Limit Amount, less
    - (ii) the aggregate amount paid by the Filer for Shares tendered pursuant to Odd-Lot Tenders.
18. The Filer will purchase at the Purchase Price that portion of the Shares deposited by Shareholders making valid Proportionate Tenders that results in the tendering Shareholders maintaining their proportionate equity ownership in the Filer following completion of the Offer.
19. The number of Shares that the Filer will purchase pursuant to the Offer and the aggregate purchase price will vary depending on whether the aggregate purchase price payable in

respect of Shares required to be purchased pursuant to Auction Tenders at Auction Prices at or below the Purchase Price and Purchase Price Tenders (the **Auction Tender Purchase Amount**) is equal to or less than the Auction Tender Limit Amount. If the Auction Tender Purchase Amount is equal to the Auction Tender Limit Amount, the Filer will purchase Shares for an aggregate purchase price equal to the Specified Dollar Amount. If the Auction Tender Purchase Amount is less than the Auction Tender Limit Amount, the Filer will purchase proportionately fewer Shares in the aggregate, with a proportionately lower aggregate purchase price.

20. ExxonMobil has advised the Filer that it intends to make a Proportionate Tender.
21. All Shares purchased by the Filer pursuant to the Offer (including Shares tendered at Auction Prices below the Purchase Price) will be purchased at the Purchase Price. Shareholders will receive the Purchase Price in cash. All Auction Tenders, Purchase Price Tenders and Proportionate Tenders will be subject to adjustment to avoid the purchase of fractional Shares. All payments to Shareholders will be subject to deduction of applicable withholding taxes.
22. All Shares tendered to the Offer and not taken up will be returned to the appropriate Shareholders.
23. The Offer is subject to the provisions of the United States regulation entitled *Regulation 14E* adopted under the 1934 Act (**Regulation 14E**).
24. The Offer is scheduled to expire at 5:00 p.m. (Calgary time) on December 9, 2022 (the **Expiration Time**).
25. Until expiry of the Offer, all information about the number of Shares tendered and the prices at which the Shares are tendered will be required to be kept confidential by the depositary and the Filer until the Purchase Price has been determined.
26. Shareholders who do not accept the Offer will continue to hold the same number of Shares as before the Offer and their proportionate Share ownership will increase following completion of the Offer.
27. The Filer may, in connection with the Offer, elect to extend the Offer if the aggregate purchase price for Shares validly tendered pursuant to Auction Tenders at Auction Prices at or below the Purchase Price and Purchase Price Tenders is less than the Auction Tender Limit Amount. The Filer will not extend the Offer if all the terms and conditions of the Offer have been complied with or waived by the Filer by the Expiration Time and the aggregate purchase price of the Shares validly tendered and not withdrawn pursuant to Auction Tenders and Purchase Price Tenders is equal to or greater than the Auction Tender Limit Amount.
28. Under the Extension Take-Up Requirement contained in subsection 2.32(4) of NI 62-104, an offeror may not extend an issuer bid if all the terms and conditions of the issuer bid have been complied with or waived unless the offeror first takes up all the securities deposited and not withdrawn under the issuer bid.

29. Under Regulation 14E, the Filer must promptly pay for all Shares deposited pursuant to the Offer at the time of expiry of the Offer. Regulation 14E does not provide for extensions of the Offer in the manner required by subsection 2.32(4) of NI 62-104.
30. In the event the Offer is extended, the Filer will be unable to take up Shares following the initial expiry of the Offer since the Purchase Price depends on all Auction Prices. Not all Auction Prices will be known at the time of the initial expiry of the Offer since there may be additional Auction Tenders during the extension period. As such, relief from the Extension Take-Up Requirement is required. Providing relief from the Extension Take-Up Requirement would enable the Filer to make a final determination regarding the Purchase Price, taking into account all Shares tendered during the period prior to the initial expiry of the Offer, as well as any subsequent extension period.
31. The Filer intends to rely on the exemption from the formal valuation requirements applicable to issuer bids under Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**) set out in paragraph 3.4(b) of MI 61-101 (the **Liquid Market Exemption**).
32. There will be a "liquid market" for the Shares, as such term is defined in MI 61-101, as of the date of the making of the Offer because the test in paragraph 1.2(1)(a) of MI 61-101 will be satisfied. In addition, an opinion has been voluntarily sought by the Filer in accordance with section 1.2 of MI 61-101 confirming that a liquid market exists for the Shares as of the date of the making of the Offer and such opinion will be included in the Circular (the **Liquidity Opinion**).
33. Based on the maximum number of Shares that may be purchased under the Offer, as of the date of the Offer, it will be reasonable to conclude (and the Liquidity Opinion will provide that it will be reasonable to conclude) that, following the completion of the Offer in accordance with its terms, there will be a market for holders of the Shares who do not tender to the Offer that is not materially less "liquid", as such term is defined in MI 61-101, than the market that existed at the time of the making of the Offer.
34. The Filer will disclose in the Circular relating to the Offer the following information:
  - (a) the mechanics for the take-up of and payment for Shares as described herein;
  - (b) that, by tendering Shares at the lowest price in the Price Range under an Auction Tender or by tendering Shares under a Purchase Price Tender or a Proportionate Tender, a Shareholder can reasonably expect that the Shares so tendered will be purchased at the Purchase Price, subject to proration and other terms of the Offer as specified herein;
  - (c) that the Filer has filed for, or has then obtained, as the case may be, an exemption from the Proportionate Take-Up Requirement, the Proportionate Take-Up Disclosure Requirement and the Extension Take-Up Requirement;
  - (d) the manner in which an extension of the Offer will be communicated to Shareholders and the public;

- (e) that Shares deposited pursuant to the Offer may be withdrawn at any time prior to the expiry of the Offer;
- (f) as applicable, the name of each Shareholder that has advised the Filer that it intends to make a Proportionate Tender;
- (g) the facts supporting the Filer's reliance on the Liquid Market Exemption, including the Liquidity Opinion;
- (h) except to the extent exemptive relief is granted further to the Exemption Sought, the disclosure prescribed by applicable securities laws for issuer bids.

**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 Filer

- (a) takes up Shares validly deposited pursuant to the Offer and not withdrawn and pays for such Shares, in each case, in the manner described herein and as set out in the Circular,
- (b) is eligible to rely on the Liquid Market Exemption,
- (c) will issue and file a press release announcing receipt of the Exemption Sought promptly, and in any case, no later than one (1) business day following receipt of the Exemption Sought, and
- (d) complies with the requirements of Regulation 14E.

*"original signed by"*

Timothy Robson  
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